STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TURRON P. SHERROD,

Defendant-Appellant.

UNPUBLISHED
March 19, 1999

No. 201872
Recorder's Court
LC No. 95-013732

Before: Markman, P.J., and Jansen and J. B. Sullivan*, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317; MSA 28.549, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), arising from the shooting death of Anthony Cunningham in Detroit. The victim was an innocent bystander who was caught in gunfire directed at a nearby house. Defendant was tried jointly with codefendant Stephon Marshall, who also was convicted of second-degree murder and felony-firearm (See Docket No. 202910). Defendant was sentenced to twenty-five to fifty years' imprisonment for the second-degree murder conviction and a consecutive two-year term for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant first argues that the trial court abused its discretion in denying his motion in limine to exclude evidence of a .44 magnum gun and ammunition. We disagree. The decision whether to admit evidence is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *People v Watkins*, 176 Mich App 428, 430; 440 NW2d 36 (1989). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made. *People v McAlister*, 203 Mich App 495, 505; 513 NW2d 431 (1994). Reversible error may not be predicated on an evidentiary ruling unless a substantial right was affected. MRE 103(a); *People v Travis*, 443 Mich 668, 686; 505 NW2d 563 (1993).

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Evidence is relevant if it tends to make a fact in issue more probable or less probable than it would be without the evidence. MRE 401. Relevant evidence may be excluded under MRE 403 if its probative value is substantially outweighed by the danger of unfair prejudice. Although the .44 magnum was not alleged to have been used in the shooting, it was confiscated from defendant's house and ammunition for the gun was found at a house that codefendant Marshall allegedly occupied. This evidence was relevant to show that defendant and codefendant Marshall were acting together in concert and the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. Thus, the trial court did not abuse its discretion.

Next, defendant contends that the trial court erred in allowing as opinion testimony under MRE 701 testimony that certain people at the crime scene had "problems" with codefendant Marshall and his family. We agree. MRE 701 provides:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

See also *People v Hanna*, 223 Mich App 466, 475; 567 NW2d 12 (1997); J. Robinson and R. Longhofer, Michigan Courtroom Evidence (1997), § 701.2, at 639.

We conclude, and plaintiff appears to concede, that the challenged testimony did not constitute opinion testimony admissible under MRE 701, because the testimony did not entail first-hand observations necessary to a clearer understanding of the witness' testimony or the determination of a fact in controversy. Rather, the testimony in question appears to constitute inadmissible hearsay under MRE 801 and MRE 802.

Nonetheless, we conclude that any error in admitting the testimony was harmless because the testimony involved only codefendant Marshall, and, in light of the weight of the properly admitted evidence concerning defendant, it is highly improbable that the error affected the verdict. *People v Gearns*, 457 Mich 170, 204-05; 577 NW2d 422 (1998); *People v Smith*, 456 Mich 543, 555; 581 NW2d 654 (1998). Specifically here, a witness testified that she recognized defendant as one of the men who was carrying a "long gun" in the vicinity of the shooting immediately before the shots were fired. Another witness identified defendant as one of the men who fired a gun at the decedent. Further, spent shell casings collected from the crime scene were determined to have been fired from the same Russian SKS carbine that was seized from defendant's house at the time of his arrest. Finally, although the spent bullets retrieved from the victim's body were too badly damaged to make a positive identification, they were determined to be of the same class and caliber as bullets fired from another Ruger carbine that was also seized from defendant's house at the time of his arrest.

Next, defendant did not object at trial to testimony that codefendant Marshall was observed with a gun earlier on the day of the offense. Therefore, this issue is not preserved for appeal. *People v Ramsdell*, 230 Mich App 386, 404; ___ NW2d ___ (1998). Further, because the testimony concerns

only codefendant Marshall's possession of a gun, our failure to review the issue will not result in manifest injustice to defendant, in our judgment. *Id.*

Defendant also argues that the trial court erred in allowing evidence of his use of false identifications to collect food stamps. Contrary to what defendant argues, the trial court allowed the prosecutor to introduce the evidence specifically for the purpose of impeachment under MRE 608(b), not as evidence of prior bad acts under MRE 404(b)(2). MRE 608(b) provides:

> *Specific instances of conduct*. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The admissibility of evidence under MRE 608(b) is reviewed for an abuse of discretion. *People v Brownridge*, 225 Mich App 291, 296-97; 570 NW2d 672 (1997); see also *People v Lester*, ___ Mich App ___; ___ NW2d ___ (199269, issued 10/23/98), slip op at 4-5.

