STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM LAMARVIN GULLEY,

Defendant-Appellant.

UNPUBLISHED
September 6, 1996

No. 183806
LC No. 94-2054-FC

Before: White, P.J., and Sawyer and R.M. Pajtas,* JJ.

PER CURIAM.

Defendant, a minor, appeals his jury convictions of armed robbery, MCL 750.529; MSA 28.797, and felony firearm, MCL 750.227b; MSA 28.424(2), and the court's decision to sentence him as an adult. Defendant was sentenced to four to twenty years for the armed robbery, consecutive to two years for the felony-firearm. We affirm.

I

The incident was captured on video, having taken place in an undercover detective's vehicle equipped with video cameras and audio tape. The video tape of the robbery was shown to the jury.[1]

Detective Bryant testified that on July 13, 1994, he was conducting undercover street-level narcotics buys in Grand Rapids. He was wearing a transmitter and a surveillance team was nearby. Bryant spotted defendant on Griggs Street, and pulled up to the curb. Defendant came from the porch of a nearby house. Bryant testified that he knew defendant from prior contacts, that he had purchased crack cocaine from defendant three times prior to this incident, and that he had seen defendant on other occasions. As defendant approached, Bryant asked him for two "twenties," i.e., two rocks of crack cocaine, each costing $20. Defendant got in the vehicle and directed Bryant to an alley, stating that he had to get the "stuff." Defendant then left the vehicle for several minutes. When he returned, Bryant was holding the two twenty dollar bills, and asked him "Where you been? I haven't seen you in a while." Defendant answered that he had been a couple of places. Rather than exchanging the cocaine

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

for Bryant's money, defendant then pulled a .38 caliber revolver from his waistband, cocked it, pointed it at Bryan's chest, and said "Drop it, drop the money or I'll bust your ass. You want to see it go off? I mean it." Bryant testified that he dropped the forty dollars he had in his hand, and defendant picked up the money, got out of the car, and said to Bryant, "I'm for real, you know, I will do it." Bryant then backed out of the alley and called the surveillance team over the transmitter he was wearing, repeating several times "Bill pulled a gun on me." Bryant testified defendant was known as "Bill." Bryant positively identified defendant, testifying he had no doubt defendant was the perpetrator. Bryant met the surveillance team, which included detectives Vandoorne, Keizer and Potter, at a designated location, and defendant's description was given to the Grand Rapids Neighborhood Patrol Unit, including a description of his clothing and the gun.

Defendant was apprehended less than one hour later, at about 5:45 p.m., in front of the Short Shop Food Store, and was wearing clothes as had been described. The arresting officer testified defendant did not have a gun and had $25 on his person.

Investigating officer Hertel testified that on July 14, 1994, he interviewed defendant at the juvenile detention facility after receiving permission from defendant's mother and informing defendant of his rights. Hertel testified that defendant confessed to having sold to Bryant in the past and having robbed Bryant on July 13. Defendant told Hertel that he found the .38 caliber weapon in bushes in the alley. He admitted cocking the weapon, and pointing it at Bryant while he demanded the forty dollars. Defendant told Hertel that he then ran up the alley and tossed the gun. The gun was never recovered.

On cross-examination, Hertel testified that defendant never requested an attorney or the presence of his parents, that the interview lasted approximately twenty minutes, that defendant showed no resistance, that defendant told him that the gun was not loaded, and that defendant had not explained why he had only twenty-five dollars on his person when he was arrested. The prosecution rested, and the defense presented no evidence. The jury returned a verdict in twelve minutes.

At defendant's sentence hearing, the Department of Corrections presentence investigator, Paula Gruber, testified and recommended, as did her report, that defendant be sentenced as a juvenile. The Department of Social Services' delinquency services coordinator, Dennis McMillan, testified that he initially recommended that defendant be sentenced as a juvenile and that he considered this a very close case. He testified that he changed his mind after viewing the videotape of defendant robbing Bryant, which "tipped the scales." A former assistant school principal testified that he believed defendant would do best in the juvenile system if it were a very structured environment. The court sentenced defendant as an adult to the maximum minimum sentence under the guidelines.

II

Defendant first argues that reversal is required because prior bad acts evidence was admitted without notice and over defense objection, and such evidence overtook the proofs surrounding the instant offense, denying defendant a fair trial and due process.

