STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 12, 2000
v	No. 211614 Oakland Circuit Court
QUAMAIN L. SPANN, Defendant-Appellant.	LC No. 97-156405-FC

Before: Kelly, P.J., and White and Wilder, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279, and willful killing of an unborn quick child, MCL 750.322; MSA 28.554.[1] Defendant was sentenced as a third habitual offender, MCL 769.11; MSA 28.1083, to enhanced sentences of thirteen to twenty years' imprisonment for the assault conviction and twenty to thirty years' imprisonment for the homicide conviction. We affirm but remand for correction of the judgment of sentence.

The instant case arose from the shooting of Rekiaya Simms on April 30, 1997. Simms testified that she was 32½ weeks pregnant at the time and lived with the father of the baby, Germaine Outlaw, in a ground floor apartment. Simms testified that she was home alone when someone knocked on the door late that evening and, when she asked who it was, the person answered "Mike." She testified that she turned on the porch light and looked out the window, and saw a man on the porch, whom she identified at trial as defendant. The man asked her to call Outlaw. She went to the bedroom to do so, and within a minute heard a bang at the front door as it was being kicked in. After the bang at the door, she heard someone say "don't run" and

[1] MCL 750.322; MSA 28.554 provides:

> The wilful killing of an unborn quick child by any injury to the mother of such child, which would be murder if it resulted in the death of such mother, shall be deemed manslaughter.

"where is the money?," and ran for the back door without seeing who had come in and without seeing a gun. Simms testified that she heard one shot while she was running through the living room. Once outside, Simms went to a neighbor's house, discovering on the way that she had been shot in the abdomen. The neighbor called 911, and Simms was hospitalized for five days. She testified that the morning after the shooting, her mother told her the baby had died, that she did not see the baby and that she had not named it.

Simms testified that she identified defendant from photographs Detective Patton showed her in the hospital the day after the shooting, and later identified defendant at a corporal line-up at the police department.

Defendant presented an alibi defense, that he was with his girlfriend and her family at the time of the shooting. Defense counsel stated in opening statement that Germaine Outlaw sold drugs from the apartment he shared with Simms, that numerous persons purchased drugs there and knew there were drugs and money there, and that numerous persons could have committed the instant crimes.

Police officers called to the scene testified at trial that Outlaw was in the parking lot of the apartment next to his car shortly after they arrived and said he had received a phone call that his girlfriend had been shot. Several police officers testified that Outlaw told them that when he arrived at the apartment he thought someone had broken in, and that he saw two black males running from the apartment and tried to chase them, when he saw a police car coming. Outlaw told them he could not identify the two, but that one of them reminded him of a Stan Jamison. When the police questioned him, Outlaw gave them a false name. The police found a picture identification of him in the apartment showing a different name, ran that name through the computer, and learned that he had outstanding felony warrants on drug charges. They arrested him on those and other charges.

Detective Patton testified that Simms told him that she was a very good friend of Stan Jamison and that she had not seen Jamison at the scene. Patton testified that Jamison is 6'2" tall. Defendant is 5'10" tall.

The police testified that their search of the apartment yielded cocaine, marihuana, drug paraphernalia, weapons, ammunition, a spent .380 casing behind or under the television, and a .380 fired bullet on the kitchen floor. Outlaw's fingerprints were found on a plate in the apartment that had cocaine residue on it. The police found a .25 caliber semi-automatic pistol outside the apartment on the lawn and a .25 auto caliber cartridge was found in Outlaw's car on the driver's side floorboard. The police testified that the .25 caliber pistol found could not have fired or accommodated the .380 bullet found in the apartment.

The patterns on Outlaw's shoes did not match the patterns on the footprint found on the apartment door. No prints were found on the recovered handgun, casing, or front door, and no physical evidence was found linking defendant to the crime scene.

