STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHRISTOPHER YOUNG,

Defendant-Appellant.

UNPUBLISHED
July 19, 1996

No. 171953
LC No. 93-005728

Before: Neff, P.J., and Fitzgerald and C.A. Nelson,* JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317; MSA 28.549, and was sentenced to twenty to thirty years' imprisonment. He appeals as of right, and we affirm.

While defendant was detained in the Wayne County Jail on a charge of writing a check for non-sufficient funds, Sgt. Donald Haigh of the Westland Police Department visited defendant to question him about the murder of Jeffrey Dansby. Defendant agreed to submit to a polygraph test. During the polygraph test, defendant became emotionally upset and said "I should talk with someone." The polygraph examiner replied "I'm someone. You can talk with me." Defendant then confessed to the murder. Defendant claimed that Dansby attempted to force him at knifepoint to submit to sodomy. In the ensuing struggle, defendant seized the knife and mortally stabbed Dansby. After the murder, defendant stole Dansby's car and several electronic appliances.

In his first issue on appeal, defendant claims that the trial court erred in denying his motion to suppress the statements he made to the police in the Wayne County Jail. Defendant raises a two-fold argument with regard to the interrogation. First, he claims that his Sixth Amendment rights were violated when Haigh interrogated him outside the presence of his attorney when he had asserted his right to counsel with regard to the non-sufficient funds case. Second, he claims that his Fifth Amendment rights were violated when the officers continued to question him after he requested an attorney.

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

Both the federal and state constitutions guarantee the right of an accused person to the assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20. This right entitles a person to the assistance of counsel once judicial proceedings have been initiated against that person. *People v Gonyea*, 421 Mich 462, 469; 365 NW2d 136 (1984) (citing *Brewer v Williams*, 430 US 387, 398; 97 S Ct 1232; 51 L Ed 2d 424, reh den 431 US 925; 97 S Ct 2200; 53 L Ed 2d 240 (1977)). Any interrogation after that date without the presence of an attorney constitutes a violation of the right to counsel unless the defendant has waived the right. *Id.*

Defendant's first argument fails because the right to counsel is offense-specific. *McNeill v Wisconsin*, 501 US 171; 111 S Ct 2204; 115 L Ed 2d 158, 166, 171 (1991). The fact that a defendant has invoked his Sixth Amendment rights with regard to one charge does not preclude police from interrogating the defendant with regard to charges for which the Sixth Amendment has not yet attached. *People v Butler*, 193 Mich App 63, 68; 483 NW2d 430 (1992). Although defendant had asserted his right to counsel in the Canton case, he did not do so in the Westland case. The police, therefore, did not need to obtain a waiver of his rights before questioning him about the Westland homicide. Furthermore, defendant's Sixth Amendment right to counsel had not yet attached in the murder case. This right attaches when adversarial proceedings are commenced against a defendant. *Id.* at 68-69, n 4. No adversarial proceedings had been commenced against defendant at the time the police questioned him with regard to the homicide

In his second argument, defendant claims that his Fifth Amendment rights were violated when the police continued to question him after he asserted his right to counsel. According to the law of *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966), police must warn a suspect, prior to a custodial interrogation, that he has the right to counsel. *People v Myers*, 158 Mich App 1, 8; 404 NW2d 677 (1987). If the individual requests an attorney, the police must cease questioning until counsel has been made available to him. *Id.*

We do not construe defendant's statement "I should to talk with someone" as a request for an attorney. Assuming that the statement could be construed as an ambiguous request for an attorney, the statement would not have required the police to cease questioning. The United States Supreme Court has held that law enforcement officers are not required to cease questioning immediately upon the making of an ambiguous or equivocal reference to an attorney. *Davis v United States*, __ US __; 114 S Ct 2350, 2356-2357; 129 L Ed 2d 362 (1994). Our Court has adopted this rule. *People v Granderson*, 212 Mich App 673, 678; 538 NW2d 471 (1995). The trial court did not err in permitting the prosecution to introduce the statements.

Defendant next claims that the trial court erred in failing to instruct the jury on the doctrine of qualified self-defense. Defendant failed to request such an instruction. Therefore, the issue is not preserved for appellate review. *People v Hendricks*, 446 Mich 435, 440-441; 521 NW2d 546 (1994).

Next, defendant claims to have been prejudiced by his trial counsel's ineffective assistance. To raise an issue of ineffective assistance of counsel on appeal, the defendant must move for a new trial or for a hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973). *People v Armendarez*, 188 Mich App 61, 73-74; 468 NW2d 893 (1991). Defendant neither requested a *Ginther* hearing nor moved for a new trial. We decline to review this issue because the record to which we are limited does not establish that counsel's performance fell below an objective standard of reasonableness. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

Defendant claims that the sentencing court erred in assessing him twenty-five points for Offense Variable 3. A sentencing court has discretion to determine the number of points scored, provided the record contains evidence to adequately support a particular score. *People v Derbeck*, 202 Mich App 443, 449; 509 NW2d 534 (1993). Appellate review of a Sentencing Guidelines calculation is consequently limited. *Id.* The Sentence Review Committee strongly recommends that this Court uphold scoring decisions for which there is any supporting evidence.

Under OV 3, twenty-five points are assigned where there was an unpremeditated intent to kill, intent to do great bodily harm; or creation of a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result. *Michigan Sentencing Guidelines*, Second Edition, p 9 (1988). A score of twenty-five points for OV 3 is appropriate for a second-degree murder conviction where the killing is intentional, and death did not occur in a combative situation or in response to victimization. *People v Hoffman*, 205 Mich App 1, 24; 518 NW2d 817 (1994).

In the instant case, defendant was convicted of second-degree murder. The only evidence that defendant was victimized by Dansby, or that the murder took place in a combative situation, was defendant's statement to the police that he killed Dansby in order to defend himself from rape. The jury apparently did not give credence to this account, because it did not acquit defendant on the basis of self-defense or convict him of manslaughter. The scoring of OV 3 was, therefore, supported by the evidence.

Finally, defendant claims that his sentence, which is within the guidelines' range, violates the principle of proportionality. *People v Milbourn*, 435 Mich 630, 657-658; 461 NW2d 1 (1990). Sentences within the guidelines are presumed proportionate unless unusual circumstances are present. *People v Harrington*, 194 Mich App 424, 431; 487 NW2d 479 (1992). Here, the trial court sentenced defendant at the bottom third of the sentencing range. Defendant has failed to present any unusual circumstances that would warrant a downward departure from the minimum recommended guidelines' range. The sentence imposed is proportionate to the circumstances surrounding the offense and the offender.

Affirmed.

/s/ Janet T. Neff
/s/ E. Thomas Fitzgerald
/s/ Charles A. Nelson