

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN L. KITTLES,

Defendant-Appellant.

UNPUBLISHED

April 29, 1997

No. 184035

Oakland Circuit Court

LC No. 94-132293-FC

Before: Corrigan, C.J., and Doctoroff and R.R. Lamb,* JJ.

PER CURIAM.

Defendant, John Kittles, appeals as of right his conviction by jury of two counts of assault with intent to commit murder, MCL 750.83; MSA 28.278; two counts of felony firearm, MCL 750.227b; MSA 28.424(2); one count of felon in possession of a firearm, MCL 750.224f; MSA 28.421(6); and two counts of possession with intent to deliver less than fifty grams of cocaine, second offense, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv) and MCL 333.7413(2); MSA 14.15(7413). Defendant subsequently pleaded guilty to habitual offender, third offense, MCL 769.11; MSA 28.1083. Defendant was sentenced to two years' imprisonment on each count of felony firearm, to run concurrently. These sentences were to be followed by a twenty to fifty year sentence for his two convictions of assault with intent to commit murder, third habitual offender, which was to run concurrently with a two to ten year sentence on his conviction as a felon in possession of a firearm, third habitual offender. These sentences were to be followed by consecutive two to forty year sentences for his two convictions of possession with intent to deliver less than fifty grams of cocaine, second offense. We affirm.

This case arose when, on November 24, 1993, the Pontiac Police attempted to search defendant's apartment for narcotics, pursuant to a search warrant. Upon finding the entrance to the apartment building locked, the police forced the door open. Defendant's upstairs apartment was also locked, thus one officer attempted to kick in the door. Upon his second kick, the officer lost his balance and fell backwards. At that time, two shots were fired from the apartment through the closed door, into the hallway. One of these bullets grazed the officer's head, causing a minor injury. The

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

remaining officers rammed open the apartment door, finding that the occupants of the apartment had escaped. Footprints in the snow indicated that the occupants left through an open kitchen window. Although the Pontiac Police were unable to track the suspects, a gun was tracked to an alley, unfired bullets were found in the apartment, and defendant's fingerprints were found on a plate of crack cocaine. In the apartment, the police also found four packs of heroin and a baggie containing crack cocaine and heroin.

Defendant asserts on appeal that the evidence presented at trial was insufficient to sustain defendant's convictions of assault with intent to murder, felony firearm and felon in possession of a firearm, and that the verdicts were against the great weight of the evidence. We review a claim of sufficiency of the evidence by viewing the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Jones*, 201 Mich App 687, 688-689; 506 NW2d 599 (1993). Undertaking such review here, we find that the prosecution presented sufficient evidence to allow a rational trier of fact to convict defendant of assault with intent to commit murder, possession of a firearm during the commission of a felony and felon in possession of a firearm.

In response to defendant's motion for directed verdict, the trial court made the following findings:

The evidence shows that several days prior to the incident in question defendant had an altercation in which gunplay was involved with a man named Carson. He relayed this information to his uncle, Anthony Simpson, and mentioned that he knew the police were looking for him, too. On the night in question, defendant, Simpson and a friend named Holyfield were at the defendant's apartment on Norton Street in Pontiac. The apartment was on the second floor of a house. Defendant went into the kitchen to mix drinks and brought them into the living room, where Simpson and Holyfield were sitting.

The Pontiac police, who were waiting to execute a search warrant at the defendant's apartment, broke the glass in a door downstairs, gained entry and ran up the stairs, yelling, 'Police, search warrant, police.'

Defendant and his friends heard the noise and became alarmed. The defendant, hearing the noise downstairs, ran into the bedroom, looked out the window, and yelled out, 'It's those niggers.' Simpson testified that upon hearing defendant's warning, he and Holyfield jumped up and ran for the kitchen window to escape. As Simpson headed out the window, he heard four muffled shots from inside the apartment.

A police officer testified that as he and another officer came up to the second floor landing, shots were fired through the door from inside the apartment and one hit his partner, Kohlman, in the head, and another officer, Pummill, testified that one shot whizzed by his ear and hit the wall behind him.

The evidence at the scene included a pouch of .22 caliber bullets, .22 caliber bullets in the hall on the landing, and a large quantity of narcotics and other material. A .22 caliber six-shot handgun was found outside on the ground behind a house in an alley adjacent to the apartment building with two live rounds in handgun and four spent cartridges in the handgun. No identifiable prints were lifted from the handgun and the bullets or shell casings, but the shells were the same brand as those in the pouch and the handgun.

