# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>May 7, 2002 |
| v | No. 224908<br>Wayne Circuit Court |
| HARVEY L. FAIRLEY,<br><br>Defendant-Appellant. | LC No. 99-001406 |

Before: Jansen, P.J., and Holbrook, Jr. and Griffin, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of assault with intent to murder, MCL 750.83, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced as a fourth felony habitual offender, MCL 769.12, to consecutive terms of life imprisonment for the assault conviction and five years for the felony-firearm conviction as a second offense. We affirm.

I

Defendant was charged with shooting Frank Perry White when Mr. White approached defendant's car, allegedly to talk to defendant's female passenger. Defendant claimed that the victim pulled him out of the car and attacked him and that the gun went off accidentally. Defendant allegedly shot the victim several more times after he fell to the ground. The victim was rendered a quadriplegic.

On appeal, defendant first argues that the trial court abused its discretion in allowing the prosecution to impeach defendant with a twenty-two-year-old armed robbery conviction, over defendant's objection. Defendant maintains that the conviction had no bearing on his veracity and, therefore, it had little probative value to outweigh the serious prejudicial effect arising from its similarity to the charged offense. We review for an abuse of discretion a trial court's decision to allow impeachment by evidence of a prior conviction. *People v Coleman*, 210 Mich App 1, 6; 532 NW2d 885 (1995).

Generally, a witness' credibility may be impeached with prior convictions, but only if the convictions satisfy the criteria set forth in MRE 609, which provides in pertinent part:

(a) General rule. For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall not be admitted unless the evidence has been elicited from the witness or established by public record during cross examination, and

(1) the crime contained an element of dishonesty or false statement, or

(2) the crime contained an element of theft, and

(A) the crime was punishable by imprisonment in excess of one year or death under the law under which the witness was convicted, and

(B) the court determines that the evidence has significant probative value on the issue of credibility and, if the witness is the defendant in a criminal trial, the court further determines that the probative value of the evidence outweighs its prejudicial effect.

* * *

(c) . . . [e]vidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date.

In the instant case, defendant was convicted of armed robbery in May 1977, paroled in 1986, and discharged from parole for that offense in 1991. The presentence investigation report states that, "[a]ccording to prison and parole records, [defendant] absconded one time from parole and had to be extradited from the state of Louisiana." However, there is no indication that defendant was reincarcerated.[1] The trial court held that defendant's prior armed robbery conviction involved an element of theft and further, that until he completed his parole, defendant had not concluded his sentence and was "not really free"; therefore, "release . . . from confinement" under MRE 609(c) meant the completion of defendant's parole in 1991 and the conviction was not time barred. The trial court concluded that the prosecution would be allowed to use defendant's prior conviction for impeachment.

This Court has previously held that crimes of robbery involve an element of theft and constitute convictions falling within MRE 609(a)(2) if they satisfy the balancing test set forth in *People v Allen*, 429 Mich 558, 605-606; 420 NW2d 499 (1988), which requires the court to examine the degree of probativeness and prejudice inherent in the admission of the prior conviction. *People v Cross*, 202 Mich App 138, 146; 508 NW2d 144 (1993); *People v Minor*, 170 Mich App 731, 736; 429 NW2d 229 (1988). Although defendant's prior armed robbery conviction has lower probative value with regard to the question of veracity than other theft

[1] Defendant was paroled only on his armed robbery conviction, not any of his other prior convictions. Defendant was arrested on felonious assault and felony-firearm charges in December 1989, while still on parole, although he was not sentenced on those charges until three months after he was discharged from parole.

offenses would have, see *Allen, supra* at 611, nonetheless "theft is an element of robbery, and an indicator that defendant is of dishonest character and may not testify truthfully." *Cross, supra* at 147. Moreover, although both armed robbery and the present charge of assault with intent to murder are assaultive in nature, there is sufficient disparity between the two offenses to diminish the prejudicial effect of the prior conviction. *Cross, supra* at 147. The more recent the prior conviction, the greater its probative value. *Allen, supra* at 611. For this reason, the ten-year cutoff set forth in MRE 609(c) specifically states that "[e]vidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement period imposed for that conviction, whichever is the later date."

In the present case, assuming arguendo that the trial court misconstrued the ten-year rule set forth in MRE 609(c) and thereby abused its discretion in allowing the prosecution to impeach defendant with the 1977 armed robbery conviction, where defendant was released on parole in 1986 and apparently was not reincarcerated before he was discharged from parole in 1991, see *People v Washington*, 130 Mich App 579, 580-581; 344 NW2d 8 (1983), the error, if any, was harmless. MCL 769.26; MCR 2.613(A); *People v Nelson*, 234 Mich App 454, 463-464; 594 NW2d 114 (1999).

