

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEVEN MARTIN ADAMS,

Defendant-Appellant.

UNPUBLISHED

January 10, 2008

No. 274028

Calhoun Circuit Court

LC No. 2006-001411-FH

Before: Fitzgerald, P.J., and Markey and Smolenski, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of felonious assault, MCL 750.82, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to a two-year prison term for the felony firearm conviction, and to a consecutive 12 to 48 month term for the assault conviction. Defendant appeals as of right. We affirm defendant's conviction, but remand for resentencing and a determination of defendant's ability to pay attorney fees. This appeal is being decided without oral argument pursuant to MCT 7.214(E).

Defendant argues he was denied a fair trial due to prosecutorial misconduct. Noting that defendant's testimony conflicted with that of complainant witness and complainant's mother and sister regarding whether an argument with complainant's mother had gotten loud, the prosecutor inquired whether defendant disputed their testimony. Further, the prosecutor recapped defendant's position that an argument did not continue in the backyard of the subject residence and these witnesses' testimony to the contrary, inquiring whether the synopsis was correct. Finally, the prosecutor asked about an apparent discrepancy between testimony that complainant had knocked a telephone out of his mother's hand and other testimony that complainant's sister had subsequently come out of the house with a telephone. Defendant clarified that the second telephone was a different telephone. There were no objections to these questions. However, defendant now claims that the prosecutor badgered him "by continually questioning him regarding his opinion of the accuracy of the prosecution witnesses' testimony." A prosecutor may not ask a defendant to comment on the credibility of prosecution witnesses, because a defendant's opinion of their credibility is not probative. *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985). The prosecutor may attempt to ascertain which facts are in dispute. *People v Ackerman*, 257 Mich App 434, 449; 669 NW2d 818 (2003). Here, the prosecutor's questions are more in the nature of clarifying what was in dispute. Accordingly, there is no error requiring reversal.

Defendant also challenges his sentence for felonious assault. Although the trial court stated that a good argument existed for an upward departure at the sentencing hearing, it further stated that its intent was to stay within the guidelines range of zero to six months, and that it was therefore imposing a sentence of six to 48 months. The court further stated that it was sentencing defendant “to a prison term on both,” presumably meaning both the felonious assault and the felony-firearm convictions, and reiterated that it would stay within the guidelines on the felonious assault conviction. However, the judgment of sentence remands defendant to the Department of Corrections to first serve his sentence for felony-firearm, and then to serve a 12 to 48 month sentence for felonious assault. Notably, MCL 769.34(4) requires an intermediate sanction, in lieu of prison, when the upper limit of the recommended minimum sentence range is less than 18 months, “unless the court states on the record a substantial and compelling reason to sentence the individual to the jurisdiction of the department of corrections.” There is no case law addressing the effect of this provision when a defendant receives a prison sentence on a conviction stemming from the same crime. In this case, there was either an error in recording the sentence on the judgment of sentence or, desiring that defendant get a term in prison on the felonious assault charge, an error in failing to articulate substantial and compelling reasons for a departure. Moreover, the court did not directly address and failed to take into account the effect of MCL 769.34(4). Since there is ambiguity in the record on these points, we remand for resentencing.

Lastly, defendant claims error in the assessment of \$400 for attorney fees without ascertaining whether he had the ability to pay. In *People v Dunbar*, 264 Mich App 240, 254-255; 690 NW2d 476 (2004), this Court held that ability to pay must be considered. Although the Legislature enacted MCL 769.1k after *Dunbar*, *supra*, and expressly provided for an assessment for “[t]he expenses of providing legal assistance to the defendant,” our Supreme Court’s orders in *People v Arnone*, 478 Mich 908; 732 NW2d 537 (2007), and *People v DeJesus*, 477 Mich 996; 725 NW2d 669 (2007), indicate that consideration of ability to pay is still necessary.

Defendant’s convictions are affirmed, but this case is remanded for resentencing and a determination of whether attorney fees should be assessed against defendant. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald

/s/ Jane E. Markey

/s/ Michael R. Smolenski