STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DANNY LAMONT BLACKSHER,

Defendant-Appellant.

UNPUBLISHED
April 25, 1997

No. 188976
Saginaw Circuit Court
LC No. 95-010280-FH

Before: Hoekstra, P.J., and Murphy and Smolenski, JJ.

PER CURIAM.

Defendant appeals as of right his convictions, following a jury trial, for voluntary manslaughter, MCL 750.321; MSA 28.553, and carrying a dangerous weapon with unlawful intent, MCL 750.226; MSA 28.423. We affirm.

First, defendant claims that the trial court erred in admitting an inculpatory statement made by defendant during a conversation initiated by a jailer. Defendant argues that his Sixth Amendment right to counsel has been violated. We disagree.

Initially, we note that defendant argued in the trial court for suppression of the statement on Fifth, not Sixth, Amendment grounds, therefore his trial objection was insufficient to preserve this precise issue on appeal. See *People v Bushard*, 444 Mich 384, 390 n 4; 508 NW2d 745 (1993); *People v Catey*, 135 Mich App 714, 722; 356 NW2d 241 (1984). However, because we view this issue as outcome determinative, we will briefly address it. *Catey, supra*.

Once adversarial proceedings have commenced against an individual, he has a right to legal representation when the government interrogates him. *Brewer v Williams*, 430 US 387, 401; 97 S Ct 1232; 51 L Ed 2d 424 (1976). The government interferes with this right by "'deliberately eliciting' incriminating statements." *United States v Henry*, 447 US 264, 272; 100 S Ct 2183; 65 L Ed 2d 115 (1980). We have reviewed the circumstances surrounding and the substance of the conversation between defendant and the jailer, and conclude that this was not a planned impermissible interference with defendant's right to counsel. *Id*. at 275. The jailer did not deliberately attempt to elicit incriminating statements or intentionally create a "situation likely to induce defendant into making an

incriminating statement." *Id*. at 274-275. As a result, defendant's Sixth Amendment right was not violated.

We also disagree with defendant that the jailer's testimony was improper rebuttal evidence. Because the testimony tended to weaken or impeach defendant's testimony by contradicting it, it was proper. See *People v Figgures*, 451 Mich 390, 399; 547 NW2d 673 (1996).

Next, defendant claims that the seizure of the "Nino" necklace violated his Fourth Amendment rights. Defendant argues that there were three separate searches and any or all of them were illegal and therefore the necklace must be suppressed. We disagree.

The first search was of defendant's bedroom in his mother's home. Because defendant's mother had common authority over defendant's bedroom, her consent to the search was valid. *People v Goforth*, __ Mich App __; __ NW2d __ (Docket No. 191325, issued March 14, 1998, pp 4-5). Defendant alleges that there was a second search of his bedroom after he was arrested. There was conflicting testimony as to whether a search actually took place. A detective testified that this search never occurred because as defendant's mother was signing a consent form, she told the detective that the necklace was not in the bedroom, but in a bedroom in defendant's grandfather's home. In any event, the testimony indicated that defendant's mother signed a consent form prior to the alleged second search, therefore, any search was valid. Defendant argues that a third search took place when the detective took defendant's mother to defendant's grandfather's home to retrieve the necklace. Testimony indicates that defendant consented to the seizure of the necklace and that defendant's mother, not the detective, went into defendant's grandfather's home, albeit at the detective's request, and retrieved the necklace for the detective. Under such circumstances, we fail to see any constitutional violation. There was conflicting testimony as to whether the detective threatened to obtain a search warrant if defendant's mother did not retrieve the necklace. However, based on the record as a whole, we cannot conclude that the trial court clearly erred in failing to suppress the necklace.

Next, defendant claims that the trial court improperly allowed the prosecutor to recall a police officer witness to testify to facts not presented in the prosecutor's case in chief or previously disclosed to the defense. The decision to admit rebuttal evidence will not be reversed absent a clear abuse of discretion. *Figgures, supra* at 398. We find no such clear abuse of discretion.

The officer was called to respond to testimony in defendant's case as to what defendant did with the weapon he possessed on the night in question. We find nothing in the recall of the officer or the substance of his testimony which leads us to believe reversal is required.

Defendant also argues that the prosecutor then used this testimony to make improper remarks and shift the burden of proof in his closing and rebuttal arguments. Because these claims are outside the scope of defendant's statement of the issue, they are not properly presented. *People v Yarbrough*, 183 Mich App 163, 165; 454 NW2d 419 (1990). In any event, we find that the prosecutor's comments were permissible argument based on the evidence and reasonable inferences therefrom.

Therefore, reversal is not required. See *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995).

Last, defendant claims that the trial court lacked jurisdiction to try and convict defendant, who was sixteen years old, of carrying a dangerous weapon with unlawful intent. Defendant argues that because that crime is not enumerated or a lesser included offense of a crime enumerated in the automatic waiver statute, MCL 600.606; MSA 27A.606, which allows a prosecutor to proceed directly to circuit court without having to request a waiver hearing, his conviction cannot stand. We disagree.

Under the automatic waiver statute, circuit courts have jurisdiction to try and sentence juveniles charged with both enumerated and nonenumerated offenses arising out of the "same criminal transaction." *People v Veling*, 443 Mich 23, 42-43; 504 NW2d 456 (1993). We consider all charges brought against defendant, including the enumerated offenses of murder, MCL 750.316; MSA 28.548, and assault with intent to murder, MCL 750.83; MSA 28.278, to have arisen out of the same criminal transaction. Therefore, defendant's trial and conviction for the nonenumerated offense of carrying a dangerous weapon with unlawful intent is proper.

Affirmed.

/s/ Joel P. Hoekstra
/s/ William B. Murphy
/s/ Michael R. Smolenski