In *People v Coddington*, 188 Mich App 584, 596; 470 NW2d 478 (1991), this Court rejected the defendant's claim that use of a prior conviction prejudiced him, stating "[o]ur review reveals that defendant actually relied on his prior conviction, confinement, and escape while on furlough to explain why he fled the home after the shootings." Similarly, in the case at hand, defendant chose to testify at trial and, on his own redirect examination, testified that he had been convicted of armed robbery in 1977 and that he left the scene here because he did not want to be involved in "another incident." The brief questions regarding the prior conviction were asked by his own counsel and reflected the fact that the convictions were old. When the prosecutor attempted to inquire about the prior armed robbery conviction again on cross-examination, the trial court stopped him, stating there was no need to raise it again. Further, the trial court instructed the jury regarding the proper use of the evidence. Finally, given that there was substantial evidence of defendant's guilt, we conclude that defendant has failed to show that "it is more probable than not that a different outcome would have resulted without the error." *People v Lukity*, 460 Mich 484, 495, 497; 596 NW2d 607 (1999). Accordingly, reversal is unwarranted.

II

Defendant next contends that the trial court's instruction to the jury regarding the charge of assault with intent to murder was erroneous and misleading and deprived defendant of a fair trial because the instruction allowed the jury to convict him of that offense if they found that he acted with intent to do great bodily harm rather than the requisite actual intent to kill. We disagree.

Generally, jury instructions are reviewed as a whole rather than piecemeal. *People v Dabish*, 181 Mich App 469, 478; 450 NW2d 44 (1989). The reviewing court must balance the meaning of the instructions as a whole against the potentially misleading effect of an isolated sentence. *People v Freedland*, 178 Mich App 761, 766; 444 NW2d 250 (1989). Even if somewhat imperfect, instructions are not grounds for reversal if they fairly present the issues to

be tried and sufficiently protect the defendant's rights. *People v Gaydosh*, 203 Mich App 235, 237; 512 NW2d 65 (1994). In this case, however, because defendant did not object to the instructions given, he must demonstrate a plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 766-767; 597 NW2d 130 (1999); *People v Knapp*, 244 Mich App 361, 375; 624 NW2d 227 (2001).

It is necessary to find an actual intent to kill for conviction of assault with intent to murder. *People v Guy Taylor*, 422 Mich 554, 567; 375 NW2d 1 (1985); *People v Brown*, 196 Mich App 153, 159; 492 NW2d 770 (1992). Having reviewed the jury instructions as a whole, we find that the trial court adequately conveyed this principle to the jury in its instructions and, thus, no plain error affecting defendant's substantial rights occurred. Unlike the circumstances in *Taylor* or *Brown*, *supra*, cited by defendant, the court in this case did not erroneously direct the jury to find whether defendant acted "with intent to commit murder," or intent to commit great bodily harm. The record indicates that the trial court instructed the jury several times that in order to convict defendant on the assault with intent to murder charge, they had to find that defendant acted with an actual intent to kill. The court also instructed the jury on the lesser included offense of assault with intent to do great bodily harm. Thus, in context, the instructions fairly and accurately presented the issues to be tried and did not affect defendant's substantial rights. Therefore, defendant's argument in this regard is without merit.

In a related argument, defendant maintains that his trial attorney rendered ineffective assistance by failing to object to the jury instructions challenged on appeal. This Court reviews de novo a claim alleging ineffective assistance of counsel. *People v Toma*, 462 Mich 281, 310; 613 NW2d 694 (2000). To establish ineffective assistance of counsel, a defendant must show that his attorney's performance was deficient under an objective standard of reasonableness and that the deficiency likely affected the outcome of the case. *People v Hoag*, 460 Mich 1, 5-6; 594 NW2d 57 (1999); *People v Snider*, 239 Mich App 393, 423-424; 608 NW2d 502 (2000). Given our conclusion that the jury instructions in question were correct when viewed as a whole, defendant has not met this burden. Trial counsel's failure to object to the instructions did not likely affect the outcome of the case. Indeed, counsel is not rendered ineffective for failing to raise meritless objections or claims. *People v Torres (On Remand)*, 222 Mich App 411, 425; 564 NW2d 149 (1997).