At the start of trial, prior to voir dire, the prosecution orally moved in limine for the admission of evidence that defendant had sold cocaine to Bryant three times before the instant offense. The prosecutor argued the evidence was relevant to show identity and motive. The court ruled that it would admit the evidence with a cautionary instruction, over defendant's objection on grounds of unfair prejudice. The court concluded that the evidence was logically relevant in that "it will help explain the officer being able to identify the assailant," and that "motive is one of the issues, and it strikes the Court that there's a logical relevancy here if the alleged perpetrator knows that the victim has money. This gives a little logical relevancy to the motive to perform a robbery at the time." The court gave three cautionary instructions regarding the use of prior acts: before opening statement, following Bryant's testimony that he knew defendant from prior cocaine purchases, and before the jury was excused for deliberations.

In light of the overwhelming evidence of defendant's guilt, we conclude that any error in the admission of this evidence was harmless.

III

Defendant also argues that he was denied a fair trial by the prosecutor's introduction of evidence regarding the drug trade in Grand Rapids, and by the prosecutor's inflammatory and improper arguments regarding the dangers and violence of crack cocaine dealing and the risk to undercover police officers. See *People v Hudgins*, 125 Mich App 140, 145; 326 NW2d 241 (1983), and *People v Williams*, 65 Mich App 753, 755; 238 NW2d 186 (1975). Defendant did not object to the introduction of this evidence or the prosecutor's arguments. We therefore review for a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

These references included portions of the prosecution's questioning of Detective Vandoorne, during which the trial court interjected and called counsel to the bench:

> Q [Prosecutor] Okay. I'd like to ask you a few questions at this time with regard to the narcotics trade in the city of Grand Rapids. Specifically, what is the primary focus of the GRPD Vice Unit at this time with regard to the narcotics trade in Grand Rapids?
>
> A The primary focus is on crack houses and street dealings at this time.
>
> Q When you say crack houses and crack cocaine, what exactly is that? What are we talking about?
>
> A Crack cocaine?
>
> Q Correct.
>
> A It's a highly refined cocaine . . . [describes process by which cocaine in powder form is reduced to crack cocaine]

Q Is that the prevalent form of dispersal of cocaine in the city of Grand Rapids at this time?

A Yes.

Q And how prevalent would you say that problem is at this time?

A It's a great problem.

THE COURT: Let me see counsel up here. Let me see counsel up here.

(Counsel approached the bench, and the following discussion was held out of the hearing of the jury)

THE COURT: I don't care that crack is a big problem or crack is –

[Prosecutor]: The reason I—okay, I'm not going into it much further. What I want to do is set up in their mind what these officers, to be aware of what these officers have to be aware of when they get on the street because of the dangerous aspect.

THE COURT: Well, keep it limited.

[Prosecutor]: Yes, sir.

The prosecutor elicited other testimony regarding the dangers of working in undercover narcotics operations, and in closing argument stated:

> And I would submit to you that a Grand Rapids police officer or any type of police officer, for that matter, who is working in an undercover capacity, who is working out buying street [sic], making street purchases of cocaine on almost a daily basis, in a very violent milieu, as we talked about earlier on with Detective Vandoorne's testimony, clearly we have an officer that knows that in an instant, at any point, his life could be taken in those circumstances.
>
> We're talking about a world of rip-offs, a lot of danger, a lot of gank, as they say on the street, fake deals. This is a very, very dangerous volatile milieu, and what [defendant] did is nothing out of the ordinary. It's done by a lot of people, a lot of situations out there in real life. . . .
>
> * * *
>
> So when you look at the facts, without the video, you clearly have enough evidence, I would submit to you, to convict Mr. Gulley of both these crimes. But in this particular case you have a very real, specific, concrete example that you as jurors rarely get to

see, and that is, you saw the crime as it happened. You saw a perfect example of what these police officers have to do for a living.

They put their lives on the line every day, and in an instant things can go wrong. . .

While we agree with defendant that the questioning and argument was improper, we cannot conclude that defendant has shown manifest injustice in light of the overwhelming evidence of his guilt. Neither of the two cases defendant cites in which convictions were reversed on the basis of such improper prosecutorial argument, *Hudgins*, *supra*, and *People v Wright*, 99 Mich App 801; 298 NW2d 857 (1980), involved overwhelming evidence of guilt, as does the instant case.[2]

IV

Defendant next argues that reversal is required because trial counsel's failure to object to these repeated instances of admission of highly inflammatory and prejudicial evidence of drug dealing and the dangers of crack cocaine constituted ineffective assistance of counsel.

