S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROY DANNELL JONES, JR.,

Defendant-Appellant.

UNPUBLISHED
September 17, 1996

No. 172564
LC No. 93-127470

Before: Gribbs, P.J., and Marilyn Kelly, and White, JJ.

PER CURIAM.

Defendant, a juvenile, was convicted by a jury of assault with intent to commit murder, MCL 750.83; MSA 28.278, armed robbery, MCL 750.529; MSA 28.797, kidnapping, MCL 750.349; MSA 28.581, breaking and entering an occupied dwelling with intent to commit larceny, MCL 750.100; MSA 28.645, and unlawfully driving away an automobile, MCL 750.413; MSA 28.645. Following a sentencing disposition hearing, the trial court determined to sentence defendant as an adult and imposed concurrent sentences of twenty to thirty years for the assault, ten to twenty years for the armed robbery, five to fifteen years for the breaking and entering, and two to five years for the UDAA. Defendant appeals, asserting prosecutorial misconduct and dispositional and sentencing error. We affirm.

I

On August 17, 1993, complainant, Brad Proper, who was sixty-two years old at the time of trial, was beaten with a pipe, robbed, abducted, stripped of his clothes and thrown into a lake. His truck was then stolen and his home broken into. Defendant and codefendant, Craig Wiggins, whom Proper identified at trial as his assailants, were arrested leaving Proper's home in his truck with items from Proper's home in the truck. Defendant and Wiggins were tried separately.

At trial, Proper gave the following account of the events. He was working alone the night of August 17 at the Scrub-a-Dub Laundromat. He was washing his pickup truck outside the Laundromat at approximately 2:00 a.m. when he was approached by three men.[1] One man struck him several times with a 2 ½ to 3 foot pipe. Proper identified defendant as the person who first approached him and hit

him with the pipe. Proper was then picked up and taken into the laundromat by the two men. They took approximately $50 in change contained in two little plastic cash boxes located inside a shelf in the laundromat. Angered at discovering only a meager amount of money inside the boxes, defendant resumed beating Proper with the pipe.

Defendant asked Proper for his keys, and Proper gave them to him. Proper was then taken to his truck, forced inside and told to keep his head down. Wiggins took Proper's wallet from him, removed the money and gave the wallet back to him. Defendant drove the truck to Beaudette Park. Proper testified that he was struck several more times by defendant on the way to the park.

At the park, defendant asked Proper if he could swim. Defendants then told Proper to remove his clothes. After removing his clothes, Proper was forced to walk naked down a dock which extends out over a lake. He was ordered to lie face down on the dock. Defendant then demanded that Proper give him his watch and his ring. Proper complied. He was then gagged and his hands and feet were tied. Defendant and Wiggins pushed Proper over the dock's railing and into the lake.[2] Defendant and Wiggins then left in Proper's truck.

Although completely submerged, Proper was able to free himself of his bonds. He walked naked to a Mobil gas station, where an employee telephoned the police. After the police arrived, Proper asked them to go to his apartment because he feared defendants were going to go there based on comments they had made during the incident.

When Proper returned home several hours later, his front door was open and many items, including a television set, a VCR and his stereo, were missing. His truck was not returned to him until three weeks later. Proper identified a ring as being the ring that was taken from him at the dock and a knife as also having been taken from him during the robbery.

On cross-examination, Proper testified that defendant was wearing a hooded sweatshirt and jeans during the incident. He also acknowledged that at the preliminary exam he testified that he was made to keep his head down and could not identify or determine who did what to him.

Officer Mark Rosencratz testified that the ring Proper had identified was recovered from Wiggins' shoe. On cross-examination, Rosercratz testified that Wiggins and defendant were both wearing shorts, not blue jeans, and that Jones had a jacket not a hooded sweatshirt.

Waterford Township Police Officer Daniel McCaw observed stero equipment and a television in Proper's truck. Defendant was driving the truck when it was stopped. A knife and some mace were retrieved from either defendant or Wiggins. There appeared to be a red or dark brown substance on defendant's clothing. McCaw testified that after the intake officer at Children's Village asked McCaw why defendant was there and McCaw responded that defendant was arrested for attempted murder, defendant stated "If I wanted to kill him, I would have killed him."

