STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee

v

DOMINIC WESSON,

Defendant-Appellant.

UNPUBLISHED
February 23, 1999

No. 204305
Kent Circuit Court
LC No. 96-007986 FC

Before: Hood, P.J., and Neff and Markey, JJ.

PER CURIAM.

Defendant was convicted by a jury of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), and assault with intent to murder, MCL 750.83; MSA 28.278. He was sentenced to consecutive terms of two years for the felony-firearm conviction, and 200 to 350 months as a second-felony habitual offender, MCL 769.10; MSA 28.1082, for the assault conviction. He appeals as of right.[1] We affirm.

Defendant first argues that he was denied a fair trial when the trial court allowed a witness to testify regarding defendant's intent to go get a gun. We disagree.

A decision whether to admit evidence is reviewed for abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). An abuse of discretion will be found only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made. *People v McAlister*, 203 Mich App 495, 505; 513 NW2d 431 (1994). However, even when there is an abuse of discretion, "[a]n error is harmless if it is highly probable that, in light of the strength and weight of the untainted evidence, the tainted evidence did not contribute to the verdict." *People v Bone*, 230 Mich App 699, 703; 584 NW2d 760 (1998).

In this case, a fight developed between defendant, the victim, and perhaps some of the victim's friends, when the victim questioned defendant about a purportedly stolen puppy. The fight stopped briefly, apparently because a police car drove through the neighborhood. When the fight resumed, defendant shot the victim three times. Defendant claims that he thought that one of the victim's friends had a gun.

At trial, the victim testified that, just before the fight was interrupted, defendant had asked him to "follow me." The victim was eventually allowed to testify, over objection, that he believed that defendant wanted to go get a gun. However, defendant himself testified that he had a gun in his possession all along, and that he did not go get it during the brief pause in the fighting. Thus, we are convinced that allowing the victim to speculate as to defendant's intent had no effect on the verdict and therefore, even if erroneous, was harmless beyond a reasonable doubt. *Bone, supra*, 230 Mich App at 703.

Defendant next argues that the prosecutor deprived him of a fair trial when he argued facts not in evidence and vouched for the credibility of a witness. We again disagree.

The test of prosecutorial misconduct is whether, in the context of the whole record, defendant was denied a fair trial. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995). A prosecutor may not make statements of fact which are unsupported by the evidence. *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994). However, a prosecutor is free to argue the evidence and all reasonable inferences and relate them to the prosecution's theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Similarly, a prosecutor may not vouch for the credibility of a witness, nor suggest that the government has some special knowledge that the witness is testifying truthfully; however, the prosecutor may argue from the facts that a witness is credible. *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997).

After carefully reviewing the record, we conclude that the prosecutor's comment that the gun was found hidden next to defendant was supported by the evidence on the record. Further, the prosecutor's comments about the credibility and demeanor of one of its witnesses was permissible argument based on the evidence. Defendant was not denied a fair trial by either of these comments.

Lastly, defendant argues that his habitual offender sentence of 200 to 350 months for the assault with intent to murder conviction was disproportionate. We disagree.

The sentencing guidelines do not apply to habitual offenders. *People v Cervantes*, 448 Mich 620, 625-626, 630; 532 NW2d 831 (1995) (Riley, J, with Mallet and Weaver, JJ, concurring; and Cavanagh, J, with Brickley and Levin, JJ, concurring). Appellate review of a habitual offender sentence is limited to whether the sentence violates the principle of proportionality announced in *People v Milbourn*, 435 Mich 630, 635-636, 654; 461 NW2d 1 (1990), that is, whether the sentence is commensurate to the seriousness of offense and the offender's record. *Cervantes*, *supra*, 448 Mich at 626-627, 631; *People v Crawford*, ___ Mich App ___; ___ NW2d ___, slip op at 6 (Docket No 200722, pub'd 11/20/98).

Defendant in this case had five juvenile adjudications involving stolen property, cocaine, possession of a weapon, malicious destruction of property, and escape from a juvenile facility. As an adult, he had several misdemeanor convictions involving trespassing, driving without a license, fleeing and eluding, use of cocaine, and assault and battery. He had one adult felony conviction for possession of an imitation controlled substance with intent to deliver. Defendant was eighteen, and committed the instant offense about three months after his release from jail. He was not on parole or probation.

Although this sentence was admittedly harsh, considering the brutality of the crime and defendant's unrelenting criminal record, we find that the sentence was proportionate to the offense and the offender.

Affirmed.

/s/ Harold Hood
/s/ Janet T. Neff
/s/ Jane E. Markey

[1] Defendant also pleaded guilty to being a felon in possession of a firearm, MCL 750.224f; MSA 28.421(6), and was sentenced to a term of forty to sixty months, to be served concurrently with the habitual offender sentence. However, defendant's attempt to appeal that conviction as of right was dismissed for lack of jurisdiction.