STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

REGINALD PAXTON WESTON,

Defendant-Appellant.

UNPUBLISHED
December 20, 1996

No. 185163
LC No. 94-51288 FC

Before: O'Connell, P.J., and Smolenski and T.G. Power,* JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of armed robbery, MCL 750.529; MSA 28.797, assault with intent to commit murder, MCL 750.83; MSA 28.278, and possession of a firearm during the commission of a felony (felony-firearm). MCL 750.227b; MSA 28.424(2). He was sentenced to a two-year term of imprisonment with respect to the felony-firearm conviction, to be followed by concurrent terms of twenty-five to fifty years and ten to fifteen years on the assault and robbery convictions, respectively. He now appeals as of right, and we affirm.

Defendant first argues that the trial court abused its discretion in allowing the complainant to testify concerning prior instances of domestic violence perpetrated by defendant. Generally, the decision to admit or exclude evidence is within the trial court's discretion. *People v McAllister*, 203 Mich App 495, 505; 513 NW2d 431 (1994). However, under the circumstances of the present case, we decline to consider whether an abuse of discretion occurred. Where overwhelming evidence of a defendant's guilt exists, the improper admission of evidence of other criminal acts may constitute harmless error. *People v Williamson*, 205 Mich App 592, 596; 517 NW2d 846 (1994). Here, the complainant positively identified defendant as her assailant, the bullets recovered from the assault were fired from a type of gun that defendant was known to possess, and powder particles consistent with the discharge of a firearm were retrieved from several articles of defendant's clothing. In light of this

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

overwhelming evidence, we conclude that any error occurring in the admission of the evidence in issue could only have been harmless.

Defendant also raises this allegation of error in the context of prosecutorial misconduct, contending that the prosecution emphasized the testimony pertaining to prior misconduct in its cross-examination of defendant and during closing argument. However, defendant failed to raise this precise issue below, instead arguing only that the evidence should have been excluded. Because defendant failed to object to what is now asserted to be prosecutorial misconduct, appellate review is precluded unless a curative instruction could not have eliminated the prejudicial effect or failure to consider the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Given that we have concluded that the admission of the evidence was harmless, we do not believe that our failure to consider the issue would result in a miscarriage of justice. Similarly, we believe that any prejudice inuring to defendant from the prosecution's actions could have been easily cured by an appropriate instruction. Therefore, we find no misconduct.

Next, defendant asserts that the trial court failed to properly instruct the jury regarding all included offenses and further failed to properly instruct the jury as to unanimity, and inconsistent statements. With respect to the trial court's failure to properly instruct with respect to lesser included offenses, unanimity, and inconsistent statements, the record reveals that defendant did not request these instructions at trial, and, as a result, these allegations of error will not be reviewed on appeal absent manifest injustice. *People v Van Dorsten*, 441 Mich 540, 545; 494 NW2d 737 (1993). We have reviewed the alleged omitted instruction in the context of the jury instructions as a whole and conclude that they fairly presented the issues to be tried and sufficiently protected defendant's rights. *People v Bell*, 209 Mich App 273, 276; 530 NW2d 167 (1995). Therefore, manifest injustice will not result from our decision not to review the issue further.

With respect to defendant's remaining claim that the trial court failed to give instructions on presence and identification, the record indicates that the trial court did in fact give these instructions. Defendant's claim is, in this regard, completely lacking in merit.

Defendant next challenges the sentence imposed, arguing that the court exceeded the guidelines recommendation based on a factor that was already reflected in the guidelines, which "double-dipping" is alleged to be improper. The court scored offense variable (OV) 2, Physical Attack and/or Injury, to reflect that the victim had been treated with "excessive brutality." The court then exceeded the guidelines recommendation of a minimum term of eight to fifteen years because of the heinousness of the underlying crime.

We find no abuse of discretion. *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). As set forth in *People v Granderson*, 212 Mich App 673, 680; 538 NW2d 471 (1995), quoting *People v Houston*, 448 Mich 312, 320 (internal citations omitted); 532 NW2d 508 (1995), the case of *People v Milbourn*

> "did not state or establish that any factors accounted for in the guidelines had been adequately considered or appropriately weighed." Where a defendant's actions are so

> egregious that standard guidelines scoring methods simply fail to reflect their severity, an upward departure from the guidelines range may be warranted.

