STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEITH T. WALTON,

Defendant-Appellant.

UNPUBLISHED
March 29, 2002

No. 226319
Wayne Circuit Court
LC No. 98-011112

Before: Jansen, P.J., and Holbrook, Jr., and Griffin, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of assault with intent to do great bodily harm less than murder, MCL 750.84, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to six years and eight months to ten years in prison for the assault with intent to do great bodily harm less than murder conviction and two years in prison for the felony-firearm conviction. We affirm.

Defendant first argues that his sentence violates the principle of proportionality. We disagree. This Court reviews sentences for an abuse of discretion. *People v Cain*, 238 Mich App 95, 130; 605 NW2d 28 (1999). A trial court abuses its discretion when it violates the principle of proportionality, which requires that sentences be proportionate to the seriousness of the crime and take into account the nature of the offense and the background of the offender. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990). The Michigan Supreme Court's sentencing guidelines apply to this case because the offense was committed before January 1, 1999. MCL 769.34(1); *People v Reynolds*, 240 Mich App 250, 254; 611 NW2d 316 (2000).

The policy of this state favors individualized sentencing for each defendant. *People v Sabin (On Second Remand)*, 242 Mich App 656, 661; 620 NW2d 19 (2000). The trial court's discretion in imposing a sentence is broad, to tailor each sentence to the circumstances of the case and the offender in an effort to balance society's need for protection with its interest in rehabilitating the offender. *Id.* To facilitate review, the sentencing court must articulate on the record the criteria considered and the reasons for the sentence imposed. *People v Pena*, 224 Mich App 650, 661; 569 NW2d 871 (1997), mod in part on other grounds 457 Mich 885 (1998). Departures from the judicial guidelines should alert appellate courts to a possible violation of the principle of proportionality. *Milbourn, supra* at 660. The sentencing court may deviate from the guidelines range when the range is disproportionate to the seriousness of the crime. *Id.* at 636.

The statutory maximum sentence for assault with intent to do great bodily harm less than murder is ten years, MCL 750.84. The judicial guidelines' range is twelve months to forty-eight months. The trial court sentenced defendant to six years and eight months to ten years in prison, noting:

> This Court finds that this is the most heinous crime that this defendant committed. And, therefore, this Court is giving this defendant the maximum sentence that is allowable by law. As the record does reflect, the defendant shot Ms. Kweli seven times, some in vital organs, left her lying bleeding on the floor all night while she begged him to call nine, one, one. At one point, she managed to crawl to the door during the night, and the defendant pulled her through the hallway, trailing the blood through the house. She is now left paralyzed from the waist down and can't control some of her vital organs. The severity of her injuries were not considered in the scoring of the guidelines. And I regret that I cannot give the defendant a higher sentence because I have to follow the law, but I think that, in all fairness, he does deserve at least the sentence that I have given him.

The trial court specified that these were the reasons it was exceeding the guidelines' range. The trial court appropriately considered the circumstances surrounding the criminal behavior. *People v Oliver,* 242 Mich App 92, 98; 617 NW2d 721 (2000). The trial court also appropriately considered the effect of defendant's crime on the victim. *People v Compagnari,* 233 Mich App 233, 236; 590 NW2d 302 (1998).

The trial court did not abuse its discretion in imposing a sentence that exceeds the judicial guidelines' range because the sentence was proportionate to the seriousness of the crime and the nature of the offense. After shooting Kweli, defendant dragged her by her feet into the hallway. When Kweli asked defendant to call 911, defendant told her that it was too late for that. Defendant then went to sleep leaving Kweli to suffer through the night. Kweli sustained gunshot wounds to the left side of her back near her spine and her right hand, as well as three wounds in her upper chest and one in her left forearm. As a result of the injuries sustained by defendant's shots, Kweli is a paraplegic, has chronic pain, and is incontinent. Based on the brutality of defendant's actions, including his allowing Kweli to suffer through the night with several bullets wounds and the permanent debilitating injuries that resulted to Kweli, the trial court's deviation from the guidelines' recommended minimum sentence range was proportionate to the crime even in light of defendant's lack of a prior criminal record. *People v Redman,* 188 Mich App 516; 470 NW2d 676 (1991).