I

Defendant's first argument, not preserved below, is that several prosecutorial remarks denied him a fair trial.[2] The standard of review for unpreserved non-constitutional error is that defendant must show that he was prejudiced by the trial court's plain error, and the reviewing court should reverse only when defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1990).

Defendant argues, and the prosecution concedes, that in opening statement and closing argument the prosecutor referred to the unborn child that died as the result of the gunshot wound to Simms' abdomen as "Germaine Simms," when Simms testified that she had not named the baby and no testimony was presented at trial that the baby had been named. Defendant argues that by employing an invented name, the prosecutor allowed the "jurors to visualize the thirty-two week fetus as a fully developed, healthy, full-term, live-born child," violating the Legislature's intent regarding MCL 750.322; MSA 28.554, that an unborn fetus, even one exhibiting brain waves and movement, be different from a live born child for purposes of the death being construed as murder. Defendant argues that if the Legislature had intended for a fetus to be considered a human being under the murder statute, it would have made a violation of the feticide statute murder instead of manslaughter.

A prosecutor may not make a statement of fact to the jury that is unsupported by the evidence. *People v Fisher*, 193 Mich App 284, 291; 483 NW2d 452 (1992). The prosecutor's references to the baby as Germaine Simms were unsupported by the evidence and thus clearly improper. *Id.* We conclude, however, that reversal is not required. The jury was instructed that the prosecution had to prove each element of the crime beyond a reasonable doubt,[3] that the lawyers' statements and arguments were not evidence, and that it should not decide the case based on sympathy, fear or prejudice. The defense did not contest that the unborn child died as a result of the gunshot wound to Simms' abdomen or that it was viable,[4] and defendant does not

[2] Defendant's appellate brief states the issue as "appellant was denied a fair trial by the prosecutor introducing unsupported inflammatory and prior bad acts evidence," but does not discuss or cite authority regarding prior acts evidence under this argument. We address the only argument defendant briefed regarding prior similar acts in Issue III, *infra.*

[3] The court instructed the jury that the prosecution had to prove beyond a reasonable doubt that defendant caused Simms' unborn child to be stillborn by shooting Simms, resulting in the killing of the unborn child, that defendant either intended to kill Simms or intended to do great bodily harm to Simms, or knowingly created a very high risk of death or great bodily harm knowing that death or such harm was the likely result of his actions, and that the unborn child was viable.

[4] Defense counsel stipulated at the preliminary examination and stated in opening statement that defendant was not contesting that the baby was viable, or that the baby died as a result of a gunshot wound to its mother. Simms testified that she had felt the baby move inside her. The obstetrician who operated on the mother testified that the baby was approximately thirty-one to thirty-two weeks old, give or take one to two weeks, and that he performed a vertical cesarean section because the baby had a very low heart rate, indicating it was in the process of dying. After the cesarean, the baby was immediately turned over to neonatal intensive care but had no

(continued…)

argue that the prosecution did not establish the elements of the crime, apart from his identity as the perpetrator. Under MCL 750.322; MSA 28.554, the killing of the unborn quick child is deemed manslaughter. See n 1, *infra.* Under these circumstances, defendant has not shown that the remarks seriously affected the fairness, integrity, or public reputation of the proceedings. *Carines, supra.*

II

Defendant next argues that the trial court abused its discretion by allowing Germaine Outlaw not to testify after he stated he would assert his Fifth Amendment privilege against self-incrimination. Defendant argues that the privilege against self-incrimination is properly invoked on a question by question basis, not by a blanket refusal to testify. We agree with that proposition, but find no error under the circumstances presented here.

