

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BOBBY SIMPSON, JR., a/k/a BOBBY SIMPSON  
JUNIOR,

Defendant-Appellant.

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UNPUBLISHED

December 27, 2002

No. 229135

Jackson Circuit Court

LC No. 00-000988-FC

Before: Whitbeck, C.J., and Hood and Kelly, JJ.

PER CURIAM.

The jury convicted defendant Bobby Simpson of armed robbery,<sup>1</sup> first-degree home invasion,<sup>2</sup> felonious assault,<sup>3</sup> and possession of a firearm during the commission of a felony.<sup>4</sup> The trial court sentenced Simpson to concurrent prison terms of 240 to 480 months for the armed robbery conviction, 180 to 480 months for the home invasion conviction, forty-eight to ninety-six months for the felonious assault conviction, and a consecutive two-year prison term for the felony-firearm conviction. Simpson appeals as of right. We remand for resentencing on the felonious assault conviction, but affirm in all other respects.

I. Basic Facts

At trial, the victim testified that she was awakened at about 2:15 a.m. when she heard knocking on her apartment door. When she answered the door, Simpson was standing outside and asked for “Tanisha.” The victim told Simpson that there was no person by that name in her apartment. When the victim noticed that Simpson had a gun in his hand, she attempted to close the door. Suddenly, another man, who was masked and dressed in black, jumped forward and put his foot in the door, and the two men forced their way into the victim’s apartment at gunpoint. Simpson pushed the victim to the floor and stood over her while the man in black

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<sup>1</sup> MCL 750.529.

<sup>2</sup> MCL 750.110a(2).

<sup>3</sup> MCL 750.82

<sup>4</sup> MCL 750.227b.

searched the apartment. Apparently convinced that no one else was in the apartment, the man in black left. Simpson then hit the victim on the back of her head with his handgun, took money that the victim had placed on a table earlier, and left the apartment.

The victim did not immediately report the crime because she was on probation, but reported it about two weeks later. The uncle of the victim's boyfriend, who lived in the same building as the victim, knew Simpson well. Several weeks after the incident, he saw Simpson and confronted him about it. Simpson apologized and said that he did not know the victim was part of the uncle's family.

## II. Sufficiency Of The Evidence

### A. Standard Of Review

Simpson argues that the evidence was insufficient to support his convictions. We apply review de novo to this issue.<sup>5</sup>

### B. Credibility

"The test for determining the sufficiency of evidence in a criminal case is whether the evidence, viewed in a light most favorable to the people, would warrant a reasonable juror in finding guilt beyond a reasonable doubt."<sup>6</sup> We must "'draw all reasonable inferences and make credibility choices in support of the jury verdict.'"<sup>7</sup>

Simpson does not dispute that there was evidence of each of the elements of the charged crimes, but claims that the testimony supporting those elements, principally testimony from the victim and her boyfriend's uncle, was fraught with so many inconsistencies that it was not credible. As Simpson acknowledges, issues of witness credibility are generally left to the jury to resolve.<sup>8</sup>

While the evidence revealed some inconsistencies between the testimony at trial and statements in the police reports, the disputed testimony does not fit into any of the limited exceptions that permit would permit us to grant relief to Simpson. The testimony was not contradicted by indisputable facts, it was not so inherently implausible that a reasonable juror would find it impossible to believe, nor was it seriously impeached and marked by uncertainties and discrepancies.<sup>9</sup> Thus, we are not free to disregard the jury's proper role in determining that the prosecutor's evidence was sufficiently credible to convict Simpson.

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<sup>5</sup> See *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001).

<sup>6</sup> *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000).

<sup>7</sup> *People v Randolph*, 466 Mich 532, 572; 648 NW2d 164 (2002), quoting *Nowack*, *supra* at 400.

<sup>8</sup> See *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992); *People v Daoust*, 228 Mich App 1, 17; 577 NW2d 179 (1998).

<sup>9</sup> See *People v Lemmon*, 456 Mich 625, 643-644; 576 NW2d 129 (1998).

### III. Double Jeopardy

#### A. Standard Of Review

Simpson argues that his double jeopardy rights<sup>10</sup> were violated because he was convicted of both armed robbery and felonious assault. Simpson asserts that the robbery and assault occurred simultaneously and, therefore, were not two separate offenses. Because Simpson failed to preserve this issue for appeal by raising it in the trial court, he must demonstrate that his dual convictions constitute a plain error affecting his substantial rights.<sup>11</sup>

#### B. Separate Offenses

Simpson argues that his dual convictions of felonious assault and armed robbery violate this Court's holding in *People v Yarbrough*<sup>12</sup> that "an assault should be punished as an offense separate from armed robbery only where it can clearly be established that the offenses occurred at separate times." In *Yarbrough*, the defendant committed "a continuing assault" against the victim in an effort to rob her of her purse.<sup>13</sup> The prosecutor, however, contends that *People v Leach*<sup>14</sup> controls this case. In *Leach*, this Court explained that when a robbery includes an assault, dual convictions are constitutionally permissible if separate intents form the basis for the robbery and assault.<sup>15</sup> In this case, we agree with the prosecutor that Simpson acted with two intents: the intent to rob the victim and the distinct intent to assault her. In particular, we note that, unlike the situation in *Yarbrough*,<sup>16</sup> Simpson and his companion did not have to assault the victim to steal her money. They had effectively immobilized the victim, Simpson saw the money, and chose to hit the victim before taking the money. Accordingly, Simpson has not demonstrated a plain error.

