

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JACQUELINE MARIE CAMERON,

Defendant-Appellant.

UNPUBLISHED

May 11, 2004

No. 247049

Oakland Circuit Court

LC No. 2002-185019-FH

Before: Fitzgerald, P.J., and Jansen and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right from her conviction by a jury of first-degree home invasion, MCL 750.110a, and felonious assault, MCL 750.82. Defendant was sentenced to concurrent terms of 75 months to 20 years for the home invasion conviction, and 2 to 4 years for the assault conviction. We affirm defendant's convictions and remand for resentencing.

This case was characterized by defense counsel as a "family feud." Defendant's niece, Misty Bell, lived with defendant's mother and stepfather. Defendant, a physician with health problems and a history of mental illness, had an on-again off-again relationship with her mother, and claimed that she had been physically abused by her stepfather. Bell took out a personal protection order (PPO) against defendant and asserted that defendant had threatened her, while defendant claimed that she had seen evidence that Bell was using illegal narcotics and told Bell that she was going to report her. Despite the PPO, defendant visited her mother at home, but did not generally go to the house when Bell was there. Plaintiff alleged that defendant forced her way into her mother's home and pulled a gun on her mother and step-father in an effort to "get to" Bell. It was defendant's theory that defendant had permission to enter the home, even had a key of her own, and that the "gun" was a cigarette lighter. Although Bell claimed that defendant hit her in the face with a "hard metal object," defendant was only charged with one count of home invasion, and two counts of felonious assault involving her mother and stepfather. The jury found defendant guilty of home invasion and the felonious assault of her stepfather.

Before trial, defendant moved to suppress the admission of Bell's PPO and supporting affidavit against defendant.¹ Although defendant's pretrial motion involved both the PPO and

¹ Although other PPOs involving defendant's mother and stepfather were discussed, there was
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the supporting affidavit, at the motion hearing defense counsel only asked that the verified statements be suppressed. The prosecutor argued that the PPO was evidence that defendant had prior knowledge that she was not allowed to enter the home, which belonged to defendant's mother rather than to Misty Bell. The prosecutor said he would not move for admission of the verified statements but would introduce testimony about phone threats that defendant made toward Bell. Defense counsel acknowledged that at least one threat was made by defendant. Defense counsel indicated that the PPO and the phone threats were relevant to defendant's theory that Bell had a grudge against defendant because she was afraid her drug use would be revealed to the nursing school where Bell was a student. Defense counsel told the jury during opening statement that Bell had a PPO against defendant.

At trial, during the prosecution's case in chief, Bell testified that she obtained a PPO because of defendant's telephone threats. Defendant later testified about some of Bell's statements, but denied that she was angry or that she ever threatened Bell. The prosecutor then sought admission of the affidavit to refute defendant's testimony. Defense counsel acknowledged that defendant had opened the door to admission of the evidence, stated on the record that the defense strategy had changed and that, "because of the manner in which the defendant testified," he had no objection to admission of the affidavit.

Defendant argues on appeal that the trial court abused its discretion in admitting the PPO and information regarding it. We need not address this issue because defense counsel specifically assented to the admission of the PPO and evidence of phone threats as a matter of trial strategy. Any error in this regard is therefore waived. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000); *People v Aldrich*, 246 Mich App 101, 111; 631 NW2d 67 (2001).

Defendant also asserts that her right to a fair trial was impaired because of the prosecutor's reference during closing arguments to the PPO and the phone threats. We do not agree. As noted previously, defendant agreed to admission of the evidence. A prosecutor may draw inferences from the testimony and may argue that a witness, including the defendant, is not worthy of belief. *People v Buckey*, 424 Mich 1, 14-15; 378 NW2d 432 (1985). A prosecutor may also comment on the improbability of defendant's theory. *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995). Considering the prosecutor's remarks in context, we are not convinced that defendant was denied a fair and impartial trial. *People v Reid*, 233 Mich App 457, 466; 592 NW2d 767 (1999).

Defendant also argues that her trial counsel was ineffective for failing to object to these alleged trial errors. To establish a claim of ineffective assistance of counsel, the burden is on defendant to show that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment and that the deficient performance prejudiced the defense as to deprive defendant of a fair trial. *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997). There is a strong presumption that counsel's conduct was reasonable. *Id.* This Court will not substitute its judgment for that of trial counsel regarding matters of trial strategy.

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only one PPO involving Bell at the time of the incident. The prosecutor agreed not to introduce the other PPOs.

People v Avant, 235 Mich App 499, 508; 597 NW2d 864 (1999). Decisions about whether to raise an objection are “quintessential” examples of trial strategy, *People v Reed*, 449 Mich 375, 400; 535 NW2d 496 (1995), Boyle, J, and counsel specifically indicated that his decisions regarding the PPO evidence was part of the defense strategy. The fact that counsel’s strategy may not have worked does not constitute ineffective assistance. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996).

Defendant also argues that the trial court erred by failing to sua sponte instruct the jury to disregard evidence surrounding the PPO and evidence that defendant had threatened Bell over the telephone. There is no merit to this claim. We review claims of instructional error de novo; reversal is not warranted if the instructions fairly present the issues to be tried and sufficiently protect the defendant’s rights. *People v Lowery*, 258 Mich App 167, 173; 673 NW2d 107 (2003); *Aldrich, supra* at 124. Again, defense counsel agreed to admission of the evidence and raised no objection to the jury instructions. *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002).

Finally, defendant asserts that the trial court departed from the sentencing guidelines without providing any reasons for the departure, and that her sentence of 75 months to 20 years’ imprisonment was improper. As a general rule, a trial court must either sentence a defendant within the appropriate guidelines sentence range, or indicate a substantial and compelling reason for its departure. MCL 769.34. Here, there are two sentencing information reports (SIRs) in the lower court file, but only one is signed, and there was no discussion on the record regarding either SIR. Defendant takes the position that the trial court relied on the signed SIR, which lists the guidelines sentence range as 30 to 50 months, and that defendant’s sentence was an unexplained departure. The prosecutor argues that the trial court signed the wrong SIR, and intended to use the unsigned report, which lists a guidelines sentence range of 51 to 85 months, and that defendant’s sentence was within the guidelines range.

We note that neither counsel discussed the variant sentencing ranges at sentencing, and that the guidelines range was never stated on the record. There was some discussion at sentencing regarding the scoring of OV 12 (contemporaneous acts), but that offense variable was given the same one-point score in both SIRs. No other scoring decisions were challenged or discussed. The different sentence ranges in the two SIRs were the result of different scores on OV 1 (aggravated use of a weapon), and OV 13 (continuing pattern of criminal behavior). OV 1 received a score of 15 on the SIR with the 51-85 month guidelines sentence range, and a score of zero on the 30-50 month SIR. Likewise, OV 13 was scored with 25 points on the 51-85 month SIR, and zero points on the 30-50 month SIR. The trial court stated on the record that the guidelines were correctly scored, and signed and dated the SIR with the 30 to 50 month guidelines sentence range. Absent any discussion on the record by either counsel or the trial court, there is no reason to believe that the trial court signed the wrong SIR, as the prosecutor suggests.

As noted earlier, the trial court sentenced defendant to a term of 75 months to 20 years in prison for her home invasion conviction, in excess of the signed guidelines sentence range of 30 to 50 months. The trial court did not indicate that it was departing from the guidelines, and did

not offer any reasons for a departure. Therefore, we remand for resentencing. *People v Babcock*, 469 Mich 247, 258; 666 NW2d 231 (2003).

Affirmed and remanded for resentencing. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald

/s/ Kathleen Jansen

/s/ Michael J. Talbot