STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DOUGLAS MACARTHUR PASCOE,

Defendant-Appellant.

UNPUBLISHED
June 7, 1996

No. 177771
LC No. 94 49726 FC

Before: Michael J. Kelly, P.J., and Bandstra and S.B.Miller,* JJ.

PER CURIAM.

Defendant, Douglas Pascoe, was convicted by a jury in Genesee County Circuit Court of bank robbery; MCL 750.531; MSA 28.799 and receiving and concealing stolen property over the value of $100, MCL 750.535; MSA 28.803. Defendant was sentenced to a term of twenty to forty years on the bank robbery charge and 2-1/2 to 5 years on the receiving and concealing charge. Defendant was on parole at the time of these events and the sentences were ordered to be consecutive to the time remaining to be served on parole. Defendant also pleaded guilty to the charge of habitual offender, 4th, and the bank robbery sentence was vacated and he was sentenced to 20 to 40 years as a Fourth habitual offender. It is not clear whether the receiving and concealing sentence was vacated but being concurrent it was, per force, subsumed. We have no brief from the prosecutor. The sentencing transcript shows the court did not set aside the conviction on Count II. The court stated: "And, the court, believing that the habitual would be enhanced if the court were to enhance it, on Count I, the longer one, the court, hence, does not make any comment on Count II."

On November 30, 1993, three men entered a branch bank in Flint and announced a holdup. One of the bandits stood in the center of the lobby and watched while the other two jumped the counter into the tellers' stations and scooped up the money. The bandits fled in a stolen vehicle. The bank employees got the license number of the getaway car and called the Flint Police. The car was found abandoned a short distance away with the motor running and a flat tire. The vehicle had been reported stolen to the police earlier in the day.

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

With the loot taken from the tellers' stations was a dye packet, which exploded as the bandits were leaving. The dye packet was thrown from the car as it was leaving the scene. When the car was found, in it there was money covered with red dye and a money bag. Defendant was arrested by police shortly after the car was found and after his arrest he made a confession to the officers of his involvement in the robbery and his knowledge that the getaway car was stolen. The other suspects were also arrested.

Defendant was tried with the other two suspects. Two juries were empaneled.. The jury that tried defendant found him guilty but acquitted the codefendant tried with him. The other jury convicted the codefendant leader.

I

Defendant appeals his conviction as of right claiming error in denial of equal protection of the law as there were no Afro-American jurors on the panel that tried his case. Defendant claims that the prosecutor excluded the only Afro-Americans from the panel. There were four Afro-Americans in the array, however, two were excused for cause. Defendant does not take issue with these. The two remaining prospective black panel members were peremptorily excused by the prosecutor. Defense counsel for each of the codefendants objected to this and after the panel had been excused the court heard arguments of counsel. The transcript of the proceedings does not contain the jury selection and voir dire proceedings. It was deliberately not ordered by appellate defense counsel. A transcript of the arguments on the motion was ordered and provided..

In considering the objection the court inquired of the prosecutor as to his reasons for the peremptory challenge of the two Afro-American women. The prosecutor explained that one of the jurors had been involved in a police matter some years before, where her son had been killed. That one of the detectives handling this case was involved in the earlier matter. The other Afro-American woman was excused by the prosecutor's use of a peremptory challenge as her questionnaire indicated that she was an employee of the DSS and the prosecutor did not want a social worker on the jury as he considered social workers too liberal.

The court ruled that the reasons of the prosecutor were not racially motivated and over the objection of defense counsel proceeded. On review defendant bears the burden of a prima facie showing of a purposeful discrimination by the peremptory exclusion of jurors of the same race as the defendant. *People v Barker*, 179 Mich App 702, 705; 446 NW2d 549 (1989), Aff'd 437 Mich 161 (1991). After a defendant has shown purposeful discrimination the burden shifts to the state to adequately explain the racial exclusion. *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986). The state must show permissible racially neutral selection criteria and procedures during jury selection. This Court is satisfied, as was the trial court, with the prosecutor's explanation that he did not exercise his peremptory challenges with respect to these two jurors because they were Afro-American. His reasons seem legitimate. We find no error.

II

Defendant next claims that the prosecutor's argument during rebuttal of closing argument was improper. No objection was made by defense counsel and the issue is not preserved unless review is necessary to prevent manifest injustice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994), cert den sub nom Michigan v Caruso, *115 S Ct 923 ___ US ___; 130 L Ed 2d 802 (1995)*. A miscarriage will not be found if the effect of the comments could be cured by timely instructions by the court. People v Bahoda, 448 Mich 261, 185; 531 NW2d 659 (1995). The standard is whether the misconduct of the prosecutor denied defendant a fair trial. *People v Guenther*, 188 Mich App 174, 181; 469 NW2d 59 (1991). In commenting to the jury on reasonable doubt the prosecutor was appropriately explaining that the jury needed a reason to find reasonable doubt. The argument did not shift the burden of proof to the defendant, but expressly admitted that the burden of proof was the prosecutors. We find no danger of manifest injustice and no error in the remarks of the prosecutor at closing argument.

III

Defendant next claims evidence was improperly admitted. Defendant objected to the admission of a baseball cap, gloves, and two coats at trial.

A trial court's decision to admit evidence will be reviewed for an abuse of discretion. *People v McAlister*, 203 Mich App 495, 505; 513 NW2df 431 (1994). An abuse of discretion will be found "only when an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling." *Id*. As a general rule, all relevant evidence is admissible, and irrelevant evidence is not. MRE 402; *People v Vander Vliet*, 444 Mich 52, 60-61; 508 NW2df 114 (1993). Evidence is relevant if it has any tendency to make the existence of a fact which is of consequence to the action more probable or less probable than it would be without the evidence.

Despite defendant's assertion to the contrary, all items he identifies as being impermissibly admitted: two coats, gloves, and a baseball cap, were in fact discussed by various witnesses in connection with the crime. Although not all the items were specifically connected to defendant, these items were connected to the robbery. This Court finds no error in the admission of the evidence in this trial.

IV

Finally, defendant claims the twenty-year minimum sentence as habitual fourth offender is excessive and disproportionate. He makes no claim of error on his sentence of thirty to sixty months on the receiving and concealing charge, Count II.

The Michigan sentencing guidelines do not apply to habitual offenders. *People v* Gatewood ___ Mich ___; ___ NW2d ___(1996). People *v Cutchall*, 200 Mich App 396, 409; 504 NW2d 666 (1993). The sentence was within the sentence guidelines of the underlying charges. It was not enhanced after the twenty to forty year sentence on the underlying conviction was set aside. A given sentence must be "proportionate to the seriousness of the circumstances surrounding the offense and the offender." *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). The underlying sentence was within the guidelines and therefore presumptively proportionate. This claim of error is frivolous and unsupportable.

Defendant's fourth-felony offender sentence of twenty to forty years' imprisonment does not violate *Milbourn*. Based on the record, defendant's sentence was proportionate to the crime committed, and the trial court did not abuse its discretion in sentencing defendant.

Affirmed.

/s/ Michael J. Kelly
/s/ Richard P. Bandstra
/s/ Stephen B. Miller