

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ERIC JAMES RITCHIE,

Defendant-Appellant.

UNPUBLISHED

March 26, 1999

No. 199999

Macomb Circuit Court

LC No. 95-002452 FC

Before: Murphy, P.J., and Gage and Zahra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to murder, MCL 750.83; MSA 28.278, assault with a dangerous weapon, MCL 750.82; MSA 28.277, carrying a concealed weapon, MCL 750.227; MSA 28.424, and two counts of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to life in prison for the assault with intent to murder conviction, two to four years' imprisonment for the assault with a dangerous weapon conviction, and two to five years' imprisonment for the carrying a concealed weapon conviction, to be served consecutively to two years' imprisonment for each of the felony-firearm convictions, to be served consecutively to each other. Defendant appeals from his convictions and sentences as of right. We affirm defendant's convictions but remand for correction of his judgment of sentence.

Defendant first argues that the trial court erroneously ordered that the two felony-firearm sentences were to be served consecutively to each other. The prosecutor concedes this argument on appeal. In *People v Sawyer*, 410 Mich 531, 535; 302 NW2d 534 (1981), our Supreme Court held that the felony-firearm statute, MCL 750.227b; MSA 28.424(2), "neither compels nor authorizes a trial judge to impose consecutive multiple sentences for felony-firearm." Accordingly, the trial court erroneously sentenced defendant to two consecutive terms for the felony-firearm convictions and we remand to the trial court to correct the judgment of sentence to reflect that defendant's sentences for his felony-firearm convictions are to be served concurrently to each other.

Defendant next argues that the trial court's imposition of life imprisonment for the assault with intent to murder conviction was disproportionate. The penalty for an assault with intent to murder conviction is "life or any number of years." MCL 750.83; MSA 28.278. The guidelines' range for defendant's assault with intent to murder conviction was eight to fifteen years, but the trial court deviated from the recommending guidelines' range and sentenced defendant to life in prison.

The sentences imposed upon criminal defendants are reviewed for an abuse of discretion. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990). A sentence constitutes an abuse of discretion if it is disproportionate to the seriousness of the circumstances surrounding the offense and the offender. *Id.* The sentencing guidelines are intended to assist the court in assessing the appropriate sentence and to promote statewide consistency in sentencing. *People v Coulter (After Remand)*, 205 Mich App 453, 456; 517 NW2d 827 (1994). A trial court must articulate its reasons for departing from the sentencing guidelines on the record at the time of sentencing. *People v Kreger*, 214 Mich App 549, 554; 543 NW2d 55 (1995).

A court may justify an upward departure by reference to factors considered, but adjudged inadequately weighed, within the guidelines, as well as by introducing legitimate factors not considered by the guidelines. See *People v Granderson*, 212 Mich App 673, 680-681; 538 NW2d 471 (1995). A sentence outside the recommended range that is imposed without reference to legitimate factors not adequately considered by the guidelines may be disproportionate. *People v Houston*, 448 Mich 312, 320; 532 NW2d 508 (1995).

We do not believe that the trial court abused its discretion in departing from the sentencing guidelines and sentencing defendant to life in prison. The trial court placed its reasons for the upward departure on the record: (1) the viciousness of the crime; (2) the lack of any mitigating circumstances; (3) the senselessness of the crime; and (4) the evidence showing that only the good fortune of defendant's gun jamming prevented another victim from being killed or seriously injured. Given the reasons articulated by the trial court, as well as the severity of the victim's injuries, the fact that he will spend the rest of his life as a quadriplegic and the fact that defendant shot him for no reason whatsoever and without provocation, the imposition of a life sentence does not seem disproportionate. We cannot say that the trial court abused its discretion in finding that the sentencing guidelines were not sufficient under the circumstances of this case to formulate a proper sentence, and thus, we conclude that defendant's sentence is proportionate to the offense and offender.

Defendant also argues that the PSIR incorrectly indicated that he did not have a psychiatric history. However, defendant stated at sentencing that he was satisfied with the contents of the PSIR. Accordingly, because defendant has not properly preserved this issue, we decline to review it. See *People v Sharp*, 192 Mich App 501, 504-505; 481 NW2d 773 (1992).

Defendant next argues that the trial court abused its discretion in admitting evidence that defendant test-fired the gun he used to shoot Brandon Easthope earlier the same day and that defendant intended to commit a carjacking that evening. However, defendant only objected to the admission of evidence that he test-fired the gun the day of the shooting. Defendant's objection was on the basis of relevancy. A trial court's decision to admit evidence will not be reversed absent an abuse of discretion.

