

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICHARD LAWRENCE WENZEL,

Defendant-Appellant.

UNPUBLISHED
November 5, 1996

No. 178557
LC No. 93-002639

Before: Michael J. Kelly, P.J. and Hoekstra and E.A. Quinnell,* JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of armed robbery, MCL 750.529; MSA 28.797, and was sentenced to forty-five to eighty years imprisonment. We affirm in part, reverse in part, and remand for resentencing.

I

Defendant first argues that the trial court abused its discretion by not allowing defense counsel to voir dire the jury. We disagree. The scope of voir dire examination of prospective jurors is within the discretion of the court and will not be set aside absent an abuse of that discretion. See MCR 6.412(C); *People v Furman*, 158 Mich App 302, 322; 404 NW2d 246 (1987). When the trial court, rather than the attorneys, conducts voir dire, the trial court abuses its discretion if it does not adequately question jurors regarding potential bias so that challenges for cause and peremptory challenges can be intelligently exercised. *People v Tyburski*, 445 Mich 606, 619, 630, 638; 518 NW2d 441 (1994).

In this case, we believe that the trial court's refusal to ask defendant's requested questions did not deny him an opportunity to utilize additional peremptory challenges. Therefore, since defendant was not prejudiced, the trial court did not abuse its discretion in limiting voir dire. *People v Cadle*, 204 Mich App 646, 652; 516 NW2d 520 (1994).

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

II

Defendant next argues that the trial court erred in allowing into evidence the statement Stephanie McCartney made at her guilty plea hearing. We disagree. The trial court's decision to admit evidence is reviewed for an abuse of discretion. *People v Hurt*, 211 Mich App 345, 350; 536 NW2d 227 (1995).

MRE 804(b)(3) provides a hearsay exception for statements made against the declarant's interests. Here, the portion of McCartney's statement that implicates defendant falls within the exception if it was made in the context of a narrative of events, at the declarant's initiative, without any prompting or inquiry so that the statement "as a whole is clearly against the declarant's penal interest and as such is reliable." *People v Poole*, 444 Mich 151, 161; 506 NW2d 505 (1993). We believe that McCartney's statement was made in the context of a narrative of events and done without prompting by custodial officials, and, therefore, falls within the ambit of MRE 804(b)(3).

Moreover, we find that the admission of McCartney's statement did not violate defendant's right to be confronted with witnesses under the Confrontation Clause of both the United States and Michigan constitutions. US Const, Am VI; Const 1963, art 1, § 20. See also *People v Petros*, 198 Mich App 401, 409; 499 NW2d 784 (1993). A statement of a codefendant may be admitted if it presents "particularized guarantees of trustworthiness." *Poole, supra*, 444 Mich 163-164. In evaluating whether McCartney's statement against penal interest bears sufficient indicia of reliability to allow it to be admitted as substantive evidence against defendant, this Court must evaluate the circumstances surrounding the making of the statement as well as its content. *Id.*, 165. First, McCartney's statement was not made to police officers, but rather under oath, in front of a judicial officer. Next, while McCartney shifts the blame somewhat in recalling defendant as the person who held the knife to the victim, McCartney still takes full responsibility for helping to commit the robbery. Moreover, there is no evidence that McCartney pleaded guilty and implicated defendant in order to curry favor or gain a lesser sentence. Finally, the trial judge, who presided over McCartney's plea hearing, relied, in part, on his personal observations of McCartney's demeanor while she rendered her plea. Therefore, in examining the totality of the circumstances, we find that McCartney's statement satisfies the dictates of the Confrontation clause, and consequently, the trial court did not abuse its discretion in allowing McCartney's statement into evidence.

III

Defendant next argues that the trial court abused its discretion by denying defendant's motion for a mistrial. We disagree. Defendant moved for a mistrial because the trial court allowed Lieutenant Krutell to testify regarding information he received about defendant from the Law Enforcement Information Network (LEIN). A motion for mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial. *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995).

