STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NATHANIEL WOODS JR.,

Defendant-Appellant.

UNPUBLISHED
March 12, 1999

No. 205587
Cass Circuit Court
LC No. 96-008701 FH

Before: Gribbs, P.J., and Saad and P.H. Chamberlain*, JJ.

MEMORANDUM.

Following a jury trial, defendant was convicted of perjury committed in court, MCL 750.422; MSA 28.664. He was sentenced to a prison term of three to twenty-two and one-half years as an habitual offender, second offense, MCL 769.10; MSA 28.1082. He appeals by right and we affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E)
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On appeal, defendant first contends that he is entitled to a new trial because the trial court failed to instruct the jury on the element of materiality, as required by *United States v Gaudin*, 515 US 506; 115 S CT 2310; 132 L Ed 2d 444 (1995). We disagree. Contrary to defendant's argument, the lack of an instruction on the element of materiality was harmless under the circumstances in this case. See *United States v Johnson*, 520 US 461; 117 S Ct 1544; 137 L Ed 2d 718 (1997); *People v Woods*, 416 Mich 581, 600-601; 331 NW2d 707 (1982).

Defendant's testimony at the trial of Katarri Edwards for carrying a concealed weapon concerned the key issue of whether Edwards possessed the gun in question. Clearly, defendant's testimony that it was he, not Edwards, who possessed the weapon was the kind of statement which, if believed, "could have affected the course or outcome of the proceeding." *People v Honeyman*, 215 Mich App 687, 692; 546 NW2d 719 (1996). Under the circumstances, the jury would have had to acquit Edwards if they believed that only defendant had possession of the gun. Whether the jury actually believed and "necessarily" relied upon defendant's testimony to find Edwards not guilty is unimportant, so long as the testimony at least "could have" affected the jury's decision.

We also reject defendant's challenge to his twenty-two and one-half year maximum sentence as an habitual offender, second offense. Whether a trial court has failed to recognize its discretion in setting the maximum sentence for an habitual offender is only of concern when there is some indication in the record that the trial court believed it had no discretion in the matter; the mere fact that the trial court happens to impose the highest allowable maximum without discussing its discretion to impose a shorter maximum is not enough. See *People v Beneson*, 192 Mich App 469, 471; 481 NW2d 799 (1992). Moreover, the fact that the trial court advised defendant that the habitual offender supplementation increases the maximum "possible" penalty to twenty-two and one-half years actually tends to indicate that the trial court was aware of its discretion to impose a lesser maximum. See *People v Farah*, 214 Mich App 156; 542 NW2d 321 (1995), (judge's advice that maximum penalty is "up to" twenty years indicates judge's recognition of discretion). We find no abuse of discretion here. *People v Hansford (After Remand)*, 454 Mich 320, 326; 562 NW2d 460 (1997). See also *People v Cervantes*, 448 Mich 620; 532 NW2d 831 (1995).

Affirmed.

/s/ Roman S. Gribbs
/s/ Henry William Saad
/s/ Paul H. Chamberlain