

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RONALD LEE GATEWOOD,

Defendant-Appellant.

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UNPUBLISHED

July 30, 1996

No. 180808

LC No. 94-050344

Before: Hood, P.J., and Griffin and J.F. Foley\*, JJ.

PER CURIAM.

Defendant was convicted of robbery armed, MCL 750.529; MSA 28.797, following a jury trial. He then pleaded guilty to habitual offender, third offense, MCL 769.11; MSA 28.1083, and was sentenced to twenty-five to forty-five years' imprisonment. He appeals as of right. We affirm defendant's convictions and sentences, but remand for proceedings consistent with this opinion.

Defendant first claims that the trial court erred in failing to instruct the jury on his alibi defense because the evidence warranted such an instruction. We disagree. Because defendant failed to object to the jury instructions, appellate review is limited to whether there was manifest injustice. *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993). In this case, defendant did not request an alibi instruction at trial. Nor did defendant present an alibi defense. In fact, defendant testified at trial that he was present at the scene of the crime. Defendant's theory of the case was not that he was at some location other than the crime scene when the crime occurred. Rather, his theory was that he had no knowledge that a crime had been committed. Such a theory does not warrant an alibi defense instruction. We therefore conclude that no manifest injustice occurred.

Defendant next claims that the trial court improperly admitted evidence of other acts because the evidence was more prejudicial than probative. Specifically, defendant argues that the trial court should not have admitted testimony that he had a broken vertebra in his neck from a car chase in which he was involved a few days prior to the instant offense. Because defendant failed to object to admission

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

of this testimony, appellate review is limited to whether manifest injustice occurred. *People v Grant*, 445 Mich 535, 545, 553; 520 NW2d 123 (1994); *People v King*, 210 Mich App 425, 434; 534 NW2d 534 (1995). We find no such injustice in this case. The record indicates that it was defense counsel who elicited from the witness a statement by defendant that he suffered a broken neck in a car chase. A defendant may not claim error on appeal based on an issue his lawyer deemed proper or in which he acquiesced at trial. *People v Barclay*, 208 Mich App 670, 673; 528 NW2d 842 (1995).

Defendant also claims that the trial court improperly admitted evidence of his involvement in a former robbery by admitting evidence that a witness, defendant's brother, pleaded guilty to a reduced charge in exchange for testifying against defendant. The witness' guilty plea included evidence of prior robberies allegedly involving defendant. The decision to admit evidence is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *People v Bahoda*, 448 Mich 261, 289; 531 NW2d 659 (1995).

MRE 404(b) provides:

Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

Evidence of another crime may be admitted if (1) it is relevant to an issue other than character or propensity, (2) it is relevant to an issue or fact of consequence at trial, and (3) its probative value is not substantially outweighed by the danger of unfair prejudice. *People v Catanzarite*, 211 Mich App 573, 578-579; 536 NW2d 570 (1995). Evidence is relevant if it has any tendency to make existence of a fact which is of consequence to the action more probable or less probable than it would be without the evidence. *People v VanderVliet*, 444 Mich 52, 60; 508 NW2d 114 (1993). The credibility of witnesses is always a material issue. *People v Mills*, 450 Mich 61, 72; 537 NW2d 909 (1995).

The guilty plea evidence in this case was offered for the purpose of impeaching the witness. The witness had testified that he did not tell anyone that he and defendant ever robbed a man. The prosecutor then impeached the witness' credibility by eliciting testimony that, in order to gain a reduced sentence, the witness told a judge that both he and defendant robbed a man. We find that the evidence was properly offered for the purpose of impeaching the witness. The evidence was also relevant to that witness' credibility. Furthermore, the probative value of the testimony was not substantially outweighed by its prejudicial effect. Credibility of the witnesses was a crucial issue in this case. The testimony was whether the witness ever told anyone that he and defendant robbed a man, not whether defendant actually did rob a man. The focus was on the witness' truthfulness, not on defendant's alleged participation in the robbery. We therefore conclude that the trial court did not abuse its discretion in admitting the evidence pursuant to MRE 404(b).

Defendant next claims several instances of prosecutorial misconduct. The test of prosecutorial misconduct is whether defendant was denied a fair and impartial trial. *People v LeGrone*, 205 Mich App 77, 82-83; 517 NW2d 270 (1994). Appellate review of allegedly improper prosecutorial remarks during trial is precluded if the defendant fails to object at trial to the prosecutorial remarks, unless the prejudicial effect could not have been cured by a cautionary instruction and failure to consider the issue would result in a miscarriage of justice. *People v Smith*, 205 Mich App 69, 75-76; 517 NW2d 255 (1994). Defendant contends that he was denied a fair trial because the prosecutor commented on defendant's failure to bring forward certain witnesses, denigrated defense counsel, compared defendant to a snake, and injected the issue of race into closing argument. Defendant only objected to the first of these alleged instances of misconduct. Therefore, the remaining instances are not preserved.

Defendant first argues that the prosecutor improperly commented during closing argument that defendant failed to bring forward witnesses such as his uncle that he went to visit that night and the women he went to visit. Defendant claims such an argument shifted the burden of proof to him. A prosecutor may not suggest in closing argument that the defendant must prove something or present a reasonable explanation for damaging evidence because this argument tends to shift the burden of proof. *People v Foster*, 175 Mich App 311, 317; 437 NW2d 395 (1989), rev'd on other grounds 450 Mich 94 (1995). A prosecutor may, however, argue that the defendant or another witness is not worthy of belief or is lying. *People v Gilbert*, 183 Mich App 741, 745-746; 455 NW2d 731 (1990). The record shows that the prosecutor commented that the witness' testimony was not credible. The burden of proof was not shifted to defendant to prove anything. The prosecutor's argument was not improper.

