STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LAWRENCE BUTLER, JR.,

Defendant-Appellant.

UNPUBLISHED
November 17, 1998

No. 201160
St. Joseph Circuit Court
LC No. 96-008300 FH

Before: Whitbeck, P.J., and Cavanagh and Neff, JJ.

PER CURIAM.

A jury convicted defendant Lawrence Butler, Jr. of delivery of less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv). The trial court sentenced defendant as an habitual offender, MCL 769.10; MSA 28.1082, to five and one-half to thirty years' imprisonment. He appeals as of right. We affirm.

I. Basic Facts

This conviction arose from a drug transaction that took place on March 21, 1996. Police officers testified that they used a confidential informant, one Greg Jones, to make the purchase from defendant. Before the transaction, the police searched both Jones and his car for contraband and money. The officers then placed a transmitter on Jones and gave him $60 for the transaction. Jones then drove to defendant's house. Over the transmitter, the police heard conversation between defendant and Jones, then heard what sounded like feet on stairs, after which they heard the rustling of paper, followed by more conversation between defendant and Jones. Jones left defendant's house and turned over to the police three rocks of crack cocaine together with $10. Jones testified that when he entered, defendant told him "I ain't got any," because defendant thought Jones was coming to collect on drugs that defendant owed him. After Jones told defendant he had money, defendant agreed to sell him drugs. Jones also admitted that he worked as an informant because he was facing three charges of delivery of cocaine and one charge of conspiracy to deliver cocaine. He further admitted that, while working for the police, he continued to both use and deliver drugs. Jones had delivered drugs for defendant the day before the transaction in this case. Defendant, however, denied selling drugs to

Jones. He said that when he told Jones, "I ain't got any," he thought Jones had come to borrow money.

II. Standard of Review

A. Sufficiency of the Evidence

This Court reviews a sufficiency challenge de novo. *People v Medlyn*, 215 Mich App 338, 340; 544 NW2d 759 (1996). In analyzing the sufficiency of the evidence, this Court's inquiry is limited to determining whether, evaluating the evidence in the light most favorable to the prosecution, a rational trier of fact could have found the elements of the offense beyond a reasonable doubt. *Jackson v Virginia*, 443 US 307, 319; 99 S Ct 2781; 61 L Ed 2d 560 (1979); *People v Wolfe*, 440 Mich 508, 516; 489 NW2d 748, amended 441 Mich 1201 (1992).

B. Addict Informer Instruction

This Court reviews a claim of failure to give a preliminary instruction, when the instruction is not mandated by statute, for abuse of discretion. See *People v Lucas*, 188 Mich App 554, 582; 470 NW2d 460 (1991); *Coles v Galloway*, 7 Mich App 93, 102; 151 NW2d 229 (1967).

C. Prosecutorial Misconduct

This Court reviews claims of prosecutorial misconduct to determine whether the defendant was denied a fair and impartial trial. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996).

D. Sentencing

In determining whether a sentence is disproportionate, this Court must determine whether the trial court abused its discretion. *People v Milbourn*, 435 Mich 630, 653; 461 NW2d 1 (1990).

III. Sufficiency of the Evidence

Defendant contends that the evidence was insufficient to support the jury's verdict. We disagree. Jones testified that defendant delivered the drugs to him. His testimony was corroborated by the police officers, who listened to the transaction taking place. Defendant argues that Jones was not credible and that the police work in this case was sloppy. Defendant's arguments all go to the credibility of witnesses and the weight of the evidence. The determination of witness credibility is the function of the jury and not of this Court. *Wolfe, supra* at 514-515; *People v McFall*, 224 Mich App 403, 412; 569 NW2d 828 (1997). Juries see and hear witnesses and are in a much better position to decide the weight and credibility of testimony. *Wolfe, supra* at 515, citing *People v Palmer*, 392 Mich 370, 375-376; 220 NW2d 393 (1974). We conclude that the evidence was sufficient to support defendant's conviction.

IV. Addict Informer Instruction

Defendant contends that the court erred in denying defendant's request to give a preliminary instruction on Jones' status as an addict informer. See CJI2d 5.7. We disagree. The trial court denied defendant's request for the preliminary instruction, saying that a general preliminary instruction that told the jury to listen to any promises in evaluating credibility was adequate. See CJI2d 2.6. The trial court gave the jury the addict informer instruction before the jury retired to deliberate. A trial court is advised to give the addict informer instruction when the uncorroborated testimony of an addict informant is the only evidence linking the accused with the offense. See Use Note, CJI2d 5.7; *People v McKenzie*, 206 Mich App 425, 432; 522 NW2d 661 (1994). However, in this case, Jones' testimony was corroborated by the police officers. As a result, the trial court was under no obligation to give the instruction. However, the trial court chose to give the jury the instruction before it retired. We see no abuse of discretion in doing so.

