STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEYON ANDREW NEAL,

Defendant-Appellant.

UNPUBLISHED
November 22, 2002

No. 233196
Wayne Circuit Court
LC No. 00-008001

Before: Talbot, P.J., and Neff and Fitzgerald, JJ.

PER CURIAM.

Defendant was convicted of assault with intent to murder, MCL 750.83, felonious assault, MCL 750.82, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent prison terms of thirty to sixty years for the assault with intent to commit murder conviction and thirty-two to forty-eight months for the felonious assault conviction, to be served consecutive to a two-year term for the felony-firearm conviction, with credit for 250 days served. Defendant appeals as of right. We affirm.

I. Facts

This case arises from a shooting spree that took place in and near CJ's Lounge, on East Warren in Detroit, during the early morning hours of May 28, 2000.

Tony Carson testified that he was outside the bar in question when he noticed two men who were arguing come around a corner; the two men met briefly with a woman and another man near a car. Carson added that the back door of the car was open, "and then he opened the trunk." The man who had been with the woman at the car started walking in Carson's direction. According to Carson, when he turned and looked because he heard someone running, the person behind him said something about Carson being nosy and shot him in the face. Carson identified defendant as his assailant. Carson saw the shooter go into CJ's, then heard more gunshots. Asked what the man who shot him was wearing, Carson described a matching-red shirt and hat combination.

David Franklin testified that he was working security at CJ's on the night in question. Franklin recounted that he had frisked defendant three times that night, because the latter repeatedly left the club and returned, and added that "[w]hen he first came he had on . . . a Gucci or Coogi shirt, sweater with a hat that match." Franklin testified that, while stationed "back in

the corridor," outside the club, he heard gunshots, after which defendant came to him and pointed two guns at his head. Franklin dropped to his knees and prayed in response, after which he heard more gunshots. According to Franklin, on this occasion defendant was dressed in a cap, blue jeans, and a dark blue sweater, adding "he changed his clothes."

Toi Reid testified that her husband, Willie Reid, was killed in her presence that night. Reid recounted that she, her husband, and other relatives were having a "cabaret" party at CJ's with David Franklin providing security at the door. According to Reid, she was outside the club when she heard a gunshot, shortly after which defendant walked past her with a gun and ran into the club. Reid followed defendant into the club out of fear for her husband, but when she got to the door defendant "was blowing my husband[']s] brains out."

Defendant was charged with first-degree murder in connection with Willie Reid, assault with intent to commit murder in connection with Tony Carson, and felonious assault in connection with David Franklin, along with felony-firearm. The jury found defendant not guilty of murder, but guilty of the other charges.

II. Sufficiency of the Evidence

Defendant argues that his conviction of assault with intent to murder must be reversed on the ground that the prosecutor failed to present sufficient evidence of his guilt. We disagree.

A valid criminal conviction requires proof beyond a reasonable doubt of every element of the charged crime. *In re Winship*, 37 US 358, 364; 90 S Ct 1068, 1073; 25 L Ed 2d 368 (1970); *People v Jaffray*, 445 Mich 287, 296; 519 NW2d 108 (1994). When reviewing the sufficiency of evidence in a criminal case, a reviewing court must view the evidence of record in the light most favorable to the prosecution to determine whether a rational trier of fact could find that each element of the crime was proved beyond a reasonable doubt. *Id.*

Defendant recites the elements of assault with intent to commit murder, but challenges the sufficiency of the evidence only with respect to his identification as the assailant.[1]

Carson positively identified defendant in court as the person who shot him in the face. Defendant acknowledges this, but invites this Court to question whether the witness had a good look at his assailant at the time, points to other evidence that could be taken to cloud the issue, and complains generally about the potential hazards of relying on eyewitness identification. However, the veracity of the witness' identification of defendant as his assailant was for the jury to determine. See *People v Lemmon*, 456 Mich 625, 637; 576 NW2d 129 (1998) ("It is the province of the jury to determine questions of fact and assess the credibility of witnesses."); *People v Abernathy*, 39 Mich App 5, 7; 197 NW2d 106 (1972) (even where the witnesses'