"A lawyer may not knowingly offer inadmissible evidence or call a witness knowing that he will claim a valid privilege not to testify." *People v Dyer*, 425 Mich 572, 576; 390 NW2d 645 (1986). This rule applies to both the defense and the prosecution. *Id.* The *Dyer* Court noted:

> This privilege [against self-incrimination] is held by the witness. However, the witness is not the sole judge of whether the testimony is or may be incriminating. The constitutional privilege against self-incrimination must not be asserted by a witness too soon, that is, where there is no reasonable basis for a witness to fear incrimination from questions which are merely preliminary. *In re Schnitzer*, 295 Mich 736, 740; 295 NW 478 (1940). However, a trial court may compel a witness to answer a question only where the court can foresee, as a matter of law, that such testimony could not incriminate the witness. 5 Callaghan's Michigan Pleading & Practice (2d ed), § 37.143, p 464.
>
> Defendant claims that Johnson should have been called to the stand and compelled to answer questions which were not incriminating. We find that the trial court properly appointed counsel for Johnson and held an evidentiary hearing outside of the jury's presence in order to establish Johnson's intention to "plead the Fifth" on the record. We agree with the trial court and Johnson's counsel that answering any questions concerning the evening of defendant's arrest, even as to Johnson's presence at the scene of the crime, might have tended to incriminate Johnson.

(…continued)

heart rate. The doctor testified that a seven-month fetus could be viable and that the decision to remove the baby from the womb in the instant case was an attempt to save it's life. He testified that with new technology and advanced neonatology, "we have babies survive even, sometimes, twenty-four (24), twenty-five (25) weeks, even younger." The doctor that performed the autopsy of the baby testified that it was normally developed for a seven-month old and would have been viable.

> Placing Johnson on the stand to invoke his Fifth Amendment privilege may have allowed the jury to infer that Johnson, not defendant, was guilty of the present charge. However, as the Court of Appeals noted, this procedure would produce no "substantial evidence." A witness who exercises his Fifth Amendment right is not confessing or admitting guilt. Therefore no inferences may be drawn from his refusal to testify.

More recently, *Dyer* was discussed in *People v Gearns*, 457 Mich 170, 194; 577 NW2d 422 (1998), overruled in part on other grounds *People v Lukity*, 460 Mich 484; 596 NW2d 607 (1999):

> We again addressed this issue in *People v Dyer* [*supra*], in which *the defendant* wanted to put a witness on the stand solely to have him assert his Fifth Amendment privilege in front of the jury in order to support his defense that someone else (the witness) committed the crime. This Court, in reversing the Court of Appeals, explained that the *Giacalone* rule applied to the defense as well as the prosecution. The witness in *Dyer* was neither an accomplice or a codefendant. *However, this Court agreed that answering any questions regarding the evening of the defendant's arrest or the witness' presence at the scene of the crime might have tended to incriminate the witness.* [Emphasis added.]

At a pre-trial hearing outside the jury's presence, the prosecutor noted that it had listed Outlaw as a potential witness on the general information and, that in preparing the case for trial, he became aware that Outlaw had a current narcotics possession case pending, also in Oakland Circuit Court. The prosecutor stated that he had notified the circuit court and had asked if Outlaw could have counsel present at any hearings where Outlaw could be called so the court could determine whether he could invoke his Fifth Amendment privilege against self-incrimination. The prosecutor stated that if the court determined that Outlaw had a valid privilege, he would move to have his name stricken from the general information and that the prosecution not be obliged to produce him at trial. Counsel for Outlaw addressed the court and stated that he had met with the prosecutor, with Outlaw, reviewed the case and advised Outlaw of his rights, and that Outlaw told him he wished to avail himself of the privilege. After stating the prosecution's version of the facts on the record, including that toxicology reports indicated that all suspected narcotics found in Outlaw and Simms' apartment were marihuana and cocaine, and that there was still the possibility Outlaw could be prosecuted for that case. The prosecutor further stated:

> As this Court is well aware, Mr. Outlaw stood before this Court last – past Monday, I believe –no, I'm sorry this past Friday where he was charged with Possession, I believe, With Intent to Deliver and he pled guilty to that.
>
> I think there was a Cobbs Agreement reached at that point where the Defendant would serve – or, if I recall correctly, one to four.
>
> Based on the fact that he had a pending case, based on the fact that he could be charged in another case, and based on the fact that it is the Prosecution's Theory

of our case that Mr. Spann had entered into Miss Simm's [sic] house on an attempted drug rip, I have to bring this to the Court's attention so the Court can make its inquiries.