We conclude that it was appropriate for the prosecutor, during cross-examination, to inquire about defendant's use of aliases for the purpose of fraudulently collecting food stamps, because such evidence was relevant to his credibility. See *People v Messenger*, 221 Mich App 171, 180; 561 NW2d 463 (1997). We find that defendant's reliance on *People v Thompson*, 101 Mich App 609, 613; 300 NW2d 645 (1980), is misplaced. In *Thompson*, this Court recognized that impeachment based upon the use of aliases could be highly prejudicial because aliases are often used for innocent purposes. In the instant case, however, defendant's use of aliases for the fraudulent collection of food stamps did not involve an innocent purpose. See also *United States v Tomblin*, 46 F3d 1369, 1389 (CA 5, 1995) ("Rule 608 authorizes inquiry only into instances of misconduct that are 'clearly probative of truthfulness or untruthfulness,' such as perjury, fraud, swindling, forgery, bribery, and embezzlement"). Moreover, unlike with MRE 404(b), there is no requirement that a prosecutor provide advance notice of evidence offered to impeach a witness under MRE 608(b). See *Tomblin, supra* at 1388, n 51; *United States v Baskes*, 649 F2d 471, 477 (CA 7, 1980); *United States v Parades*, 751 F Supp 1288, 1293 (ND Ill, 1990); *United States v Matos-Peralta*, 691 F Supp 780, 791 (SDNY 1988).

We agree, however, that the prosecutor should not have been permitted to introduce the false identifications themselves into evidence, given that specific instances of a defendant's conduct for the purpose of attacking his credibility may not be proved by extrinsic evidence under MRE 608(b). *Lester, supra*. However, because defendant admitted that he had used the aliases to collect food stamps, we find that any error in this regard was harmless. *Gearns, supra.*

Next, defendant claims that the prosecutor improperly vouched for his guilt when he told the jury in closing argument that another suspect, Anthony Johnson, would never be charged, thus implying that Johnson was not guilty because he was never charged and, conversely, that defendant was guilty because he had been charged. Because defendant did not object to the prosecutor's remarks at trial, appellate review of this issue is precluded absent a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). In this instance, failure to review this issue will not result in a miscarriage of justice because a timely curative instruction could have eliminated any potential prejudicial effect caused by the remarks.

Next, the trial court did not abuse its discretion in denying defendant's motions for a mistrial. *People v Gonzales*, 193 Mich App 263, 266; 483 NW2d 458 (1992). A mistrial should be granted only when the error complained of is so egregious that there is no other way of removing its prejudicial effect. When a defendant moves for a mistrial on the basis of prosecutorial misconduct, "[t]he governing standard is whether the error is of such magnitude that the granting of a mistrial is a 'manifest necessity.'" *People v Robbins*, 132 Mich App 616, 619-20; 347 NW2d 765 (1984).

Defendant moved for a mistrial on three occasions. The first occurred after a police officer volunteered information that photographs confiscated from codefendant Marshall's house depicted "a number of black males in their twenties making gang gestures." The trial court denied the motion for a mistrial and instead gave a cautionary instruction, directing the jury to disregard the testimony injected by the officer and informing it that "[t]here is no indication of any gang involvement or gang activity in this case."

Defendant relies principally on *People v Wells*, 102 Mich App 122, 129-30; 302 NW2d 196 (1980), in which this Court held that the trial court abused its discretion when it admitted evidence of past episodes of motorcycle gang rivalry to prove the defendant's motive for the murders and there was "no reason for introducing the evidence except to inflame the passions and prejudice of the jury in an effort to convince them to convict defendant because of his association with violent motorcycle gangs." The instant case is clearly distinguishable. Here, there is no indication that the prosecutor sought to show that defendant or his codefendant's motivation for the killing was related to any gang activity. Rather, the testimony in question was unsolicited and injected by the witness. As a general rule, "unresponsive testimony by a prosecution witness does not justify a mistrial unless the prosecutor knew in advance that the witness would give the unresponsive testimony or the prosecutor conspired with or encouraged the witness to give that testimony." *People v Hackney*, 183 Mich App 516, 531; 455 NW2d 358 (1990). Further, the trial court directed the jury to disregard the officer's testimony and informed it that there was no indication of any gang involvement or gang activity in the case. Thus, the trial court did not abuse its discretion in denying the motion for mistrial.

