STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENNETH JAMES PORTER,

Defendant-Appellant.

UNPUBLISHED
February 3, 1998

No. 196096
Ottawa Circuit Court
LC No. 95-019333-FC

Before: Neff, P.J., and Sawyer and Murphy, JJ.

PER CURIAM.

Defendant Kenneth James Porter was convicted by a jury of assault with intent to commit murder, MCL 750.83; MSA 28.278. According to the prosecution, defendant tried to kill his wife by driving his pickup truck, in which his wife was a passenger, into a tree. When his attempt was unsuccessful, defendant beat his wife over the head with a tire iron several times before he was restrained. Defendant was sentenced by the trial court to twelve to twenty-five years' imprisonment. Defendant appeals his conviction and sentence as of right. We affirm.

I

Defendant first claims on appeal that the trial court abused its discretion by denying his motion in limine and admitting photographs of the victim's injuries. According to defendant the photographs presented cumulative evidence and were so gory and graphic that any probative value was outweighed by the danger of unfair prejudice. Defendant argues that the gory nature of the photographs was demonstrated by the fact that one juror fainted while viewing them. Defendant claims that he was further prejudiced by that incident because two witnesses for the prosecution, while acting honorably in assisting the juror, tainted the jury in favor of the prosecution. The decision whether to admit evidence is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *People v Lugo*, 214 Mich App 699, 709; 542 NW2d 921 (1995).

The photographs, which depict the injuries to the victim's head, face and arms, were relevant to defendant's intent to kill because they illustrated the severity and extent of the victim's injuries. *People*

v Mills, 450 Mich 61, 71; 537 NW2d 909, modified and remanded on other grounds 450 Mich 1212 (1995). The jury is entitled to view the nature and extent of the injuries for itself, and not to depend solely on the testimony of experts. *Id*. at 72. Indeed, photographs may be used to corroborate a witness' testimony and are not excludable simply because they are cumulative of witnesses' oral testimony. *Id*. at 76.

Moreover, the probative value of the photographs was not outweighed by the danger of unfair prejudice. Although the photographs at issue show that the victim in this case was upset and her hair was matted with blood, they were not particularly shocking or gruesome. They were an accurate representation of the injuries sustained by the victim and were highly probative of defendant's intent to kill. The trial court did not abuse its discretion by admitting the photographs at trial.

With regard to the juror who fainted while viewing the photographs, it is evident from the record that the juror was particularly sensitive to the sight of blood. The juror stated on the record that the sight of blood made him queasy and that he had passed out previously for the same reason. In denying defendant's motion for a mistrial and renewed motion in limine, the court noted that the incident was relatively minor. The jurors were immediately excused to the jury room, while the afflicted juror was taken to a different area. In addition, after the initial response of two prosecution witnesses, the balance of the care was provided by a nurse who happened to be in the courtroom at the time. The court also excused the juror to prevent a repeat incident. Because any prejudice to defendant arising out of the incident was minimal, the trial court did not err by denying defendant's motion for a mistrial or his renewed motion in limine.

II

Next, defendant claims that the trial court committed error warranting reversal by failing to instruct the jury on attempted manslaughter when there was adequate evidence of provocation to support such an instruction. At trial, defense counsel requested that the trial court instruct the jury on the lesser offenses of attempted manslaughter, felonious assault and aggravated assault. A judge must instruct the jury on a lesser included offense when so requested and if the instruction is supported by the evidence. *People v Moore*, 189 Mich App 315, 319; 472 NW2d 1 (1991). The trial court expressed some doubt as to whether defendant presented enough evidence to support the submission of his provocation defense to the jury. Ultimately, the court refused to give an instruction on attempted manslaughter, but agreed to instruct the jury that if it believed that the charge would have been manslaughter had the victim died, then the jury could not find defendant guilty of assault with intent to commit murder and could consider a lesser offense. However, had the jury found that defendant acted as a result of provocation from the victim, the logical lesser included offense would have been attempted manslaughter.

Assuming there was sufficient evidence of provocation to support an instruction on attempted manslaughter, the court's error was harmless in light of the jury's finding that defendant was guilty of the principal offense of assault with intent to murder. See *People v Beach*, 429 Mich 450; 418 NW2d 861 (1988). Pursuant to the trial court's instructions, if the jury had found that defendant's intent to kill

was mitigated by the victim's provocation, it could not have found defendant guilty of the principal offense. Rather, the jurors would have had to consider whether defendant was guilty of one of the two instructed-upon lesser offenses.

III

Defendant next claims that the trial court erred by denying his motion to change venue based on prejudicial pretrial publicity. According to defendant, the media's depiction of defendant as a "violent wife beater" made it impossible for him to receive a fair trial in Ottawa County. This Court will not disturb a trial court's grant or denial of a motion for change of venue absent a palpable abuse of discretion. *People v Jendrzejewski*, 455 Mich 495, 500; 566 NW2d 530 (1997).

