STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN BLACK, III,

Defendant-Appellant.

UNPUBLISHED
June 1, 1999

No. 209757
Berrien Trial Court
LC No. 97-404822-FH

Before: Sawyer, P.J., and Murphy and Talbot, JJ.

PER CURIAM.

Defendant John Black, III was charged with assault with intent to commit murder, MCL 750.83; MSA 28.278, possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), and carrying a concealed weapon, MCL 750.227; MSA 28.424. Following a jury trial, he was convicted of assault with intent to commit great bodily harm less than murder, MCL 750.84; MSA 28.279, felony-firearm, and CCW. The trial court sentenced defendant to two to ten years' imprisonment for the assault conviction, to two to five years' imprisonment for the CCW conviction, and to two year's imprisonment for the felony firearm conviction. Defendant appeals as of right and we affirm.

On appeal, defendant first argues that the trial court denied defendant the effective assistance of counsel when it sustained several prosecutorial objections during defense counsel's cross-examination of various witnesses. Although defendant's brief is far from clear, it is apparent that the crux of his argument is not that defense counsel performed deficiently, see generally *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984), but rather that the trial court's rulings prevented defense counsel from fully performing her role as defendant's trial counsel, see generally *United States v Chronic*, 466 US 648; 104 S Ct 2039; 80 L Ed 2d 657 (1984); *People v Mitchell*, 454 Mich 145, 154-155; 560 NW2d 600, 153-155 (1997). This argument is without merit. The trial court did not prevent defendant's attorney from cross-examining the prosecution's witness; it merely sustained several prosecutorial objections. Nor did it prevent defendant's attorney from making offers of proof as to what testimony would have been elicited on cross-examination if defense counsel had been permitted to

ask the challenged questions. Under these circumstances, we cannot say that defendant was deprived of the assistance of counsel in any way. Cf. *Chronic, supra*, *Mitchell, supra* at 153-155.

Defendant next contends that the jury's verdict was against the great weight of the evidence. Because defendant failed to preserve it for appeal by making a timely motion for a new trial below, we decline to review this issue. See *People v Winters*, 225 Mich App 718, 729; 571 NW2d 764 (1997).

Defendant also argues that this Court should grant a new trial on the basis of newly discovered evidence. We disagree. To merit a new trial on the basis of newly discovered evidence, a defendant must show that the evidence (1) is newly discovered, (2) is not merely cumulative, (3) would probably have caused a different result, and (4) was not discoverable and producible at trial with reasonable diligence. *People v Davis*, 199 Mich App 502, 515; 503 NW2d 457 (1993).

In this case, the so-called "newly discovered evidence" is described in a letter from defendant's trial counsel to his appellate counsel. The letter states, "I have recently learned that one of the police detective's involved in Mr. Black's case has been involved in a fraud which occurred prior to his investigation of Mr. Black." Defendant argues that he would have been able to "discredit" the detective's testimony at trial if he had been able to introduce evidence of the detective's involvement in a fraud. Defendant further claims that the evidence of the detective's "conviction" of a fraud was "hidden by the prosecution, for fear that it would discredit the police officer's testimony before the jury." Defendant provides no support for his assertions that the detective was convicted of a crime or that the prosecution actively covered up the detective's "involvement" in a "fraud." This is hardly a sufficient base upon which to build a persuasive argument on appeal. Nevertheless, assuming that the detective was "involved in a fraud" and that this evidence was not discoverable before trial, defendant would not be entitled to a new trial because newly discovered evidence is not a valid ground for a new trial where it would be used merely to impeach. *Id*. at 516. Accordingly, defendant is not entitled to the relief requested.

Finally, defendant argues that his two-year minimum sentence was disproportionately severe. We disagree. Sentencing decisions are subject to review by this Court on an abuse of discretion standard. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990). A sentence constitutes an abuse of the trial court's discretion if it violates the principle of proportionality. The principle of proportionality requires sentences to be "proportionate to the seriousness of the circumstances surrounding the offense and the offender." *Id.* at 636. In this case, defendant's minimum sentence was within the range recommended by the sentencing guidelines. A sentence within the sentencing guidelines is presumptively proportionate, and can only be disproportionate if unusual circumstances exist. See *id.* at 661; *People v Rivera*, 216 Mich App 648, 652; 550 NW2d 593 (1996). If a defendant believes that such "unusual circumstances" exist, the defendant must present those circumstances in open court to be

considered by the sentencing judge before sentencing. *People v Sharp*, 192 Mich App 501, 505-506; 481 NW2d 773 (1992). Because defendant failed to do so in this case, this issue has not been preserved for appeal. *Id.* at 506.

Affirmed.

/s/ David H. Sawyer
/s/ William B. Murphy
/s/ Michael J. Talbot