The trial court also did not abuse its discretion when it denied defendant's motion for a mistrial after the prosecutor remarked in rebuttal closing argument that the decedent was "in the Lord's hands," but "this case and justice in this court, in this City, is in your hands," and "it's time to take care and make sure that justice and justice dictates in this case that those two defendants . . . be found guilty as charged on murder second degree and felony firearm." Defense counsel objected to these remarks on the grounds that they were an improper civic duty argument and injected religion into the trial.

It appears that the prosecutor's brief allusion to "the Lord's hands" occurred in response to the testimony of one witness, who remarked that the issue of defendant's guilt was "in the Lord's hands." The prosecutor sought to remind the jurors that, while the victim was dead and thus in "the Lord's hands," the determination of defendant's guilt or innocence on the basis of the evidence was in "their hands." Viewed in this context, we conclude that the prosecutor's remark did not improperly inject religion into the proceedings or constitute an appeal to the jurors to convict defendant because it was their religious duty. *People v Rohn*, 98 Mich App 593, 597; 296 NW2d 315 (1980).

In addition, the prosecutor's remark that "it's time to take care and make sure that justice and justice dictates in this case [sic] that those two defendants . . . be found guilty as charged on murder second degree and felony firearm" did not rise to the level of "manifest necessity" as to warrant the declaration of a mistrial. Here again, viewed in context, the remark represented, at most, an inartful way of telling the jury that they should convict defendant and his codefendant based upon the evidence that they committed the charged offenses.

In *People v Bass (On Rehearing)*, 223 Mich App 241, 251-52; 565 NW2d 897 (1997), this Court considered a "civic-duty" argument in which the prosecutor urged the jury "to do the right thing" and "do justice" through the following remarks:

> Ladies and gentlemen, when you're deciding this case, you're not supposed to decide upon whether you like this man, whether you feel sorry for this man or whether you hate this man. It has nothing to do with this case. This case is about doing the right thing. About looking at the evidence. About deciding what evidence to believe. About trying to do justice. About trying to do justice.

This Court observed that prosecutors are generally "accorded great latitude regarding their arguments," and concluded that the remarks did not deny the defendant a fair and impartial trial:

> The remarks "do justice" and "do the right thing" occurred at the end of a lengthy discussion of the evidence and were followed by further comments on the evidence. The remarks were isolated, and the prosecutor's argument was otherwise proper. Moreover, an objection and curative instruction could have eliminated any prejudicial effect.

Similarly, the prosecutor's invocation in this case that "justice dictates" that the jury convict defendant occurred at the end of a lengthy discussion of the evidence. Although the remark was not followed by further discussion of the evidence, it was isolated and the remainder of the prosecutor's remarks were proper. Further, the trial court provided a curative instruction that sufficiently eliminated any potential prejudice caused by the remarks. Under these circumstances, the trial court did not abuse its discretion in refusing to declare a mistrial.

Finally, relying on *People v Dalessandro*, 165 Mich App 569, 578-82; 419 NW2d 609 (1988), defendant contends that a mistrial should have been declared because the prosecutor argued that "the defense was smoke bombs." Again, we conclude that the trial court properly denied the

motion for mistrial where the thrust of the prosecutor's argument was simply that defense counsel was attempting to confuse the jury, not that the entire defense was a "pack of lies as in *Dalesandro*.

Next, defendant claims that the trial court erred in denying his pretrial motion to suppress the evidence of the firearms and weapons seized from the closet of his bedroom. A trial court's decision to grant or deny a motion to suppress evidence will not be reversed unless it is clearly erroneous. *People v Bloxson*, 205 Mich App 236, 239-40; 517 NW2d 563 (1994). A ruling is clearly erroneous when the reviewing court is firmly convinced that a mistake has been made. *People v Grimmett*, 97 Mich App 212, 214; 293 NW2d 768 (1980).