MR. VERPLOEG [*Defense counsel*]: Your Honor, for the Defense, I would object to this hearing even being held at this time. I don't think it is appropriate at this time to even bring the issue up, because I am expecting Mr. Outlaw be produced at trial as a witness. And, if I ask him a question that he may invoke the Fifth Amendment Privilege to, that he is allowed to do it at that time, but he is not allowed to take a blank [sic blanket] Fifth Amendment Privilege.

The questions I am entitled to ask him about is what he knows about this particular incident, not anything about what he might be charged with, with regard to any other crime, for what he knows about this particular incident.

What the Prosecutor is leaving out, is that this witness, Mr. Outlaw, has information about this offense. He was the first one to arrive on the scene after this break in took place and saw two people running away from that scene. That makes him a res gestae witness, your Honor, and whether he invoked the Fifth Amendment Privilege about questions I asked him about drug use, or weapons possessions, or anything else unrelated to this offense [] I am entitled to ask him questions about what he knows about the facts of what he saw prior to him being taken into custody by the police for drug possession or whatever else he was arrested for.

* * *

MR. WALTON [*Counsel for the Prosecution*]: Your Honor, in brief response, I would indicate that we can't do this in the presence of the Jury. If the Witness were to take the stand and invoke a Fifth Amendment right we would have a serious mistrial issue on our hands. I am bringing this to the attention of the Court so it can make its inquiry.

I would agree that this witness would indicate that he saw two black males running from the scene. There were also two responding officers who get their moments [sic?] – and see two black males running from the scene. This witness cannot, according to statements, indicate who those people were, simply that two black males were running from the scene.

And, additionally I can't prosecute this case successfully on our theory without asking questions that I know he is going to respond that his is going to invoke his Fifth Amendment. Knowing that, I can't ask the question of [sic, in front of] the Jury. I bring it to the Court's attention for its inquiry.

THE COURT: Correct. In other words, Mr. Verploeg, it is my understanding that if a witness is going to take the Fifth Amendment we do it outside the presence of

the Jury, because the appellate courts feel that if a person takes the Fifth Amendment it hurts the Defendant in the case.

MR. VERPLOEG: I understand, your Honor, I agree with that.

THE COURT: And, therefore, --

MR. VERPLOEG: (Interposing) It should be outside the Jury's presence. There is no question it should be outside the Jury's presence. But, I am still entitled to call him as a witness.

THE COURT: Well, if he is a res gestae witness you can call him, but that's what we are trying to do now. The case is called, we're in trial, and we're having a hearing before we bring in a Jury and that's what we want to find out.

If he's taking the Fifth Amendment, the Court is not going to bring him in front of the Jury.

MR. VERPLOEG: I understand that, Judge, but like I said [sic], he cannot just get up on the stand and claim or invoke a Fifth Amendment Privilege about questions that are not going to incriminate him, Judge, he can't do it.

He has to answer questions if he has knowledge of a particular instance [sic?]

THE COURT: Well, if he thinks it is going to incriminate him.

MR. VERPLOEG: Judge, there is no way – if I ask him did you see two people running from the scene where your girlfriend lives, where there is also testimony that he lives there himself, Judge, whether there are other witnesses to that effect or not, it doesn't matter. What this witness knows I am entitled to ask him about what he saw.

MR. WALTON: At that point, your Honor, though he is already at that point created a Fifth Amendment issue. He has indicated that he resides there, narcotics were found there.

THE COURT: Correct.

MR. WALTON: He is now being a witness against himself. And I tell the Court, we are not offering him immunity. If he puts some questions like that is [sic] going to invoke an answer that is going to be incriminating against this witness himself.