Again, in light of the overwhelming evidence of defendant's guilt, even assuming counsel's representation fell below the professional norm, defendant is unable to show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *People v Pickens*, 446 Mich 298, 314; 521 NW2d 797 (1994). Thus, defendant has failed to show that he was prejudiced by his counsel's behavior. *Id*. at 332-333.

V

Defendant last argues the trial court clearly erred and abused its discretion in sentencing defendant as an adult where the statutory factors mandated that he be sentenced as a juvenile and that the trial court based its sentence on inaccurate information contradicted by the record.

At the sentencing hearing, Paula Gruber, the pre-sentence investigator, testified that she had held that position since 1977. She recommended that defendant be sentenced as a juvenile and incarcerated in the juvenile system. Gruber had interviewed defendant, contacted the detective in charge and Bryant by phone, checked if defendant had a juvenile record (and stated that he had no convictions but had pending charges), spoke with a probation officer at Juvenile Court who was dealing with defendant at the time he was arrested on another juvenile matter, and spoke to defendant's mother. Gruber testified as to the contacts defendant had had with the juvenile system: 1) a June 29, 1987 petition for malicious destruction of property over $100, at age nine, for which defendant was not prosecuted; 2) a December 15, 1989 petition for entering without breaking with intent to commit larceny, which was not pursued; 3) a November 22, 1991 petition for possession with intent to deliver cocaine, for which defendant was referred to the Family Outreach Center and not prosecuted; 4) an August 19, 1993 petition for creating a disturbance, trespassing, and failure to obey a police officer, for which defendant received 180 days informal probation, and was referred to the Dakota Residential Treatment center, an unlocked short-term residential treatment, which he left twice; 5) a June 3, 1994 petition for felonious assault and possession of cocaine, which was not prosecuted; and 6) three pending

cocaine delivery charges. Following his arrest for felonious assault, defendant was referred to Project Rock, but did not start the program because of the instant arrest.

Gruber testified that defendant should be treated in the juvenile system. She noted that defendant was of small stature, being 5'3" and weighing 125 pounds, was mentally limited and attended special education classes, has physical problems and has had a colostomy and several subsequent surgeries. She testified that his short stature would make him more likely to be preyed on in the adult system. Gruber opined defendant would be more likely to be rehabilitated at Maxey Boys Training School (MBTS), in that they provided more treatment than is available in the prison system, and there are long waiting lists for such treatment in the adult system and no guarantee that treatment will ever be received. She testified that MBTS tailors its treatment plans according to the needs of the juveniles, and that defendant would benefit from the education, substance abuse programs and mental health treatment there. She testified that she was not totally convinced that defendant wants to benefit from the programs at MBTS, but that she thought he should be given a chance because of his age, and that she was hoping for the best. Gruber testified that defendant is very immature for a sixteen year old, and that defendant did not seem to know what was going on or understand the situation.

Gruber testified that she had spoken to Bryant and had also viewed the videotape of the robbery. When the court asked if the videos changed her opinion at all, she responded that she acknowledged that this was a very serious offense, and that she was recommending incarceration, but incarceration within the juvenile system. She testified that she believed that if defendant received intervention and treatment he would be less likely to have further criminal involvement upon release. Gruber testified that defendant had been in jail, an adult facility, for the last six months and she believed that it had had a real impact on him. Gruber testified that the guidelines range for an adult is twelve to forty-eight months.

Dennis McMillan, delinquency services coordinator for DSS, testified that he had dealt with several hundred juveniles, and prepared a report in this case, as well as an addendum. He interviewed the parties involved and then went through the guidelines under the court rule. He reviewed defendant's record and concurred with Gruber's testimony. He also viewed the videotape, but after he prepared his first report. He testified that there was really no long-term pattern of offenses, but there were some very serious offenses such as several charges of possession with intent to deliver and armed robbery, in a short period in 1994. He testified defendant had no adjudications in juvenile court "[s]o there's nothing as far as a pattern there that over time it would be immediate proof that he was, that to me he was not amenable to some type of treatment." McMillan testified that although defendant had had thirteen contacts with juvenile court, his was "not a very intensive juvenile record compared to a lot of the youth that we see today." He testified that there was nothing unusual about defendant's record, and that he had seen it with many others.