The plain-view exception to the warrant requirement allows seizure of objects falling within the plain view of an officer who has a right to be in the position to have such a view. *Harris v United States*, 390 US 234, 236; 88 S Ct 992, 993; 19 L Ed 2d 1067 (1968); *People v Tisi*, 384 Mich 214, 218; 180 NW2d 801 (1970); *People v Jordan*, 187 Mich App 582, 588; 468 NW2d 294 (1991). The search-incident-to-a-lawful-arrest exception allows an arresting officer to search the area within the arrestee's immediate control for weapons or evidence, including closed containers. *Chimel v California*, 395 US 752, 763; 89 S Ct 2034, 2040; 23 L Ed 2d 685 (1969); *People v Champion*, 452 Mich 92, 115; 549 NW2d 849 (1996); *People v Catanzarite*, 211 Mich App 573, 581; 536 NW2d 570 (1995). A protective sweep is a quick and limited search of a premises, incident to an arrest and conducted to protect the safety of police officers or others. It is narrowly confined to a cursory visual inspection of places in which a person might be hiding. *Maryland v Buie*, 494 US 325; 110 S Ct 1093, 1094; 108 L Ed 2d 276, 281 (1990). Police may, without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be undertaken. *Id*; *People v Shaw*, 188 Mich App 520, 524; 470 NW2d 90 (1991).

In this case, the testimony indicated that defendant was arrested pursuant to an arrest warrant, and that, in the course of arresting defendant in his bedroom, two police officers saw a large handgun on the shelf of a half-open closet in defendant's bedroom. Both police officers had the right to be in a position to view the gun under the plain-view exception to the warrant requirement. Further, the police could also properly search the closet under the exception allowing a search incident to an arrest, notwithstanding the fact that defendant may have already been handcuffed, because the police are permitted "as a precautionary matter and without probable cause or reasonable suspicion, to look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched." *Buie*, *supra*. Accordingly, the trial court did not clearly err in denying defendant's motion to suppress.

Next, defendant claims that the trial court erred in allowing evidence that his ex-girlfriend had filed a criminal complaint against him. We conclude that review of this issue has been waived because defense counsel only challenged the admissibility of the specific criminal charge, which the trial court agreed to exclude; he did not contest the admissibility of the mere fact that a criminal complaint had been filed. *People v McCray*, 210 Mich App 9, 14; 533 NW2d 359 (1995). Further, we conclude that the trial court did not abuse its discretion in admitting the evidence where it was not offered for the purpose of impeaching defendant's credibility, but instead was offered as evidence of his ex-girlfriend's

motive in not testifying on defendant's behalf. See *People v Yarbrough*, 183 Mich App 163, 164-65; 454 NW2d 419 (1990).

Next, defendant claims that the trial court erred in allowing the prosecutor to argue an alternative aiding and abetting theory in closing argument. Defendant did not object to the prosecutor's closing argument, nor did he object to the trial court instructing the jury on aiding and abetting. Therefore, appellate review of this issue is waived. Moreover, our failure to review this issue will not result in manifest injustice. *People v Grant*, 445 Mich 535, 547, 553; 520 NW2d 123 (1994). A defendant may be charged as a principal but convicted as an aider and abettor. *People v Turner*, 213 Mich App 588, 568; 540 NW2d 728 (1995). Nor is there any indication that defendant was deprived of notice of the charges against him as an aider and abettor, MCL 767.39; MSA 28.979; *People v Palmer*, 42 Mich App 549, 553; 202 NW2d 536 (1972), or that he had to alter his defense to challenge the prosecutor's aiding and abetting theory.

Next, the trial court also did not abuse its discretion by denying defendant's motion for a separate trial. *People v Hana*, 447 Mich 325; 524 NW2d 682 (1994). MCR 6.121 provides, in pertinent part:

> (C) Right of Severance; Related Offenses. On a defendant's motion, the court must sever the trial of defendants on related offenses on a showing that severance is necessary to avoid prejudice to substantial rights of the defendant.
>
> (D) Discretionary Severance. On the motion of any party, the court may sever the trial of defendants on the ground that severance is appropriate to promote fairness to the parties and a fair determination of the guilt or innocence of one or more of the defendants. Relevant factors include the timeliness of the motion, the drain on the parties' resources, the potential for confusion or prejudice stemming from either the number of defendants or the complexity or nature of the evidence, the convenience of witnesses, and the parties' readiness for trial.

In *Hanna*, *supra* at 346, the Court observed:

> Severance is mandated under MCR 6.121(C) only when a defendant provides the court with a supporting affidavit, or makes an offer of proof, that clearly, affirmatively, and fully demonstrates that his substantial rights will be prejudiced and that severance is the necessary means of rectifying the potential prejudice. The failure to make this showing in the trial court, absent any significant indication on appeal that the requisite prejudice in fact occurred at trial, will preclude reversal of a joinder decision.