Officer Carl Solden testified that he instituted surveillance of Proper's apartment complex at approximately 4:05 a.m. He drove around the entire area looking for Proper's truck, but did not see the truck at that time. He parked and maintained surveillance. The door to Proper's apartment was closed. He waited for about thirty-five minutes. He then drove around the complex again looking for the security guards he had seen earlier. He drove back to his original location and noticed Proper's truck backed into a spot just south of his apartment building. He saw two men walking away from the truck. He described the clothing as that worn by Wiggins and defendant when arrested. The men walked toward Proper's apartment and out of view. They returned minutes later carrying some items and placed them in the truck. They did this three times. As defendant and Wiggins drove away, uniformed police officers stopped the truck and arrested them. Defendant was driving the truck.

Detective Charles Jehle described the scene at the laundromat and the dock. He testified that he retrieved the pocket knife and ring Proper had earlier identified from Wiggins when he and defendant were arrested. Jehle had asked Wiggins, "Where is the ring," and Wiggins said "It's right here in my shoe." Without objection,[3] Jehle testified he spoke to Wiggins and took an audio and video tape of Wiggins' statement, and that after he spoke to Wiggins he went to Bethune Elementary School to look for a wallet, a watch, and some towels, but found nothing. He also directed Officer Tippen to the Lakeside Homes housing project. Tippen returned with two cash boxes one red and one black. Jehle testified that exhibit 15 depicted the red box.

Investigator Christopher Tippen stated he observed a red substance in Proper's truck. He testified he was unable to obtain prints from the items recovered from the truck, and that a fingerprint taken from Proper's apartment belonged to Wiggins. He also testified, without objection, that Detective Jehle directed him to a dumpster where he recovered two cash boxes, one black and one red. Pictures of the dumpster and boxes were admitted into evidence.

David Woodford, a scientist with the Michigan State Police Department testified that blood found on the clothing of both defendants matched that of Proper.[4] Blood found on the dock also matched Proper's.[5]

Defendant presented a character witness and the testimony of his mother and brother. His mother testified that she saw defendant at home at 1:30 a.m., before going to bed. His brother testified that defendant was picked up by Wiggins and another male, named Jessie, at about 3:00 a.m.

Defendant testified that he left with Wiggins and Jessie at about 3:00 a.m. Jessie had been beaten up and was bleeding. They went to the Lakeside Homes' project but did not see anyone. Then they went to Jessie's home and played video games and wrestled with neighbors. Jessie then dropped defendant and Wiggins off at a track at a school on the way to Jesse's girlfriend's house and said he would be back. He did not, however, return. After working out, running and wrestling for over an hour, defendant and Wiggins started walking home. As they approached Proper's apartment complex, defendant saw three "guys kind of like jogging." They were wearing jeans and two had shirts with hoods. Defendant saw that one of the apartments was wide open and lit up. He also saw a truck with

its lights on. They approached the complex and defendant told Wiggins he was going to shut the truck's lights off. When he reached in the truck, he saw a VCR on the seat and keys in the ignition. Wiggins noticed a TV in the back. They hid behind another truck as a van drove by and when no one returned they decided to see if anyone answered the door at the apartment, and to take the VCR and TV if no one appeared. They went into the apartment, looked around, saw a stereo, and decided to take the stereo and borrow the truck to transport the stolen items. When they got in the truck, defendant felt something moist on the seat. They drove off and were soon arrested. Defendant denied making the statement attributed to him by McCaw.

Defendant recalled Proper to the stand and established that Proper had not identified defendant in a lineup, that he had told the officers at the scene that he could not identify his assailants, and that he recognized defendant from court. The prosecutor then elicited testimony that at the preliminary examination, about 1½weeks after the incident, Proper recognized defendant and Wiggins without difficulty. Defense counsel established that Proper understood at the preliminary examination that defendant and Wiggins were the two persons arrested.

The prosecutor presented rebuttal, and the jury found defendant guilty of assault with intent to commit murder, armed robbery, kidnapping, breaking and entering, and unlawfully driving away an automobile.

II

Defendant first argues that after the trial court ruled that Wiggins' statements were inadmissible at trial, the prosecutor committed reversible error and denied defendant his right of confrontation when he violated the court's order and informed the jury that Wiggins had told police where to find incriminating evidence that had been introduced at trial. Defendant objected to the prosecutor asking questions regarding Wiggins' statement to police and Wiggins' testimony at a plea-taking proceeding, but did not object when the questions at issue here were asked, and did not object to the complained of comments in the prosecutor's closing argument. Therefore, absent a miscarriage of justice, we will not reverse. *People v Gonzalez, 178 Mich App 526,* at 534-535; 444 NW2d 228 (1989).

