# STATE OF MICHIGAN

# COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JACKIE VERNON SAUNDERS,

Defendant-Appellant.

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UNPUBLISHED
November 16, 2001

No. 221258
Oakland Circuit Court
LC No. 99-164146-FH

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

PER CURIAM.

Defendant appeals as of right his jury conviction of attempted second-degree home invasion, MCL 750.110a(3) and MCL 750.92. He was sentenced as a fourth habitual offender, MCL 769.12, to six to fifteen years' imprisonment. We affirm.

Defendant's conviction arose out of an incident that occurred on December 21, 1998. On that day, at about 2:00 pm, a Southfield police officer patrolling near West Hampton Street, was approached by a woman. This woman then provided the officer with certain information that resulted in the officer looking for a black male carrying a large black duffel bag and wearing a three-quarter length coat and tan baseball cap. While looking for this individual, the officer noticed sunlight hitting an open storm door of a home and, at the same time, heard the sound of wood cracking from the same vicinity as the open storm door. On closer inspection, the police officer noticed defendant, who matched the description given by the woman, standing between the storm and front doors of the home, trying to gain entry into the home by prying off the deadbolt of the front door. Instead of immediately approaching defendant, the officer called for backup and proceeded to wait. However, while waiting for backup, the woman who originally gave the officer information regarding defendant, pulled up in front of the house, honked her horn and pointed at defendant. As a result, defendant ran from the scene, eventually being arrested by another Southfield police officer in the parking lot of a nearby credit union. After arresting defendant at the scene, officers searched the duffle bag, which contained three screwdrivers, a ski mask, gloves, clothing, syringe, and a needle.

In furtherance of the investigation, the officer who initially noticed defendant and a K-9 Unit went back to the house where defendant was first observed by the officer. Once there, the officer noticed that the area around the deadbolt lock of the front door had been chipped off to

the point that one could actually see into the house. In addition, the K-9 Unit tracked scent from the front door of the home to the credit union parking lot where defendant was sitting in a police car. Defendant was then transferred to the police station, where he was advised of his *Miranda*[1] rights and interviewed by the detective in charge of the case.

At trial, the detective testified that defendant admitted during questioning that he was involved in an attempted breaking and entering on West Hampton and that he had used small screwdrivers in an attempt to gain entry into the home, but that he had been "scared off" by the police. The detective also testified that defendant informed him once inside the home, he intended to get money for methadone. He further testified that defendant admitted he had also tried to break into a home one street north of West Hampton on the day in question, but that "for some reason he was spooked off."[2] In contrast, defendant testified that he had tried to break into both homes but that he abandoned his attempts voluntarily after determining that "it's not going to work." He also testified that he had been a heroin addict since shortly after graduating from high school and that if he did not have heroin everyday he would get sick. Defendant further testified that he had used heroin the day before and that if he had broken into either home he was going to take money so that he could buy methadone.[3]

I

On appeal, defendant first argues that the prosecutor improperly used a peremptory challenge to dismiss a potential juror because of her race in violation of *Batson v Kentucky*, 476 US 79, 96; 106 S Ct 1712; 90 L Ed 2d 69 (1986). We disagree. This Court's review of a trial court's *Batson* ruling is for an abuse of discretion. See *People v Ho*, 231 Mich App 178, 184; 585 NW2d 357 (1998) and *People v Howard*, 226 Mich App 528, 534; 575 NW2d 16 (1997).

In deciding whether a defendant has made a prima facie case of discriminatory dismissal,

> the trial court must consider all relevant circumstances, including whether there is a pattern of strikes against black juror, the questions and statements made by the prosecutor during voir dire and in exercising his challenges, all of which may support or refute an inference of discriminatory purpose. [*People v Barker*, 179 Mich App 702, 705-706; 446 NW2d 549 (1989), citing *Batson*, *supra* at 97.]