[1] The defense never challenged the admissibility of Carson's in-court identification of defendant, and thus did not prompt the trial court to rule on whether the witness' initial identification of defendant at the preliminary examination was unduly suggestive, or whether the in-court identification was proper according to the applicable factors. See *People v Kachar*, 400 Mich 78, 95-96; 252 NW2d 807 (1977); *People v Colon*, 233 Mich App 295, 304; 591 NW2d 692 (1998).

identification of the defendant is less than positive, the question remains one for the jury). It is well established that a single complainant's eyewitness testimony, if believed by the trier of fact, is sufficient by itself to support a conviction. See *People v Newby*, 66 Mich App 400, 405; 239 NW2d 387 (1976). We decline defendant's invitation to announce a new rule in contravention of this principle. Because of our duty to view the evidence in the light most favorable to the prosecution, we hold that Carson's unequivocal identification of defendant as his assailant by itself is sufficient to prove that element.

III. Evidentiary Issue

Defendant argues that the trial court erred by allowing the prosecutor to use impeachment evidence as substantive evidence of guilt. This issue arises in connection with two witnesses, Sadiyyah Moore and Alisha Alexander, who testified at trial that the police had coerced them into making statements inculpatory of defendant.

The decision whether to admit evidence is within the trial court's discretion and is reviewed on appeal for an abuse of discretion. *People v Bahoda*, 448 Mich 261, 288; 531 NW2d 659 (1995). "Inconsistent out-of-court statements of a witness are admissible only for impeachment purposes and, since they would otherwise be hearsay, cannot be used as substantive evidence of the truth of the matter asserted." *People v Kohler*, 113 Mich App 594, 599; 318 NW2d 481 (1981), citing *People v White*, 401 Mich 482, 510; 257 NW2d 912 (1977). "The general rule is that evidence of a prior inconsistent statement of the witness may be admitted to impeach a witness even though the statement tends directly to inculpate the defendant." *People v Kilbourn*, 454 Mich 677, 682; 563 NW2d 669 (1997), citing MRE 607. See also MRE 613. However, at issue here is the narrow exception to this general rule: "impeachment should be disallowed when (1) the substance of the statement purportedly used to impeach the credibility of the witness is relevant to the central issue of the case, and (2) there is no other testimony from the witness for which his credibility was relevant to the case." *Kilbourn*, *supra* at 683, citing *People v Stanaway*, 446 Mich 643; 521 NW2d 557 (1994).

Sadiyyah Moore identified defendant as someone she used to talk to, and stated that she had gone to CJ's on the night in question with defendant, her sister, and Alisha Alexander. Moore estimated that they were at the club for an hour before the shooting started, but added that she was in the rest room at the time and did not know who shot Willie Reid. Moore additionally described defendant's clothing that night as "Coogi hat and shirt," agreeing that the outfit was multi-colored, with green, red, beige, and cream colors.

However, the prosecutor elicited from Moore that she had told the police that defendant was responsible for the murder, but Moore protested that she had lied to the police "to get out of jail." Moore conceded that she made all of the statements that the police attributed to her, but reiterated that she told the police what they wanted to hear in order to gain her freedom. The prosecutor read to Moore from one of her statements: "[Defendant] was drinking and he kept calling somebody on his cellphone. [Defendant] said he was going to get Willie. [Defendant] said that Willie had guys following him around the neighborhood trying to get him out of the neighborhood. Willie and [defendant] both . . . roll." Moore clarified that "to roll" meant to sell drugs. The prosecutor further read Moore's statements to the police indicating that defendant had asked for her assistance in getting a change of clothes out of the trunk of the car in which they had arrived. Moore reiterated that she had been lying, but agreed that she had further stated

that defendant changed into black pants and a black hat, that she saw defendant run up to the alley and shoot a man, and that she heard three or four more shots afterward.

