

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CLARENCE ANTHONY HIGGINS,

Defendant-Appellant.

UNPUBLISHED
November 15, 2011

No. 299752
Oakland Circuit Court
LC No. 2010-231226-FC

Before: SERVITTO, P.J., and CAVANAGH and STEPHENS, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of one count of armed robbery, MCL 750.529, one count of possession of a firearm during commission of a felony (felony-firearm), MCL 750.227b, one count of third-degree fleeing and eluding, MCL 257.602a(3), and one count of receiving and concealing a stolen motor vehicle, MCL 750.535(7). Defendant was sentenced as a fourth-offense habitual offender, MCL 769.12, to concurrent terms of 20 to 60 years' imprisonment for all of the above crimes with the exception of felony-firearm, for which he received the statutory two-year consecutive sentence. Because the prosecution did not engage in misconduct that denied defendant a fair trial and because defendant is not entitled to resentencing, we affirm.

Defendant's convictions arise out of an armed robbery of an Allied Cash Advance business in Oakland County. According to an employee of Allied Cash Advance, a man came into the business and asked if he could cash a check. A second man, later identified as defendant, came into the business behind the first man, cocked a gun and pointed it at his face. The two men then robbed the business, taking the employee's personal property as well, and fled. Police located a stolen mini-van, driven by defendant, within a few miles of the Allied Cash business shortly after the robbery. Defendant refused to stop the vehicle and when a patrol car collided with the vehicle in an attempt to force its stop, defendant exited the vehicle and began running. He was apprehended and charged in the instant matter a short time later.

On appeal, defendant first argues that he was denied a fair trial as a result of prosecutorial misconduct. Specifically, defendant takes issue with the prosecutor's comments during his closing argument that the armed robbery nearly resulted in the death of the victim. We disagree that the comments constituted misconduct.

Defendant did not timely object in the court below to the challenged remarks. Therefore, this issue is unpreserved. *People v Unger*, 278 Mich App 210, 234-235; 749 NW2d 272 (2008). Accordingly, our review is limited to ascertaining whether there was plain error that affected substantial rights. *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008). Under such standard, reversal is only warranted where plain error resulted in the conviction of an innocent person, or seriously affected the fairness, integrity, or public reputation of the proceedings. *Unger*, 278 Mich App at 235.

Prosecutorial misconduct issues are decided on a case-by-case basis, with this Court examining the prosecutor's remarks in context. *People v Mann*, 288 Mich App 114, 119; 792 NW2d 53 (2010). A prosecutor is not allowed to appeal to the jury to sympathize with the victim. *Unger*, 278 Mich App at 237. However, because jurors are presumed to follow their instructions, *People v Hana*, 447 Mich 325, 351; 524 NW2d 682 (1994), comments by the prosecutor that could be viewed as inviting the jury to sympathize with the victim generally do not warrant reversal where the trial court gave a proper instruction to the jury not to be influenced by sympathy or prejudice, *People v Watson*, 245 Mich App 572, 591-592; 629 NW2d 411 (2001).

During closing argument, the prosecutor commented that "[t]his was a very, very, very, very serious crime that could have turned out a whole lot differently, and you know how it happens that way all the time, unfortunately." Subsequently, the prosecutor repeated this sentiment: "One wrong step, one wrong move on [the victim's] part, this would be a homicide case. If [defendant] got a little bit nervous or scared, maybe if the alarm did get hit, this could have been a murder case." These statements were somewhat inflammatory in that they invite the jurors to consider the dire consequences that could have befallen the victim if the armed robbery had taken a bad turn. The prosecutor's isolated comments, however, were not part of a continuous pattern of eliciting sympathy for the victim and were not so inflammatory so as to prejudice defendant. *Id.*

Moreover, the trial court properly instructed the jury to decide the case on the basis of the evidence, not on any sympathy felt or prejudice held. "Remember," the trial court charged the jurors, "you have taken an oath to return a true and just verdict based only on the evidence and my instructions on the law. You must not let sympathy or prejudice influence your decision." Further, the trial court instructed that "you may only consider evidence that is properly admitted in the case," which does not include the "lawyers' statements and arguments." Given the trial court's clear instructions, and the reasonable presumption that those instructions were followed, *Hana*, 447 Mich at 351, defendant has not carried his burden of showing that the prosecutor's brief statements amounted to plain error that denied him a fair trial.

Defendant next argues that the trial court erred in not scoring the guidelines for all of defendant's convictions, as well as failing to articulate substantial and compelling reasons for departing from what the guidelines would have been for his fleeing and eluding, and receiving and concealing convictions. Accordingly, defendant contends he is entitled to resentencing. We disagree.

This Court stated in *People v Mack*, 265 Mich App 122, 126-128; 695 NW2d 342 (2005), that when a sentencing court imposes concurrent sentences for multiple offenses of different

crime classes, a presentence report need only include a scoring grid for consideration for the crime having the highest crime class. See MCL 771.14(2)(e)(ii).¹ *Mack* was called into question by *People v Johnigan*, 265 Mich App 463, 470-472; 696 NW2d 724 (2005), the case relied upon by defendant for the proposition that the trial court was required to score a minimum guidelines range for each felony. In extended dicta, the majority in *Johnigan* explained why it felt that *Mack's* “interpretation of MCL 777.21(2) is erroneous.” *Id.* at 470. “[T]he result that the *Mack* Court should have reached is that, under the clear language of MCL 777.21(2) as written, a sentencing court must score the sentencing guidelines for all offenses that fall within the scope of the guidelines.” *Id.* at 471. However, the *Johnigan* majority based its ultimate conclusion regarding MCL 777.21(2) on the statute’s plain language while simultaneously recognizing that the language may “produce an illogical and even unintended result.” In fact, the majority noted, perhaps “the Legislature intended to reference § 14 of chapter XI (MCL 771.14) [instead of § 14 of chapter IX (MCL 769.14)] in MCL 777.21(2) indicating that then “the result reached in *Mack*” would not be in error. *Johnigan*, 265 Mich App at 471. The Legislature in fact amended MCL 777.21(2) in 2006 (arguably in response to *Johnigan*), substituting “chapter XI” for “chapter IX.” 2006 PA 655. This amendment renders any conflict between *Mack* and *Johnigan* illusory. Therefore, this Court is required to follow *Mack* pursuant to MCR 7.215(J)(1).

The trial court scored defendant for armed robbery, which is a class A felony. MCL 777.16y. It therefore did not have to score the defendant for fleeing and eluding, a class E felony, MCL 777.12e, or receiving and concealing a stolen vehicle, also a class E felony. MCL 777.16z. *Mack*, 265 Mich App at 125-129. In light of *Mack*, the sentence imposed on defendant for the lesser-class felonies for which he was convicted did not have to be supported by substantial and compelling reasons, because the lesser-class felonies did not have to be scored at all.

Affirmed.

/s/ Deborah A. Servitto
/s/ Mark J. Cavanagh
/s/ Cynthia Diane Stephens

¹ The *Mack* Court questioned, without deciding, whether a sentence for a lesser unscored felony could permissibly exceed the sentence imposed for the higher-class felony and remain proportional. *Mack*, 265 Mich App at 128-129.