

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CAROLYN ANTONY SAMMONS,

Defendant-Appellant.

UNPUBLISHED

June 7, 1996

No. 172421

LC No. 93-7368-FC

Before: Kelly, P.J., and Bandstra and S. B. Miller,* JJ.

PER CURIAM.

Defendant appeals by right her conviction of two counts of first degree criminal sexual conduct stemming from defendant's role in a sexual assault in which defendant and another girl held the victim down while she was raped. We affirm.

Defendant's first claim of error is that she was denied a fair trial due to the allegedly improper remarks made by the prosecutor during voir dire. Because defendant failed to timely and specifically object, appellate review is precluded unless an objection could not have cured the error or failure to review the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Defendant was not prejudiced by prosecutorial comments that were merely attempts in the course of the voir dire process to discover whether potential jurors had biases that would have prevented them from bringing in a verdict of guilty. *People v Burwick*, 133 Mich App 141, 148; 348 NW2d 307 (1984). Furthermore, the record shows that defendant indicated that the jury was satisfactory. Both sides exercised their right to peremptorily challenge particular jurors. Thus, no miscarriage of justice occurred and defendant's claim is foreclosed from review.

Defendant next contends that the admission of testimony regarding the out-of-court statements made by the males involved in the assault violated her Sixth Amendment right to confrontation under *Bruton v United States*, 391 US 123; 88 S Ct 1620; 20 L Ed 2d 476 (1968). In order for the rule in *Bruton* to apply, there must be (1) a nontestifying codefendant at a joint trial; (2) a confession by that

* Circuit judge, sitting on the Court of Appeals by assignment.

codefendant that is admitted at trial; and (3) a portion of the confession that incriminates the other defendant. *Id.*, 391 US at 135-136. However, in this case the statements were not those of a codefendant at a joint trial because defendant was tried individually. Moreover, although the men admitted having had sexual relations with the victim, they did not admit to rape. Thus, their statements were not confessions of wrongdoing, nor did the statements implicate defendant in any way. Furthermore, even where a violation of the *Bruton* rule occurs, this Court held in *People v Harris*, 201 Mich App 147, 150; 505 NW2d 889 (1993), that reversal is not automatically required if the properly admitted evidence is strong and the prejudicial effect of the statement is insignificant in comparison. In this case, the victim's version of the incident was substantially corroborated by both an eyewitness and physical evidence. In addition, an audiotape of defendant's statement to police was played for the court in which she admitted her role in the assault after executing a valid written waiver of her *Miranda* rights. Thus, the statements cannot be considered outcome determinative. Defendant's constitutional rights were not compromised.

Defendant's third claim of error is that the trial court should have sua sponte instructed the jury regarding lesser included offenses. Because defendant acceded to the instructions as given, this issue is not properly before this Court. *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993). Moreover, the failure to instruct did not result in manifest injustice because defendant grounded her defense on the premise that no sexual assault occurred. "Given this posture of the case, there was no reason for the parties to focus on the specifics of individual penetrations. In this context, the failure to give an instruction [on CSC II, III or IV] . . . in no way impeded the defense or denied the defendant a fair trial." *Id.* at 505.

Defendant also claims that the trial court violated the principle of proportionality by imposing a minimum twenty-year sentence in the absence of any prior felony convictions or a juvenile record. This issue has been waived on appeal because the sentence is within the guidelines and neither defendant nor her attorney presented unusual circumstances to the lower court before sentence was imposed. *People v Sharp*, 192 Mich App 501, 505-506; 481 NW2d 773 (1992).

Finally, defendant asserts that her attorney's failure to object to the prosecutor's remarks or to the admission of testimony regarding the statements of the males involved in the assault or to request that the jury be charged with lesser included offenses were errors so serious that defendant was denied the effective assistance of counsel at trial. To establish ineffective assistance of counsel, the defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Stanaway, supra* at 687-688. Defendant has not met her burden of proving that her representation at trial fell below the standard of reasonableness or prevailing professional norms. Furthermore, in light of defendant's own admission to the police and the fact that the victim's version of the assault was corroborated by at least one eyewitness, it is extremely unlikely that the outcome of the trial would have been different even if counsel had performed as defendant

contends he should have. Thus, we find no merit in defendant's claim that she was denied the effective assistance of counsel.

Affirmed.

/s/ Michael J. Kelly

/s/ Richard P. Bandstra

/s/ Stephen B. Miller