STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANDREW RAY DURON,

Defendant-Appellant.

UNPUBLISHED
January 21, 1997

No. 174890
LC No.93-63412-FCA

Before: Michael J. Kelly, P.J., and O'Connell and K.W. Schmidt,* JJ.

PER CURIAM.

Defendant was convicted by a Kent County Circuit Court jury of assault with intent to commit great bodily harm, MCL 750.84; MSA 28.279, conspiracy, MCL 750. 157a; MSA 28.354(1), and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). On February 3, 1994 he was sentenced to five to ten years imprisonment on each conviction, to be served concurrently and two years to be served consecutively on the felony firearms conviction. Defendant appeals as of right.

Defendant was charged with assault with intent to murder, MCL 750.83; MSA 28.278, conspiracy to commit assault with intent to murder, MCL 750.157a; MSA 28.354(1) and felony firearm, MCL.750.227b; MSA 28.424(2). Defendant claims there was insufficient evidence to support the verdict of guilty of assault with intent to murder and conspiracy to murder. Although an objection regarding the jury instructions, or a motion for new trial was not made, this issue may be raised on appeal. *People v Patterson,* 428 Mich. 502; 410 NW2d 733 (1987*)*. Defendant claims there was insufficient evidence that defendant intended to kill and submission to the jury, decreased his chance of acquittal and increased the possibility of a compromised verdict. *People v Vail,* 393 Mich 460, 463-464; 227 NW2d 535 (1975*)*.

When deliberating on whether a defendant had the intent to kill, the trier of fact should; "take into consideration the nature of the defendant's acts constituting the assault; the temper or disposition of mind with which they were apparently performed, whether the instrument and means used were

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

naturally adapted to produce death, his conduct and declarations prior to, at the time, and after the assault, and all other circumstances calculated to throw light upon the intention with which the assault was made." *People v Taylor*, 422 Mich 554, 568; 375 NW2d 1 (1985)

Defendant admitted shooting the victim, in an act of vengeance, on or about midnight August 14, 1993. Defendant obtained a sawed-off shotgun, then conspired with others to lure the victim into an ambush. Defendant fired two shots which wounded the victim, but claimed at trial that he shot into the ground to scare him. Prosecution witness, Detective Jorgensen, testified that his examination of the area revealed no indication that the shotgun was fired into ground. A rebuttal witness, Sergeant Friend, tended to establish that the victim's wounds were consistent with shots fired from waist high. The jury could have reasonably found from this evidence that defendant intended to kill the victim. There was certainly sufficient evidence to support the assault conviction.

Defendant next challenges the sufficiency of the evidence to support his conviction of conspiracy. MCL 750.157a; MSA 28.354(1), requires that one or more persons conspire to commit an illegal act or a legal act in an illegal manner. Direct proof is not required, the agreement can be established by circumstantial evidence. *People v Carter*, 415 Mich 558, 568; 330 NW2d 314 (1991). Being a specific-intent crime, conspiracy requires both the intent to conspire with others and the intent to accomplish the illegal objective. *Cotton, Supra*. 392.

Along with defendant's own testimony, there was substantial evidence that defendant conspired with others to assault the victim. There was sufficient evidence to support the defendant's conspiracy conviction.

Defendant claims he was denied a fair trial as a result of prosecutorial comments and conduct, based upon evidence not presented at trial. Generally, an objection must be made to preserve a prosecutorial misconduct issue for review, *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Where an objection has not been made appellate review is precluded unless a miscarriage of justice would result. *Stanaway, supra,* 446 Mich 687. Prosecutorial misconduct is reviewed on a case-by-case basis, with an examination of the record and evaluation of the prosecutor's remarks. *People v LeGrone,* 205 Mich App 77, 82; 517 NW2d 270 (1994). Prosecutorial comments are to be read as a whole, in light of the defense's arguments and the relationship they bear to evidence admitted. *People v Lawton*, 196 Mich App 341, 353; 492 NW2d 810, (1992).

Defendant claims error in the prosecutor's attempt to tie defendant to a gang. The court sustained defendant's objection regarding the term "gang". No specific evidence existed to tie defendant to a gang. The prosecutor was arguing that fact based upon a reasonable inference that this event was a gang retaliation for a previous assault. These arguments by the prosecutor were made in conjunction with the peoples theory of the case that resulted from a reasonable inference from the evidence. Therefore defendant was not denied a fair trial by these arguments. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995).

Defendant next claims error for remarks by the prosecutor in the closing arguments that made reference to defendant being unable, with his attorney, "to formulate the final story". An objection was made and the trial court made a ruling with an appropriate statement of the law to guide the jury. Trial evidence showed that defendant gave differing accounts of the night in question. The prosecution has the right to comment upon the evidence and argue that the witness is not trustworthy, and to further contend that the defendant is lying. *People v Sharbnow*, 174 Mich App 94, 100; 435 NW2d 772 (1989*)*. Appropriate comments by the prosecutor tempered by the ruling of the trial court which eliminated any prejudice afforded defendant due process and a fair trial.

Defendant claims error in that the prosecutor elicited testimony from officer Owczarzak as to how the interview with defendant ended. The witness explained, that the defendant requested an attorney and stated he would tell the truth about the matter after a discussion with his attorney. An objection was not made and appellate review is precluded absent a miscarriage of justice, which is not present here.

Defendant next claims error in the vouching for the credibility of witness Godlewski by the prosecutor, when the jury was told that he was " an honest, frightened 16-year old individual". An objection was not made to this statement. The prosecutor did not convey to the jury that he had special knowledge concerning the truthfulness of the witness, *Bahoda , Supra* 276. The mere statement of the prosecutor's belief in the witness' honesty is not error when the remarks are fair. *People v.McElhaney*, 215 Mich App 269, 284; 545 NW2d 18 (1996*)* The jury instructions regarding the role of the jurors as fact-finders cured any error.

