STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES ROUNDTREE,

Defendant-Appellant.

UNPUBLISHED
March 28, 1997

Nos. 163376; 182622
Oakland Circuit Court
LC No. 92-116442

AFTER REMAND

Before: Fitzgerald, P.J., and MacKenzie and Taylor, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of armed robbery, MCL 750.529; MSA 28.797, buying, receiving, possessing, or concealing stolen, embezzled, or converted money, goods, or property over $100, MCL 750.535; MSA 28.803, and two counts of possession of a firearm at the time of commission or attempted commission of a felony, MCL 750.227b; MSA 28.424(2). After his convictions, defendant pleaded guilty to being an habitual offender, fourth offense, MCL 769.12; MSA 28.1084. He was sentenced to fifteen to twenty-five years' imprisonment for the armed robbery conviction, three to five years' imprisonment for the possession of stolen goods conviction, and two years' consecutive imprisonment for the felony-firearm convictions. After his guilty plea on the habitual offender charge, defendant's sentences for the armed robbery and possession of stolen goods convictions were vacated, and he was sentenced to twenty to fifty years' imprisonment for the habitual offender conviction. Defendant appealed as of right, Docket No. 163376. We remanded to allow defendant to move for resentencing and we retained jurisdiction. The trial court resentenced defendant to fourteen to twenty-five years' imprisonment on the armed robbery conviction, three to five years' imprisonment on the possession of stolen goods conviction, and two years' imprisonment on the felony-firearm convictions. The trial court then vacated defendant's sentences on the armed robbery and possession of stolen goods convictions, and sentenced defendant to nineteen to fifty years' imprisonment on the habitual offender conviction. Defendant then appealed his new sentences as of right, Docket No. 182622, and the two appeals were consolidated by this Court. We now affirm.

Defendant's convictions arise from an armed robbery at a jewelry store in a crowded mall. Defendant waited outside the mall in a stolen car while his accomplice robbed the store. Both defendant and his accomplice were carrying guns and fired numerous shots during the robbery and attempted getaway. Defendant and his accomplice were both arrested after leading police on a chase and crashing the stolen getaway car.

Defendant first argues that the prosecutor introduced improper rebuttal evidence against him. We review the admission of rebuttal evidence for an abuse of discretion. *People v Figgures*, 451 Mich 390, 398; 547 NW2d 673 (1996). First, defendant argues that evidence regarding his prior relationship to an accomplice should have been presented in the prosecution's case in chief. This argument is without merit.

In some cases, evidence should not be permitted in rebuttal where it more properly belongs in the prosecution's case in chief. *People v Losey*, 413 Mich 346, 351; 320 NW2d 49 (1982). However, the fact that evidence could have been introduced in the prosecution's case in chief does not necessarily preclude its use as rebuttal evidence. *Figgures, supra* at 399. Here, evidence of defendant's relationship to the accomplice, who was tried separately, did not establish any of the elements of the offenses defendant was charged with. In fact, the prosecutor could not properly argue "guilt by association." *People v Hudgins*, 125 Mich App 140, 146; 336 NW2d 241 (1983). Thus, the prosecutor properly declined to use this evidence in his case in chief.

Defendant argues that the rebuttal evidence concerning defendant's relationship to the accomplice violated MRE 403 because it was far more prejudicial than probative. Defendant claims that the rebuttal evidence was prejudicial because it tended to undermine his theory of the case. Almost all of the prosecution's evidence will tend to undermine the defendant's theory of the case; this is not the type of prejudice MRE 403 was intended to guard against. See *People v Mills*, 450 Mich 61, 75; 537 NW2d 909, modified on other grounds 450 Mich 1212 (1995). Thus, the trial court did not abuse its discretion in allowing the rebuttal evidence.

In a related argument, defendant contends that the prosecutor improperly elicited defendant's denial on cross-examination that he knew the accomplice. Defendant argues that this improperly injected a new issue into the case and allowed the prosecutor to introduce the rebuttal evidence. While such an elicitation is improper, the prosecutor may impeach statements brought out on cross-examination where the questions did not inject a new issue into the case, but rather "served as the basis for a thorough and proper exploration regarding the veracity of defendant's prior testimony." *Figgures, supra* at 401. Here, defendant called several witnesses in an attempt to establish that he was in the area of his arrest for an entirely innocent purpose. The prosecutor properly attempted to discredit that story by showing that defendant was "coincidentally" in the very same parking lot where his friend or acquaintance was being arrested at the exact same time. When defendant and another witness testified that he did not know the accomplice, the prosecutor properly introduced rebuttal testimony on that issue.

Defendant also argues that the prosecutor improperly introduced rebuttal evidence on a collateral matter by eliciting testimony that his nickname was "Honeyman." However, the record clearly indicates that defendant himself acknowledged his nickname during cross-examination; the prosecutor did not elicit any rebuttal testimony regarding defendant's nickname. Thus, this argument is not supported by the record and therefore has no merit.

Defendant also suggests that the rebuttal evidence (1) identifying the accomplice's handwriting in an address book, and (2) indicating that the accomplice spoke the word "Honey" were inadmissible hearsay. Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. MRE 801(c). The rebuttal evidence offered against defendant was not hearsay. The "statements" offered against defendant were not assertions within the meaning of the rule, and they were not offered for the truth of the matter asserted. See *Belvidere Land Co v Owen Park Plaza, Inc*, 362 Mich 107, 109-112; 106 NW2d 380 (1960). Thus, the evidence was properly admitted.

