

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THOMAS DUANE BASS,

Defendant-Appellant.

UNPUBLISHED

August 22, 1997

No. 183789

Saginaw Circuit

LC No. 93-008327-FC

Before: Markey, P.J., and Jansen and White, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions by jury for assault with intent to murder, MCL 750.83; MSA 28.278, discharging a weapon from a motor vehicle, MCL 750.234; MSA 28.431, and felony firearm, MCL 750.227b; MSA 28.424(2), and his pleas of guilty to charges of felon in possession of a weapon, MCL 750.224f; MSA 28.421(6), and habitual offender, third offense, MCL 769.11; MSA 28.1083. Defendant was sentenced to prison terms of twenty-five to fifty years for assault with intent to murder, four to eight years for discharging a weapon from a motor vehicle, five to ten years for felon in possession of a firearm, and two years for felony-firearm, with the sentences for assault with intent to murder, discharging a weapon from a motor vehicle and felon in possession of a firearm to be served consecutive to the felony-firearm sentence.¹ We affirm.

I

Defendant argues that the trial court improperly denied his request for forensic testing of a gun, which was of the same general type used in the shooting for which defendant was convicted, and which was recovered from another individual when he was arrested for an apparently unrelated incident while driving a car matching the general description of the car that defendant was alleged to have driven during the shooting. Defendant asserts that if ballistics testing had shown that the gun had fired the shells that were recovered from the scene of the shooting, then the evidence would have been relevant to defendant's argument that the person from whom the gun was recovered, rather than defendant, had done the shooting. The trial court denied the motion for testing of the gun, finding that even if the gun

had been used in the shooting, it would be irrelevant because the gun could have been used by defendant and then later transferred to the person from whom it was eventually recovered.

The trial court erred in concluding that the evidence would be irrelevant even if ballistics tests confirmed that the gun was used in the shooting. Relevant evidence is defined as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” MRE 401. If the gun in the other individual’s possession was in fact the same gun used to shoot the victim in this case, it would not conclusively establish that the other individual had done the shooting, but it would make it more likely. Therefore, a positive test result would have been relevant to the issue of the identity of the shooter, and the trial court erred in ruling that it was not relevant.

While we agree that the court abused its discretion in denying defendant’s motion, we conclude the error does not require reversal. We will assume that the testimony would have shown that the gun was the same one used in the instant offense. Nevertheless, our review of the trial record leads us to conclude that the introduction of such evidence would not have affected the verdict.

II

Defendant contends that he was denied the right to effective assistance of counsel when counsel elicited testimony that defendant had been incarcerated previously. Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Citing *People v Kelsey*, 303 Mich 715, 717; 7 NW2d 120 (1942), and *People v Stegall*, 102 Mich App 147, 151; 301 NW2d 473 (1980), defendant concedes that a mention of his criminal past in an answer that was unresponsive to counsel’s proper question is generally not grounds for a mistrial. However, defendant asserts that he was prejudiced by counsel’s failure to request a cautionary instruction directing the jury to disregard the remark. However, counsel may have determined that requesting a cautionary instruction would have highlighted the evidence and, accordingly, he may have decided not to request such an instruction. Such a trial strategy would not have been unsound. Therefore, defendant has not overcome the presumption that he received effective assistance of counsel.

III

Defendant next argues that he was denied a fair trial and due process of law because the prosecutor shifted the burden of proof in closing argument and because the prosecutor’s reference to certain evidence as uncontradicted focused the jury’s attention on defendant’s failure to testify. Because no objection was made regarding the allegedly improper remarks, appellate review is precluded unless an objection could not have cured the error or a failure to review the issue would result in a miscarriage of justice. *Stanaway, supra* at 687.

The prosecution has the burden of proving each element of the crime charged, and may not shift this burden to the defendant. *People v Reed*, 393 Mich 342, 349; 224 NW2d 867 (1974). A prosecutor may not comment on a defendant’s failure to testify, but may argue that certain evidence is

uncontradicted. *People v Perry*, 218 Mich App 520, 538; 554 NW2d 362 (1996). A prosecutor may not imply in closing argument that defendant must prove something or present a reasonable explanation for damaging evidence because such an argument tends to shift the burden of proof. *People v Green*, 131 Mich App 232, 237; 345 NW2d 676 (1983). We conclude that, in context, the prosecutor's remarks merely highlighted the fact that the victim's identification of defendant was uncontradicted, and was thus permissible under *Perry, supra*, 218 Mich App at 538. Defendant's reliance on *Green, supra* at 234-236, where the prosecutor referred to specific incriminating facts and asked that they be explained by defense counsel, is misplaced because in the present case the prosecutor's statement appears to have merely emphasized the uncontroverted nature of the victim's testimony rather than requiring the defense to present proof. Further, where the prosecutor's argument "reaches facts which could well be within the knowledge of persons other than [defendant]. . . . [i]t is not improper to argue that the people's evidence is uncontradicted." *Id.*, 512. In the present case, the shooting occurred at a crowded intersection, and the passenger in the car allegedly driven by defendant was identified. Therefore, the prosecutor's reference to "uncontroverted facts" was permissible. *Perry, supra* at 538.

IV

Defendant next argues that because the sentencing guidelines do not apply in habitual offender cases, the trial court's reliance on the sentencing guidelines was improper in imposing sentence for the conviction of assault with intent to murder.

The trial court sentenced defendant to a term of 25 to 50 years for assault with intent to murder. The applicable guidelines recommended a minimum sentence within the range of 180 months to 300 months (15 to 25 years). The only rationale noted by the trial court in imposing sentence was that "this sentence is supported by the sentencing guidelines and imposed pursuant to them."

To facilitate appellate review, the sentencing court must articulate on the record the criteria considered and the reasons for the sentence imposed. *People v Fleming*, 428 Mich 408, 428; 410 NW2d 266 (1987); *People v Sandlin*, 179 Mich App 540, 542; 446 NW2d 301 (1989). In *People v Cervantes*, 448 Mich 620, 625 (Riley, J), 630 (Cavanagh, J); 532 NW2d 831 (1995), the Supreme Court suggested that the sentencing guidelines are inapplicable to sentencing habitual offenders. However, *Cervantes* dealt with a defendant who challenged a sentence that exceeded the guidelines. *Id.*, 622. The *Cervantes* Court noted that "it is necessary to punish habitual criminals *more severely* [than first-time offenders] in order to deter future criminal conduct" because of the "apparent persistence in the commission of crime by the person convicted and his indifference to the laws deemed necessary for the protection of the people and their property." *Id.*, 624 (emphasis added; citation omitted). In *People v Gatewood*, 450 Mich 1025 (1996), a summary disposition, the Court interpreted *Cervantes* as more narrowly holding that sentencing guidelines do not apply to *appellate review* of the sentences of habitual offenders, and may not be considered *on appeal* in determining an appropriate sentence for an habitual offender (emphasis added). In *People v Haacke*, 217 Mich App 434, 438; 553 NW2d 15 (1996), this Court held that the guidelines may be considered, but need not be considered, by the trial court.

We conclude the trial court did not err in referring to the guidelines, and that the sentence is proportionate.

V

In a supplemental pro per brief, defendant raises three claims of ineffective assistance of counsel. We have reviewed each claim, and conclude that defendant has failed to make the requisite showing. *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994).

Affirmed.

/s/ Jane E. Markey

/s/ Kathleen Jansen

/s/ Helene N. White

¹ Although the judgment of sentence suggests that defendant received a separate sentence of four to eight years for the habitual offender conviction, the sentencing transcript does not mention the habitual offender conviction. Defendant does not raise this as a concern.