III

Defendant next argues that the trial court pierced the veil of judicial impartiality by usurping the role of the prosecutor, making objections, and injecting sua sponte evidentiary rulings. Defendant maintains that this conduct deprived defendant of a fair trial, particularly where the evidence concerning defendant's intent was far from overwhelming. However, defendant did not object to any of the alleged improper remarks by the trial court and thus has not preserved this issue for appellate review. *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995). Consequently, reversal is unwarranted unless "a miscarriage of justice would result because the defendant is actually innocent or . . . the error 'seriously affects' the fairness, integrity, or public reputation of judicial proceedings." *People v Grant*, 445 Mich 535, 549-550; 520 NW2d 123 (1994). See also *Carines*, *supra* at 763.

"A trial court has wide, but not unlimited, discretion and power in the matter of trial conduct." *Paquette*, *supra* at 340. "A trial court's conduct pierces the veil of judicial

impartiality where its conduct or comments unduly influence the jury and thereby deprive the defendant of a fair and impartial trial." *Id*. The record should be reviewed as a whole; portions of the record should not be taken out of context in order to show trial court bias against a defendant. *Id*. "Judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases do not generally support a challenge for partiality." *People v McIntire*, 232 Mich App 71, 104; 591 NW2d 231 (1998), rev'd on other grounds, 461 Mich 147; 599 NW2d 102 (1999). Similarly, a court's questioning of a witness does not deprive the defendant of a fair trial if the questions are posed in a neutral manner and the trial court's comments and questions neither add to nor distort the evidence. *People v Davis*, 216 Mich App 47, 50; 549 NW2d 1 (1996). "The test is whether the judge's questions or comments may have unjustifiably aroused suspicion in the mind of the jury concerning a witness' credibility and whether partiality quite possibly could have influenced the jury to the detriment of the defendant's case." *People v Cheeks*, 216 Mich App 470, 480; 549 NW2d 584 (1996).

Applying these criteria, our review of the record indicates that the complained of comments by the trial court were not intimidating, argumentative, prejudicial, unfair, or partial. Viewed in context, the court did not demonstrate partisanship or unjustifiably arouse suspicion in the mind of the jury concerning a witness' credibility. *Cheeks, supra* at 480. Rather, the court interjected evidentiary rulings that are not challenged by defendant on appeal and merely directed defense counsel to proceed in a proper manner in order to avoid irrelevant matters and lines of inquiry. The trial judge was acting within the scope of his authority in controlling the proceedings. Therefore, there was no plain misconduct and defendant was not deprived of a fair trial. *Grant, supra* at 549-550, 552-553.

IV

Defendant next alleges that the trial court improperly sentenced him to a five-year prison term as a second felony-firearm offender. Defendant does not contest the trial court's enhancement of the predicate offense (assault with intent to murder) as an habitual fourth-felony offender and he does not take issue with the validity of his prior conviction for felony-firearm. Defendant merely contends that he was never charged as an habitual second-offender on the count of felony-firearm because neither the information nor amended information so charged him and, therefore, he had no notice that his sentence for felony-firearm would be enhanced. Defendant's claim is without merit.

The felony-firearm statute provides that "[u]pon a second conviction under this section, the person *shall* be imprisoned for 5 years." MCL 750.227b(1) (emphasis added). "[T]he sentencing provisions of the felony-firearm statute are mandatory, not discretionary." *People v Honeycutt*, 163 Mich App 757, 760; 415 NW2d 12 (1987). Although, as defendant argues, the habitual offender statute may not be used to enhance a defendant's felony-firearm conviction, *id*. at 762, this is not what occurred in the instant case.

Here, defendant was charged as a fourth felony habitual offender but was never charged as a repeat felony-firearm offender. However, defendant's prior felony-firearm conviction was listed in the presentence investigation report. Defendant acknowledged receipt of the presentence investigation report at sentencing and in no manner contested the accuracy of that information at sentencing. Defendant's judgment of conviction and sentence, as well as the

sentencing transcript, properly noted that defendant was sentenced under the felony-firearm statute.

As our Supreme Court held in *People v Miles*, 454 Mich 90, 100; 559 NW2d 299 (1997),

> Due process protections afforded defendants subject to such [the felony-firearm] sentence enhancement provisions are less than those afforded defendants for the substantive offense, because the enhancement is not a separate element that must be proved beyond a reasonable doubt. *People v Eason* [435 Mich 228; 458 NW2d 17 (1990)], *supra* at 233. Applying *People v Eason*, the Court of Appeals in *People v Williams*, 215 Mich App 234, 236; 544 NW2d 480 (1996), held that for enhancement of a felony-firearm sentence "due process is satisfied as long as the sentence is based on accurate information and the defendant has a reasonable opportunity at sentencing to challenge that information." We agree.