In bringing forth a prima facie case of discriminatory dismissal, the defendant must show that: (1) the juror belonged to a recognized racial group, (2) a peremptory challenge was used to excuse the juror, and (3) the facts and other relevant circumstances must provide an inference that the prosecutor used a peremptory challenge in an effort to exclude the juror based on race. *Batson*, *supra* at 80. Thus, as stated in *Clarke v Kmart Corp (After Remand)*, 220 Mich App 381,

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[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; L Ed 2d 694 (1966).

[2] It appears as if defendant was charged with this first attempted home invasion separately.

[3] Defendant testified that he was thirty-eight-years-old at the time of trial; however, according to his Presentence Investigation Report (PSIR), defendant would have been forty-eight-years-old in 1999.

383; 559 NW2d 377 (1996), "the race of a challenged juror alone is not enough to make out a prima facie case of discrimination." *Id*. See also *Howard*, *supra* at 536 n 3, citing *People v Williams*, 174 Mich App 132, 137; 435 NW2d 469 (1989). In addition, if there is no prima facie showing of purposeful discrimination, a prosecutor is not required to offer a neutral explanation for the use of the peremptory challenge. *Williams*, *supra*.

Here, although the potential juror was African American and excused through the prosecutor's use of a peremptory challenge, the prosecutor did not ask any questions or make any comments from which an inference could be made that the use of the peremptory challenge was motivated by race. In addition, the prosecutor used a total of three peremptory challenges, only one of which was used to excuse an African American juror, even though the record indicates that there were at least two African American jurors on the panel. Therefore, because defendant has failed to show any questions or statements made by the prosecutor that support an inference of discrimination and since the record does not indicate a pattern of strikes against African American jurors, defendant has failed to establish a prima facie showing of purposeful discrimination. See *Batson*, *supra* at 97; *Barker*, *supra*; *Howard*, *supra*. Accordingly, because defendant failed to establish a prima facie showing of discrimination, we find that the trial court did not abuse its discretion when it implicitly rejected defendant's *Batson* challenge. *Howard*, *supra* at 534, 536.[4]

II

Defendant also argues that the prosecutor made an improper community protection or civic duty argument in her opening statement and that the argument prejudiced the jury to the extent that he is entitled to a new trial. However, defendant failed to object to the prosecutor's opening statement at trial; thus, this issue has not been preserved for appellate review. See *People v Conner*, 209 Mich App 419, 422; 531 NW2d 734 (1995). Appellate review of unpreserved claims of prosecutorial misconduct is precluded unless the prejudicial effect could not have been cured by a cautionary instruction or if the failure to consider the issue would result in the miscarriage of justice. *People v Nimeth*, 236 Mich App 616, 626; 601 NW2d 393 (1999); *People v Griffin*, 235 Mich App 27, 46; 597 NW2d 176 (1999).

At trial, the prosecutor began her opening statement by saying:

> A drug addict who invades the safety and sanctity of home owner's home to feed his habit. *An individual who preys on home owners*, the individual seated in that chair, the defendant. . . . Ladies and gentlemen of the jury, this case will tell the story of [defendant] and what he does and what he does for a living.

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[4] Because no prima facie showing under *Batson* was made, the prosecutor was not required to articulate a race neutral explanation for the use of the peremptory challenge. Nonetheless, we note that the prosecutor claimed that she excused the potential juror because of her lower educational level and her young age; thus, articulating a race neutral explanation for the prosecutor's use of the peremptory challenge. See *Howard*, *supra* at 534, 536.

* * *

> When [the victim] left [his] house he had given no one permission to enter that house. He had given no one permission to pry the door on his house. But during the course of that afternoon you're going to learn that something happened to his house. Something happened to his house at the hands of the man in this chair, *an individual who preys upon home owners*. [Emphasis added.]