Defense counsel objected on hearsay[2] grounds when the prosecutor reported that the police had asked Moore why her family said that she knew more about the shooting, which the trial court overruled on the ground that the question did not concern the truth of the matter asserted, but rather why the police asked the question, and why she answered as she did. Defense counsel reiterated the objection when the prosecutor read the witness' statement to the police concerning the death of Willie Reid, which the trial court overruled on the ground that the witness had admitted making the statements, but that counsel was free to cross-examine about who wrote them, or whether she really said them.

We agree with defendant that Moore's testimony was of no value to the prosecutor, except insofar as the prosecutor was able to impeach her with her statements to the police that were inculpatory of defendant. However, defense counsel never objected to this exchange between the prosecutor and Moore on the ground that the impeachment evidence went to a central question in the case and that the witness had offered no other testimony where credibility was at issue. To preserve an evidentiary issue for appellate review, a party opposing the admission of evidence must object at trial and specify the same ground for objection that it asserts on appeal. MRE 103(a)(1); *People v Welch*, 226 Mich App 461, 464; 574 NW2d 682 (1997). A defendant pressing an unpreserved claim of error must show a plain error that affected substantial rights. The reviewing court should reverse only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Moore's statements to the police of which the prosecutor made capital were cumulative to the testimony of other witnesses concerning defendant's identity as the shooter. In light of compelling testimony from Carson, Franklin, and Toi Reid, we cannot conclude that the improper impeachment evidence resulted in the conviction of an innocent man, or threw the proceedings into disrepute.

The same analysis and conclusion applies as concerns Alisha Alexander. The latter confirmed that she had been at CJ's with Moore and defendant at the time in question. She testified that she had been sitting next to the person who was shot inside the bar, but did not see the shooter. Alexander admitted telling the police that she had witnessed the shooting, and that defendant was the shooter, but testified that she lied to the police because they had threatened her with incarceration as an accessory. When the prosecutor elicited that Alexander had told the police, contrary to her trial testimony, that she had in fact discussed the shooting with Moore, defense counsel interposed a hearsay objection, and the trial court allowed the questioning for purposes of impeachment. Alexander agreed that she had told the police that Moore had said that defendant should not have shot the man outside while his family was present. Alexander also agreed that she had told the police that she saw defendant "run in and shoot Willie."

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[2] Hearsay, meaning testimony as to another person's unsworn, out-of-court assertions offered to prove the truth of the matters asserted, is presumptively inadmissible, subject to several exceptions provided by the rules of evidence. See MRE 801 - 805.

Alexander further conceded that she had told the police that, at the time of the shooting, defendant was wearing all black. The witness persisted in maintaining that her statements to the police implicating defendant in the matter were lies, in response to threats.

Because this witness also provided no testimony of use to the prosecutor, except insofar as the latter was able to impeach her with her earlier statements to the police inculpatory of defendant, a timely objection citing the principles articulated in *Kilbourn* and *Stanaway* should have kept the impeachment evidence out. Reversal for this unpreserved issue remains unwarranted, however, because the proper testimony of Carson, Franklin, and Toi Reid rendered the improper impeachment evidence cumulative. Defendant's substantial rights were thus not affected. *Carines, supra*.

Further militating against the conclusion that the jury reached the wrong verdict because of the presentation of the challenged impeachment evidence is that the trial court instructed the jury to consider any witnesses' prior statements inconsistent with their trial testimony for purposes of credibility assessment only, not for purposes of deciding whether the elements of the crimes were satisfied. "It is well established that jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 487; 581 NW2d 229 (1998).