Defendant claims error in the prosecutors improper revelation to the jury of the defendant's prior contact with police. While defendant was awaiting trial he wrote a letter to a teacher at his high school admitting his part in the shooting .The letter included defendant's version of the events, including a statement which admitted to actually shooting the victim in the leg. This letter came into the possession of officer Owczarzak during the course of his investigation. The officer also testified that the letter contained the defendant's latent fingerprints. The letter, being consistent with defendant's theory of defense, was admitted on the prosecutor's offer of proof, without objection. Officer Owczarzak also testified that he interviewed defendant on August 16 when defendant was in custody on a warrant from another charge, at which time defendant denied any involvement in the shooting.

Subsequent to officer Owczarzak's testimony the prosecutor called witness William Wolz, a latent fingerprint expert with the police department. Witness Wolz was offered as an expert, without objection by defense counsel, and the jury was so advised. Mr. Wolz explained the process of lifting latent fingerprints. Defense counsel made no objection to this testimony. The prosecutor then had the fingerprint cards marked as exhibits #31 and #32. Again, no objection was made by defense counsel. After the fingerprint cards were identified as being the record of defendant, defense counsel objected on the grounds that the evidence was cumulative as defendant had admitted that he was the author of the letter. The exhibits were not admitted, although there was an agreement at a bench conference that the exhibits contained the defendant's fingerprints and the witness was allowed to testify that he made this information available to officer Owczarzak. The following morning defense counsel's motion for a

mistrial was denied. Defendant claims the misconduct of the prosecutor in interjecting defendant's prior contact with the police denied him a fair trial.

Officer Owczarzak had testified, without objection, that defendant was in custody on another warrant when defendant was first interviewed in relation to this shooting. The jury knew that defendant had prior police contact. The objection to the offered exhibit was based upon relevance and not as evidence of bad character. William Wolz, identified himself as a member of the latent print unit of the Grand Rapids Police Dept. and defense counsel stipulated to the witness as an expert. Exhibits #31 and #32 were then marked in open court, without comment or objection. The witness was asked to identify and describe the exhibits, which was done in some detail. An objection regarding relevance was then made, which resulted in the process coming untracked. The exhibits were not admitted and the record does not disclose that they were shown to or exhibited to the jury. Without objection, the witness testified that the finger prints on the letter matched the police record card, that the record card included defendant's photo and that the record identified the defendant. Defense counsel obtained an admission from the witness that he did not obtain defendant's fingerprints from the shotgun or it's shells. The court ruled that the exhibits, #31 and #32 were relevant but they were not admitted. In view of the agreement of the attorneys regarding the fingerprints' match we find any error harmless.

Defendant next claims ineffective assistance of counsel denied him a fair trial. Appellate counsel did not move for a hearing before the trial court, pursuant to *People v Ginther,* 90 Mich 436; 212 NW2d 922 (1973*)* and this Court is limited to deficiencies apparent from the record. *People v Moore,* 391 Mich 426, 431; 216 NW2d 770 (1974); *People v Stammer,* 179 Mich App 432, 440-441 (1989). The record contains sufficient detail to review this issue. Effective assistance of counsel is presumed and defendant bears the burden of proving otherwise. *People v Stanaway,* 446 Mich 643, 687-688; 521 NW2d 557 (1994*)*. Counsel's performance must be measured against objective standards of reasonableness without the benefit of hindsight. *People v LaVearn* 448 Mich 207, 216; 528 NW2d 721 (1995).

Defendant first alleges that counsel was ineffective by failing to move for a directed verdict at the close of the peoples case. A review of the record reveals that all of the charges were supported by the evidence. Defense counsel is not required to argue frivolous or meritless motions. *People v Gist* 188 Mich App 610, 613; 470 NW2d 475 (1991*)*. Defendant next claims that counsel failed to object to instances of the prosecutors misconduct, denying him a fair trial. We find no prosecutorial misconduct, only vigorous advocacy. The record does not disclose that defense counsel performance fell below an objective standard of reasonableness. *People v Sardy* 216 Mich App 111; 549 NW2d 23 (1996).

Last, defendant claims error in that his sentence was not proportionate. Appellate review of sentencing is limited to determining whether the trial court abused its discretion. *People v Milbourn,* 435 Mich 630, 461 NW2d 1 (1990); *People v Odendahl,* 200 Mich App 539, 505 NW2d 16 (1993). The sentence of two years for the conviction of felony firearms is mandatory for the first offense. The court has no discretion under the statute. The defendant argued, at the time of sentencing that he was a young man, employed, active in school and church activities and that this single lapse of judgment should not have been enough to imprison him for several years.

The sentence guidelines for the assault conviction was thirty-six to eighty months, the record does not disclose objection to the scoring. The guidelines for the conspiracy conviction are the same as for the assault conviction as conspiracy is punishable by a penalty equal to that which could be imposed for the crime defendant conspired to commit. MCL 750.157a; MSA 28.354(1).

Defendants sentence is within the guidelines and is presumed proportional. *People v Cotton,* 209 Mich App 82, 85; 530 NW2d 495 (1995). A court abuses its discretion when sentence is imposed that is not proportional to the seriousness of the offense. *People v Houston,* 448 Mich 312, 319; 532 NW2d 508 (1995). The circumstances of this case, and the factors cited by defendant are not so unusual that they overcome the presumption of proportionality. A sentence in the middle of the guidelines for deliberately discharging a shotgun at another person was a proper exercise of judicial discretion Defendant's sentence is proportional

Affirmed

/s/ Michael J. Kelly
/s/ Peter D. O'Connell
/s/ Kenneth W. Schmidt