MR. VERPLOEG: I disagree, your Honor.

THE COURT: Mr. Outlaw, did you hear what you attorney has said to the Court?

MR. OUTLAW: Yes.

> THE COURT: That if you are called as a witness in this case that you intend to avail yourself of your Constitutional Rights and not answer questions under the Fifth Amendment?
>
> MR. OUTLAW: Yes.
>
> THE COURT: In other words, you are not going to answer any questions; is that correct/
>
> MR. OUTLAW: Correct.
>
> THE COURT: Counsel, do you have anything further to say?
>
> MR. O'CONNOR: The only other thing is that I have reviewed alternative theories of the Prosecutor's presentation, and I would like to point out to the Court and that also is a basis for his exercising his Fifth Amendment Constitutional Rights under the U.S. Constitution and the Michigan Constitution.

Outlaw was sworn in outside the jury's presence, responded to the two questions put him by the prosecution by stating "Fifth Amendment." Defense counsel then asked:

> Q Mr. Outlaw, if I asked you questions that have nothing to do with you being charged with any other crime whatsoever, but I asked you questions about what you know about what you saw in this particular incident only; what will you answer to that?
>
> A Fifth Amendment.

Defense counsel then argued to the court that Outlaw had no right to invoke the privilege to that type of question and asked that the court impose sanctions for improperly invoking the privilege. The prosecution then stated:

> MR. WALTON: Your Honor, in response to Counsel's argument, the theory of the Prosecution has been laid out before the Court. In that theory, regardless of whether Counsel asked a question or not which would allow him, assuming arguendo, if he does not assert a Fifth Amendment right, to any questions Counsel asks. If I were to cross-examine him on any issue where he asserted a Fifth Amendment right it would first, deny the People the ability to effectively cross-examine an individual.
>
> And, second, it would create a prejudicial situation for the Defendant.
>
> THE COURT: The Court has made its ruling and at this time he will not be able to be called as a witness in this case because he has communicated that he wants to avail himself of his Fifth Amendment privileges.

MR. WALTON: Your Honor, I would just ask that the Court, upon review of case law or something further down the line as the case develops, if the Court wants to revisit the issue, I would ask that Counsel be summoned for Mr. Outlaw.

THE COURT: I would agree. I would agree.

MR. WALTON: Thank you.

THE COURT: And, we will take those cases Mr. Verploeg and we'll examine them for you.

MR. VERPLOEG: Thank you .

During the prosecution's case and outside the jury's presence, defendant moved for permission to call Outlaw as a defense witness, again arguing that he could not assert a blanket privilege. Defense counsel's argument included that Outlaw was

> an important witness to the Defense, because it involves other people that are possible suspects to this crime.
>
> He knows Mr. Spann personally. He has not identified Mr. Spann as either one of those individuals as being the ones that ran away from the scene.
>
> Normally the case is, Judge, that the Prosecution is barred from calling a witness that is going to be invoking the Fifth Amendment, because it involves prejudice to the Defendant, because this person may be a co-conspirator, or a – some other situation. That situation is not present in these facts, Judge. This is a defense witness now that we are asking to call for those limited purposes, of seeing what he – asking what he saw at that particular time, Judge.
>
> THE COURT: The Court's going to deny your motion, based on PEOPLE VERSUS DYER (phonetic)
>
> > "The rule that a lawyer may not knowingly offer inadmissable [sic] evidence, or call a witness, knowing that the witness will claim a valid privilege not to testify applies to Defense Counsel, as well as the Prosecutor". [sic]

The trial court determined as a matter of law that Outlaw could incriminate himself by testifying and did not allow Outlaw to testify. The prosecution noted that the contents of Outlaw's proposed testimony had been provided to the jury in testimony of the police, to which, the prosecutor stated, he intentionally did not object on hearsay grounds, and the court agreed that there had been testimony by several witnesses that two persons were observed leaving the crime scene. Defense counsel again argued that Outlaw had to invoke the privilege question by question. The following colloquy ensued:

THE COURT: He said he was taking the Fifth, and then I questioned him, "Is it because you're afraid you're going to be incriminated?"

