

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHRISTINE YVONNE JONES, a/k/a YVONNE
CHRISTINE JONES,

Defendant-Appellant.

UNPUBLISHED

May 21, 1999

Nos. 203693; 203718

Kent Circuit Court

LC Nos. 96-012893 FC;

96-012895 FC

Before: Gage, P.J., and White and Markey, JJ.

PER CURIAM.

Defendant appeals by right from her jury trial convictions and sentences for assault with intent to rob while armed, MCL 750.89; MSA 28.284, and assault with a dangerous weapon, MCL 750.82; MSA 28.277. Defendant was sentenced as a second habitual offender, MCL 769.10; MSA 28.1082, to concurrent terms of fifteen to fifty years' imprisonment and four to six years' imprisonment, respectively. We affirm.

I

First, defendant argues that the trial court abused its discretion, warranting reversal, in allowing the prosecutor to impeach the credibility of defense witness Mary Williams by referring to her prior conviction for prostitution. While we agree that Williams' conviction was inadmissible under either MRE 608 or MRE 609, we conclude that the error is harmless and does not warrant reversal in this case.

It is generally improper to impeach the credibility of a witness with evidence of that witness' reputation for or conviction of prostitution. *People v Williams*, 416 Mich 25, 45; 330 NW2d 823 (1982); *People v Chaplin*, 412 Mich 219, 224-226; 313 NW2d 899 (1981). However, the erroneous admission of evidence requires reversal only if it is prejudicial. *People v Mateo*, 453 Mich 203, 215; 551 NW2d 891 (1996). Whether the error is prejudicial depends upon the nature of the error and its effect on the reliability of the verdict in light of the weight and strength of the untainted

evidence. *Id.* The instant evidentiary error is a preserved error, defense counsel having properly challenged admission of the evidence below, and it is nonconstitutional in nature. Thus, we apply the “highly probable” test, i.e., whether it is highly probable that the challenged evidence did not affect the verdict. *People v Graves*, 458 Mich 476, 482-483; 581 NW2d 229 (1998); *People v Gearns*, 457 Mich 170, 205; 577 NW2d 422 (1998).

We find that it is “highly probable,” if not certain, that, given the strength of the other, untainted evidence of defendant’s guilt in this case and given defendant’s own admission that she herself was a prostitute, any error in admitting the improper impeachment evidence did not contribute to the verdict and was harmless. *Gearns, supra; Mateo, supra.*

II

Next, defendant argues that the trial court committed error requiring reversal in permitting the prosecutor to present evidence of defendant’s possession of two crack cocaine pipes on the night of the instant offenses. We disagree.

Evidence of defendant’s drug usage was relevant to defendant’s motive and to her conduct in assaulting and attempting to rob the two victims. See *People v Sholl*, 453 Mich 730, 740-742; 556 NW2d 851 (1996), and see generally *Fisher, supra* at 451-453. The evidence was not unfairly prejudicial where other evidence was admitted that on the night of the incidents, defendant told a police officer that earlier that evening she had smoked marijuana and crack cocaine. We review the trial court’s decision whether to admit the evidence for an abuse of discretion, *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998), and conclude that the trial court’s admission of the evidence was within the court’s discretion

III

Third, defendant argues that the trial court erred in allowing the prosecution to have a photograph of defendant, taken when she was booked, displayed on the prosecution table during trial. We cannot agree.

The trial court made two rulings on defendant’s objection: (1) that it was not likely that the jury could see the photograph, and (2) that the photograph, even if seen by jurors, was not prejudicial. Other than his bare assertions, defendant has presented nothing to this Court to establish that the trial court clearly erred in ruling that, given the configuration of the courtroom, the photograph was unlikely to have been seen by the jury. MCR 6.213(C). In addition, although defendant characterizes the photograph as one showing defendant “angry and hostile,” defendant does not substantiate this characterization. It is unclear from either the record or the parties’ briefs whether the photograph at issue is the same photograph of defendant police took on the night she was arrested and which defense counsel himself subsequently moved to have admitted into evidence. Defendant has not established that the display of the photograph was prejudicial and denied defendant a fair trial.