People v Coleman, 210 Mich App 1, 4; 532 NW2d 885 (1995). To find an abuse of discretion, the result must have been so violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or an exercise of passion or bias. *Id.*

We do not believe that the trial court abused its discretion in admitting evidence that defendant had test-fired the gun on the day he shot Brandon Easthope. The evidence was relevant because it had a tendency to make the existence of a fact that was of consequence to the determination of the action more probable than it would be without the evidence. MRE 401. That is, the fact that defendant tested the gun on the day of the shooting had a tendency to show that defendant wanted to make sure the gun was working. Thus, it makes it more probable that defendant intended to use the gun during his criminal endeavors.

Moreover, the admission of the evidence was not substantially more prejudicial than probative. MRE 403. Unfair prejudice does not mean damaging. *People v Mills*, 450 Mich 61, 75-76; 537 NW2d 909, modified by 450 Mich 1212 (1995). Rather, it denotes a situation in which there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury, and where it would be inequitable to allow the proponent of the evidence to use it. *Id.* There is no indication that the jury gave the evidence that defendant test-fired the gun undue or preemptive weight, and we do not believe that it was inequitable to allow the prosecution to use it.

With respect to the admission of the evidence that defendant intended to commit a carjacking, defendant failed to tender a timely objection. In order to preserve an evidentiary issue for appellate review, the opposing party must object at trial and specify the same grounds for objection as it asserts at trial. MRE 103(a)(1); *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993). Where the defendant has not objected to the admission of evidence, but there was plain error, reversal is not required unless the error affected the substantial rights of the defendant. *People v Grant*, 445 Mich 535, 552-553; 520 NW2d 123 (1994). An error affects the substantial rights of a defendant if it affected the outcome of the proceedings. *Id.*

We do not believe that admission of the evidence that defendant intended to commit a carjacking constituted plain error. Dr. Steven Miller, the forensic psychologist, testified that “the reason [defendant] was in possession of the gun from the week before [the shooting] was because him and his buddy had talked about doing a carjacking.” Thus, the evidence was relevant to show the reason that defendant was carrying a gun. It also had a tendency to make the existence of the fact that he could plan and intend to commit a crime, and to do whatever was necessary to follow through with the crime, more probable than it would be without the evidence. Therefore, on this record, we find no plain error that would necessitate our further review of this issue.

Defendant also argues that he was denied a fair trial by several instances of prosecutorial misconduct. However, defendant objected to only two of the prosecutor’s comments that he alleges were improper. Appellate review of improper prosecutorial remarks is precluded absent objection by counsel, unless failure to review the issue would result in a miscarriage of justice or if a cautionary instruction could not have cured the prejudicial effect. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Where defendant objected to the prosecutor’s comment, the test of misconduct

by the prosecutor is whether a defendant was denied a fair and impartial trial. See *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995).

Issues of misconduct by a prosecutor are decided case by case. The reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. *Id.* A prosecutor may not argue facts not entered into evidence. *Id.* at 282. However, the prosecutor is free to argue the evidence and all reasonable inferences from the evidence as it relates to the prosecutor's theory of the case. *Id.* Moreover, a prosecutor may not appeal to the sympathy of the jury. *People v Swartz*, 171 Mich App 364, 372; 429 NW2d 905 (1988).

Defendant first claims that he was denied a fair trial by the following comment of the prosecutor during closing argument, which, according to defendant, was not based on the evidence and was merely used to show that defendant was a bad person:

The evidence in this case is completely uncontroverted. There is testimony that the week before the Defendant and a friend planned a car jacking. They were not able to get a weapon so that plan was thwarted at that time. On the day of the crime, August 22, 1995, the Defendant, Mr. Ritchie, along with this same friend had a weapon, had a weapon and planned the car jacking again. This plan was to lose his little brother so he didn't get involved in that kind of trouble. His plan was to go to the store and get some alcohol and then finally to look for some stangs or vets with lone occupants inside them. And that was on the day of the crime. It was early on the day of the crime. What that shows is a predisposition to violence and a leap to criminal intent to kill is a baby step for someone who is predisposed to violence.

