

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PERNELL BEASLEY,

Defendant-Appellant.

UNPUBLISHED
October 24, 2000

No. 219010
Ingham Circuit Court
LC No. 98-074188-FH

Before: Wilder, P.J., and Smolenski and Whitbeck, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to cause great bodily harm less than murder, MCL 750.84; MSA 28.279. The trial court sentenced him as a fourth habitual offender, MCL 769.12; MSA 28.1084, to a term of 10 to 20 years' imprisonment. Defendant appeals as of right. We affirm his conviction, but remand for entry of a corrected presentence investigation report.

Defendant argues that he was denied his right to fair trial as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution when the prosecutor argued facts not in evidence during her closing arguments to the jury. Specifically, defendant contends that the prosecutor's assertion that defendant aimed at the victim's neck with the intent to cause great bodily harm was not supported by the evidence. Because defendant did not object to the prosecutor's remark at trial, this issue is not preserved for appellate review. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000).

This Court reviews unpreserved claims of constitutional error under the plain error rule. *People v Carines*, 460 Mich 750, 764-765; 597 NW2d 130 (1999). In order to avoid forfeiture of this unpreserved claim of constitutional error, defendant must satisfy the three requirements of the plain error test. *People v Wyngaard*, 462 Mich 659, 668; 614 NW2d 143 (2000). Defendant must demonstrate: (1) that an error occurred at trial, (2) that the error was plain, and (3) that the plain error affected substantial rights. *Carines*, *supra* at 763. Further, if this Court finds plain error, defendant's conviction will not be reversed unless the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Id.* at 772.

We must evaluate the prosecutor's comments in context to discern whether they denied defendant his right to a fair trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995). Although courts accord wide latitude to prosecutors in making arguments to the jury, *Id.* at 282, it is well settled that prosecutors are not permitted to make statements of fact unsupported by the evidence. *People v Ellison*, 133 Mich App 814, 820; 350 NW2d 812 (1984). Nevertheless, a prosecutor is permitted to argue to the jury all reasonable inferences that arise from the evidence as those inferences relate to the prosecutor's theory of the case. *Bahoda, supra*, 448 Mich 282; *People v Christel*, 449 Mich 578, 599-600; 537 NW2d 194 (1995).

The specific intent necessary to commit assault with intent to cause great bodily harm less than murder may be found in conduct as well as words. *People v Mack*, 112 Mich App 605, 611; 317 NW2d 190 (1981). Similarly, the jury may infer the defendant's specific intent to commit that crime from the circumstantial evidence. *People v Eggleston*, 149 Mich App 665, 668; 386 NW2d 637 (1986). In this case, a witness testified that defendant used a utility knife during the assault. Further, the medical testimony revealed that the victim suffered multiple stab wounds to his neck. One of the lacerations was so deep that the treating physician ordered exploratory surgery to determine whether one of defendant's arteries had been severed. The jury could have properly inferred the requisite intent to support a conviction of this offense from defendant's use of a utility knife during the assault, along with the nature of the victim's wounds. We therefore conclude that the prosecutor's comments were proper in light of the evidence admitted at trial, and did not amount to plain error denying defendant a fair trial or due process. Further, defendant was not prejudiced by the prosecutor's closing comments because the trial court later instructed the jury that the attorneys' arguments were not evidence. Where no objection is made, the court's instruction that the attorneys' arguments are not evidence will dispel any prejudice. *Bahoda, supra*, 448 Mich 281.

Defendant next argues that the trial court failed to forward an accurate presentence investigation report to the Department of Corrections. Specifically, defendant argues that the trial court erroneously failed to strike two convictions for loud and boisterous conduct from that report, even though the court found those convictions irrelevant and declined to consider them for the purpose of sentencing. Further, defendant argues that the trial court failed to ensure that inaccurate information which the court manually struck from the report was rendered illegible. Defendant does not contend that he was sentenced on the basis of inaccurate information. Rather, he argues that he is entitled to the preparation of an accurate presentence information report.

