STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JERMAINE JAMAL ALLEN,

Defendant-Appellant.

UNPUBLISHED
February 26, 1999

No. 203523
Kent Circuit Court
LC No. 96-8878 FC

Before: Markey, P.J., and Saad and Collins, JJ.

PER CURIAM.

The jury convicted defendant Jermaine Jamal Allen of two counts of assault with intent to commit great bodily harm less than murder, MCL 750.84; MSA 28.279, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant appeals as of right. We affirm defendant's convictions, but remand for a new sentencing hearing.

This case arises from a shooting that occurred in Grand Rapids. While walking to a store, Anthony McConer and Jamal Overstreet encountered a group of men who pulled guns and began shooting at them. Overstreet escaped without being hit by any bullets, but McConer was cornered by defendant Allen and Anthony Vance. Defendant Allen and Vance shot McConer three times in the legs. Defendant fired one of the three shots that hit McConer. When they ran out of bullets, defendant and Vance viciously beat McConer about the head with their guns. Police arrived on the scene shortly thereafter and summoned an ambulance. McConer told police that "Anthony" had shot him. Overstreet told one officer that defendant and Vance were the shooters. Defendant introduced evidence that he was at Blodgett Hospital with the mother of his children at the time of the shooting.

Defendant contends that the trial court abused its discretion in admitting statements made by McConer to Officers Glen Bailey and Bowers, and by Overstreet to Officer Sherie Bailey. We disagree. During Glen Bailey's testimony, the prosecutor asked if he had asked McConer how he had been shot. During a hearing outside the presence of the jury, Bailey said he spoke with McConer both at the scene and in the hospital immediately after he had been taken there. He asked McConer at the hospital who had shot him. McConer said "Anthony" had shot him. A detective who spoke with McConer the day after the shooting said McConer told him that he got the name from Overstreet while

he was being treated at the scene. The court ruled the statement to Glen Bailey admissible as an excited utterance.

The requirements for a statement to be admissible as an excited utterance are 1) that there be a startling event, and 2) that the resulting statement be made while under the excitement caused by the event. *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998). There is no time limit for excited utterances. *Id.*, 551-552. The trial court's determination whether the declarant was still under the stress of the event is given wide discretion. *Id*., 552. In this case, McConer made the statement to Glen Bailey within fifteen to twenty minutes of the time he was shot. While the length of time from the shooting is not dispositive in determining whether McConer was under the stress of the event, it is relevant. In addition, the fact that the statement was made in response to questioning does not necessarily mean the statement should be excluded. As long as the questioning was not suggestive, it should not result in the evidence being rendered inadmissible. *Id.*. There is no evidence in the record that McConer had the opportunity for reflection and fabrication. The court did not abuse its discretion in allowing this testimony.

As for the testimony of Bowers and Sherie Bailey, we find that defendant has failed to preserve his complaint for review. Defendant's objection to Bowers' testimony was on the basis that Bowers never identified the person from whom he received the statement. Because he now challenges that testimony on a different ground, we conclude that his objection was insufficient to preserve his hearsay objection on appeal. *People v Winchell*, 171 Mich App 662, 665; 430 NW2d 812 (1988). As for Sherie Bailey's testimony concerning Overstreet's statement, again, defendant failed to object. Accordingly, he has waived appellate review in the absence of manifest injustice. *People v Turner*, 213 Mich App 558, 583; 540 NW2d 728 (1995). No manifest injustice appears in the admission of either Officer Bowers' or Officer Sherie Bailey's testimony. In both cases, the statements were taken shortly after the shooting, with Bowers speaking to McConer in the ambulance and Sherie Bailey speaking to Overstreet at the scene. There is no indication that either McConer or Overstreet had a chance for reflection or fabrication. The evidence was properly admitted.

Defendant claims that the trial court erred in assessing maximum sentences in this case that exceeded the maximum sentence provided by statute. We agree. Defendant was convicted of assault with intent to commit great bodily harm less than murder, MCL 750.84; MSA 28.279. This offense is punishable by a sentence of not more than ten years' imprisonment. Defendant was sentenced as an habitual offender, MCL 769.10; MSA 28.1082, and accordingly, his maximum sentence could have been increased to a maximum of fifteen years' imprisonment. However, the trial court sentenced defendant to 6 ½ to 20 years' imprisonment. A sentence shall not be in excess of the sentence prescribed by law. MCL 769.1; MSA 28.1072. When a punishment is in excess of that allowed by law, we must affirm as to the part of the sentence that is not in excess of the law. MCL 769.24; MSA 28.1094. The 6 ½year minimum is not in excess of that allowed by law. Accordingly, we will remand for resentencing to a maximum of fifteen years' imprisonment, the maximum allowed by law. See *People v Thomas*, 447 Mich 390, 393; 523 NW2d 215 (1994). Although defendant claims that the trial court failed to exercise discretion in setting its sentence, we find nothing in the record to indicate that the trial court set a twenty-year maximum sentence because it believed it was without discretion to set a

lower maximum. See *People v Green*, 205 Mich App 342, 346; 517 NW2d 782 (1994). In this case, we do not find a failure to exercise discretion, but simply an error in the maximum sentence assessed. Accordingly, we will not remand for a full punishment hearing, but for sentencing on the maximum sentence to be served by defendant.

Defendant contends that he is entitled to credit for time served before sentencing in either this case or Case No. 96-01193-FC (Docket No. 203502). Although it appears that defendant is eligible for credit in one of the two cases, we disagree to the extent that he argues he is entitled to the time in this case. Defendant was on bond in 96-01193-FC when he committed the offenses in this case. He was held from July 24, 1996 until April 21, 1997, when he was sentenced in both cases. The court ordered that his sentences in this case commence after the sentences in 96-1193-FC have been served. Although a defendant who is unable to post bond must be awarded credit for all time served in jail before sentencing, MCL 769.11b; MSA 28.1083(2), this statute may not be used to frustrate the intent of a consecutive sentencing statute. *People v Connor*, 209 Mich App 419, 431-432; 517 NW2d 782 (1995). Defendant's consecutive sentences are authorized under MCL 768.7b(2)(a); MSA 28.1030(2)(2)(a). When a defendant receives a consecutive sentence, he is not entitled to credit for presentence time that he had to serve under the prior sentence. *Connor, supra*, 209 Mich App 431. Defendant is not entitled to time served in this case. Nothing in this opinion should be construed as either prohibiting or requiring that the 272 days' credit be given in 96-01193-FC.

The convictions are affirmed. We remand the cases for resentencing on the assault convictions to reflect a fifteen-year maximum sentence. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Henry William Saad
/s/ Jeffrey G. Collins