Defendant also claims that the prosecutor denigrated defense counsel during rebuttal argument by accusing him of twisting the facts, speculating, and making outrageous accusations. The record indicates that the prosecutor made these comments in response to the same type of comments made by defense counsel during closing argument. Because prosecutorial arguments are to be considered in light of defense counsel arguments, *People v Spivey*, 202 Mich App 719, 723; 509 NW2d 908 (1993), we find that the prosecutor's comments were proper in light of the accusations that defense counsel made about the prosecutor in closing argument.

Defendant also contends that the prosecutor improperly compared him to a snake during closing argument. A prosecutor is free to relate the facts adduced at trial to his theory of the case, and to argue the evidence and all reasonable inferences arising from it to the jury. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). The prosecutor specifically said that he was not calling defendant a snake. The prosecutor used an analogy to support his theory of the case. Furthermore, in light of defendant's failure to object to this argument at trial, we do not find that a miscarriage of justice resulted from the prosecutor's use of the analogy.

Defendant's final claim of prosecutorial misconduct is that the prosecutor improperly injected the issue of race during closing argument. We disagree. There is no indication on the record that that

the prosecutor mentioned the issue of race in his closing argument.<sup>1</sup> We therefore conclude that no manifest injustice resulted from the prosecutor's closing argument.

Defendant also claims that defense counsel was ineffective because he injected the issue of race into the proceedings during his closing argument. Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing norms and that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Id.*

Defense counsel stated:

You know, when I was listening to [the prosecutor's argument], I couldn't help but think that the whole thing is based on innuendos [sic], speculation, it's based on guesses. And I want to start out with what I think is the most offensive part of that argument, offensive. It has racist overtones to it. The suggestion that a black man is out of his neighborhood and has some criminal motive is a repulsive argument.

While it may be possible to infer from the prosecutor's closing argument that the prosecutor was attempting to interject the issue of race, the prosecutor never mentioned the issue of race. However, defense counsel decided to answer this possible inference in his closing argument. It was defense counsel's decision how to address the prosecutor's argument. 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. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987); *People v Kvam*, 160 Mich App 189, 200; 408 NW2d 71 (1987). Moreover, based on the evidence presented, we are not convinced that, but for defense counsel's closing argument, the outcome of defendant's trial would have been different.

Defendant also challenges his sentence as disproportional under *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990). A sentence must be proportional to the seriousness of the circumstances surrounding the offense and the offender. *Id.*, p 636. The guidelines on the underlying offense were 3 to 10 years, and defendant emphasizes that the court made no reference to the guidelines. This Court, however, has held that appellate review of habitual offender sentences using the sentencing guidelines is inappropriate. *People v Gatewood (On Remand)*, \_\_\_ Mich App \_\_\_; \_\_\_ NW2d \_\_\_ (Docket 193626, issued 5/14/96). Therefore, our review is limited to considering whether the sentence violates the principle of proportionality, without reference to the guidelines. *Id.*

In this case, defendant pleaded guilty to habitual offender, third conviction. MCL 750.529; MSA 28.797 authorizes a sentence to life imprisonment because defendant's third offense was armed robbery, which is punishable by life or any term of years. Defendant's two prior convictions were for receiving and concealing stolen property over \$100 and unlawfully driving away an automobile. The

crime in which defendant aided and abetted involved holding a store clerk at knife point. The record reveals that defendant attempted to escape from custody during trial. In light of the circumstances surrounding the offenses and the offender, we would probably conclude that defendant's sentence does not violate the principle of proportionality, if we were able to ascertain the trial court's reasons for the sentence imposed.

Defendant also argues, however, that trial court failed to articulate the reasons for the sentence it imposed. We agree. In order to aid the appellate review process in determining whether there has been an abuse of discretion, the trial court must, at the time of sentencing, articulate on the record its reasons for imposing the sentence given. *People v Triplett*, 432 Mich 568, 573; 442 NW2d 622 (1989). Based on our review of the sentencing transcript, we are not satisfied that the trial court adequately stated any reasons for the sentence it imposed.<sup>2</sup> We therefore remand to the trial court for articulation of the reasons for the sentence imposed or for resentencing. *Id.* However, we note that we find no support in the record for defendant's claim that the sentencing court harbored a personal bias against him.

Affirmed, but remanded to the trial court for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Harold Hood  
/s/ Richard Allen Griffin  
/s/ John F. Foley

<sup>1</sup> During the rebuttal argument, in response to defense counsel's argument, the prosecutor stated that the did not interject the issue of race into his closing argument. In light of defense counsel's closing argument regarding race, the prosecutor's rebuttal argument was not improper. *People v Spivey*, 202 Mich App 719, 723; 509 NW2d 908 (1993).

<sup>2</sup> During sentencing, the trial court did discuss at length defendant's attempt to escape during trial. We are not convinced, however, that this portion of the record sufficiently set forth reasons for the sentence imposed. Defendant's prior convictions were for receiving and concealing stolen property and unlawfully driving away an automobile.