

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT WASHEL,

Defendant-Appellant.

UNPUBLISHED

January 22, 2004

No. 244025

Wayne Circuit Court

LC No. 01-012321

Before: Smolenski, P.J. and Saad and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction and sentence for bank robbery, MCL 750.531. The trial court sentenced defendant to sixteen months to fifteen years in prison. We affirm defendant's conviction but remand for resentencing.

I. Basic Facts

This case arises from two bank robberies in Livonia. In the first robbery, the robber who wore a an "old man" or "Joker" mask, drove away from the bank but was followed by a customer who, after losing sight of him, described the event to police officers. In the second robbery, the robber, who wore a fencing mask, was similarly followed by a customer who informed police where he lost site of the robber's vehicle. Although defendant was charged with two counts of robbery, the jury convicted him of only the second robbery.

II. Sentencing

Defendant first argues that the trial court erred in not sentencing him to an intermediate sanction where the court specifically stated that no departure was warranted.¹ We agree.

MCL 769.34(3) provides that a trial court "may depart from the appropriate sentence range established under the sentencing guidelines . . . if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure." If the

¹ The statutory sentencing guidelines apply because the offense was committed on August 29, 2001. MCL 769.34(2); *People v Babcock*, 469 Mich 247, 255 n 7; 666 NW2d 231 (2003).

trial court fails to articulate a substantial and compelling reason on the record, this Court “must remand for resentencing or rearticulation.” *People v Babcock*, 469 Mich 247, 259; 666 NW2d 231 (2003). In reviewing a departure from the guidelines range, the existence of a particular factor is a factual determination subject to review for clear error; the determination that the factor is objective and verifiable is reviewed as a matter of law; the determination that the factors constituted substantial and compelling reasons for departure is reviewed for an abuse of discretion; and the amount of the departure is reviewed for an abuse of discretion. *Id.* at 264-265.

Here, it is undisputed that the sentencing guidelines minimum range is zero to seventeen months and the intermediate sanctions apply. An intermediate sanction does not include a prison sentence. *People v Stauffer*, 465 Mich 633, 635; 640 NW2d 869 (2002); MCL 769.34(4)(a). Thus, if the sentencing guidelines indicate an intermediate sanction, the trial court must articulate a substantial and compelling reason for imposing a prison sentence, even though its minimum length does not exceed the upper end of the guidelines range. *Stauffer, supra* at 636.

The trial court sentenced defendant to a minimum of sixteen months in prison and wrote on the sentencing information report “no” on the line indicating whether there was a guidelines departure. At the time of sentencing, defense counsel argued that the sentence was a departure from the guidelines and requested that defendant be sentenced within the range of zero to twelve months in jail. The court disagreed stating:

[I]f you consider something that’s not contemplated by the guidelines, then I can go above the guidelines which I think is the argument. I think the argument is sound. It makes no sense to me – these guidelines on a capital offense being zero to seventeen months to me is just not contemplated on what can occur. Now, certainly I’m not going to take into consideration everything that can occur; only what occurred in this case, but I think that’s the argument, not that just because I want to, but because I may think that there are factors that are not contemplated and just because it’s not there doesn’t mean that the legislature considered it and rejected it.

* * *

I think it means this committee was not – didn’t have people on it that actually practiced law. I know there were some people on it that do, but I happen to know who most of the committee members were and so I can’t then say that just because it wasn’t contemplated that means that they – or just because it’s not here that means that took it and rejected it.

There are many, many problems with these guidelines and not just this being one of them, but that’s neither here nor there. I’m not going to consider it just because I think it would be something else. That would not be a reason that I think would be something that I can do under the law and I won’t do that.

* * *

Again, I don't think you are a candidate for going above the guidelines. I think that would be inappropriate based on your background and your history and the circumstance of this case and I am going to sentence you within the guidelines, but it's not going to be a jail sentence.

