

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHRISTOPHER O. BROWN,

Defendant-Appellant.

UNPUBLISHED

February 24, 1998

No. 200494

Genesee Circuit Court

LC No. 95-053160-FH

Before: McDonald, P.J., and Sawyer and Hoekstra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted as an habitual offender, MCL 769.10(1)(a); MSA 28.1082(1)(a), of receipt of stolen property in excess of \$100, MCL 750.535(1); MSA 28.803(1). Defendant was sentenced to five to 7½ years' imprisonment and appeals as of right. We affirm.

Defendant argues that he is entitled to a new trial because the prosecuting attorney engaged in misconduct by deliberately eliciting testimony from a prosecution witness that defendant had previously been involved in an automobile theft. We disagree. Before trial, defendant moved the court to prohibit the prosecution from referencing, during its case-in-chief, defendant's past conviction for the unauthorized driving away of an automobile. In response, the prosecution informed the court that it had no intention of offering information about defendant's criminal record. However, when the prosecution asked its first witness about why she was suspicious of defendant's possession of a new automobile, the witness testified that defendant had stolen cars in the past. Defense counsel did not timely object to the witness' testimony.

Our review of a claim of prosecutorial misconduct is generally precluded absent objection by counsel; however, an exception exists if a curative instruction could not have eliminated the prejudicial effect or where failure to consider the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Here, defendant's pretrial motion was insufficient to preserve this issue for appellate review, and from our review of the record, we find that a curative instruction would have obviated any prejudice that resulted from the witness' answer.

Moreover, any error that did occur was harmless because the witness' testimony was merely cumulative to defendant's own testimony during direct and redirect examinations about his past involvement with automobile theft. See *People v Solomon*, 220 Mich App 527, 531; 560 NW2d 651 (1996).

Defendant also argues that his sentence of five to 7½years' imprisonment is disproportionate. We disagree. We review a challenge to the proportionality of a sentence for an abuse of discretion. *People v Elliott*, 215 Mich App 259, 261; 544 NW2d 748 (1996). A sentencing court abuses its discretion when it imposes a sentence that is disproportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 636, 654; 461 NW2d 1 (1990). The sentencing guidelines do not apply to habitual offenders, *People v Gatewood*, 450 Mich 1025; 546 NW2d 252 (1996), and may not be considered on appeal in determining an appropriate sentence for an habitual offender, *People v Gatewood (On Remand)*, 216 Mich App 559, 560; 550 NW2d 265 (1996).

Although a trial court abuses its discretion when it imposes the maximum possible sentence in the face of compelling mitigating circumstances, *Milbourn, supra* at 653, a sentence within the statutory limits is proportionate when an habitual offender's underlying felony and criminal history demonstrate that he is unable to conform his conduct to the laws of society, *People v Hansford (After Remand)*, 454 Mich 320, 326; 562 NW2d 460 (1997). Here, in imposing the maximum sentence allowed by law, the trial court first noted that defendant committed the instant offense only a few days after being placed on parole for a previous felony. Second, defendant's presentence investigation report highlights the similarities between the present offense and the previous conviction, e.g., both offenses involved a car stolen from a General Motors lot in Flint. In light of these two facts, defendant's sentence is not disproportionate because defendant's actions demonstrate that he is unable to conform his conduct to the law.

Affirmed.

/s/ Gary R. McDonald

/s/ David H. Sawyer

/s/ Joel P. Hoekstra