

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HAROLD DEWAYNE BEAN,

Defendant-Appellant.

UNPUBLISHED

November 27, 2001

No. 224968

Ingham Circuit Court

LC No. 98-074013-FH

Before: O’Connell, P.J., and Sawyer and Smolenski, JJ.

PER CURIAM.

Defendant appeals as of right his jury conviction of assault with intent to do great bodily harm less than murder, MCL 750.84, for which he was sentenced to five to ten years’ imprisonment. We affirm.

Defendant raises several issues on appeal. He first contends that the trial court violated his constitutional right to testify on his own behalf when the court refused to reopen proofs to allow defendant’s testimony. This Court reviews a trial court’s denial of a defendant’s request to reopen proofs for an abuse of discretion. *People v Solomon (Amended Opinion)*, 220 Mich App 527, 534; 560 NW2d 651 (1996), cert den 524 US 930; 118 S Ct 2327; 141 L Ed 2d 701 (1998).

Defendant correctly asserts that his right to testify on his own behalf is an important factor in his constitutional right to due process. *Solomon, supra* at 533-534, citing *Rock v Arkansas*, 483 US 44, 51-52; 107 S Ct 2704; 97 L Ed 2d 37 (1987). This right is, however, not absolute, and a defendant’s right to testify may yield to legitimate interests in the criminal trial process. *Id.* at 534.

This Court affirmed a trial court’s denial of a defendant’s request to reopen proofs to accommodate his testimony where the request was made *after* closing arguments and where the defendant had previously waived his right to testify. *People v Moore*, 164 Mich App 378, 384; 417 NW2d 508 (1987), modified 433 Mich 851; 442 NW2d 638 (1989). In the absence of changed circumstances or unfair advantage to the prosecution, a trial court may properly deny a defendant’s request to testify after the close of proofs. *Id.* at 384. Here, the evidence supports a conclusion that defendant previously decided not to testify and later acquiesced in his attorney’s recommendation at trial when defendant first indicated his desire to testify. We are convinced

that the trial court did not abuse its discretion by denying defendant's untimely request to testify on his own behalf.

Defendant next claims that he was denied the effective assistance of counsel. Because defendant did not raise the specific errors he asserts on appeal as evidence of his counsel's ineffective assistance, the issue was not preserved. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). Our review of a defendant's unpreserved claim of ineffective assistance of counsel is limited to the existing record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

A reversal based on ineffective assistance of counsel is justified if a defendant affirmatively shows that his counsel's performance fell below an objective standard of reasonableness and prejudiced him to the extent that he was denied a fair trial. *People v Williams*, 240 Mich App 316, 330; 614 NW2d 647 (2000); *People v Mitchell*, 454 Mich 145, 158, 164-167; 560 NW2d 600 (1997). A defendant bears a heavy burden of disproving the presumption of his counsel's competence. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). He must also show that actual prejudice resulted from his counsel's ineffectiveness – that is, had counsel not erred, there existed a reasonable probability that the result of the trial would have been different. *People v Murray*, 234 Mich App 46, 65; 593 NW2d 690 (1999); *Mitchell*, *supra* at 158, 164-167.

Defendant first alerted his attorney of his desire to testify immediately after the close of proofs. Defendant's attorney did not raise defendant's request before the trial judge but quietly reminded defendant of his previous agreement that it was not in defendant's best interests to testify. After the jury retired to the jury room but before it began deliberations, defendant addressed the court and raised the issue himself. Defendant informed the trial judge that before closing arguments began he told his attorney he wanted to testify, but that his attorney simply reminded defendant of his previous decision not to testify, a decision defendant claimed not to recall. Defense counsel acknowledged the interchange with defendant and further admitted that he did not bring defendant's request to the court's attention at the time.

A defense attorney may not override a defendant's decision to exercise his constitutional right to testify truthfully—regardless of the attorney's preference or the testimony's potential effect on the attorney's established trial strategy. *United States v Curtis*, 742 F 2d 1070, 1076 (CA 7, 1984), cert den 475 US 1064; 106 S Ct 1374; 89 L Ed 2d 600 (1986). A defendant has no right to testify falsely, and a defense attorney has the concomitant duty not to present testimony he knows is false. *Id.* In the absence of any evidence regarding the substance of defendant's potential testimony, this Court presumes defendant would have testified truthfully.

Defendant's attorney should have responded to defendant's request to testify by immediately bringing it to the court's attention. Had defense counsel moved to reopen proofs when defendant first asked him about testifying, the trial court could not have denied the request without abusing its discretion. *Solomon*, *supra* at 535 (trial court's refusal to reopen proofs for the defendant's testimony was an abuse of discretion where the defendant made the request before closing arguments and only thirty minutes after the close of proofs). Defense counsel's failure to address defendant's request was error—an error which, in light of defendant's

unquestionable right to testify on his own behalf and the minimal effort required by defense counsel to move the court to reopen proofs, was objectively unreasonable. *Williams, supra* at 330.

However, to support his claim of ineffective assistance of counsel on this issue, defendant still must show that counsel's failure to respond to his request to testify prejudiced the outcome of the trial—that the jury likely would have reached a different verdict if it had considered defendant's testimony. *Williams, supra* at 330; *Mitchell, supra* at 158, 164-167. Although defense counsel's failure to respond immediately did deprive defendant of his right to testify, reversal is not warranted. We are not convinced that defendant's testimony was likely to have had any measurable effect on the outcome of the trial in light of the other evidence presented. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999).

