

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICHARD M. KELLEY,

Defendant-Appellant.

UNPUBLISHED

April 13, 1999

No. 205414

Recorder's Court

LC No. 96-002796

Before: Whitbeck, P.J., and Cavanagh and Griffin, JJ.

PER CURIAM.

Defendant appeals as of right from his bench trial convictions of felonious assault, MCL 750.82; MSA 28.277, assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279, and possession of a firearm during the commission of a felony, MCL 750.277b; MSA 28.424(2). Defendant was sentenced to two years and eight months to four years in prison for the felonious assault conviction and five to ten years in prison for the assault with intent to do great bodily harm less than murder conviction, the two sentences to run concurrently to each other but consecutively to a two-year term for the felony-firearm conviction. We affirm.

Defendant's first issue on appeal is that the prosecution failed to present sufficient evidence to support a finding that defendant was sane and lacked diminished capacity. We disagree.

First, pursuant to 1994 PA 56 (MCL 768.21a; MSA 28.1044(1)), the defense of insanity is an affirmative defense for which the defendant has the burden of proof.

Second, in reviewing the sufficiency of the evidence following a bench trial, this Court must view the evidence in the light most favorable to the prosecutor and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Hutner*, 209 Mich App 280, 282; 530 NW2d 174 (1995) (citing *People v Petrella*, 424 Mich 221, 268-270; 380 NW2d 11 (1985)).

On this record, ample evidence exists of defendant's sanity. First, the beating of complainant was brought on by defendant's belief that she went to another bar, not his depression or a disorder.

Although defendant may have been suffering from depression and alcoholism, Dr. Paige, a clinical psychologist, testified that these conditions did not render him mentally ill. Furthermore, Dr. Paige determined that defendant was not suffering from post-traumatic stress disorder because there was no stressful event that he was recalling. According to Dr. Paige, defendant was also not displaying any avoidance behavior typical of such a disorder. Defendant was not having flashbacks or stress associated with memories or trying to avoid stressful situations.

Most importantly, defendant indicated to Dr. Paige that at the time the crime occurred, he was angry and got into a fight with complainant. His assault on her resulted because he was trying to protect himself from her scratching and biting, not mental illness. Dr. Paige testified that defendant was not responding to hallucinations or delusions. Rather, he was contemplating suicide and did not have the nerve so he shot at the police officers to keep them at bay. Viewed in the light most favorable to the prosecution, Dr. Paige's expert testimony was sufficient to prove defendant's sanity beyond a reasonable doubt.

Defendant's next issue on appeal is that his sentences violated the principle of proportionality. We disagree.

This Court reviews the legality of a trial court's imposition of sentence for an abuse of discretion. *People v Houston*, 448 Mich 312, 319; 532 NW2d 508 (1995). A trial court abuses its discretion when it violates the principle of proportionality. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990). This principle is violated when the sentence is not proportionate to the seriousness of the circumstances surrounding the offense and the offender. *Id.* Defendant's sentences do not violate the principle of proportionality expressed in *Milbourn, supra*.

Defendant's five-year minimum sentence is within the guidelines range of two to five years. A sentence imposed within an applicable sentencing guidelines range is presumptively neither excessively severe nor unfairly disparate. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987); *People v Kennebrew*, 220 Mich App 601, 609; 560 NW2d 354 (1996). According to *Milbourn*, however, sentences within the guidelines range can be an abuse of discretion in unusual circumstances. *Milbourn, supra* at 661. Unusual circumstances are defined as uncommon, not usual or rare. *People v Sharp*, 192 Mich App 501, 505-506; 481 NW2d 773 (1992).

The guidelines range in this case, as scored for assault with intent to do great bodily harm, is two to five years. Defendant's minimum sentence of five years is within the sentencing guidelines range. Defendant did not point out any special circumstances in his case which would warrant a sentence outside the guidelines range. Furthermore, the nature of defendant's crime was particularly violent and serious. He beat his girlfriend repeatedly with a club. He kicked her, pulled her hair, and tried to bite her nose off. He also barricaded himself in his house for eight hours and shot at two police officers. Defendant's sentence of two years and eight months to four years in prison for the felonious assault conviction is also proportionate for the reasons stated above.

Defendant further argues that the court did not properly articulate the reasons for sentencing defendant as it did. A trial court must articulate at the time of sentencing its reasons for imposing the

sentence given. *People v Coles*, 417 Mich 523, 549-550; 339 NW2d 440 (1983), overruled in part on other grounds *Milbourn, supra*. However, when the context of the parties' arguments make it clear that the court based the sentence on the guidelines, the articulation requirement is satisfied. *People v Lawson*, 195 Mich App 76, 78; 489 NW2d 147 (1992).

At sentencing, the prosecutor specifically discussed what sentence would fall within the guidelines range based on defendant's criminal history. The prosecutor recommended that the court sentence defendant within the guidelines range, and the court did. Thus, the articulation requirement was satisfied.

Affirmed.

/s/ Mark J. Cavanagh

/s/ Richard Allen Griffin