And, he said, "Yes."

MR. VERPLOEG: Well, Judge, like I said [sic], that's not a valid claiming for the Fifth Amendment, Judge. To ask him what he saw, there's no possible way he could be incriminated on that question.

THE COURT: Because there's one question he might be able to answer, where I think, in my opinion . . . you're making a mistake, is because one question which might not incriminate him is, 'what you saw'. And, I would agree. That is not incriminating.

But, to the other questions the Prosecutor wanted to ask him –

MR. VERPLOEG: (Interposing) That's when –

THE COURT: (Continuing) . . . which would incriminate him.

MR. VERPLOEG: That's when he takes the Fifth –

THE COURT: (Interposing) and, then –

MR. VERPLOEG: (Continuing) that's when it's proper –

THE COURT: But, that –

MR. VERPLOEG: (Continuing) . . .that's when it's valid, Judge.

THE COURT: But, whenever a man's going to take the Fifth, period, they say you don't let him take the stand when he's got a proper Fifth Amendment right, growing out of the facts of the case.

MR. VERPLOEG: It still – It still should be a question-by-question basis, Judge.

* * *

THE COURT: The case doesn't say that, PEOPLE VERSUS DYER (phonetic) doesn't say that.

So that's my ruling on that.

We find no error requiring reversal. The facts in the instant case are similar to those in *Dyer*, *supra*. The prosecution's theory of the case, that defendant was attempting to rob a drug house (Outlaw's and Simms' apartment) directly implicated Outlaw. Outlaw was facing the prospect of a criminal prosecution arising directly from the facts of the instant case. Defendant suffered no prejudice from the court's refusal to permit defendant to call Outlaw to testify

regarding his observations regarding the two men and then restricting the prosecutor's cross-examination, which would have been necessary to prevent Outlaw's invocation of the Fifth Amendment before the jury. Outlaw's potential testimony would have been largely duplicative of the testimony of the police officers, who testified that Outlaw told them he observed two black males running from the apartment, but could not identify them. We find no error requiring reversal.

III

Defendant next argues that the trial court erred by failing to give a limiting instruction on prior similar acts evidence. Defendant contends that a cautionary instruction was needed because the prosecutor spoke too loudly during a side bar, revealing that defendant had shot someone the day before Simms was shot.

"After jury deliberations begin, the court may give additional instructions that are appropriate." MCR 6.414(F). Jury instructions are reviewed in their entirety to determine if the trial court committed error requiring reversal. Even if the jury instructions were imperfect, error occurs only where the instructions do not fairly present the issues to be tried and do not sufficiently protect a defendant's rights. *People v Whitney*, 228 Mich App 230, 252; 578 NW2d 329 (1998).

Defense counsel asked Detective Patton on cross-examination:

Q He [defendant], in fact turned himself in to you; did he not?"

A He turned himself in –

Q MR. WALTON (Interposing) Your Honor, may we approach.

THE COURT: You may.

A sidebar conference was held and several minutes later defendant moved for a mistrial, arguing that the prosecutor had spoken loudly enough at the sidebar conference for the jury to hear him state that defendant had been arrested for another shooting. The prosecutor responded:

> MR. WALTON: Your Honor, actually, what I did for Counsel was courtesy [sic].
>
> He brought in the fact that Mr. Spann had turned himself in, but on another shooting.
>
> Rather than bring this up with a full blown question in front of the Jury I had the decency to approach the Court and forewarn, that if he brought that up, that was the line of questioning that I was going to get into. Because I -–I would argue to the Court it's extremely relevant.
>
> In that case, your Honor, and individual was shot and lived, and Mr. Spann claimed an act of self defense.