The forensic evidence established that given the angle of the shots through the bedroom door and the angle at which they hit the door across the landing, they could have only come from someone standing within a small area inside the bedroom, slightly away and to the left of the door.

There were also two bullet holes in the bedroom window. The angle of the shots through the protective plastic and the glass indicated that they could only have been made by someone standing within four feet of the window, within only a few feet of the spot from which the shots through the door could have been fired.

* * *

The evidence shows that the police came to execute a warrant at the defendant's apartment. The defendant knew the police were looking for him. When he heard the [police] break in, he ran into the bedroom while Simpson and Holyfield ran in the opposite direction and headed out the kitchen window. As they did so, four shots rang out from inside the apartment. The forensic evidence shows that the shots could only have been fired from a small area inside the bedroom. Given that the defendant was the only person in the bedroom at the time the shots were fired, a reasonable juror could conclude beyond a reasonable doubt that the defendant fired the weapon. Given that the defendant knew the police were after him and fired the gun through the door toward the police on the other side, a reasonable juror could conclude beyond a reasonable doubt that the defendant intended to murder the police officers at whom he fired.

Accordingly, the Court finds that the evidence is sufficient to go to the jury on the assault with intent to murder charges. That being the case, the attendant weapons charges may also go to the jury.

We review a claim regarding the sufficiency of the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Jaffray*, 445 Mich 287, 296; 519 NW2d 108 (1994); *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, modified 441 Mich 1201 (1992).

The record establishes that three men -- defendant, his companion "Holyfield," and defendant's uncle Anthony Simpson -- were inside the apartment when police officers attempted to serve a warrant.

Defendant did not testify at trial. Holyfield was neither identified nor located for trial. Accordingly, we must rely on the evidence adduced, including the testimony from Simpson and the scientific evidence, and the fair inferences that arise from the evidence.

Simpson testified that on November 24, 1993, defendant telephoned and said that he had been in an altercation earlier and that the police may have had a warrant for his arrest. Because defendant seemed anxious and troubled, Simpson, a counselor at Children's Village, agreed to meet with defendant and Holyfield. The three men went to defendant's apartment. Simpson and Holyfield sat in the living room while defendant served them drinks. A short time later, the men heard glass breaking. Defendant went into the bedroom, looked out the window and yelled that someone was coming.¹ Simpson ran to the kitchen, opened the window and jumped out.² He heard gunshots behind him. Simpson testified that he met up with defendant in the adjacent alley and they fled to a friend's home.

Police officers testified that, pursuant to the search warrant, they forced open the door to defendant's apartment building. As one officer kicked at the door to defendant's apartment, two shots came through the closed apartment door, one of which grazed the officer's head. Two shots also were fired through the bedroom window. Upon entering the apartment, the police discovered that the occupants had escaped through the kitchen window.

Police officers found a gun in a nearby alley. The gun, a six-shot .22 handgun, had two live and four spent rounds in it. In defendant's apartment, police also found bullets of the same brand, type and caliber as those in the gun. Police experts could not opine conclusively, however, that the bullets fired through the door had come from the gun found in the alley. Simpson denied owning a gun, denied having a gun that day, and denied seeing either defendant or Holyfield with a gun.

Pontiac police officer Diana Peters, whom the court qualified as an expert in criminal investigation, testified about the trajectory of the bullets. In her opinion, the bullets shot at the police must have been fired from the bedroom. Peters opined that the location of a dresser and the angle of the bullet holes meant that the shooter had stood in the northwest part of the bedroom. Peters stated that the shooter could not have shot from anywhere else in the apartment because a wall that jutted out and other obstacles, such as furniture and a closet, would have prevented it. Also, the shooter was in the bedroom when he fired two bullets at a downward angle through the bedroom window to the outside. Simpson testified that *only* defendant went into the bedroom. The record is devoid of evidence that either Simpson or Holyfield went into the bedroom at any time. From that circumstantial evidence, a reasonable inference arises that defendant fired the shots at police from the bedroom. A trier of fact may draw reasonable inferences from the facts, but may not draw inferences that are unsupported by any direct or circumstantial evidence. *People v Metzler*, 193 Mich App 541, 547; 484 NW2d 695 (1992). The above evidence provided grounds for the trial court to deny defendant's motion for directed verdict. Such evidence also provided a sufficient basis for the jury to find that defendant fired the shots – Simpson's testimony established that defendant was the only one of the three men to go into the bedroom. The evidence conclusively established that the shots were fired only from the bedroom.

