

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SHIRLEY HOUSE,

Defendant-Appellant.

UNPUBLISHED

June 24, 1997

No. 187611

Calhoun Circuit Court

LC No. 94-3219 FH

Before: Gage, P.J., and Reilly and Hoekstra, JJ.

MEMORANDUM.

In a jury trial in Calhoun Circuit Court, defendant was convicted of delivery of cocaine under 50 grams, and adjudged a second drug offender, receiving an enhanced maximum sentence under §7413 of the Public Health Code. Defendant appeals by right.

Defendant first contends that error occurred during trial when an undercover informant, called as a rebuttal witness with respect to her defense of duress, was allowed to give opinion testimony that defendant was not under duress when the sale of cocaine occurred. The record does not support defendant's claim. The prosecutor began by asking the witness whether he thought defendant was under duress on this or any previous occasion when the witness had purchased cocaine from defendant; defense counsel objected, and the trial court, anticipating the nature of the objection, ordered the prosecutor to rephrase the question so as to elicit facts concerning the duress defense, even though the trial court might, in its discretion, have permitted the question to stand and the witness to answer it. MRE 704. The prosecutor then inquired of the witness whether, on this or previous occasions, defendant had been observed to have a fearful demeanor or otherwise to be acting in a manner evidencing duress. The witness responded in the negative. To this question and answer, there was no objection. Neither the question nor the answer was improper or inadmissible, although defendant's failure to timely object waives the issue for appellate review in the absence of manifest injustice, which did not occur here. *People v Grant*, 445 Mich 535; 520 NW2d 1 (1994).

Defendant next contends that the trial court erred in imposing a 40-year maximum sentence because it failed to recognize its discretion not to enhance defendant's sentence, or to enhance it to a

lesser degree than 40 years, which represents a doubling of the sentence for the underlying offense. The record indicates no statement or suggestion by the trial court that it had no discretion in setting the maximum sentence, and accordingly this assertion of error is without merit. *People v Beneson*, 192 Mich App 469, 471; 481 NW2d 799 (1992).

Finally, defendant contends that her 5 to 40 year sentence violates the principle of proportionality. Although the sentence guidelines do not properly apply to habitual offenders, *People v Edgett*, 220 Mich App 686; ___ NW2d ___ (1996), here defendant's minimum sentence is within the guideline range for the underlying offense, and *a fortiori* defendant has failed to overcome the presumption that a sentence within the guideline range is proportionate to the offense and the offender. *People v Eberhardt*, 205 Mich App 587; 518 NW2d 511 (1994).

Affirmed.

/s/ Hilda R. Gage
/s/ Maureen Pulte Reilly
/s/ Joel P. Hoekstra