# STATE OF MICHIGAN

# COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HARRY LEE WESTON,

Defendant-Appellant.

UNPUBLISHED
August 2, 1996

No. 178269
LC No. 94-000811

Before: Gribbs, P.J., and Hoekstra and Charles H. Stark,* JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of armed robbery, MCL 750.529; MSA 28.797, in connection with the theft of some steaks from a supermarket in Battle Creek. Defendant was sentenced to four to twenty years' imprisonment. Defendant now appeals, and we affirm his conviction, but remand for further proceedings in the trial court.

Defendant first argues that the jury should have been instructed on the lesser offense of felonious assault. We disagree. At trial, defendant objected to the giving of this instruction, which was requested by the prosecution, and the trial court agreed not to give the instruction. It is well-settled that a jury verdict will not be set aside where the trial court fails to instruct on any point of law unless the accused requests such an instruction. MCL 768.29; MSA 28.1052; *People v Mills*, 450 Mich 61, 80; 537 NW2d 909, modified and remanded 450 Mich 1212 (1995). Here, not only did defendant not request the instruction at issue, he specifically objected to it being given. A defendant may not request a certain action of the trial court and then argue on appeal that the action constituted error. *People v Piotrowski*, 211 Mich App 527, 530; 536 NW2d 293 (1995). Accordingly, we find this issue to be without merit.

Defendant next argues that he should have been charged only with felonious assault and shoplifting, and not with armed robbery. Given the facts of the case, we find no abuse of discretion in the prosecutor's decision to charge defendant with armed robbery. A prosecutor has wide discretion in

* Circuit judge, sitting on the Court of Appeals by assignment.

deciding what charges to file, and that discretion will not be disturbed absent a showing of clear and intentional discrimination based upon an unjustifiable standard. *People v Oxendine*, 201 Mich App 372, 377; 506 NW2d 885 (1993). Defendant has made no such showing in this case, and we find no abuse of discretion.

Defendant also argues that the trial court erred in scoring his Sentencing Information Report (SIR). Although not raised below, we agree with defendant that his SIR was improperly scored when the same felony conviction was counted as both a high severity felony under PRV 1 and a low severity felony under PRV 2 in computing his PRV score. Eliminating the ten points scored for the low severity felony under PRV 2 changes the applicable guidelines' range from 3 to 10 years to 1 ½to 5 years. Because the trial judge indicated that he believed he was sentencing defendant to a sentence at the low end of the guidelines range, we remand the case to the trial court so that the court can determine whether it would impose the same sentence, or a different sentence, in light of the changed scoring. *People v Chesebro*, 206 Mich App 468, 474; 522 NW2d 677 (1994).

Defendant's final argument is that his four to twenty year sentence is disproportionate and constitutes cruel and unusual punishment. In light of the remand ordered on the previous issue, it would be premature to decide these issues at this time. *Chesebro, supra* at 475. If the trial court affirms its original sentence or imposes a shorter sentence which defendant still believes to be disproportionate and cruel and unusual, defendant may again raise these challenges in an appeal following the remand. *Id*.

To the extent defendant also attempts to argue that he received ineffective assistance of counsel, we decline to review this issue because it was not properly set forth in defendant's statement of questions involved and, therefore, is not preserved for review. MCR 7.212(C)(5); *City of Lansing v Hartsuff*, 213 Mich App 338; 539 NW2d 781 (1995).

Affirmed, but remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Roman S. Gribbs
/s/ Joel P. Hoekstra
/s/ Charles H. Stark