STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WATHOL CARTWRIGHT, a/k/a TOT,

Defendant-Appellant.

UNPUBLISHED
June 28, 1996

No. 172265
LC No. 93-001518

Before: Griffin, P.J., and Bandstra and M. Warshawsky,* JJ.

PER CURIAM.

Defendant appeals by right his conviction following a jury trial of assault with intent to commit great bodily harm, MCL 750.84; MSA 28.279, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Following the jury trial, defendant pleaded guilty to being a third habitual offender, MCL 769.11; MSA 28.1083. Defendant was originally sentenced to five to ten years' imprisonment on the assault conviction and two years on the felony-firearm conviction. The sentence for the assault conviction was vacated, and defendant was sentenced to five to ten years on the habitual offender conviction. Following a remand by this Court, defendant was resentenced to four to ten years on the assault conviction and two years on the felony-firearm conviction. The sentence for the assault conviction was immediately vacated, and defendant was sentenced to five to ten years on the habitual offender conviction.[1] We affirm.

Defendant first argues on appeal that the lower court's limitation on cross-examination regarding the victim's prior assaultive behavior denied him his constitutional right to a fair trial. We disagree. The scope of cross-examination is a matter left to the discretion of the trial court. That discretion, however, must be exercised with due regard for a defendant's constitutional right to confront witnesses against him. *People v Paintman*, 139 Mich App 161, 172; 361 NW2d 755 (1984); *People v Grisham*, 125 Mich App 280, 285; 335 NW2d 680 (1983). A limitation on cross-examination which prevents a defendant from placing before the jury facts from which bias, prejudice, or the lack of credibility of a

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

prosecution witness might be inferred constitutes a denial of the defendant's right of confrontation. *People v Mumford*, 183 Mich App 149, 153; 455 NW2d 51 (1990).

During cross-examination of the victim, defense counsel asked why the victim was living with defendant rather than with his mother who lived next door to defendant. The victim admitted that he was on probation for "getting into it" with his mother and that there was a court order preventing him from going to her house. During direct examination of defendant, defendant was permitted to say that he knew that the victim carried a gun, that the victim had assaulted other people, including his mother, and that the victim had a violent reputation in the community. Thus, the lower court's refusal to allow counsel to delve into this area with the victim himself did not prevent defendant from placing before the jury facts from which bias, prejudice, or lack of credibility of a prosecution witness might be inferred. *Mumford, supra* at 153; *Grisham, supra* at 285. As such, the lower court did not abuse its discretion when it refused to allow counsel to question the victim himself regarding his prior assaultive conduct. *Id.*

Defendant also argues that the trial court's failure to instruct the jury that defendant had no duty to retreat when attacked in his own home undermined his theory of self-defense and denied him his right to a fair trial. We disagree. Jury instructions are to be read as a whole rather than extracted piecemeal to establish error. *People v Dabish*, 181 Mich App 469, 478; 450 NW2d 44 (1989). Even if somewhat imperfect, instructions do not create error if they fairly present the issues to be tried and sufficiently protect the defendant's rights. *People v Wolford*, 189 Mich App 478, 481; 473 NW2d 767 (1991).

A lower court must instruct the jury on a defense if the evidence presented supports the issuance of such an instruction. *People v Cross*, 187 Mich App 204, 210; 466 NW2d 368 (1991). A person has a right to defend himself when he honestly and reasonably believes that his life is in imminent danger or there is a threat of serious bodily harm. *People v Wilson*, 194 Mich App 599, 602; 487 NW2d 822 (1992); CJI2d 7.15. Generally, a person must retreat, if retreat is possible, before using deadly force to ward off an attack. However, when a person is assaulted in their own home, there is no duty to retreat. *People v Lenkevich*, 394 Mich 117, 120-121; 229 NW2d 298 (1975); *People v Watts*, 149 Mich App 502, 515; 386 NW2d 565 (1986).