The present circumstances are nearly identical to those in *Williams, supra*, where the defendant argued that the trial court erred as a matter of law when it imposed a five-year enhanced sentence for his second felony-firearm offense because he was not charged as a second offender under the felony-firearm statute and did not plead guilty to being a second-time felony-firearm offender. This Court rejected the defendant's claim, stating:

> At the sentencing hearing, defendant's counsel stated that defendant had reviewed the presentence report and had no objections to it. After explaining the sentence-enhancement provision, the trial court told defendant he was being placed on notice of the provision and asked defendant if he wished to contest the prior conviction. Defense counsel indicated that defendant did not wish to do so. We conclude defendant was not denied due process and was properly sentenced. [*Williams, supra* at 236.]

Pursuant to *Miles* and *Williams*, the trial court in the instant case properly sentenced defendant to the mandatory five years for his second felony-firearm conviction.

V

Defendant next contends that the sentence of life imprisonment imposed for assault with intent to commit murder is disproportionate and constitutes an abuse of discretion. We disagree.

A sentence imposed on an habitual offender is reviewed for an abuse of discretion. *People v Hansford (After Remand)*, 454 Mich 320, 323-324; 562 NW2d 460 (1997). The sentencing guidelines do not apply and may not be considered. *People v Gatewood*, 450 Mich 1025; 546 NW2d 252 (1996); *Hansford, supra* at 323. Instead, "a trial court does not abuse its discretion in giving a sentence within the statutory limits established by the Legislature when an habitual offender's underlying felony, in the context of his previous felonies, evidences that the defendant has an inability to conform his conduct to the laws of society." *Hansford, supra* at 326.

We find no abuse of discretion in the imposition of defendant's sentence of life imprisonment.[2] Assault with intent to murder carries a statutory maximum of life or any number of years. MCL 750.83. Therefore, under the applicable habitual offender statute, defendant could be sentenced to life or a lesser term. See MCL 769.12. The sentence imposed by the trial court was within statutory limits.

This was a vicious and senseless offense that easily could have been avoided. At sentencing, the trial court noted that defendant was a convicted felon and had no legal right to carry a firearm. Defendant's presentence investigation report discloses that this was actually defendant's fifth felony conviction, two of which were assaultive offenses involving the use of a weapon. Defendant had been out of prison approximately 4 ½ months when he committed the instant offense. If defendant had not had a weapon, the entire incident could have been avoided. Further, defendant shot the victim while he lay on the ground, leaving him a quadriplegic. The present felony, in the context of defendant's prior record, shows that defendant is unable or unwilling to conform his conduct to the laws of society. Therefore, the trial court did not abuse its discretion in sentencing him to life in prison.

VI

Next, defendant argues that his conviction as an habitual offender should be dismissed because the prosecution failed to provide written notice of intent within twenty-one days as required by MCL 769.13. Whether the prosecutor fulfilled the statutory requirements regarding habitual offender enhancements is a question of law that we review de novo. *People v Sierb*, 456 Mich 519, 522; 581 NW2d 219 (1998).

MCL 769.13(1) provides in pertinent part that "the prosecuting attorney may seek to enhance the sentence of the defendant as provided under section 10, 11, or 12 of this chapter, by filing a written notice of his or her intent to do so within 21 days after the defendant's arraignment on the information charging the underlying offense or, if arraignment is waived, within 21 days after the filing of the information charging the underlying offense." The notice "shall list the prior . . . convictions that will or may be relied upon for purposes of sentence enhancement." MCL 769.13(2). The notice must be filed with the court and served on the defendant and his attorney and a proof of service filed with the court. MCL 769.13(2).

Defendant was arraigned in circuit court on February 23, 1999. The prosecutor indicated on the record that she had filed an amended information that morning and had served it on defense counsel. Count three of the amended information, which was read into the record at defendant's request, was captioned "HABITUAL OFFENDER – FOURTH OFFENSE NOTICE"; it listed three prior felonies and indicated the prosecutor's intent to seek an enhanced sentence under MCL 769.12. That language had been on the charging document since the original complaint.

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[2] Because the offense was committed before the January 1, 1999, effective date of the legislative sentencing guidelines, those guidelines do not apply to this case. MCL 769.34(2); *People v Babcock*, 244 Mich App 64, 72; 624 NW2d 479 (2000).

