

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee

v

CHAD W. ALLEN,

Defendant-Appellant

UNPUBLISHED

October 7, 1997

No. 193887

Oakland Circuit Court

LC No. 94-133356

Before: Saad, P.J., and Neff and Jansen, JJ

PER CURIAM.

The jury convicted defendant of assault with intent to rob while armed, MCL 750.89; MSA 28.284. He appeals as of right and we affirm.

On March 15, 1994, at approximately 10:00 p.m., defendant, Ryan Vezzetti and David Dodt¹ left a party and went to the City of Oxford Post Office. There they saw the complainant; defendant approached him and demanded money. When the complainant refused to comply, defendant and another individual hit complainant in the shoulder and chest area. As the complainant attempted to leave, he was hit between the eyes. The resulting injury required seventeen to eighteen stitches.

I

Defendant first argues that the trial court erred by not requiring the trial testimony of an endorsed witness for the prosecution, Sergeant Miller of the Oxford Police Department. We disagree. A deletion of a witness from the prosecutor's witness list is reversible only for an abuse of discretion. *People v Burwick*, 450 Mich 281, 291; 537 NW2d 813 (1995).

At defendant's preliminary examination on June 14, 1994, it was adduced that Dodt gave a statement to Miller on May 26, 1994. According to defense counsel, Dodt stated that defendant did not strike the complainant. In light of Dodt's refusal to testify on defendant's behalf, defense counsel requested that Miller be allowed to testify regarding Dodt's statement.²

In the original information filed July 13, 1994, Miller was not listed as a witness, *res gestae* or otherwise. However, in the First Amended Information, filed January 4, 1996 (fifteen days before trial) Miller was listed as both a *res gestae* witness and as a prosecution witness intended to be called at trial.

The prosecutor later moved to strike Miller from the witness list, and defense counsel objected because he thought Miller might be a relevant witness. The prosecutor then suggested that the parties stipulate to entry of Dodt's statement so Miller would not have to be called as a witness. Defense counsel agreed.

At trial, after both parties rested, but prior to closing arguments, defense counsel requested that Miller be produced as a witness because he helped investigate the case. The prosecutor asserted that Miller's only involvement was interviewing Dodt and that his testimony would be cumulative. When the trial court inquired why Miller could not be found, the prosecutor stated that Miller had been suspended, demoted and was on a fishing boat in Florida. The prosecutor had tried to contact him, but was unsuccessful. Ultimately, the trial court held that Miller was not required to testify at trial. However, neither the parties nor the court mentioned the stipulation regarding Miller's nonproduction if Dodt's statement was allowed into evidence.

Under MCL 767.40a(3); MSA 28.980(1)(3), witnesses listed on the prosecutor's witness list are required to be produced at trial, regardless of whether that witness is a res gestae witness. *People v Wolford*, 189 Mich App 478, 483-484; 473 NW2d 767 (1991). Thus, because Miller was listed on the prosecutor's witness list as an endorsed witness, the prosecutor had an obligation to produce him at trial. However, under MCL 767.40a(4); MSA 28.980(1)(4), a witness can be deleted from the witness list at any time upon good cause shown or stipulation by the parties. Here, the parties stipulated to Miller being deleted if Dodt's statement was admitted into evidence. Although Dodt's statement was apparently never admitted, the record reveals no attempt by defendant to introduce Dodt's statement during trial. Therefore, defendant created the very error which he now claims entitles him to reversal of his conviction. We will not allow defendant to harbor error as an appellate parachute. *People v Hughes*, 217 Mich App 242, 247; 550 NW2d 871 (1996). As such, the stipulation regarding Miller's deletion from the prosecutor's witness list allowed for Miller's nonproduction at trial.³

II

Defendant also claims that the trial court erred in failing to instruct the jury on the misdemeanor offense of simple assault and/or assault and battery. Here, the trial court instructed the jury on: (1) assault with intent to commit armed robbery, the lesser offenses of (2) assault with intent to commit robbery being unarmed, (3) assault with a dangerous weapon, and the misdemeanor of (4) aggravated assault. We find that the requested instruction on assault and/or assault and battery was not supported by a rational view of the evidence. See *People v Stephens*, 416 Mich 252, 261-264; 330 NW2d 675 (1982).

At trial, it was adduced that the complainant had been beaten in the head and received a severe injury, and the trial court believed that the serious nature of the injury disallowed a simple assault instruction. We agree; an aggravated assault encompasses the elements of a simple assault and battery and includes the element of "serious or aggravated injury." MCL 750.81a; MSA 28.276(1); *People v Brown*, 97 Mich App 606, 611; 296 NW2d 121 (1980). Indeed, if the jury had found that defendant did not have the mens rea to aid and abet the commission of a robbery, then the appropriate crime would have been aggravated assault, not simple assault. Accordingly, the trial court did not abuse its discretion in denying the requested misdemeanor instruction.⁴

III

Defendant further contends that the trial court abdicated its sentencing discretion by deferring to the complainant's wishes at sentencing. Defendant initially pleaded guilty in exchange for a sentence of one year, although the guidelines sentence suggested a two year minimum. At sentencing, the trial court stated he would not sentence defendant to one year if the complainant objected. The complainant in fact objected to the one year sentence. Defendant then withdrew his plea. Defendant now argues that the trial court abdicated its sentencing discretion when it deferred to the complainant's judgment. We disagree.