### IV. Ineffective Assistance Of Counsel

#### A. Standard of Review

Simpson argues that trial counsel was ineffective because (1) he failed to subpoena one of the police officers for trial, and (2) he failed to object when the prosecutor elicited testimony from the investigating officer that, at the time of the incident, there was an outstanding felony murder warrant against "Tanisha." Because Simpson did not raise this issue in the trial court, not

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<sup>10</sup> See US Const Am V; Const 1963, art 1, § 15.

<sup>11</sup> See *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

<sup>12</sup> *People v Yarbrough*, 107 Mich App 332, 336; 309 NW2d 602 (1981).

<sup>13</sup> *Id.* at 335.

<sup>14</sup> *People v Leach*, 114 Mich App 732, 735; 319 NW2d 652 (1982).

<sup>15</sup> *Id.* at 735.

<sup>16</sup> See *Yarbrough*, *supra* at 335.

only is our review limited to the existing record,<sup>17</sup> he must demonstrate plain error affecting his substantial rights.<sup>18</sup>

## B. Prejudice

As this Court explained in *People v Knapp*,<sup>19</sup>

To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that, but for defense counsel's errors, there was a reasonable probability that the result of the proceeding would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). A defendant must affirmatively demonstrate that counsel's performance was objectively unreasonable and so prejudicial as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). The defendant must also overcome the presumption that the challenged action might be considered sound trial strategy. *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991), citing *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

We can assume for the sake of analysis that defense counsel was deficient in failing to subpoena Officer Tijerina. Nevertheless, the parties stipulated to admit in evidence Officer Tijerina's police report, which largely favored Simpson because it contained several statements inconsistent with the victim's trial testimony. The prosecutor attributed the inconsistencies to inattentiveness by Officer Tijerina. Had Officer Tijerina testified at trial, the prosecutor would have been free to explore the discrepancies in his report. We have no basis on which to conclude that Officer Tijerina would have provided testimony favorable to Simpson beyond what was in his report. Thus, we conclude that Simpson has not demonstrated a reasonable probability that the result would have been different had Officer Tijerina been subpoenaed for trial.<sup>20</sup>

Simpson also argues that counsel was deficient for failing to object to testimony that "Tanisha" was wanted under a felony-murder warrant. Because the testimony did not involve evidence of a "crime, wrong or act" Simpson allegedly committed, and therefore had no bearing on his character and propensity to commit the charged crime, it was not subject to exclusion under MRE 404(b). The evidence was also relevant and admissible to demonstrate Simpson's motive for committing the charged offense.<sup>21</sup> Attorneys need not advocate meritless positions, such as objecting to admissible evidence.<sup>22</sup> Thus, we conclude that Simpson has failed to show

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<sup>17</sup> See *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

<sup>18</sup> See *Carines*, *supra*.

<sup>19</sup> *People v Knapp*, 244 Mich App 361, 385-386; 624 NW2d 227 (2001).

<sup>20</sup> See *Knapp*, *supra*.

<sup>21</sup> See *People v Taylor*, 252 Mich App 519, 521-522; 652 NW2d 526 (2002).

<sup>22</sup> See *People v Hawkins*, 245 Mich App 439, 456-457; 628 NW2d 105 (2001).

that counsel was deficient for failing to object. Overall, Simpson has failed to demonstrate that he is entitled to relief on the basis of ineffective assistance of counsel.

## V. Prosecutorial Misconduct

### A. Standard Of Review

Simpson argues that several times at trial the prosecutor committed misconduct requiring reversal. Simpson again failed to object to the challenged remarks at trial, which now requires us to review this unpreserved issue for plain error affecting his substantial rights.<sup>23</sup>

### B. Felony Warrant

“The test for prosecutorial misconduct is whether a defendant was denied his right to a fair and impartial trial.”<sup>24</sup> Simpson, however, has not demonstrated that either aspect of the prosecutor’s conduct he now challenges denied him a fair trial. With respect to Simpson’s claim that the prosecutor committed misconduct by eliciting the testimony that “Tanisha” was wanted under a felony-murder warrant, MRE 404(b) did not preclude this testimony. Further, Simpson’s reliance on *People v Jones (On Rehearing After Remand)*<sup>25</sup> is misplaced because that case is factually distinguishable. Unlike the situation in *Jones*,<sup>26</sup> the prosecutor in this case did not improperly argue that the evidence of the warrant against “Tanisha” showed that Simpson was a bad person.

