STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RUBEN ESQUIVEL,

Defendant-Appellant.

UNPUBLISHED
April 4, 1997

No. 186120
Ingham Circuit Court
LC No. 93-66179-FH

Before: O'Connell, P.J., and Smolenski and T.G. Power*, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of felonious assault, MCL 750.82; MSA 28.277, and one count of possession of a firearm during the commission of a felony (felony-firearm). MCL 750.227b; MSA 28.424(2). He subsequently pleaded guilty to being an habitual offender, fourth offense. MCL 769.12; MSA 28.1084. He was sentenced to a term of imprisonment of two years with respect to the felony-firearm conviction, to be followed by a term of four to six years with respect to the habitual offender conviction predicated on the felonious assault convictions. These sentences were ordered to be served consecutively to each other, but, significantly, were also to be served consecutively to a sentence defendant was already serving for a probation violation. We affirm defendant's convictions, but hold that the judgment of sentence must be amended to reflect that defendant's habitual offender sentence is to be served concurrently with the probation violation sentence.

Defendant first challenges the consecutive nature of the sentences imposed, contending that the court was without authority to order the habitual offender sentence to be served consecutively to his probation violation sentence. The policy of this state is to require concurrent sentences unless there is specific legislative authority for consecutive sentencing. *People v Wakeford*, 418 Mich 95, 113; 341 NW2d 68 (1983); *People v Nantelle*, 215 Mich App 77, 79; 544 NW2d 667 (1996). While the sentencing court correctly determined that the felony-firearm sentence should be served before the sentence for the underlying felony, MCL 750.227b; MSA 28.424(2), there is no statutory authority for structuring the sentence so that the probation violation sentence would run consecutively. Since the

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

prior offense for which defendant was on probation was not pending at the time he committed the assaults in this case, MCL 768.7b; MSA 28.1030(2) does not provide for a consecutive sentence. Moreover, a conviction for felony-firearm may run consecutively only to the underlying felony. *People v Cortez*, 206 Mich App 204, 207; 520 NW2d 693 (1994). Therefore, the judgment of sentence must be amended to provide that the probation violation and habitual offender sentences will run concurrently.

Defendant next submits that his conviction for feloniously assaulting John Agueros must be reversed. Defendant argues that because the prosecution dismissed the charge prior to jury selection, believing that Agueros was not going to appear, and only later elected to go forward with the charge when Agueros appeared, reversal is required. However, given that the charge was reinstated before opening statements were offered and before any evidence was introduced, we fail to see how defendant was harmed. Defendant's defense was in no way prejudiced because he knew of the Agueros charge both when preparing for trial and throughout the trial, where he put forward his entire case and argued his position to the jury. We find no prejudice.

Defendant next argues that this second assault conviction should be reversed because the trial court gave a combined instruction on the two felonious assault charges. Defendant did not object and accordingly, we review for manifest injustice. MCL 768.29; MSA 1052. In reviewing the court's instruction as a whole, it appears that a citizen of average intelligence would understand that two separate counts referring to two separate crimes were charged. Because the overall instructions adequately explained that defendant was charged with two discrete felonious assault offenses, the issues were fairly presented and defendant's rights were sufficiently protected. *People v Wolford*, 189 Mich App 478, 431; 473 NW2d 767 (1991). Therefore, the instruction did not result in manifest injustice.

Defendant next argues that the trial court abused its discretion when it excluded extrinsic evidence regarding the origin of the animosity between defendant and one of his victims. However, the evidence defendant sought to present had little, if any, bearing on the issues at trial. Defendant could not establish a connection between this evidence and the offenses charged. Therefore, the trial court properly exercised its discretion to limit evidence to pertinent matters. *People v Perkins*, 116 Mich App 624; 323 NW2d 311 (1982).

Defendant also argues that the trial court pierced the veil of judicial impartiality by questioning defendant regarding whether there was a visitation order in place on his child and by asking defendant about the location of various streets in Lansing. The questions, though irrelevant, revealed nothing that would have swayed the jury and therefore did not result in error requiring reversal. *People v Paquette*, 214 Mich App 336, 341; 543 NW2d 342 (1995).

Similarly, defendant's argument that the prosecutor's isolated question regarding child support constituted prosecutorial misconduct necessitating reversal is without merit. The comment was an isolated one that could have been cured with a timely instruction had defendant objected. *Id.*, 341-342.

Finally, we conclude that the habitual offender sentence, predicated on defendant's felonious assault convictions, were not disproportionate. Because defendant was an habitual offender, the

sentencing guidelines have no place when determining whether the sentences imposed are proportionate, *People v Gatewood (On Remand)*, 216 Mich App 559, 560; 550 NW2d 255 (1996), meaning that we have ignored the bulk of defendant's argument on appeal. Considering the seriousness of the present offense and defendant's significant criminal history, we find no abuse of discretion in the sentence imposed. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990).

Affirmed in part and remanded for amendment of defendant's sentence in conformity with this opinion.

/s/ Peter D. O'Connell
/s/ Michael R. Smolenski
/s/ Thomas G. Power