STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GEORGE VERNON PETERSEN,

Defendant-Appellant.

UNPUBLISHED
July 30, 1996

No. 177300
LC No. 93-013603

Before: Hood, P.J., and Markman and A. T. Davis,* JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction for first-degree premeditated murder in the killing of his father. MCL 750.316; MSA 28.548. Defendant was sentenced to life imprisonment. We affirm.

Defendant argues that the trial court erred in failing to suppress his tape recorded statement to police officers in which he confessed to the killing because the statement was involuntarily made. We disagree.

> In evaluating the voluntariness of a confession, this Court is guided by the factors articulated by our Supreme Court in *People v Cipriano*, 431 Mich 315; 429 NW2d 781 (1988). In reviewing a trial court's determination regarding voluntariness, the Court examines the entire record and makes an independent determination. Nonetheless, we defer to the trial court's superior ability to view the evidence and the witnesses, and we will not disturb the court's findings unless they are clearly erroneous. *People v Marshall*, 204 Mich App 584; 517 NW2d 554 (1994).

People v Krause, 206 Mich App 421, 423; 522 NW2d 667 (1994). The voluntariness of a confession is a question for the trial court. *Marshall*, *supra*, p 587.

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

The ultimate test of admissibility of a confession is whether the totality of the circumstances under which it was made indicates that it was done freely and voluntarily. *Cipriano*, *supra*, p 334. In doing so, there are several factors which a court should consider in determining the voluntariness of a confession; albeit, the presence or absence of any one of the factors is not necessarily conclusive on the issue. *Id.* These factors include:

> [T]he age of the accused; his lack of education or intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse. *Id.* at 334.

After examining the record, we conclude that the trial court's findings were not clearly erroneous. Testimony indicated that, prior to questioning, defendant was given copies of his constitutional rights, was read these rights while following along, and signed the form indicating that he understood his rights as read. In addition, the testimony indicated that defendant appeared relaxed and not under the influence of alcohol or drugs at the time. Defendant did not request an attorney, did not request food or state that he was hungry, nor did he make any complaints about how he was being treated. Although defendant testified to the contrary, this Court defers to the trial court's superior ability to view the evidence and witnesses. *Marshall*, *supra*, p 587. Therefore, we conclude that the trial court's decision was not clearly erroneous.

Defendant next argues that he was denied his right to a fair trial due to the prosecutor's misconduct. Defendant failed to preserve this issue for appellate review. Therefore, we will review the issue only for manifest injustice. *People v Wofford*, 196 Mich App 275, 282; 492 NW2d 747 (1992). Manifest injustice will not be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction. *People v Cross*, 202 Mich App 138, 143; 508 NW2d 144 (1993). First, defendant argues that the prosecutor erroneously characterized its rebuttal witness as the court's witness, thereby misleading the jury. This is not borne out by our review of the transcript. Second, defendant argues that the prosecutor improperly argued facts not in evidence during his closing argument. We conclude that, to the extent the prosecutor drew unwarranted conclusions from the facts, they related to immaterial matters which could easily have been cured by objection if defense counsel had deemed them sufficiently important. Third, defendant argues that the prosecutor impermissibly shifted the burden of proof to defendant by his statements. Our review of the prosecutor's argument does not persuade us that there was anything inappropriate in his arguments. *People v Heath*, 80 Mich App 185; 263 NW2d 58 (1977). We find no manifest injustice here as a result of any of the alleged instances of prosecutorial misconduct, particularly where defendant failed to support two of his

arguments with any authority thereby precluding appellate review. *People v Piotrowski*, 211 Mich App 527, 530; 536 NW2d 293 (1995).

Defendant also argues that the prosecutor stated during closing argument that defendant's testimony regarding sexual abuse was mentioned for the first time at trial and thereby misled the jury. Our review of the prosecutor's statement does not lead us to the same conclusion. It is not at all clear that the prosecutor was attempting to undermine the veracity of defendant's assertion of sexual abuse with his observation that such information was "for the first time introduced yesterday." While the statement is ambiguous and susceptible to misinterpretation, we believe that the prosecutor was simply alluding to the fact that the sexual abuse issue had only recently been raised in the trial. The prosecutor made no references to prior occasions on which defendant could have raised this mitigating circumstance but failed to do so. Rather than seeking to place any burden upon defendant to have asserted this circumstance prior to trial, we believe that the prosecutor was making a rather innocuous temporal observation. In any event, defendant has not explained what prejudice he suffered as the result of this statement by the prosecutor apart from his allegation that the jury was thereby "fooled."

Defendant next argues that he was denied his right to a fair trial based upon the trial court's failure to properly instruct the jury, *sua sponte*, regarding the correct assessment of defendant's statement, and in refusing to instruct the jury on the lesser included offense of voluntary manslaughter. Defendant failed to preserve this issue for appellate review because he did not object below and failed to request the instructions in question. *People v Hendricks*, 446 Mich 435, 440-441; 521 NW2d 546 (1994). Therefore, appellate review again is limited to the manifest injustice standard. *People v Hoffman*, 205 Mich App 1, 22; 518 NW2d 817 (1994). We find no manifest injustice occurred where defendant failed to support his argument that the trial court should have instructed the jury, *sua sponte*, with any authority, and where defendant never requested the voluntary manslaughter instruction. *Piotrowski*, *supra*, p 530.

Finally, defendant argues that he was denied the effective assistance of counsel. Because defendant failed to make a motion for a new trial or evidentiary hearing, appellate review is limited to errors apparent on the record. *People v Wilson*, 196 Mich App 604, 612; 493 NW2d 471 (1992). In order to establish a claim of ineffective assistance of counsel, the defendant must show that counsel's performance was 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. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). The effective assistance of counsel is presumed and the defendant bears the heavy burden of proving otherwise. *Stanaway*, *supra*.

Defendant claims five specific instances of ineffective assistance of counsel. First, defendant claims that he was denied the effective assistance of counsel when his attorney failed to object to prejudicial hearsay testimony. We disagree. The testimony in controversy falls under the 'party admission against interest' exclusion from the hearsay rule. MRE 801d(2)(A). Therefore, we conclude that his attorney's failure to object to this questioning could not be in error.

Defendant's next alleged instance of ineffective assistance of counsel is that his attorney failed to request a jury instruction regarding the jury's role in properly assessing defendant's statement to the police. However, defendant took the stand and testified at trial that he made the statement to the police and committed the crime. As such, the nature of the statement and whether defendant made the statement was not in question; defense counsel's decision not to request an instruction could be considered reasonable trial strategy under the circumstances. In addition, defendant's third and fourth alleged instances of ineffective assistance of counsel are that his attorney failed to object to speculative testimony and testimony admitted without proper foundation. Finally, defendant claims that he was denied the effective assistance of counsel because his attorney failed to object to numerous instances of prosecutorial misconduct. Because defendant failed to support each of these arguments with any authority, or to set forth the alleged prejudice to himself, appellate review is precluded. *Piotrowski, supra*, p 530.

Affirmed.

/s/ Harold Hood
/s/ Stephen J. Markman
/s/ Alton T. Davis