STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 27, 2001
v	No. 220104 Wayne Circuit Court
JEFFREY MARK STAWARZ, Defendant-Appellant.	LC No. 93-013006

Before: Doctoroff, P.J., and Holbrook, Jr. and Hoekstra, JJ.

PER CURIAM.

Defendant was convicted by jury of two counts of voluntary manslaughter, MCL 750.321; MSA 28.553, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b; MSA 28.424(2).[1] With regard to the voluntary manslaughter convictions, the trial court sentenced defendant to ten to fifteen years' imprisonment and eight to fifteen years' imprisonment, to be served concurrently. Further, the trial court sentenced defendant to a consecutive two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant first argues that the trial court erred in failing to instruct the jury regarding the proper use of the prior inconsistent statements of a prosecution witness. We disagree. Because defendant neither requested such an instruction nor objected to the jury instructions at trial, but actually approved of the instructions given by the trial court, defendant has waived his right to appellate review. *People v Carter*, 462 Mich 206, 214-216; 612 NW2d 144 (2000); *People v Tate*, ___ Mich App ___; ___ NW2d ___; 2001 WL 118629, pp 5-6. Defendant may not harbor error as an appellate parachute. *Carter, supra* at 214; *People v Green*, 228 Mich App 684, 691; 580 NW2d 444 (1998).

[1] Previously, defendant was convicted by jury of second-degree murder, MCL 750.317; MSA 28.549, voluntary manslaughter, and felony-firearm. On appeal, this Court reversed defendant's convictions, holding that the trial court erred in refusing to suppress one of defendant's statements to police. *People v Stawarz*, unpublished opinion per curiam of the Court of Appeals, issued October 11, 1996 (Docket No. 179010).

Defendant next argues that he is entitled to resentencing because his sentences are invalid. Specifically, defendant contends that the trial court made an independent determination that he had committed second-degree murder. We disagree. A trial court's imposition of a particular sentence is reviewed for an abuse of discretion. *People v Compagnari*, 233 Mich App 233, 236; 590 NW2d 302 (1998); *People v Castillo*, 230 Mich App 442, 447; 584 NW2d 606 (1998). A trial court may not make an independent finding that a defendant was guilty of a greater offense than was determined by the jury and use the greater offense as a basis for justifying the sentence imposed. *People v Fortson*, 202 Mich App 13, 21; 507 NW2d 763 (1993).

Here, the record indicates that, contrary to defendant's argument, the trial court did not make such a determination. The court explicitly stated that, *based upon the guidelines*, it was imposing a ten- to fifteen-year sentence for one of the voluntary manslaughter convictions. The trial court merely noted that this sentence was also consistent with the ten- to twenty-year sentence that defendant received for the second-degree murder conviction after his first trial, although the convictions resulting from the first trial were reversed on appeal. At no point during defendant's sentencing hearing did the trial court state that it believed that defendant had actually committed second-degree murder rather than voluntary manslaughter. Therefore, the trial court did not make an independent determination that defendant had committed a greater offense than that for which he was convicted. See, generally, *People v Shavers*, 448 Mich 389, 392-394; 531 NW2d 165 (1995). Because defendant's sentences were not invalid, resentencing is not required.

Next, defendant claims that he was denied a fair trial because the prosecutor's remarks during closing argument impermissibly shifted the burden of proof to defendant. Again, we disagree. Appellate review of alleged prosecutorial misconduct is precluded unless a defendant makes a timely objection. *People v Carines*, 460 Mich 750, 761-764; 597 NW2d 130 (1999); *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). Here, because defendant made no objection, we review his claim only for plain error. *Carines*, *supra*; *Schutte*, *supra*.

Prosecutorial misconduct is reviewed on a case-by-case basis, considering contested remarks in context, as a whole, and in light of defense arguments. *Schutte*, *supra* at 721. A prosecutor may properly argue the evidence and draw reasonable inferences from the evidence presented at trial. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995); *People v Kelly*, 231 Mich App 627, 641; 588 NW2d 480 (1998). Where impermissible comments are made in response to arguments previously raised by defense counsel, reversal is not required. *People v Vaughn*, 200 Mich App 32, 39; 504 NW2d 2 (1993); *People v Stacy*, 193 Mich App 19, 36; 484 NW2d 675 (1992).

In the present case, defendant contends that the prosecutor's remarks shifted the burden of proof to defendant by highlighting and calling for defendant to produce evidence of his knowledge of the prior violent acts of the victims, which is evidence that only defendant could have produced. However, we conclude that the prosecutor's remarks, read in context and in light of defense counsel's closing argument, were not improper. *Vaughn*, *supra*; *Stacy*, *supra*. In response to defense counsel's comments that the victims were "rough characters", the prosecutor's remarks merely pointed out that there was no evidence that defendant knew of one of the victim's reputation for having previously "threw somebody through a window one time."

This argument did not shift the burden of proof, but rather constituted fair comment on the evidence presented at trial. *Bahoda, supra*; *Kelly, supra*. The prosecutor permissibly argued that, while a witness believed that that victim was a rough and violent person, no evidence was presented that defendant was of the same opinion. Defendant's state of mind was pertinent to his theory of self-defense and whether he reasonably believed that he was threatened with serious bodily harm. Thus, the prosecutor's comments were properly made in response to defense counsel's own remarks, *Kelly, supra* at 641, and did not constitute plain error, *Carines, supra* at 763; *Schutte, supra* at 720.

Affirmed.

/s/ Martin M. Doctoroff
/s/ Donald E. Holbrook, Jr.
/s/ Joel P. Hoekstra