

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee

v

ORLANDO RUSSELL,

Defendant-Appellant.

UNPUBLISHED

December 13, 1996

No. 182894

LC No. 94-005518

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee

v

ANTHONY HUTCHINSON,

Defendant-Appellants.

No. 183744

LC No. 94-006996

Before: Fitzgerald, P.J., and Cavanagh and N.J. Lambros,* JJ.

PER CURIAM.

In No. 182894, defendant Russell appeals as of right from his jury trial convictions of felonious assault, MCL 750.82; MSA 28.277, and possession of a firearm during the commission of a felony, MCL 750.529; MSA 28.424(2). Defendant Russell subsequently pleaded guilty of being an habitual offender, third offense, MCL 769.11; MSA 28.1083. The trial court sentenced defendant Russell to two to four years' imprisonment on the felonious assault conviction and two years' imprisonment on the felony-firearm conviction. The sentence on the felonious assault conviction was then vacated, and defendant Russell was sentenced to six to eight years' imprisonment as an habitual offender.

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

In No. 183744, defendant Hutchinson appeals as of right from his jury trial convictions of felonious assault and possession of a firearm during the commission of a felony. Defendant Hutchinson subsequently pleaded guilty of being an habitual offender, fourth offense, MCL 769.12; MSA 28.1084. The trial court sentenced defendant Hutchinson to two to four years' imprisonment on the felonious assault conviction and two years' imprisonment on the felony-firearm conviction. The sentence on the felonious assault conviction was then vacated, and defendant Russell was sentenced to ten to fifteen years' imprisonment as an habitual offender.

No. 182894

Defendant Russell argues that he was denied a fair trial when the trial court allowed the prosecutor to elicit testimony that he had robbed the complainant's brother and had committed other robberies. The decision whether to admit or exclude evidence is within the trial court's discretion. This Court will find an abuse of discretion only when an unprejudiced person, considering the facts on which the trial court acted, would say there is no justification or excuse for the ruling made. *People v McAlister*, 203 Mich App 495, 505; 513 NW2d 431 (1994).

We find no error. In the case at bar, the complainant's testimony regarding defendant's other bad acts was not being offered to establish that defendant had a criminal propensity, but rather to explain the complainant's five-month delay in reporting the incident in question. Thus, the testimony was within the range of litigated matters and was therefore relevant pursuant to MRE 401. See *People v Mills*, 450 Mich 61, 66-68; 537 NW2d 909 (1995). The trial court twice instructed the jury that the evidence was being presented solely for the purpose of establishing complainant's state of mind and was not to be used to establish that defendants robbed complainant's brother. We conclude that the trial court properly admitted the testimony regarding defendants' prior bad acts pursuant to MRE 404(b). See *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993).

Defendant next argues that he was denied the effective assistance of counsel when his trial counsel failed to object to the habitual offender charge, which was not timely filed. However, the Supreme Court has found that an unconditional guilty plea on an habitual offender charge waives a criminal defendant's right to challenge the timeliness of the prosecutor's filing of the supplemental information charging him or her as an habitual offender. *People v Lannom*, 441 Mich 490, 495; 490 NW2d 396 (1992). Where a defendant waives a claim as a result of an unconditional guilty plea, the defendant also waives his right to challenge his conviction by alleging ineffective assistance of counsel based upon alleged deficient conduct by his trial counsel which relates to the waived issues. *People v Vonins (After Remand)*, 203 Mich App 173, 175-176; 511 NW2d 706 (1993). Therefore, because defendant entered an unconditional guilty plea to the habitual offender charge, he has waived review of this claim.

Next, defendant argues that he was denied a fair trial by the prosecutor's improper statements during rebuttal closing argument which denigrated defense counsel by suggesting that the prosecutor's job was to do justice while defense counsel's job was to get their clients off. Defendant did not timely

object at trial to the comments of which he now complains. To preserve for appeal an argument that the prosecutor committed misconduct during trial, a defendant must timely object to the conduct at trial on the same ground as he asserts on appeal. In the absence of a proper objection, review is precluded unless a curative instruction could not have eliminated the prejudicial effect or the failure to consider the issue would result in a miscarriage of justice. *People v Nantelle*, 215 Mich App 77, 86-87; 544 NW2d 667 (1996).

Under Michigan law, it is improper for the prosecutor to denigrate defense counsel by implying that the prosecutor's job is to do justice while defense counsel's job is to get his client acquitted. *People v Hunt*, 68 Mich App 145, 148; 242 NW2d 45 (1976). However, viewing the prosecutor's statement in context, we find that because the prosecutor's statement was clearly made in response to the statement of counsel for defendant Hutchinson that the prosecutor wanted to win and therefore implying that she had a motive to lie, reversal is not required. Cf. *People v Vaughn*, 200 Mich App 32, 39; 504 NW2d 2 (1993). Moreover, we conclude that a curative instruction could have eliminated any prejudicial effect, had one been requested. *Nantelle*, *supra*.