As a general rule, defendants must be tried in the county where the crime is committed. *Id.* at 499. However, venue of a criminal case may be changed "upon good cause shown by either party." MCL 762.2; MSA 28.850. The existence of pretrial publicity, standing alone, does not necessitate a change of venue. *People v Passeno*, 195 Mich App 91, 98; 489 NW2d 152 (1992). Rather, to be entitled to a change of venue, the defendant must demonstrate that there is either a pattern of strong community feeling against him and that the publicity is so extensive and inflammatory that jurors could not remain impartial when exposed to it, or that the jury was actually prejudiced or the atmosphere surrounding the trial was such as would create a probability of prejudice. *Id.*; *People v Wytcherly*, 172 Mich App 213, 220; 431 NW2d 463 (1988).

Here, the trial court denied defendant's motion but stated that it would reconsider if the jury selection process indicated that defendant would be prejudiced as a result of the publicity. It is appropriate, even preferable, for a trial court to elect to defer determination on a request for change of venue until jury selection has been attempted in the original county. *People v Muhammed*, 170 Mich App 747, 760; 428 NW2d 762 (1988); *People v Harvey*, 167 Mich App 734, 741; 432 NW2d 335 (1988). A change of venue is not necessary even though jurors have been exposed to adverse publicity and hold preconceived notions of guilt or innocence if they can lay aside their impressions or opinions and render a verdict based upon the evidence presented in court. *Jendrzejewski, supra* at 517. The totality of the circumstances, including the quality and quantity of pretrial publicity and the voir dire examination transcript, should be evaluated on appeal in deciding whether a defendant was deprived of a fair and impartial trial due to local prejudice. *Id.*

Defendant presented six items from the *Grand Haven Tribune* that were printed over a two month period near the time of the incident and defendant's preliminary examination. The last article appeared on December 30, 1995, several months before defendant's trial in April 1996. Generally, the articles were news stories that reported the facts surrounding the incident. Although some of the articles contained information and allegations regarding defendant's history of spousal abuse, they did not constitute "a barrage of inflammatory publicity leading to a 'pattern of deep and bitter prejudice' against the defendant, or a carnival-like atmosphere surrounding the proceedings." *Id* at 506-507.

Moreover, the trial court successfully impaneled a fair and impartial jury. The prosecutor opened voir dire by asking the potential jurors whether they had any prior knowledge of the case. Only four of the potential jurors interviewed by the prosecutor and defense counsel knew anything about the case. Those jurors indicated that they had seen one or more newspaper articles but stated that they would not be influenced by them. Nevertheless, three out of these jurors were excused, leaving only one as a member of the final jury panel. This juror specifically stated that he did not formulate any opinions based upon what he read in the paper, and that he had no concern about his ability to be fair and impartial in this case. Consequently, we find no abuse of discretion in the trial court's denial of defendant's motion for change of venue.

IV

Defendant argues that the trial court abused its discretion by permitting the victim to testify as a rebuttal witness. Defendant contends that the testimony was not proper rebuttal evidence and was merely cumulative of the victim's prior testimony. According to defendant, the improper rebuttal testimony was particularly prejudicial because it was given just before closing arguments. We disagree.

The test of whether rebuttal evidence was properly admitted is not whether the evidence could have been presented in the prosecutor's case-in-chief, but, rather, whether the evidence is properly responsive to evidence introduced or a theory developed by the defendant. *People v Figgures*, 451 Mich 390, 399; 547 NW2d 673 (1996). As long as evidence is responsive to material presented by the defense, it is properly classified as rebuttal, even if it overlaps evidence admitted in the prosecutor's case in chief. *Id*. The admission of rebuttal evidence is within the sound discretion of the trial court. *Id*. at 398.

In this case the victim's rebuttal testimony was directly responsive to defendant's version of the facts surrounding the car crash. The rebuttal evidence was not rendered improper merely because it overlapped somewhat with her previous testimony. *Id*. at 399. Moreover, the victim's rebuttal testimony was brief and did not include any details of the ensuing assault or the injuries that she sustained. The trial court did not abuse its discretion in admitting the rebuttal evidence.

V

Finally, defendant claims on appeal that his sentence of twelve to twenty-five years is unjustly harsh in light of the significant mitigating factors present in this case. Appellate review is limited to whether the sentencing court abused its discretion. *People v Williams,* 223 Mich App 409, 410-411; 566 NW2d 649 (1997). A sentencing court abuses its discretion when it violates the principle of proportionality. *People v Milbourn*, 435 Mich 630, 635-636, 654; 461 NW2d 1 (1990).

The sentencing guideline range in this case was seven to fifteen years. Defendant's minimum sentence of ten years was well within the guidelines range, and thus is presumed to be proportionate. *People v Kennebrew*, 220 Mich App 601, 609; 560 NW2d 354 (1996). Nonetheless, a sentence within a guidelines range can conceivably violate proportionality in unusual circumstances. *Milbourn,*

supra at 661. Defendant insists that his sentence was disproportionate because he had no prior criminal convictions as an adult or juvenile, he had been employed for eighteen years by the Michigan Department of Corrections and had reached the rank of lieutenant, and because he had no history of drug or alcohol abuse. None of these facts constitute unusual circumstances that would overcome the presumption. See *People v Daniels*, 207 Mich App 47, 54; 523 NW2d 830 (1994). Moreover, in light of the brutal nature of defendant's assault of the victim, we find defendant's sentence to be proportionate.

Affirmed.

/s/ Janet T. Neff
/s/ David H. Sawyer
/s/ William B. Murphy