IV. Prosecutorial Misconduct

Citing various comments from the prosecutor's opening statement, closing argument, and rebuttal argument, defendant alleges that the prosecutor engaged in misconduct denying him a fair trial. However, none of the remarks of which defendant here complains drew any objections at trial, leaving this issue unpreserved. Our review is thus limited to plain error affecting defendant's substantial rights. *Carines, supra*. Comporting with this standard is this Court's pronouncement in *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996), that "[a]bsent an objection or a request for a curative instruction, this Court will not review alleged prosecutorial misconduct unless the misconduct is sufficiently egregious that no curative instruction would counteract the prejudice to defendant or unless manifest injustice would result from failure to review the alleged misconduct." We will examine each of defendant's allegations of misconduct with these stringent standards in mind.

A. Facts Not in Evidence

"Prosecutors may not make a statement of fact to the jury that is unsupported by the evidence, but they are free to argue the evidence and all reasonable inferences arising from it as they relate to the theory of the case." *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000).

In arguing that the prosecutor in this case argued facts that never came into evidence, defendant points to the following passage from the prosecutor's opening statement: "Make no mistake about it, when these proofs are done you will conclude beyond a reasonable doubt that this was a first degree premeditated murder. This was a hit. The deceased in this case Willie Reid suffered seven gunshot wounds. That's the first degree premeditated murder."

In particular, defendant complains that "[n]o evidence of a hit surfaced in the trial." However, defendant does not define "hit" as used here, or otherwise suggest why we should

regard that expression as indicating anything other than that defendant entered the club intending to murder Willie Reid. There was evidence that the latter had been shot, at close range, seven times. This is sufficiently indicative of an intentional homicide that the prosecutor's choice of words does not clearly suggest that he was announcing an intention to prove something for which he had no evidence.

In any event, the jury found defendant not guilty in the murder of Willie Reid. Defendant does not explain how, in light of that development, he was prejudiced by the prosecutor's unsuccessful attempt to persuade the jury that defendant came to the bar and performed a "hit." Defendant fails to expose any prosecutorial misconduct in this instance.

B. Vouching for Witnesses

"Included in the list of improper prosecutorial commentary or questioning is the maxim that the prosecutor cannot vouch for the credibility of his witnesses to the effect that he has some special knowledge concerning a witness' truthfulness." *Bahoda, supra* at 276. However, where the jury is faced with a credibility question, the prosecutor is free to argue credibility from the evidence. *People v Smith*, 158 Mich App 220, 231; 405 NW2d 156 (1987). The critical inquiry is whether the prosecutor urged the jury to suspend its own judgment powers out of deference to the prosecutor or police. *People v Whitfield*, 214 Mich App 348, 352; 543 NW2d 347 (1995).

Defendant observes that, in closing, the prosecutor stated that each of his witnesses presented sufficient evidence to support a conviction. However, review of the transcript reveals only argument from the evidence, no suggestion that the prosecutor had personal insights into the witnesses' credibility.

Defendant complains that it was improper for the prosecutor to point out that the witnesses who had identified him were interested in identifying the right person, and had no other motive for implicating him in the matter. Again, this was reasonable argument from the evidence, with no implication that the prosecutor was sharing superior personal knowledge. Nor do we agree that it was objectionable for the prosecutor to offer the opinion that David Franklin was the best witness on the subject of defendant's identification. The prosecutor was merely suggesting that assessment to the jury, not implying that he had personal knowledge.

C. Use of Impeachment as Substantive Evidence

Defendant incorporates his argument, discussed above, that the prosecutor in effect used impeachment evidence as substantive evidence. This argument better fits the rubric of evidentiary error and that of prosecutorial misconduct. For that reason, and because we have addressed the issue fully above, we decline to revisit it here.