In the present case, the court held that the guidelines recommendation was simply inadequate, failing to reflect that defendant had shot the complainant, his ex-girlfriend, five or six times in the head area and arm at point blank range. While defendant would term this "double-dipping," we believe that the sentencing court's actions are more appropriately described as the imposition of a sentence that "reflects the seriousness of the matter." *Houston, supra*. To impose such a sentence, while in excess of the guidelines recommendation, does not constitute an abuse of discretion.

Next, defendant argues that the police failed to inform him of his *Miranda*[1] rights. Unfortunately, defendant's brief on appeal, in which he devotes a solitary page to this issue, does not indicate any particular statement he believes should have been suppressed, and fails even to include a discussion of *any* facts remotely related to statements made by defendant. Instead, the brief states, "[t]he details of this incident are set forth in defendant's [handwritten, eight page, single-spaced] affidavit annexed [sic] hereto." We deem this issue waived.

Defendant further contends that his sentence constitutes cruel and unusual punishment in contravention of US Const, Ams VIII, XIV; Const 1963, art 1, § 16. Because defendant's sentence is proportionate, ante, it is, therefore, deemed not to be cruel or unusual. *People v Williams (After Remand)*, 198 Mich App 537, 543; 499 NW2d 404 (1993). Michigan's prohibition against "cruel or unusual" punishment is interpreted more broadly than the Eighth Amendment's prohibition against "cruel and unusual." *People v Bullock*, 440 Mich 15, 30; 485 NW2d 866 (1992). Accordingly, defendant's sentence contravenes neither the federal nor Michigan's constitutional mandate against cruel and/or unusual punishment.

Next, defendant submits that he was denied the effective assistance of counsel. Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms and there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). The majority of defendant's allegations of error constitute trial strategy, and we decline to second-guess counsel's judgment in this regard. *People v Daniel*, 207 Mich App 47, 58-59; 523 NW2d 830 (1994). With respect to defendant's remaining claims, defendant has failed to demonstrate how he was prejudiced by his successor attorney or how counsel's alleged lack of preparation prejudiced him. *People v Nantelle*, 215 Mich App 77, 87; 544 NW2d 667 (1996).

Defendant also argues that he was denied his due process rights as a result of the trial court's failure to suppress Lt. Kent Gardner's testimony. Gardner, a firearms expert, testified that a dark overcoat recovered from defendant's apartment contained powder particles with traces of nitrate residue, evidence consistent with that of a shooter of a firearm. Gardner also found one powder particle on the front of defendant's jogging pants. He further found three powder particles on a pair of blue coveralls from the trunk of defendant's car. No evidence exists that would suggest that the

prosecution deliberately attempted to sabotage the defense by presenting Gardner's proposed testimony at the last minute. The prosecutor's explanation, that the clothing had been misplaced, does not reflect any intentional concealment on his part. Cf. *People v Davis*, 199 Mich App 502, 514; 503 NW2d 457 (1993). The trial court did not abuse its discretion in admitting this evidence. *McAlister*, *supra*.

Defendant has also filed a supplemental brief on his own behalf in which he raises two issues. First, he submits that the trial court abused its discretion, *McAlister*, *supra*, in allowing a police officer to testify concerning the victim's statements immediately after the officer arrived at the scene of the crime. Defendant argues that this testimony did not fall within MRE 801(d)(1)(C), and was, accordingly, hearsay, which should have been excluded. We need not pass on whether the complainant's statements, as related by the police officer, were properly admitted as being statements "of identification of a person made after perceiving the person," MRE 801(d)(1)(C), because the court did not admit the statements pursuant to that rule of evidence, but pursuant to MRE 803(2), the "excited utterance" exception to the bar against hearsay evidence. Additionally, we would note that the statements in issue were not admitted to bolster the complainant's credibility, as implied by defendant, but as substantive evidence of defendant's guilt. Therefore, defendant has directed this Court's attention to no error in this context.

Second, defendant claims that "the assistant prosecutor's [mis]conduct and overall trial tactics were so improper that they denied defendant his fundamental right to a fair trial." Because defense counsel failed to object to these alleged instances of misconduct, we need not review this issue unless the failure to do so would result in manifest injustice. *Stanaway*, *supra*, p 687. We have examined defendant's argument, and conclude that our failure to address it will not result in manifest injustice.

Affirmed.

/s/ Peter D. O'Connell
/s/ Michael R. Smolenski
/s/ Thomas G. Power

[1] *Miranda v Arizona*, 384 US 426; 86 S Ct 1602; 16 L Ed 2d 694 (1966).