On appeal, defendant claims that by referring to defendant as an "individual who preys upon home owners," the prosecutor made an improper civic duty argument. We disagree. An improper civic duty argument injects into trial issues broader than the guilt or innocence of a defendant or encourages the jurors to suspend their powers of judgment. *People v Bahoda*, 448 Mich 261, 284; 531 NW2d 659 (1995); *People v Truong (After Remand)*, 218 Mich App 325, 340; 553 NW2d 692 (1996). Here, the prosecutor's reference to defendant as an "individual who preys upon home owners" did not inject issues broader than defendant's guilt or innocence nor did it encourage the jurors to suspend their powers of judgment; instead, the prosecutor's opening statement was a characterization of defendant that was ultimately supported by trial testimony. Thus, the prosecutor did not appeal to the jurors' sense of civic duty to convict defendant or improperly play upon their general fears and prejudices. *People v Cross*, 202 Mich App 138, 145; 508 NW2d 144 (1993); see also *Bahoda*, *supra* at 282-283. Accordingly, because the prosecutor's statements were not improper, they could not result in a miscarriage of justice. See *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996).

III

Next, defendant contends that the trial court abused its discretion when it allowed similar-acts evidence at trial. Again, we disagree. We review a trial court's decision to admit similar-acts evidence for an abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998); *People v Schutte*, 240 Mich App 713, 715; 613 NW2d 370 (2000). An abuse of discretion is found when an unprejudiced person, considering the facts on which the trial court acted, would conclude that there was no justification or excuse for the ruling made. *Id.*; *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996).

MRE 404(b)(1) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. *It may*, however, *be admissible for other purposes, such as proof of* motive, opportunity, *intent*, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case. [Emphasis added.]

In *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994), the Court clarified the test to be utilized in determining the admissibility of similar-acts evidence:

> First, that the evidence be offered for a proper purpose under Rule 404(b); second, that it be relevant under Rule 402 as enforced through Rule 104(b); third, that the probative value of the evidence is not substantially outweighed by unfair prejudice; fourth, that the trial court may, upon request, provide a limiting instruction to the jury.

It is insufficient for the prosecution to merely recite one of the purposes articulated in MRE 404(b); instead, the prosecution must demonstrate how the similar-act evidence is relevant. *Crawford, supra* at 387-388. To this end, we note that:

> Relevance is a relationship between the evidence and a material fact at issue that must be demonstrated by reasonable inferences that make a material fact at issue more probable or less probable than it would be without the evidence. . . . The logical relationship between the proffered evidence and the ultimate fact sought to be proven must be closely scrutinized. [*Id.* (citation and footnote omitted).]

In the instant case, defendant was charged with attempted second-degree home invasion, MCL 750.110a(3) and MCL 750.92. In order to prove the attempt, the prosecution was required to establish that defendant had the specific intent to commit the crime of second-degree home invasion. See *People v Strand*, 213 Mich App 100, 103; 539 NW2d 739 (1995). Defendant's defense was that he had abandoned his attempt and thus, did not have the specific intent to commit and complete the crime of second-degree home invasion. In this regard, the prosecutor argued that defendant's prior attempt at another home invasion on the same day was relevant to the issue of intent and showed a planned scheme and system. Thus, the prosecutor articulated a proper purpose under MRE 404(b). In addition, the similar-acts evidence was logically relevant and probative. Defendant argued that he abandoned his first attempt at home invasion that day because he had a change of heart. Yet, shortly thereafter and one street over, defendant again attempted to break into a home in order to obtain money for methadone. At trial, defendant argued that he also had a change of heart with regard to the second attempt. Hence, evidence of the first attempt was relevant to the issue of whether defendant had the specific intent to break into the second home. Accordingly, the evidence was highly probative of the issue of intent, providing the jury with evidence that defendant was desperate to break into a home and get money for methadone and that, after his first, failed attempt, his intention was to succeed in entering the second home. Thus, we find no abuse of discretion in the trial court's decision to admit evidence of defendant's first attempted home invasion and conclude that the danger of unfair prejudice from the admission of the evidence did not substantially outweigh the highly probative value of the evidence. See *People v Sabin (After Remand)*, 463 Mich 43, 57-58; 614 NW2d 888 (2000) and *People v Sholl*, 453 Mich 730, 741; 556 NW2d 851 (1996).

