

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GEORGE PHILLIP HUDSON,

Defendant-Appellant.

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UNPUBLISHED

November 26, 1996

No. 183487

LC No. 93-007811-FH

Before: Saad, P.J., and Griffin and M. H. Cherry,\* JJ.

PER CURIAM.

Defendant was convicted by a jury of assault with intent to commit great bodily harm less than murder, MCL 750.84; MSA 28.279, and thereafter pleaded guilty to habitual offender, second offense, MCL 769.10; MSA 28.1082. He was sentenced to 3-1/2 to 15 years' imprisonment, and now appeals as of right. We affirm.

On appeal, defendant first claims that a mistrial was warranted by admission of evidence that the victim was bruised before defendant's assault. Defendant argues that the evidence prejudiced him by allowing the jury to infer that he was a violent, abusive person. We disagree. The comments by the victim were not elicited by the prosecutor, but were volunteered. Therefore, such comments are not grounds for a mistrial unless so egregious as to deny defendant a fair trial. *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995). After a thorough review, we conclude that defendant was not prejudiced by testimony that the victim had some bruises before defendant's assault. Neither the victim nor the examining physician implied that defendant caused the preexisting bruises or previously assaulted the victim. See *Id.*; *People v Yarger*, 193 Mich App 532, 539; 485 NW2d 119 (1992). Moreover, the charged offense was confined to the assault that occurred and the injuries that were received *solely* on August 8, 1993. A photograph of the victim taken on the day following the assault that was admitted into evidence depicted the victim's preexisting bruises. Had the doctor not testified that some of the bruises were old bruises, the jury could have thought that *all* the bruises were inflicted on August 8. Accordingly, defendant was not denied a fair trial and the trial court did not abuse

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\* Circuit judge, sitting on the Court of Appeals by assignment.

its discretion in admitting the limited evidence or denying defendant's motion for mistrial. *People v Ullah*, 216 Mich App 669, 673, 676; 550 NW2d 568 (1996); *Haywood*, *supra*.

Second, defendant makes numerous assertions in support of his claim that he was deprived of the effective assistance of counsel. However, there was no evidentiary hearing on this issue below. Therefore, appellate review is limited to the record. *People v Barclay*, 208 Mich App 670, 671; 528 NW2d 842 (1995). We conclude that defendant has neither sustained his burden of proving that counsel made a serious error that affected the result of trial nor overcome the presumption that counsel's actions were strategic. *People v Johnson*, 451 Mich 115, 121-122, 124; 545 NW2d 637 (1996); *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994); *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). Defendant's many assertions on appeal either lack substantiation or are patently false. Our review of the record reveals that defense counsel competently, conscientiously, and zealously protected defendant's rights by bringing numerous motions on defendant's behalf and limiting the evidence against defendant by raising and vigorously arguing several objections during trial.

Defendant next claims that his constitutional right to remain silent was violated at trial by the police officer's remark, "I don't believe he said a word." We disagree. The record reflects that defendant was not under arrest when the police officer contacted defendant on August 9, 1993. Although defendant was the focus of the police investigation at that point and although the officer's presence in defendant's home arguably deprived him of his freedom of action, the record does not indicate that defendant was interrogated, questioned, or read *Miranda*<sup>1</sup> warnings. Therefore, any purported "silence" was not a constitutionally protected silence, and defendant's right to remain silent was not implicated in this instance. *People v Cetlinski (After Remand)*, 435 Mich 742, 746-747, 760; 460 NW2d 534 (1990); *People v Schollaert*, 194 Mich App 158, 165-166; 486 NW2d 312 (1992). Therefore, the admissibility of the remark in question is analyzed under the rules of evidence. *Cetlinski*, *supra* at 759; *Schollaert*, *supra* at 167. The questioning by the prosecutor constituted properly responsive rebuttal to inferences raised by defense counsel that the parties had engaged in a mutual fight. *People v Figures*, 451 Mich 390, 399; 547 NW2d 673 (1996). The court did not abuse its discretion in admitting the evidence in question and in denying defendant's motion for mistrial on this basis.

Finally, we find no merit to defendant's various claims of sentencing error. The trial court did not err in considering defendant's twenty-four-year-old conviction for malicious destruction of property. See *People v Zinn*, 217 Mich App 340, 349; 551 NW2d 704; *People v Line*, 145 Mich App 567, 571; 378 NW2d 781 (1985). Contrary to defendant's claim, the court clearly recognized that it had discretion to consider the prior conviction. *People v Bewersdorf*, 438 Mich 55, 66; 475 NW2d 231 (1991). Offense Variable 1 was properly scored as fifteen points because defendant's use of either the chair or the television remote control device could be construed as use of a "weapon" during his assault of the victim. *People v Goolsby*, 284 Mich 375, 378; 279 NW 867 (1938); *People v Sanders*, 58 Mich App 512; 228 NW2d 439 (1975); *People v Ragland*, 14 Mich App 425, 426; 165 NW2d 639 (1968). Additionally, because defendant pleaded guilty to being an habitual offender, the sentencing guidelines are inapplicable. *People v Gatewood*, 450 Mich 1025; 542 NW2d 252 (1996); *People v*

*Cervantes*, 448 Mich 620, 625 (Riley, J.), 630 (Cavanagh, J.); 532 NW2d 831 (1995). After a thorough review, we hold that defendant's sentence is proportionate to the seriousness of the offense, the offender, and the effect the crime had on the victim. *People v Houston*, 448 Mich 312, 322; 532 NW2d 508 (1995); *People v Milbourn*, 435 Mich 630, 661; 461 NW2d 1 (1990); *People v Girardin*, 165 Mich App 264, 266; 418 NW2d 453 (1987).

Affirmed.

/s/ Henry William Saad

/s/ Richard Allen Griffin

/s/ Michael H. Cherry

<sup>1</sup> *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966).