V. Prosecutorial Misconduct

A. Unpreserved Claims

Defendant contends that the prosecutor engaged in eight separate acts of misconduct. We disagree. Six of defendant's eight claims were not properly preserved because defendant failed to object. We are precluded from review of unpreserved claims of prosecutorial misconduct unless a curative instruction could not have cured 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).

B. The Prosecutor's Opening Statement

Four of defendant's claims focus on the prosecutor's opening statement. Defendant cites no authority in support of his claims on two of the four claims. Generally, this Court will not review a claim not supported by citation to authority. See *People v Smith*, 203 Mich App 136, 137; 512 NW2d 5 (1993). We decline to depart from this general rule in this case.

In the third claim, defendant argues that, by saying, "You will hear rustling of paper indicating the transaction took place," and characterizing a conversation on the tape, saying, "[I]t's very difficult to understand. I think you'll have trouble understanding it," the prosecutor provided testimony and minimized the cross-examination of Jones and the police witnesses concerning the audiotape. However, opening argument is the appropriate time for the prosecutor to make a statement of the people's case and the facts to be presented at trial. MCR 6.414(B); *People v Johnson*, 187 Mich App 621, 626; 468 NW2d 307 (1991). The prosecutor is not limited to reciting physical facts; he or she may properly relate and draw reasonable inferences from such information. *People v Nard*, 78 Mich App 365, 375; 260 NW2d 98 (1977). The quality of the tape was the subject of testimony, and one of the officers testified that, in his experience, the rustling sound on the tape was consistent with the sound of money. Even if this statement was improper, an instruction to disregard could have cured the prejudicial effect. *Johnson, supra* at 627.

Defendant's fourth claim with respect to the opening statement is that, by saying that "[T]here may or may not be a defense. Mr. Butler is under absolutely no obligation to make any defense, and if he does there will be a defense," the prosecutor improperly shifted the burden of proof. A prosecutor may not comment on the defendant's failure to testify or otherwise improperly shift the burden of proof. See *People v Dean*, 103 Mich App 1, 6; 302 NW2d 317 (1981). Viewed in context, the statement by the prosecutor served as a guide for the jury as to the order in which trial would proceed. Even if erroneous, any prejudicial effect could have been cured by an instruction to disregard. *Johnson, supra* at 627.

C. Testimony As To A Street Name

Defendant claims that, by eliciting testimony that he had a nickname, "Buggy," the prosecutor prejudiced the jury by suggesting that, by using a street name, he was involved in criminal activity. He cites no authority in support of this argument. We decline to review this claim in the absence of citation to authority. *Smith, supra*.

D. Agreement With The Informant

Defendant claims that the prosecutor committed misconduct by eliciting evidence of the nature of the agreement between Jones and the police, that included a promise to testify truthfully. Defendant characterizes this testimony as improperly suggesting to the jury that the prosecutor has special knowledge of Jones' truthfulness. We disagree. The prosecutor has a duty to disclose promises made to obtain an accomplice's testimony. See *People v Atkins*, 397 Mich 163, 173; 243 NW2d 292 (1976). The simple reference to an agreement containing a promise to testify truthfully is not in itself grounds for reversal. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). Error is committed only if the prosecutor conveys to the jury a message that the prosecutor has some special knowledge or facts indicating the witness' truthfulness. *Id*. at 277. Nothing in the record supports this conclusion.

E. "Expert" Testimony

Defendant contends that the prosecutor committed misconduct when he elicited from James Hart, the officer in charge of the investigation, testimony about the cocaine trade in Three Rivers. At trial, defendant objected to this testimony, contending that Hart was getting into opinion testimony and was not qualified as a "DEA expert." On appeal, defendant contends that the prosecutor's questions amounted to vouching for a prosecution witness. An objection based on one ground is insufficient to preserve an appellate attack on a different ground. *People v Winchell*, 171 Mich App 662, 665; 430 NW2d 812 (1988). Therefore, this issue is unpreserved. In any event, the prosecutor in this case questioned Hart about his experience, then elicited testimony about his field of expertise. Nothing in the record can be construed as the prosecutor vouching for Hart's credibility.

F. Failure To Bring Witnesses To Testify

In his remaining claim of misconduct, defendant contends that the prosecutor committed misconduct when he cross-examined defendant extensively about his failure to bring witnesses to testify on his behalf. Defendant had testified that two men, Donald Workman and Brian Burton, were in the house when Jones came over. This contradicted Jones' testimony that Workman was not at the house. The prosecutor then examined defendant about his failure to obtain the presence of Burton. The prosecution may cross-examine a defendant as to the defendant's excuse for not producing a witness. *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995). We see no evidence of misconduct in any of the actions raised by defendant.