IV

Defendant also contends that the trial court's failure to instruct the jury on the lesser included offense of malicious destruction of property, MCL 750.377a,[5] constituted error requiring reversal. We disagree.

We first note that defendant never requested that the jury be instructed with regard to the lesser included offense of malicious destruction of property. In addition, before the jury instructions were read, defense counsel specifically indicated to the judge that he had no disputes with the instructions and also indicated that after the judge instructed the jury that he had no objections to the instructions as given. Thus, pursuant to *People v Carter*, 462 Mich 206, 216; 612 NW2d 144 (2000) and *People v Tate*, 244 Mich App 553, 558; 624 NW2d 524 (2001), defendant has waived review of this issue. See also *People v Taylor*, 159 Mich App 468, 488; 406 NW2d 859 (1987).

In any event, assuming defendant has not waived appellate review of this issue, we note that this Court has previously indicated that a trial court has no duty to sua sponte instruct on lesser included offenses. See *People v Reese*, 242 Mich App 626, 629; 619 NW2d 708 (2000) and *People v Kuchar*, 225 Mich App 74, 77-78; 569 NW2d 920 (1997). See also *People v Stephens*, 416 Mich 252, 261; 330 NW2d 675 (1982) (except for cases involving first-degree murder, there is no duty to instruct sua sponte on lesser included offenses) and *People v Ramsdell*, 230 Mich App 386, 403; 585 NW2d 1 (1998). Therefore, as a matter of law, a trial court need not sua sponte instruct a jury on malicious destruction of property in a second-degree home invasion case. *Reese*, *supra*; *Kuchar*, *supra*. In addition, we also note that defense counsel informed the jury during her opening statement that defendant was not charged with destroying property. Thus, defendant's strategy appears to have been an "all or nothing" strategy. If the jury believed defendant's theory of the case, he would have been acquitted. With instruction on an intermediary charge of malicious destruction of property, there was a greater chance that defendant would have been convicted of at least one crime. Accordingly, because the trial court had no duty to sua sponte instruct on the lesser offense, *Reese*, *supra*; *Stephens*, *surpra*, and since defendant (1) informed the jury that defendant was not being charged with destruction of property, (2) failed to request the malicious destruction of property instruction, and (3) indicated on the record that he did not object to the instructions as given, we conclude that the trial court committed no error in failing to instruct the jury on the lesser included offense of malicious destruction of property. Cf *People v Bulger*, 462 Mich App 495, 569; 614 NW2d 103 (2000); *People v Fetterley*, 229 Mich App 511, 520; 583 NW2d 199 (1998) (A defendant may not harbor error as an appellate parachute.).

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[5] MCL 750.377a, at the time defendant committed this crime, provided:

> Any person who shall willfully and maliciously destroy or injure the personal property of another, by any means not particularly mentioned or described in the preceding section, if the damage resulting from such injury shall exceed $100.00, shall be guilty of a felony. If the damage done shall be $100.00 or less, such person shall be guilty of a misdemeanor.

V

Defendant also claims that the trial court's decision to admit evidence of flight constituted error requiring reversal. As stated previously, we ordinarily review a trial court's decision regarding the admission of evidence for an abuse of discretion. *Schutte, supra*; *People v Snider*, 239 Mich App 393, 419; 608 NW2d 502 (2000). However, because defendant failed to object to the admission of the evidence about which he now complains, he has failed to preserve the issue for our review. We therefore review the admission of "flight" evidence under the plain error rule, *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999), to determine whether plain error occurred that affected defendant's substantial rights. *Id*. In order to be plain, the error must be clear or obvious. *Id*. In order to show that substantial rights have been affected, a defendant is generally required to show that the lower court proceedings were affected by the error, therefore causing prejudice to the defendant. *Id*. Further, if a defendant is able to show these three requirements, we must exercise our discretion in deciding whether to reverse a defendant's convictions. *Id*. To this end,

> [r]eversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error "'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence." [*Id*., quoting *United States v Olano*, 507 US 725, 736-737; 113 S CT 1770; 123 L Ed 508 (1993).]