Generally, under MRE 404(b), evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. *People v Engelman*, 434 Mich 204, 211; 453 NW2d 656 (1990). In this case, the prosecution never elicited testimony from Krutell concerning specifics about defendant's past crimes. In fact, Krutell only referred to defendant's "background information" generally and never testified whether defendant had been convicted of prior felonies or misdemeanors. Consequently, because the jury was not made aware of any specific past crime that defendant may have committed, defendant was not prejudiced by Krutell's testimony. A mistrial will not be declared as a consequence of any mere irregularity which is not prejudicial to the rights of a defendant. *People v Barker*, 161 Mich App 296, 305; 409 NW2d 813 (1987). Therefore, since Krutell's reference to defendant's record did not deny defendant a fair trial, the trial court did not abuse its discretion in denying defendant's motion for a mistrial.

IV

Defendant next alleges that the trial court erred in admitting certain statements of McCartney pursuant to MRE 801(d)(2)(E). MRE 801(d)(2)(E) provides in pertinent part that a statement is not hearsay if "[t]he statement is offered against a party and is . . . a statement by a coconspirator . . . [and is made] during the course and in furtherance of the conspiracy on independent proof of the conspiracy." *People v Vega*, 413 Mich 773, 780; 321 NW2d 675 (1982). Because McCartney's statements may have been made *after* the alleged robbery was completed, we find that McCartney's statements were not made "during the course" of the conspiracy. See *People v Bushard*, 444 Mich 384, 394; 508 NW2d 745 (1993). Moreover, we also find that McCartney's statements were not made "in furtherance" of the conspiracy between McCartney and defendant. See *People v Centers*, 141 Mich App 364, 376; 367 NW2d 397 (1985). Therefore, we conclude that McCartney's statements were inadmissible hearsay. Nevertheless, any error in the admission of McCartney's statements was harmless in nature and, therefore, no reversal is warranted. MCR 2.613; *Cadle, supra*, 204 Mich App 653.

V

Defendant also argues that the trial court erred by failing to read to the jury two requested instructions, CJI2d 4.1 (Defendant's Statements as Evidence Against the Defendant) and CJI2d 5.12 (Prosecutor's Failure to Produce a Witness). We disagree. The failure to give a requested instruction is error requiring reversal only if the requested instruction: (1) is substantially correct; (2) was not substantially covered in the charge given to the jury; and, (3) concerns an important point in the trial so that the failure to give it seriously impaired the defendant's ability to effectively present a given defense. *People v Moldenhauer*, 210 Mich App 158, 159-160; 533 NW2d 9 (1995). In this case, CJI2d 4.1 was inapplicable to the facts of this case, and the trial court's failure to read it did not affect defendant's ability to present an adequate defense. Similarly, the trial court's failure to read CJI2d 5.12 did not impair defendant's ability to effectively present a defense. See *People v DeMeyers*, 183 Mich App

286, 293; 454 NW2d 202 (1990); *People v Jackson*, 178 Mich App 62, 65-66; 443 NW2d 423 (1989). Accordingly, no error exists as to this issue.

VI

Lastly, defendant argues that the sentence imposed was disproportionate to the offense and the offender. We agree. In Michigan, trial courts are given broad discretion in imposing sentences so as to assure that the sentence fits the circumstances of the case, the characteristics of the defendant and the interests of society. *People v Poppa*, 193 Mich App 184, 187; 483 NW2d 667 (1992). This discretion is not unfettered, however, in that a sentence must be proportionate to the seriousness of the crime and the individual characteristics of the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

At the sentencing hearing, the trial court sentenced defendant to forty-five to eighty years' imprisonment for the armed robbery conviction. The guidelines recommended a minimum sentence range of five to twenty-five years for the armed robbery conviction. While the trial court was within its discretion in departing from the guidelines, particularly in light of defendant's low chances for rehabilitation, the extent of the departure in this case was excessive. See *People v Cramer*, 201 Mich App 590, 597; 507 NW2d 447 (1993). Therefore, we remand this case to the trial court for resentencing

Affirmed in part, reversed in part, and remanded for resentencing.

/s/ Michael J. Kelly
/s/ Joel P. Hoekstra
/s/ Edward A. Quinnell