Prosecutorial misconduct issues are decided on a case-by-case basis, and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. *People v LeGrone,* 205 Mich App 77, 82-83; 517 NW2d 270 (1994). The propriety of a prosecutor's remarks depends on all the facts of the case. Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Lawton,* 196 Mich App 341, 353; 492 NW2d 810 (1992).

Wiggins invoked his Fifth Amendment rights and refused to testify at defendant's trial. When the prosecutor later sought to introduce Wiggins' confession and his guilty-plea statement under MRE 804 (b)(3), statement against interest by unavailable witness, defendant objected and the trial court ruled that Wiggins' statements were inadmissible against defendant. Later, while defendant's character

witness was on the stand, the prosecutor, without objection, asked whether the witness had "ever heard what Craig Wiggins said about this." After the witness stated he did not know Wiggins, the prosecutor, outside the presence of the jury, requested that he be allowed to ask the witness if he had heard, from any source, that Wiggins stated that defendant participated in the robbery and beating. Defense counsel objected, and the trial court sustained the objection on the basis that the witness had stated that he did not know Wiggins and had no idea what he said. When the jury was recalled, the prosecutor asked the witness three questions regarding whether anyone had told the witness what Craig Wiggins said about the incident. All were answered in the negative, and none were objected to.

We conclude that the prosecutor's questions did not constitute misconduct. The prosecutor merely sought to test the predicate of the court's ruling – that the witness had no knowledge of what Wiggins said. The prosecutor did not repeat the question to which defense counsel objected, a question which referred to the contents of Wiggins statement asserting that Wiggins said defendant had participated in the offenses.

After defendant rested, and outside the presence of the jury, the prosecutor asked to recall Detective Jehle and for permission to have Detective Jehle play for the jury a portion of Wiggins' statement as rebuttal to defendant's alibi.[6] Defense counsel objected, and the court ruled Wiggins' statement inadmissible. The prosecutor then recalled Detective Jehle and the following colloquy ensured:

> Q. Dectective Jehle, I want to show you exhibit 20. Who is that [a] photograph of?
>
> A. This photograph is of Craig Christopher Wiggins.
>
> Q. And was that photograph taken August 17th after he was arrested?
>
> A. Yes, sir.
>
> Q. Did you interview Mr. Wiggins?
>
> A. Yes, sir.
>
> Q. How did you interview him? Was it recorded or anything?
>
> A. Yes, sir.
>
> [DEFENSE COUNSEL]: Your honor, may I make a statement at this point?
>
> THE COURT: Not a statement. You can make an objection.
>
> [DEFENSE COUNSEL]: Make an objection, Your Honor.

THE COURT: Sure, go ahead.

[DEFENSE COUNSEL: I guess I admit I don't know where this testimony may be leading, but I believe that anything that Mr. Wiggins may have said will be hearsay for this particular trial, Your Honor.

THE COURT: You are correct. It will be hearsay.

Go ahead.

Q. (By [the prosecutor], continuing) Was this interview with Mr. Wiggins tape recorded?

A. Yes, sir, it was.

Q. In what fashion?

A. Both audio as well as videotape.

Q. Now, after you spoke to Mr. Wiggins, did you go yourself or did you direct any other officers to go to look for any physical evidence in the case?

A. Yes, sir.

Q. And which did you do?

A. I directed Officer Tippen to go to a location and check for some evidence.

Q. Tell us where you told Officer Tippen to go look for evidence?

A. To the Lakeside housing project in the City of Pontiac on Howard McNeil Street, to the second dumpster on the left of Howard McNeil Street.

Q. And did Officer Tippen return with anything after you told him to go look there?

A. Yes, sir, he did.

Q. What did he return with?

A. One black plastic box and one red plastic box.

Q. Let me show you exhibit 15. What is depicted in exhibit 15?

A. It is a color photograph of various trash, but also depicted in this is a red plastic box, and I believe I see the corner of a black plastic box.

In closing arguments, the prosecutor discussed the discovery of the cash boxes and alluded to the fact that if Wiggins knew where the cash boxes were, then he was involved in the entire episode, and that defendant must also have been involved, because defendant stated that Wiggins was with him the whole evening.

Defendant argues that his convictions must be reversed because the prosecutor disregarded or attempted to circumvent the trial court's ruling that Wiggins' statement was inadmissible. We disagree.