As to defendant's potential for treatment and whether the nature of his delinquent behavior is likely to render him a danger to the public if released at the age of twenty-one, McMillan testified that

. . . this is a point in my report, I thought it was difficult to assess his potential, because there had really been no intervention. He had not really been involved in any program, so there's nothing really to assess.

It's not like he was in something and bombed out. The closest he had come was the, being placed at Dakota, and Dakota is about a two-week kind of quick intervention in substance abuse, and the doors aren't locked there. He took advantage of it and left . . .

* * *

. . . And that is not out of line, either, because oftentimes when we first put these juveniles into some type of program, their first inclination is to run. So that's not surprising that he did that, to tell you the truth.

McMillan testified that usually his recommendation is MBTS, the most restrictive program that the juvenile system offers, a locked and secure program. He testified that a juvenile there "is not a danger to the public," and that it is the type of program where the youth has to perform, do his treatment program, or he does not get out. The average stay is twelve to fourteen months "if a youth comes in and gets down to business. It's not unusual for a youth to be there longer, two years, three years." McMillan saw nothing to indicate defendant had a mental limitation other than that he had been in special education classes.

McMillan testified that his initial report recommended that defendant be treated as a juvenile, and explained why he thought "it was an extremely close call to make:"

Well, basically, on the one hand, you have a young man who's involved in some very serious crime, a crime that was life threatening. There was a gun involved. Someone could have been shot. Someone could have been killed. We have some other very serious crimes that are recently coming to light, such as about three different charges of possession with intent to deliver cocaine.

It appeared that he was embracing the street life. He was selling drugs, he was using illegal drugs. He appeared to be a person, you know, getting into some very serious trouble.

On the other hand, we had a young man who had no adjudicated offenses through the Juvenile Court system, had not been involved in any type of a training program. There's no indication to indicate to me that he would not be amenable to treatment in the juvenile system.

Basically, in my initial report I was giving him a break, and I did recommend the juvenile system.

McMillan testified that the videotapes changed his mind and that he was very alarmed at what he saw, that it appeared that defendant "came very close to possibly shooting the officer, and I think that kind of tipped the scales for me." He further testified that what he saw in the videos that convinced him was that he "saw someone who was like a definite threat to the community, and I think that's probably where my thought was to change my recommendation."

McMillan testified that MBTS would be of benefit to defendant, and referred to the specialized substance abuse program, which deals with both those who take illegal drugs and those who sell illegal drugs.

Maurice Coleman, assistant principal of a school defendant attended for two years, testified that defendant was not a problem in the classroom, but was a problem in the halls, and that defendant had to have structure all the time. He testified that defendant is emotionally impaired and has a learning disability, but that he showed motivation in structured environments. Coleman testified that defendant could not control himself when outside a structured environment, but that defendant always responded to his discipline. Coleman also testified that defendant was eventually transferred to another school because of disruptive behavior. Coleman thought defendant would benefit from being sent to a boy's school where there is training, as opposed to prison, if "it's structured so that there's something for him to do every minute of his time . . ."

Detective Bryant testified to defendant's aggressiveness while the court viewed the video of the cocaine purchases and the armed robbery. Bryant explained that during one contact with defendant, defendant was in Bryant's car and threatened another seller who was trying to sell to Bryant. When defendant thought Bryant was going to buy from the other seller, he became aggressive and threatened to "pop" him. Bryant testified that defendant did not seem to be intoxicated or high when he robbed Bryant.[3]

We review the trial court's factual findings with regard to each factor enumerated in MCL 769.1(3); MSA 28.1072(3) under the clearly erroneous standard. MCR 2.613(C); *People v Lyons*, 203 Mich App 465, 468, 513 NW2d 170 (1994). The trial court's findings are "clearly erroneous" if, after review of the record, this Court is left with a definite and firm conviction that a mistake has been made. *Id*. The ultimate decision whether to sentence as a juvenile or as an adult is reviewed for an abuse of discretion. *Id.*

The trial court must conduct a juvenile sentencing hearing to determine if the best interests of the juvenile and the public would be served better by placing the minor in juvenile custody or by sentencing the juvenile as an adult offender. MCL 769.1(3); MSA 28.1072(3) and MCR 6.931(A). The trial court is to consider the following factors in making its sentencing determination:

> (a) The prior record and character of the juvenile, his or her physical and mental maturity, and his or her pattern of living.
>
> (b) The seriousness and the circumstances of the offense.

