

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICHARD PEREZ,

Defendant-Appellant.

UNPUBLISHED
February 15, 2002

No. 224953
Wayne Circuit Court
Criminal Division
LC No. 99-005610

Before: Saad, P.J., and Bandstra, C.J., and Whitbeck, J.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to do great bodily harm less than murder, MCL 750.84, and malicious destruction of property over \$1,000 but less than \$20,000, MCL 750.377a(1)(b)(i). He was sentenced to concurrent prison terms of four to ten years for the assault conviction, and two to five years for the malicious destruction of property conviction. Those sentences were vacated by the trial court, which then sentenced defendant to the same term as a second habitual offender, MCL 769.10. Defendant appeals as of right. We affirm defendant's convictions, but vacate his sentence and remand for resentencing.

Defendant first argues that misconduct by the prosecutor denied him a fair trial. Because defendant did not object to the challenged conduct at trial, we review this issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

After reviewing defendant's unpreserved allegations of error, we conclude that defendant has failed to demonstrate plain error affecting his substantial rights, i.e., error that is clear or obvious and affected the outcome of the proceedings. *Id.* Defendant has failed to show that the prosecutor acted in bad faith when questioning a witness with respect to whether discrepancies in the witness' trial testimony and prior statements were possibly attributable to threats or coercion by defendant. Defendant has failed to show that the prosecutor's questioning did not involve a good-faith attempt to introduce legitimate evidence. *People v Noble*, 238 Mich App 647, 660-661; 608 NW2d 123 (1999). Similarly, although we agree that a statement made by the prosecutor during closing argument could be viewed as an improper "civic duty" argument, *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995), the statement was both brief and isolated. Consequently, the statement was not so prejudicial that it affected the outcome of this trial. See *People v Duncan*, 402 Mich 1, 15-17; 260 NW2d 58 (1977); *People v Rivera*, 216 Mich App 648, 651-652; 550 NW2d 593 (1996). Accordingly, appellate relief is not warranted on the basis of this unpreserved issue.

Defendant next maintains that the trial court's comments and questions during trial demonstrated a bias toward the prosecution and deprived him of his constitutional right to a fair trial. Again, because defendant did not preserve this issue by objecting to the challenged conduct at trial, our review is limited to plain error affecting defendant's substantial rights. *Carines, supra*; *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). Defendant first refers to the court's opening remarks directing the jurors not to find defendant guilty or innocent until they had heard all of the evidence. The remarks, however, were neutral and balanced, and simply involved an instruction that the jurors were to hear all of the evidence before making a decision. The remarks were not plainly improper. Moreover, although defendant also challenges the court's conduct in questioning prosecution witnesses, there was nothing in the court's questioning demonstrating partiality or impropriety. See MRE 614; *People v Cheeks*, 216 Mich App 470, 480-481; 549 NW2d 584 (1996).

Defendant also argues that the trial court improperly instructed the jury that

[t]he intent with which an assault is made can sometimes be determined by whether a dangerous weapon was used. A dangerous weapon is any instrument that is used in a way that is likely to cause serious physical injury or death.

This instruction, which is the embodiment of CJI2d 17.8, is not plainly erroneous. See *People v Crane*, 27 Mich App 201, 204; 183 NW2d 307 (1970). Accordingly, we conclude that defendant has failed to demonstrate that relief is warranted on these unpreserved issues. *Carines, supra*.

Lastly, defendant argues that the trial court erred when it departed from the statutory sentencing guidelines' recommended minimum sentence range of ten to twenty-eight months and imposed a sentence of four to ten years. We agree.

A trial court may not properly depart from the sentencing guidelines recommended minimum sentence range absent substantial and compelling reasons to do so. MCL 769.34(11). Factors meriting departure must be objective and verifiable. *People v Babcock*, 244 Mich App 64, 79; 624 NW2d 479 (2000). We review a trial court's determination that a particular factor is objective and verifiable de novo as a matter of law. *Id.* at 76. A trial court's determination that the objective and verifiable factors present in a particular case constitute substantial and compelling reasons to depart from the guidelines is reviewed, however, for an abuse of discretion. *Id.*

In the instant case, the sole reason given by the trial court for departing from the sentencing guidelines was that defendant had not shown remorse for his crimes.¹ Because a defendant's remorse, or lack thereof, is not generally objective and verifiable, see *People v Daniel*, 462 Mich 1, 7-8; 609 NW2d 557 (2000); *People v Fields*, 448 Mich 58, 69, 80; 528 NW2d 176 (1995); see also *Babcock, supra* at 74, we conclude that it does not constitute a proper basis for departing from the sentencing guidelines' recommended range unless it is capable of being independently confirmed through objective manifestations. No such manifestations are apparent on the record provided to this Court on appeal. Moreover, review of

¹ Because neither the sentencing information report nor its accompanying departure evaluation form are contained in the record submitted to this Court on appeal, we base our conclusion in this regard solely on a review of the sentencing transcript.

the record suggests that the trial court based its conclusion that defendant was not remorseful solely on the fact that defendant maintained his innocence at sentencing. Although evidence of a lack of remorse may properly be considered in determining a defendant's potential for rehabilitation, a defendant's claim of innocence is not a proper consideration in any sentencing decision. See *People v Wesley*, 428 Mich 708, 711; 411 NW2d 159 (1987) ("a sentencing court cannot, in whole or in part, base its sentence on a defendant's refusal to admit guilt"). Accordingly, we hold that the trial court erred in departing from the sentencing guidelines' range because of defendant's perceived lack of remorse, and thus vacate defendant's sentence and remand for resentencing. MCL 769.34(11).

We affirm defendant's convictions, vacate the sentence and remand for resentencing. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Richard A. Bandstra
/s/ William C. Whitbeck