Specifically, defendant argues that the trial court erred when it allowed officers to testify that he was arrested after running from the crime scene, being chased by an officer, and after failing to stop when ordered. This evidence is classic evidence of flight and, as such, was clearly admissible:

> It is well established in Michigan law that evidence of flight is admissible. Such evidence is probative because it may indicate consciousness of guilt, although evidence of flight by itself is insufficient to sustain a conviction. The term "flight" has been applied to such actions as fleeing the scene of the crime, leaving the jurisdiction, running from the police, resisting arrest, and attempting to escape custody. [*People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995), citing 29 Am Jur 2d, Evidence, § 532, p 608.]

Further, the trial court read the jury CJI2d 4.4,[6] which properly instructed the jury that they were allowed to consider the evidence of flight in determining whether defendant's actions of fleeing

[6] At trial, the trial court instructed the jury, pursuant to CJI2d 4.4, as follows:

> There has been some evidence that the defendant ran away after the alleged crime or after the police tried to arrest him.
>
> This evidence does not prove guilt. A person may run or hid for innocent reasons, such as panic, mistake or fear. However, a person may also run or hide because of a consciousness of guilt.

(continued…)

the scene show that he had a guilty state of mind. *Id*.; *People v Taylor*,195 Mich App 57, 63-64; 489 NW2d 99 (1992). Accordingly, defendant has failed to show plain error affecting his substantial rights. *Carines*, *supra*.

VI

Defendant next argues that his sentence appears to have been based, at least in part, upon his failure to plead guilty. Sentencing decisions are reviewed by this Court for an abuse of discretion. *People v Noble*, 238 Mich App 647, 661; 608 NW2d 123 (1999).

While it is true that a sentencing court "may not consider a defendant's refusal to plead guilty" when imposing a sentence, *People v Rabb*, 112 Mich App 430, 432; 316 NW2d 446 (1982), nothing in the record of the trial or sentencing hearing supports defendant's allegation that the trial court improperly considered defendant's refusal to plead guilty. Instead, defendant supports his argument by way of an affidavit attached to his amended motion for a new trial. In that affidavit, defendant states that he was informed by his counsel that he would receive a maximum of two years' imprisonment if he pleaded guilty. Despite this claim, there is no evidence suggesting that the trial court was aware of any sentencing agreement negotiations between the prosecutor and defense counsel. In addition, even if the trial court had been aware of sentencing negotiations between defendant and the prosecutor, the court was not bound by those agreements. See *People v Killebrew*, 416 Mich 189, 206-207; 330 NW2d 834 (1982). Thus, even if defense counsel discussed a certain sentence with defendant in exchange for a plea, the trial court did not have to accept that sentence. *Id*. at 207. Therefore, we conclude that the trial court was within its discretion when it sentenced defendant to six to fifteen years' imprisonment. *Noble*, *supra*.

VII

Defendant also argues that his sentence was disproportionate and that the trial court improperly sentenced him based on his past record without consideration of the seriousness, or lack thereof, of the current offense. Again, we disagree. This Court reviews a sentence imposed by the trial court under the habitual offender statute for an abuse of discretion. *People v Hansford (After Remand)*, 454 Mich 320, 326; 562 NW2d 460 (1997); *People v Reynolds*, 240 Mich App 250, 252; 611 NW2d 316 (2000). See also *People v Crawford*, 232 Mich App 608, 621; 591 NW2d 669 (1998). A sentence constitutes an abuse of discretion if it is disproportionate to the seriousness of the circumstances surrounding the offense and the offender. *Id*., citing *People v Milbourn*, 435 Mich 630, 635-636, 654; 461 NW2d 1 (1990). A trial court does not abuse its discretion in sentencing an habitual offender within the statutory limits when the offender's underlying felony, in the context of previous felonies, indicates the

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(…continued)

> You must decide whether the evidence is true, and, if true, whether it shows that the defendant had a guilty state of mind.

defendant's inability to conform his conduct to the laws of society. *Reynolds*, *supra*; *Hanford*, *supra*.

