

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL VEAL,

Defendant-Appellant.

UNPUBLISHED

September 21, 2001

No. 222823

Ingham Circuit Court

LC No. 99-074374-FH

Before: O’Connell, P.J., and White and Smolenski, JJ.

PER CURIAM.

Defendant appeals as of right from his jury conviction of assault with intent to cause great bodily harm less than murder, MCL 750.84. The trial court sentenced defendant to a term of seven to fifteen years’ imprisonment, as an habitual offender.¹ We affirm.

Defendant contends that the prosecution presented insufficient evidence to support his assault conviction. We disagree. When reviewing a sufficiency challenge, we must resolve all conflicts with regard to the evidence in the light most favorable to the prosecution. *People v Lee*, 243 Mich App 163, 167; 622 NW2d 71 (2000). Viewed in that light, we conclude that the evidence was sufficient to show that the essential elements of the crime were proven beyond a reasonable doubt.

In *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997), this Court explained the essential elements of the charge of assault with intent to commit great bodily harm less than murder:

Assault with intent to commit great bodily harm less than murder requires proof of (1) an attempt or threat with force or violence to do corporal harm to another (an assault), and (2) an intent to do great bodily harm less than murder. Assault with intent to commit great bodily harm less than murder is a specific intent crime. [Citations omitted.]

¹ Simultaneously, the trial court sentenced defendant to a concurrent term of two to forty-eight months’ imprisonment for absconding. MCL 750.199a. Because defendant does not challenge the absconding sentence here, we do not address it.

First, the evidence supports a determination that defendant assaulted the victim. Five eyewitnesses testified that an assailant deliberately struck the victim with a stool from behind. Three witnesses positively identified defendant as the assailant. One of those three testified that defendant threatened him with the stool when he attempted to render the victim assistance. Second, the evidence supports a determination that defendant intended to cause great bodily harm when he struck the victim. Witnesses testified that defendant swung the stool with full force, hitting the side of the victim's head with a "thud." The blow was so powerful that the victim staggered and fell to the ground. Further, the victim suffered a blowout fracture of his orbital bone, requiring reconstructive surgery. Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime. *Lee, supra* at 167-168. The jury may also infer a defendant's specific intent from circumstantial evidence. *People v Denton*, 138 Mich App 568, 573; 360 NW2d 245 (1984). We conclude that the evidence was sufficient to establish the essential elements of the crime beyond a reasonable doubt.

Defendant next argues that the trial court improperly admitted "gang hand sign" evidence at trial. This evidence consisted of photographs taken at the scene and testimony about the pictures. Defendant also argues that the prosecutor engaged in misconduct during closing argument when she discussed this evidence. We disagree.

Defendant stipulated to admission of the photographs at issue here. Defendant's stipulation constitutes a waiver that extinguished any error related to the admission of the photographs. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). Further, defendant failed to object to the testimony related to the "gang hand signs." Therefore, we review this issue for plain error. *People v Carines*, 460 Mich 750, 764-765; 597 NW2d 130 (1999). We conclude that defendant has failed to establish grounds for relief on this issue. Although the "gang hand sign" testimony was marginally relevant at best, we find that admission of the testimony was not outcome determinative. Three eyewitnesses identified defendant as the assailant. The ample evidence of defendant's guilt and the clear testimony that defendant was not suspected of gang involvement leads us to the conclusion that defendant's argument fails the plain error test.

Defendant also failed to object to the alleged prosecutorial misconduct. Appellate review of this issue is therefore precluded, unless a curative instruction could not have eliminated possible prejudice or a failure to consider the issue would result in a miscarriage of justice. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). Issues of prosecutorial misconduct are decided case by case, with the reviewing court examining the pertinent portion of the record and evaluating the prosecutor's remarks in context. *Id.* Further, prosecutorial misconduct "cannot be predicated on good-faith efforts to admit evidence." *Id.*; see also *People v Missouri*, 100 Mich App 310, 328-329; 299 NW2d 346 (1980). A prosecutor is entitled to introduce evidence that she legitimately believes will be accepted by the court, as long as that attempt does not involve bad faith by the prosecutor, or actual prejudice to the defendant. *Id.* The ultimate test is whether the defendant was denied a fair trial. *Noble, supra* at 660.

