STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SHAE KONAN BERRY,

Defendant-Appellant.

UNPUBLISHED
December 20, 1996

No. 180096
Bay County
LC No. 94-001124

Before: McDonald, P.J., and Murphy and J.D. Payant,* JJ.

PER CURIAM.

Defendant, Shae Konan Berry, appeals as of right from his jury trial conviction for possession of a firearm by a felon, MCL 750.224f; MSA 28.421(6), and from his sentence of seven to twenty years' imprisonment as a fourth habitual felony offender, MCL 769.12; MSA 28.1084. We affirm.

First, defendant argues that the trial court abused its discretion in allowing the prosecutor to impeach the preliminary examination testimony of a non-testifying witness introduced at trial with extrinsic evidence of a prior inconsistent statement. Defendant contends that because the prosecutor failed to lay the proper foundation for the admission of this impeachment evidence, it should not have been admitted. We disagree.

The decision whether to admit evidence is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *People v Underwood,* 184 Mich App 784, 786; 459 NW2d 106 (1990). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made. *People v McAlister*, 203 Mich App 495, 505; 513 NW2d 431 (1994).

MRE 613(b), the relevant evidentiary provision, provides:

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

> (b) *Extrinsic Evidence of Prior Inconsistent Statement of Witness*. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposing party is afforded an opportunity to interrogate him thereon, or in the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in Rule 801(d)(2).

It has long been held that the foundational requirements described in MRE 613(b) are necessary before extrinsic evidence may be used to impeach a witness with a prior insistent statement. See e.g., *People v Barnett*, 165 Mich App 311, 315; 418 NW2d 445 (1987). However, the issue here is unique in that it poses the question of whether an opposing party should be able to impeach the prior testimony of a nontestifying witness at trial. By virtue of the qualifying statement in MRE 613(b), "or the interests of justice otherwise require," we answer this question in the affirmative.

In this case, the witness' preliminary examination testimony was read into the record as part of defendant's defense at trial, and inured to his benefit. There is no reason to believe that the witness' unavailability was due to any action or inaction on plaintiff's part. Because the purpose of and the burden of proof at a preliminary examination are different than at trial, we do not wish to punish plaintiff for not impeaching the witness at the preliminary examination, when presumably, plaintiff had no idea that the examination being conducted at the preliminary examination was to be the testimony introduced at trial. Under the circumstances of this case, we would consider it unfair for the trial court not to allow plaintiff to impeach the testimony. In any event, in light of the other evidence presented, including eyewitness testimony corroborating the fact that defendant was in possession of a gun on the night in question, any error would have been harmless.

Defendant also argues that the trial court abused its discretion in limiting his cross-examination of a witness for the prosecution. Defendant claims that he was denied his constitutional right to confront the witness.[1] We disagree.

A primary interest secured by the Confrontation Clause is the right of cross-examination; however, the right of cross-examination is not without limit. *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993). It does not confer a right to cross-examine on irrelevant issues and may bow to accommodate other legitimate interests of trial. *Id.*

Here, the record indicates that defendant sought to impeach the prosecution's witness with evidence based upon mere speculation. Therefore, we conclude that defendant was not denied his right to confront the witness, and hold the that the trial court did not abuse its discretion limiting defendant's cross-examination. *Adamski, supra* at 138; *Blunt, supra* at 651.

Next, defendant argues that the trial court failed to instruct the jury on the elements of the offense of possession of a firearm by a felon. Defendant specifically argues that the trial court failed to instruct the jury that they had to find that less than five years had passed since defendant had finished serving his sentence on a prior felony conviction. We disagree.

Jury instructions are reviewed in their entirety to determine if reversal is required. *People v Moldenhauer,* 210 Mich App 158, 159; 533 NW2d 9 (1995). Where the instructions, as a whole, sufficiently protected the defendant's rights and fairly presented the issues to be tried, reversal is not required. *Id.*; *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994). Because defendant failed to object to the instructions below, our review is precluded absent manifest injustice. *People v Ferguson,* 208 Mich App 508, 510; 528 NW2d 825 (1995).

Where the record indicates that defendant conceded that he was a felon at the time he had allegedly committed the instant crime, and where the record further indicates that defendant focused his case on whether he was in possession of a firearm on the night in question, we conclude that manifest injustice will not result from our failure to review this issue. *Ferguson, supra* at 510.

Next, defendant argues that the trial court abused its discretion in denying his motion for a mistrial. Defendant contends that a mistrial was in order because the police destroyed a 911 tape containing an exculpatory call from a witness. Defendant further argues that the statements made in the call would have been admitted at trial as excited utterances. We disagree.

We review a trial court's grant or denial of a mistrial for an abuse of discretion. *People v Haywood,* 209 Mich App 217, 228; 530 NW2d 497 (1995). A trial court should grant a mistrial only for an irregularity that is prejudicial to the rights of the defendant, and impairs his ability to get a fair trial. *Id.*

The trial court did not abuse its discretion in denying defendant's motion for a mistrial where the statements made in the 911 call were inadmissible hearsay. Because the record indicates that the call in question was made one and one-half hours after the alleged incident, we find that it could not be considered an excited utterance because there was time for contrivance or misrepresentation. *People v Kowalak (On Remand),* 215 Mich App 554, 557; 546 NW2d 681 (1996). In addition, the record indicates that the police recorded over the 911 tape as part of normal operating procedures, more than sixty days after the call was made, and before it was requested for trial. Therefore, we find that defendant failed to show any intentional act or wrong doing on the part of the police, necessary to order a mistrial. See *People v Carlton Brown,* 126 Mich App 282, 289-290; 336 NW2d 908 (1983).

Next, defendant argues that he was denied his right to a fair trial when he prosecutor insinuated in closing argument that witnesses were afraid of defendant. We disagree.

The test for prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Legrone,* 205 Mich App 77, 82-83; 517 NW2d 270 (1994). Because defendant failed to object at trial, our review is precluded absent manifest injustice. *People v Gonzalez,* 178 Mich App 526, 534-535; 444 NW2d 228 (1989).

We hold that because the prosecutor's comments made during closing argument were proper inferences based upon the evidence, manifest injustice will not result from our failure to review this issue. *Gonzalez, supra* at 534-535; *People v McElhaney,* 215 Mich App 269, 284; 545 NW2d 18 (1996).

Finally, defendant argues that the trial court abused its discretion in sentencing defendant, because it considered him guilty of uncharged offenses and imposed a disproportionate sentence. We disagree.

We review sentencing decisions for an abuse of discretion. *People v Poppa,* 193 Mich App 184, 187; 483 NW2d 667 (1992). A sentencing court has abused its discretion when the sentence is not proportional to the circumstances surrounding the offense and the offender. *Id; People v Milbourn,* 435 Mich 630, 636; 461 NW2d 1 (1990). Our review of a habitual offender sentence is limited to whether the sentence violates the principle of proportionality without reference to the guidelines. *People v Zinn,* 217 Mich App 340, 349; 551 NW2d 704 (1996).

We find that the sentencing court properly based its decision on the evidence presented at trial. *People v Watkins,* 209 Mich App 1, 5-6; 530 NW2d 111 (1995). Further, where the record indicates that defendant had a lengthy criminal history and committed the instant offense of possession of a firearm while on parole, we hold that his sentence of seven to twenty years' imprisonment was not disproportional. *Zinn, supra* at 349.

Affirmed.

/s/ Gary R. McDonald
/s/ William B. Murphy
/s/ John D. Payant

[1] US Const, Am VI; Const 1963, art 1, § 20.