Here, there was no evidence that defendant was assaulted in his own home. Although defendant and the victim had been arguing all day, there was no evidence presented at trial that the victim attempted to attack defendant on the day of the shooting. Because defendant was not assaulted in his own home, there was no evidence to support the giving of an instruction on the exception to the duty to retreat rule, and thus the lower court did not err in refusing to give one. *Cross, supra* at 210.

Defendant next argues that the lower court's "state of mind" instruction improperly shifted the burden of proof. We disagree. Failure to object to jury instructions waives error unless relief is necessary to avoid manifest injustice. MCL 768.29; MSA 28.1052; *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993). Because defendant did not object to the complained of instruction, this Court need not review this issue unless relief is necessary to avoid manifest injustice. A

reading of the record evidences that the instructions, as given, fairly presented the issues to be tried and sufficiently protected defendant's rights, *Wolford*, *supra* at 481, and, therefore, failure to review this issue will not result in manifest injustice. *Van Dorsten*, *supra* at 544-545.

Lastly, defendant argues that the lower court abused its discretion by failing to follow the clear intent of the original sentencing court when it resentenced defendant. We disagree. The original judge sentenced defendant at the high end of the recommended guidelines' range and did not enhance defendant's sentence. Defendant's new sentence was a one-year enhancement from the recalculated guidelines' range. Defendant argues that this sentence was disproportionate.

When reviewing a sentence for proportionality, provided permissible factors are considered, this Court's review is limited to whether the sentencing court abused its discretion. *People v Coles*, 417 Mich 523, 550; 339 NW2d 440 (1983), overruled in part on other grounds *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). A sentencing court abuses its discretion when it violates the principle of proportionality. A sentence is proportionate when it is tailored to the circumstances of both the case and the defendant in an effort to balance society's need for protection against its interest in rehabilitating the offender. *Milbourn*, *supra* at 635-636; *People v Odendahl*, 200 Mich App 539, 540-541; 505 NW2d 16 (1993). Sentences which fall within the guidelines' range are presumptively proportionate. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987); *People v Williams (After Remand)*, 198 Mich App 537, 543; 499 NW2d 404 (1993). The sentencing guidelines do not, however, apply to habitual offenders, *People v Cutchall*, 200 Mich App 396, 409; 504 NW2d 666 (1993), and there is no mathematical formula for determining whether a sentence imposed on a habitual offender is proper. *People v Cervantes*, 448 Mich 620, 626; 532 NW2d 831 (1995).

When looking at the offense and the offender, the sentence imposed was proportionate. Defendant, an admitted crack addict and alcohol abuser, deliberately shot at the victim at close range at least four times and nearly killed him. During defendant's incarceration, society is protected from any such further acts by defendant and defendant has an opportunity to rid himself of his addictions and become a contributing member of society. *Id.; Odendahl*, *supra* at 540-541. Because the sentence was proportionate to both the offense and the offender, the lower court did not abuse its discretion in sentencing defendant to five to ten years' imprisonment on the habitual offender conviction. *Milbourn*, *supra* at 635-636, 654.

Affirmed.

/s/ Richard Allen Griffin
/s/ Richard A. Bandstra
/s/ Meyer Warshawsky

[1] Defendant was sentenced on November 15, 1993, before Judge Michael L. Stacey to five to ten years' imprisonment on the assault conviction and two years on the felony-firearm conviction. On

November 16, 1993, Judge Stacey vacated defendant's sentence on the assault conviction and sentenced him to five to ten years on the habitual offender conviction. Following a remand by this Court for resentencing on September 9, 1994, defendant was resentenced on February 21, 1995, before Judge Amy P. Hathaway, as Judge Stacey had retired. Defendant's guidelines were recalculated. He was originally subject to a minimum sentence range of one to five years on the assault conviction, but the new guidelines range was recalculated at one to four years. Judge Hathaway sentenced defendant to four to ten years on the assault conviction. This sentence was immediately vacated, and defendant was sentenced to five to ten years on the habitual offender conviction. Defendant was also sentenced to two years on the felony-firearm conviction.