

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee/
Cross-Appellant,

v

ERNEST JOHNSON,

Defendant-Appellant/
Cross-Appellee.

UNPUBLISHED

July 7, 1998

No. 202248

Oakland Circuit Court

LC No. 95-142815-FC

Before: Jansen, P.J., and Kelly and Markey, JJ.

PER CURIAM.

Defendant was convicted of assault with intent to murder, MCL 750.83; MSA 28.278, and sentenced to four to twenty years' imprisonment. He now appeals as of right. The prosecution has filed a cross-appeal on the issue of sentencing. We affirm both the conviction and the sentence.

Defendant's first argument is that the trial court erred in failing to instruct the jury that he did not have a duty to retreat from his own home or dwelling. Because defendant not only failed to request such an instruction, but also stated his satisfaction with the instructions as given, this issue has not been preserved for appellate review. *People v Hendricks*, 446 Mich 435, 440-441; 521 NW2d 546 (1994). Therefore, this Court may review the issue only to avoid manifest injustice. *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993).

In the present case, it is undisputed that the altercation between defendant and the victim occurred in the driveway outside defendant's home. We find that defendant's driveway was outside the curtilage of his home for the purpose of the no-duty-to-retreat rule.¹ Accordingly, the trial court did not err in failing to give the jury an instruction on the no-duty-to-retreat rule. *People v Godsey*, 54 Mich App 316, 320-321; 220 NW2d 801 (1974). See also *People v Wytcherly*, 172 Mich App 213, 221; 431 NW2d 463 (1988) and *People v Drake*, 142 Mich App 357, 361; 370 NW2d 355 (1985).

Next, defendant argues that the prosecutor denied him a fair trial by attempting to obtain testimony from a witness that he had suborned perjury. Although defense counsel made a timely

objection to the admission of the testimony, she did not specify the same ground for objection as claimed on appeal, namely, that the prosecutor's statements to the jury were not supported by the evidence. 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).

Moreover, were we to review the issue, we would find that the trial court did not abuse its discretion in admitting evidence that defendant had talked with the witness on several occasions about the assault, and therefore, the prosecutor's arguments were proper and did not deny defendant a fair and impartial trial. Evidence of a defendant's attempt to induce perjury is admissible and may be considered by the jury as evidence of guilt. *People v Lytal*, 119 Mich App 562, 574-575; 326 NW2d 559 (1982).

Defendant next argues that he was denied a fair trial by the trial court's admission of three separate instances of irrelevant and unfairly prejudicial evidence. This Court reviews a trial court's decision to admit evidence for an abuse of discretion. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996). What is relevant and material depends on the relationship of the elements of the charge, the theories of admissibility, and the defenses asserted. *People v VanderVliet*, 444 Mich 52, 75; 508 NW2d 114 (1993), modified on other grounds 445 Mich 1205 (1994).

In the present case, defendant testified on direct examination about his whereabouts earlier in the day. On cross-examination, the prosecutor asked defendant whether he had been with a woman earlier that day and whether they were romantically involved at the time of the incident. We find that the trial court did not abuse its discretion in allowing the prosecution to question defendant in this regard because the questions went to defendant's credibility as a witness and were within the limits of proper cross-examination. *People v Minor*, 213 Mich App 682, 684; 541 NW2d 576 (1995). The prosecutor also asked defendant whether he had ever given his stepson a "whooping." This evidence was relevant to rebut defendant's statement on direct examination that he had never physically hurt anyone before. Finally, the prosecution introduced evidence that defendant had made threats against the victim within two months prior to the assault. Defendant was charged with assault with intent to murder. Evidence that defendant had threatened to kill the victim if he caught him with his wife made the existence of an intent to murder more probable than it would have been without evidence of such threats. MRE 401. Therefore, the evidence was relevant to show defendant's intent. Evidence of defendant's threats were also admissible as a party admission under MRE 801(d)(2)(A). In sum, we find that the trial court did not abuse its discretion in admitting the disputed evidence and defendant was not denied a fair trial on this basis.

