

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SAMUEL GONZALES LOPEZ,

Defendant-Appellant.

UNPUBLISHED
October 18, 1996

No. 182791
LC No. 94-009558-FC

Before: Neff, P.J., and Hoekstra and G. D. Lostracco,* JJ.

PER CURIAM.

A jury convicted defendant of assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279. The trial court found defendant to be a third habitual offender, MCL 769.11; MSA 28.1083, and sentenced him to ten to twenty years of imprisonment. Defendant appeals as of right. We affirm.

I

Defendant's conviction stemmed from an incident in which he physically attacked his wife. By his own admission defendant struck her at least three times. Defendant's wife testified that he used a knife in the attack, and that she sustained four distinct stab wounds necessitating thirty stitches. Defendant denied the use of a knife, but nevertheless admitted that his hands were lethal weapons because he had martial arts training.

II

Defendant argues that the trial court's exclusion of evidence concerning the circumstances surrounding his marriage resulted in a miscarriage of justice and violated his constitutional right to present a defense. Defendant claims that evidence was critical to show that his wife's motive in marrying him was to prevent him from being called to testify against her in a probate court matter.

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

According to defendant, once the probate matter was concluded, his wife set him up so that she could get rid of him by having him sent back to prison. We find no error on the record below.

A trial court's ruling on the admissibility of evidence will not be reversed absent an abuse of discretion. *People v Baker*, 157 Mich App, 613, 616; 403 NW2d 479 (1986). A defendant does not have an unlimited right of cross-examination; cross-examination may be limited as to collateral matters bearing only on general credibility. *People v Canter*, 197 Mich App 550, 564; 496 NW2d 336 (1992).

Here, while the evidence of the probate matter is arguably relevant to defendant's defense, its tendency to confuse the jury substantially outweighs its probative value. MRE 403. Indeed, contrary to defendant's argument, the trial court allowed defendant to pursue his defense. The court, however, simply did not allow the introduction of evidence concerning the unrelated probate matter. Defense counsel cross-examined defendant's wife as to whether she ever asked a third party to physically assault defendant, whether she set defendant up, and whether she ever threatened him to the effect that she would put him back in prison. Later, during his direct testimony, defendant testified that Mrs. Lopez' denials were false. Accordingly, we find no abuse of discretion in the trial court's ruling.

In any event, any error in the exclusion of this evidence was harmless because defendant admitted to all essential elements of the offense.

III

Defendant next contends that the prosecution violated its duty to use due diligence in attempting to produce a *res gestae* witness. We find no abuse of discretion in the trial court's ruling.

There is no factual basis on which to agree with defendant. While he did move for assistance in locating a witness and the trial court instructed the prosecution to undertake additional effort, defendant agreed with those instructions and never raised the issue again. Accordingly, because it appears that defendant's objections were cured, and no further objections made, the issue has been waived. See *People v Considine*, 196 Mich App 160, 162; 492 NW2d 465 (1992).

IV

Finally, defendant argues that his sentence is disproportionate to his offense because it is a product of the trial court's individual philosophy in violation of *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). We disagree.

The sentencing decision of a trial court as to an habitual offender will not be reversed absent an abuse of discretion. *People v Cervantes*, 448 Mich 620, 626-628; 532 NW2d 831 (1995). The sentencing guidelines do not apply to habitual offenders like defendant. *Id.* In fashioning defendant's sentence, the trial court considered his extensive prior record, the escalation of his crimes, the need to protect society, the need to properly discipline defendant, his potential for rehabilitation, and the goal of

detering others. These considerations were proper, and we find defendant's sentence to be proportionate to both him and his crime. *Id.*; *Milbourn, supra*.

Affirmed.

/s/ Janet T. Neff

/s/ Joel P. Hoekstra

/s/ Gerald D. Lostracco