

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HAROLD SPENCER WILLIAMS,

Defendant-Appellant.

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UNPUBLISHED

May 20, 2003

No. 230566

Oakland Circuit Court

LC No. 00-171038-FC

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

PER CURIAM.

Defendant appeals by right from his convictions by a jury of assault with intent to commit murder, MCL 750.83, possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, and two counts of carrying a concealed weapon (CCW), MCL 750.227. Defendant had previously pleaded guilty to discharge of a firearm in a dwelling, MCL 750.234b, and another felony-firearm count. The trial court sentenced him to two concurrent, two-year prison terms for the felony-firearm convictions, to be followed by concurrent prison terms of 18-1/2 to 50 years for the assault with intent to commit murder conviction, two to five years each for the CCW convictions, and one to four years for the discharge of a firearm conviction. We affirm.

I

Defendant first argues that his trial attorney rendered ineffective assistance of counsel because she (1) failed to seek an interlocutory appeal of the court's denial of defendant's motion to quash the information; (2) conceded defendant's guilt on three charges, without obtaining defendant's waiver; (3) refused to allow defendant to testify; and (4) failed to present the victim's treating physicians to testify about the nature and extent of his injuries.

To establish ineffective assistance of counsel, a defendant must show that his counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and that, but for counsel's error or errors, it is reasonably probable that the outcome of the proceedings would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *Id.* at 302. Here, because defendant failed to make a testimonial record in the trial court in connection with a motion for a new trial or an evidentiary hearing, this Court's

review of this issue is limited to mistakes apparent on the record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

We find no basis for reversal. With regard to counsel's failure to pursue an interlocutory appeal, we cannot conclude that this failure affected the outcome of the case. *Toma, supra* at 302-303. Indeed, had such an appeal been pursued, we would have reviewed the circuit court's decision de novo to determine whether the district court abused its discretion in binding defendant over for trial. *People v Libbett*, 251 Mich App 353, 357; 650 NW2d 407 (2002). The abuse of discretion standard is narrow; for an abuse of discretion to be present, the result of the proceedings must have been so violative of fact and logic that it evidences a defiance of judgment or an exercise of passion or bias. *Id.*

Here, the district court was required to bind defendant over for trial if the prosecutor presented competent evidence constituting probable cause to believe that defendant committed assault with intent to murder. *People v Northey*, 231 Mich App 568, 574; 591 NW2d 227 (1998). The court's "determination that sufficient probable cause exists will not be disturbed unless the determination is wholly unjustified by the record." *Id.* "Probable cause requires a reasonable belief that the evidence presented during the preliminary examination is consistent with defendant's guilt." *Id.* at 575. "Circumstantial evidence, coupled with those inferences arising therefrom, is sufficient to establish probable cause . . ." *Id.*

Assault with intent to murder requires (1) an assault; (2) with the actual intent to kill; (3) that, if successful, would make the killing murder. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999). "Circumstantial evidence and the reasonable inferences that arise from the evidence can constitute satisfactory proof of the elements of the crime." *Id.* "The intent to kill may be proved by inference from any facts in evidence." *Id.* "Because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient." *Id.*

Here, the victim, Bradford Williams (defendant's brother), testified at the preliminary hearing concerning his past conflicts with defendant and the fact that they were not on speaking terms. He also explained that defendant appeared on his doorstep in the early morning hours and lied about their father's death to obtain entry into the house. He testified that once inside the house, defendant fired a gun at him numerous times, hitting him at least once. Williams stated that defendant chased him, eventually indicating that he was upset over issues concerning a bank account. Given this evidence, even had certain medical records been presented to the district court, it still would have had probable cause to bind defendant over on the assault with intent to murder charge. Therefore, any interlocutory appeal would have been futile. Counsel is not required to advocate a meritless position. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

With regard to counsel's alleged concession of defendant's guilt of certain charges, we again find no basis for reversal. Contrary to defendant's contention on appeal, counsel did not explicitly concede guilt with regard to the felony-firearm charge. Moreover, while counsel did concede guilt with respect to the CCW charges, defendant's contention that counsel did not obtain his permission to do so is not demonstrated by the record. Therefore, no claim may be based on counsel's failure to obtain defendant's waiver. Moreover, defense counsel was employing the accepted trial strategy of admitting guilt to a lesser offense, which this Court will

not second-guess. *People v Emerson (After Remand)*, 203 Mich App 345, 349; 512 NW2d 3 (1994).

With regard to counsel's alleged refusal to allow defendant to testify, we note that decisions regarding which evidence to present and whether to question or call witnesses are presumed to be issues of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). "This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *Id.* at 76-77.

Here, while defendant states that counsel refused to allow him to testify, the only record evidence belies this contention. Indeed, defendant informed the court that he decided not to testify. Therefore, no claim may be premised on defendant's claim that counsel refused to allow him to testify. Moreover, even if it was counsel's decision not to present defendant, this decision must be presumed to be trial strategy. There is some suggestion in the record that counsel feared that the prosecutor would follow through with his intention to ask defendant questions about where his weapons came from, which could have led to prejudicial evidence being admitted. While defendant could have offered his version of the incident, which may have helped his case, counsel opted instead to defend the case based on an argument that the prosecutor failed to prove beyond a reasonable doubt that defendant intended to murder Williams. Counsel argued that the evidence showed that there was an argument and fight between the brothers and suggested that the gun accidentally discharged. Counsel argued that there was no motive to kill Williams. That this strategy failed does not render its use ineffective assistance of counsel. *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001).

With regard to counsel's failure to present the physicians who treated Williams after the incident, we again find no error requiring reversal. Defendant contends that the testimony in question would have shown that Williams lied about his injuries. He also contends that the testimony would have explained the medical records and supported the defense theory that this was an accidental shooting.

Again, counsel's decision not to present the evidence must be presumed to be trial strategy. Moreover, "[i]neffective assistance of counsel can take the form of failure to call witnesses only if the failure deprives the defendant of a substantial defense." *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vacated in part on other grds 453 Mich 902 (1996). "A defense is substantial if it might have made a difference in the outcome of the trial." *Id.* Here, the medical records pertaining to Williams' injuries were admitted into evidence. These records were not overly technical. According to a brief filed by defendant, they indicated that Williams suffered a gunshot wound that did not puncture vital organs. The records indicated that the brothers had an argument and that Williams had been shot in the abdomen. The records further revealed that Williams had been hit in the head with the butt of a gun. While defendant speculates that the treating physicians would have further helped his case, the record does not support this claim. Because the jury had the actual medical records, defendant was not deprived of a substantial defense due to counsel's failure to also present the treating physicians. Reversal is unwarranted.

## II

Next, defendant argues that the trial court erred in admitting evidence that the handgun defendant used was stolen from his neighbor. Defendant contends that this evidence should have been excluded as irrelevant or as more prejudicial than probative. We review a trial court's decision to admit evidence for an abuse of discretion. *People v Taylor*, 252 Mich App 519, 521; 652 NW2d 526 (2002). An abuse of discretion occurs if an unprejudiced person, considering the facts available to the trial court, would find no justification for the ruling made. *Id.*

On the first day of trial, defendant moved in limine to exclude Gregg Burt's testimony. Burt apparently would testify that the gun used to shoot the victim was stolen and that defendant was somehow involved in its theft. The court said it would decide the issue if defendant testified. However, defendant never testified, and the court ultimately never ruled on the issue.

However, at trial, the issue of the stolen nature of the weapon arose in another context. The prosecutor sought to admit a certified document from the Michigan Department of State Police. This document was a certification on the status of the two guns the police recovered and indicated whether the weapons were registered as required by law. The document indicated that one of the weapons was reported stolen. The prosecutor argued that the document was relevant because it pertained to his theory that defendant had a gun that could not be traced back to him. The prosecutor argued that the document was self-authenticating and did not give any indication of the circumstances of the theft. The prosecutor said that he did not intend to suggest that defendant was the thief, unless defendant took the stand and opened the door to such evidence.

Defendant objected to the document, arguing that it would lead to questions in the jurors' minds. Defendant argued that the evidence would cause the jury to conclude that he stole the gun or that he was a bad person because he possessed a stolen gun. Defendant requested that any reference to the stolen nature of the gun be redacted. Defendant offered to stipulate that he possessed a gun that was not registered to him. Defendant argued that the proposed evidence was not relevant and that it was more prejudicial than probative. The court overruled defendant's relevancy objection, apparently on the basis that the document did not reveal evidence of another crime involving defendant. The prosecutor subsequently admitted the document into evidence as an exhibit.

We find no basis for reversal. Generally, all relevant evidence is admissible, while irrelevant evidence is not. MRE 402. Relevant evidence means any evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. Relevant evidence may be excluded if its "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ." MRE 403.

Here, the evidence was relevant because if defendant used a stolen gun, this made it more likely that he was attempting to avoid detection. This was an issue because the prosecutor theorized that defendant used weapons in the assault that could not be traced back to him. The prosecutor's theory was that defendant's use of such weapons was relevant to the issue of defendant's intent. Moreover, the probative value of this evidence was not substantially outweighed by the danger of unfair prejudice because there was nothing indicating that defendant was involved in the theft of the gun, and the court gave a limiting instruction. The

court instructed the jury that the evidence was admitted only to show that the guns were not registered to defendant. Moreover, contrary to defendant's claim, the fact that the prosecutor referred to the gun as stolen in summation did not constitute error because he was merely arguing the evidence as it related to his theory. No abuse of discretion occurred, and reversal is unwarranted.

### III

Next, defendant argues that the prosecutor committed misconduct requiring reversal during his closing arguments by shifting the burden of proof, impinging on defendant's Fifth Amendment right to remain silent, and making a religious argument.

An appellate court reviews claims of prosecutorial misconduct on a case-by-case basis. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996). The court examines the prosecutor's actions in context to decide if they deprived the defendant of a fair and impartial trial. See *id.* Otherwise improper remarks may not require reversal if the remarks were made in response to defense counsel's arguments. *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996). Moreover, defendant in the instant case did not object to the comments he challenges on appeal. If a defendant did not object to alleged prosecutorial misconduct below, this Court reviews for plain error. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). To obtain relief under the plain error doctrine, a defendant must demonstrate the existence of a clear or obvious error that likely affected the outcome of the case. *Id.*; *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Even if defendant satisfies this initial burden, reversal is appropriate only if the plain error resulted in the conviction of an actually innocent person or seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Carines*, *supra* at 763; *Schutte*, *supra* at 720. Moreover, "[n]o error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction." *Schutte*, *supra* at 721.

We find no plain error requiring reversal. Defendant contends that the prosecutor improperly shifted the burden of proof when he asked the jury whether it had heard "any evidence, any credible evidence to contradict the evidence the People put in in this case." A prosecutor may not imply in summation that a defendant "must prove something or present a reasonable explanation for damaging evidence because such an argument tends to shift the burden of proof." *People v Green*, 131 Mich App 232, 237, 345 NW2d 676 (1983). "Moreover, such a technique indirectly focuses upon a defendant's exercise of his Fifth Amendment right to remain silent should [the] defendant decide not to testify." *Id.* However, a prosecutor may properly argue that the evidence was uncontradicted "even though the defendant is the only person who could have contradicted the evidence." *Id.*; see also *People v Earl*, 299 Mich 579, 582-583; 300 NW 890 (1941). Given these authorities, we discern no clear or obvious error with respect to the comment at issue.<sup>1</sup>

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<sup>1</sup> Defendant relies on *Raper v Mintzes*, 706 F2d 161 (CA 6, 1983), in support of his argument for reversal, but that case is distinguishable because the dispositive fact there was that the prosecutor repeatedly commented about the uncontradicted nature of the evidence, *Raper*, *supra* at 167, whereas here, only an isolated comment was made. The prosecutor in the instant case did not  
(continued...)

Defendant also contends that the prosecutor improperly referred to the biblical story of Cain and Abel. As this Court stated in *People v Rohn*, 98 Mich App 593, 596; 296 NW2d 315 (1980), overruled on other grounds by *People v Perry*, 460 Mich 55 (1999):

Prosecutors are accorded great latitude regarding their arguments and conduct. However, it is paramount that prosecutors pursue any lawsuit with as equal a concern for ensuring a defendant a fair trial as for convicting him. A defendant's opportunity for a fair trial may be jeopardized when the prosecution interjects issues broader than the guilt or innocence of the accused. This is particularly true when the prosecutor appeals to a jury's civic duty, or when extraneous racial, religious or ethnic matters are introduced at trial. [Citations omitted.]

Whenever religious matters are mentioned in a trial, there is always the risk of incidentally arousing prejudice. *George v Travelers Indemnity Co*, 81 Mich App 106, 114; 265 NW2d 59 (1993).

Here, under these standards, the prosecutor's argument was improper. However, reversal is not required because the prejudicial effect of these comments could have been cured by a timely instruction. *Schutte, supra* at 721. Had defendant objected, the court could have instructed the jury that the story of Cain and Abel had no bearing on defendant's guilt. Further, we cannot conclude that the challenged statements affected the outcome of the case, given the evidence introduced at trial. *Carines, supra* at 763. Moreover, any prejudice was in fact dispelled by the court's instruction that the prosecutor's arguments were not evidence. *Schutte, supra* at 721-722. Because defendant suffered no prejudice, his claim of ineffective assistance of counsel, raised in a footnote in his reply brief, also fails. See *Toma, supra* at 302-303.

#### IV

Next, defendant argues that the evidence was insufficient to support the assault with intent to murder conviction because the prosecution failed to prove that defendant had the specific intent to kill. In reviewing the sufficiency of the evidence, this Court "must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt." *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997); see also *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). All conflicts with regard to the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). Further, this Court should not interfere with the jury's role of determining the weight of the evidence or the credibility of witnesses. *Id.*; *Wolfe, supra* at 514-515. As noted, assault with intent to murder requires (1) an assault; (2) with an actual intent to kill; (3) that, if successful, would make the killing murder. *McRunels, supra* at 181. "Circumstantial evidence and the reasonable inferences that arise from the evidence can

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imply that defendant must prove something and merely briefly commented that the evidence was uncontradicted.

constitute satisfactory proof of the elements of the crime.” *Id.* “The intent to kill may be proved by inference from any facts in evidence.” *Id.* “Because of the difficulty of proving an actor’s state of mind, minimal circumstantial evidence is sufficient.” *Id.*

Here, the circumstantial evidence, viewed in the light most favorable to the prosecution, was sufficient to establish defendant’s intent to kill. The evidence demonstrated that the brothers had had an ongoing feud over the care of their father. Several days before the shooting, defendant had surveiled the area in which the shooting occurred. He subsequently appeared in the early morning hours, hit Williams in the head with a piece of steel, shot at Williams multiple times, and then chased after him.

Moreover, the evidence established that defendant used a newly-purchased vehicle (i.e., one not likely to be linked to him) to surveil the area, and he used a gun not registered to him. Moreover, he was due to close on a new house in Canada the day after the shooting.

All of the above facts, viewed in a light most favorable to the prosecution, could have permitted the jury to conclude that defendant intended to kill his brother. Reversal is unwarranted.

## V

Finally, defendant contends that this Court must remand for resentencing on the assault charge due to the trial court’s numerous scoring errors.<sup>2</sup> “A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score.” *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). Scoring decisions will be upheld if there is any evidence in support of them. *Id.*

Defendant contends that the trial court erred in scoring twenty-five points for OV 3, which addresses physical injury to a victim. The court should score twenty-five points if “[i]f threatening or permanent incapacitating injury occurred to [the] victim.” MCL 777.33(1)(c). Defendant contends that the court should have scored only ten points, which is proper if “[b]odily injury requiring medical treatment occurred to a victim.” MCL 777.33(1)(d).

The trial court scored twenty-five points because Williams suffered a life-threatening injury as a result of a bullet that hit the upper portion of Williams’ body and penetrated an area where vital organs were located. The court stated, “[t]he fact that an injury may heal has nothing to do with the fact that it still may be life threatening . . . .” Essentially, the court recognized that an abdominal bullet wound is life-threatening if left untreated. Given this reasoning, we cannot conclude that the trial court abused its discretion.

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<sup>2</sup> The offenses here were committed in November 1999; therefore, this matter is controlled by the legislative sentencing guidelines. MCL 769.34(2); *People v Reynolds*, 240 Mich App 250, 253, 611 NW2d 316 (2000).

Defendant contends that the court improperly scored ten points for OV 4, which addresses psychological injury to a victim. The court should score ten points for OV 4 if “[s]erious psychological injury requiring professional treatment occurred to a victim.” MCL 777.34(1). Ten points are proper if the serious psychological injury *may* require professional treatment. MCL 777/34(2). “In making this determination, the fact that treatment has not been sought is not conclusive.” *Id.* The court assessed ten points for OV 4, commenting:

I think we have for centuries been psychologically damaged by the incident of Cain and Able [sic], am I my brother’s keeper? They didn’t have professionals in those days and we’re still suffering the consequences in being able to answer that question. Ten points.

Here, in his victim impact statement, Williams said that his biggest trauma was not his physical injuries but rather the psychological and emotional toll the incident created. He said the emotional impact was indescribable and that defendant “totally shattered the easy going security that should be within the family.” As a result of the incident, his entire family suffered extreme emotional fatigue. Additionally, at sentencing, Williams informed the court that, as a result of the incident, he was constantly in fear and was currently receiving counseling. His whole family had been drained and exhausted by the incident. Given these comments, and considering the facts and circumstances of the incident, the court properly assessed ten points.

Defendant contends that the court erred in scoring ten points for OV 9, which addresses the number of victims. Ten points are to be scored if there are between two and nine victims. MCL 777.39(1)(c). Each person who is placed in danger of injury or loss of life is considered a victim. MCL 777.39(2)(a). Here, the court assessed ten points, apparently agreeing with the prosecutor that Williams’s wife and children were also victims.

In *People v Kimble*, 252 Mich App 269, 274; 651 NW2d 798 (2002), lv granted \_\_\_ Mich \_\_\_; 659 NW2d 231 (2003), the defendant shot the victim who, at the time, was next to her fiancé and child. This Court held that ten points were properly assessed in that case because the defendant placed all three persons in danger of injury or loss of life. *Id.* Here, defendant fired multiple shots in the home. Because Williams’ wife and children were in the next room when this occurred, they were also placed in danger of injury. Accordingly, the court properly assessed ten points.

OV 10 addresses exploitation of a vulnerable victim. Defendant contends that the court erred in scoring fifteen points for OV 10. Fifteen points are to be scored if there was predatory conduct involved. MCL 777.40(1)(a). “‘Predatory conduct’ means preoffense conduct directed at a victim for the primary purpose of victimization.” MCL 777.40(3)(a). Here, the court apparently agreed with the prosecutor’s argument that defendant engaged in predatory conduct since he was seen lurking around Williams’ house several days before the incident and also because defendant caught Williams by surprise by showing up at the house in the middle of the night, under the ruse that their father had died.

In *Kimble*, *supra* at 274-275, this Court held that the court properly assessed fifteen points for OV 10 where the defendant had driven around for an hour, looking for a car to steal, and followed the victim home before shooting her. The Court stated, “Defendant’s preoffense behavior in seeking out a victim and following this victim home for the specific purpose of

committing a crime against her was clearly predatory within the meaning of the statute.” *Id.* at 275.

Similarly, the court in the instant case properly accepted the prosecutor’s argument, which was supported by the evidence. The court correctly scored fifteen points for OV 10.

OV 12 addresses contemporaneous felonious criminal acts. Defendant contends that the court erred in scoring ten points for OV 12. The court should score ten points if three or more contemporaneous felonious criminal acts involving other crimes were committed. MCL 777.42(1)(c). A felonious criminal act is contemporaneous if both of the following circumstances exist: (1) the act occurred within 24 hours of the sentencing offense and (2) the act has not and will not result in a separate conviction. MCL 777.42(2)(a).

Here, the court apparently agreed with the prosecutor that there were three contemporaneous crimes. Namely, (1) carrying a concealed weapon, based on the knife found in defendant’s car upon his arrest; (2) receiving or concealing stolen property, based on the fact that the handgun defendant used was stolen, and (3) discharge of a weapon in a building, based on the fact that defendant fired multiple shots in the house, but was only charged with one count.

Even disregarding the receiving or concealing stolen property offense and the additional CCW offense, the evidence showed that defendant fired a gun multiple times, so he technically committed multiple violations of MCL 750.234b. Williams’ wife testified that she heard at least four gunshots, and there were multiple bullet holes in the house after the incident. Therefore, there was evidence of at least three contemporaneous crimes. The court properly assessed ten points for OV 12.

Finally, defendant contends that the court erred in assessing fifty points for OV 6 because this variable was inapplicable to his assault conviction. The trial court rejected this argument, agreeing with the prosecutor that this variable did in fact apply to assault with intent to kill cases. The court should score fifty points for OV 6 if the defendant

had a premeditated intent to kill or the killing was committed while committing or attempting to commit arson, criminal sexual conduct in the first or third degree, child abuse in the first degree, a major controlled substance offense, robbery, breaking and entering of a dwelling, home invasion in the first or second degree, larceny of any kind, extortion, or kidnapping or the killing was the murder of a peace officer or corrections officer. [MCL 777.36(1)(a).]

At the time of sentencing, MCL 777.22 expressly provided that OV 6 was only to be scored for homicide or attempted homicide. The statute was amended, effective October 1, 2000, to specifically include assault with intent to commit murder as a crime for which OV 6 could be scored. Therefore, unless the amendment applies retroactively, the court plainly erred in assessing any points for OV 6.

Here, we need not even address whether the amendment applies retroactively, because even assuming, arguendo, that the court erred in its scoring of OV 6, no resentencing would be warranted. Indeed, even if this Court reduced defendant’s total offense variable score by fifty points, the remaining 100 points would still place defendant in the highest level of offense

severity and would not affect the recommended sentence range. See MCL 777.62. Accordingly, the possible scoring error was harmless. *People v Johnson*, 202 Mich App 281, 290; 508 NW2d 509 (1993).

Finally, we reject defendant's proportionality claim, because his sentence is within the range recommended by the statutory sentencing guidelines. *People v Pratt*, 254 Mich App 425, 429-430; 656 NW2d 866 (2002).

Affirmed.

/s/ Patrick M. Meter  
/s/ Kathleen Jansen  
/s/ Michael J. Talbot