Next, defendant argues that the trial court abused its discretion in allowing the testimony of his estranged wife at trial where he had asserted his spousal privilege. Prior to trial, the trial court granted the prosecutor's motion in limine to allow defendant's wife to testify at trial. The trial court found that defendant had deserted or abandoned the marriage and was not entitled to invoke the spousal privilege.

Generally, where two people are legally married at the time of trial, one spouse is prohibited from testifying against the other if the privilege has been invoked. MCL 600.2162; MSA 27A.2162; *People v Hamacher*, 432 Mich 157, 161; 438 NW2d 43 (1989). However, Michigan law provides an exception in cases of desertion or abandonment. MCL 600.2162(1)(e); MSA 27A.2162(1)(e). Because the spousal privilege is narrowly construed, exceptions to the privilege should be broadly construed. *People v Eberhardt*, 205 Mich App 587, 589; 518 NW2d 511 (1994).

Testimony was presented that defendant had not resided with his wife since the date of the offense, which at the time of the hearing was over one year. There was also evidence presented that defendant's wife had attempted to file for divorce, but was unable to locate defendant for service of process. Contrary evidence by defendant indicated he continued to support, make mortgage payments and attempt reconciliation.²

In this case, we need not determine whether the trial court erred in rejecting defendant's claim of spousal privilege because, even if the ruling was erroneous, any error by the trial judge in this regard was harmless. The victim's testimony that he was sitting in his car in front of defendant's house talking to defendant's wife, Carla Johnson, when defendant drove up, got out of his truck, walked over to the victim and, without provocation, began hitting him with a baseball bat was fully corroborated by defendant's neighbor Herman Mayes who happened to be driving by defendant's house at the time of the incident in question. Therefore, Carla Johnson's testimony to this effect was merely cumulative to the testimony of the victim and Herman Mayes. Under these circumstances, any error in the admission of Carla Johnson's testimony was harmless.

Finally, on cross-appeal, the prosecution argues that the guidelines used by the trial court in imposing sentence were incorrect and that, because the trial court departed from the guidelines and sentenced defendant to a minimum term below the guidelines' recommended range, it should have had an accurate guidelines range to properly evaluate its reasons for departure and proportionality. The prosecution also argues that defendant's minimum sentence was disproportionate.

The sentencing record indicates that the prosecution did not object to the calculation of the sentencing guidelines or the scoring of the guidelines. Having failed to preserve this issue, the prosecution is precluded from raising the issue for the first time on appeal. MCR 6.429(C); *People v Winters*, 225 Mich App 718, 730; 571 NW2d 764 (1997). Therefore, defendant's sentence is reviewed only for proportionality. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990).

In the present case, defendant's minimum sentence of four years fell below the guideline range. However, the trial court carefully considered the feelings of the victim who recommended a sentence of five years, and the fact that defendant had an opportunity to retreat. Still, the trial court found "substantial and compelling reasons" to deviate below the recommended guidelines, including defendant's advanced age, his total lack of criminal history, his good work history, and the stable community life evidenced by numerous letters of community support received by the court on his behalf. We find that the trial court did not abuse its discretion in sentencing defendant to a minimum term of four

years. Given the circumstances surrounding the offense and the offender, the sentence was proportionate.

Affirmed.

/s/ Kathleen Jansen

/s/ Michael J. Kelly

/s/ Jane E. Markey

¹ Defendant relies on *People v Toarmina*, 130 Mich App 73, 78; 343 NW2d 236 (1983) to support his argument that the driveway was within the curtilage of his home. However, *Toarmina* deals with the definition of curtilage within a Fourth Amendment search and seizure context and not the duty-to-retreat rule. *Id.* Therefore, we find that *Toarmina* is not applicable to the case at bar.

² Although there is no clear precedent in Michigan indicating that the statutory exception is limited to a civil proceeding, our sister state, Illinois, has decided that the marital privilege remains in effect as to confidential communications even though parties are separated as long as they are not divorced. *People v Dubanowski*, 75 Ill App3rd 809, 394 NW2d 605 (1979).