(c) Whether the offense is part of a repetitive pattern of offenses which would lead to 1 of the following determinations:

(i) The juvenile is not amenable to treatment.

(ii) That despite the juvenile's potential for treatment, the nature of the juvenile's delinquent behavior is likely to disrupt the rehabilitation of other juveniles in the treatment program.

(d) Whether, despite the juvenile's potential for treatment, the nature of the juvenile's delinquent behavior is likely to render the juvenile dangerous to the public if released at the age of 21.

(e) Whether the juvenile is more likely to be rehabilitated by the services and facilities available in adult programs and procedures than in juvenile programs and procedures.

(f) What is in the best interests of the public welfare and the protection of the public security.

The prosecutor has the burden of proving by a preponderance of the evidence that the best interests of the juvenile and the public would be served by imposing a sentence on the juvenile as though he were an adult offender, and the trial court must make factual findings and conclusions of law forming the basis for the decision to sentence as an adult. MCR 6.931(E)(2) and (4).

As to factor (a) the trial court found (1) that although defendant had no prior convictions, he had had several contacts with the juvenile court beginning at the age of eight, and that those offenses increased in severity as defendant got older; (2) that although defendant was small for his age and intellectually challenged, he engaged in extremely aggressive "adult" behavior and was not afraid to challenge another or act out his anger; and (3) that defendant was engaging in the dangerous and aggressive life of a "street-level dealer." These findings were supported by Gruber's report of defendant's juvenile contacts with the legal system, Coleman's testimony that defendant was easily angered, that his behavior was sometimes "out-of-control" and that he generally challenged others' authority, and McMillan's testimony that defendant was "embracing the street life."

As to factor (b), the court found that defendant had engaged in a very serious and life-threatening offense, specifically noting that the videotape revealed that defendant held a cocked .38-caliber handgun, with finger on trigger, at Bryant's chest when robbing him.

As to factor (c), the court first found that although defendant received no formal treatment within the juvenile system, he never complied with the only structure that that system tried to employ, referring to testimony that defendant went AWOL twice from a residential treatment program and was later arrested for the current charges before his treatment at Project Rock began. Second, based on Coleman's testimony that the benefits to defendant of a structured environment faded when defendant

returned to a "normal" setting, the court concluded that defendant would continue to be disruptive, thus negatively affecting the treatment of others and the success of his own treatment, and opined that he would leave the juvenile system just as "bad" as he was when he entered.

Finally, with respect to factors (d), (e) and (f) the trial court found that based on the seriousness of the crime, defendant's grossly aggressive behavior, and the fact that he does not succumb to authority, defendant was a severe threat and danger to society. The court also opined that the juvenile system would be no more beneficial to defendant than would the adult system, and because defendant posed such a serious danger, the adult system would detain defendant for a longer period of time in the interests of society.

The trial court's factual findings are supported by the record and the evidence presented at the sentencing hearing.[4] The trial court did not err in its factual findings, and the court's decision to sentence defendant as an adult was adequately supported, was not an abuse of discretion, and was "proportionate to the seriousness of the circumstances surrounding the offense and the offender." *Lyons,* 203 Mich App 468.

Affirmed.

/s/ Helene N. White
/s/ David H. Sawyer
/s/ Richard M. Pajtas

[1] The videotape is not before us. Trial testimony revealed that the audio tape was sometimes inaudible and that the video did not visually capture defendant taking the two twenty-dollar bills. Defendant testified he dropped them on the car seat. The bills were unmarked, and when defendant was arrested he had only $25.

[2] Nor does the case defendant cited in which convictions were reversed on the basis of prosecutorial argument vouching for the veracity of the police, *People v Green*, 74 Mich App 601, 604; 254 NW2d 788, clarified on remand 79 Mich App 186; 261 NW2d 253 (1977)(stating "Given the lengthy jury deliberations and dearth of direct evidence implicating defendant, we are unable to say that the frequent instances of prosecutorial misconduct which occurred below were harmless beyond a reasonable doubt"). A second case defendant cites regarding improper prosecutorial vouching for a police officer, *People v Hunt*, 68 Mich App 145, 147-148; 242 NW2d 45 (1976), did not involve that issue.

[3] The pre-sentence report states that defendant said he was both at the time of the robbery.

[4] Although we agree that the only evidence regarding whether the gun was loaded was that defendant stated to a police officer that it was unloaded, that the gun may not have been loaded is not conclusive in determining the seriousness of an assault with a deadly weapon.