STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BARON D. IRVINE,

Defendant-Appellant.

UNPUBLISHED
March 20, 1998

No. 198400
Eaton Circuit Court
LC No. 96-000091 FC

Before: Fitzgerald, P.J., and Hood and Sawyer, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions by jury of assault with intent to rob while armed, MCL 750.89; MSA 28.284, assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279, and possession of a firearm during the commission of a felony, MCL 750.227b, MSA 28.424(2). Defendant was sentenced to twenty to forty years' imprisonment for the assault with intent to rob conviction, six to ten years' imprisonment for the assault with intent to do great bodily harm conviction and the mandatory consecutive two-year term for the felony-firearm conviction to be served consecutively. We affirm.

Defendant first argues that he was denied the effective assistance of counsel when defense counsel failed to object to: (1) the prosecution's request during its closing argument that the jury "do justice"; and (2) jury instructions given by the trial court regarding aiding and abetting and how it related to the felony-firearm count. Because defendant did not move for a new trial or request an evidentiary hearing on his claim of ineffective assistance of counsel, we will review the existing record to the extent that it contains sufficient detail to support defendant's position. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). In order to establish ineffective assistance, the defendant is required to show that trial counsel's performance was objectively deficient to an extent that counsel was not functioning as "counsel" guaranteed by the Sixth Amendment. *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994); *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). The defendant must also show that the deficient performance prejudiced the defense. *Strickland*, *supra* at 687; *Pickens, supra* at 314.

Regarding the prosecutor's remark during closing argument, we note that generally prosecutors are accorded great latitude regarding their arguments and conduct. *People v Bahoda*, 448 Mich 261, 282-283; 531 NW2d 659 (1995). Nevertheless, there are a number of arguments to which a prosecutor should not resort, including civic duty arguments that appeal to the fears and prejudices of jury members. *Bahoda*, *supra* at 282-283. However, in *People v Bass (On Rehearing)*, 223 Mich App 241, 251; 565 NW2d 897 (1997), nullified on other grounds 456 Mich 851 (1997), this Court found that a prosecutor's request to the jury during closing argument to "do the right thing" and to "try to do justice" did not constitute an improper civic duty argument because it was at the conclusion of a discussion of the evidence and was an isolated remark. The remark made by the prosecution in this case, namely "to do justice," was very similar to that of the prosecution in *Bass*. Also similar was that the prosecution's remark was made during a lengthy discussion of the evidence and was an isolated comment. It was not designed to inflame the jurors or to urge them to ignore evidence. Therefore, it did not constitute prosecutorial misconduct and accordingly, the failure to object to it did not constitute ineffective assistance.

Regarding counsel's failure to object to the jury instructions, we note that this Court reviews jury instructions in their entirety to determine if there is error requiring reversal. *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994). As defendant correctly argues, to convict one of aiding and abetting the commission of a separately charged crime of carrying or having a firearm in one's possession during the commission of a felony, it must be established that the defendant procured, counseled, aided or abetted and so assisted in obtaining the proscribed possession, or in retaining such possession otherwise obtained. *People v Johnson*, 411 Mich 50, 54; 303 NW2d 442 (1981). However, in *People v Purofoy*, 116 Mich App 471; 323 NW2d 446 (1982), this Court held that *Johnson* did not require a specific instruction on aiding and abetting for a felony-firearm charge. It stated that a trial judge's instruction on the elements of aiding and abetting after a reading of the charges satisfied the principle set forth in *Johnson*, and that the judge was not required to reiterate the elements of aiding and abetting after each of the instructions on the charged offenses and lesser included offenses. Thus, we find no error in the trial court's failure to give a separate instruction to the jury stating that the prosecution had to establish that the defendant procured, counseled, aided, or abetted and so assisted in obtaining the firearm. Accordingly, the failure to object did not constitute ineffective assistance of counsel.

Next, defendant argues that the trial court abused its discretion in ruling that the prosecution used due diligence in locating two res gestae witnesses and that it therefore improperly denied defendant's request for CJI2d 5.12, a jury instruction that the missing witnesses' testimony presumably was adverse to the prosecution. In compliance with MCL 767.40a(3); MSA 8.980(1)(3), the prosecution filed its list of intended witnesses in excess of the requisite thirty days before trial, which included the names of two res gestae witnesses who had not yet been located. The trial court conducted a due diligence hearing on a separate record during the course of defendant's trial. According to *People v Burwick*, 450 Mich 281, 292; 537 NW2d 813 (1995), this procedure was appropriate because the prosecution may amend the witness list "at any time" if good cause is shown. The trial court's determination of whether the prosecution had good cause to amend its witness list is reviewed for an abuse of discretion. *People v Rode*, 196 Mich App 58, 67-68; 492 NW2d 483

(1992), rev'd on other grounds 447 Mich 325; 574 NW2d 682 (1994). An abuse of discretion can be found where the defendant is able to show prejudice as a result of the failure to produce a witness or as a result of amendment of the witness list. *Rode, supra* at 68. Defendant did not set forth what testimony these witnesses would have given or explain how the absence of their testimony prejudiced his case. Therefore, we find that the trial court did not abuse its discretion in allowing the prosecution to delete these witnesses from the witness list during trial or in refusing to give CJI2d 5.12 to the jury.

Finally, defendant argues that the trial court abused its discretion when it sentenced defendant based on misscored offense variables. However, miscalculations of sentencing guidelines variables are not in themselves an appealable claim of legal error. *People v Raby,* 456 Mich ___; ___ NW2d ___ (Docket No. 108010, issued 2/5/98); *People v Mitchell*, 454 Mich 145, 175; 560 NW2d 600 (1997). The trial court's sentencing considerations were based on factual findings that were not clearly erroneous. Therefore, we decline review of this issue.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Harold Hood
/s/ David H. Sawyer