I do not think a jail sentence is appropriate . . . Anybody that either had a record or the factual scenario of this case will start at five years frankly. That's how serious I think that bank robbery is and I think I would have more than substantial and compelling reasons to go above the guidelines

When defendant asked "But then why is jail not possible?", the court responded, "I don't know what else I can say. That's my position. All right."

Because the sixteen months' imprisonment was a departure from the guidelines and the trial court did not state substantial and compelling reasons for such a departure on the record, we must remand for resentencing.

III. Cross-Examination of Witness

Defendant next argues that he was denied a fair trial and his constitutionally guaranteed right of confrontation by the trial court's improper restriction on his cross-examination of a witness regarding a plea bargain in an unrelated legal matter. We disagree.

A preserved evidentiary issue is reviewable under the abuse of discretion standard. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999) and decisions regarding the admission of evidence often involve preliminary questions of law that we review de novo. *Id.*

Defendant has a constitutional right to confront his accusers in the Sixth Amendment of the United States Constitution, and Const 1963, Art 1, § 20. *People v Bean*, 457 Mich 677, 682; 580 NW2d 390 (1998). But "[n]either the Sixth Amendment Confrontation Clause, nor due process, confers on a defendant an unlimited right to cross-examine on any subject." *People v Cantor*, 197 Mich App 550, 564; 496 NW2d 336 (1992). The court may limit the scope of cross-examination and deny cross-examination with respect to collateral matters bearing only on general credibility, as well as on irrelevant issues. *Id.*

Although a prosecution witness's pending charges may be relevant to the issue of a witness's interest in testifying and may be admitted for that purpose, *People v Hill*, 174 Mich App 686, 690-691; 436 NW2d 446 (1989), the trial court correctly ruled that *Hill* did not apply here because the witness did not have charges pending when he testified. Further, there was no indication that the witness's plea bargain was in any way relevant to the credibility of his testimony. Nonetheless, defendant argues that there was a general inference of bias in the witness's testimony because it was changed after the plea bargain. But the lower court record bears no indication of changes related to the plea bargain.

Therefore, defendant was not denied his constitutional right of confrontation and the trial court did not abuse its discretion in limiting cross-examination regarding the witness's plea bargain.

IV. Prosecutorial Misconduct

Defendant next argues that he was denied his due process right to remain silent because the prosecutor shifted the burden of proof to defendant by commenting on his failure to present evidence about his asserted lack of knowledge of a fencing mask. We disagree.

Allegations of prosecutorial misconduct are reviewed de novo, while reviewing the trial court's factual findings for clear error. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001). Claims of prosecutorial misconduct are reviewed on a case-by-case basis, examining the challenged conduct in context, to determine whether the defendant received a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995).

The prosecutor's comment was not improper. In closing argument, defense counsel presented the theory that defendant could not have robbed the bank because there was no evidence that he knew anything about a fencing mask. The prosecutor's rebuttal comments about the lack of testimony that defendant lacked knowledge of a fencing mask were designed to show that defendant's theory or corroborating evidence did not support the theory. "[W]here a defendant . . . advances, either explicitly or implicitly, an alternate theory of the case that, if true, would exonerate the defendant, comment on the validity of the alternate theory cannot be said to shift the burden of proving innocence to the defendant. Although a defendant has no burden to produce any evidence, once the defendant advances evidence or a theory, argument on the inferences created does not shift the burden of proof." *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995). It is also permissible for a prosecutor to observe that evidence against a defendant is undisputed, and despite the fact that a defendant has no burden to produce any evidence, once he advances a theory, argument regarding the inferences created does not shift the burden of proof. *People v Godbold*, 230 Mich App 508, 521; 585 NW2d 13 (1998). Accordingly, the prosecutor's comment was not improper.

Even if it was improper, the court instructed the jury that the prosecutor had the burden of proving each element of the crime, and that defendant was not required to prove his innocence. Even though it was the following day, the curative jury instruction was provided and juries are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

We affirm defendant's conviction but remand for resentencing consistent with this opinion. We do not retain jurisdiction.

/s/ Michael R. Smolenski

/s/ Henry William Saad

/s/ Kirsten Frank Kelly