S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 19, 1996
v	No. 189318 LC No. 94-001289-FC
JEFFERY WAYNE MOORE, Defendant-Appellant.	

Before: Bandstra, P.J., and Neff and M. E. Dodge,* JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of second-degree murder, MCL 750.317; MSA 28.549. Defendant subsequently pleaded guilty to being a third habitual offender, MCL 769.11; MSA 28.1083. Defendant was sentenced to thirty to fifty years on the second-degree murder conviction; however, that sentence was vacated, and defendant was then sentenced to fifty to seventy-five years on the third habitual offender conviction. We affirm.

I

Defendant's first issue on appeal is that he was denied effective assistance of counsel because of his attorney's failure to move for a *Walker*[1] hearing to determine the voluntariness of defendant's confession. We disagree.

A

Defendant submitted a motion for ineffective assistance of counsel but failed to move for a new trial, nor was a *Ginther*[2] hearing held. Therefore, this Court's review is limited to the extent to which counsel's claimed mistakes are apparent on the record. *People v Nantelle,* 215 Mich App 77, 87; 544 NW 2d 667 (1996).

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

Effective assistance of counsel is presumed, and to establish that the right to effective assistance of counsel was so undermined that it justifies reversal of an otherwise valid conviction, a defendant must show: (1) that counsel's performance was deficient, falling below an objective standard of reasonableness, and (2) that the representation so prejudiced the defendant as to deprive him of a fair trial. *Id.*

B

The right against self-incrimination is guaranteed by both the United States and the Michigan Constitutions. US Const, Am V; Const 1963, art 1, § 17. Statements of an accused made during custodial interrogation are inadmissible unless the accused voluntarily, knowingly and intelligently waived his Fifth Amendment rights. *People v Garwood*, 205 Mich App 553, 555-556; 517 NW2d 843 (1994). Whether the defendant's statement was knowing, intelligent, and voluntary is a question of law for the court's determination under the totality of the circumstances. *People v Etheridge*, 196 Mich App 43, 57; 492 NW2d 490 (1992). We will not upset the trial court's findings regarding voluntariness unless they are clearly erroneous.

C

We conclude that defendant's statement was given voluntarily based upon the existing record, i.e., the testimony given at both the preliminary examination and at trial. Officer Monica Childs, the officer in charge, testified at both the preliminary examination and at trial that she had defendant read his constitutional rights aloud, and sign and initial the standard form used to indicate that he understood his rights. Defendant indicated on the constitutional rights form that he went to college and majored in business administration. Defendant was in custody for approximately seven and a half hours from the time he arrived at the police station to when he made his statement. Officer Childs gave defendant a series of preliminary questions to answer prior to taking his statement to determine whether he was intoxicated. Prior to advising defendant of his rights, Officer Childs brought him two cups of water and some hot coffee. Defendant never asked to speak to a lawyer, but did request to speak to his girlfriend.

D

Because we conclude that defendant's statement was voluntarily given, defendant did not receive ineffective assistance of counsel. Counsel is not required to argue a frivolous or meritless motion. *People v Gist,* 188 Mich App 610, 613; 470 NW2d 475 (1991). In any event, the other evidence of defendant's guilt was sufficiently strong so that any error in failing to require a Walker hearing could not have prejudiced defendant's case.

II

Defendant next argues that he was denied a fair and impartial trial because the prosecution improperly injected the issue of alibi into the case when no notice of alibi was filed. We disagree. Prosecutorial misconduct issues are reviewed on a case by case analysis. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996). This Court must examine the pertinent portion of the

record and evaluate a prosecutor's remarks in context. *Id.*. The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *Id.*

The prosecutor's use of the word "alibi" was improper where defendant did not raise the defense of alibi. Prior to the defendant's actual presentation of an alibi at trial, the prosecution and trial court may not comment on the defendant's filing of an alibi notice. *People v Holland*, 179 Mich App 184, 191; 445 NW2d 206 (1989). In the instant case, no alibi notice was filed by defendant and no alibi was presented by defendant at trial. Therefore, the prosecutor's reference to a potential alibi defense for defendant was improper.

However, a curative instruction generally eliminates any possible prejudicial effect that may have resulted from a prosecutor's misconduct. *Nantelle, supra.* Here, the trial court gave a curative instruction twice, once when the remark was made and again at the close of all evidence. In addition, the prosecutor immediately admitted her mistake and did not repeat the word "alibi" again throughout the remainder of the trial. Therefore, defendant was not denied a fair and impartial trial. *McElhaney, supra.*

III

Defendant next argues that he was denied a fair and impartial trial because of the prosecutor's comments during closing argument. We disagree.

