STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TERRY L. FIELDS, JR.,

Defendant-Appellant.

UNPUBLISHED
July 25, 1997

No. 185176
Oakland Circuit Court
LC No. 94-135096-FH

Before: MacKenzie, P.J., and Holbrook, Jr., and T.P. Pickard*, JJ.

PER CURIAM.

Defendant was convicted by a jury of assault with intent to commit great bodily harm, MCL 750.84; MSA 28.279. The conviction arose from defendant's unprovoked and violent attack on the victim, who had jogged past the house where defendant and his companions were having a party. As an habitual offender, second offense, MCL 769.13; MSA 28.1085, defendant was sentenced to serve an enhanced prison term of 6 ½to 15 years. Defendant's motion for a new trial in the lower court was denied. He now appeals as of right and we affirm.

Defendant first argues that the trial court abused its discretion in ruling before trial that defendant's prior conviction of breaking and entering with intent to commit larceny would be admissible for impeachment purposes in the event that defendant chose to testify. Given that defendant did not testify in his own behalf at trial, defendant has waived appellate review of this issue. *People v Finley*, 431 Mich 506; 431 NW2d 19 (1988).

Defendant next argues that he was denied a fair trial because the arresting police officers testified, upon direct examination, that they recognized defendant from earlier police contact. We disagree. On direct examination, arresting officer Timothy O'Neill testified as follows:

> *Q [by assistant prosecutor]:* And how did the people appear when they were talking with the people in the Trans Am?

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

A [by Officer O'Neill]: Excited.

Q: Still excited?

A: Yeah.

Q: Did you recognize anybody in that group of people, sir?

A: Mr. Fields.

Q: And how did you recognize Mr. Fields?

Mr. Cataldo [codefendant's attorney]: Objection, your Honor. At this point I think we need to approach.

The Court: Please approach.

(Side bar conference held at 11:55 a.m.)

* * *

Q: Based upon that information that you received and that particular description, what did you do, sir?

A: We started heading back to the residence where I am familiar with that group of young adults living at, and we immediately begin calling for back up, and we got several additional units to respond with us to help to secure the area.

On direct examination, arresting officer Josephine Fagan testified as follows:

Q [By assistant prosecutor]: Could you tell what these people were doing besides the high-five? Was there anything else about this group of people that you noticed?

A [by Officer Fagan]: Well, we had been at the residence of 5 Elizabeth Lake earlier that week and had identified some of the individuals.

Q: But did you notice what they were doing at this point in time? I mean when you saw [co]defendant Bible doing the high-five, did you notice anything else?

A: They were coming across—like I explained, they were coming westbound across the street.

* * *

Q: Did you notice anybody else at that time that you know today? Was there another individual that you noticed in that group?

A: I couldn't identify anybody positively other than, again, Bible caught my eye because he was pumped up, and there were a couple other individuals that I don't see in the courtroom today that, again, we had identified at previous encounters.

Q: What did you do after you noticed this group with Dale Bible doing the high-five with the people in the Camaro?

A: Again, when we had identified them on previous occasions, they weren't good –

Mr. Cataldo: Excuse me, Your Honor. May we approach the bench?

The Court: Yes, you may.

(Whereupon counsel approached the bench and conferred with the Court.)

The Court: You may proceed.

At the outset, we note that a valid objection to the officers' testimony was not placed on the record. However, because it is unclear what transpired during the side bar conferences with the court, we will presume that the issue is properly preserved for appeal. Review of the officers' testimony in context indicates that the officers' answers to the prosecutor's questions were unresponsive. An unresponsive, volunteered answer to a proper question does not warrant reversal of an otherwise valid conviction. *People v Kelsey*, 303 Mich 715, 717; 7 NW2d 120 (1942); *People v Stinson*, 113 Mich App 719, 318 NW2d 513 (1982). Moreover, it does not appear that the officers were attempting in bad faith to inject potentially prejudicial information regarding defendant, *People v Haisha*, 111 Mich App 165, 169-170; 314 NW2d 465 (1981), but rather were attempting to bolster proof of their ability to recognize defendant, *People v Bradford*, 10 Mich App 696; 160 NW2d 373 (1968). Given that defendant's theory at trial was one of misidentification, we find no error requiring reversal of defendant's conviction. *People v Hooper*, 36 Mich App 123, 125; 193 NW2d 203 (1971).

Defendant next raises three interrelated arguments. First, defendant argues that he was deprived of his right to present a misidentification defense where the trial court denied his motion to remove his shirt and show the jury his tattoos, which a key prosecution witness denied seeing. Second, defendant argues that the prosecutor impermissibly shifted the burden of proof to defendant during closing argument by suggesting that defendant should have shown the jury his tattoos. Finally, defendant argues that the prosecutor's argument violated his Fifth Amendment right to remain silent. We conclude defendant was not denied a fair trial on this basis.