A defendant in a criminal proceeding may challenge the accuracy or relevancy of any information contained in the presentence investigation report. MCL 771.14(6); MSA 1144(6). The statute is designed not only to ensure that a defendant is sentenced based on accurate information, but also to prevent the Department of Corrections from receiving false information. *People v Taylor*, 146 Mich App 203, 205; 380 NW2d 47 (1985). If the trial court finds on the record that information contained in the presentence investigation report is inaccurate or irrelevant, that report "shall be amended, and the inaccurate or irrelevant information shall be stricken accordingly before the report is transmitted to the department of corrections." MCL 771.14(6); MSA 1144(6).

In the present case, the trial court declined to consider defendant's two prior convictions for loud and boisterous conduct, holding that those convictions were not relevant to the instant charge. However, the court failed to strike those convictions from the presentence investigation report. Where a trial court declines to consider certain information for sentencing purposes, that information must be stricken from the report before it is forwarded to the Department of Corrections. MCL 771.14(6); MSA 1144(6); *People v Swartz*, 171 Mich App 364, 380-381; 429 NW2d 905 (1988); *Taylor, supra*, 146 Mich App 206. Because the trial court failed to strike the two convictions for loud and boisterous conduct from the presentence report, we remand for correction of the report.

At sentencing, the trial court manually corrected several other inaccuracies in the presentence report. First, the trial court manually struck out the listed jurisdiction for eight of defendant's prior convictions, changing the designation from circuit to district court. Second, the court corrected one previous conviction from the charge of larceny from a person to the charge of attempted larceny from a person. While this inaccurate information was "struck" from the presentence report, it remained clearly legible on the report. Defendant argues that the trial court was required to render the inaccurate information completely illegible. We disagree. "There is no requirement that information to which challenges were sustained be made completely illegible at the time of sentencing, as long as it is 'stricken' and the court does not consider it." *People v Martinez (After Remand)*, 210 Mich App 199, 202; 532 NW2d 386 (1995). Nevertheless, because we must remand with instructions for the circuit court to correct the presentence report by deleting defendant's convictions for loud and boisterous conduct, we direct the court to simultaneously correct the remaining errors.

Finally, defendant argues in his supplemental brief that trial counsel's performance amounted to ineffective assistance of counsel. Specifically, defendant alleges that his trial counsel failed to inform him of a plea bargain offer. Defendant strenuously argues that he first learned of the plea bargain offer after his conviction, and that he would have accepted the offer if he had known of it. The failure of defense counsel to communicate a plea bargain offer may amount to ineffective assistance of counsel. *People v Williams*, 171 Mich App 234, 241; 429 NW2d 649 (1988). Nevertheless, for defendant to succeed on a claim of ineffective assistance of counsel, he must satisfy this Court that counsel's performance was objectively unreasonable, and that defendant was prejudiced as a result. *People v Mitchell*, 454 Mich 145, 164; 560 NW2d 600 (1997).

Defendant provided this Court with a photocopy of a criminal pretrial statement as evidence of the prosecutor's plea bargain offer. The original pretrial statement contained in the trial court record is a two-sided document. Defendant's signature appears on the reverse side of that document, immediately underneath a paragraph which states: "Defendant certifies that s/he has read this document and understands that the plea offer listed above will not be renewed." The record in this case does not reveal that trial counsel's conduct was unreasonable or that defendant was prejudiced. Rather, the criminal pretrial statement in the court's file indicates that the plea agreement was made known to defendant, who rejected it. Therefore, we find that defendant's claim of ineffective assistance of counsel is without merit.

We affirm defendant's conviction, but remand for entry of a corrected presentence investigation report. We do not retain jurisdiction.

/s/ Kurtis T. Wilder

/s/ Michael R. Smolenski

/s/ William C. Whitbeck