D. Denigration of Defense Counsel

A prosecuting attorney may not personally attack defense counsel. See *People v Phillips*, 217 Mich App 489, 498; 552 NW2d 487 (1996). Defendant asserts that he was prejudiced in this case by such misconduct. Defendant cites pages in the record in support of these arguments, but does not present the precise words asserted as misconduct. Examination of the pages cited brings to light no misconduct, but only reasonable argument:

> [I]f the facts are with you argue the facts. If the law is with you you argue the law. If you've got neither you attack the opponent. I think there's been a little of all of that going on during the course of [defense counsel's] closing argument. I don't mean to cast aspersions on him. [Defense counsel] is a very aggressive competent lawyer, well prepared. But, I suggest to you you have to see things as they are. . . .
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> When you get to the legal representations that were made, that I think are somewhat misleading that were presented to you, counsel indicates that I have to prove to you my theory of the case, whatever he thinks my theory of the case is. That suggest[s] to you that I have to prove each and every fact that happened. The judge is going to tell you different. . . . My theory of the case, or [defense counsel's] theory of the case is not relevant to the decision that you're going to have to make. So, I think that's sort of a way to argue that I have to prove more than the court is going to tell you I have to.
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> Then you get to the third point that when things don't work you attack your opponent. . . . He . . . said that I don't care about the rights that were passed by the [s]tatute and the constitution that . . . defendant has. That essentially all I care about is a conviction. That I stood by and watched Mr. Franklin commit perjury . . . .

Arguing in these benign terms that the opposition's case is weak, or that some of opposing counsel's legal implications are not quite right, does not constitute misconduct. Nor, obviously, does defending oneself against an opponent's accusation of misconduct. Defendant has failed to show any improper argument.

V. Instructional Issue

A criminal defendant has a right to have a properly instructed jury. MCL 768.29; *People v Vaughn*, 447 Mich 217, 226; 524 NW2d 217 (1994) (Brickley, J., joined by Mallet, J.), citing *People v Liggett*, 378 Mich 706, 714; 148 NW2d 784 (1967). It is essential that juries deliberate with the understanding that conviction is proper only upon proof beyond a reasonable doubt of every element of the charged offense. See *United States v Gaudin*, 515 US 506, 522-523; 115 S Ct 2310; 132 L Ed 2d 444 (1995); *Jaffray*, *supra*.

The trial court instructed the jury as follows:

> A reasonable doubt is a fair, honest doubt growing out of the evidence or lack of evidence. It is not merely an imaginary or possible doubt, but a doubt based on reason and common sense. A reasonable doubt is just that, a doubt that is reasonable after a careful and considered examination of the facts and circumstances of this case.

This is consistent with CJI2d 3.2(3). Defendant cites earlier standard instructions, and other authorities, for the proposition that the instruction that was given is inadequate for want of

admonishments equating a "reasonable doubt" to a "hesitancy to act" when making an important decision, and equating "beyond a reasonable doubt" to "moral certainty."

As an initial matter, we note that defense counsel expressly declined to object to the instructions as given. Failure to object to jury instructions waives error unless relief is necessary to avoid manifest injustice. MCL 769.26; *People v Torres (On Remand)*, 222 Mich App 411, 423; 564 NW2d 149 (1997). Reversal over an unpreserved issue is appropriate only where the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Carines, supra*.

In any event, this Court has squarely addressed the question whether CJI2d 3.2(3) adequately instructs a jury on reasonable doubt, and has ruled in favor of the standard instruction. *People v Sammons*, 191 Mich App 351, 372; 478 NW2d 901 (1991). We see no reason to express disagreement with the reasoning or result in that case, or otherwise to revisit the issue here.

VI. Cumulative Error

Defendant argues that even if any single assertion of error does not itself warrant reversal, that result is nonetheless required because the cumulative effect of all errors was to deny him a fair trial. Because we have rejected all of defendant's claims of error, but for the unpreserved one, deemed harmless above, concerning improper impeachment evidence, there was no accumulation of error to support this argument.

