

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL THOMAS HICKS,

Defendant-Appellant.

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UNPUBLISHED

April 2, 1999

No. 200575

Monroe Circuit Court

LC No. 95-026967 FC

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

PER CURIAM.

Defendant was convicted by a jury of armed robbery, MCL 750.529; MSA 28.797, possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), assault with intent to murder, MCL 750.83; MSA 28.278, and being a felon in possession of a firearm, MCL 750.224f; MSA 28.421(6). Defendant was sentenced as a fourth habitual offender, MCL 769.12; MSA 28.1084, to twenty-five to fifty years' imprisonment for the armed robbery conviction, two years' imprisonment for the felony-firearm conviction, fifty to seventy-five years' imprisonment for the assault with intent to murder conviction, and five to ten years' imprisonment for the felon in possession of a firearm conviction. Defendant appeals as of right. We affirm.

Defendant first contends that the prosecutor improperly elicited testimony that during a police interrogation defendant exercised his right to remain silent by requesting an attorney. Defendant failed to object at trial to the prosecutor's question that elicited this testimony. Appellate review of allegedly improper remarks or questions is precluded absent an objection unless a curative instruction could not have eliminated the prejudicial effect or where failure to consider the issue would result in a miscarriage of justice. *People v Howard*, 226 Mich App 528, 544; 575 NW2d 16 (1997). Although the prosecutor improperly inquired regarding defendant's invocation of his privilege against self-incrimination, he did not engage in a studied attempt to place this matter before the jury. *People v Sain*, 407 Mich 412, 415; 285 NW2d 772 (1979). The prosecutor made only this one, limited mention of defendant's invocation, and did not subsequently refer to defendant's invocation during his closing argument. *People v Truong (After Remand)*, 218 Mich App 325, 336; 553 NW2d 692 (1996).

Furthermore, given the overwhelming evidence of defendant's guilt in the instant case, we conclude that defendant suffered no manifest injustice from the prosecutor's inquiry.

Defendant next argues that the prosecutor inflamed the jury during his opening statement by stating that defendant had been on a "murderous rampage." Prosecutorial misconduct issues are decided on a case-by-case basis, and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks or questions in context. *People v Legrone*, 205 Mich App 77, 82; 517 NW2d 270 (1994). The test is whether the defendant was denied a fair and impartial trial. *People v Paquette*, 214 Mich App 336, 342; 543 NW 2d 342 (1995).

The prosecutor stated twice during his opening statement that defendant had been on a "murderous rampage." This description aptly characterized defendant's crime spree. Although no murder was committed, it was not for defendant's lack of trying. Defendant had pointed a gun at and threatened to kill the clerk of the party store that he and his accomplice robbed, pointed a gun at and threatened to kill his accomplice, and then fired eight shots at a pursuing police officer during a sometime high-speed chase through residential neighborhoods. We note that prosecutors may use hard language when it is supported by the evidence, and are not required to phrase arguments in the blandest of all possible terms. *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996). Considering defendant's behavior, we conclude that the phrase "murderous rampage" did not inflame the prejudices of the jury to the extent that defendant was denied a fair and impartial trial, *People v Marji*, 180 Mich App 525, 538; 447 NW2d 835 (1989), remanded on other grounds sub nom *People v Thomas*, 439 Mich 896; 478 NW2d 445 (1991), especially in light of the trial court's instruction to the jury that the lawyers' arguments do not constitute evidence.

Defendant next argues that he received ineffective assistance of counsel. To find that a defendant's right to effective assistance of counsel was so undermined that it justifies reversal of an otherwise valid conviction, a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Because defendant did not move for a new trial or an evidentiary hearing before the trial court, our review is limited to the existing record. *Marji*, *supra* at 533.

Defendant claims that defense counsel was ineffective for failing to object to the prosecutor's inquiry regarding defendant's invocation of his privilege against self-incrimination. As discussed above, however, because the prosecutor's question did not deprive defendant of a fair trial, defense counsel's failure to object cannot constitute ineffective assistance. *Pickens*, *supra*.

Defendant also alleges that defense counsel was ineffective for failing to object to the admission of an audio cassette containing both defendant's accomplice's 911 call reporting that defendant had a gun and was looking for him and the pursuing officer's conversation with police dispatch describing the police chase as it occurred. Both the accomplice's report that defendant was pursuing him and the police officer's conversation with dispatch during the high speed chase of defendant were admissible as present sense impressions under MRE 803(1) or as excited utterances under MRE 803(2). *People v Slaton*, 135 Mich App 328, 334; 354 NW2d 326 (1984). Furthermore, the prosecutor in this case

adequately laid a foundation for introducing the dispatch tape via the testimony of the dispatcher and the police officer who made the statements that were on the tape. MRE 901; *Slaton*, *supra* at 335-336. Because the trial court properly admitted the dispatch tape, defense counsel did not render ineffective assistance in failing to object to its admission. See *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991) (defense counsel not required to argue a frivolous or meritless motion).

Defendant next argues that he was denied a fair trial by the cumulative effect of these alleged errors. As we have discussed above, however, the only error defendant has identified was the prosecutor's inquiry regarding defendant's invocation of his privilege against self-incrimination, which we have concluded did not deprive defendant of a fair trial. Because defendant's other allegations of error are without merit, his argument regarding the cumulative effect of these alleged errors is likewise meritless.

Lastly, defendant argues that his sentences are disproportionate and so severe that they amount to cruel and unusual punishment. This Court reviews sentencing decisions for an abuse of discretion. *People v Milbourn*, 435 Mich 630, 634-635; 461 NW2d 1 (1990). A sentence constitutes an abuse of discretion if it violates the principle of proportionality, which requires sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender. *Id.* at 636. A proportionate sentence is not cruel and unusual punishment. *People v Terry*, 224 Mich App 447, 456; 569 NW2d 641 (1997).

Defendant was sentenced as a fourth habitual offender; therefore, the fact that his sentences fall outside any guidelines range is not evidence of an abuse of discretion. *People v McFall*, 224 Mich App 403, 415; 569 NW2d 828 (1997). Pursuant to MCL 769.12(1)(a); MSA 28.1084(1)(a), the trial court had authority to impose enhanced sentences of life or any term of years for defendant's armed robbery, assault with intent to murder, and felon-in possession convictions. In imposing defendant's sentences, the trial court properly considered the protection of society, defendant's potential for rehabilitation, *People v Johnson*, 173 Mich App 706, 709; 434 NW2d 218 (1988), defendant's prior record, the serious nature of the crimes and their surrounding circumstances. *People v Ross*, 145 Mich App 483, 495; 378 NW2d 517 (1985). Therefore, we conclude that the trial court did not abuse its discretion in imposing defendant's sentences. *Milbourn*, *supra*. Because the sentences are proportionate to the seriousness of the circumstances surrounding defendant and his crimes, the sentences do not qualify as cruel and/or unusual punishment. *Terry*, *supra*.

Affirmed.

/s/ William B. Murphy

/s/ Hilda R. Gage

/s/ Brian K. Zahra