STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NATHANIEL MONTE EATMAN,

Defendant-Appellant.

UNPUBLISHED
December 12, 1997

No. 193351
Kent Circuit Court
LC No. 95-001293-FC

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

PER CURIAM.

Defendant appeals as of right his convictions by a jury of two counts of assault with intent to murder, MCL 750.83; MSA 28.278, and two counts of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced as a second felony offender, MCL 769.10; MSA 28.1082, to concurrent terms of two years' imprisonment on each felony-firearm conviction to be served consecutively to concurrent terms of twenty-three to seventy years and twenty to sixty years' imprisonment on the two counts of assault with intent to murder. We affirm.

I

Defendant first argues that he was denied a fair trial because the prosecutor discussed anticipated testimony in his opening statement that ultimately was not presented to the jury. Alternatively, defendant argues that he was denied effective assistance of counsel because his attorney failed to object to the prosecutor's improper remarks. We disagree.

Opening argument is the appropriate time to state the facts to be proven at trial. *People v Johnson,* 187 Mich App 621, 626; 468 NW2d 307 (1991). When a prosecutor states that evidence will be submitted to the jury but it is not presented during trial, reversal is unwarranted if the prosecutor acted in good faith. *Id.*

In this case, the prosecutor, in his opening statement, stated in pertinent part as follows:

> A man by the name of Richard Thompson ... [or] Robert Thompson, will come and he will testify that he had conversations with Nathaniel Eatman and as he testified under oath on May 2nd of 1995, he [i.e., Eatman] was bragging about what Mr. Eatman had done. He was bragging about having shot "some niggers" having shot some niggers at Brown and Madison. Those were the words that were used by Mr. Eatman. Mr. Thompson will tell you that it was said to him a number of times.

Robert Thompson, who had been defendant's cellmate at the Kent County jail, could not be located to testify. The prosecutor, nevertheless, argued that he should be able to admit the transcript of Thompson's preliminary examination testimony because, pursuant to MRE 804(a)(5) and 804(b)(1), Thompson was an unavailable witness, and defendant had the opportunity to develop his testimony by cross-examination at the preliminary hearing. However, the trial court found that defense counsel did not have an opportunity to fully develop Thompson's testimony at the prior hearing and denied the prosecutor's request. A subpoena was secured and served on Thompson. Subsequently, after the first day of trial, the prosecutor obtained a material witness warrant for Thompson because at that point the prosecutor discovered that Thompson was refusing to honor the first subpoena. The court found that pursuant to MRE 804(a)(5), the prosecutor exercised due diligence to secure Thompson's presence.

Although there was no other evidence that defendant made the statements to Thompson, we find, upon review of the record, that the prosecutor did not act in bad faith. *Johnson, supra* at 626. The prosecutor, despite Thompson's recalcitrance, still attempted to secure his presence with the material witness warrant. There was no evidence to contradict that the prosecutor was acting on his confidence in the success of this warrant, which was obtained on November 6, 1995, when he made his opening statement on the second day of trial, November 7, 1995. Therefore, the prosecutor's remarks were not impermissibly injected in an attempt to prejudice the jury. *People v Solak,* 146 Mich App 659, 676; 382 NW2d 495 (1985). Accordingly, the prosecutor's remarks did not deny defendant a fair trial.

Defendant also argues that he should be given a new trial because he was denied effective assistance of counsel where his attorney failed to object to the prosecutor's opening statements regarding Thompson's testimony.

When asserting a claim of ineffective assistance of counsel, a defendant must first be heard by the trial court by way of a motion for a new trial or evidentiary hearing to establish a record of the facts pertaining to such a claim. *People v Kesl,* 167 Mich App 698, 702; 423 NW2d 365 (1988) (citing *People v Ginther,* 390 Mich 436, 443; 212 NW2d 922 (1973)). Here, defendant did not move for a new trial or evidentiary hearing. Where a *Ginther* hearing has not been conducted, review is limited to the record, trial counsel is presumed to have provided effective assistance, and this presumption can only be overcome by a showing of counsel's failure to perform an essential duty that prejudiced the defendant. *People v Sharbnow,* 174 Mich App 94, 106; 435 NW2d 772 (1989).

