

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STACY MARTELL SWIMP,

Defendant-Appellant.

UNPUBLISHED

April 18, 1997

No. 177407

Genesee Circuit Court

LC No. 94050000 FC

Before: Sawyer, P.J., and Marilyn Kelly and D.A. Burrell,* JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to commit murder, MCL 750.83; MSA 28.278, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The trial judge sentenced him to consecutive terms of ten to twenty years' and two years' imprisonment, respectively. He now appeals as of right. We affirm.

Defendant first argues that evidence of his intent to murder was insufficient to support his conviction for assault with intent to murder. We disagree. Viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could reasonably infer that defendant intended to kill the victim. *People v Barclay*, 208 Mich App 670, 674; 528 NW2d 842 (1995). The necessary intent may be inferred from the fact that defendant pointed a gun at the victim and then fired it directly at her. *People v Drayton*, 168 Mich App 174, 176-178; 423 NW2d 606 (1988). Accordingly, the evidence is sufficient to support defendant's conviction.

Defendant next argues that, because he presented evidence that he was intoxicated on the date of the offense and the prosecution failed to rebut his proofs, there was insufficient evidence to support his assault with intent to murder conviction. We disagree. The prosecutor is not required to prove that defendant was not intoxicated on the date of the incident. Rather, it must prove that he had the necessary specific intent considering his intoxication. See generally *People v McKinley*, 168 Mich App 496; 425 NW2d 460 (1988) and CJI2d 6.2. We find that the prosecution satisfied its burden. Therefore, defendant's argument is without merit.

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

Defendant next contends that the trial court abused its discretion in allowing the victim's daughter, Wendy McCoy, to testify regarding the violent nature of her relationship with defendant. Because defense counsel never objected to the testimony and defendant's substantive rights were not affected, we decline to review the issue. MRE 103; *People v Grant*, 445 Mich 535, 545-546; 520 NW2d 123 (1994).

Defendant also argues that his counsel was ineffective, because he failed to object to the testimony. We disagree. A review of the record reveals that admission of McCoy's testimony was proper. Accordingly, an objection by defense counsel would have been futile. *People v Lyles*, 148 Mich App 583; 385 NW2d 676 (1986). Thus, defendant was not denied the effective assistance of counsel on this basis.

Defendant claims that he was denied a fair trial due to several instances of prosecutorial misconduct. Because he failed to object to any of the remarks that the prosecutor made, the issue is not preserved for our review. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Regardless, we find that none of the remarks was improper, and any prejudice could have been cured by a timely instruction from the court. *Id.* Therefore, reversal is not required.

Defendant next contends that the trial court failed to articulate on the record its reasons for sentencing him. We disagree. Because it is apparent from the record that the trial court expressly relied on the sentencing guidelines, the court sufficiently articulated its reasons for the sentence imposed. *People v Lawson*, 195 Mich App 76, 77; 489 NW2d 147 (1992).

Defendant argues that his sentence is reflective of the trial court's determination that he committed first-degree murder instead of assault with intent to commit murder. We disagree. The trial court stated that defendant did not murder the victim but caused her family much grief. The statement was innocuous and does not reveal that the trial court made an independent finding that defendant was guilty of first-degree murder. *People v Tyler*, 188 Mich App 83, 85-86; 468 NW2d 537 (1991).

Defendant's final argument is that his sentence was not proportionate in light of the seriousness of the offense. We disagree. Defendant's sentence of ten to twenty years' imprisonment for assault with intent to murder fell within the prescribed guidelines' range of seven to fifteen years and is presumed proportionate. *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990); *People v McElhaney*, 215 Mich App 269, 286; 545 NW2d 18 (1996). Moreover, defendant has failed to articulate any unusual circumstances that render the sentence disproportionate. *People v Piotrowski*, 211 Mich App 527, 532; 536 NW2d 293 (1995). Accordingly, the trial court did not abuse its discretion in sentencing him.

Affirmed.

/s/ David H. Sawyer
/s/ Marilyn Kelly
/s/ Daniel A. Burress