IV

Fourth, defendant argues that comments made in closing argument by the prosecutor, in which the prosecutor argued that the defense had no evidence to support its claim that defendant had engaged in acts of prostitution with the victims, impermissibly shifted the burden of proof to defendant. We disagree.

We conduct a de novo review and evaluate the prosecutor's remarks in context to determine whether defendant was denied a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995). Prosecutorial comments are considered in light of defense arguments and an otherwise improper remark may not rise to the level of error requiring reversal when the prosecutor is responding to an issue or argument raised by defense counsel. *People v Duncan*, 402 Mich 1, 16; 260 NW2d 58 (1977); *People v Kennebrew*, 220 Mich App 601, 607-608; 560 NW2d 354 (1996).

We agree with the trial court that the comments made by the prosecutor were proper response to the assertion made by defendant that each complainant had engaged defendant in prostitution. Although defendant had no burden to produce any evidence, once defendant advanced this theory of defense, the prosecutor was entitled to comment on the improbability of defendant's theory and her failure to prove the theory. *People v Fields*, 450 Mich 94, 111-116; 538 NW2d 356 (1995). The prosecutor did not shift the burden of proof and defendant was not denied a fair trial by the prosecutor's remarks in closing argument. *Id.*

V

As a fifth allegation of error, defendant contends that the prosecutor committed misconduct by vouching for the credibility of one of the victims when the prosecutor in opening argument described an incident in which the victim had stopped and helped a woman in Detroit who was stranded on the road and then elicited testimony from the victim regarding the incident. We disagree.

We first note that this issue is unpreserved. At trial, defendant objected to the remarks now challenged on the ground of *relevancy*. On appeal, defendant asserts these same remarks constituted *improper bolstering* of the prosecution witness. Because the ground for her appellate attack is different from the ground relied on at trial, this issue is unpreserved. *People v Maleski*, 220 Mich App 518, 523; 560 NW2d 71 (1996).

Regardless, even if preserved, defendant's claim is without merit. While it is true that "the prosecutor cannot vouch for the credibility of his witnesses to the effect that he has some special knowledge concerning a witness' truthfulness," *Bahoda, supra* at 276, we find that not to have occurred in this case. The prosecutor neither suggested that he had special knowledge that the testimony of the victim was truthful nor put the prestige of the prosecutor's office behind the veracity of the victim's testimony. There was no misconduct by the prosecutor denying defendant a fair trial. *Id.*

VI

Finally, defendant appeals the proportionality of her sentences. Because defendant was sentenced as an habitual offender, the sentencing guidelines do not apply, and we do not consider them

in reviewing her sentence. *People v Gatewood*, 450 Mich 1025; 546 NW2d 252 (1996); *People v Cervantes*, 448 Mich 620, 625 (Riley, J), 630 (Cavanagh, J); 532 NW2d 831 (1995). Rather, we review the proportionality of defendant's sentence for an abuse of discretion by the trial court. *Id.* at 627, 630; *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). The trial court did not abuse its discretion in imposing sentence on defendant.

In imposing sentence, the trial court was not precluded from considering the sentencing guidelines. *People v Haacke*, 217 Mich App 434, 438; 553 NW2d 15 (1996). The court considered the guidelines and imposed sentence within the guidelines, despite sentencing defendant as a second habitual offender, MCL 769.10; MSA 28.1082. A sentence imposed within the guidelines is presumptively proportionate. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987).

In considering the factors articulated by the trial court and the seriousness of the instant offenses, particularly the stabbing of one of the victims as well as defendant's admitted drug addiction, prostitution, and parole status at the time of the instant offenses, which the trial court correctly noted diminishes the prospect for rehabilitation, we conclude that the trial court did not abuse its discretion in sentencing this defendant. Where defendant's adult criminal history demonstrates that she is unable to conform her conduct to the law, the sentences within the statutory limits are proportionate. *People v Hansford (After Remand)*, 454 Mich 320, 326; 562 NW2d 460 (1997).

We affirm.

/s/ Hilda R. Gage

/s/ Helene N. White

/s/ Jane E. Markey