

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHRISTOPHER DALE GREEN,

Defendant-Appellant.

UNPUBLISHED

June 23, 2000

No. 211906

St. Clair Circuit Court

LC No. 97-001771-FC

Before: Owens, P.J., and Neff and Fitzgerald, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of felonious assault, MCL 750.82; MSA 28.277, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to twenty-four to forty-eight months' imprisonment for the felonious assault conviction to be served consecutive to his two-year sentence for the felony-firearm conviction. Defendant appeals as of right. We affirm defendant's conviction, but remand to the trial court for the limited purpose of conducting a hearing to determine whether its sentence was based in part on erroneous information.

On appeal, defendant first argues that the trial court committed error requiring reversal when it omitted from its jury instruction on felonious assault the element of specific intent. We disagree. Because counsel failed to raise the issue at trial, the error is unpreserved. *People v Grant*, 445 Mich 535, 553-554; 520 NW2d 123 (1994). Where no objection is made to an alleged constitutional error, we review for plain error. *People v Carines*, 460 Mich 750, 761, 764-766; 597 NW2d 130 (1999).

The trial court explained specific intent in its instructions for assault with intent to murder and assault with intent to do great bodily harm less than murder. The court instructed the jury that for the final charge, felonious assault, the intent "related to" the previously given instructions. Although the court did not use the term "specific intent" in its instruction on felonious assault, the jury was well apprised of the elements of the offense, including intent, and thus, we find no error. The jury was asked to determine whether defendant intended to either injure William Rogan, Jr.(the victim) or make Rogan reasonably fear an immediate battery. It is presumed that the jury followed the court's instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Further, we find no prejudice

because, when viewed as a whole, the court's instructions protected defendant's rights. *Carines, supra* at 770-771. Thus, defendant forfeited his claim of error by not objecting to the instructions at trial. *Id.* at 772.

Defendant next argues that the trial court incorrectly scored the sentencing guideline variables by finding that Rogan was terrorized. We review the application of the guidelines on appeal only where (1) a factual predicate is wholly unsupported, (2) a factual predicate is materially false, and (3) the sentence is disproportionate. *People v Raby*, 456 Mich 487, 496; 572 NW2d 644 (1998); *People v Mitchell*, 454 Mich 145, 177; 560 NW2d 600 (1997). Otherwise, we recognize no basis for claims of error predicated on the trial court's alleged misinterpretation of the guidelines, instructions regarding how the guidelines should be applied, or misapplication of guideline variables. *Id.* at 176-177.

Here, the factual basis for finding that defendant was subjected to terrorism is not wholly unsupported by the record, nor materially false. There was ample evidence, viewed either subjectively from Rogan's viewpoint, or objectively, that Rogan was terrorized by defendant. Rogan testified that defendant came to the door of defendant's house and that he waved a gun in Rogan's face and told him to leave. Rogan claimed that defendant threatened to kill him if he did not leave. Then, Rogan testified, he ran away in fear for his life when defendant pointed the gun at him. Moreover, Rogan's version of events is not materially false because it was supported by Michelle Hernandez, a disinterested eyewitness. Accordingly, we find that the trial court did not err in scoring the guidelines.

Defendant next argues that the trial court erred by considering information in the presentencing information report (PSIR) that was incorrect and that the corrections that the trial court ordered were never made. At trial, the court ordered stricken any indication that defendant was "under suspicion for quite some time for drug dealing." The trial court also ordered that the PSIR be changed to indicate that defendant had a pending drug charge after crack cocaine was found in clothing "delivered to the jail on [defendant's] behalf." Apparently, neither change was made. We therefore remand for the trial court to make the above corrections to the PSIR. *People v Newson (After Remand)*, 187 Mich App 447, 450; 468 NW2d 249, vacated in part on other grounds 437 Mich 1054.

