

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RUSTY LEE MAYO,

Defendant-Appellant.

UNPUBLISHED

May 2, 1997

No. 184737

Jackson Circuit Court

LC No. 94-69996-FC

Before: Taylor, P.J. and Hood and Gribbs, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of breaking and entering an occupied dwelling with the intent to commit a felony therein, MCL 750.110; MSA 28.305. Defendant was sentenced as a second offense habitual offender, MCL 769.10; MSA 28.1082. Defendant appeals as of right, and we affirm.

Defendant argues that the trial court's questioning of a witness deprived him of a fair trial. Defendant did not object at trial. Normally the lack of an objection would mean that this issue was not preserved for appellate review. MRE 614(c). However, there is a split in this Court regarding whether an objection is necessary to preserve the issue. See *People v Moore*, 161 Mich App 615, 619; 411 NW2d 797 (1987). After reviewing the record, and assuming the issue did not need to be preserved, we are satisfied that the court's questioning did not unjustifiably arouse suspicion in the mind of the jury regarding the witness' credibility, *People v Davis*, 216 Mich App 47, 49-52; 549 NW2d 1 (1996), or pierce the veil of judicial impartiality. *People v Burgess*, 153 Mich App 715, 720; 396 NW2d 814 (1986).

Defendant next argues that he is entitled to a new trial because the prosecutor argued a point to the jury that he knew to be false. While we agree that the argument was improper, we find that it did not rise to the level of error requiring reversal, *People v Bahoda*, 448 Mich 261, 272; 531 NW2d 659 (1995), because it is unlikely that the argument prejudiced defendant. *People v Mateo*, 453 Mich 203, 210, 213; 551 NW2d 891 (1996). Further, we are satisfied that if some prejudice resulted from the

impropriety, it was dispelled by the court's instruction that the arguments of attorneys are not evidence. *Bahoda, supra* at 281.

Defendant further argues that he was denied the effective assistance of counsel. In order to prevail on such a claim, defendant must show that, but for his counsel's errors, there is a reasonable probability that the result of the proceeding would have been different and, even if such a showing is made, defendant must also demonstrate that the result of the proceeding was unfair or unreliable. *People v Poole*, 218 Mich App 702, 718; 555 NW2d 485 (1996). After reviewing each of defendant's claims and the trial court's opinion following the evidentiary hearing that was held regarding this claim, we are unpersuaded that defendant has satisfied the necessary burden.

Finally, defendant argues that his sentence was disproportionate. Because defendant was sentenced as an habitual offender, we determine whether defendant's sentence was disproportionate, ignoring the sentencing guidelines. *People v Gatewood (On Remand)*, 216 Mich App 559; 550 NW2d 265 (1996). We also do not consider the fact that defendant must serve another sentence before he begins serving the sentence on the instant offense in determining the proportionality of the sentence imposed. *People v Clark*, 207 Mich App 500, 502; 526 NW2d 357 (1994). After consideration of defendant's prior juvenile and adult record and the facts adduced at trial, we find that the sentence imposed reflected the seriousness of the matter, *People v Houston*, 448 Mich 312, 320; 532 NW2d 508 (1995), and thus was not an abuse of the sentencing court's discretion. *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990).

Affirmed.

/s/ Clifford W. Taylor

/s/ Harold Hood

/s/ Roman S. Gibbs