

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEVIN MAURICE WRIGHT,

Defendant-Appellant.

UNPUBLISHED

December 17, 1996

No. 188692

LC No. 95-068794 FH

Before: Taylor, P.J., and Markman and P. J. Clulo,* JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of felonious assault, MCL 750.82; MSA 28.277, and sentenced to concurrent terms of three to eight years' imprisonment as enhanced by his conviction as a second-offense habitual offender, MCL 769.10; MSA 28.1082. Defendant appeals of right. We affirm.

Defendant contends that he was denied a fair trial by the prosecutor's remarks during her rebuttal argument. We disagree. Rather than shifting the burden of proof, the prosecutor permissibly commented on the evidence and the validity of defendant's theory of self-defense. *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995); *People v Sharbnow*, 174 Mich App 94, 100; 435 NW2d 772 (1989).

In a related argument, defendant asserts that he was denied a fair trial by a remark of the trial court during its ruling on his objection to the prosecutor's rebuttal argument. Defendant did not preserve this issue by objecting at trial. *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995). No manifest injustice would result from our failure to review this issue because the jury was not unduly influenced by the trial court's review of what it believed to be the testimony before ruling on the objection. *Id.* at 340-341.

Defendant's remaining issues relate to his two concurrent three to eight year sentences. First, defendant contends that the sentencing court improperly made an independent finding of guilt with

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

respect to an offense of which he was acquitted and then considered it as a factor in sentencing. We disagree. Rather than making a finding of guilt with respect to a pending charge, the sentencing court permissibly considered the facts underlying the charged offenses, including whether the evidence was sufficient to convict defendant of higher offenses. *People v Shavers*, 448 Mich 389, 393-394; 531 NW2d 165 (1995); *People v Newcomb*, 190 Mich App 424, 427; 476 NW2d 749 (1991).

Defendant next argues that the sentencing court improperly considered his refusal to admit guilt in fashioning a sentence. Again, we disagree. The sentencing court cannot base its sentence on a defendant's refusal to admit guilt. *People v Yennior*, 399 Mich 892; 282 NW2d 920 (1977). However, upon review of the sentencing court's remark in context, we find that the sentencing court did not consider defendant's refusal to admit guilt, but rather merely noted that, despite defendant's continued assertion of innocence, the jury's guilty verdict would be the starting point for its sentencing decision. See *People v Drayton*, 168 Mich App 174, 178-179; 423 NW2d 606 (1988) (improper consideration of the failure to admit guilt is normally evidenced by the sentencing court's request that a defendant admit his guilt or an indication that a lesser sentence would be imposed if he so admitted).

Defendant contends that he is entitled to be resentenced because the sentencing court failed to inquire into the existence of his prior convictions before enhancing his sentences pursuant to the habitual offender statute. Initially, we note that this issue was not preserved for appeal. *People v Rodriguez*, 192 Mich App 1, 5; 480 NW2d 287 (1991). In 1994, the Legislature amended the habitual-offender statutes, eliminating a defendant's statutory right to a jury determination of his underlying convictions for enhancement purposes. 1994 PA 110. Now, the statute provides:

The existence of the defendant's prior conviction or convictions shall be determined by the court, without a jury, at sentencing, or at a separate hearing scheduled for that purpose before sentencing. The existence of a prior conviction may be established by any evidence that is relevant for that purpose, including, but not limited to, 1 or more of the following:

- (a) A copy of the judgment of conviction.
- (b) A transcript of a prior trial or a plea-taking or sentencing proceeding.
- (c) Information contained in the presentence report.
- (d) A statement of the defendant. [MCL 769.13(5); MSA 28.1085(5).]

We find no error because information regarding the prior convictions was contained in the presentence investigation report. Assuming, arguendo, that the court did not "determine" defendant's prior convictions, a remand would serve no useful purpose because defendant does not challenge the accuracy or constitutionality of the prior convictions. See *People v Ristich*, 169 Mich App 754, 759; 426 NW2d 801 (1988).

Finally, defendant argues that the sentencing court abused its discretion by imposing terms of incarceration that violate the principle of proportionality. Our review of defendant's habitual-offender sentences is conducted without reference to the sentencing guidelines for the underlying offenses and is limited to considering whether the sentences violate the principle of proportionality. *People v Gatewood (On Remand)*, 216 Mich App 559; 550 NW2d 265 (1996). Upon review of the instant offenses and the offender, we find that the sentencing court did not abuse its discretion because the sentences imposed are not disproportionate. *Id.* We are satisfied that defendant's sentences reflect the seriousness of the matter. *People v Houston*, 448 Mich 312, 320; 532 NW2d 508 (1995).

Affirmed.

/s/ Clifford W. Taylor
/s/ Stephen J. Markman
/s/ Paul J. Clulo