STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SHAWN ALEXANDER,

Defendant-Appellant.

UNPUBLISHED
July 18, 1997

Nos. 186829; 186836
Recorder's Court
LC Nos. 94-003740; 94-012078

Before: Holbrook, Jr., P.J., and White and A.T. Davis, Jr.*, JJ.

PER CURIAM.

In these consolidated appeals, defendant appeals as of right from his jury trial convictions of assault with intent to 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), as well as his guilty plea conviction of carrying a concealed weapon, MCL 750.227; MSA 28.424. Defendant was sentenced to serve prison terms of twenty to forty years, two years, and two to five years, respectively. We affirm.

In his first issue, defendant raises a two part argument. First, defendant argues that the prosecutor denied him a fair trial by continually misstating the law with regard to a guilty but mentally ill verdict. Defendant also argues that the trial court erred in not instructing the jury about the prosecutor's error. We disagree on both points. The guilty but mentally ill statute provides:

> (1) If the defendant asserts a defense of insanity in compliance with section 20a, the defendant may be found "guilty but mentally ill" if, after trial, the trier of fact finds all of the following beyond a reasonable doubt:
>
> (a) That the defendant is guilty of an offense.
>
> (b) That the defendant was mentally ill at the time of the commission of that offense.

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

(c) That the defendant was not legally insane at the time of the commission of that offense. [MCL 768.36; MSA 28.1059.]

The prosecutor in this case suggested to the jury that, in order to come to the "guilty but mentally ill" verdict, they had to find that defendant's mental illness "caused" his actions. This Court has held that when a prosecution's serious misstatement of the law remains uncorrected and severely undermines a viable defense theory, the defendant has been deprived of a fair trial. *People v Matulonis*, 115 Mich App 263, 267-268; 320 NW2d 238 (1982). Here, the court instructed the jury on the elements of the guilty but mentally ill verdict immediately before they began their deliberations. Further, the judge warned the jury that only he could instruct them on the law. Thus, we find that the prosecutor's misstatement of the law was adequately corrected, and any error was harmless pursuant to MCL 769.26; MSA 28.1096.

Similarly, we cannot agree with defendant that he was denied a fair trial because of his counsel's failure to object to the prosecutor's misstatement of the law. To prevail on a claim of ineffective assistance of counsel, a defendant must show that but for counsel's deficient performance the outcome of the trial would have been different. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Because the judge in this case ensured that the jury was properly instructed on all the possible verdicts, and warned the jury that only he could instruct them properly on the law, we believe that counsel's error in failing to object did not prejudice defendant.

Next, defendant argues that his twenty to forty year sentence for the assault with intent to commit murder conviction was disproportionate under *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1(1990). We disagree. Defendant's twenty-year minimum sentence fell squarely within the recommended guidelines range of fifteen to twenty-five years. Based upon the trial court's articulation of its reasons for the given sentence, the trial court did not accept defendant's suggestion that his mental illness should be taken into account during sentencing. We find no abuse of discretion.

Finally, we reject defendant's argument that his two to five year sentence for carrying a concealed weapon was disproportionate. This conviction stemmed from an incident where defendant walked into a police precinct with a concealed weapon, purportedly to turn in the weapon. Defendant's sentence for this offense is also within the guidelines range of six to thirty months. Sentences which fall within the guidelines range are presumed to be neither excessively severe nor unfairly disparate. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 879 (1987). Defendant claims his minimal level of culpability in this case mitigates his sentence length; however, this Court has held that this factor does not constitute the type of unusual circumstance that would overcome the presumption of proportionality. *People v Daniel*, 207 Mich App 47, 54; 523 NW2d 830 (1994).

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Helene N. White
/s/ Alton T. Davis, Jr.