We conclude that defendant has failed to demonstrate prosecutorial misconduct relating to the "gang hand sign" testimony. The prosecutor argued that this evidence was relevant to explain why the college dance erupted into such a violent altercation. The prosecutor also

stressed that defendant was not accused of gang membership. We are not convinced that the prosecutor acted in bad faith or that defendant suffered actual prejudice. Moreover, any potential prejudice to defendant could have been cured with a timely objection and curative instruction. *Id.* at 661. Therefore, we conclude that defendant was not denied a fair trial.

Defendant next argues that the prosecutor engaged in misconduct during closing argument by vouching for the truthfulness of prosecution witnesses and by interjecting the prosecutor's personal opinion of defendant's guilt and credibility. We disagree.

Again, this issue is unpreserved because defendant failed to object at trial. Therefore, appellate review of the alleged misconduct is precluded unless a curative instruction could not have eliminated possible prejudice or failure to consider the issue would result in a miscarriage of justice. *Id.* at 660. After analyzing each of the allegedly improper statements, we find no prosecutorial misconduct. The prosecutor based her arguments on the evidence and did not imply that the jury should make its decision on any basis other than the evidence presented. Moreover, we conclude that any potential prejudice to defendant could have been cured with a timely objection and curative instruction. Therefore, appellate review is precluded. *Id.* at 661.

Defendant next argues that he was improperly sentenced as an habitual offender. Defendant does not contest the existence of his prior conviction. Rather, defendant argues that the trial court failed to make a determination on the record that the prior conviction existed. Defendant's argument is without merit.

When sentencing an habitual offender, the trial court must determine the existence of the defendant's prior conviction or convictions, either at sentencing or at a separate hearing scheduled for that purpose before sentencing. MCL 769.13(5). The existence of the prior conviction may be established by any evidence relevant for that purpose, including but not limited to: (1) a copy of a judgment of conviction, (2) a transcript of a prior trial, plea-taking or sentencing proceeding, (3) information contained in a presentencing report, or (4) a statement of the defendant. MCL 769.13(5).

In this case, defendant's former conviction was established by the information in the presentencing report. Further, during sentencing, defense counsel acknowledged defendant's prior felonious assault conviction. As noted above, the trial court sentenced defendant simultaneously on his assault and absconding convictions. The record reflects that defendant struck a plea bargain with the prosecutor, under which the prosecutor agreed to drop any habitualization related to the absconding charge. Defendant reached no such plea bargain regarding the assault charge. We conclude that defendant is not entitled to resentencing based on the provisions of MCL 769.13(5).

Finally, defendant argues that his sentence violates the principle of proportionality. We disagree. While a sentence that is within the sentencing guidelines range is presumptively proportionate, sentencing guidelines are not applicable to habitual offenders. *People v Alexander*, 234 Mich App 665, 679; 599 NW2d 749 (1999). Rather, this Court's inquiry with regard to habitual offenders is whether the sentencing court abused its discretion. *Id.* A sentence constitutes an abuse of the trial court's discretion if it is disproportionate to the seriousness of the

circumstances surrounding the offense and the offender. *People v Green*, 228 Mich App 684, 698; 580 NW2d 444 (1998).

The sentencing court determined that this crime, in conjunction with defendant's prior conviction for felonious assault, demonstrated that defendant was a threat to the physical safety of others. We agree. Further, we note that defendant committed the instant crime while on probation for the felonious assault conviction, and he had a history of several probation violations. The trial court applied the habitual offender enhancement and sentenced defendant to a term of seven to fifteen years' imprisonment. This sentence fell within the legislatively created punishment for this offense. MCL 750.84; MCL 769.10. We find that the brutality of this attack, in conjunction with defendant's criminal history, supports the sentence imposed by the trial court.

Affirmed.

/s/ Peter D. O'Connell

/s/ Helene N. White

/s/ Michael R. Smolenski