The Crime Victim's Rights Act, MCL 780.751 *et seq.*; MSA 28.1287(751) *et seq.*, affords a victim the right to submit impact statements to be included with the presentence investigation report and to be considered at sentencing. *People v Steele*, 173 Mich App 502, 504; 434 NW2d 175 (1988). According to MCL 780.763(3); MSA 28.1287(763)(3), the victim's impact statement may include:

- (a) An explanation of the nature and extent of any physical, psychological, or emotional harm or trauma suffered by the victim.
- (b) An explanation of the extent of any economic loss or property damage suffered by the victim.
- (c) An opinion of the need for and extent of restitution and whether the victim has applied for or received compensation for loss or damage.
- (d) The victim's recommendation for an appropriate sentence.

Here, defendant failed to object to complainant's oral impact statement or the trial court's comments regarding the statement even though defendant had an opportunity do so. See *Steele, supra*, 173 Mich App at 505. Moreover, as the *Steele* Court pointed out, under the Crime Victim Right's Act, the complainant had the right to make an oral impact statement at the sentencing of defendant. Surely, the choice of the word "impact" in this statute evinces the legislature's decision that the victim's views be considered at sentencing. Therefore, in light of our holding in *Steele, supra*, and the legislative mandate in the Crime Victim Right's Act, we conclude that the trial court did not abuse its discretion at sentencing.

IV

Next, defendant asserts that the trial court improperly considered defendant's failure to admit guilt in fashioning his sentence. Specifically, the trial court stated, "[T]he only problem I have is I've never heard [defendant] say that he did anything wrong." While the sentencing court may not consider a defendant's refusal to admit his guilt at sentencing, *People v Miller*, 179 Mich App 466; 446 NW2d 294 (1989), it may consider a defendant's lack of remorse. *People v Houston*, 448 Mich 312, 323; 532 NW2d 508 (1995).

Here, the trial court addressed defendant's failure to admit guilt as it related to his history of avoiding responsibility for his actions. See *People v Stewart*, 219 Mich App 38, 44-45; 555 NW2d 715 (1996). Admittedly, the trial judge's comments, standing alone, intimate that he considered defendant's failure to take responsibility for his role in the assault. Yet, the court's statements can be

read as a comment on defendant's general habit of avoiding responsibility for his actions because the court had just noted that defendant had lied about being charged with an OUIL violation. Moreover, because the court stated that it was considering the deterrent effect of any potential sentence, the court's comments could also be read as addressing the permissible factor of remorsefulness as it bore upon defendant's rehabilitation. Lastly, the trial court's comments, taken as a whole, do not indicate that the sentence imposed on defendant would have been less severe had he admitted guilt. Accordingly, no reversal is necessary.

V

Finally, defendant argues that his four to twenty year prison sentence (which fell within the minimum guidelines range of two to six years) is disproportionate. A sentence within the guidelines range is presumed to be proportionate, *People v Albert*, 207 Mich App 73, 75; 523 NW2d 825 (1994), and nothing presented constitutes sufficiently "unusual circumstances," *People v Milbourn*, 435 Mich 630, 661; 461 NW2d 1 (1990), to render the sentence imposed disproportionate. Defendant's request for resentencing is denied.

Affirmed.

/s/ Henry William Saad

/s/ Janet T. Neff

/s/ Kathleen Jansen

¹ Vezzetti pleaded no contest for his involvement in this incident and served ten months in jail. Dodt was convicted of one count of assault with intent to rob while armed, and was sentenced to five to thirty years' imprisonment as an habitual offender.

² The trial court found that neither Dodt's nor Miller's presence at the preliminary examination affected the fact that defendant could be bound over, and defendant was bound over to circuit court.

³ Even without the stipulation, Miller's testimony would have been cumulative. Where the statute governing endorsed witnesses is violated, a defendant must show prejudice from the violation for relief on appeal. *People v Hana*, 447 Mich 325, 358 n 10; 524 NW2d 682 (1994). Here, Miller's testimony about the investigation would have been cumulative to that of other officers, and his testimony about Dodt's statement would have been cumulative to Vezzetti's testimony that defendant did not strike the complainant. Thus, any error was harmless. See *People v DeMeyers*, 183 Mich App 286, 293; 452 NW2d 202 (1990).

⁴ Any error in omitting the assault and/or assault and battery instruction was harmless because this is *not* a case where the jury rejected the primary charge and convicted defendant on the least serious offense on which it was instructed. See *People v Taylor*, 195 Mich App 57, 63; 489 NW2d 99 (1992).