Defendant relies on *People v Strong*, 404 Mich 357, 361-363; 273 NW2d 70 (1978). In *Strong*, the trial court ruled the prosecutor could not make reference to a lineup in which a five-year old "incompetent" witness was unable to identify defendant as the assailant. Despite this ruling, the prosecutor specifically asked a witness if the five-year old attended a lineup to which the witness responded yes. The prosecutor also referred to this fact in closing argument. *Id.* at 361-362. The Supreme Court in *Strong* stated:

> Despite the midtrial instruction, the fact remains that incompetent evidence, . . . was placed before the jury and later argued to the jury by the prosecutor . . . .
>
> The prosecutor, despite careful warning by the trial judge and repeated objection by defense counsel, placed before the jury, in the form of a question and later in argument, incompetent, damaging evidence. His question resulted in ineradicable prejudice, and was asked and answered before the court could intervene. His argument reiterated the prejudice. In such a case any attempt by the court to remove the damage is futile, "for here the effective control is for the examining counsel and not for the judge."

The Supreme Court also found that the prosecutor's behavior violated professional standards. Id. at 363. The *Strong* Court concluded that the prosecutor's deliberate injection of incompetent and prejudicial evidence into the case was cause for reversal. *Id*. at 362-363.

Our review of the record leads us to conclude that *Strong* is inapplicable. In the instant case, all indications are that the prosecutor intended to respect the court's rulings. After the court ruled Wiggins' statement inadmissible, the prosecutor asked that the jury be excused each time he sought to elicit evidence regarding the statement on the basis that other evidence at trial justified its admission. When examining Detective Jehle on rebuttal, the prosecutor did not ask him what Wiggins said, or whether Wiggins admitted placing the boxes in the dumpster. He phrased his question so as not to elicit testimony regarding Wiggins' statement.

Further, while defendant may have objected that the question effectively elicited hearsay by implication, no such objection was made. The court had consistently sustained the objection to that point and defense counsel may well have persuaded the court that the question objected to on appeal

was also objectionable. However, no objection was made and we will not reverse absent manifest injustice. We conclude that given all the testimony at trial, no manifest injustice has been shown. Officer Tippen and Detective Jehle had already testified, without objection, that after speaking with Wiggins, Detective Jehle had sent Tippen to the dumpster and that Tippen had found the cash boxes there. Photographs of the dumpster and the dumpster with a cash box in it had been admitted, and Proper had identified the boxes as the ones taken from the laundromat.

Similarly, we conclude that the prosecutor's unobjected to statements in closing argument did not result in manifest injustice.

III

Defendant next argues that the prosecutor used improper methods in impeaching a character witness under MRE 405(a) when he cross-examined a defense character witness regarding defendant's pending juvenile charges.

During the cross-examination of Reverend Amos Johnson, a minister at defendant's church who was called by defendant as a character witness, the prosecutor asked Reverend Johnson if he knew that defendant had been arrested for shoplifting and assault and battery. Defendant did not object. The prosecutor then asked whether Reverend Johnson heard about an assault charge after a car accident where defendant pushed and choked the other driver. Defendant objected on the basis that there had been no conviction. The court responded that the questions went to reputation, and defense counsel appeared to acquiesce in the ruling. Later, the prosecutor returned to the subject and defense counsel objected on relevancy and prejudice grounds. The court overruled the objection but directed the focus to the basis of the witness' opinion. We conclude that while the court could properly have curtailed the questioning when it continued at some length, the witness' testimony opened the door to the prosecutor's questions. People v Whitfield, 425 Mich 116, 131; 388 NW2d 206 (1986) Further, the court instructed the jury that it was to consider what it learned from the cross examination of the character witness only when deciding whether the character witness really knows defendant's character and described it accurately. We conclude that defendant was not deprived of a fair trial by this questioning.

IV

Defendant further argues that the trial court's findings of fact were clearly erroneous and the court abused its discretion when it determined to sentence defendant as an adult. We do not agree.

In reviewing a trial court's decision to sentence a juvenile as an adult, this Court must apply a bifurcated standard. *People v Haynes*, 199 Mich App 593, 595; 502 NW2d 758 (1993), *People v Buck*, 197 Mich App 404, 429; 496 NW2d 321 (1992). First, the trial court's findings of fact are reviewed under the clearly erroneous standard. *People v Miller*, 199 Mich App 609, 612; 503 NW2d 89 (1993), *Haynes, supra* at 595. Findings of fact are clearly erroneous if, after examining the

whole record, the reviewing court is left with a definite and firm conviction that a mistake has been made. *People v Brown*, 205 Mich App 503, 505; 517 NW2d 806 (1994). Second, the trial court's ultimate decision to sentence a defendant as a juvenile or an adult is reviewed for an abuse of discretion. *Haynes, supra* at 595; *Buck, supra* at 429.