The trial court denied defendant's motion to show the jury his tattoos unless he took the witness stand and waived his Fifth Amendment privilege to remain silent. This was a correct statement of the law in Michigan. *People v Budd*, 279 Mich 110, 113; 271 NW 577 (1937); *People v Burke*, 38 Mich App 617, 621-622; 196 NW2d 830 (1972). Cf. *People v Williams*, 42 Mich App 278, 280-281; 201 NW2d 286 (1972). Defendant was not denied his right to present a misidentification defense

where other evidence supporting the existence and nature of defendant's tattoos was presented to the jury through defense counsel's effective cross-examination of the prosecution witnesses and by the testimony of defense witnesses. Cf. *Williams, supra* at 280-281. Moreover, the eyewitness' failure to notice the tattoos goes to the weight of her identification testimony, rather than its admissibility. See *People v Rojem*, 99 Mich App 452, 458-459; 297 NW2d 698 (1980).

Defendant's Fifth Amendment right to remain silent was not infringed by the prosecutor's closing argument that questioned the distinctiveness of defendant's tattoos, given the conflicting witness testimony regarding the issue. As noted by the trial court in denying defendant's motion for a mistrial, the prosecutor did not comment on defendant's failure to take the stand or his failure to show the jury his tattoos. See *People v Fields*, 450 Mich 94; 538 NW2d 356 (1995). Read in context, the prosecutor's comments during rebuttal argument were a proper response to defense counsel's closing argument, which contrasted the testimony of defense witnesses regarding the distinctive nature of the tattoos and of an eyewitness to the assault who denied seeing any tattoos. See *People v Calloway*, 169 Mich App 810, 821; 427 NW2d 194 (1988), vacated on the grounds 432 Mich 904 (1989) (prosecutor may comment upon own witness' credibility during closing argument, especially when there is conflicting evidence and the question of the defendant's guilt or innocence turns on which witness is to be believed). Accordingly, we find no error requiring reversal because of the prosecutor's comments. In any event, if there was error, it was harmless beyond a reasonable doubt.

Next, we agree with defendant that certain mistakes occurred in his judgment of sentence. The judgment provides that defendant was convicted by guilty plea of the assault charge and of being a second-offense habitual offender, and further appears to provide for consecutive prison terms of 6 ½ to 10 and 6 ½ to 15 years, respectively. Effective May 1, 1994, the procedure for sentence enhancement under the habitual offender statute, MCL 769.13; MSA 28.1085, was dramatically changed. See, e.g., *People v Zinn*, 217 Mich App 340; 551 NW2d 704 (1996). As required by the amended statute, the prosecutor filed a "notice of intent to seek sentence enhancement." However, the record is unclear whether there was compliance with the remaining requirements of the statutory procedure. To the extent that the judgment of sentence is facially erroneous or ambiguous, we amend it nunc pro tunc, MCR 7.216(A)(1), as follows:

(1) The judgment shall reflect that defendant was convicted of a single offense, assault with intent to commit great bodily harm, MCL 750.84; MSA 28.279.

(2) The judgment shall reflect that defendant's assault conviction was obtained following a *jury trial*, rather than by plea.

(3) The judgment shall reflect that defendant's sentence was enhanced as an habitual offender, second offense, MCL 769.13; MSA 28.1085 (as amended), MCL 769.10; MSA 28.1082. No *conviction* as an habitual offender shall be entered.

(4) The judgment shall reflect that defendant's sentence of 6 ½ to 10 years in prison on the assault conviction is vacated.

(5) The judgment shall reflect that defendant's enhanced 6 ½ to 15-year prison term is *consecutive* to an earlier sentence for which he was on parole when the current offense was committed.

Defendant next argues that his sentence violates the principle of proportionality set forth in *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990), because the victim suffered no permanent disfigurement as a result of the attack. We find no abuse of discretion. As a convicted habitual offender, defendant's sentence is reviewed on appeal without reference to the sentencing guidelines, which have no bearing on whether an habitual offender's sentence is proportional. See *People v Cervantes*, 448 Mich 620, 625; 532 NW2d 831 (1995); *People v Yeoman*, 218 Mich App 406, 418; 554 NW2d 577 (1996). Apparently on a dare, defendant and his codefendant viciously attacked the victim, who had the misfortune of jogging past the house where defendant and his companions were having a party. The victim was beaten with a stick, a large rock, and was also stomped and kicked in the head and chest. The victim suffered serious injuries, requiring hospitalization for several hours, but recovered from those injuries without serious permanent disfigurement. Contrary to defendant's claim, however, this fact does not entitle defendant to leniency in sentencing. Defendant's extensive prior criminal record included a juvenile record beginning when he was twelve years of age, as well as three felonies and five misdemeanors as an adult. Accordingly, under the circumstances of this offender and this offense, we find no abuse of discretion by the trial court in imposing a prison term of 6 ½ to 15 years.

Affirmed. The judgment of sentence is amended as ordered.

/s/ Barbara B. MacKenzie
/s/ Donald E. Holbrook, Jr.
/s/ Timothy P. Pickard