Viewed in a light most favorable to the prosecution, the evidence was sufficient to establish that defendant fired the shots through the door. Defendant admitted to Simpson that the police had a warrant for his arrest and that he had argued with other officers earlier in the day. Defendant thus had a motive to shoot through the door. No evidence exists that Simpson or Holyfield had a motive to shoot. Regarding a defendant's motive in a murder case, our Supreme Court stated that "[i]n cases such as the instant case, in which the proofs are circumstantial and the only witness is the accused, evidence of motive would be highly relevant." *People v Fisher*, 449 Mich 441, 453; 537 NW2d 577 (1995).

Based on the above, we find that the prosecution presented sufficient evidence to allow a rational trier of fact to find defendant guilty of assault with intent to commit murder, felony firearm, and felon in possession of a firearm.

Defendant next asserts on appeal that he was denied a fair and impartial trial due to prosecutorial misconduct. In order to preserve the issue of prosecutorial misconduct, a defendant must timely and specifically object to the prosecutor's remarks. *People v Stanaway*, 446 Mich 643, 687; 521 NW 2d 557 (1994). Where, as here, a defendant fails to object to the alleged instances of prosecutorial misconduct, we reverse only for manifest injustice. *People v Wise*, 134 Mich App 82, 105; 351 NW2d 255 (1984). Examining the record here, we find the prosecutor's conduct at trial did not constitute manifest injustice and did not deny defendant a fair and impartial trial.

Defendant first claims that during closing argument, the prosecutor committed misconduct by improperly arguing that statements by witness Simpson, which were admitted for impeachment purposes, were evidence for the jury to consider. Although defendant is correct that use of the statements should have been limited to impeachment purposes, manifest injustice will not be found if the prejudicial effect of the prosecutor's remarks could have been cured by a timely instruction. *People v Biggs*, 202 Mich App 450, 455; 509 NW2d 803 (1993). Here, a timely instruction could have clearly informed the jury that this evidence could not be used as substantive evidence upon which to convict defendant, and therefore, prosecutorial misconduct cannot be found on this basis. In addition, as indicated above, the properly admitted evidence at trial showed that defendant was the only one of the three occupants of the apartment who had the opportunity and motive to shoot at the police. Thus, we find that the prosecutor's improper use of the impeachment testimony did not affect the jury's verdict, and defendant was not denied a fair and impartial trial. See *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995).

Defendant next contends that the prosecutor committed misconduct by improperly impeaching witness Simpson through the use of prior convictions. A review of the record indicates that, pursuant to MRE 609, the prosecutor did improperly impeach the witness with a prior conviction. However, in this case, the witness whose credibility was attacked was the only individual who could place defendant at the scene of the shooting. Thus, impeachment of the witness actually benefited defendant. If the jury were to find no credibility in Simpson's testimony, it would be left with little evidence upon which to convict defendant. Thus, no manifest injustice can be found from the evidentiary error.

Defendant also asserts that the prosecutor committed misconduct by improperly eliciting hearsay and bad act testimony in violation of MRE 801 and MRE 404, when he presented the testimony of several police officers that they had been told that defendant had been involved in a prior shooting incident and that he was to be considered armed and dangerous. A review of the record reveals that the prosecutor was not eliciting the statements as evidence of the truth of the matters asserted or to prove the character of defendant in order to show action in conformity therewith, but only as evidence of the motive behind the procedures used by the police department in executing the search warrant on defendant's apartment. Therefore, as this testimony did not violate MRE 801 or 404, it cannot be considered to be prosecutorial misconduct.

Defendant also contends that the prosecutor committed misconduct by using statements during closing argument concerning the testimony that defendant may have been involved in a prior shooting as if it had been proven by competent evidence. Although the prosecutor may have treated the possibility that defendant was involved in a prior shooting as though it had been proven by competent evidence, he also noted that the identity of a victim of an assault is irrelevant to their determination, essentially stating that any involvement by defendant in a prior shooting was also irrelevant. Therefore, prosecutorial misconduct cannot be based on this claim.

