

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BERNARD REED,

Defendant-Appellant.

UNPUBLISHED

July 24, 2008

No. 277876

Wayne Circuit Court

LC No. 06-012011-01

Before: Meter, P.J., and Smolenski and Servitto, JJ.

PER CURIAM.

Defendant appeals as of right from his jury-based convictions of assault with intent to commit great bodily harm less than murder, MCL 750.84, and unarmed robbery (two counts), MCL 750.530.¹ Defendant was sentenced as a fourth-offense habitual offender, MCL 769.12, to concurrent sentences of 10 to 25 years for each conviction. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Complainants Howard Troy and Norman Martin testified that defendant approached them in the parking lot of a liquor store as they were in their car preparing to leave. Defendant was holding a handgun. Defendant entered the car and ordered the men to give him their money and sunglasses. They complied. He then ordered them to give him the car keys. Martin stated that he lied and told defendant that a person who was still in the store had the keys. At one point, Martin pushed the gun toward the dashboard, and Troy and defendant began to struggle for control of the gun. The gun discharged and struck the door, approximately one inch from Martin. Martin left the car and told people in the store to call the police. He returned to the car and saw defendant and Troy struggling for the gun. Defendant struck Troy in the head repeatedly with Troy's metal steering lock. Troy eventually gained control of the gun, and defendant ran from the scene.

Defendant was on parole when the instant offenses occurred. Defendant argues that the prosecution violated MRE 404(b) by improperly questioning him regarding the conditions of his parole, and regarding whether he had violated it by staying out past his curfew. Defense counsel

¹ Defendant was acquitted of various other charges.

did not object to this line of questioning. Defendant has failed to preserve this claim of error for review. *People v Cain*, 238 Mich App 95, 115; 605 NW2d 28 (1999). Thus, we review his claim for plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

At trial, defendant maintained that he had been the actual victim of an armed robbery by Martin and Troy. A portion of defendant's defense was that he did not reveal this to the police when he was stopped, because of his parole status. Defense counsel stated during opening statement that defendant did not talk about the fight because he was "on parole for driving around a stolen vehicle," and he knew that "if he admits to any association with a weapon he'll get five years as a parole violation." During direct examination, defendant testified that after the fight he ran away in part because he did not want to be anywhere near a gun. When asked why, defendant admitted that he was on parole at the time of the robbery for "being in a stolen vehicle" and that he thought he would be subject to five years in prison if he were found in the vicinity of a gun. Defendant tried to use these disclosures to suggest to the jurors that he was being forthright and honest with them, and also to provide support for his claim that he had a valid reason to run away, even though he was the actual victim. Defendant thus "opened the door" to inquiry into these areas by the prosecution on cross-examination. See *People v Figures*, 451 Mich 390, 399-400; 547 NW2d 673 (1996), *People v Vasher*, 449 Mich 494, 503; 537 NW2d 168 (1995), and *People v Johnson*, 409 Mich 552, 558-561; 297 NW2d 115 (1980). The prosecutor's questions were related to defendant's assertion that he was trying to comply with the conditions of his parole and how this contrasted with his other behavior. Defendant has not demonstrated plain error.

Defendant also maintains that trial counsel provided ineffective assistance by failing to object to the prosecutor's questioning regarding defendant's parole status. However, as discussed above, the questioning was permissible after counsel decided to introduce the fact that defendant was on parole during direct examination. Counsel is not ineffective for failing to raise meritless or futile objections. *People v Moorner*, 262 Mich App 64, 76; 683 NW2d 736 (2004).

Defendant next argues that the trial court erred when it sentenced him as an habitual offender. He first maintains that the prosecution failed to provide notice that it was charging him as an habitual offender, as required by MCL 769.13. Defendant also maintains that the trial court did not sentence him as an habitual offender, and that he never acknowledged or pled to that status. Therefore, he contends that his sentences, which fell outside the maximum allowable under the underlying statutes, were not authorized by law.

Defendant failed to properly preserve this issue for appeal. *People v McLaughlin*, 258 Mich App 635, 669-670; 672 NW2d 860 (2003); *People v Sexton*, 250 Mich App 211, 228; 646 NW2d 875 (2002). We review unpreserved sentencing issues for plain error that affected substantial rights. *Sexton*, *supra* at 228. A plain error merits reversal only when the defendant is actually innocent or the "error seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Carines*, *supra* at 763-764.

Defendant is mistaken in his assertion that the prosecution did not provide notice that it would seek sentence enhancement under MCL 769.12. The prosecution provided this notice in the information, which was issued on the date of defendant's arraignment. The prosecutor complied with MCL 769.13.

Defendant contends that the trial court did not specifically find that defendant could be sentenced as an habitual offender. We disagree. The sentencing information report listed defendant's status as a fourth-offense habitual offender. The trial court effectively found that defendant was an habitual offender when it stated that defendant's convictions "all have a maximum of life." Nor did defendant challenge his status as an habitual offender pursuant to MCL 769.13(5). The fact that defendant did not specifically acknowledge his status does not render his sentence invalid, because acknowledgement is only one way to establish the existence of prior convictions. The trial court's decision was supported by the information in defendant's presentence information report. Defendant did not challenge the validity of the information contained in the report at trial and does not do so now. Therefore, the trial court's decision was properly supported by the evidence. See MCL 769.13(5)(d). Defendant has not demonstrated plain error that requires resentencing.

Affirmed.

/s/ Patrick M. Meter
/s/ Michael R. Smolenski
/s/ Deborah A. Servitto