

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARRELL L. TURNAGE,

Defendant-Appellant.

UNPUBLISHED

December 13, 1996

No. 182859

LC No. 94-000594

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DENNIS D. WHITE,

Defendant-Appellant.

No. 182864

LC No. 94-000594

Before: Sawyer, P.J., and Marilyn Kelly and D.A. Burress,* JJ.

PER CURIAM.

Defendant Darrell Turnage appeals as of right his sentence on his conviction after a jury trial of one count of voluntary manslaughter, MCL 750.321; MSA 28.553, and one count of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.548. He was sentenced to ten to fifteen years on the conviction for voluntary manslaughter; and two years consecutive on the conviction for felony-firearm. Defendant Dennis D. White appeals as of right his conviction after a jury trial of one count of voluntary manslaughter, MCL 750.321; MSA 28.553, and one count of felony-firearm, MCL 750.227b; MSA 28.548. He was sentenced to four to fifteen years on his conviction for voluntary manslaughter, and two years consecutive on his conviction for felony-firearm. We affirm.

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

On appeal, defendant Turnage first contends that the trial court sentenced defendant based on impermissible criteria. Defendant asserts that although the jury acquitted defendant of first- or second-degree murder, finding him guilty of voluntary manslaughter instead, the lower court at sentencing continued to consider him guilty of first-degree murder. We disagree.

A trial court's sentencing decision is reviewed for abuse of discretion. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). Here, the lower court at sentencing stated that because defendant fired nine shots at the victim, the court found clear intent to kill. As intent to kill is one of three states of mind necessary for a conviction of voluntary manslaughter, the lower court did not abuse its discretion by considering this factor, despite the fact that the jury had acquitted defendant of first- or second-degree murder. CJI2d 16.8.

Defendant Turnage next contends that the lower court's sentence of ten to fifteen years' imprisonment on defendant's voluntary manslaughter conviction is excessive and violates the principle of proportionality. We disagree.

In reviewing the lower court's sentencing decision for abuse of discretion, we conclude that the lower court's three-year departure from the recommended sentencing guidelines range does not violate the principle of proportionality. A sentencing court is allowed to depart from the guidelines range when the recommended range is considered to inadequately reflect the seriousness of the offense or the characteristics of the offender. *People v Witcher*, 192 Mich App 307, 308-309; 480 NW2d 636 (1991). Here, the lower court based its departure from the sentencing guidelines on its finding that defendant Turnage's shooting at the deceased nine times with an automatic rifle was such an egregious crime that it warranted some departure. We do not find this to be an abuse of discretion.

On appeal, defendant White contends that he was denied a fair trial due to prosecutorial misconduct. As defendant failed to adequately preserve this issue for appellate review, we review only for manifest injustice. *People v Wise*, 134 Mich App 82, 105; 351 NW2d 255 (1984). In reviewing defendant's contentions, we do not conclude that reversal is mandated on the basis of manifest injustice.

Defendant White first asserts that the prosecutor behaved improperly by basing her argument on facts not in evidence; and also vouching for the credibility of a police witness through a line of improper questioning. We disagree. Comments by a prosecutor intended to rebut a defense theory do not constitute prosecutorial misconduct. *People v Bahoda*, 448 Mich 261, 286; 531 NW2d 659 (1995). Here, the prosecutor's questioning was not an attempt to bolster the testimony of the police witness, but instead was designed to rebut defendants' allegation that a delay in charging defendants was due to sloppy police work as to defendants' theory of self-defense.

Defendant White next alleges that prosecutorial misconduct occurred by the prosecutor's improperly appealing to the jury's religious duty to convict defendant in her closing argument. We disagree. Although reversal of a defendant's conviction is mandated where potentially inflammatory religious references are intentionally injected into a trial with no apparent justification except to arouse prejudice, the prosecutor's one-sentence statement here does not appear to have been unjustifiably

intended to engender such prejudice. *Bahoda, supra* at 266. Therefore, no manifest injustice has occurred requiring reversal.

Finally, defendant White contends that prosecutorial misconduct occurred when the prosecutor improperly denigrated defense counsel. Once again, we disagree. While it is true that a prosecutor may not denigrate defense counsel, a review of the record here reveals that the prosecutor's remarks were not improper. *Wise, supra* at 101-102. The remarks came in the prosecutor's rebuttal closing argument and were in response to defendant White's closing argument. As comments by the prosecution intended to rebut a defense theory are not prosecutorial misconduct, the prosecutor's comments here do not rise to the level of prosecutorial misconduct requiring reversal. *Bahoda, supra* at 286.

Affirmed.

/s/ David H. Sawyer

/s/ Marilyn Kelly

/s/ Daniel A. Burrell