

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEFFREY RIVERA,

Defendant-Appellant.

UNPUBLISHED

September 19, 1997

No. 188276

Oakland Circuit Court

LC No. 95-137471-FC

Before: Sawyer, P.J., and Hood and Hoekstra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279. Defendant subsequently pleaded guilty to being an habitual offender, third offense, MCL 769.11; MSA 28.1083, and was sentenced to four to twenty years' imprisonment. Defendant now appeals as of right. We affirm.

Defendant first argues that the trial court erred in denying a motion in limine to exclude any reference to codefendant's nickname "King Louie." Alternatively, he argues that the trial court erred in denying a motion for a mistrial after a juror wrote a note asking if "King Louie" was a gang-leader's title. We review decisions regarding motions in limine and motions for a mistrial for an abuse of discretion. *People v Lugo*, 214 Mich App 699, 704; 542 NW2d 921 (1995); *People v Johnson*, 133 Mich App 150, 156; 348 NW2d 716 (1984).

Here, we find that the trial court did not abuse its discretion in denying the motion in limine. While codefendant's nickname had little probative value, this value was not substantially outweighed by the danger of unfair prejudice. MRE 403; see *People v Amison*, 70 Mich App 70, 74; 245 NW2d 405 (1976). Similarly, we find that the trial court did not abuse its discretion in denying the motion for a mistrial. When a juror asked the trial court whether "King Louie" was a gang title, the court properly instructed the jury that this was "just a nickname." This instruction was sufficient to prevent any prejudice from the use of codefendant's nickname.

Defendant next argues that the trial court erred in finding that the prosecutor had exercised due diligence in attempting to locate David Valez, a res gestae witness. However,

Valez was an accomplice, and the prosecutor was not required to produce him. *People v Lytal*, 415 Mich 603, 611-612; 329 NW2d 738 (1982). Thus, the trial court's determination regarding due diligence is irrelevant, and we decline to review it.

Defendant next argues that the prosecutor committed misconduct warranting reversal by commenting on his failure to present witnesses, by arguing facts not in evidence, by comparing the assault in this case to a fox hunt, and by referring to him and codefendant as animals. We disagree. The prosecutor in this case did not impermissibly comment on defendant's failure to produce witnesses. Instead, the prosecutor argued on rebuttal that there was no evidence that Spanish was defendant and codefendant's "native tongue." Thus, the prosecutor's remark properly pointed out that defense counsel was relying on facts not in evidence. The prosecutor's comment regarding the victim's coat was also proper, as it was based on the evidence adduced at trial. While none of the witnesses at trial expressly referred to the coat as a "winter jacket," the evidence was clear that the victim was wearing a jacket, and that the assault occurred in Michigan in late December. In addition, any prejudice from this remark was cured when the trial court instructed the jury that the arguments of the attorneys are not evidence. Furthermore, the prosecutor did not commit misconduct in comparing the assault in this case to a hunt or a chase. A prosecutor is not required to state his inferences and conclusions in the blandest possible terms. *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996). While we agree that the prosecutor should not have compared defendant and codefendant to dogs or referred to them as "animals," we find that these isolated comments did not deny defendant a fair and impartial trial, particularly in light of the trial court's curative instruction.

Next, defendant argues that the cumulative effect of errors at trial denied him a fair trial. We disagree.¹ There was no error to accumulate at defendant's trial because the trial court's actions were proper and the prosecutor's comments were either proper or were cured by the trial court's instructions. Thus, defendant's claim is without merit.

Finally, defendant argues that he is entitled to be resentenced because of inaccuracies in his presentence investigation report. Defendant argues that a change in the presentence investigation report might change the scoring of his guidelines. However, because he was sentenced as an habitual offender, the sentencing guidelines do not apply. *People v Edgett*, 220 Mich App 686, 691; 560 NW2d 360 (1996). Thus, defendant may not challenge the calculation of his guidelines' score on appeal. *Id.* at 694-695. Moreover, after examining the report, we conclude that it accurately reflects defendant's prior convictions.

Affirmed.

/s/ David H. Sawyer

/s/ Harold Hood

/s/ Joel P. Hoekstra

¹ We note that, among defendant's alleged errors, he argues that he was prejudiced by his joint trial with codefendant. This issue was not preserved below, and was not raised in defendant's statement of

questions involved on appeal as required by MCR 7.212(C)(5). Even if this issue had been preserved, we would conclude that it was without merit. Defendant and codefendant did not present inconsistent defenses, and defendant has failed to show that his substantial rights were prejudiced or that severance was a necessary means of preventing this prejudice. Thus, he was not entitled to severance. *People v McCray*, 210 Mich App 9, 12; 533 NW2d 359 (1995).