STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN MICHAEL BARSOTTI,

Defendant-Appellant.

UNPUBLISHED
February 4, 1997

No. 183231
St. Clair Circuit Court
LC No. 94-001558-FH

Before: Cavanagh, P.J., and Reilly and C.D. Corwin,* JJ.

PER CURIAM.

Defendant appeals as of right from his conviction by a jury of possession of fifty or more, but less than 225, grams of cocaine, MCL 333.7403(2)(a)(iii); MSA 14.15(7403)(2)(a)(iii), and his conviction pursuant to a plea of guilty to habitual offender, third offense, MCL 769.11; MSA 28.1083. He was sentenced to fifteen to forty years' imprisonment. We affirm.

On September 10, 1993, the police stopped a van driven by Robert Burby in which defendant and Raymond Hill, Jr., were passengers. Cocaine was found on Hill's person and in the van. At trial, Burby and Hill testified against defendant pursuant to plea agreements. A tape recording of defendant's conversation with an undercover police informant, in which he made incriminating statements, was also played to the jury.

Defendant first advances a number of assertions of prosecutorial misconduct, only one of which was preserved below. We review the preserved claim in context to determine whether it denied defendant a fair trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995). Defendant objected to questions about whether he could have received the cocaine at issue from "Tony" in response to his statement indicating that he had no way of obtaining the amount of cocaine involved in this case. Defendant asserts that the prosecutor's questions referred to a matter excluded from evidence. However, he has not noted any ruling barring the evidence. Accordingly, we find no error requiring reversal.

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

Review of the remaining unpreserved assertions of prosecutorial misconduct is precluded unless a curative instruction could not have eliminated the prejudicial effect or failure to consider the matter would result in a miscarriage of justice. *People v Nantelle*, 215 Mich App 77, 87; 544 NW2d 667 (1996). Contrary to defendant's contention that certain remarks by the prosecutor during jury selection improperly intimated special knowledge of the case, the remarks called on the jury not to be distracted by extraneous matters. Neither has defendant established any impropriety in the prosecutor's statements that the police officers involved in this case were not involved in an incident at Michigan State University involving a potential juror's stepson. The prosecutor's use of the word "I" and other first person pronouns in his opening statement was not inherently improper. *People v Yearrell*, 101 Mich App 164, 167; 300 NW2d 483 (1980).

We conclude that it was not improper for the prosecutor to refer to a need to make a deal with "sewer rats" in order to get the "really big rats." A prosecutor is not required to state his arguments in the blandest possible terms. *People v Pawelczak*, 125 Mich App 231, 238; 336 NW2d 453 (1983). In addition, the prosecutor's use of a vulgarity while cross-examining defendant, although perhaps crude, was not legally improper. See *People v Rosengren*, 159 Mich App 492, 503-504; 407 NW2d 391 (1987).

We also find defendant was not prejudiced by an incident in which the prosecutor indicated that he and another person in the prosecutor's office made the charging decisions in this case because these remarks did not vouch for defendant's guilt. See *People v Cowell*, 44 Mich App 623, 628; 205 NW2d 600 (1973). Neither do we perceive any reasonable possibility of prejudice from the prosecutor's statement at one point during the trial that defendant was not called to testify at a preliminary examination for Hill because Hill waived such an examination.

Defendant also challenges the prosecutor's closing argument. However, the passages cited by defendant constitute permissible argument regarding defendant's credibility. See *People v Buckey*, 424 Mich 1, 14-15; 378 NW2d 432 (1985). Defendant suggests that the prosecutor improperly referred in rebuttal argument to not jeopardizing his professional career by the manner in which he handled this case. However, this was in response to defense counsel questioning in his closing argument whether the case was brought as a vendetta. While using the prestige of the prosecutor's office to inject personal opinion is improper, because of their rebuttal nature, these comments did not amount to error requiring reversal. Cf. *Bahoda*, *supra* at 286.

We do find that it was improper for the prosecutor to make statements during defendant's cross-examination expressing his personal belief that defendant had lied to him during a previous interview. See *People v Smith*, 158 Mich App 220, 231; 405 NW2d 156 (1987). However, because defendant acknowledged having lied during the interview, we conclude that this error was harmless.

Defendant next contends that the prosecutor improperly inquired into the facts underlying his prior conviction of attempted larceny by false pretenses over $100 to indicate that he had actually committed a greater offense. However, as the prosecution notes, defense counsel first elicited testimony

from defendant about that prior conviction which tended to downplay its significance. Ordinarily, in cross-examination of a defendant, no query may be made about higher original charges that did not result in conviction or the factual basis behind a prior conviction. *People v Falkner*, 389 Mich 682, 695; 209 NW2d 193 (1973). However, we find this case distinguishable from *Falkner* because the defense, not the prosecution, injected the matter of the facts underlying the prior conviction. Accordingly, we conclude that the prosecution's responsive cross-examination of defendant to the extent reasonably necessary to clarify that matter did not constitute error requiring reversal. *People v Vaughn*, 200 Mich App 32, 39; 504 NW2d 2 (1993).

In his next issue, defendant argues that the trial court erred in refusing to give a "mere presence" instruction. We disagree. Under the jury instructions given, the jury could not have based defendant's conviction for possession of cocaine on defendant merely being in the presence of others who were possessing cocaine because the instructions stated that the prosecutor must prove, in pertinent part, that defendant knowingly possessed cocaine. Cf. *People v Moldenhauer*, 210 Mich App 158, 160-161; 533 NW2d 9 (1995).

Defendant also contends that the record indicates that the trial court was mistaken or confused regarding whether it had discretion to sentence defendant as an habitual third offender to a maximum term less than twice the ordinary maximum sentence. However, the trial court never stated that it lacked discretion to sentence defendant to a maximum term less than the one it imposed and, accordingly, defendant is not entitled to resentencing based on this argument. *People v Beneson*, 192 Mich App 469, 471; 481 NW2d 799 (1992).

Finally, we disagree with defendant's claim that his fifteen-year minimum sentence was disproportionately severe. Contrary to defendant's argument, while the sentencing court would have needed substantial and compelling reasons to depart downward from the mandatory minimum for his offense, such special justification was not required to impose a higher minimum sentence. See *People v Shuler*, 188 Mich App 548, 552-553; 470 NW2d 492 (1991). Defendant received a minimum sentence one and one-half times the mandatory minimum. The offense included defendant's significant and substantial involvement and the involvement of others. Furthermore, defendant was sentenced as an habitual third offender. "[T]he Legislature has determined to visit the stiffest punishment against persons who have demonstrated an unwillingness to obey the law after prior encounters with the criminal justice system." *People v Milbourn*, 435 Mich 630, 668; 461 NW2d 1 (1990). Accordingly, we conclude that defendant's fifteen-year minimum sentence was not disproportionately severe. Defendant's indication that his offense would have been treated much less severely under the federal sentencing guidelines is inapposite because a Michigan court's sentencing discretion is to be exercised within the range established by the Michigan Legislature. Cf. *Milbourn, supra* at 651. It is also immaterial that defendant received harsher prison sentences than Hill and Burby because a sentencing court is not required to consider a co-participant's sentence. See *In re Jenkins*, 438 Mich 364, 376; 475 NW2d 279 (1991).

Affirmed.

/s/ Mark J. Cavanagh
/s/ Maureen Pulte Reilly
/s/ Charles D. Corwin