Finally, defendant contends that, during closing argument, the prosecutor improperly invoked the jury's sympathy for the police-officer victim. In general, a prosecutor may not appeal to the jury to sympathize with the victim. *People v Swartz*, 171 Mich App 364, 373; 429 NW2d 905 (1988). Similarly, a prosecutor may not urge the jurors to convict the defendant as part of their civic duty. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). In examining the record here, although the prosecutor appeared to appeal to the jury to perform a civic duty to support the police, defendant never objected to these statements. A timely instruction could have limited the prosecutor's remarks and cautioned the jury that sympathy was not to play a part in their determination. Because any error caused by the prosecutor's remarks could have been cured by a timely instruction, no prosecutorial misconduct can be found on this basis. *Biggs, supra*, at 455. In addition, as set forth above, there was considerable evidence of defendant's guilt such that the prosecutor's improper arguments did not affect the jury's verdict, and defendant was not denied a fair and impartial trial. See *Swartz, supra* at 373-374.

In defendant's next issue, he contends that he was denied a fair trial based on ineffective assistance of counsel. This Court reviews a claim for ineffective assistance of counsel to determine whether counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and whether a reasonable probability exists that, in the absence of counsel's unprofessional errors, the outcome of the proceedings would have been different. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). In addition, reversal is not warranted unless the result of the proceeding was fundamentally unfair or unreliable. *People v Poole*, 218 Mich App 702, 718; 555 NW2d 485 (1996).

Examining the record below, we agree with defendant's contention that his trial counsel's performance fell below an objective standard of reasonableness under prevailing professional norms.

We believe that his attorney should have objected to the prosecution's substantive use of the impeachment testimony of witness Simpson, or at least counsel should have requested a limiting instruction. In addition, defendant's attorney should have objected to the prosecutor's closing argument in which sympathy for the police-officer victim was invoked. However, to establish that his counsel was ineffective, defendant also needed to show that but for his counsel's errors, "there is a reasonable probability that the result of the proceeding would have been different *and* that the result of the proceeding was fundamentally unfair or unreliable." *Poole, supra*. We find that, in light of the considerable evidence of defendant's guilt, the errors by the trial counsel did not affect the jury verdict and did not render the result of the proceeding fundamentally unfair or unreliable. See *Id.* Accordingly, reversal is not warranted on the basis of ineffective assistance of counsel.

Defendant next asserts that the minimum aggregate total of his sentences violated the principle of proportionality set forth in *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). Defendant also contends that the manner and order of sentencing was in error. We disagree.

Because defendant was an habitual offender, the sentencing guidelines do not apply to his sentences. In determining proportionality, each sentence of a defendant must be viewed individually in considering whether the sentence is excessive. *People v Warner*, 190 Mich App 734, 736; 476 NW2d 660 (1991). Each of the sentences imposed by the trial court were within the range established by statute. In addition, the trial court sentenced defendant using permissible considerations such as defendant's criminal history and potential for rehabilitation. *People v Cervantes*, 448 Mich 620, 626; 532 NW2d 831 (1995). These considerations were properly balanced against the protection of society and the deterrence of others. *People v Snow*, 386 Mich 586, 592; 194 NW2d 314 (1972). Therefore, defendant's minimum aggregate sentence of twenty-six years did not violate the principle of proportionality.

In addition, we find no merit in defendant's contention that the trial court violated statutory authority in the order and manner in which it imposed defendant's sentence. In this case, the felony firearm sentence was properly imposed consecutively with and preceding the term of imprisonment imposed for the conviction of assault with intent to commit murder. MCL 333.7401(3); MSA 14.15(7401)(3). Accordingly, we find no basis to disturb defendant's sentence.

Affirmed.

/s/ Maura D. Corrigan
/s/ Martin M. Doctoroff
/s/ Richard R. Lamb

¹ In its findings of fact, the trial court stated that "[w]hen [defendant] heard the [police] break in, he ran into the bedroom while Simpson and Holyfield ran in the opposite direction and headed out the kitchen window." While Simpson testified that defendant ran into the bedroom, he also stated that defendant turned toward Simpson and moved back toward the living room while yelling.

² The trial court made the following finding of fact: “[U]pon hearing defendant’s warning, [Simpson] and Holyfield jumped up and ran for the kitchen window to escape.” At trial, however, Simpson testified that he did not know where Holyfield was when he ran to the window. The record reflects that all three men escaped through the kitchen window before the police entered the apartment.