

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TIMOTHY NELSON, JR.,

Defendant-Appellant.

UNPUBLISHED

July 14, 1998

No. 194131

Detroit Recorder's Court

LC No. 95-003249

Before: White, P.J., and Hood and Gage, JJ.

PER CURIAM.

Defendant appeals by right after jury convictions for assault with intent to rob while armed, MCL 750.89; MSA 28.284, assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant received sentences of fifteen to thirty years' imprisonment for the assault with intent to rob while armed conviction, five to ten years for the assault with intent to do great bodily harm less than murder conviction, and two years for the felony-firearm conviction. The two assault sentences are to run concurrently, consecutive to the felony-firearm sentence. We affirm.

Defendant first argues that the trial court erred in failing to reinstruct the jury on the lesser included offense of felonious assault. We disagree. We review for an abuse of discretion a trial court's decision to provide additional instructions requested by the jury. *People v Fisher*, 166 Mich App 699, 714; 420 NW2d 858 (1988). During deliberations, the jury requested that the trial court reinstruct it on assault with intent to murder and assault with intent to do great bodily harm less than murder. The trial court reinstructed the jury on these charges, but did not reinstruct on felonious assault. The jury did not request reinstruction on felonious assault, nor did it show any confusion as to the trial court's prior felonious assault instruction. Therefore, the trial court did not abuse its discretion by failing to reinstruct on felonious assault. See *People v Paquette*, 214, Mich App 336, 338-340; 543 NW2d 342 (1995).

Next, defendant claims that he did not receive effective assistance of counsel. We disagree. Because no lower court hearing was held pursuant to *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), our review is limited to mistakes of counsel apparent on the record. *People v*

Williams, 223 Mich App 409, 414; 566 NW2d 649 (1997). To establish ineffective assistance of counsel, a defendant must demonstrate that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial. *People v Nantelle*, 215 Mich App 77, 87; 544 NW2d 667 (1996). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Leonard*, 224 Mich App 569, 592; 569 NW2d 663 (1997).

Defendant first alleges that he received ineffective assistance of counsel because his defense counsel was not present during jury reinstruction. However, defense counsel's partner, who had previously attended defendant's trial several times, stood in for defense counsel during his absence, and defendant acquiesced on the record to this temporary substitution. Furthermore, in light of our holding above that no error occurred during reinstruction of the jury, defendant cannot demonstrate that he was prejudiced by defense counsel's absence. Therefore, we conclude that defense counsel's absence did not deprive defendant of effective assistance.

Defendant argues second that defense counsel's failure to argue claim of right as a defense constituted ineffective assistance of counsel. Defense counsel proceeded at trial on a theory that defendant did not take anything from the taxicab whose driver he assaulted. This was a matter of trial strategy that we will not attempt to second-guess. *People v Stewart*, 219 Mich App 38, 42; 555 NW2d 715 (1996). The mere fact that defense counsel's strategy may not have worked does not render his assistance ineffective. *Id.*

Finally, defendant claims that the trial court imposed a disproportionate sentence. We disagree. Our review of sentencing decisions by the trial court is limited to determining whether an abuse of discretion has occurred. *People v Poppa*, 193 Mich App 184, 187; 483 NW2d 667 (1992). An abuse of discretion occurs when the sentence imposed violates the principle of proportionality, which requires that sentences "be proportionate to the seriousness of the circumstances surrounding the offense and the offender." *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). Sentences within the guidelines range are presumptively proportionate. *People v Wybrecht*, 222 Mich App 160, 175; 564 NW2d 903 (1997). To preserve for appellate review a claim that a sentence within the guidelines range is disproportionate, a defendant must present to the sentencing judge in open court unusual circumstances that would counsel against the court's imposition of a sentence within the guidelines. *People v Sharp*, 192 Mich App 501, 505-506; 481 NW2d 773 (1992). Defendant's fifteen to thirty year sentence for assault with intent to rob while armed was within the applicable guidelines range of 120 to 300 months or life. Because defendant failed to raise before the sentencing judge any unusual circumstances, he has failed to preserve appellate review of his sentence's proportionality. *Id.*

Affirmed.

/s/ Helene N. White

/s/ Harold Hood

/s/ Hilda R. Gage

