STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENNETH RICHARD TEBO,

Defendant-Appellant.

UNPUBLISHED
July 7, 1998

No. 192066
Iosco Circuit Court
LC No. 95-003101-FH

Before: Holbrook, Jr., P.J., and Young, Jr. and J.M. Batzer*, JJ.

PER CURIAM.

After a jury trial, defendant was convicted of two counts of felonious assault, MCL 750.82; MSA 28.277. Defendant was given an enhanced sentence as an habitual offender, fourth offense, of five to fifteen years in prison pursuant to MCL 769.12; MSA 28.1084. He now appeals his convictions as of right. We affirm.

At approximately 10:00 a.m. on May 3, 1995, defendant arrived at the trailer home of Wendy Haire, located at 6483 Seminole in Oscoda Township. Wendy Haire, Bobby Thomas, Daniel Miller, and Nelda Carter were also present in the trailer. At approximately 1:30 or 2:00 p.m., defendant and Bobby Thomas, who had both been drinking alcohol since 10:00 a.m., began to argue. Wendy Haire asked defendant to leave the trailer and, when he refused, Thomas walked defendant to the door of the trailer, someone pushed defendant out the trailer door, and Thomas followed defendant outside. According to the prosecution witnesses, when Thomas turned around to walk back into the trailer, defendant threw a board at Thomas, which struck Thomas in the arm. Defendant testified that he threw the board at Thomas because Thomas was coming toward him and he was afraid that Thomas was going to "stomp" on him. As Thomas again turned to walk back into the trailer, defendant hit Thomas in the head with a bicycle chain that was lying on the ground. Thomas' head injury required twelve stitches. Defendant testified that he hit Thomas with the chain because Thomas was threatening to kill him. Defendant also testified that he feared Thomas because he was aware of an incident in which Thomas badly beat another man, and defendant was afraid that Thomas, who was considerably larger than defendant, would do the same to him.

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

Defendant first argues that the trial court abused its discretion in denying his motion for new trial based on newly discovered evidence. We disagree.

A grant or denial of a motion for new trial is in the trial court's discretion and will not be reversed on appeal absent a clear abuse of that discretion. *People v Herbert*, 444 Mich 466, 477; 511 NW2d 654 (1993). A motion for new trial based on newly discovered evidence will only be granted if the defendant shows 1) that the evidence is newly discovered, 2) that the evidence is not merely cumulative, 3) that the evidence was not discoverable and producible at trial with reasonable diligence, and 4) that the evidence would probably have caused a different result at trial. *People v Mechura*, 205 Mich App 481, 483; 517 NW2d 797 (1994). Newly discovered evidence is not a ground for a new trial if the new evidence would be used merely for impeachment purposes, or pertains only to the credibility of a witness. *People v Sharbnow*, 174 Mich App 94, 104; 435 NW2d 772 (1989).

We conclude that the testimony presented at the hearing on defendant's motion for new trial would not have caused a different result at trial. Jan Tebo's testimony revealed no new information about the assault. Although Ben Miller and Heather Beck testified that Thomas verbally insulted defendant, threatened defendant, and encouraged defendant to fight, neither Ben Miller nor Heather Beck testified that Thomas physically assaulted defendant before defendant threw the board at him. Furthermore, both Ben Miller and Heather Beck testified that they lost sight of defendant and Thomas at some point before they saw Thomas walk back to the trailer holding his head. Linda Borus' testimony, which was accepted by the court as an offer of proof of Pam Beck's testimony, indicated that Pam Beck's version of the events was factually similar to that of Ben Miller and Heather Beck. Furthermore, although Michael Umphrey testified that he overheard prosecution witnesses Danny Miller, Wendy Haire, and Nelda Carter discussing their testimony in the hallway outside the courtroom on the day of defendant's trial, it was not clear from his testimony whether the conversation he overheard took place before or after those witnesses testified. In addition, it is not clear from the substance of the conversation, as related by Umphrey, that the prosecution witnesses gave false testimony. Under these circumstances, we find no abuse of discretion in the trial court's refusal to grant a new trial based on newly discovered evidence.

Defendant next argues that the trial court abused its discretion by refusing to grant a new trial on the ground that the verdict was against the great weight of the evidence. We disagree.

Defendant first argues that the jury's verdict was against the great weight of the evidence because the testimony of the prosecution witnesses was not credible. A judge may grant a new trial after finding that the testimony of the witnesses for the prevailing party was not credible. *Herbert*, 444 Mich at 477. However, such an exercise of judicial power must be undertaken with great caution, keeping in mind the special role accorded jurors in our system of justice. *Herbert*, 444 Mich at 477.

We do not believe the trial court abused its discretion in declining to grant a new trial on the ground that the prosecution witnesses were not credible. Defendant first asserts that the fact that Wendy Haire, Nelda Carter, and Ben Miller all testified that Thomas did not touch defendant inside the trailer, while Thomas testified that he grabbed defendant by the coat while they were still inside the

trailer, indicates that Haire, Carter, and Miller collaborated to give false testimony against defendant. Defendant also argues that the fact that Haire, Carter, and Miller testified that Thomas appeared dazed or stunned after being hit with the board, while Thomas did not testify that he was dazed or stunned, was further evidence of collaboration in the testimony of Haire, Carter, and Miller. However, we believe the points on which Thomas' testimony differed from that of the other prosecution witnesses were relatively minor and do not support a finding that the remainder of the testimony of those witnesses was not credible. Therefore, we conclude that the trial court did not abuse its discretion in declining to grant defendant a new trial on the ground that the testimony of the prosecution witnesses was not credible.