Defendant raises two challenges to his sentence. First, he argues that he is entitled to resentencing because the six- to eight-year sentence imposed by the trial court violated the two-thirds rule set forth in *People v Tanner*, 387 Mich 683; 199 NW2d 202 (1972). The prosecutor concedes that the sentence is invalid, and we agree. We therefore remand this matter for the trial court to set a minimum sentence which complies with the two-thirds rule. *People v Thomas*, 447 Mich 390, 392-394; 523 NW2d 215 (1994).

Defendant also argues that the trial court abused its discretion in imposing consecutive sentences. We disagree. The order of conviction indicates that the felonious assault sentence as enhanced was to be served consecutive to his felony firearm conviction and the "sentence serving." Statements made at the sentencing hearing indicate that the sentence imposed in the case at bar was expected to run consecutive to the sentence of ten to twenty years defendant received on November 15, 1994, for an armed robbery conviction. The armed robbery in that case was committed after defendant had been charged in the case at bar, but before his conviction and sentence herein. Because defendant had not yet been convicted or sentenced for the robbery at issue in this case, the charges stemming therefrom were still pending, and consecutive sentencing was authorized pursuant to MCL 768.7b; MSA 28.1030(2).¹

No. 183744

Defendant Hutchinson argues that the trial court erred in allowing the prosecutor to elicit testimony regarding uncharged misconduct. However, as discussed above, we find no error requiring reversal because the testimony was offered not to show that defendant had a propensity to commit robberies, but rather to explain the complainant's delay in reporting the incident in question.

Defendant also argues that the trial court erred in replacing a juror who refused to render a verdict for religious reasons. As a result, defendant asserts that he was denied his right to a fair trial. A trial court's decision to remove a juror will only be reversed where this Court finds a clear abuse of discretion. *People v Dry Land Marina, Inc*, 175 Mich App 322, 325; 437 NW2d 391, lv den 433 Mich 916 (1989), cert den 495 US 931 (1990). The standard for reviewing an abuse of discretion is narrow; the result must have been so violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or an exercise of passion or bias. *People v Woods*, 200 Mich App 283, 288; 504 NW2d (1993).

We find no abuse of discretion. Although a defendant has a fundamental interest in retaining the composition of the jury as originally chosen, a defendant also has an equally fundamental right to have a fair and impartial jury decide his case. Thus, in order to preserve that right, a trial court may remove a juror after deliberations have begun, if the juror is either too ill to serve or unwilling to cooperate. *Dry Land Marina, supra* at 326. Because the juror in this case refused to render a verdict for religious reasons, she was properly removed by the trial court.

Defendant also argues that the trial court erred in recalling a previously discharged alternate juror to replace the juror whom the court removed. We disagree. A trial court's decision to recall an alternate juror requires reversal only if the defendant was prejudiced as a result. *Id.* at 329-330. We find no evidence to suggest that defendant Hutchinson was prejudiced by the trial court's decision to replace the juror. The juror selected to replace the removed juror had been in attendance for the presentation of all the evidence and was present when the jury was instructed by the trial court as to the applicable law. Before being reinstated as a juror, the trial court questioned her and established that she could fully and fairly consider this case. The trial court then instructed the jurors to begin deliberations again. Subsequently, the jury deliberated for approximately one hour and eighteen minutes before finding defendant Hutchinson guilty. Because defendant Hutchinson was not prejudiced by this replacement, reversal of his conviction is not required.

Defendant next contends that he was denied a fair trial when the trial court denied his motion for mistrial based on the prosecutor's rebuttal argument. However, as discussed above, because the prosecutor's statement was clearly made in response to defense counsel's statements implying that the prosecutor wanted to win and therefore had a motive to lie, reversal is not required.

Finally, defendant argues that he is entitled to resentencing because the trial court failed to state adequate reasons for the sentence imposed and his sentence was disproportionate. To facilitate appellate review, a sentencing court must articulate on the record the criteria considered and the reasons for the sentence imposed. *People v Fleming*, 428 Mich 408, 428; 410 NW2d 266 (1987). After reviewing the transcript of the sentencing hearing, we conclude that the trial court's remarks, while brief, were nonetheless an adequate articulation of the reasons for the sentence imposed. The trial court considered defendant Hutchinson's continued criminal activity and the fact that he committed the offense in question while on parole in determining that there was little hope for defendant's rehabilitation. Contrary to defendant's assertion, a trial court may appropriately consider a defendant's criminal history

and potential for rehabilitation when imposing sentence on a defendant charged as an habitual offender. See *People v Cervantes*, 448 Mich 620, 627; 532 NW2d 831 (1995). Furthermore, defendant's sentence is proportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

We affirm defendants' convictions, but remand for resentencing of defendant Russell in conformance with the rule set forth in *Tanner*. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald

/s/ Mark J. Cavanagh

/s/ Nicholas J. Lambros

¹ MCL 768.7b; MSA 28.1030(2) authorizes consecutive sentences when a person, who has been charged with a felony and pending the disposition of the charge, commits a subsequent offense which is a felony.