Simpson claims that the prosecutor improperly vouched for the victim’s credibility when she asked the jury to consider whether the victim had any motive to accuse Simpson falsely. “[T]he prosecutor cannot vouch for the credibility of his witnesses to the effect that he has some special knowledge concerning a witness’ truthfulness.”<sup>27</sup> The prosecutor in this case, however, did not imply to the jury that she had special knowledge that the victim was testifying truthfully.

We also conclude that the prosecutor’s remarks about Officer Tijerina’s police report were proper arguments concerning the evidence and the reasonable inferences that could be drawn from the evidence.<sup>28</sup>

## VI. Instructional Error

Simpson challenges a number of aspects of the trial court’s instructions to the jury. However, his attorney waived these instructional issues by stating that he was satisfied that the

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<sup>23</sup> See *Carines, supra*.

<sup>24</sup> *People v Rodriguez*, 251 Mich App 10, 32; 650 NW2d 96 (2002).

<sup>25</sup> *People v Jones (On Rehearing After Remand)*, 228 Mich App 191; 579 NW2d 82 (1998), modified 458 Mich 862 (1998).

<sup>26</sup> *Id.* at 202-203.

<sup>27</sup> *People v Bahoda*, 448 Mich 261, 276; 531 Mich 659 (1995).

<sup>28</sup> *Id.* at 282.

court's instructions were proper.<sup>29</sup> Further, even if we treated these claims as unpreserved issues subject to forfeiture rather than waiver,<sup>30</sup> we would conclude that appellate relief is not warranted. Assuming that CJI2d 4.5 was applicable in this case as Simpson claims, he has not demonstrated a likelihood of prejudice from the absence of the instruction.<sup>31</sup> Also, because there was no evidence that Simpson committed a prior crime, CJI2d 4.11 was not applicable and the trial court did not err when it failed to give this instruction.<sup>32</sup> Lastly, defense counsel did not deprive Simpson of his right to effective assistance of counsel in failing to request these instructions because the trial court either was not required to issue the instruction or the absence of the instruction was not prejudicial.<sup>33</sup>

## VII. Sentencing

Simpson argues that he is entitled to resentencing because the trial court improperly considered the prosecutor's suggestion that he intended to commit a murder when he was searching for "Tanisha." We disagree. Nothing in the record supports the idea that the trial court took any notice of the prosecutor's comment, much less used that information when sentencing him. Indeed, in presenting her argument, the prosecutor asked the trial court to sentence Simpson at the high end of the guidelines for the assault and home invasion convictions, and to make those sentences consecutive. The trial court declined to do so in both instances.

We agree, however, with Simpson's other argument that the trial court improperly departed from the sentencing guidelines' recommended range of one to three years in prison for the felonious assault conviction without stating substantial and compelling reasons for a departure. MCL 769.34(3) states:

A court may depart from the appropriate sentence range established under the sentencing guidelines set forth in chapter XVII if the court has a *substantial and compelling reason for that departure and states on the record the reasons for departure*.<sup>34</sup>

The sentencing guidelines for felonious assault recommend a minimum sentence range of twelve to thirty-six months. The trial court actually sentenced Simpson to forty-eight to ninety-six months for felonious assault. The trial court, however, did not state that it was departing from the guidelines recommendation and did not provide any reasons for a departure from the recommended range. Nor did the trial court advise Simpson that he had the right to appeal the

<sup>29</sup> See *People v Ortiz*, 249 Mich App 297, 311; 642 NW2d 417 (2001), citing *People v Carter*, 462 Mich 206, 214-219; 612 NW2d 144 (2000).

<sup>30</sup> See *Carter*, *supra* at 215.

<sup>31</sup> See *People v Bonner*, 116 Mich App 41, 47; 321 NW2d 835 (1982).

<sup>32</sup> See *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000) (trial court may not omit an instruction if the evidence supports it).

<sup>33</sup> See *Ortiz*, *supra* at 311-312.

<sup>34</sup> Emphasis added.

sentence on the basis that it was longer or more severe than the appropriate sentence range, as MCL 769.34(7) required it to do if it sentenced Simpson outside the guidelines. Accordingly, we vacate Simpson's sentence for felonious assault and remand for resentencing on that conviction.<sup>35</sup> If, on remand, the trial court determines that a departure from the recommended guidelines range is warranted for substantial and compelling reasons, it shall state those reasons on the record<sup>36</sup> and provide the advice required by MCL 769.34(7).

Affirmed in part, vacated in part, and remanded for resentencing in accordance with this opinion. We do not retain jurisdiction.

/s/ William C. Whitbeck

/s/ Harold Hood

/s/ Kirsten Frank Kelly

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<sup>35</sup> See MCL 769.34(11); *People v Hegwood*, 465 Mich 432, 438-440; 636 NW2d 127 (2001).

<sup>36</sup> MCL 769.34(3).