

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEVEN P.J. STEWART

Defendant-Appellant.

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UNPUBLISHED

May 24, 1996

No. 168920 and 178415

LC No. 93-060929

Before: Saad, P.J., and McDonald and M. A. Chrzanowski\*, JJ.

PER CURIAM.

In docket number 168920 defendant appeals as of right from his jury trial conviction of unarmed robbery, MCL 750.530; MSA 28.798 and resulting sentence of twenty-four months' probation. In docket number 178415 defendant appeals from the revocation of his probation, MCR 6.445, MCL 771.4; MSA 28.1134, following a revocation hearing conducted after defendant and his brother assaulted defendant's girlfriend and another woman, and resulting prison sentence of from four to fifteen years. We affirm but remand for calculation of sentencing credit.

Docket number 168920

No prosecutorial misconduct arose from the prosecutor's remarks distinguishing sworn testimony from defendant's unsworn statement to the police. Such remarks are a permissible comment on what weight the jury should give the evidence. *People v Guenther*, 188 Mich App 174; 469 NW2d 59 (1991). Moreover, any error would have been cured by the court's instruction to the jury regarding the weight to be afforded defendant's statement. *People v Gonzalez*, 178 Mich App 526; 444 NW2d 228 (1989). The trial court did not abuse its discretion in scoring the defendant's sentence information report. *People v Derbeck*, 202 Mich App 443; 509 NW2d 534 (1993). The record contains sufficient information to support the scoring. *People v Warner*, 190 Mich App 26; 475 NW2d 397 (1991).

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\* Circuit judge, sitting on the Court of Appeals by assignment.

Finally, it appears, as conceded by the prosecution, defendant is entitled to 12 days sentencing credit for the time defendant was incarcerated pending trial. However, we are unable to discern from the record whether the 126 day credit defendant was given following his probation revocation hearing included this 12 days. We therefore remand the matter to the trial court to determine whether defendant was credited the proper number of days.

Docket #178414

Defendant's claim he was denied a fair hearing before revocation of his probation is without merit. Although a probationer is denied his right to a fair hearing when he is unable to call witnesses on his own behalf, there is nothing in this record to suggest the court or prosecutor in any manner infringed on defendant's right to call witnesses or present a defense. *In re Bobowski*, 313 Mich 521; 21 NW2d 838 (1946).

We also find no deprivation of defendant's right to the effective assistance of counsel. We note defendant's failure to move for a *Ginther*<sup>1</sup> hearing, as well as his failure to provide us with a copy of the transcript of his motion for a new trial before the trial court, limits our review of this claim to alleged errors apparent from the record. *People v Johnson (On Reh)*, 208 Mich App 137; 526 NW2d 617 (1994). The record fails to demonstrate the alleged deficiencies in defense counsel's representation. Counsel's decision not to call defendant's brother, who was a codefendant, could easily have been sound trial strategy. Defendant has failed to overcome the strong presumption that his counsel's actions were the product of sound trial strategy. *People v Hurst*, 205 Mich App 634; 517 NW2d 858 (1994).

Finally, we find defendant's sentence to be proportionate to both the offense and the offender. *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). A trial court may take into account a defendant's actions and the seriousness and severity of the facts and circumstances surrounding a probation violation in arriving at the proper sentence to be given. *People v Peters*, 191 Mich App 159; 477 NW2d 479 (1991).

Affirmed but remanded for calculation of sentencing credit.

/s/ Henry William Saad

/s/ Gary R. McDonald

/s/ Mary A. Chrzanowski

<sup>1</sup> *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973)