

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SHAURON D. STINNETT,

Defendant-Appellant.

UNPUBLISHED
October 28, 1997

No. 193824
Genesee Circuit Court
LC No. 95-053380-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARAILE L. STINNETT a/k/a TARAILE L.
STINNETT,

Defendant-Appellant.

No. 193855
Genesee Circuit Court
LC No. 95-053379-FC

Before: Markman, P.J., and McDonald and Fitzgerald, JJ.

PER CURIAM.

Following a joint jury trial, defendants, who are cousins, were convicted of armed robbery, MCL 750.529; MSA 28.797, and possession of a firearm during the commission of a felony, MCL 750.227b(1); MSA 28.424(2). Defendant Shaaron Stinnett was sentenced as an habitual offender, second offense, MCL 769.10; MSA 28.1082, to twelve to twenty years' imprisonment for the robbery conviction, and two years' imprisonment for the felony-firearm conviction. Defendant Daraile Stinnett was sentenced to eight to twenty years' imprisonment for the armed robbery conviction, and to two years' imprisonment for his felony-firearm conviction. Defendants appeal as of right. These cases were consolidated by order of this Court. We affirm.

Shaaron Stinnett first argues he was denied a fair trial because the prosecutor insinuated he was involved in another armed robbery. However, Shaaron failed to object to the question and comments below. Appellate review of improper prosecutorial remarks is generally precluded absent objection by counsel because the trial court is otherwise deprived of an opportunity to cure the error. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). An exception exists if a curative instruction could not have eliminated the prejudicial effect or where failure to consider the issue would result in a miscarriage of justice. *Id.* We find there was no resulting miscarriage of justice. Shaaron called the officer to testify that he was an informant in a separate robbery investigation. Moreover, the officer testified that Shaaron was not a suspect in that robbery. Therefore, it is unlikely that the jury concluded Shaaron was involved in the other robbery.

Next, Shaaron argues he was denied effective assistance of counsel by his attorney's rejection of a jury instruction on the defense of alibi. We disagree.

Because Shaaron failed to make a motion to the trial court for a new trial or for an evidentiary hearing as required under *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), this Court's review is limited to the record. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995). A defendant who asserts a denial of effective assistance must show that counsel's performance was so deficient that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment, and that the deficient performance prejudiced the defense to the extent that the defendant was deprived of a fair trial with a reliable result. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996). The defendant must also overcome the presumption that the challenged action was trial strategy. *Id.* Further, the defendant must show a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. *Id.*

Shaaron filed a pretrial notice of an alibi defense. Daraile testified that he and Shaaron were at his mother's house or Hodo's house at the time of the robbery. During closing argument, Shaaron's counsel stated Shaaron had an alibi, that he was with Daraile at Hodo's house at the time Johnson was robbed. Although Daraile's counsel requested an instruction regarding alibi, CJI2d 7.4,¹ Shaaron's counsel specifically asked the trial court not to give the instruction for Shaaron.

We question Shaaron's counsel's decision to reject a jury instruction on the primary defense theory presented at trial. However, we find Shaaron has failed to show that but for this error, the outcome of the trial would have been different. Daraile's counsel did request an alibi instruction, and the trial court gave such an instruction as to Daraile only. Daraile essentially had the same alibi as Shaaron—playing video games at Hodo's house. Daraile and Shaaron were charged with the same crime of robbing the victim. However, even with the benefit of the alibi instruction that Shaaron did not enjoy, Daraile was also found guilty based on the same set of facts.

In addition, while the evidence presented against Shaaron was not overwhelming, it was substantial. The police apprehended Shaaron in the area where the victim was robbed. Shaaron ran when police told him to freeze. The victim described one of the robbers as wearing a red mask. A red

hat with holes in it was found in the bush in which Shaaron was hiding when police spotted him. A pager was stolen from the victim, and one was found about 35 feet from where the hat was found. The victim and other witnesses testified that one of the robbers was carrying a black .9 millimeter gun. A gun fitting this description was found about 25 feet from the red hat, near where Shaaron was apprehended. One of the suspects was described as wearing a blue coat. Shaaron was apprehended wearing a blue coat. In light of this strong evidence, we are not convinced that but for counsel's error, Shaaron would have been acquitted. Therefore, Shaaron has not established the requisite prejudice, and his claim of ineffective assistance of counsel must fail.

Finally, Shaaron argues the trial court committed reversible error by allowing a police officer to give "expert" testimony which bolstered the credibility of the victim. However, Shaaron objected to the testimony only on the grounds that the testimony was not relevant. An objection based on one ground at trial is insufficient to preserve an appellate attack based on a different ground. *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993). The failure to object to the admission of evidence waives appellate review in the absence of manifest injustice. *People v King*, 210 Mich App 425, 433; 534 NW2d 534 (1995). We find no manifest injustice. Officer Jones' testimony was admissible as lay opinion based on his perceptions of other crime victims and helped decide the issue of the victim's credibility as a witness. MRE 701; See also *People v Daniel*, 207 Mich App 47, 57; 523 NW2d 830 (1994). Accordingly, the testimony was proper.

No. 193855

Daraile Stinnett argues his sentence for the armed robbery conviction was disproportionate. We disagree.

Daraile was sentenced to eight to twenty years for the armed robbery conviction. The sentencing guidelines called for a sentence of two to six years. A sentence constitutes an abuse of discretion if it violates the principle of proportionality, which requires sentences imposed by the trial court to 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). A sentence may depart from or adhere to the recommended guidelines as long as it reflects the seriousness of the matter. *People v Houston*, 448 Mich 312, 320; 532 NW2d 508 (1995); *People v Kregger*, 214 Mich App 549, 553; 543 NW2d 55 (1995).

At Daraile's sentencing, the trial court stated the factors that contributed to its decision to exceed the sentence recommended under the guidelines. The trial court stated Daraile had two prior felony convictions and was on probation for those convictions when he committed this offense. In addition, Daraile had several juvenile adjudications. Daraile had a GED, but was unemployed. He had been using alcohol and marijuana for three years. He was single with no dependents. The person he robbed was sixty years old. The trial court stated it did not believe that the sentence recommended under the guidelines would accomplish the goals of rehabilitation and deterrence. In light of the seriousness of the crime, Daraile's prior felony convictions and juvenile record, and the fact that he committed this crime while on probation, we find the sentence of eight to twenty years to be proportionate. Accordingly, Daraile's sentence was not an abuse of discretion.

Affirmed.

/s/ Stephen J. Markman

/s/ Gary R. McDonald

/s/ E. Thomas Fitzgerald

¹ CJI2d 7.4 provides:

(1) You have heard evidence that the defendant could not have committed the alleged crime because [he/she] was somewhere else when the crime was committed.

(2) The prosecutor must prove beyond a reasonable doubt that the defendant was actually there when the alleged crime was committed. The defendant does not have to prove [he/she] was somewhere else.

(3) If, after carefully considering all the evidence, you have a reasonable doubt about whether the defendant was actually present when the alleged crime was committed, you must find [him/her] not guilty.