Defendant's next argument is that the impeachment of his wife was improper because she was not confronted with her prior inconsistent statement before it was used to impeach her. A witness must be given the opportunity to explain or deny a prior inconsistent statement used to impeach their testimony. MRE 613(b); *Westphal v American Honda Motor Co, Inc*, 186 Mich App 68, 71; 463 NW2d 127 (1990). However, this rule does not require that the witness be confronted with the statement *before* it is used for impeachment. As long as the witness can be recalled to the stand, the requirement that the witness be allowed to explain or deny the statement has been met. *Id.* at 71. Here, defendant's wife was not only available, she was actually recalled to the stand and denied making the statements. Clearly she was given the opportunity to respond to the statement offered to impeach her. Thus, the trial court did not abuse its discretion, and evidence of the prior inconsistent statement was properly admitted.

Defendant next argues that the trial court erred in denying his motion for a mistrial. We review the grant or denial of a mistrial based on the prosecution's use of rebuttal evidence for an abuse of discretion. *People v Lugo*, 214 Mich App 699, 704; 542 NW2d 921 (1995). Here, as noted above, the evidence was not inadmissible hearsay. Even had the evidence been inadmissible, the trial court was within its discretion in determining that introduction of the evidence did not require a mistrial, and that an appropriate instruction could cure any prejudice.

Defendant next argues that he was denied the effective assistance of counsel. This argument is without merit. The Michigan Supreme Court adopted the test for ineffective assistance of counsel in *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994):

> [T]o find that a defendant's right to effective assistance of counsel was so undermined that it justifies reversal of an otherwise valid conviction, a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial. [*Id.* at 338.]

Defendant claims that his trial counsel should have objected to the admission of two witnesses' identification testimony. However, this testimony was properly admissible, and defense counsel's failure to object did not prejudice defendant in any way. Thus, defendant was not denied the effective assistance of counsel.

Defendant next argues that the prosecutor committed several instances of misconduct. These claims are without merit. In one instance, defendant objected to a question asked by the prosecutor, and the trial court sustained his objection. Thus, defendant has already received his relief. *People v Miller (After Remand)*, 211 Mich App 30, 42-43; 535 NW2d 518 (1995). Defendant did not object to the other instances of misconduct. Absent an objection at trial, appellate review of improper remarks 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, 87; 544 NW2d 667 (1996). Any error stemming from the alleged improper remarks could have been cured by an appropriate jury instruction, and our failure to review them will not result in a miscarriage of justice. Thus, we decline to review those remarks.

Lastly, defendant argues that his sentence was "excessively disparate" when compared to that of his accomplice.[1] We review sentences for an abuse of discretion. *People v Honeyman*, 215 Mich App 687, 697; 546 NW2d 719 (1996). A sentence constitutes an abuse of discretion if it is disproportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

Here, defendant does not argue that his sentence was disproportionate under *Milbourn*. Instead, he argues that his sentence was disparate, because he received a much longer minimum sentence than his accomplice. However, our Supreme Court has recognized that "there is no requirement that the court consider the sentence given a coparticipant." *In re Dana Jenkins*, 438 Mich 364, 376; 475 NW2d 279 (1991). Thus, *Milbourn* is still the applicable standard. We find that defendant's sentence is proportionate to the circumstances surrounding the offender and the offense. Defendant was convicted as a fourth habitual offender, and faced a maximum sentence of up to life in prison. MCL 769.12; MSA 28.1084. Defendant had a history of previous offenses, mostly non-assaultive. During the instant offense, defendant: (1) fired several rounds from an automatic weapon in a mall parking lot during lunch hour, (2) attempted to elude the police, (3) drove recklessly and at high speed, (4) perjured himself, and (5) failed to show any remorse for his crimes. Under these circumstances, defendant's sentence of nineteen to fifty years' imprisonment is proportionate to the circumstances surrounding the offender and the offense. See *People v Chandler*, 211 Mich App 604, 615-616; 536 NW2d 799 (1995). Therefore, the trial court did not abuse its discretion in sentencing defendant.

Defendant argues, however, that his accomplice's lighter sentence after pleading guilty suggests that he was punished for electing to go to trial. Defendant cites *People v Travis*, 85 Mich App 297; 271 NW2d 208 (1978), where this Court found that the trial court improperly considered the fact that the defendant elected to go to trial, while his codefendant pled guilty and received a much lighter sentence. *Id.* at 303. In that case, the trial court gave this explanation for the different sentences:

> Now in addition to that, I might also point out that Claxton Cooper did plead guilty. Now that, I agree with you, I don't think that any person should have their right to a jury trial chilled. But, on the other hand, occasionally, the Court will reward a person, giving something less than they deserve just because they have plead [sic] guilty, and, consequently, not put the People to the risk of a not guilty verdict." *Id.*

The court's comments in *Travis* are vastly different than those here. In this case, the court simply stated the obvious: the volume of information regarding the offender and the offense is almost always greater at trial, and the trial court cannot be expected to ignore that information in determining a sentence. Defendant cannot complain where the trial court considered facts revealed at his trial when determining his sentence. Indeed, the trial court indicated that the accomplice would have received a longer sentence if the court had been aware of all the facts of the crime at the time the accomplice was sentenced. Thus, the accomplice's sentence in this case does not change the fact that defendant's sentence was proportionate.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Barbara B. MacKenzie
/s/ Clifford W. Taylor

[1]Defendant raised other sentencing issues in his original appeal. However, those issues were rendered moot when defendant was resentenced.