VII. Ineffective Assistance of Counsel

Defendant asks that we remand this case for a *Ginther*[3] hearing in order that he might prove that defense counsel at trial was constitutionally ineffective. We conclude that no further development of this assertion is required.[4]

The federal and state constitutions guarantee a criminal defendant the right to the assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20. The constitutional right to counsel is a right to *effective* assistance of counsel. *United States v Cronic*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984); *People v Pubrat*, 451 Mich 589, 594; 548 NW2d 595 (1996). To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). Defendant must further show that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and that the attendant proceedings were fundamentally unfair or unreliable. *People v Poole*, 218 Mich App 702, 718; 555 NW2d 485 (1996).

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

[4] Defendant asserts in passing that defense counsel failed to visit him in the county jail during "the critical pretrial period." However, defendant identifies no specific such period, and nowhere suggests how his posture at trial could have been improved had there been greater attorney-client contact. For these reasons, we will not concern ourselves with the allegation that defense counsel failed to visit defendant in jail.

"[W]here . . . a cognizable claim is raised that counsel did not investigate potentially meritorious defenses to the charges, and . . . a substantial possibility appears on the record that potential defenses suggested by defendant were not considered, . . . a full evidentiary hearing on the ineffective assistance of counsel allegation must be conducted." *People v Kimble*, 109 Mich App 659, 663; 311 NW2d 446 (1981).

A. Misidentification Defense

Defendant argues that because the defense was premised on the assertion that he had been misidentified as the shooter, defense counsel was ineffective for failing to present an expert to discourse on the problems with eyewitness identification. We disagree.

As an initial matter, we decline to hold as a matter of law that in every instance where the defense is mistaken identity, defense counsel must present an identification expert in order to represent the accused effectively. Further, the decision not to call an expert could have been sound trial strategy. *People v Henry*, 239 Mich App 140, 146; 607 NW2d 767 (1999) (a defendant pressing a claim of ineffective assistance of counsel must overcome a strong presumption that counsel's tactics were matters of sound trial strategy). Because three eyewitnesses unhesitatingly identified defendant as the shooter, to call a defense expert on eyewitness identification would have likely been to hand the prosecutor an evidentiary opportunity. In other words, the possibility exists that the prosecutor would have made some capital out of that expert's presence as well, potentially strengthening the case against defendant. Because we can discern a possible strategic reason for the lack of an identification expert, this argument cannot support a claim of ineffective assistance of counsel. See *People v Toma*, 462 Mich 281, 308; 613 NW2d 694 (2000).

Defendant additionally argues that defense counsel was ineffective for failure to develop the issue of tainted pretrial identifications. Again, we disagree.

The major limitation on in-court identification is that such testimony is generally barred where the witness was exposed to an impermissibly suggestive pretrial identification procedure. *People v Colon*, 233 Mich App 295, 304; 591 NW2d 692 (1998), citing *People v Kurylczyk*, 443 Mich 289, 303 (Griffin, J.), 318 (Boyle, J.); 505 NW2d 528 (1993). For example, where a witness has identified an incarcerated defendant in a photographic lineup conducted without allowing the latter to have counsel present, a trial court should not admit subsequent in-court identification of the defendant absent a showing, on clear and convincing evidence, of an independent basis for the identification. *People v Gray*, 457 Mich 107, 115; 577 NW2d 92 (1998), citing *People v Anderson*, 389 Mich 155, 169; 205 NW2d 461 (1973).

In the instant case, defendant points to no pretrial identification procedure that could reasonably be considered tainted. Defendant complains that certain witnesses had not participated in any lineup, but cites no authority for the proposition that this renders an in-court identification suspect. Defendant implies that initial identifications at the preliminary examination were suspect, but neither cites authority for the proposition that this is necessarily error, nor offers reasons why the identification at the examination in this instance was unduly suggestive.

In short, defendant leaves this Court to speculate concerning how any pretrial identification procedure may have been tainted. We decline to do so. An evidentiary hearing on this issue would be nothing more than a fishing expedition.