Defendant also claims that the last-minute substitution of his trial counsel deprived him of effective assistance of counsel because his attorney was left with little time to prepare his defense before trial. Absent any affirmative showing of his counsel's errors and their prejudicial effect on the outcome of defendant's trial, an attorney's preparation time—however short it may appear to defendant—does not merit a presumption that defendant was deprived of the effective assistance of counsel. *Mitchell, supra* at 161-162; *United States v Cronin*, 466 US 648, 664-665; 104 S Ct 2039; 80 L Ed 2d 657 (1984), on remand 839 F2d 1401 (CA 10, 1988), after remand 900 F2d 1511 (CA 10, 1990).

Defendant cites his trial counsel's failure to move for a hearing regarding the admissibility of the prosecution witnesses' in-court identification as further evidence that he was denied the effective assistance of counsel. We disagree. An independent basis for a witness' in-court identification is unnecessary where a defendant has not shown that the pretrial identifications were impermissibly suggestive. *People v McElhaney*, 215 Mich App 269, 288; 545 NW2d 18 (1996). Even if defendant could have succeeded in showing that the pretrial identifications were made under circumstances substantially likely to produce misidentification, clear and convincing evidence existed independent of the pretrial identification to support the admissibility of the in-court identifications. *People v Colon*, 233 Mich App 295, 305; 591 NW2d 692 (1998). Counsel need not argue a meritless issue. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Defendant next contends that insufficient evidence was presented at trial to support his conviction. This Court reviews a defendant's claim of insufficient evidence to determine whether a rational trier of fact would be justified in finding that each element of the charge was proven beyond a reasonable doubt, and resolves all conflicts of fact in favor of the prosecution. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

Assault with the intent to do great bodily harm less than murder requires proof of (1) an attempt or threat with force or violence to do corporal harm to another, and (2) an intent to do great bodily harm less than murder. MCL 750.84; *People v Pena*, 224 Mich App 650, 659; 569 NW2d 871 (1997), modified on other grounds 457 Mich 885; 586 NW2d 925 (1998).

Defendant asserts that the lack of physical evidence linking him to the assault and the inconsistent testimony of witnesses at trial should preclude a rational trier of fact from finding him guilty beyond a reasonable doubt of the charged crime. However, reasonable inferences drawn from circumstantial evidence may be sufficient to prove the elements of a crime. *People v Jolly*, 442 Mich 458, 462; 502 NW2d 177 (1993). In its entirety, the evidence was sufficient to support the jury's verdict.

Defendant next contends that the prosecutor improperly asserted its belief in defendant's guilt and its belief that defendant's statements to the police were untruthful. Defendant failed to preserve this issue for appellate review. This Court's review of improper prosecutorial remarks is generally precluded in the absence of objection because the trial court was deprived of the opportunity to cure the alleged error. *People v Green*, 228 Mich App 684, 693; 580 NW2d 444 (1998). A jury's verdict will not be disturbed unless the error could not have been cured by a timely instruction at trial or this Court's failure to address the error would result in manifest injustice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994), cert den sub nom *Michigan v Caruso*, 513 US 1121; 115 S Ct 923; 130 L Ed 2d 802 (1995).

The prosecution may remark on the evidence admitted at trial and all reasonable inferences that can be drawn from the evidence as they relate to the prosecution's theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). A prosecutor's remarks cannot be viewed in isolation—the scope of appellate review must include the context in which the remarks were made. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). In addition, a prosecutor may argue from the facts that a defendant is not believable. *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996). A prosecutor may likewise draw reasonable inferences from the evidence admitted at trial and argue that those inferences indicate a defendant's guilt. *People v Kelly*, 231 Mich App 627, 641; 588 NW2d 480 (1998). The prosecutor's comments during closing and rebuttal arguments were well within the parameters of proper advocacy supported by evidence admitted at trial and permissible inferences arising from the evidence.

Defendant next contends, without evidentiary support, that the police officers' entry into his bedroom and seizure of clothing from within the room violated defendant's state and federal constitutional rights to be free from unreasonable searches and seizures. Defendant's failure to raise this issue below forfeited it for appellate review. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).

Finally, defendant asserts that the trial court's upward departure from the minimum sentence recommended under the sentencing guidelines was impermissibly based on factors adequately addressed by OV scoring in his PSIR. This Court reviews sentence proportionality for an abuse of discretion. *People v Alexander*, 234 Mich App 665, 679; 599 NW2d 749 (1999); *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). The critical test of proportionality is whether the sentence imposed reflects the seriousness of the crime, not whether it departs from or adheres to the recommended sentence length under the sentence guidelines. *People v Castillo*, 230 Mich App 442, 448; 584 NW2d 606 (1998).

A trial court's upward or downward departure from the sentencing guidelines is appropriate when the guidelines do not adequately account for legitimate factors relevant to tailoring a sentence proportionate to the seriousness of the offense. *Milbourn, supra* at 657; *Castillo, supra* at 448. A trial court may also consider circumstances related to the conviction, even where those circumstances are already reflected in the variable scores. *People v Ridley*, 142 Mich App 129, 134; 369 NW2d 274 (1985). The trial court was entitled to consider evidence regarding defendant's motive underlying the assault and did not abuse its discretion in exceeding the recommended minimum sentence under the guidelines.

Affirmed.

/s/ Peter D. O'Connell

/s/ David H. Sawyer

/s/ Michael R. Smolenski