MCR 6.931(E)(3) sets out the criteria to be used by the court in determining whether to sentence a juvenile offender as an adult. The Court is to take into consideration (a) the juvenile's prior record and character, his physical and mental maturity and his pattern of living, (b) the seriousness and the circumstances of the offense, (c) whether the offense was one of a series of repetitive offenses such that the juvenile would not be amenable to treatment or is a potentially disruptive influence in the rehabilitation of others in the juvenile system, (d) whether, despite any treatment the juvenile might receive, he will be a threat to society when released at age 21, (e) whether the juvenile is more likely to be rehabilitated by the programs offered in the adult system or the juvenile system and (f) what is in the best interest of the public welfare and what is best for public safety. *See also Miller, supra* at 610-611; *Buck, supra* at 428-429.

At the dispositional hearing, the trial court heard testimony from a DSS representative, a probation officer, the director of a youth crisis prevention center who had worked with defendant, and a church youth program director who also had worked with defendant. The first two witnesses recommended that defendant be sentenced as an adult, the last two testified in support of defendant's position that he should be sentenced as a juvenile.

In rendering its decision regarding defendant and Wiggins, the trial court recounted the facts of the offense and observed that although Wiggins confessed, defendant insists on limiting his involvement despite the overwhelming evidence. The court reviewed the testimony of the witnesses at the dispositional hearing and stated that it had received letters from friends and relatives of defendant.

The court then noted the prosecutor's burden of proof and the relevant factors, and concluded that defendant should be sentenced as an adult, basing this decision on the facts that (1) defendant had prior contacts with the criminal justice system, (2) defendant was of average size and weight with average intelligence, although defendant had a learning disability, (3) the offense committed was serious and extremely vicious, (4) the offense appeared to be part of a pattern of escalating criminal activity on the part of defendant, (5) because defendant would not accept responsibility for his actions it is unlikely that he would benefit from placement in the juvenile system (6) the unlikelihood of defendant benefiting from DSS programs indicates defendant would likely be a danger to the public when released at age 21, while the adult system offers rehabilitative services and would not release defendant before his rehabilitation.

We conclude the trial court's findings were supported by the record and were not clearly erroneous, and, based on the evidence and the testimony of all the witnesses, the decision to sentence defendant as an adult was not an abuse of discretion. The court, using the criteria set out in MCR 6.931(E)(3), examined the circumstances surrounding the offense and the offender and concluded that

defendant would best be placed in the adult system. The court did not simply rely on the seriousness of the offenses or the other juvenile charges.

V

Lastly, we conclude defendant's sentence did not violate the principle of proportionality set forth in *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). Although the trial court's discretion in imposing a sentence is broad, it must tailor the sentence to the circumstances of the case and to the particular defendant. *People v Odendahl*, 200 Mich App 539, 540-541; 505 NW2d 16 (1993) Sentences within the guidelines are presumptively proportional. *People v Hurst*, 205 Mich App 634, 639, 517 NW2d 858 (1994).

Defendant's twenty year minimum sentence is within the recommended guidelines range of twenty to thirty years, and is presumptively proportionate. While a juvenile's age is an important factor in determining an appropriate sentence, a court is not required to impose a lesser sentence than is otherwise appropriate simply because of a defendant's youth. Given all the circumstances, the court did not abuse its discretion.

Affirmed.

/s/ Roman S. Gribbs
/s/ Marilyn Kelly
/s/ Helene N. White

[1] The third person did not participate in the incident.

[2] The water at this point in the lake was apparently only four feet, six inches deep.

[3] After establishing that Jehle took a statement from Wiggins, the prosecutor said: I can't and I am not going to ask you any questions about what Mr. Wiggins told you; that would be hearsay; but did you go looking for things after you spoke to Mr. Wiggins? Defendant did not object.

[4] Woodford testified on the basis of blood types and PGM subtypes. Defendant, Wiggins and Proper all have different blood types. Defendant is type O, Wiggins is type B, and Proper is type A. Defendant and Wiggins have the same PGM subtype – one plus, two plus, and Proper's subtype is one plus, one minus. Woodford found human, type A blood on defendant's jacket (Proper's type) and type O blood on his shorts (defendant's own type.). He was unable to subtype these samples. He subtyped a different sample from defendant's shorts. This sample revealed a one plus, one minus subtype, which matches Proper's blood, not defendant's.

[5] The blood on the dock was type A. The sample was insufficient for subtype testing.

[6] The prosecutor argued that defendant had, in effect, offered alibi testimony for both himself and Wiggins, because defendant asserted they were together, and that Wiggins statement would rebut that testimony.