We find the result of the proceedings was not fundamentally unfair or unreliable. Counsel cannot be faulted for failing to object to the prosecutor's mentioning testimony that was never presented at trial where she had no way of knowing the witness would not appear. Under an objective standard

of reasonableness, counsel's performance was not deficient nor did she commit an error so serious that she was not functioning as an attorney as guaranteed under the Sixth Amendment. *People v Mayes (After Remand)*, 202 Mich App 181, 183; 508 NW2d 161 (1993).

II

Next, defendant argues that he was denied a fair trial when the prosecution elicited opinion testimony from its expert witness regarding defendant's guilt. We disagree.

Defendant did not object to the witness' opinion testimony. Absent a showing of manifest injustice, objections to the admission of evidence cannot be raised for the first time on appeal. *People v Stimage*, 202 Mich App 28, 29; 507 NW2d 778 (1993). The witness at issue was Dr. Lowell Bursch, the physician who treated the victim Dyson for his gunshot wounds. Bursch testified about the shooting in pertinent part as follows:

> It would seem that it's intentional unless the person was very, very unlucky.... [T]o get [hit] four times accidentally in different places would seem like more than possible coincidence. Most of the wounds were clearly entered somewhat from the back which would be consistent with Mr. Dyson trying to get away from the gun, and to be hit four time [sic] I can't quite see how that could be possibly accidental.

MRE 702 provides as follows:

> If the court determines that recognized scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert ... may testify thereto in the form of an opinion or otherwise.

MRE 704 provides as follows:

> Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

Bursch had experience in treating gunshot wounds. He gave an opinion, drawing on his experience, whether the shooting was intentional, not as to defendant's guilt. Furthermore, the fact that an expert's opinion may embrace an ultimate issue in the case does not make it inadmissible. *People v Williams (After Remand)*, 198 Mich App 537, 541-542; 499 NW2d 404 (1993); MRE 704. The fact that Bursch's testimony addressed the ultimate issue of intent did not render the evidence inadmissible. See *Stimage, supra* at 30.

Accordingly, we find that Bursch properly testified in the form of an opinion that could assist the trier of fact in understanding the evidence or to determine a fact in issue. MRE 702. Thus, defendant can establish no manifest injustice regarding Bursch's testimony.

III

Defendant next argues that the trial court abused its discretion in sentencing him to a term disproportionate to the nature of the offense and defendant's background. We disagree.

This Court properly reviews a defendant's sentence for an abuse of discretion, even though the sentencing guidelines do not apply to habitual offenders. *People v Cervantes,* 448 Mich 620, 626, 631-632; 532 NW2d 831 (1995). A sentence constitutes an abuse of discretion if it violates the principle of proportionality, which requires sentences to be proportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn,* 435 Mich 630, 636; 461 NW2d 1 (1990).

Defendant, with a crowd of people around him, aimed and fired at least nine rounds from a semiautomatic handgun loaded with jacketed hollow-point ammunition, hitting Dyson several times as he ran. The shooting was an act of gang vengeance. One of defendant's shots also struck Sherman who was running ahead of Dyson. Hence, defendant was not concerned about hitting others when he intentionally fired at Dyson.

Further, defendant has an extensive juvenile record and a 1994 felony assault conviction for which he received three years' probation consisting of ten months in jail with early release on December 20, 1994 to an Alternative Directions Program. Defendant absconded from this program after one day and did not reenter the system until his arrest for the instant offenses. Given these factors, we find that defendant's sentences in this case were not disproportionate to the seriousness of the circumstances surrounding the offenses and the offender. Therefore, the trial court did not abuse its discretion in sentencing defendant.

Affirmed.

/s/ Janet T. Neff
/s/ Kathleen Jansen
/s/ Jane E. Markey