We believe that the prosecutor properly argued facts in evidence and reasonable inferences that relate to his theory of the case. Dr. Lois Wightman, a clinical psychologist, testified that defendant and his friend discussed committing a carjacking the weekend before the shooting, but postponed their plans because they did not have a gun. On the day of the shooting, they had a gun and planned to go to the store and purchase alcohol before committing the crime. Defendant told Dr. Wightman that he told his brother to go inside the house and then snuck away because he did not want him "involved in trouble." He also told Dr. Wightman that he and his friend waited until after dark before proceeding with their carjacking plan. Moreover, the prosecutor was commenting on his theory of the case based on this evidence when he stated that this planning and intent showed that defendant was predisposed to violence and that that was a small step to finding criminal intent to kill. Therefore, we do not believe that defendant was denied a fair trial by this comment.

Defendant also claims that the prosecutor improperly showed a photograph of the victim, Brandon Easthope, to the jury during rebuttal closing argument, which depicted him before he was shot and injured. Although the prosecutor likely elicited the jury's sympathy by showing the photograph, we do not believe that defendant was denied a fair and impartial trial. The jury already knew that before the shooting, Brandon was a healthy person and it also knew of the injuries he sustained after the shooting. Seeing Brandon on the witness stand likely elicited more sympathy than seeing his photograph during closing argument. Accordingly, we find no error that would require reversal.

The other claims of prosecutorial misconduct by the prosecutor were not objected to. We have reviewed the record and do not believe that our failure to fully review any of those alleged instances of misconduct will result in a miscarriage of justice.

Defendant next argues that the trial court erroneously admitted defendant's confession that he shot Brandon Easthope because the confession was taken without the consent of a parent or guardian and the totality of the circumstances does not establish that he voluntarily waived his right against self incrimination. However, defendant neither objected to the admission of his confession nor sought a *Walker*¹ hearing for the purpose of having the trial court determine whether his confession was voluntarily given. Accordingly, this issue is waived. Nonetheless, our Supreme Court has held that even where a defendant has neglected to object to the admissibility of his confession, the factual situation itself might be suspicious enough to alert the trial court of the existence of a substantial question of voluntariness. *People v Ray*, 431 Mich 260, 269; 430 NW2d 626 (1988). However, in this case, we see nothing on the record that should have alerted the trial court to the necessity of conducting a *sua sponte* inquiry into the voluntariness of defendant's confession.

Finally, defendant argues that he was denied the effective assistance of counsel by his attorney's failure to request a *Walker* hearing to determine the voluntariness of his confession and his failure to object to the admission of the confession. Because defendant did not move for a new trial or an evidentiary hearing, this Court's review is limited to errors apparent on the record. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996). A defendant who claims that he has been denied the effective assistance of counsel must establish that (1) the performance of his counsel was below an objective standard of reasonableness under prevailing professional norms and (2) a reasonable probability exists that, in the absence of counsel's unprofessional errors, the outcome of the proceeding would have been different. *Id.* at 41.

We do not believe that defendant has overcome the strong presumption that his trial counsel was exercising sound trial strategy by not moving to suppress his confession. Brandon Easthope and five of his friends testified that defendant shot Brandon for no apparent reason, other than defendant believed Brandon was staring at him. The police found defendant hiding in some bushes, shortly after the shooting, carrying the gun that was used to shoot Brandon. Had defendant simply denied shooting Brandon, his defense would have most certainly been unsuccessful. Thus, defendant's trial counsel exercised sound strategy by attempting to establish that, although Brandon shot defendant, he could not have formed the intent to shoot him. Because defendant told the police that he did not know why he shot Brandon and that he "just went nuts," it was reasonable for defense counsel to use that statement to show that defendant did not have the requisite intent to kill, but merely lost control of his composure.

Moreover, even if defense counsel had moved to exclude the confession, his motion would not likely have been successful. And, even if the motion would have been successful, we believe that the outcome of trial would not likely have been affected. There was ample evidence, aside from defendant's confession, that he shot Brandon Easthope. Drs. Miller and Wightman both testified that defendant told them that he shot Brandon and indicated his reasons, or lack of reasons, for doing so. Thus, the jury would have essentially heard the same evidence as they would have if defendant's

confession would have been excluded. Accordingly, defendant was not denied the effective assistance of counsel.

Defendant's convictions are affirmed, and we remand for sole purpose of correcting the judgment of sentence. We do not retain jurisdiction.

/s/ William B. Murphy

/s/ Hilda R. Gage

/s/ Brian K. Zahra

¹ *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).