Severance is required where defenses are mutually exclusive or irreconcilable, not simply where they are inconsistent. *Hanna supra* at 349; see also *McCray*, *supra* at 12.

Here, the trial court properly recognized that defendant and codefendant Marshall's defenses were not mutually exclusive or irreconcilable. At trial, defendant and codefendant Marshall both denied

participating in the charged offenses and neither one claimed that the other committed the killing. Contrary to defendant's argument, he and codefendant Marshall did not have antagonistic defenses simply because he testified that the guns were left at his house. Nor does it follow that antagonistic defenses existed just because counsel for codefendant Marshall seemed to attack defendant's credibility in closing argument by stating that defendant could not remember who brought the guns to his house. This statement does not necessarily imply that defendant, but not codefendant Marshall, was guilty. While the defenses may have been inconsistent, they were not mutually exclusive or irreconcilable. Thus, the trial court did not abuse its discretion by denying defendant's motion for severance.

Defendant also claims that he was denied a fair trial because the trial court failed to give a preliminary instruction on the presumption of innocence, offered an inadequate reasonable doubt instruction, and failed to give a cautionary instruction on identification based upon *People v Anderson*, 389 Mich 155; 205 NW2d 461 (1973). However, because defendant did not object to the trial court's jury instructions at trial, review is warranted only if necessary to prevent manifest injustice. *People v Dorsten*, 441 Mich 540, 544-45; 494 NW2d 737 (1993); *People v Yarger*, 193 Mich App 532, 536-37; 485 NW2d 119 (1992). In this case, appellate relief is not necessary to avoid manifest injustice.

While the trial court failed to provide a preliminary instruction on the presumption of innocence, it provided the appropriate instruction before the jury began its deliberations. Further, the trial court instructed the jury on reasonable doubt in accordance with CJI2d 3.2, and, contrary to what defendant argues, there is nothing to indicate that instruction was "nebulous." Finally, there was no error in the trial court's failure to give a specific cautionary instruction on identification where the trial court instructed the jurors that they must determine beyond a reasonable doubt that defendant was one of the persons who committed the charged offenses. *People v Roberson*, 90 Mich App 196, 203; 282 NW2d 280 (1979).

Next, defendant did not object to the trial court's failure to immediately swear the jury upon their selection and, therefore, failed to preserve this issue for appellate review. *Grant*, *supra*. Further, defendant was not prejudiced where the trial court corrected its error and had the jury sworn before trial began.

Next, defendant was not deprived of a fair and impartial trial by the prosecutor's remarks during closing argument. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995). First, as we have previously concluded, the prosecutor did not improperly inject religion into the proceedings or make an improper civic duty argument. Beyond this, defendant failed to object to the remaining alleged instances of prosecutorial misconduct and a miscarriage of justice will not result from our failure to review the matters because the prejudicial effect of the remarks, if any, was not so great that it could not have been cured by an appropriate instruction. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

Although defendant failed to object to the prosecutor's remarks concerning his failure to go to the police, we will briefly address this issue because a significant constitutional question is involved. *People v Alexander*, 188 Mich App 96, 101; 469 NW2d 10 (1991). We find no merit to defendant's

claim that it was improper for the prosecutor to comment upon defendant's failure to go to the police after learning that a warrant had been issued for his arrest. In *People v Lawton*, 196 Mich App 341, 353; 492 NW2d 810 (1992), this Court, citing *People v Collier*, 426 Mich 23, 31; 393 NW2d 346 (1986), observed that "[the] right to remain silent in the face of accusation," set forth in *People v Bobo*, 390 Mich 355; 212 NW2d 190 (1973), "is not controlling in cases where the 'silence' occurred before any police contact." As this Court observed in *Lawton*, *supra* at 353, the Supreme Court in *Collier* approved a prosecutor's argument that "if defendant's version [of the events in question] were true, he would have reported the crime." Thus, in *Lawton*, this Court approved a similar closing argument in which "the prosecutor asked why [the defendant] did not immediately report the shooting instead of waiting two months and telling his story to a codefendant's lawyer." Accordingly, we find nothing improper with the prosecutor's remarks during closing argument.