Defendant next argues that the trial court abused its discretion in permitting the prosecution to admit certain testimony into evidence. We disagree. The decision to admit evidence is within the trial court's discretion and should only be reversed if there is a clear abuse of discretion. *People v Starr,* 457 Mich 490, 494; 577 NW2d 673 (1998). An abuse of discretion will be found only when an unprejudiced person, considering the facts on which the trial court acted, would conclude that there was no justification or excuse for the ruling made. *People v Ullah,* 216 Mich App 669, 673; 550 NW2d 568 (1996).

Generally, all relevant evidence is admissible, and irrelevant evidence is not. MRE 402; *Starr, supra* at 497. Evidence is relevant if it has any tendency to make the existence of a fact

that is of consequence to the action more probable or less probable than it would be without the evidence. MRE 401; *People v Crawford*, 458 Mich 376, 388; 582 NW2d 785 (1998). Under this broad definition, evidence is admissible if it is helpful in throwing light on any material point. *People v Aldrich*, 246 Mich App 101, 114; 631 NW2d 67 (2001).

In the first instance of error that defendant alleges, the prosecutor asked Kweli's treating physician, Dr. Cartwright, the following question:

> *Q*. Okay. You already indicated that one bullet seemed to have missed its target, the chest, and was off to here [indicating], off to one side. And then there was another one even further off, a little bit in the arm area?
>
> *A*. That's right.[1]

Admission of this testimony was not plain error because it was relevant to the material points regarding where Kweli sustained gunshot wounds and whether defendant intended to injure or kill her. Defendant argues that this evidence should not have been admitted because it was improper for the witness to opine on defendant's intent. However, pursuant to MRE 704, testimony in the form of an opinion or inference, which is otherwise admissible, is not objectionable because it embraces an ultimate issue to be decided by the trier of fact. *People v Smith*, 425 Mich 98, 106-107; 387 NW2d 814 (1986). Based on the evidence presented, Dr. Cartwright made a reasonable inference that defendant intended the shots to hit Kweli in the chest but missed a shot when Kweli lifted her arms. Because the evidence is otherwise relevant to material points in the case, it is not improperly admitted solely because it embraces an ultimate issue to be decided by the jury.

In the second instance of alleged error, the prosecutor questioned Dr. Cartwright as follows:

> *Q. (attorney for defense)* Can you tell us, based on your experience in treating all these types of wounds, anything about the intent of the person inflicting these wounds, based upon the location of the wounds and their nature?
>
> *Mr. Plumpe (attorney for prosecution):* Same objection. That's the ultimate issue. There's a self-defense claim, here, too.
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> *Mr. Bernardi (attorney for defense):* Well, I'm not asking her anything about self-defense, I'm just asking her about based on these types of wounds. And I don't know if she can or can't, but—
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> *The Court:* (Interposing) I'll allow her to answer the question.

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[1] Defendant made no objection to this testimony. Therefore, it is reviewed for plain error. *People v Pesquera*, 244 Mich App 305, 316; 625 NW2d 407 (2001).

The Witness (Dr. Cartwright): Any one of the wounds that she sustained could have killed her. And my first thought when I saw her was somebody wanted her dead.

Mr. Plumpe: I'll object to that. That's highly prejudicial, and totally inappropriate. I ask that it be stricken.

The Court: What's your response, Mr. Bernardi.

Mr. Bernardi: I don't know if it's highly inappropriate, or not. And this Court can strike that. That's her opinion. I don't know if that's based on her experience as an emergency physician, or not, or just a gut reaction. Perhaps I'll ask her.

Q. Is that based upon your--

A. (Interposing) It's my gut reaction.

Q. Then I have--

A. (Interposing) Like I say, I've seen a lot of people with one of the gunshot wounds that she has had, and they're dead.

Mr. Plumpe: Well, wait, wait a minute. We haven't ruled on the objection, yet.

The Court: All right. Then I'll sustain the objection.

The trial court did not abuse its discretion as defendant's objection was, in fact, sustained. Although the jury had already heard the testimony, defendant did not request a further curative instruction. Nonetheless, the court adequately instructed the jury as follows: "At times during the trial I may have excluded evidence that was offered or stricken testimony that was heard. Do not consider those things in deciding he [sic] case. Make your decisions only on the evidence that I've let in and nothing else." Therefore, the trial court did not abuse its discretion in regard to this portion of Dr. Cartwright's testimony.

