

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RONALD ZUESKI,

Defendant-Appellant.

UNPUBLISHED

May 29, 2001

No. 221271

Wayne Circuit Court

LC No. 99-002495

Before: Neff, P.J., and Fitzgerald and Markey, JJ.

PER CURIAM.

Defendant appeals by right from his jury trial convictions for unarmed robbery, MCL 750.530; MSA 28.798, and malicious destruction of personalty, MCL 750.377a(1)(b)(i); MSA 28.609(1)(1)(b)(i). Defendant was sentenced as a third habitual offender, MCL 769.11; MSA 28.1083, to concurrent sentences of three to fifteen years' imprisonment for the unarmed robbery conviction and one to four years' imprisonment for the malicious destruction conviction. We affirm in part and remand for further proceedings.

On appeal, defendant first argues that the trial court clearly erred by denying defendant's pretrial motion to suppress the in-court identifications of defendant by the complainants, Barbara Wilhelms and Mary Gawne, as the preliminary examination was unduly suggestive, and there was no independent basis for the complainants' identifications of defendant. We disagree.

A trial court's decision to admit identification evidence and deny a motion to suppress that evidence is entitled to deference and will not be reversed unless it is clearly erroneous. *People v Kurylczyk*, 443 Mich 289, 303; 505 NW2d 528 (1993); *People v Faucett*, 442 Mich 153, 170; 499 NW2d 764 (1993). "If a witness is exposed to an impermissibly suggestive pretrial identification procedure, the witness' in-court identification will not be allowed unless the prosecution shows by clear and convincing evidence that the in-court identification will be based on a sufficiently independent basis to purge the taint of the illegal identification. The defendant must show that, in light of the totality of the circumstances, the procedure used was so impermissibly suggestive as to have led to a substantial likelihood of misidentification." *People v Colon*, 233 Mich App 295, 304; 591 NW2d 692 (1998) (citations omitted). Regardless of whether the preliminary examination in the case at bar was unduly suggestive, it was not clearly erroneous for Wilhelms and Gawne to be permitted to provide in-court identifications of defendant during his trial. In *People v Kachar*, 400 Mich 78, 95-96; 252 NW2d 807 (1977), the

Supreme Court listed the factors that should be considered in determining, based on the totality of the circumstances, whether an independent basis for an in-court identification exists. This Court has held that “the *Kachar* factors are equally applicable . . . where the problem of an unduly suggestive confrontation, itself, must be resolved in relationship to the totality of the circumstances.” *People v Leverette*, 112 Mich App 142, 154; 315 NW2d 876 (1982). The *Kachar* factors are as follows:

1. Prior relationship with or knowledge of the defendant.
2. The opportunity to observe the offense. This includes such factors as length of time of the observation, lighting, noise or other factor[s] affecting sensory perception and proximity to the alleged criminal act.
3. Length of time between the offense and the disputed identification. . . .
4. Accuracy or discrepancies [between the description provided during the identification in question] and defendant’s actual description.
5. Any previous proper identification or failure to identify the defendant.
6. Any identification prior to [identification] of another person as defendant.
7. . . . [T]he nature of the alleged offense and the physical and psychological state of the victim. . . .
8. Any idiosyncratic or special features of defendant. [*People v Gray*, 457 Mich 107, 115-116; 577 NW2d 92 (1998), quoting *Kachar*, *supra* at 95-96.]

Several of the *Kachar* factors were satisfied in the present case. Both complainants had the opportunity to observe defendant at close proximity and for several minutes during the commission of the robbery. *Gray*, *supra* at 117-118. Also, although neither complainant had any acquaintance with defendant before the robbery, immediately following the robbery, both complainants were able to provide the police with accurate descriptions of defendant’s approximate height, weight, hair color, the length of his facial hair, the color and type of vehicle he drove, and his license plate number. The complainants also both provided valid explanations for their failures to positively identify defendant during the lineup, and both made statements during the lineup indicating that they recognized the robber among the suspects present at the lineup. *Gray*, *supra* at 109, 121. Additionally, the complainants demonstrated by their actions during the robbery - obtaining defendant’s license plate number and immediately contacting the police - that their perceptions of the robber were not distorted by the adverse circumstances of being robbed, or by their psychological states during the robbery, to an extent that would make them unable to identify the robber at a later date. *Id.* at 123. Therefore, the identification evidence was properly presented to the jury. *People v Whitfield*, 214 Mich App 348, 351; 543 NW2d 347 (1995).

Defendant next argues on appeal that the trial court clearly erred by denying defendant’s motion to suppress evidence of his prior convictions. We disagree. As defendant did not testify

and evidence of his prior convictions was not introduced at trial, this issue was not preserved for review on appeal. *People v Gaines*, 198 Mich App 130, 131; 497 NW2d 210 (1993). As this is an unpreserved, nonconstitutional issue, this Court will review it for plain error. *People v Carines*, 460 Mich 750, 761-764; 597 NW2d 130 (1999). Even if it was erroneous for the lower court to permit admission of defendant's prior convictions into evidence, the error did not constitute a plain error affecting defendant's substantial rights. *Carines, supra* at 763. Although defendant contends that the court's erroneous allowance of evidence of his prior convictions discouraged him from testifying, defendant has not shown that his testimony was important to his defense or would have consisted of more than, at most, denial of his involvement in the alleged crime. *People v Hicks*, 185 Mich App 107, 111; 460 NW2d 569 (1990). This defense theory was sufficiently conveyed to the jury by defendant's counsel. *Id.* Additionally, as the challenged evidence was never presented to the jury, it can be absolutely determined that a jury would, and this jury did, find defendant guilty beyond a reasonable doubt without improper consideration of defendant's prior convictions. *Id.*