Defendant argues that inclusion of the notice in the information itself was insufficient to comply with the statute because the prosecutor did not file a separate and independent pleading in the form of a notice-seeking enhancement. This argument is meritless. Clearly, defendant was given actual notice of the prosecutor's intent to seek sentence enhancement – the goal of the notice requirement. Further, the statute does not specify the form that the notice must take and does not contain such a requirement. See MCL 769.13. Defendant has cited no authority for the proposition that the notice of intent must appear in a document separate from the felony information. "A party may not merely state a position and then leave it to this Court to discover and rationalize the basis for the claim." *People v Griffin*, 235 Mich App 27, 45; 597 NW2d 176 (1999). Defendant's argument is therefore without merit.

VII

Finally, defendant contends that the prosecution engaged in prosecutorial misconduct in its closing and rebuttal arguments by allegedly vouching for the truthfulness of its key witness, using a religious tone as part of its argument, and making improper comments concerning the evidence and its implications. This issue was not raised or decided below and thus has not been properly preserved for appellate review. Unpreserved errors are forfeited unless the defendant can show plain error that was outcome determinative. *Carines, supra; Grant, supra*.

Claims of prosecutorial misconduct are reviewed case by case and the challenged remarks are reviewed in context to determine whether the defendant was deprived of a fair trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995); *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999); *Paquette, supra* at 342.

Defendant first argues that the prosecutor in his closing argument appealed to the jurors' sympathy for the victim and improperly injected religion into the proceeding. However, our review of the record indicates that the prosecutor's comment referencing the quadriplegic condition of the victim ("[a]nd it left him [the victim] in a condition that most of us probably pray to God that none of our loved ones, let alone ourselves, would ever be in") was relatively innocuous and isolated. "No error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction." *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001)." Further, the trial court instructed the jury to be objective and not to "decide the case based on sympathy or bias or prejudice." Additionally, the evidence against defendant was strong and the only issue at trial was whether the shooting was accidental. Given these circumstances, defendant has not demonstrated prejudice. *Carines, supra*; *Watson, supra*.

Defendant further argues that the prosecutor improperly vouched for the credibility of a key eyewitness to the assault and misrepresented the record concerning whether the eyewitness was afraid to testify. However, the record reflects that the prosecutor was encouraging the jury to draw inferences from the evidence and from the witness' demeanor, not vouching for her credibility. Although the witness may have said that she was not afraid to testify, even assuming arguendo that the prosecutor mischaracterized her demeanor, defendant cannot show that the isolated comment at issue "could have been decisive of the outcome," or that it resulted in a miscarriage of justice. *Grant, supra* at 549-550, 552-553. See, generally, *Watson, supra* at 586-592; *Knapp, supra* at 382-385.

Next, although the prosecutor improperly vouched for the credibility of the victim when he told the jury that the victim was being truthful, see *Bahoda, supra* 276-277, his comment was brief and isolated and a prompt curative instruction could have removed any taint arising from his comment. *Knapp, supra* at 382. Moreover, the trial court, as noted above, instructed the jury to be objective, not to decide the case based on sympathy or prejudice, and that it was their duty to determine the credibility of the witnesses. Therefore, the prosecutor's comment, albeit improper, does not warrant reversal. *Carines, supra*.

Likewise, defendant's argument that the prosecutor misrepresented the victim's medical records, which had been introduced into evidence, does not constitute error requiring reversal. The prosecution's argument on rebuttal, referencing and characterizing the medical evidence, may not have been completely accurate but nonetheless constituted a legitimate response to defense counsel's argument that the medical evidence did not show that the shooting was intentional. The prosecutor was inviting the jury to infer intent to kill from the medical evidence and from the wounds they saw in open court. "[A]n otherwise improper remark may not rise to error requiring reversal when the prosecutor is responding to the defense counsel's argument." *Watson, supra* at 593, quoting *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996). When the prosecutor's comments are considered as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial, *People v Schultz*, 246 Mich App 695, 710; 635 NW2d 491 (2001), the prosecutor did not plainly commit misconduct depriving defendant of a fair trial. *Carines, supra*.

Defendant argues that the cumulative effect of the prosecutor's alleged misconduct deprived him of a fair trial. See *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998). However, as already discussed, the prosecutor's comments did not deny defendant a fair and impartial trial. *Bahoda, supra* at 266-267. Reversal is therefore unwarranted.

Affirmed.

/s/ Kathleen Jansen
/s/ Donald E. Holbrook, Jr.
/s/ Richard Allen Griffin