STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EDWARD ANTHONY STAPLETON,

Defendant-Appellant.

UNPUBLISHED
September 27, 1996

No. 184473
LC No. 94-003416

Before: Wahls, P.J., and Fitzgerald and L.P. Borrello,* JJ.

PER CURIAM.

Defendant appeals as of right from his bench trial convictions of second-degree murder, MCL 750.317; MSA 28.549, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to twenty-five to sixty years' imprisonment for the murder conviction and the mandatory two year prison term for the felony-firearm conviction. We affirm.

Defendant first contends that, since he was under the influence of illicit narcotics at the time he made a statement, the trial court erroneously determined that defendant's confession was knowing, intelligent and voluntary. We disagree. Whether a defendant's statement was knowing, intelligent and voluntary is a question of law that the court must determine under the totality of the circumstances, including the education, experience and conduct of the defendant, and the credibility of the police. *People v Garwood,* 205 Mich App 553, 557-558; 517 NW2d 843 (1994). Intoxication from drugs can effect a valid waiver of *Miranda*[1] rights; however, contrary to defendant's assertions, the fact that a person is under the influence of drugs is not dispositive of the issue of voluntariness. *People v Leighty,* 161 Mich App 565, 571; 411 NW2d 778 (1987).

In this case, following a *Walker*[2] hearing, the trial court considered the inconsistencies in defendant's testimony and concluded that it did not believe defendant's testimony. Credibility is crucial in determining a defendant's level of comprehension and the trial judge is in the best position to make

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

this assessment. *People v Cheatham*, 453 Mich 1, 30; ___ NW2d ___ (1996). After a thorough review of the record, we conclude that the trial court correctly concluded that defendant voluntarily, knowingly and intelligently waived his rights. *People v Johnson,* 202 Mich App 281, 287-288; 508 NW2d 509 (1993).[3]

Defendant next argues that he was denied effective assistance of counsel when defense counsel allowed the bench trial to proceed before the same judge that conducted the *Walker* hearing at which defendant testified. We disagree. In assessing defense counsel's performance, we will not utilize hindsight to second-guess counsel's decisions, especially with regard to trial strategy and tactics. *People v Pickens,* 446 Mich 298, 330; 521 NW2d 797 (1994). The fact that a strategy does not work does not render counsel's assistance ineffective. *People v Murph,* 185 Mich App 476, 479; 463 NW2d 156 (1990), on rehearing 190 Mich App 707; 476 NW2d 500 (1991).

Defendant argues that he was required to testify, in violation of the attorney-client privilege, about whether he made a certain statement to his attorney. Defendant's alibi witness testified that she was driving around with defendant in his car until approximately 1:30 a.m. Defendant later testified that his twin brother had his car for at least three hours during the time of the crime and that he was not driving around with the alibi witness as the alibi had previously testified. Over defense counsel's objection, the prosecutor asked defendant whether he had ever told his attorney that his brother was driving his car on the night of the crime and would be an alibi witness. Defendant indicated that he did not. Assuming that the trial court erred in requiring defendant to answer the question, any error was harmless. Defendant's testimony contradicted the testimony of his alibi witness and was not supported by any other evidence. The evidence against defendant was overwhelming, and thus any erroneous admission of the evidence was harmless. *People v Mateo*, 453 Mich 203; ___ NW2d ___ (1996).

Finally, defendant asserts that his sentence of twenty-five to sixty years' imprisonment is disproportionate. Defendant's twenty-five year minimum sentence for his second-degree murder conviction was within the sentencing guidelines' range of ten to thirty years or life and, therefore, it is presumptively proportionate. *People v Cotton,* 209 Mich App 82, 85; 530 NW2d 495 (1995). Defendant, a three-time felony offender, has failed to raise any mitigating circumstances that would overcome the presumption of proportionality. *Milbourn, supra* at 661.

Affirmed.

/s/ Myron H. Wahls
/s/ E. Thomas Fitzgerald
/s/ Leopold P. Borrello

[1] *Miranda v Arizona,* 384 US 436; 86 Sct 1602; 16 L Ed 2d 694 (1966).

[2] *People v Walker (On Rehearing),* 374 Mich 331; 132 NW2d 87 (1965).

[3] Although defendant also asserts that his statement was coerced by a promise of leniency, he failed to raise the issue at the *Walker* hearing. Because no evidence of coercion was offered at the hearing, this Court may not consider it in the independent review of the trial court's ruling.