

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MATTHEW GERALD BERGER,

Defendant-Appellant.

UNPUBLISHED

November 21, 1997

No. 189288

Macomb Circuit Court

LC No. 93-002180-FC

Before: Saad, P.J., and Holbrook and Doctoroff, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to commit great bodily harm less than murder, MCL 750.84; MSA 28.279, and was sentenced to six and one half to ten years' imprisonment. He now appeals as of right. We affirm his conviction, but remand for correction of the judgment of sentence.

Defendant stabbed the victim in the arm and in the back over an argument involving drug money. He raises numerous issues upon appeal, only one of which has merit.

Defendant first argues that the trial court abused its discretion in rejecting the plea agreement reached between defendant and the prosecutor because the court applied the wrong standard. He contends that the trial court rejected the prosecutor's sentence recommendation because it did not find substantial and compelling reasons to deviate from the statutory minimum sentence. Defendant argues that this was erroneous, because substantial and compelling reasons are required to deviate from the statutory minimum in drug cases, but no such requirement exists in cases that do not involve drugs.

This Court reviews a trial court's acceptance or rejection of a sentencing recommendation for an abuse of discretion. *People v Swirles (After Remand)*, 218 Mich App 133, 140; 553 NW2d 357 (1996). If a plea agreement offered by the prosecutor and the defendant to the court includes a recommendation of a particular sentence, the judge may accept the plea, after consideration of the presentence report, yet refuse to be bound by the recommended sentence. *People v Killebrew*, 416 Mich 189, 209; 330 NW2d 834 (1982). However, the trial judge must explain to the defendant that the recommendation was not accepted, and must state the sentence that the court finds to be

appropriate. *Id.* The court must then give the defendant the opportunity to affirm or withdraw his plea. *Id.* at 210.

Defendant was originally charged with armed robbery, MCL 750.529; MSA 28.797. He pleaded nolo contendere to the charge in exchange for the prosecution's recommendation of a three-year minimum sentence cap. At a sentencing hearing on April 24, 1995, the trial court rejected the prosecution's sentence recommendation, and allowed defendant to withdraw his plea. On review of the record, we find that the trial court complied with the requirements of *Killebrew, supra*, in rejecting the prosecution's sentence recommendation. Furthermore, the record does not support defendant's argument that the trial court applied the incorrect standard. The trial court stated that, after reviewing the presentence report and "other circumstances the Court might consider," it saw no reason to deviate from the minimum end of the guidelines. It was only in response to a comment by defendant that the court stated that it found no "substantial and compelling reasons to deviate from the minimum sentence." Therefore, the trial court did not abuse its discretion in rejecting the prosecution's sentence recommendation.

Defendant also argues that the judgment of sentence is inaccurate. We agree. The trial court imposed a prison sentence of six and a half years, or seventy-eight months. However, the judgment of sentence inaccurately reflects defendant's minimum sentence as eighty months' imprisonment. Pursuant to MCR 6.429, the trial court has the authority to correct the invalid sentence to reflect the sentence imposed on defendant. Therefore, remand is necessary for entry of an amended judgment of sentence.

Defendant next argues that he was denied a fair trial when he was escorted into the courtroom by three deputies in view of the jury, and when three deputies sat in the courtroom. However, because defendant did not object at trial to the presence of the deputies, this issue is not properly preserved for appellate review. *People v Jacques*, 215 Mich App 699, 702; 547 NW2d 349 (1996).

Defendant next argues that the trial court erred in refusing to instruct the jury on the lesser included offense of assault and battery. Five conditions must be met prior to giving jury instructions on lesser included misdemeanors in a felony trial: (1) a specific request has been made for the misdemeanor instruction; (2) an appropriate relationship exists between the charged offense and the requested misdemeanor instruction; (3) the requested misdemeanor instruction must be supported by a rational view of the evidence; (4) if the prosecution requests the instruction, the defendant must have adequate notice; and (5) the requested instruction does not result in confusion or some other injustice. *People v Stinnett*, 163 Mich App 213, 217; 413 NW2d 711 (1987); *People v Acosta*, 143 Mich App 95, 100; 371 NW2d 484 (1985).

Defendant admitted that he stabbed the victim, but stated that he had done so in self defense. Because there is no dispute as to whether defendant was armed at the time of the assault, the instruction on simple assault was not supported by the evidence. *Stinnett, supra*. Therefore, we find that the trial court's refusal to instruct the jury was not an abuse of discretion.

Defendant next argues that the trial court erred by giving the jury instructions in writing during deliberations when the jury requested the definitions of assault with intent to do great bodily harm less

than murder and felonious assault. However, because defense counsel explicitly approved of the trial court's action, this argument is without merit. *People v Ullah*, 216 Mich App 669, 676; 550 NW2d 568 (1996).

Defendant next argues that prosecutorial misconduct denied him a fair trial. On review, this Court examines the pertinent portion of the record and evaluates the prosecutor's remarks in context in order to determine whether the defendant was denied a fair and impartial trial. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996). Appellate review of improper prosecutorial remarks is generally precluded absent objection by counsel unless a curative instruction could not have eliminated the prejudicial effect or where failure to consider the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). A miscarriage of justice will not be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely curative instruction. *People v Rivera*, 216 Mich App 648, 651-652; 550 NW2d 593 (1996).

