

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RONALD DUPREE BRACKETT,

Defendant-Appellant.

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UNPUBLISHED

December 26, 2000

No. 213140

Genesee Circuit Court

LC No. 98-001910-FC

Before: Kelly, P.J., and White and Wilder, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession of less than twenty-five grams of cocaine, MCL 333.7403(2)(a)(v); MSA 14.15(7403)(2)(a)(v), assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The trial court sentenced defendant to concurrent terms of three to four years' imprisonment for the possession of cocaine conviction, and five to ten years' imprisonment for the assault with intent to do great bodily harm less than murder conviction, to be served consecutive to the two-year sentence for the felony-firearm conviction. Defendant appeals as of right. We affirm defendant's convictions, but remand to the trial court for imposition of a minimum sentence of two years and eight months' imprisonment for the possession of cocaine conviction.

Defendant first argues that the prosecutor improperly commented during cross-examination and closing arguments on defendant's presence during trial and his ability to fabricate his testimony to conform to the evidence. We disagree. Because defendant failed to object to the alleged improper remarks at trial, we will review the claim only if a curative instruction could not have eliminated the prejudicial effect of the prosecutor's comments or if failure to review the issue would result in a miscarriage of justice. *People v Avant*, 235 Mich App 499, 512; 597 NW2d 864 (1999); *People v Ullah*, 216 Mich App 669, 679; 550 NW2d 568 (1996).

Claims of prosecutorial misconduct are reviewed to determine whether a defendant was denied a fair and impartial trial. *Avant, supra* at 508. Prosecutorial misconduct is reviewed on a case-by-case basis, considering contested remarks in context, as a whole, and in light of defense

arguments. *People v Phillips*, 217 Mich App 489, 497; 552 NW2d 487 (1996); *People v Lawton*, 196 Mich App 341, 353, 355; 492 NW2d 810 (1992).

When there is evidence to support an inference that a defendant fabricated his testimony, a prosecutor may comment that the defendant's presence at trial provided him the opportunity to fabricate or conform his testimony to the evidence. *People v Buckey*, 424 Mich 1, 16; 378 NW2d 432 (1985). A prosecutor may comment upon the testimony, draw inferences from it, and argue that a witness, including a defendant, is not credible. *Id.* at 14-15. Further, the United States Supreme Court recently held that a prosecutor's comments that the defendant had an opportunity to hear other witnesses testify and to tailor his own testimony accordingly did not deprive the defendant of his Sixth Amendment right to be present at trial and to confront the witnesses against him, his Fifth and Sixth Amendment rights to testify on his own behalf, or his Fourteenth Amendment right to due process. *Portuondo v Agard*, \_\_\_ US \_\_\_; 120 S Ct 1119, 1127; \_\_\_ L Ed 2d \_\_\_ (2000).

The evidence presented in this case gave rise to an inference of fabrication by defendant. Keon Lard testified that the shooting was instigated by a verbal and physical fight he had with Hiesser, defendant's cousin, a few weeks prior to this incident. Lard testified that on the day of the shooting, he was riding his bicycle when he noticed defendant standing next to Hiesser, and observed defendant reaching for a gun. According to Lard, he jumped off his bike to run away, but was struck by a bullet after he turned around to see where the gunshots were coming from. Lard did not actually see defendant shoot him, but saw gunfire from defendant's gun. Defendant, on the other hand, testified that Lard had instigated the fight by shooting at Hiesser's car a few days before this incident while defendant and Hiesser were in the vehicle. Defendant stated that he did not actually see Lard shooting the car, but heard from others that Lard shot the vehicle. Defendant testified that on the day of the shooting, he observed Lard on his bicycle ride past defendant toward Hiesser and reach behind his back, presumably for a weapon, before jumping off the bike. Defendant heard three gunshots, but did not retrieve his gun from the vehicle until after the shooting. Defendant's testimony was in direct conflict with Lard's testimony. The prosecutor simply argued that the fact that defendant heard all the testimony and Lard did not, and therefore could not tailor his testimony, made Lard's testimony more credible. These comments were not improper, *Buckey, supra* at 16, and did not deprive defendant of his constitutional protections. *Portuondo, supra* at 1127.

Defendant next argues that his sentence for the possession of less than twenty-five grams of cocaine conviction violates the two-thirds rule of *People v Tanner*, 387 Mich 683, 690; 199 NW2d 202 (1972). We agree. We review sentencing determinations for an abuse of discretion. *People v Fetterley*, 229 Mich App 511, 525; 583 NW2d 199 (1998). An abuse of discretion occurs when an unbiased person, considering the facts upon which the trial court relied, would conclude that there was no justification or excuse for the decision. *People v Orzame*, 224 Mich App 551, 557; 570 NW2d 118 (1997).

A sentence with a minimum term greater than two-thirds of the maximum term violates the indeterminate sentencing act and is improper. *People v Thomas*, 447 Mich 390, 392; 523 NW2d 215 (1994); *Tanner, supra* at 690. The appropriate remedy for a violation of this rule is to

reduce the minimum term to two-thirds of the maximum term, or, in other words, to set aside the unlawful excess. MCL 769.24; MSA 28.1094; *Thomas, supra* at 393-394.

Defendant's three-year minimum sentence for the possession of cocaine conviction exceeds two-thirds of his four-year maximum term. *Thomas, supra* at 392; *Tanner, supra* at 690. Defendant's minimum term must, therefore, be reduced to two years and eight months, or two-thirds of his four-year maximum term. MCL 769.24; MSA 28.1094; *Thomas, supra* at 393-394. Accordingly, we remand for correction of defendant's sentence.

Affirmed in part and remanded to the trial court for imposition of a minimum sentence of two years and eight months' imprisonment for defendant's possession of less than twenty-five grams of cocaine conviction. We do not retain jurisdiction.

/s/ Michael J. Kelly

/s/ Helene N. White

/s/ Kurtis T. Wilder