

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RANDALL EDWARD VALKOUN,

Defendant-Appellant.

UNPUBLISHED

February 4, 1997

No. 161924

Genesee Circuit Court

LC No. 90-043560-FH

Before: White, P.J. and Griffin, and D.C. Kolenda*, JJ.

PER CURIAM.

Defendant was convicted by a jury of assault with intent to murder, MCL 750.83; MSA 28.278, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to twenty-five to forty years for the assault and two years' consecutive imprisonment for the felony firearm. He appeals as of right and we affirm.

Defendant's convictions arose out of the shooting of Jeff Dean, an acquaintance of defendant's son, Mark, with whom Mark had argued before the shooting. Both defendant and Mark were charged with and pleaded guilty to assault with intent to murder, and defendant additionally pleaded guilty to felony-firearm. Defendant was subsequently permitted to withdraw his pleas and have a jury trial.

Defendant's first three issues involve instances of alleged prosecutorial misconduct. Questions of prosecutorial misconduct are reviewed on a case-by-case basis. *People v Allen*, 201 Mich App 98, 104; 505 NW2d 869 (1993). The reviewing court examines the record and evaluates the prosecutor's remarks in context. *Id.* The test of prosecutorial misconduct is whether defendant was denied a fair and impartial trial. *Id.* A prosecutor's comments are to be considered in light of defense counsel's arguments. *People v Vaughn*, 200 Mich App 32, 39; 504 NW2d 2 (1993).

* Circuit judge, sitting on the Court of Appeals by assignment.

In this case, defendant claims the prosecutor improperly attempted to imply, through his redirect examination of David Koivupera, that Mark's sentencing judge believed defendant was the shooter as reflected by the relatively light sentence Mark received. The court ruled in favor of defendant's objections, defendant failed to request a curative instruction, and the court instructed the jury that it was not to consider matters as to which there had been a sustained objection. Thus, despite the prosecutor's apparent reluctance to comply with the court's ruling,¹ defendant has failed to show that he was denied a fair and impartial trial. *Allen, supra*.

Defendant next argues that the prosecutor impermissibly listed convicted felons from defendant's neighborhood during the cross-examination of Richard Sanchez to show either guilt by association or a conspiracy to assist defendant at trial. We note initially that the record does not specifically indicate that the jury was informed of the felon status of the persons about whom the prosecutor questioned Sanchez. Further, the line of questioning lasted five pages before defense counsel raised a relevancy objection. Thereafter, the jury was excused, the prosecutor made a record, the court sustained defendant's objection, and the case proceeded without further incident regarding this line of cross-examination. Additionally, even before Sanchez testified, defense counsel had established, in his cross-examination of Mark and other witnesses, that many of the players in this incident knew each other from "the neighborhood," and that at least some of them had experience with the criminal justice system.

Defendant also claims that the prosecutor improperly elicited the fact that Rodgers was in prison with defendant. Generally, unresponsive testimony by a prosecution witness does not justify a mistrial unless the prosecutor knew in advance that the witness would give the unresponsive testimony or the prosecutor conspired or encouraged the witness to give the objectionable testimony. *People v Hackney*, 183 Mich App 516, 531; 455 NW2d 358 (1990). The ruling on a motion for a mistrial is committed to the sound discretion of the trial court, the test being whether the defendant was denied a fair trial. *Id.*

In this case, the prosecutor asked Rodgers whether he had "see[n] [defendant in March or April of 1991] to pass by and say "Hi?" after the prosecutor had established that Rodgers had been in prison since April 19, 1991. The trial court denied defendant's subsequent motion for a mistrial. Defendant argues that the real impropriety and lack of inadvertence is made clear in the prosecutor's rebuttal argument where he again mentions defendant's incarceration after the trial court had ruled that any mention of that should be avoided. We disagree. The record reveals that the prosecutor was responding to defense counsel's argument. Furthermore, there was no defense objection. Defendant has failed to show that he was denied a fair trial.

Defendant next claims that the trial court abused its sentencing discretion because (1) his sentence was far more severe than Mark's, (2) the sentence exceeded the guidelines by ten years, and (2) prior to allocution, the court had predetermined defendant's sentence based on the sentence originally imposed when defendant pleaded guilty to assault with intent to murder and felony-firearm.

A trial court abuses its discretion when it imposes a sentence which is disproportionate to the seriousness of the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1

(1990). In the absence of factors legitimately considered at sentencing and not adequately considered by applicable guidelines, a departure from the recommended range indicates a possibility that a sentence may be disproportionate. *People v Houston*, 448 Mich 312, 320; 532 NW2d 508 (1995). Sentences must be individualized to fit the circumstances of the defendant and the case, but there is no requirement that the sentencing court consider the sentence given to a coparticipant. *In re Dana Jenkins*, 438 Mich 364, 376; 475 NW2d 279 (1991). However, this Court has stated that “neither justice nor the appearance of justice is served when similar offenders committing similar offenses receive dissimilar sentences.” *People v Pfeiffer*, 177 Mich App 170, 172; 441 NW2d 65 (1989).

In this case, the trial court based its sentence on the fact that defendant was the prime mover and the shooter, and that his actions resulted in the felony conviction of his son. Further, the court noted defendant’s attempts to blame others, his alcohol abuse, his violence, the number of major misconducts he had accumulated in the short time he was in prison, and the severe injury to the victim. Moreover, the circumstances of this case are such that, had the victim died, defendant could have been convicted of premeditated murder. All these factors justify not only disparate sentences for defendant and Mark but also the departure from the guidelines. *Jenkins, supra*. Under the circumstances, defendant’s twenty-five to forty year sentence does not violate the principle of proportionality. *Milbourn, supra*. Moreover, the record does not support defendant’s claim that the trial court predetermined his sentence prior to allocution so as to render allocution meaningless.

Affirmed.

/s/ Helene N. White
/s/ Richard Allen Griffin
/s/ Dennis C. Kolenda

¹ We do not approve of the prosecutor’s conduct.