Defendant first argues that he was denied a fair trial when the prosecutor called him "Mr. Liar the Defendant" during jury voir dire. After reviewing the jury voir dire transcript, we found no improper comments or name-calling by the prosecution, or any comments remotely similar to defendant's allegations. Since the remarks are not reflected in the record, they cannot be reviewed on appeal. Moreover, any prejudice caused by the alleged remarks could have been eliminated by a timely curative instruction.

Defendant next argues that he was denied a fair trial by the prosecutor's "unexplained fits," and by the prosecutor throwing his pen and paper down on the table causing them to slide onto the floor, taking the easel on which the defense counsel had written and throwing it against the wall, and rocking in his chair and laughing. This conduct is not reflected in the record, and, therefore, cannot be reviewed on appeal. Furthermore, defendant did not object at trial to the conduct. Accordingly, any prejudice caused by the conduct could have been eliminated by a timely curative instruction.

Defendant next argues that he was denied a fair trial when the prosecutor misstated facts to the jury regarding codefendant Brian Scott's trial. The record reveals that defense counsel objected to the prosecution's improper remarks, and the trial court sustained the objections. We find that these actions were sufficient to cure any prejudice caused by the questioning. See *People v Curry*, 175 Mich App 33, 44; 437 NW2d 310 (1989).

Defendant also argued that the prosecutor disobeyed the court's order that there be no mention of Brian Scott's trial. On review of the record, it appears that the parties agreed that no mention would be made of Scott's acquittal. It does not appear that the parties agreed not to mention the trial at all. Therefore, defendant's argument has no merit.

Defendant next argues that he was denied a fair trial when the prosecutor commented on defendant's whereabouts at a particular time, suggesting to the jury that defendant was in jail. During cross-examination of the victim by defense counsel, the prosecutor objected to defense questioning regarding whether he had walked in front of defendant's home after the incident. The prosecutor stated "[H]e doesn't even know where the Defendant was at the time, and if we can get into that I'd be happy

to, your Honor.” We do not believe that this comment in any way suggested to the jury that defendant was incarcerated. Therefore, taken in context, it did not deny defendant a fair and impartial trial.

Defendant next objects to the prosecutor’s comment to the defendant:

Sir, that’s your attorney right over there, right? And you know he can subpoena anybody you want for this trial, you know that, correct?

The court later gave the jury the following instruction:

Members of the jury, the Defendant in this case does not have to subpoena anybody. The burden of proof of satisfying you of the Defendant’s guilt is with the prosecutor. Some discussion was, well, if you wanted somebody you could have subpoenaed him. Totally forget that. Can you understand what I’m saying? You remember the testimony, it was volunteered and the prosecutor then made a statement that they could have subpoenaed. Well, they don’t have to subpoena anybody, so totally disregard—can you totally disregard that part of the conversation, that part of the testimony? Shake your head yes or no, please. Thank you. Proceed, counsel.

We find that this instruction was sufficient to eliminate any prejudice caused by the prosecutor’s improper remark.

Defendant next argues that he was denied the effective assistance of counsel when defense counsel failed to object to the prosecutor’s improper conduct, the trial court giving written instructions to the jury without explanation, and the trial court’s failure to instruct on assault and battery. To prove ineffective assistance of counsel, defendant must prove that trial counsel’s performance was below an objective standard of reasonableness under prevailing professional norms, and that there is a reasonable probability that, but for counsel’s error, the outcome of the trial would have been different. *Stanaway*, *supra* at 687-688. Trial counsel is presumed competent, and defendant has the burden of proving that the complained of conduct is not within sound trial strategy. *Id.*

Defense counsel is not required to raise a meritless objection. *People v Torres (On Remand)*, 222 Mich App 411, 425;. 564 NW2d 149 (1997). Because counsel requested the instruction for assault and battery, he did not need to object to the court’s failure to give the instruction, where the court ruled that the evidence did not support the instruction. Moreover, the trial court did not err in giving the jury written instructions without explanation, and the prosecutor’s conduct did not deny defendant a fair and impartial trial. Therefore, defendant has not met his burden of proving that counsel’s performance was below an objective standard of reasonableness and that, but for counsel’s error, the outcome of his trial would have been different.

Finally, defendant argues that the evidence was insufficient to convict him of assault with intent to do great bodily harm less than murder. We disagree.

In reviewing the sufficiency of the evidence, this Court must consider the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have concluded that the

elements of the crime were established beyond a reasonable doubt. *People v McCrady*, 213 Mich App 474, 484; 540 NW2d 718 (1995). The elements of assault with intent to do great bodily harm less than murder are: (1) an attempt or offer with force and violence to do corporeal hurt to another (an assault), coupled with (2) a specific intent to do great bodily harm less than murder. *People v Bailey*, 451 Mich 657, 668-669; 549 NW2d 325 (1996). Defendant argues on appeal that his conviction should be reversed because it was based on the prosecutor's false statements and misrepresentations of the evidence. This Court will generally not overturn a conviction on the basis of the credibility of a witness. *People v Hughes*, 217 Mich App 242, 248; 550 NW2d 871 (1996). Taken in a light most favorable to the prosecution, the evidence indicates that defendant stabbed the victim once in the back and once in the forearm, while the victim was holding his arms in front of his torso to protect himself. This evidence was sufficient from which a rational trier of fact could have found that the elements of assault with intent to do great bodily harm less than murder were proven beyond a reasonable doubt.

This case is remanded to the trial court for entry of an amended judgment of sentence. Affirmed as to all other issues.

/s/ Henry William Saad

/s/ Donald E. Holbrook, Jr.

/s/ Martin M. Doctoroff