Defendant also failed to preserve for review, by way of objection, his contention that he was denied his right to due process when, during the prosecutor's closing argument, the prosecutor allegedly improperly expressed his personal beliefs regarding the credibility of the police officers who were involved in defendant's apprehension. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). An unpreserved allegation of prosecutorial misconduct is also reviewed for plain error. *Carines, supra* at 763-764; *Schutte, supra* at 720. "Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error 'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence." *Schutte, supra*, quoting *Carines, supra* at 763. Defendant challenges the propriety of the following remarks made by the prosecutor during closing arguments:

The officers almost impeached themselves up on the stand. And how do I say that? Well [Taylor Police Officer Edward Shalda]. Do you remember he got up and testified? He said, oh, no, I remember that Mr. Zueski hit the person that was on the right side. But [Dearborn Heights Police Officer Robert Schnell] says man I'm the one that was hit. I know. I was on the left.

Only thing I can think of is that one green T-Bird on the left, green Mercury Cougar on the right. Both very similar cars and they are both green in color. But I believe Officer Schnell. He got up on that stand. He didn't seem to be a B. S. kind of guy. Didn't argue with defense counsel. Seemed to be pretty straight up. This is what happened. I got hit. Guy rammed me. It didn't seem to me that he seemed incredible [sic]. And you know what now you think about it it adds credibility.

These remarks were not improper because the prosecutor did not make statements of fact to the jury that were unsupported by the evidence. *Schutte, supra* at 721. Nor did the prosecutor attempt to represent to the jury that he had special knowledge of any witness' truthfulness or place the prestige of his office behind his personal belief regarding the witness' truthfulness. *People v Bahoda*, 448 Mich 261, 277, 277 n 26; 531 NW2d 659 (1995); *Schutte, supra* at 722.

On the contrary, the prosecutor addressed the fact that Officers Shalda and Schnell presented contradictory testimony regarding defendant's collision with an unmarked police vehicle. Shalda testified that the first car hit by defendant was the unmarked vehicle to the right of defendant's truck, while Schnell testified that his car was the first car hit by defendant's truck, and he was on the left side of defendant's truck at that time. In order to convict defendant of malicious destruction of personalty, it was necessary for the prosecution to prove that defendant did, in fact, cause his truck to collide with another vehicle.¹ This, in turn, required that the jury believe the testimony of at least one of the officers. Thus, the prosecutor was properly arguing the prosecution's position as to the credibility of the witnesses in relation to a theory of the case and based upon the evidence presented during trial, and his challenged statements did not constitute an outcome-determinative plain error requiring reversal. *Schutte, supra* at 722.

Defendant also argues on appeal that he should be resentenced because his sentence violates the principle of proportionality. Where the minimum sentence imposed upon a defendant is within the minimum sentence range assigned by the legislative guidelines, the sentence is beyond this Court's review unless errors occurred in the scoring of the sentencing guidelines or inaccurate information was relied upon in determining the defendant's sentence. MCL 769.34(10); MSA 28.1097(3.4)(10); *People v Babcock*, 244 Mich App 64, 73; 624 NW2d 479 (2000). Remand for resentencing is appropriate where errors occurred in the scoring of the sentencing guidelines. MCL 769.34(10); MSA 28.1097(3.4)(10). Defendant's SIR for his unarmed robbery offense contains errors. There is no notation on the SIR indicating defendant's status as an habitual offender, and the minimum sentence range indicated on the SIR is incorrectly reported as the range applicable to first-time offenders, not the range applicable to third habitual offenders such as defendant. Additionally, although an SIR was required for all conviction offenses at the time of the instant offense and conviction,² no separate SIR regarding defendant's malicious destruction of personalty conviction was completed. MCL 777.21(2); MSA 28.1274(31)(2); *State of Michigan Sentencing Guidelines Manual* (1999), pp 1, 147. If the procedures had been properly followed and the trial court had been aware of the proper minimum sentencing ranges for each of defendant's convictions, the court may have imposed different sentences. Therefore, this case is remanded in order for the trial court to determine defendant's sentences based upon a proper consideration of the sentence ranges for each of defendant's convictions.

In his *in propria persona* supplemental brief on appeal, defendant includes an isolated statement that his attorney was ineffective. Defendant makes no further statement regarding this assertion. This Court will not review an issue that was not raised in the asserting party's statement of questions as an issue on appeal or addressed in that party's appellate brief. *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000); *People v Kean*, 204 Mich App 533,

¹ MCL 750.377a(1); MSA 28.609(1)(1) provides: "A person who willfully and maliciously destroys or injures the personal property of another person is guilty of a crime"

² It appears that, effective October 1, 2000, an SIR is not required for lesser offenses. *State of Michigan Sentencing Guidelines Manual* (2000), p 1.

536; 516 NW2d 128 (1994). This Court will also not attempt to create an argument for a party when a party fails to argue the merits of the claim of error. *People v Jones (On Rehearing)*, 201 Mich App 449, 456-457; 506 NW2d 542 (1993). Furthermore, in support of his assertion that his counsel was ineffective, defendant cites no authority. Generally, the failure of a party to cite any authority in support of a party's position on an issue results in abandonment of that issue on appeal. *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000); *People v Noble*, 152 Mich App 319, 328; 393 NW2d 619 (1986). Therefore, this issue is beyond this Court's review.

We affirm in part and remand in part. We do not retain jurisdiction.

/s/ Janet T. Neff
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey