

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee

v

DARYLE ANTHONY STEWART,

Defendant-Appellant.

UNPUBLISHED

September 26, 2006

No. 259358

Wayne Circuit Court

LC No. 90-003165

Before: Cavanagh, P.J., and Markey and Meter, JJ.

PER CURIAM.

In July 1990, defendant was convicted by a jury of armed robbery, MCL 750.529, assault with intent to rob while armed, MCL 750.89, assault with intent to commit murder, MCL 750.83, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent prison terms of 25 to 50 years for each of the armed robbery and assault convictions and to a consecutive two-year term of imprisonment for the felony-firearm conviction. He appeals pursuant to this Court's prior order affording defendant an appeal after determining that defendant was previously deprived of his right to appeal because of the ineffectiveness of his original appellate attorney. *People v Stewart*, unpublished order of the Court of Appeals, entered November 9, 2005 (Docket No. 259358).¹ We affirm.

Defendant first contends that because the armed robbery and assault with intent to rob while armed convictions involved the same victim and encompassed the same wrongful conduct, double jeopardy principles preclude convictions for both crimes. "A double-jeopardy argument presents a question of constitutional law that this Court reviews de novo." *People v Hill*, 257 Mich App 126, 149-150; 667 NW2d 78 (2003). Because defendant failed to raise the double jeopardy issue before the trial court, this Court reviews the alleged constitutional violation for

¹ This Court found that defendant was entitled to appeal the merits of his convictions because his original appellate attorney "provided ineffective assistance of counsel that deprived defendant of his right to appeal by not timely filing the claim of appeal, and then abandoning a second chance for defendant to appeal his convictions in the form of a delayed application for leave to appeal." *People v Stewart*, unpublished order of the Court of Appeals, entered November 9, 2005 (Docket No. 259358).

plain error that affected his substantial rights. *People v Matuszak*, 263 Mich App 42, 47; 687 NW2d 342 (2004).

Both federal and Michigan double jeopardy provisions afford three related protections: (1) against a second prosecution for the same offense after acquittal, (2) against a second prosecution for the same offense after conviction; and (3) against multiple punishments for the same offense. . . . [T]he purpose of the double jeopardy protection against multiple punishments for the same offense is to protect the defendant from having more punishment imposed than the Legislature intended.

* * *

Under the federal Double Jeopardy Clause, whether the Legislature intended to impose multiple punishments for violations of more than one statute during the same transaction or incident is generally determined by the application of the . . . “same elements” test.² [*People v Ford*, 262 Mich App 443, 447-448; 687 NW2d 119 (2004) (internal citations and quotation marks omitted).]

“There is no violation based on double prosecution if one crime is complete before the other takes place, even if the offenses share common elements or one constitutes a lesser offense of the other.” *People v Swinford*, 150 Mich App 507, 515; 389 NW2d 462 (1986).

With respect to the assault with intent to rob while armed conviction, the victim testified that defendant approached him while holding a revolver, placed the revolver to the victim’s head to encourage him to leave his grandmother’s house, forcefully escorted the victim to the victim’s Mustang while keeping the revolver pointed toward his side, handcuffed the victim, pointed the gun at the victim while threatening several times to kill him if he did not give defendant money, and thereafter drove the victim around Detroit for more than an hour while repeatedly threatening to kill the victim if he did not produce money. The victim’s testimony thus establishes that an assault with intent to rob while armed occurred as early as the moment that defendant first ordered that the victim turn over some money, shortly after defendant initially had placed the victim inside the Mustang. *People v Akins*, 259 Mich App 545, 554; 675 NW2d 863 (2003) (listing the elements of assault with intent to rob while armed as (1) committing an assault with force and violence, (2) having the specific intent to rob or steal, and (3) being armed).

The charged armed robbery took place toward the end of this protracted ordeal, when defendant shot out one of the Mustang’s windows while getting out of the car, shot the victim’s brother in the face while the victim watched, got back inside the victim’s Mustang, and drove

² The same elements test generally considers whether “each offense contains an element not contained in the other; if not, they are the ‘same offence’ and double jeopardy bars additional punishment and successive prosecution.” *Ford, supra* at 448 (internal citation and quotation marks omitted). This Court has recognized, and the parties do not dispute, that assault with intent to rob while armed constitutes a necessarily included lesser offense of armed robbery. *People v Akins*, 259 Mich App 545, 552; 675 NW2d 863 (2003).

away. *Ford, supra* at 458 (listing the elements of armed robbery as (1) an assault, (2) plus a felonious taking of property from the victim's presence, (3) while armed with a dangerous weapon). By the victim's estimation, the robbery occurred at least between 1 and 1-1/2 hours after defendant first had accosted the victim on his grandmother's front porch. Because the armed robbery of the victim involved entirely distinct circumstances from those constituting the crime of assault with intent to rob the victim while armed, and because the crimes occurred in different locations and with a wide temporal gap between them, we conclude that defendant's convictions of both crimes do not result in multiple punishments for the same offense. *Swinford, supra* at 515-516; *People v Yarbrough*, 107 Mich App 332, 333-336; 309 NW2d 602 (1981) (explaining that armed robbery and felonious assault convictions do not violate double jeopardy principles if the facts clearly show that the offenses occurred at separate times).

Defendant next argues that his trial counsel was ineffective for failing to object to a comment by the prosecutor during her closing argument that allegedly shifted the burden of proof and insinuated that she had special knowledge of defendant's guilt. Because defendant never raised this issue in a motion for a new trial or an evidentiary hearing, our review of this claim is limited to mistakes apparent on the existing record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). To establish ineffective assistance of counsel, "a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial." *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). With respect to the prejudice prong of the test, a defendant must "demonstrate a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, *and* the attendant proceedings were fundamentally unfair or unreliable." *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001) (emphasis in original).

Defendant maintains that his trial counsel was ineffective for failing to object to the emphasized portion of the prosecutor's closing argument:

And we have the identification because we listened to [the victim] Wayne Rodgers . . . and [eyewitness] Eric Brown who told us . . . they didn't try and bolster their story. They would have said a lot of things. They could have said, well, we got up and we stood and I looked straight in his eye or I knew him because I've known him for 20 years, I've known him since I was a kid. He didn't say any of that stuff. He said, yeah, I kind of know him from around the neighborhood but they didn't come in and try and tell you a story. This isn't just a blind mugging in an alley and they were just looking for somebody to blame and he's just a bad guy in the neighborhood so we're just going to blame it on him. They don't live in the same neighborhood.

And then we have Mr. Stewart who says he doesn't know any of these people. *Now, ladies and gentlemen, you've got to ask yourself, why would we be here at trial, why would I be standing here in front of you arguing if he's just an innocent bystander and I'm supposed to assume that the Detroit Police Department has decided to employ Gestapo techniques and take people off the street and making [sic] them stand [sic] for a crime that they didn't commit?* You have to use your common sense. Daryle Stewart was identified by three different people. [Emphasis added.]

Given the context of this remark, which occurred after the prosecutor's accurate summary of the trial testimony by the victim and Eric Brown identifying defendant as the assailant, and after defendant's trial testimony denying his presence during the charged crimes and suggesting that the police had arrested him by mistake, we find that the challenged remark constituted proper argument, based on trial testimony, that defendant's version of events was implausible and unworthy of belief. *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996) (observing that a "prosecutor may argue from the facts that a witness, including the defendant, is not worthy of belief . . . and is not required to state inferences and conclusions in the blandest possible terms").³

Defendant additionally asserts that the sentences imposed by the trial court for the assault and robbery convictions are disproportionately severe. This Court generally reviews a sentence imposed under the former judicial sentencing guidelines for an abuse of discretion. See *People v Milbourn*, 435 Mich 630, 634; 461 NW2d 1 (1990). "[A] given sentence can be said to constitute an abuse of discretion only if that sentence violates the principle of proportionality, which requires sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender." *Id.* at 636.

The guidelines calculated with respect to defendant's concurrent assault and robbery convictions recommended a minimum sentence between 84 and 180 months. The trial court explained as follows its decision to depart upward from the recommended guideline range:

I do intend to exceed the guidelines in this case and I want to state my reason as clearly as possible for doing that. For example, defense counsel has stated to the effect that the matter is scored for one particular offense and that there were, it could not be scored to incorporate other matters because they were separate offenses and I think that because . . . they are separate offenses that maybe, or one right after the other, that that is a factor for the court to consider in looking at the guidelines here. Because if I even scored this for robbery armed we've got another approximately 10 or 15 years that were involved with that if

³ To the extent that any impropriety occurred, the remark did not affect the outcome of defendant's trial. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). First, apart from the one-sentence remark in question, defendant provides no other citations to the record of situations in which the prosecutor allegedly insinuated having some special knowledge concerning his guilt. See *Launsburry*, *supra* at 361 (finding that the isolated nature of the prosecutor's improper comments weighed against a finding of substantial prejudice). Second, the trial court instructed the jury that the "lawyers' statements and arguments are not evidence" and that the jurors were the sole and final determiners of "the facts of this case," including "whether [they] believe what each of the witnesses said." See *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). Third, ample evidence supported defendant's robbery and assault convictions in light of the consistent trial testimony by the victim, who spent a significant amount of time in the Mustang with defendant, and Brown, identifying defendant as the assailant.

they were being scored and sentenced separately. You know, you really can't have it, you know, both ways.

But the fact of the matter is that this defendant Stewart created the situation that is just by, I guess, the grace of God that didn't result in murder of possibly two people here. And particularly as to the one young man who was shot at two or three times while he was trying to avoid Mr. Stewart from behind the vehicle there and every effort was taken to shoot at and finally did hit this person. It is lucky that he didn't die from that wound, that head wound.

And it really, you know, you have a right to maintain your innocence, Mr. Stewart, but in the face of three people who identify you and certainly Mr. Roper who knows you from prior contact and you want to, you know, still maintain that you know nothing about this and you weren't there, -- that is your privilege and your right to do that, -- but you can keep on maintaining that while you are sitting behind the prison at Jackson.

For the offense of felony firearm I place the defendant in the custody of the Michigan Department of Corrections for two years and again in terms of the other offenses here, the sentence that I will impose, there is nothing to justify or to even understand the actions that were taken here in riding him around, you know, in a car and threatening him and then when his brother tries to rescue him to attempt to kill, to kill him, as you were found guilty of by the jury.

I think you are a dangerous person. Anyone who would go to such lengths to try and kill someone and to stalk the person in the first place deserves considerable time in prison.

You will be sentenced then for the offense of robbery armed to a minimum of 25 years to a maximum of 50 years. For the offense of assault with intent to rob armed, 25 to 50 years. For the offense of assault with intent to murder, 25 to 50 years, and those are to run concurrent and consecutive to the two years for the felony firearm.

“Where there is a departure from the sentencing guidelines, an appellate court's first inquiry should be whether the case involves circumstances that are not adequately embodied within the variables used to score the guidelines.” *Milbourn, supra* at 659-660. “In the absence of factors legitimately considered at sentencing and not adequately considered by the applicable guidelines, a departure from the recommended range indicates a possibility that a sentence may be disproportionate.” *People v Houston*, 448 Mich 312, 320; 532 NW2d 508 (1995).

First, the trial court considered and properly articulated several legitimate sentencing factors when deciding to depart from the guidelines. The trial court properly emphasized the nature and severity of the instant crimes, *People v Rice (On Remand)*, 235 Mich App 429, 446; 597 NW2d 843 (1999), the circumstances surrounding defendant's commission of the crimes, including his stalking of the victim before the assault with the intent to rob him, the interrelationship of the charged crimes, *People v Oliver*, 242 Mich App 92, 98; 617 NW2d 721 (2000), and defendant's attitude toward his criminal behavior, specifically his failure to express

remorse for any of the charged crimes in the face of identification testimony by multiple witnesses. *People v Spanke*, 254 Mich App 642, 649-650; 658 NW2d 504 (2003);⁴ *Oliver, supra* at 98. The trial court also expressly considered proper objectives in imposing defendant's sentence, such as punishing defendant and protecting society from him. *Rice, supra* at 446.

Second, the trial court's reasons for departure also constitute "circumstances not adequately embodied within the variables used to score the guidelines." *Milbourn, supra* at 659-660. As the trial court observed, the guidelines do not take into account that defendant's multiple assault and robbery convictions were related and that all occurred within the scope of a course of conduct that defendant generated and prolonged over the course of well more than an hour. The trial court also relied on the fact that defendant did not randomly commit these crimes, but had premeditated his stalking and abduction of the victim. Although the trial court did not use the term "prior relationship," the court apparently considered that defendant had specifically targeted the victim, a factor not accounted for within the offense variables. See *Milbourn, supra* at 660 (characterizing a prior relationship between the victim and the offender as "[p]erhaps the clearest example" of a factor "not included in the sentencing guidelines"). The trial court additionally emphasized the egregious nature of defendant's actions in committing the instant series of crimes, specifically his seemingly unmotivated stalking of the victim, his placing of the victim in a car and driving him around Detroit for a prolonged period of time while repeatedly threatening to shoot him, his repeated firing of gunshots toward the victim's brother and possibly Brown, his pursuit of the victim's brother around a car while firing at him from close range, and his ultimate firing of the gunshot that struck the victim's brother directly in the face and only "by . . . the grace of God . . . didn't result in murder." Although the sentencing guidelines applicable to assault and armed robbery score offense variable points for an offender's discharge of a firearm (OV 1) and infliction of "excessive brutality" or "bodily injury" (OV 2), we find that the trial court astutely observed that the guidelines do not take into account behavior like defendant's purposeful and repetitive efforts to end the life of the victim's brother, or his stalking and extended captivity of the victim. See *Milbourn, supra* at 660 n 27 (recognizing that "there will be occasions when the conduct or the criminal record to be scored . . . is extraordinary in its degree, and thus beyond the anticipated range of behavior treated in the guidelines").

In summary, the trial court did not abuse its discretion in departing upward from the sentencing guidelines. The 25- to 50-year sentences imposed by the court qualify as proportionate to the seriousness of the egregious and exceptional circumstances surrounding the offenses and the offender. *Milbourn, supra* at 636. "[A] proportionate sentence is not cruel and unusual." *People v Colon*, 250 Mich App 59, 66; 644 NW2d 790 (2002) (internal citation and quotation marks omitted).

⁴ Although a trial court may not premise a sentence on a defendant's refusal to accept guilt, resentencing on this basis "is required only if it is apparent that the court erroneously considered the defendant's failure to admit guilt, as indicated by action such as asking the defendant to admit his guilt or offering him a lesser sentence if he did." *Spanke, supra* at 650. Here, the trial court did neither.

Affirmed.

/s/ Mark J. Cavanagh

/s/ Jane E. Markey

/s/ Patrick M. Meter