

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

AARON DEMPSEY HOLLOWELL,

Defendant-Appellant.

UNPUBLISHED

May 21, 1999

No. 205658

Saginaw Circuit Court

LC No. 96-012424 FH

Before: Hoekstra, P.J., and Saad and R. B. Burns*, JJ.

PER CURIAM.

Defendant appeals of right from his jury trial conviction of home invasion in the first degree, MCL 750.110a(2); MSA 28.305(a)(2) and unarmed robbery, MCL 750.530; MSA 28.798. The trial court sentenced defendant as a four-time habitual offender, MCL 769.12; MSA 28.1084, to concurrent terms of ten- to twenty-years' imprisonment for each conviction. We affirm.

I

Defendant first argues that the trial court improperly sentenced him as a fourth habitual offender because he disputed one of his prior felony convictions and the trial court never confirmed the conviction. However, the record shows that both defendant and his trial counsel acknowledged at the sentencing hearing that defendant was a four-time habitual offender. Defendant's counsel also noted that the probation department representative had a certified copy of the disputed prior conviction that showed the conviction to be a felony. Defendant did not challenge his counsel's statements.

The habitual offender statutes do not define substantive criminal offenses. Rather, they prescribe a means by which the trial court can enhance a defendant's sentence. *People v Zinn*, 217 Mich App 340, 347; 551 NW2d 704 (1996). They do not require that the existence of defendant's prior convictions be proven beyond a reasonable doubt. *Id.* Here, defendant's acknowledgment and his counsel's statements sufficiently established his prior felony conviction. MCL 769.13(5); MSA 28.1085(5). We find no error.

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

II

Defendant next argues that the maximum sentence for his unarmed robbery conviction was improper. We disagree. Because the trial court sentenced defendant as an habitual offender, his maximum sentence was proper. MCL 769.12; MSA 28.1084.

Defendant also argues that the imposition of two identical habitual offender sentences violates his double jeopardy protection against multiple punishments. However, because the habitual offender statutes do not charge substantive criminal offenses and are merely sentence enhancement mechanisms, *Zinn, supra* at 345, the sentences are not identical, but rather are enhancements of separate sentences for different underlying felonies.

III

Defendant next argues that the prosecutor's remarks during closing argument deprived him of a fair trial. We disagree. Because defendant failed to object to the remarks below, this Court will only review his claim to determine whether failure to consider the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). We consider the prosecutor's remarks in context. Where the remarks are based on the evidence or responsive to matters raised by defendant, they are not grounds for reversal. *People v Duncan*, 402 Mich 1, 16-17; 260 NW2d 58 (1977). Absent an objection, the trial court's admonition that counsel's arguments are not evidence sufficiently eliminates any prejudice. *People v Bahoda*, 448 Mich 261, 281; 531 NW2d 659 (1995).

We do not find the remarks in questions to be improper. Defendant claims he was unfairly prejudiced by the prosecutor's remarks concerning his credibility; however, those remarks were proper because defendant testified. Other remarks pointed out in defendant's brief were simply comments concerning defendant's theory of the case; as such, they were proper. *People v Brown*, 126 Mich App 282, 289; 336 NW2d 908 (1983); *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995). Still other remarks defendant maintains were improper were simply inferences properly drawn from the evidence. *People v Ricky Vaughn*, 200 Mich App 32, 39; 504 NW2d 2 (1993). None of the remarks listed in defendant's brief were improper, and we can find no manifest injustice.

IV

Defendant next argues that the trial court committed error requiring reversal when it gave an ex parte supplemental instruction to the jurors during their deliberations. We review the trial court's ex parte communications with the jury to determine whether the communications were substantive, administrative, or housekeeping in nature. We then determine whether defendant was prejudiced by the communication. Prejudice is broadly defined as "any reasonable possibility of prejudice." *People v France*, 436 Mich 138, 162-163; 461 NW2d 621 (1990). Because the trial court gave the jury supplemental instructions on the law, the ex parte communication was substantive and presumptively prejudicial. However, this presumption may be rebutted by "showing that the instruction was merely a recitation of an instruction originally given without objection, and that it was placed on the record." *Id.*

at 163 n34. Here, the ex parte supplemental instruction merely reiterated the court's prior instructions, to which defendant voiced no objection. The instructions were handwritten on the same paper that contained the jury's question, and the note was placed in the court file. Furthermore, the trial court described its contents on the record. The trial court did not verbally address the jury in defendant's absence, and defendant never objected to the trial court's actions. "Defendant's failure to object . . . implies that defendant agreed with the manner in which the court handled the situation." *People v Gonzalez*, 197 Mich App 385, 403; 496 NW2d 312 (1992). Because the note only reiterated the original instructions, to which defendant voiced no objection, we find that defendant was not prejudiced.

V

Finally, defendant argues that his trial counsel's failure to object to an allegedly burden-shifting remark by the prosecutor in the rebuttal argument deprived him of his right to the effective assistance of counsel. Because defendant failed to preserve this claim, we will review this issue only for mistakes apparent on the record. *People v Price*, 214 Mich App 538, 547; 543 NW2d 49 (1995). We review the record to determine whether defendant has shown that his counsel's performance so prejudiced him as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994).

The remark in question did not shift the burden of proof. Therefore, no objection was warranted, and defense counsel cannot be deemed ineffective for failing to object. *People v Dixon*, 217 Mich App 400, 409; 552 NW2d 663 (1996). Assuming arguendo that an objection was warranted, defendant has failed to show that any potential prejudice could not be cured by an instruction from the trial court. *People v Messenger*, 221 Mich App 171, 180; 561 NW2d 463 (1997). Defendant has, therefore, failed to demonstrate both that he was denied the effective assistance of counsel and that he was prejudiced.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Henry William Saad
/s/ Robert B. Burns