Defendant also argues that the PSIR wrongly identified one of his juvenile offenses and that the trial court was not apprised of the mistake. Essentially, at sentencing, the probation officer stated that defendant was charged with entry without permission and assault and battery, but that he pleaded guilty to larceny under \$100. In actuality, defendant was charged with unarmed robbery and "stolen property \$100 or less," and he later pleaded guilty to larceny over \$100. On remand, therefore, the trial court shall conduct a hearing at which it shall determine whether the misinformation affected its sentencing decision. *People v Tew*, 151 Mich App 556, 559-560; 390 NW2d 738 (1986). If so, then defendant shall be resentenced.

Defendant, in propria persona, raises two additional issues for our consideration. First, he argues that the prosecutor committed error requiring reversal when, during closing arguments, he accused eyewitness Kimberly Jones, defendant's girlfriend, of being an accessory to the crime and when he attacked her credibility. At trial, defendant failed to object to either of the comments made by the prosecutor. Appellate review of allegedly improper conduct is precluded where the defendant fails

to timely and specifically object unless an objection could not have cured the error or a failure to review the issue would result in a miscarriage of justice. *People v Kelly*, 231 Mich App 627, 638; 588 NW2d 480 (1998).

Prosecutorial misconduct issues are decided case by case, and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). In this case, we are mindful of the fact that the trial court repeatedly instructed the jury that the statements and arguments of the attorneys are not evidence. Generally, juries are presumed to have followed the instructions. *Graves, supra* at 486.

Prosecutors are free to argue the evidence and all reasonable inferences arising from it as they relate to the theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Jones testified that she asked defendant to intervene on her behalf. The prosecutor's remarks to this effect during closing arguments were therefore based on the evidence and not improper. *Id.*

The prosecutor chastised defendant and Jones, stating that they should have let the courts contend with Rogan. However, the prosecutor need not use the least prejudicial evidence available to establish a fact at issue, nor must he state his arguments in the blandest possible terms. *People v Fisher*, 449 Mich 441, 452; 537 NW2d 577 (1995); *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996). Finally, the prosecutor cast doubt on Jones' version of events by stating that the story did not "fit," and that if anybody was lying at trial, it was she. The prosecutor did not accuse Jones of lying. Instead, he merely argued that the jury should reach the conclusion that Jones was not credible. Again, the prosecutor need not always couch his arguments in the blandest of terms. *Id.*

Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Lawton*, 196 Mich App 341, 353-355; 492 NW2d 810 (1992). Here, remarks during closing were not improper where the prosecutor was rebutting charges made by defense counsel that Rogan, not Jones, was not telling the truth. Otherwise improper prosecutorial remarks might not require reversal if they address issues raised by defense counsel. *People v Duncan*, 402 Mich 1, 16; 260 NW2d 58 (1977).

Finally, defendant argues the he was denied the effective assistance of counsel when his defense counsel failed to challenge defendant's sentence as disproportionate. We disagree. Because defendant did not move for a new trial or an evidentiary hearing below, our review is limited to mistakes apparent from the record. *People v Henry*, 239 Mich App 140, 146; 607 NW2d 767 (1999), lv pending.

Effective assistance of counsel is presumed, and the defendant bears the burden of proving otherwise. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that the defendant was prejudiced such that he was denied a fair trial, i.e., there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Mitchell, supra* at 164; *Henry, supra* at 145-146.

On the existing record, defendant has not shown that he was denied the effective assistance of counsel. Defendant was sentenced within the guidelines, yet he believes that the court should have sentenced him to a lesser term given the surrounding circumstances. Defendant's sentence was proportionate to the seriousness of the crime. Rogan was unarmed when defendant chased him with a loaded gun and fired a shot into his vehicle, narrowly missing Rogan. Counsel is not required to argue a frivolous or meritless motion. *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998). A motion for resentencing would have been frivolous under these circumstances.

Affirmed. Remanded to the trial court for the limited purposes of correcting the PSIR and conducting a hearing to determine whether defendant's sentence was based in part on defendant's juvenile record where the trial court was misinformed of that record. We do not retain jurisdiction.

/s/ Donald S. Owens

/s/ Janet T. Neff

/s/ E. Thomas Fitzgerald