# STATE OF MICHIGAN

# COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PEGGY RANNA MORRIS,

Defendant-Appellant.

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UNPUBLISHED
November 8, 1996

No. 180517
LC No. 93-126344

Before: Michael J. Kelly, P.J., and Hoekstra and E.A. Quinnell,* JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279, and was sentenced to a prison term of four to ten years. Defendant appeals as of right, and we affirm.

In this case, the prosecution alleged that defendant stabbed the victim numerous times on the evening of May 28, 1993, while at a party. Apparently, the stabbing occurred as a result of a dispute between the victim and defendant over a mutual boyfriend. Defendant claimed self-defense.

Defendant claims that several instances of prosecutorial misconduct resulted in error warranting reversal. We disagree. Only defendant's claim that the prosecutor improperly chastised defense counsel by suggesting that defense counsel was intentionally trying to mislead the jury was preserved for review by an objection. While it is improper for a prosecutor to attack defense counsel in his arguments and suggest to the jury that defense counsel is intentionally trying to mislead the jury, a prosecutor may suggest that the defendant is lying. *People v Dalessandro*, 165 Mich App 569, 580; 419 NW2d 609 (1988). Here, the prosecutor's comments did not chastise defense counsel. Rather, the prosecutor was arguing that defendant's story that she had acted in self-defense was not believable based on the evidence which would be, or had been, presented.

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

All of defendant's remaining claims of prosecutorial misconduct are unpreserved. Appellate review of alleged prosecutorial misconduct is foreclosed where the defendant fails to object or request a curative instruction, unless the misconduct was so egregious that no curative instruction could have removed the prejudice to the defendant, or if manifest injustice would result from our failure to review the alleged misconduct. *People v Paquette*, 214 Mich App 336, 341-342; 543 NW2d 342 (1995). We have reviewed defendant's unpreserved claims of prosecutorial misconduct and conclude that manifest injustice will not result from our failure to provide further review because the claims either were without merit or any possible prejudice could have been removed by curative instructions.

Next, defendant raises a number of instructional errors that she asserts denied her the right to a properly charged jury and due process of law. Again, we disagree. Defendant argues that an instruction by the court on the presumption of innocence at the beginning of voir dire removed from the jury's consideration a not guilty verdict. Defendant failed to raise an objection to this instruction. Appellate courts will refrain from reviewing instructional errors absent an objection, except upon a showing that manifest injustice will result from a failure to review. *People v Vaughn*, 200 Mich App 32, 39-40; 504 NW2d 2 (1993). We conclude that no manifest injustice will result from our failure to review because the instruction given by the trial court was not misleading.

Defendant also argues that the trial court should have instructed on nondeadly force instead of deadly force when it gave the instructions on self-defense. Deadly force is defined as when "the defendant's acts are such that the natural, probable, and foreseeable consequence of said acts is death." *People v Pace*, 102 Mich App 522, 534; 302 NW2d 216 (1980). The test is not whether death actually resulted. *Id.* If conflicting evidence is presented regarding whether the force was deadly under this definition, then the court should give both the instruction on deadly and non-deadly force. *Id.*, at 534, n 7.

Here, the evidence was not conflicting; the force used by defendant was deadly. Although none of the victim's injuries actually caused her death or proved to actually be life threatening, the defendant's acts of repeatedly stabbing the victim in her head, chest and extremities are the type of acts from which one would believe that the natural, probable and foreseeable consequence is death. Thus, error did not occur when the court instructed the jury only on deadly force. See *People v Clark*, 172 Mich App 407, 417-418; 432 NW2d 726 (1988).

Also, defendant asserts that the court invaded the province of the jury when it instructed the jury to first consider the offense charged. Defendant contends that the court should have instructed the jury that it could first consider the issue of self-defense. Defendant has abandoned this issue on appeal because she cites no authority that the order in which a court instructs the jury to deliberate can constitute error. *People v Piotrowski*, 211 Mich App 527, 530; 536 NW2d 293 (1995). Moreover, because the instructions fairly presented the issue of self-defense such that defendant's rights were protected, error did not result. *People v Bell*, 209 Mich App 273, 276; 530 NW2d 167 (1995).

Thirdly, defendant argues that she received ineffective assistance of counsel. Defendant did not move for a new trial or a hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973). Thus, our review is limited to deficiencies apparent from the record. *People v Johnson (On Reh*), 208 Mich App 137, 142; 526 NW2d 617 (1994). In order to succeed on a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that the representation prejudiced the defendant to the point of depriving him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Effective assistance is presumed and the defendant bears a heavy burden proving otherwise. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

Defendant claims that counsel was ineffective for failing to request that CJI2d 5.8a, character evidence regarding conduct of defendant, be given. We agree that this instruction should have been requested. However, the failure to request this instruction does not amount to ineffective assistance of counsel because there is not a reasonable probability that the result of the proceeding would have been different if counsel had requested, and the court had given, CJI2d 5.8a. *Stanaway*, *supra* at 687-688. Even if the jury had been instructed that they could consider defendant's reputation for peacefulness, the evidence was overwhelming that defendant attacked the victim with knives and did not act peaceful during this incident.

Additionally, defendant argues that counsel was ineffective in failing to object when the court did not instruct on non-deadly force. However, given our earlier conclusion that the force used was deadly, even if counsel had raised this objection, the jury would not have been instructed on non-deadly force. Defendant also argues that counsel was ineffective for failing to object to the claimed instances of prosecutorial misconduct raised on appeal. However, as has already been shown, none of these claims warrant reversal and accordingly, counsel was not ineffective for failing to object.

Finally, defendant argues that the trial court erroneously scored the sentencing guidelines. Defendant argues that the trial court erred in scoring offense variable two (OV2) at fifty points, reflecting that the victim had been treated with excessive brutality. We disagree. Appellate review of guidelines calculations is very limited and this Court should not disturb the scoring where there is record evidence to support the scores. *People v Johnson*, 202 Mich App 281, 288; 508 NW2d 509 (1993). Here, the victim was stabbed repeatedly with two knives while she was unarmed and lying on the floor. As a result of the stabbing the victim lost an eye and required stitches and plastic surgery. We find the scoring of fifty points under OV2 was supported by the record.

Affirmed.

/s/ Michael J. Kelly
/s/ Joel P. Hoekstra
/s/ Edward A. Quinnell