

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MITCHELL SMITH,

Defendant-Appellant.

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UNPUBLISHED  
February 14, 1997

No. 187851  
Recorder's Court  
LC No. 95-000630

Before: Hood, P.J., and Saad and T.S. Eveland\*, JJ.

PER CURIAM.

Defendant was convicted of carjacking, MCL 750.529A; MSA 28.797(1), following a jury trial. He was sentenced to life imprisonment. Defendant was subsequently convicted of habitual offender, fourth offense, MCL 769.12; MSA 28.1084. His carjacking sentence was vacated, and he was sentenced to life imprisonment for his habitual offender, fourth offense conviction. He appeals as of right. We affirm.

On December 19, 1994, the victim stopped at a Detroit gasoline station, while her six-year old daughter was asleep in the backseat of the car. The victim prepaid for her gas, pumped her gas, then returned to the window for her change. While at the window, the victim saw defendant ask the attendant for loose cigarettes, then walk away. As the victim walked back to her car, defendant started running for her car. The victim started running, but defendant got to the car first. Defendant jumped into the car. The victim screamed that her six-year old daughter was in the backseat. The victim grabbed the steering wheel and prevented defendant from closing the car door. Defendant found an extra set of keys, started the car, and began to drive away with the victim still clinging to the steering wheel. Defendant and the victim continued to struggle while the car traveled a few blocks down Harper Road. During the struggle, the victim reached into the backseat, retrieved the Club, an anti-theft steering wheel locking device, and began striking defendant with it.

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

The victim's arm eventually hit the car's gear shift and shifted the car into neutral, which slowed the car's speed. She pulled defendant out of the car and the two tumbled into the street. The victim got up and tried to catch the runaway car, but could not. The car continued down Harper Road and struck a restaurant. The victim continued fighting defendant, but managed to yell to bystanders to go and check on her daughter. A bystander went to the car and retrieved the victim's daughter, who was uninjured. The struggle between defendant and the victim ended when the EMS and the police arrived. By that time, defendant had managed to obtain the victim's purse and steal twelve or fifteen dollars from it.

Defendant first raises two claims of ineffective assistance of counsel. We initially note that defendant improperly supported his arguments with affidavits that he submitted to this Court in support of his motion to remand for a *Ginther*<sup>1</sup> hearing. A party may not submit as exhibits on appeal documents which were not part of the record below. *Isagholian v Transamerica Ins Corp*, 208 Mich App 9, 18; 527 NW2d 13 (1994). Furthermore, the affidavits were insufficient to support a remand for a *Ginther* hearing, and they remain insufficient to establish ineffective assistance of counsel.

In any event, effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing norms and that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Id.*

Defendant first claims that defense counsel was ineffective because he failed to fully cross-examine defense witness, Edmond Hasty, who could have testified that someone other than the victim was driving the car which allegedly struck defendant. Contrary to defendant's assertion, our review of the record reveals that defense counsel did ask Hasty whether he saw who struck defendant with the car. The witness testified that he did not see that. The witness only saw defendant flying in the air and a lady chasing a car. Furthermore, defense counsel's decision not to ask a witness a particular question may be a matter of trial strategy. This Court will not second-guess defense counsel's trial strategy. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987). Moreover, defendant has failed to allege or offer any evidence that, but for counsel's actions, there was a reasonable probability that the outcome of the trial would have been different.

Defendant also claims that defense counsel was ineffective because he failed to present expert medical testimony that would have corroborated his testimony that he sustained injuries when he was struck by a car. The decision to call a witness is a matter of trial strategy. *Id.* Again, this Court will not second-guess defense counsel's trial strategy. *Id.* Furthermore, defendant failed to offer any evidence that, but for his counsel's actions, the outcome of his trial would have been different, particularly where such testimony would not have exonerated defendant.

Defendant also raises two claims of prosecutorial misconduct. Neither has merit. The test of prosecutorial misconduct is whether defendant was denied a fair and impartial trial. *People v LeGrone*, 205 Mich App 77, 82-83; 517 NW2d 270 (1994). This Court reviews prosecutorial misconduct

issues on a case-by-case basis, and must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. *Id.* at 82.

Defendant first alleges that, during cross-examination, the prosecutor improperly asked defendant, "Mr. Smith, seriously, is that your testimony?" Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Lawton*, 196 Mich App 341, 353; 492 NW2d 810 (1992). Also, a prosecutor may argue that the defendant is not worthy of belief or is lying. *People v Gilbert*, 183 Mich App 741, 745-746; 455 NW2d 731 (1990). Defendant testified that he stepped into the street, was struck by a car, and then, for no apparent reason, a woman began beating him with a steering wheel locking device. In light of defendant's incredulous testimony, we are not convinced that the prosecutor's comment was improper.

Defendant also argues that the prosecutor's remarks, during closing argument, were improper. By not raising a timely objection in the trial court, defendant failed to preserve this issue for appeal. *People v Smith*, 205 Mich App 69, 75-76; 517 NW2d 255 (1994). Our review is, therefore, limited to whether the resulting prejudice, if any, was so great that it could not have been cured by an appropriate instruction by the trial court and whether failure to consider the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994), cert den sub nom *Michigan v Caruso*, \_\_\_ US \_\_\_; 115 S Ct 923; 130 L Ed 2d 802 (1995); *Smith, supra*. Our review of the prosecutor's closing argument reveals her comments were confined to the evidence presented and reasonable inferences drawn therefrom. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Defendant was not denied a fair and impartial trial.

Defendant finally argues that his life imprisonment sentence for habitual offender, fourth offense, was disproportionate and excessively severe. We disagree. This Court's review of an habitual offender sentence is limited to considering whether the sentence violates the principle of proportionality. *People v Gatewood (On Rem)*, 216 Mich App 559, 560; 550 NW2d 265 (1996). The principle of proportionality requires that the sentence imposed be proportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

The circumstances surrounding this offense were serious. Defendant stole the victim's car knowing that her six-year old daughter was in the backseat. Defendant dragged the victim along side the car as he drove from the gas station. While the car swerved across the road, defendant repeatedly punched the victim with a closed fist and tried to choke her with the scarf she wore around her neck. Defendant either jumped out of the car or was pulled out by the victim during their struggle, which sent the unattended vehicle crashing into a restaurant with the six-year old child in the backseat. Defendant continued to beat on the victim and attempted to steal her purse. As the sentencing court stated, and we agree, defendant beat the victim "like an animal." The court also noted that defendant's psychiatric report revealed that defendant is "an individual who cares nothing about anyone else; who is only concerned for himself."

Moreover, defendant has an extensive criminal history. At trial, defense counsel even acknowledged that defendant “has a terrible record.” Defendant’s adult record includes multiple convictions for breaking and entering, carrying a concealed weapon, and controlled substances offenses. In fact, at the time he committed the instant offense, defendant was on parole from a sentence for delivery of a controlled substance. Defendant’s juvenile record includes offenses such as truancy, larceny from a building, unlawfully driving away an automobile, and receiving and concealing stolen property over \$100. Defendant’s criminal history indicates a total disregard for the law and resistance to rehabilitation. Defendant’s life imprisonment sentence was proportional to the offender and the circumstances surrounding the offense. The trial court did not abuse its discretion.

Affirmed.

/s/ Harold Hood

/s/ Henry William Saad

/s/ Thomas S. Eveland

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