

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEROME GARCIA NEAL,

Defendant-Appellant.

UNPUBLISHED

November 21, 1997

No. 190165

Macomb Circuit Court

LC No. 94-002772-FC

Before: Saad, P.J., and Holbrook, Jr. and Doctoroff, JJ.

PER CURIAM.

A jury convicted defendant of carrying a concealed weapon, MCL 750.227; MSA 28.424, and possession of marijuana, MCL 333.7403(2)(d); MSA 14.15(7403)(2)(d); the jury acquitted defendant of second-degree murder, MCL 750.317; MSA 28.549, assault with a dangerous weapon, MCL 750.82; MSA 28.77, and felony-firearm, MCL 750.227b; MSA 28.424(2). Defendant appeals as of right. We affirm.

I

Defendant first argues that the trial court improperly allowed the prosecutor to elicit information about defendant's 1993 felonious assault conviction. We agree but find the resulting error harmless. At trial, the prosecutor argued that the evidence was admissible pursuant to MRE 404(b)¹ to show that defendant had a propensity to carry a dangerous weapon. He also argued that evidence of the 1993 conviction repelled defendant's self-defense claim in the current case.

In *People v VanderVliet*, 444 Mich 52; 508 NW2d 114 (1993), the Court held that such "evidence must be relevant to an issue other than propensity" in order to be introduced. *Id.* at 74. Here, the evidence was not relevant to any issue other than propensity, and it was not relevant to rebut defendant's self-defense claims. Even if defendant was the aggressor in the 1993 felonious assault, that fact does not tend to prove that he was an aggressor in the incident giving rise to this case.

However, reversal is not required because the error was harmless. The jury acquitted defendant of second-degree murder, assault with a dangerous weapon, and felony-firearm, and only

convicted him of the crimes to which he directly admitted on the witness stand. Therefore, it is neither highly probable nor more probable than not that the error affected the verdict. *People v Humphreys*, 221 Mich App 443, 448; 561 NW2d 868 (1997).

II

Defendant next argues that the trial court erred by allowing the prosecutor to elicit certain evidence from defense witness Lewis. We agree that the trial court erred by permitting the prosecutor to cross-examine Lewis about his conviction for attempted murder and about his numerous contacts with police that did not result in conviction. See MRE 609(a). *People v Yarbrough*, 183 Mich App 163, 165; 454 NW2d 419 (1990). However, again the errors were harmless where defendant was convicted only of the two crimes that he directly admitted.

III

Defendant next argues that certain statements of the prosecutor amounted to prosecutorial misconduct necessitating reversal. We disagree.

Defendant's trial took place during the OJ Simpson trial. The prosecutor referred to Kato Kaelin when objecting to a statement made by a witness. The comment, although improper, did not deny defendant a fair trial. The comment did not liken defendant to OJ Simpson. In fact, OJ Simpson's name had not been mentioned to the jury by either party. Moreover, the trial judge admonished both parties for their conduct surrounding the comment and warned them that he would not tolerate such behavior unlike "Judge Ito." In addition, the comment did not undermine defendant's self-defense theory, which the jury apparently believed because they acquitted him of all charges except those to which he admitted. Therefore, the comment cannot be said to have deprived defendant of a fair trial. See *People v Truong, (After Remand)*, 218 Mich App 325, 336-337; 553 NW2d 692 (1996).

Defendant also contends that three comments by the prosecutor in his closing statement were improper and amounted to prosecutorial misconduct. However, where as here, defendant did not object to these comments, we look only to determine whether failure to review would result in a miscarriage of justice. *People v Graham*, 219 Mich App 707, 712; 558 NW2d 2 (1996). We find that no miscarriage of justice would result if we failed to review these comments, because any possible prejudice could have been cured by a timely instruction.

IV

Finally, defendant argues that his sentence was disproportionate. The guidelines sentence for the conviction of carrying a concealed weapon was zero to twelve months; defendant was sentenced to forty to sixty months.

The principle of proportionality requires "sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender." *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). The sentencing court must take into account "the nature of the offense and the background of the offender." *Id* at 651. However,

departures from the guidelines may be appropriate where the guidelines do not adequately account “for important factors legitimately considered at sentencing.” *Id.* at 657.

Here, the trial court justified the upward departure by noting that the victim died and that shortly after this incident defendant had a subsequent felonious assault conviction (where he stabbed the victim in the face). It is true that, when the trial court scored the guidelines, defendant received the maximum score (100 for loss of life) for OV 18 (injury or threat to life), and that defendant's subsequent conviction was also scored. However, in *Milbourn, supra* at 659-660, n 27, the Court acknowledged that a sentencing judge “may depart from the guidelines on the basis of a factor that is already within the guidelines.” It is within the court’s discretion to go outside the guidelines where: (1) due to special circumstances or characteristics of a defendant, justice requires a sentence different than the one provided, or (2) regardless of special characteristics, the court feels that the sentencing range is inappropriate. *People v Brown*, 150 Mich App 168, 172; 388 NW2d 249 (1986).

We conclude that the guidelines recommended sentence (zero to twelve months) was inappropriate, and the sentenced imposed (forty to sixty months) was appropriate, in light of defendant’s conduct, both in this incident and in his subsequent conviction. Here, defendant entered a crowded fair with a loaded gun, displayed the gun repeatedly and eventually shot an individual in the chest. Very shortly afterwards, defendant attacked and stabbed another victim in the face. A sentence of five years or less for this violent behavior is not disproportionate.

Affirmed.

/s/ Henry William Saad
/s/ Donald E. Holbrook, Jr.
/s/ Martin M. Doctoroff

¹ (1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.