> This case is completely different, in that an unprotected pregnant woman was shot and the child was killed.
>
> The question, itself, raised by Counsel, makes an impermissible suggestion.
>
> So I approached the – approached and told the Court, this was going to be my line of questioning, and have Counsel – allow Counsel the opportunity to rethink their position.

The trial court denied defendant's motion for a mistrial stating that the jury did not hear the prosecutor's statement. We will not interfere with this finding, and conclude, based on the court's finding, that the prosecutor's statements at sidebar did not necessitate the giving of a similar acts instruction. Further, defendant's girlfriend testified about the prior shooting and defendant does not argue on appeal that the trial court erred in failing to give a limiting instruction based on her testimony.[5]

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[5] Defendant requested the limiting instruction after deliberations began. The only record we have of the request is defense counsel's statement on the record after the jury sent a message that they had reached a verdict:

> THE COURT: I understand we have received a message we have a verdict. We are going to bring the Jury in.
>
> MR. VERPLOEG: Your Honor, may I make a statement?
>
> THE COURT: You may.
>
> MR. VERPLOEG: The record should reflect that I requested a limited Instruction based on some of the testimony that came out about a prior act of the Defendant over my objection. That that testimony came out during the trial.
>
> I asked for a Limiting Instruction asking the Court to advise the Jury that they were not to consider that as evidence, but only to effect or not effect [sic] the credibility of the witness that was on the stand at that time.
>
> The Court did deny my request after they came out with a question asking to hear that witness's testimony again. I asked that that Instruction be given, and that request was denied by the Court. I just wanted the record to be clear with that.
>
> MR. WALTON: The only thing I would add, your Honor, is in regards to this case, when we first initially instructed the Jury there was satisfaction expressed by both Prosecution and Defense in regards to the Instructions that were given.
>
> It was not until the Jury had deliberated for the better part of three hours that such an Instruction is requested.

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IV

Finally, defendant argues that the trial court abused its discretion by imposing the maximum statutorily allowed sentence. We disagree.

Whether to impose an increased sentence as authorized by the habitual offender act, MCL 769.10 *et seq.*; MSA 28.1082 *et seq.*, is within the sentencing court's discretion. *People v Bewersdorf*, 438 Mich 55, 66; 475 NW2d 231 (1991); *People v Alexander*, 234 Mich App 665, 673-674; 599 NW2d 749 (1999). Because the sentencing guidelines do not apply to habitual offenders, this Court's review of an habitual offender sentence is limited to considering whether the sentence violates the principle of proportionality of *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). *People v Gatewood (On Remand)*, 216 Mich App 559, 560; 550 NW2d 265 (1996).

The presentence report reflects that defendant had an extensive criminal history, including possession of controlled substances, armed robbery, and assault with intent to commit murder. The presentence report noted that at the time defendant was arrested for his first adult offense he was an absconder, and that the assault with intent to murder offense occurred the night before the instant shooting. The report further noted that defendant reported not having held employment and that the money he had earned had been from selling drugs. The trial court noted at sentencing that "[t]he day before this lady was shot, and her baby killed, the Defendant shot another person . . . . And the Court took that under consideration, and thinks that anyone that would shoot human beings within two days should serve an extensively long sentence." We conclude that the sentences did not constitute an abuse its discretion.

Affirmed, but remanded to the trial court for a correction of the judgment of sentence to reflect that defendant was convicted of assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279, rather than assault with intent to commit murder, MCL 750.83; MSA 28.278. We do not retain jurisdiction.

/s/ Michael J. Kelly
/s/ Helene N. White
/s/ Kurtis T. Wilder

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> The Court, in chambers, warned both the Prosecution and Defense in this case that it was concerned it would be ringing the bell even louder on something like this to draw the attention to it after the Jury had requested the opportunity to rehear that portion of the trial.
>
> THE COURT: The record may so indicate. Would you bring the Jury in.

We find no reversible error.