VI. Sentencing

Defendant contends that the court abused its discretion in assessing a sentence of five and one-half to thirty years' imprisonment because the sentence is disproportionate to the crime committed. In assessing sentence, the trial court may consider, among other issues, (1) the severity of the offense, *People v Hunter*, 176 Mich App 319, 320-321; 439 NW2d 334 (1989); (2) the nature of the crime, *id*.; (3) the circumstances surrounding the criminal behavior, *People v Ross*, 145 Mich App 483, 495; 378 NW2d 517 (1985); (4) the defendant's attitude toward his criminal behavior, *id.*; and (5) the defendant's criminal history, *id.* The trial court must articulate on the record its reasons for the sentence assessed. *People v Coles*, 417 Mich 523, 550; 339 NW2d 440 (1983), modified in part on other grounds, *Milbourn, supra*. Here, the trial court articulated its reasons for the sentence assessed as (1) defendant's prior record, (2) his parole status at the time of the offense, and (3) the fact that defendant admitted when he was arrested that he had been using cocaine, then later denied it.

Defendant contends that the trial court abused its discretion because (1) it ignored the many positive factors involving defendant, (2) the case was characterized by the trial court as "close," and the evidence not overwhelming and (3) the trial court sentenced him in part for denying he committed the offense. We disagree. As for defendant's first argument, the trial court expressly noted defendant's job, home ownership, and "acceptance or [sic] responsibility" as positive factors. Defendant contends that the trial court should also have taken into account his honorable discharge from the Navy and the fact that he obtained a GED while incarcerated. Both military record and education may be considered in determining what sentence to assess. See *People v Perry*, 216 Mich App 277, 280, 282; 549 NW2d 42 (1996); *People v Vandenboss*, 25 Mich App 702, 703; 181 NW2d 622 (1970). However, there is no per se rule for how much weight to give to these factors, or whether a trial court need consider these particular factors at all in assessing sentence.

Defendant next argues that, because the trial court said it was a close case and the evidence was not overwhelming or compelling, it should have taken this into account when assessing sentence. It is not improper for a trial court to disagree with a jury verdict. See *In re Hocking*, 451 Mich 1, 12; 546 NW2d 234 (1996). But nothing in the judge's comments indicate that he disagreed with the verdict. Even if the judge did not take into account the strength of the evidence, he did not abuse his discretion in failing to do so.

As to defendant's claim that the trial court may have sentenced him for asserting his innocence, the judge noted that defendant was "in denial." Defendant's argument ignores the trial court's express

language. The statement by the trial court was that defendant had admitted that he had been using cocaine, but later, when being interviewed for the presentence investigation report, he was "in denial of cocaine." The trial court clearly referred to defendant's *use* of cocaine, not the delivery of cocaine. The trial court's observation was based on the presentence investigation report, which said that defendant first admitted to a parole officer that he was currently using cocaine, then later denied the cocaine use. Defendant had also admitted to use of cocaine and alcohol since at least 1983. Alcohol was a factor in defendant's first felony conviction. At the time of the report, defendant showed a minimum of thirteen years of drug use.

Drug abuse may be considered in assessing sentence. See *People v Pohl*, 202 Mich App 203, 212-213; 507 NW2d 819 (1993). The trial court did not abuse its discretion in concluding that defendant was "in denial of cocaine."

A trial court does not abuse its discretion in giving a sentence within the statutory limits established by the Legislature when an habitual offender's underlying felony, in the context of his previous felonies, evidences that the defendant has an inability to conform his conduct to the laws of society. *People v Hansford (After Remand)*, 454 Mich 320, 326; 562 NW2d 460 (1997). In this case, defendant had two prior felony convictions, one for delivery of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv), and one for attempted carrying a firearm with unlawful intent, MCL 750.222; MSA 28.419; MCL 750.92; MSA 28.287. In addition, defendant had a prior misdemeanor conviction for attempted absconding, MCL 750.199a; MSA 28.396(1). Furthermore, defendant was on parole for his earlier drug conviction when he committed the offense here. A trial court may consider parole status at the time of the offense as an aggravating factor in sentencing. See *People v Maben*, 208 Mich App 652, 655; 528 NW2d 850 (1995). Just as in *Hansford*, defendant's conduct displays an inability to reform.

Given defendant's prior criminal record, his parole status at the time he committed the offense in the present case, and his substance abuse problem together with his inability to admit his problem, the trial court did not abuse its discretion in sentencing him to five and one-half to thirty years.

Affirmed.

/s/ William C. Whitbeck
/s/ Mark J. Cavanagh
/s/ Janet T. Neff