Defendant next argues that the prosecutor denied him a fair trial when he asked him to comment on the credibility of prosecution witnesses. We disagree.

Defendant did not object at trial to the prosecutor's questions he now claims were improper. Appellate review of allegedly improper remarks is precluded if the defendant fails to timely and specifically object unless an objection could not have cured the error or a failure to review the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). A miscarriage of justice will not be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction. *People v Rivera*, 216 Mich App 648, 651-652; 550 NW2d 593 (1996). Thus, if defense counsel fails to object, review is foreclosed unless the prejudicial effect of the remark was so great that it could not have been cured by an appropriate instruction. *People v Turner*, 213 Mich App 558, 575; 540 NW2d 728 (1995).

It is improper for a prosecutor to ask a defendant to comment on the credibility of prosecution witnesses. *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985). However, if such improper questioning by the prosecutor does not result in unfair prejudice to the defendant, the error does not require reversal. *Buckey*, 424 Mich at 17. Here, we do not believe the prosecutor's questioning requires reversal. The questioning was not prolonged and did not bolster the credibility of the prosecution witnesses. *Id*. Furthermore, any prejudice resulting from the improper questioning could have been cured by an appropriate limiting instruction and we do not believe the questioning resulted in a miscarriage of justice. *Id;* see also *People v Messenger*, 221 Mich App 171, 180; 561 NW2d 463 (1997).

Defendant next argues that he was denied a fair trial when Nelda Carter gave a unresponsive answer on direct examination and injected prejudicial evidence into the proceedings. We disagree.

The following exchange occurred during Nelda Carter's direct examination testimony:

Prosecutor: Okay. Did he [defendant] hit him?
Witness: Yes, I do believe it's the right side he hit him on.
Prosecutor: Right side of what?
Witness: Of his head.
Prosecutor: Okay. What happened next?
Witness: Bob hurried up and took off running into the house.

Prosecutor: Where did Mr. Tebo go?
Witness: He was still there, *and he had hit a child at the age of 12*.
Defense Counsel: I'm going to object to other – if she's going to be indicating other things happened after this incident, your Honor. Nothing has been charged.
Court: Okay, the objection will be sustained. [Emphasis added.]

The prosecutor may not inject unfounded prejudicial innuendo into the proceedings. *People v Williams*, 114 Mich App 186, 198; 318 NW2d 671 (1982). However, generally, a volunteered and unresponsive answer to a proper question does not require a new trial. *People v Holly*, 129 Mich App 405, 415; 341 NW2d 823 (1983). Here, we do not believe the unresponsive answer warrants reversal. There was no indication that the prosecutor attempted to elicit the answer to deny defendant a fair trial. *Id*. Furthermore, it is unlikely that one, isolated comment resulted in substantial prejudice to defendant, and any prejudice that may have resulted could have been cured by an appropriate instruction, which defense counsel failed to request. Under these circumstances, we conclude that Nelda Carter's unresponsive answer did not deny defendant a fair trial.

Finally, defendant argues that his sentence violates the principle of proportionality. We disagree.

The proportionality of an habitual offender's sentence is reviewed under an abuse of discretion standard, and the sentencing guidelines have no bearing with regard to whether an abuse has occurred. *People v Yeoman*, 218 Mich App 406, 419; 554 NW2d 577 (1996). When an habitual offender's underlying felony and criminal history demonstrate that he is unable to conform his conduct to the laws of society, a sentence within the statutory limits set by MCL 769.12; MSA 28.1084, is proportionate. *People v Hansford (After Remand)*, 454 Mich 320, 326; 562 NW2d 460 (1997). The habitual offender statute, MCL 769.12(1)(b); MSA 28.1084(1)(b), provides that if the underlying felony is punishable by a maximum term that is less than five years, the court may sentence the defendant to a maximum of not more than fifteen years. According to MCL 750.82(1); MSA 28.277(1), a conviction of felonious assault is punishable by imprisonment for not more than four years.

Furthermore, defendant was convicted of three felony offenses before committing the instant offense. Therefore, because defendant's sentence was within the statutory limits set by MCL 769.12; MSA 28.1084, and because the underlying offense and defendant's criminal history indicate that defendant is unable to conform his conduct to the law, defendant's sentence did not violate the principle of proportionality. *Hansford*, 454 Mich at 326.

We find no merit in defendant's argument that the trial court erred in failing to consider his alcohol addiction and his self-defense theory when imposing sentence. Defendant failed to present any authority to support his position that alcoholism is a mitigating factor to be considered when sentencing a defendant. Moreover, the transcript of the sentencing hearing indicates that the court considered defendant's alcoholism at length. Finally, it is clear from the jury's verdict that it rejected defendant's self-defense theory and, therefore, the sentencing court

was not required to consider the defense as a mitigating factor when imposing sentence. *People v Roberson*, 167 Mich App 501, 519; 423 NW2d 245 (1988).

Affirmed.

/s/ Donald E. Holbrook, Jr
/s/ Robert P. Young, Jr.
/s/ James M. Batzer