Defendant next claims that he was denied the effective assistance of counsel. Because defendant did not move for a new trial or request an evidentiary hearing on this issue, our review is limited to the existing record. *People v Armendarez*, 188 Mich App 61, 74; 468 NW2d 893 (1991). To establish a claim of ineffective assistance of counsel, defendant must show that counsel's performance was deficient and that, under an objective standard of reasonableness, counsel made an error so serious that counsel was not functioning as an attorney as guaranteed under the Sixth Amendment. Defendant must also overcome the presumption that the challenged action might be considered sound trial strategy. Finally, defendant must show that he was prejudiced by the alleged deficiency. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994); *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). To establish prejudice, defendant must show that, but for counsel's alleged deficient performance, there is a reasonable probability that the result of the proceeding would have been different and that the result was fundamentally unfair. *People v Poole*, 218 Mich App 702, 718; 555 NW2d 485 (1996).

Defendant first alleges that trial counsel was ineffective for failing to move in limine to exclude testimony that he was arrested by the "Repeat Offenders Bureau" of the Detroit Police Department. Even assuming that trial counsel committed error in failing to seek exclusion of this testimony, we are satisfied that defendant was not prejudiced by the testimony. *Poole*, *supra* at 718. Defendant also claims that trial counsel was ineffective because he did not move for a mistrial when a witness, Theresa Cunningham, testified that it was known throughout the neighborhood that Terrance Hill hired defendant "to do the dirty work." Even if defense counsel had moved for a mistrial, it is unlikely that such a motion would have been granted. Moreover, considering the strength and weight of the evidence of defendant's guilt, there is no reasonable probability that the challenged testimony affected the outcome of the proceedings. Accordingly, ineffective assistance of counsel has not been established. Defendant's remaining allegations of ineffectiveness involve issues previously addressed in this opinion. For the reasons previously discussed, we conclude that defendant has failed to establish any basis for relief due to ineffective assistance of counsel. *Pickens*, *supra*.[1]

Finally, defendant has not shown that the trial court imposed a harsher sentence in retaliation for his rejection of an earlier sentence evaluation under *People v Cobbs*, 443 Mich 276, 283; 505 NW2d 208 (1993). The decision in *Cobbs* allows a judge, in the context of plea bargaining, to make a

preliminary evaluation of a defendant's sentence length in a given case on the basis of information available at the time. *Id.* at 283. However, "the judge's preliminary evaluation of the case does not bind the judge's sentencing discretion, since additional facts may emerge during later proceedings." *Id.*

Here, in connection with the prosecutor's plea offer, the trial court indicated that it was inclined to impose a minimum sentence of fifteen years for a second-degree murder conviction. Defendant rejected the plea offer. After his jury trial conviction, the trial court sentenced defendant to a term of twenty-five to fifty years' imprisonment for the second-degree murder conviction. In *People v Sickles*, 162 Mich App 344, 365-66; 412 NW2d 734 (1987), this Court observed:

> Unless there is something in the record which indicates the higher sentence was imposed as a penalty for the accused's assertion of his right to trial by jury, the sentence imposed will be sustained. Anno.: *Propriety of sentencing justice's consideration of defendant's failure or refusal to accept plea bargain*, 100 ALR3d 834… Where the court offers a different reason for the sentence imposed than the reason asserted by the defendant, a reviewing court will not assume the sentence was imposed in retaliation for rejection of an initially offered plea.

See also *People v Snow*, 386 Mich 586; 194 NW2d 314 (1972); *People v Rivers*, 147 Mich App 56, 61-2; 382 NW2d 731 (1985).

Here, the trial court's remarks at sentencing fail to disclose anything intimating that a longer sentence was imposed because defendant had turned down the prosecutor's plea offer and proceeded to trial. Rather, the trial court observed that the sentencing guidelines recommended a minimum sentence of ten to twenty-five years, and that defendant had "prior convictions for weapons type offenses" and was involved in other "pending cases, involving violence." The court also noted that the victim had been gunned down as a bystander in the street. Although considering a sentence beyond the guidelines, the court ultimately imposed a sentence at the upper end of the guidelines. Accordingly, we reject defendant's contention that the sentence was imposed in retaliation for his rejection of the plea offer.

Affirmed.

/s/ Stephen J. Markman
/s/ Kathleen Jansen
/s/ Joseph B. Sullivan

[1] The cumulative effect of any errors did not deprive defendant of a fair trial. *People v Kvam*, 160 Mich App 189, 201; 408 NW2d 71 (1987).