STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GENE MANN, a/k/a RANDY LEE COOPER, a/k/a THOMAS MANN, a/k/a THOMAS G. MANN, a/k/a GENE THOMAS MANN, a/k/a THOMAS JAY COOPER, a/k/a JAMES KEETER,

Defendant-Appellant.

UNPUBLISHED
June 30, 2000

No. 220565
Kent Circuit Court
LC No. 98-013218-FC

Before: Smolenski, P.J., and Zahra and Collins, JJ.

PER CURIAM.

Defendant was convicted by a jury of assault with intent to commit criminal sexual conduct involving penetration, MCL 750.520g(1); MSA 28.788(7)(1), and was sentenced as a fourth habitual offender, MCL 769.12; MSA 28.1084, to a term of seven to twenty years' imprisonment. He appeals as of right from his conviction and sentence. We affirm.

I

Defendant raises two claims of instructional error. First, he argues that the trial court erroneously instructed the jury as to the definition of "sexual penetration." Second, he argues that the trial court erroneously responded to a question from the jury as to the definition of the term "criminal" in the phrase "criminal sexual conduct." We conclude that defendant has forfeited his claims of error because he did not object to the challenged instructions at trial. Further, as to both of his claims, defendant has not demonstrated the existence of a plain error that adversely affected his substantial rights, i.e., that the alleged errors affected the outcome of trial. *People v Carines*, 460 Mich 750, 763-764, 766-767, 773-774; 597 NW2d 130 (1999); *People v Grant*, 445 Mich 535, 553; 520 NW2d 123 (1994). Nor has defendant established that he is actually innocent or that the alleged errors seriously affected the fairness, integrity, or public reputation of his judicial proceedings. *Carines, supra* at 763-764, 772.

II

Defendant next takes issue with comments made by the prosecutor during rebuttal argument, which defendant contends constituted improper commentary on his failure to testify at trial and shifted the burden of proof. We disagree.

Defendant's Fifth Amendment right not to testify neither precluded the prosecutor from making arguments regarding reasonable inferences based on the evidence presented at trial, nor from responding to defense counsel's arguments. *People v Fields*, 450 Mich 94, 109-111; 538 NW2d 356 (1995); *People v Reid*, 233 Mich App 457, 477-478; 592 NW2d 767 (1999); *People v Messenger*, 221 Mich App 171, 180-181; 561 NW2d 463 (1997). As our Supreme Court explained in *Fields*, *supra* at 115:

> [W]here a defendant testifies at trial or advances, either explicitly or implicitly, an alternate theory of the case that, if true, would exonerate the defendant, comment on the validity of the alternate theory cannot be said to shift the burden of proving innocence to the defendant. Although a defendant has no burden to produce any evidence, once the defendant advances evidence or a theory, argument on the inferences created does not shift the burden of proof. [Footnote omitted.]

In the instant case, defense counsel argued that defendant did not intend to commit criminal sexual conduct involving penetration when he assaulted the victim. During rebuttal argument, the prosecutor made fair comments on the evidence and upon the theory advanced by the defense regarding defendant's intent. The prosecutor did not engage in misconduct in making the comments and did not deny defendant a fair trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995).

III

Finally, defendant raises two sentencing issues. We conclude that both claims are without merit, and that defendant is not entitled to resentencing.

First, defendant claims that he is entitled to resentencing because at least three of the prior felony convictions listed in his presentence report either are inaccurate or were obtained without counsel or without a proper waiver of the right to appointed counsel. The trial court used these prior felony convictions to enhance defendant's sentence under MCL 769.12; MSA 28.1084. A criminal defendant has a constitutional right to collaterally challenge a prior conviction that is used to enhance a sentence when the defendant alleges that the prior conviction was procured in violation of the Sixth Amendment right to counsel enunciated in *Gideon v Wainwright*, 372 US 335; 83 S Ct 792; 9 L Ed 2d 799 (1963). *Custis v United States*, 511 US 485; 114 S Ct 1732; 128 L Ed 2d 517 (1994); *People v Carpentier*, 446 Mich 19, 28; 521 NW2d 195 (1994). A defendant who collaterally challenges a prior conviction allegedly procured in violation of *Gideon* bears the initial burden of establishing that the

conviction was obtained without counsel or without a proper waiver of counsel. *People v Moore,* 391 Mich 426, 440-441; 216 NW2d 770 (1974).

Defendant's offers of proof are insufficient to establish prima facie proof that his prior convictions are constitutionally infirm on the basis of a right to counsel violation. In *Carpentier,* our Supreme Court clarified the mandates in *Moore* regarding the burden a defendant must carry in a collateral attack of a prior conviction, such as in this case. The Court rejected a "presumption of invalidity" where a collateral attack is made on a prior conviction and where the record is silent on whether counsel was validly waived. *Carpentier, supra* at 36-37, n 10. The Court noted that, "while the presumption of invalidity may enjoy a very obvious and proper place in direct judicial review—simply to insure proper sentencing in the first instance," the presumption of regularity attaches to final judgments that are being collaterally attacked, even when the question is waiver of constitutional rights. *Id.* at 37. Therefore, where defendant's offers of proof show that he waived his right to counsel for the two prior convictions that he is now collaterally attacking, defendant also carries the initial burden of presenting prima facie evidence that his waivers were invalid. Defendant has presented no prima facie proof showing that his waivers of counsel were invalid.

Additionally, defendant argues that one conviction listed on his presentence report, involving two counts of burglary and one count of theft by receiving and concealing stolen property, was inaccurate because he was only convicted of the one theft count. Even assuming that defendant's prior conviction on January 16, 1989, was for only one count of receiving and concealing stolen property and not for burglary, defendant would still have three presumptively valid prior convictions. Therefore, his status as a fourth habitual offender would be unchanged. Additionally, we note that defendant admitted at sentencing to having at least three prior felony convictions. Therefore, defendant is not entitled to resentencing or a remand on the bases claimed here.

Defendant also argues that he is entitled to resentencing because the trial court allegedly made a material mistake of law or fact at sentencing when it stated an intent to sentence him within or at the top end of the sentencing guidelines, but actually imposed a minimum sentence four months above the guidelines range. We do not believe that defendant is entitled to resentencing on this basis. There is "no obligation upon the trial court to take the guidelines into consideration in its sentencing determinations for habitual offenders." *People v Haacke,* 217 Mich App 434, 437; 553 NW2d 15 (1996) (footnote omitted). In this case, it does appear that the trial court initially considered the guidelines in its determination of defendant's sentence. However, the trial court appropriately recognized that the sentencing guidelines do not apply in this case because defendant is an habitual offender. *People v Hansford (After Remand),* 454 Mich 320, 323-324; 562 NW2d 460 (1997).

A sentence may be set aside only when it is invalid. *People v Mitchell,* 454 Mich 145, 176; 560 NW2d 600 (1997), citing *People v Whalen,* 412 Mich 166, 169-170; 312 NW2d 638 (1981). Although defendant argues that the sentencing court made a mistake of fact regarding the number of months for his minimum sentence to be within the guidelines, defendant makes no argument that the sentence he received is disproportionate. We conclude that the sentence is

proportionate and that defendant is not entitled to resentencing. See *Mitchell, supra* at 177; *Hansford, supra* at 325-326.

Affirmed.

/s/ Michael R. Smolenski
/s/ Brian K. Zahra
/s/ Jeffrey G. Collins