At sentencing, the trial court first recognized that defendant's record was "dismal," having been previously convicted of breaking and entering and being incarcerated for five to thirty years as a result of that conviction. The court then indicated that because of this past conviction, as well as discipline and punishment of defendant, protection of society, potential for reformation, and for deterrence of others, she was sentencing defendant to prison for six to fifteen years. In addition, having heard testimony in the case, the trial court was clearly aware of the details of the crime, as evidenced in its decision to order restitution in the exact amount of the victim's insurance deductible. Further, the trial court was familiar with the Presentence Investigation Report, which indicated that defendant had been convicted of eight felonies and three misdemeanors, and that he was on parole at the time of the instant crime. Thus, because the trial court articulated appropriate factors in sentencing defendant, see *Rice*, *supra* at 445-446, and because defendant's record indicates an inability to conform his conduct to the law, *Reynolds*, *supra*; *Hanford*, *supra*; and since both defendant's minimum and maximum sentence are within the statutory guidelines for habitual offenders, we conclude that his sentence was proportionate and that the trial court acted within its discretion in assessing a six to fifteen year sentence. *Id*.; see also MCL 769.12 and 750.92(2).[7] Moreover, because defendant's sentence was proportionate to the underlying crime and within the statutory guidelines, defendant's argument that his sentence is either cruel or unusual has no merit. Cf *People v Poole*, 218 Mich App 702, 715, 555 NW2d 485 (1996); *Launsburry*, *supra* at 363.

VIII

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[7] MCL 769.12 provides, in part:

> (1) If a person has been convicted of any combination of 3 or more felonies or attempts to commit felonies . . . and that person commits a subsequent felony within this state, the person shall be punished upon conviction of the subsequent felony . . . as follows:
>
> (a) If the subsequent felony is punishable upon a first conviction by imprisonment for a maximum term of 5 years or more or for life, the court . . . may sentence the person to imprisonment for life or for a lesser term.

To this end, MCL 750.92(2) provides:

> If the offense so attempted to be committed is punishable by imprisonment in the state prison for life, or for 5 years or more, the person convicted of such attempt shall be guilty of a felony, punishable by imprisonment in the state prison not more than 5 years or in the county jail not more than 1 year.

Further, the statutory sentence for second-degree home invasion is any term of years up to 15 years. See MCL 750.110a(6).

Finally, defendant contends that because his counsel failed to call the woman who brought defendant to the attention of the police as witness, he was deprived of the effective assistance of counsel. Because defendant never requested a *Ginther*[8] hearing below, our review is limited to errors apparent on the record. *People v Williams,* 223 Mich App 409, 414; 566 NW2d 649 (1997). To establish a claim of ineffective assistance of counsel, a respondent must show that counsel's performance fell below an objective standard of reasonableness and, but for counsel's error, there was a reasonable probability that the result of the proceedings would have been different, thus depriving respondent of a fair trial. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). In addition, this Court will not substitute its judgment for that of counsel regarding matters of trial strategy and counsel's decision regarding whether to call a particular witness is presumed to be matters of trial strategy. *People v Rockney*, 237 Mich App 74, 76; *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999).

Here, because the witness alerted the police to look for defendant on the day of the crime, she was obviously suspicious of defendant. Thus, after a thorough review of the record, we find that counsel's decision not to call the witness was not objectively unreasonable, see *Rockney*, *supra* at 78, and therefore conclude that defendant cannot overcome the presumption that his counsel's failure to call the witness was sound trial strategy. *Id*. at 76; *People v Tommolino,* 187 Mich App 14, 17; 466 NW2d 315 (1991). As such, defendant has not met his burden of demonstrating that his counsel's performance was objectively unreasonable and so prejudicial as to deprive him of a fair trial. *Stanaway*, *supra*; *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994).

Affirmed.

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

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[8] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).