

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CRAIG C. WIGGINS,

Defendant-Appellant.

UNPUBLISHED

September 13, 1996

No. 172860

L.C.No. 93-127471

Before: Gribbs, P.J., and Marilyn Kelly and White, JJ.

PER CURIAM.

Defendant was convicted by a jury of assault with intent to commit murder, MCL 750.83; MSA 28.278. During the course of the trial, defendant pled guilty to other charges arising out of the same incident, armed robbery, MCL 750.529; MSA 28.797, kidnapping, MCL 750.349; MSA 28.581, breaking and entering an occupied dwelling, MCL 750.110; MSA 28.305, and unlawfully driving away an automobile, MCL 750.413; MSA 28.645. Defendant, a juvenile, was sentenced as an adult to concurrent terms of two to five years, five to fifteen years, ten to twenty years, ten to twenty years, and fifteen to thirty years imprisonment. We affirm.

First, defendant argues that his confession was not knowingly and voluntarily made, and that it should have been suppressed. When reviewing a trial court's determination of voluntariness, this Court must examine the entire record and make an independent determination. *People v Brannon*, 194 Mich App 121, 131; 486 NW2d 83 (1992). However, great deference is given to the trial court's assessment of the credibility of witnesses, and its findings of fact will not be reversed unless clearly erroneous. *Id.*

Here, the trial court properly considered numerous relevant factors when determining that defendant's statement was voluntarily and knowingly made. *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988). Defendant was not mistreated by the police and had been in custody only a

short time when the statement was made. The police waited until defendant's mother arrived before questioning him and asked both defendant and his mother if they understood defendant's rights before being asked to waive them. Neither defendant nor his mother informed the police that defendant had a learning disability and emotional problems, and the officer believed that defendant was a normal fifteen year old who had completed ninth grade. In addition, the trial court had an opportunity to view defendant on the stand, and to view the videotape of the confession, and so was able to assess defendant's credibility and his ability or capacity to waive his rights. We find no error.

In addition, we note that the evidence in this case was overwhelming. Defendant was identified by the victim, and defendant was arrested outside the victim's home in the victim's truck. Defendant was in possession of the victim's property and had the victim's blood on his clothing when he was arrested. Even if admission of defendant's statement had been error, it would have been harmless.

Defendant also argues that he was prejudiced when the trial court told the jury not to concern itself with four of the five charges, but did not inform the jury that defendant had pleaded guilty to those charges. Defense counsel agreed to the trial court's instruction below and cannot argue on appeal that it was improperly given. *People v Taylor*, 159 Mich App 468, 488; 406 NW2d 859 (1987).

Nor was counsel inefficient for failing to object to the instruction. It would clearly have been inappropriate to inform the jury that defendant was guilty of all the other charged offenses. Defendant speculates on appeal that the jury may have believed that the other charges were being dismissed because of a "technicality", but it may just as likely have believed that the charges were dismissed because defendant was innocent. At best, the question how defense counsel wanted the trial court to inform the jury that it should not consider the four charges was a matter of trial strategy, which will not be second guessed by this Court. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987). Counsel was not ineffective in this case.

Defendant contends that the trial court abused its discretion by sentencing defendant as an adult. We do not agree. The trial court conducted the required dispositional hearing and considered the appropriate criteria. MCR 6.931(E)(3). Witnesses from the Department of Social Services and the Department of Corrections testified that defendant was more likely to be rehabilitated by the services available in the adult system because he could not be held for a sufficient amount of time in the juvenile system. The trial court considered the best interests of the public, especially in light of defendant's inability to control his behavior and the extreme viciousness and senselessness of the offense. Even though this crime was not part of a repetitive pattern, the trial court was permitted to give the remaining factors the weight it deemed appropriate. The trial court's findings of fact are not clearly erroneous, and we find no abuse of discretion. *People v Haynes*, 199 Mich App 593, 595; 502 NW2d 758 (1993).

Defendant also contends, in two separate issues, that he was denied a fair trial because of prosecutorial misconduct. We do not agree. Appellate review of prosecutorial misconduct is foreclosed where the defendant fails to object or request a curative instruction unless the misconduct

was so egregious that no curative instruction could have removed the prejudice to the defendant, or if manifest injustice would result from this Court's failure to review the alleged misconduct. *People v Bahoda*, 448 Mich 261, 267; 531 NW2d 659 (1995).

Here, defendant was not denied a fair and impartial trial because of the prosecutor's questions during voir dire. The purpose of voir dire is to give counsel the opportunity to develop a rational basis for exercising both challenges for cause and peremptory challenges. *People v Forman*, 158 Mich App 302, 322; 404 NW2d 246 (1987). The prosecutor's questions in this case, concerning defendant's age, the requirement that he be tried as an adult, and the possibility that he could be sentenced as either an adult or juvenile, resulted in some jurors being excused when they stated that they had a problem with those factors.

Nor was defendant denied a fair trial by the prosecutor's alleged misstatement of the law. Even assuming arguendo that the prosecutor improperly stated the law concerning aiding and abetting during closing argument, the trial court cured any error when it directed the jury to follow the instruction given by the court and disregard instructions by the lawyers.

Defendant was not denied a fair trial because of the prosecutor's cross-examination of defendant's mother. The trial court sustained defendant's objection to the prosecutor's references to a psychological report, and instructed the jury to disregard any reference to the report. It is presumed that the jury followed the trial court's instruction. *People v McAlister*, 203 Mich App 495, 504; 513 NW2d 431 (1994). Further, the continued questioning did not deprive defendant of a fair trial. It was not improper for the prosecutor to attempt to impeach defendant's mother concerning her willingness to lie to protect her son. MRE 608.

Finally, defendant argues that the trial court violated the principle of proportionality in sentencing. Defendant's minimum sentences were within the guidelines' range and are presumptively proportionate. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987); *People v Dukes*, 189 Mich App 262, 266; 471 NW2d 651 (1991). Defendant has not presented any unusual circumstances to rebut that presumption. *People v Sharp*, 192 Mich App 501, 505-506; 481 NW2d 773 (1992). The lower court was aware of defendant's age and lack of prior record, but those factors do not constitute an unusual circumstance sufficient to overcome the presumption of proportionality. *People v Piotrowski*, 211 Mich App 527, 532-533; 536 NW2d 293 (1995). In this case, after the victim was beaten with a metal pipe, stripped naked, gagged, bound, and thrown into a pond to die, defendant and codefendant stole the victim's truck and burglarized his apartment. Defendant's sentences do not violate the principle of proportionality. *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990).

Affirmed.

/s/ Roman S. Gibbs

/s/ Marilyn Kelly

/s/ Helene N. White