Defendant also argues that the prosecution engaged in misconduct when eliciting the above-mentioned testimony. We disagree. Allegations of prosecutorial misconduct are reviewed de novo, *People v Pfaffle,* 246 Mich App 282, 288; 632 NW2d 162 (2001), and are decided on a case by case basis. *People v Noble,* 238 Mich App 647, 660; 608 NW2d 123 (1999). The reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context to determine if the defendant was denied a fair and impartial trial. *Id.*; *People v Reid,* 233 Mich App 457, 466; 592 NW2d 767 (1999). The propriety of the prosecutor's remarks depends on all the facts of the case. *People v Bahoda,* 448 Mich 261, 267, n 7; 531 NW2d 659 (1995). "Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted." *People v Schutte,* 240 Mich App 713, 720; 613 NW2d 370 (2000).

A prosecutor may not make a statement of fact to the jury that is unsupported by the evidence, but he is free to argue the evidence and all reasonable inferences arising from it as they relate to his theory of the case. He need not use the least prejudicial evidence available to establish a fact at issue and does not have to state the inferences in the blandest possible terms. *Aldrich, supra* at 112.

In the first instance of alleged error,[2] it was not improper for the prosecutor to elicit this testimony because it was relevant to the material points whether and where Kweli sustained gunshot wounds and whether defendant intended to injure or kill her. Defendant argues that this evidence should not have been admitted because it was improper for the witness to opine on defendant's intent. However, as noted above, pursuant to MRE 704, testimony in the form of an opinion or inference, which is otherwise admissible, is not objectionable because it embraces an ultimate issue to be decided by the trier of fact. *Smith, supra* at 106-107.

In the second instance of alleged error,[3] it was also not inappropriate for the prosecution to elicit the testimony; admissible evidence is not improper solely because it embraces an issue for the trier of fact. MRE 704; *Smith, supra* at 106-107. Defendant states that the evidence was irrelevant and immaterial but fails to argue how. In any event, the evidence was relevant to the material point whether defendant intended to injure or kill Kweli. Even if this were improper, the trial court sustained defendant's objection and then adequately instructed the jury. It is therefore not more probable than not that the prosecutor's conduct, even if improper, resulted in a miscarriage of justice. *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999).

Defendant also argues that the prosecutor made improper remarks during closing argument. In the first instance of alleged misconduct in closing argument, the prosecutor argued that defendant emptied the clip of bullets on Kweli. This was not misconduct because the prosecutor was merely arguing based on the evidence presented. The prosecutor even pointed out that defendant himself testified to this fact.

In the second instance of alleged misconduct during closing argument, the prosecutor argued during rebuttal:

> And the defense doesn't have to do anything. And he's absolutely right. The defense doesn't have to do anything. But they could do something. They can do things. They can ask for fingerprints to be taken. They can do that. And they did not do that in this case because it was never an issue.

Although a prosecutor may not comment on a defendant's failure to present evidence, he may argue that certain evidence is uncontradicted and may contest evidence presented by the defendant. *Reid, supra* at 477. This was not misconduct because the prosecutor was merely arguing based on both the evidence presented at trial and on defense counsel's closing argument. Detroit police officer Barbara Profit testified that neither gun was tested for fingerprints. Defendant also testified that Kweli held the rifle to him before he shot her. Additionally,

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[2] See page 3 *supra.*

[3] See page 3-4 *supra.*

otherwise improper prosecutorial remarks might not require reversal if they address issues raised by defense counsel. *Schutte*, *supra* at 721. Defense counsel argued in closing argument:

> Mr. Walton, the next morning, went to the police station with the guns that he said were involved in the incident. Included was the rifle, okay. We got this business. And, again, be very careful. The burden doesn't shift. Something about an order from the judge to get fingerprints. Let's assume, for a minute, that they didn't find out about it until Tuesday. They said those guns were, at least originally, preserved for prints. What would have prevented the prosecutor from doing, at that point, or the police from getting prints, then? The point is, the defendant doesn't have to do anything. It's up to him the prosecutor, to disprove every element of self-defense. And it's not up to the defense to do that.

Therefore, the prosecutor did not engage in misconduct that deprived defendant of a fair trial.

Affirmed.

/s/ Kathleen Jansen
/s/ Donald E. Holbrook, Jr.
/s/ Richard Allen Griffin