

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARK THOMAS,

Defendant-Appellant.

UNPUBLISHED

May 22, 2001

No. 216063

Wayne Circuit Court

Criminal Division

LC No. 98-003468

Before: Doctoroff, P.J., and Saad and Wilder, JJ.

PER CURIAM.

The jury convicted defendant of assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279, and armed robbery, MCL 750.529; MSA 28.797. The evidence established that defendant struck the victim various times with a hammer and robbed him of \$2.00. Defendant now appeals as of right, and we affirm.

Defendant claims that the trial court failed to exercise any discretion in denying the jury's request to be provided with a transcript of a witness' testimony. Because defendant affirmatively approved the trial court's handling of the jury request, he has waived any claim of error. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).

Defendant also argues that he was denied a fair trial because of prosecutorial misconduct during closing argument. Because defendant failed to preserve this issue with an appropriate objection at trial, he must show plain error that affected his substantial rights. *People v Carines*, 460 Mich 750, 764-765; 597 NW2d 130 (1999). Reviewing the prosecutor's closing argument in context, we conclude that defendant has failed to show plain error because the prosecutor did not express a personal opinion of defendant's guilt, argue from personal knowledge, express his own personal knowledge of the credibility of defendant's witnesses or shift the burden of proof. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995); *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994).

Defendant further says that the trial court denied him a fair trial because it did not sua sponte give an instruction on the defense of alibi. Because defendant failed to preserve this issue with a proper request, he must show plain error that affected his substantial rights. *Carines*, *supra*. A review of the record reveals that defendant did not present an alibi defense and there

was to evidence in support such an instruction. Accordingly, defendant has failed to show plain error. *Id.*

Additionally, defendant contends that his convictions must be reversed because the trial court gave an erroneous jury instruction, as reported in the original transcript, because it instructed the jury that it must consider the fact that he did not testify when arriving at its verdict. Because defendant failed to object to the challenged instruction below, we review this issue for plain error affecting defendant's substantial rights. *Carines, supra.* We accept the court reporter's corrected transcript showing that the trial court instructed the jury that it must *not* consider the fact that defendant did not testify in rendering its verdict. MCR 7.216(A)(4); *People v Jones*, 106 Mich App 429, 432; 308 NW2d 243 (1981). Accordingly, there was no plain instructional error.

Also, defendant alleges that the trial court's jury instructions on the assault charges denied him a fair trial. Because defendant did not preserve this issue by objecting to the challenged instructions at trial, we review this issue for plain error affecting defendant's substantial rights. *Carines, supra.* Although the trial court's assault example may have been confusing, the instructions as a whole adequately instructed the jury on the assault charges, fairly presented the issues to be tried, and sufficiently protected defendant's rights. *People v Joeseype Johnson*, 407 Mich 196, 210; 284 NW2d 718 (1979); *People v Davis*, 216 Mich App 47, 54; 549 NW2d 1 (1996). Accordingly, plain error has not been shown. Additionally, because the principal issue at trial was identity and because it was undisputed that the victim was assaulted and suffered actual injuries, there is no reasonable likelihood that the challenged instruction affected the outcome of trial. Accordingly, defendant has not shown that his substantial rights were affected. *Carines, supra.*

Furthermore, defendant claims that he was denied his right to due process and a fair trial when the trial court corrected the original verdict returned by the jury. Because defendant failed to raise this issue at trial, it is not preserved and defendant must therefore show plain error affecting his substantial rights. *Carines, supra.* The trial court could properly clarify the jury verdict to reflect that defendant was convicted of assault with intent to do great bodily harm less than murder and armed robbery, *People v Rand*, 397 Mich 638, 641; 247 NW2d 508 (1976), modified on other grounds, 399 Mich 1040 (1977); *People v Gabor*, 237 Mich App 501; 603 NW2d 840 (1999), and its conduct in doing so did not amount to plain error.

Based on the foregoing, defendant was not denied the effective assistance of counsel. Even assuming that trial counsel erred in failing to properly preserve the issues discussed above, he has failed to show that he was prejudiced as a result. *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994).

Affirmed.

/s/ Martin M. Doctoroff
/s/ Henry William Saad
/s/ Kurtis T. Wilder