STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TERRY W. WILLIAMS,

Defendant-Appellant.

UNPUBLISHED
November 1, 1996

No. 174582
LC No. 93-012545

Before: Sawyer, P.J., and Marilyn Kelly and D.A. Burress,* JJ.

PER CURIAM.

Defendant was convicted in a bench trial of assault with intent to murder, MCL 750.83; MSA 28.278, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to two years for the felony-firearm conviction followed by eight to twelve years for the assault with intent to murder conviction. Defendant appeals as of right. We affirm.

Defendant was originally charged with two counts of assault with intent to murder and one count of felony-firearm and was scheduled for trial on October 28, 1993. On the day of trial, the prosecution could not produce one of the complainants and sought to introduce that complainant's preliminary examination testimony as evidence or to endorse additional witnesses. When the trial court denied these motions, the prosecution opted to dismiss all charges without prejudice. Defendant was subsequently arrested and charged a second time with the same crimes.

Defendant first argues that he was subjected to double jeopardy because of the dismissal and reinstatement of charges against him. Defendant argues that jeopardy attached during the first proceeding, either when evidence was presented during the prosecution's pre-trial motions or at the impaneling of the jury which defendant waived on the day of trial. We find that defendant was not subjected to double jeopardy.

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

Jeopardy did not attach at the impaneling of the jury because defendant properly waived his right to a jury trial. The trial court, although it did not use the specific questions suggested by defendant, made sufficient inquiry into whether defendant understood and voluntarily waived that right. See *People v Shields*, 200 Mich App 554, 560-561; 504 NW2d 711 (1993). Defense counsel's failure to explain all the implications of this waiver, including the fact that jeopardy would no longer attach upon the impaneling of the jury, does not mean that the wavier was not knowing or intelligent. See *People v James*, 192 Mich App 568, 570-571; 481 NW2d 715 (1992).

Because defendant selected a bench trial, jeopardy did not attach unless the first witness was sworn, *People v Brower*, 164 Mich App 242, 245-246; 416 NW2d 397 (1987), or the trial court began to hear evidence in the case, *People v Hicks*, 447 Mich 819, 826-827; 528 NW2d 136 (1994). The only testimony presented to the trial court in this case related to a pre-trial motion. Pre-trial motions are distinct from the trial itself. See *People v Cooke*, 419 Mich 420, 434 n 4; 355 NW2d 88 (1984). Because such evidence would not be presented to the jury or to the judge as trier of fact, it cannot be considered evidence in the case. Thus, jeopardy did not attach during the pre-trial motion and the prosecution's decision to voluntarily dismiss the charges and to reinstate them later did not subject defendant to double jeopardy.

Defendant argues in the alternative that he was denied due process by the prosecution's decision to charge defendant a second time with the same crimes. We disagree. Multiple attempts to prosecute a defendant for the same crime may violate the defendant's due process rights if these efforts indicate an attempt to harass the defendant or to shop for a more favorable forum. See *People v Stafford*, 168 Mich App 247, 251; 423 NW2d 634 (1988). In the original action, the prosecution opted to dismiss all charges rather than appeal the trial court's unfavorable rulings related to one of the two assault charges. However, this decision cannot be considered an attempt to "forum shop," since defendant was not bound over on this charge in the second proceeding nor did the prosecution make the rejected motions again. There is no indication that the dismissal was intended to harass defendant, rather than simply to compensate for prosecutorial ineptness. See *People v Laslo*, 78 Mich App 257, 259-260; 259 NW2d 448 (1977). Further, defendant was not prejudiced by the decision to reinstitute charges given that he did not lose any favorable rulings related to the charges actually considered in the second case.

Defendant next argues that the trial court erred when it did not suppress defendant's post-arrest statement to police. Again, we disagree. The trial court properly found that, considering the totality of the circumstances, this statement, if made by defendant, was voluntary. *People v Haywood*, 209 Mich App 217, 226; 530 NW2d 497 (1995). The trial court rightly refused to suppress the statement on the grounds that defendant did not actually make it, since this is a question for the trier of fact. *People v Neal*, 182 Mich App 368, 371; 451 NW2d 639 (1990). Although defendant now argues that he invoked his right to remain silent by his refusal to make a written statement, he did not make this specific argument below. Defendant has therefore waived this basis for appeal. *People v Todd*, 186 Mich App 625, 627; 465 NW2d 380 (1990). Further, failure to review this issue does not create manifest injustice. A refusal to write out a statement is not an unequivocal invocation of the right to remain silent, requiring police to end all questioning. *People v Davis*, 191 Mich App 29, 36; 477 NW2d 438

(1991). Further, the evidence presented does not suggest that defendant refused to make a written statement before Officer Huck questioned him about the crime.

Defendant next challenges the trial court's failure to suppress his post-arrest statement or to take other remedial action because the notes of that statement were not provided to defendant as required by the discovery order. Because defendant did not object to the use of this statement or request that the trial court take any remedial action on this basis, this issue is not preserved for appellate review. See *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993); *People v Malone*, 193 Mich App 366, 371-372; 483 NW2d 470 (1992). Further, defendant was not prejudiced by the trial court's failure to fashion a remedy for the alleged discovery violation. Defense counsel was made aware of the existence and the substance of the notes on defendant's post-arrest statement during the preliminary examination several months prior to trial.[1] Thus, there is no indication that defendant was unable to prepare a proper cross-examination on those notes, see *People v Clark*, 164 Mich App 224, 231; 416 NW2d 390 (1987), or that defendant could have significantly used the notes themselves in his defense, see *People v Davis*, 199 Mich App 502, 514; 503 NW2d 457 (1993).

Defendant's final argument on appeal is that his sentence is disproportionate. We disagree. Because the sentence falls within the minimum sentence range suggested by the sentencing guidelines, it is presumptively proportionate. *People v Albert*, 207 Mich App 73, 75; 523 NW2d 830 (1994). Defendant's emotional stress, frustration, voluntary intoxication, and subsequent remorse do not constitute unusual circumstances justifying a minimum sentence below the suggested range. See *People v Milbourn*, 435 Mich 630, 661; 461 NW2d 1 (1990).

Affirmed.

/s/ David H. Sawyer
/s/ Marilyn Kelly
/s/ Daniel A. Burress

[1] Although the counsel who represented defendant at trial was not present during the preliminary examination, he had already been assigned to the case and should therefore have been aware of the information which his substitute gathered during the preliminary examination.