B. Failure to Challenge the Voluntariness of Prosecution Witnesses

Defendant argues that defense counsel was ineffective for failing to request an evidentiary hearing in which to challenge the voluntariness of the statements that Sadiyyah Moore and Alisha Alexander gave to the police. However, defendant cites no authority for the proposition that a criminal defendant has a right to a special hearing to determine the voluntariness of statements made by prosecution witnesses. The admissibility of defendants' own confessions are often tested through separate *Walker*[5] hearings, but not so damaging assertions by other witnesses. "The rule of . . . *Walker* . . . applies to criminal defendants whose confessions may have been illegally or involuntarily obtained. Statements of witnesses are not included under the rule." *People v Arthur Jones*, 115 Mich App 543, 548; 321 NW2d 723 (1982), aff'd 419 Mich 577 (1984). Instead, challenges to the voluntariness of statements from such witnesses may be challenged only through the conventional credibility-testing devices of cross-examination and conflicting evidence.

Defense counsel in the instant case thus had nothing to gain from requesting any such special hearing. "Counsel is not obligated to make futile objections." *People v Meadows*, 175 Mich App 355, 362; 437 NW2d 405 (1989). For these reasons, this argument does not support a claim of ineffective assistance of counsel.

VIII. Sentencing Issues

Defendant challenges the trial court's decision to exceed the range recommended by the sentencing guidelines[6] in imposing minimum sentences for the two assault convictions, arguing that the court did so because it independently concluded that defendant was really guilty of murder despite defendant's acquittal on that charge, and otherwise that the court failed to provide substantial and compelling reasons for the departure. We review a trial court's sentencing decisions for an abuse of discretion. *People v Cain*, 238 Mich App 95, 130; 605 NW2d 28 (1999).

Not in dispute is that the high end of the recommended minimum sentence range in this case was 280 months (twenty-three years and four months) for assault with intent to murder, and twenty-four months (two years) for felonious assault. The trial court exceeded both, imposing minimum sentences, respectively, of thirty years and thirty-two months (two years and eight months).

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[5] *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

[6] Because the conduct for which defendant was convicted occurred after January 1, 1999, the legislative sentencing guidelines, enacted pursuant to MCL 769.34, were used to determine the recommended range of defendant's minimum sentence.

A sentencing court may take into account facts underlying uncharged offenses, pending charges, and acquittals. *People v Newcomb*, 190 Mich App 424, 427; 476 NW2d 749 (1991), citing *People v Ewing (After Remand)*, 435 Mich 443, 446 (Brickley, J.), 473 (Boyle, J.); 458 NW2d 880 (1990). "However, the court may not make an independent finding of guilt of a crime other than that for which the defendant is being sentenced." *Newcomb*, *supra* at 427-428.

The trial court did express some puzzlement at how the jury in this case could have found defendant guilty of the two assaults outside the bar yet not of the murder inside. However, the court took pains to acknowledge that it was constrained to respect the jury's verdict, stating that the court "cannot . . . draw a different conclusion from facts . . . drawn by a jury" and reminding the murder victim's wife that it was "not . . . putting a lot of emphasis" on that murder, because the court was obliged to remain mindful of "the jury verdict here and what higher courts may do in terms of anyone concluding that my sentence is based on that rather than the real facts here of what happened to the persons who were shot." To credit defendant's argument that the court really sentenced defendant for the conduct for which he was acquitted would be to conclude that the court was simply lying when it acknowledged that it was bound to refrain from any such course of action. We instead take the court at its word, and reject defendant's argument.

This leaves the question whether the trial court abused its discretion by departing from the guidelines range. A review of the sentencing transcript reveals that the trial court identified objective and verifiable factors to support its conclusion that there were substantial and compelling reasons to justify a departure from the guidelines. MCL 769.34(3); *People v Babcock*, 244 Mich App 64, 74-782; 624 NW2d 479 (2000). Accordingly, we find no abuse of discretion in the sentence imposed.

Affirmed.

/s/ Michael J. Talbot
/s/ Janet T. Neff
/s/ E. Thomas Fitzgerald