A

The prosecutor's comment regarding defendant's failure to call corroborating witnesses was not improper. The prosecution did not improperly shift the burden of proof to defendant by commenting on the non-production of witnesses. *People v Fields,* 450 Mich 94, 115; 538 NW2d 356 (1995). In addition, the comment would not be improper as the prosecution was responding to defense counsel's argument that the prosecution did not bring out any other witnesses who would testify that they saw defendant running from the scene. *People v King*, 210 Mich App 425, 434; 534 NW2d 534 (1995). Therefore, we hold that defendant was not denied a fair and impartial trial on the basis of this statement.

B

Defendant next argues that he was denied a fair and impartial trial because of the prosecutor's "civic duty" argument that more evidence would have been produced by the prosecutor but for the cost of producing the evidence. We disagree.

Generally, prosecutors are accorded great latitude regarding their arguments and conduct. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). They are free to argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case. *Id.* However, prosecutors should not resort to civic duty arguments that appeal to the fears and prejudices of the jury members or express their personal opinion or a defendant's guilt, and must refrain from denigrating a defendant with intemperate and prejudicial remarks. *Id*. at 282-283.

Here, we question the propriety of the prosecutor's statement. Indeed, in light of the overwhelming evidence of defendant's guilt, we question why such a reference was made at all, pushing the boundaries of proper advocacy for no discernable reason. Although we do not condone this type of argument, in light of the overwhelming evidence, we conclude that any error was harmless beyond a reasonable doubt. *People v Gilbert,* 183 Mich App 741, 747; 455 NW2d 731 (1990).

IV

Lastly, defendant argues that he is entitled to resentencing. We disagree.

A

Defendant argues that his sentence of fifty to seventy-five years for his third habitual offender conviction is disproportionate. We disagree. This Court reviews the legality of a defendant's sentence for an abuse of discretion. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990). A trial court abuses its discretion when it violates the principle of proportionality. *Id.*

Pursuant to a recent order issued by the Michigan Supreme Court in *People v Gatewood,* 450 Mich 1025; 546 NW2d 252 (1996), the sentencing guidelines do not apply to appellate review of the sentences of habitual offenders. Accordingly, this court's review of a habitual offender sentence is limited to determining whether the sentence violates the principle of proportionality without reference to the guidelines.

In the instant case, the record reflects that defendant stabbed the victim fourteen times all over her body because she taunted and teased him because he could not maintain an erection. The presentence report indicates that defendant has an extensive criminal history, including convictions for attempted second-degree criminal sexual conduct, breaking and entering a business, possession of narcotic paraphernalia, uttering and publishing, and inmate in possession of a weapon. Accordingly, we hold that the trial court was justified in concluding that defendant was a threat to society and in sentencing defendant to fifty to seventy-five years as a third habitual offender. We find defendant's sentence to be proportionate to both him and his senseless crime.

B

Defendant next argues that there is no reasonable possibility that he can serve the minimum term within his lifetime, and thus his sentence is, in essence, an improper attempt. We disagree.

Defendant was thirty-two years old at the time of sentencing, and we conclude that it is reasonably possible for defendant to serve his fifty-year minimum sentence and that the trial court did not abuse its discretion in imposing such. *People v Kelly,* 213 Mich App 8, 12; 539 NW2d 538 (1995).

Further, we are no longer constrained to resentence a defendant because his indeterminate sentence is effectively a life term without the possibility of parole and that the proportionality standard as

set forth in *Milbourn, supra,* is the appropriate standard by which to judge the legality of a defendant's sentence, *Kelly, supra,* 15-16.

C

Finally, defendant argues that the trial court's procedure of vacating his underlying sentence and then resentencing him as a habitual offender was improper. We disagree. The trial court properly vacated defendant's underlying sentence of thirty to fifty years on the second-degree murder conviction pursuant to MCL 769.13; MSA 28.1085, and then appropriately resentenced defendant to fifty to seventy-five years as a third habitual offender.

Affirmed.

/s/ Richard A. Bandstra
/s/ Janet T. Neff
/s/ Michael E. Dodge

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

[2] *People v Ginther,* 390 Mich 436; 212 NW 2d 922 (1973).