

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLET ALAN FIFIELD,

Defendant-Appellant.

UNPUBLISHED

December 19, 1997

No. 197088

Livingston Circuit Court

LC No. 95-009003-FC

Before: Corrigan, C.J., and Doctoroff and Fitzgerald, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of three counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a) [victim under 13 years of age], and was sentenced to concurrent prison terms of sixty to ninety years for each conviction. Defendant appeals as of right. We affirm.

Defendant's conviction arises out of an incident that occurred on June 8, 1995, at the victim's home. While visiting the victim's home with his family, defendant took the six-year-old victim into her bedroom to read her a book. Defendant performed digital penetration and cunnilingus on the victim. He also forced her to perform fellatio on him. Defendant confessed to the incident. On November 16, 1995, pursuant to a plea agreement whereby the prosecutor would recommend a twelve-year cap on the minimum sentence, defendant pleaded no contest to three counts of first-degree criminal sexual conduct. However, the trial court rejected the plea agreement and defendant subsequently withdrew his plea.¹ A jury trial was held, and defendant was convicted as charged.

Defendant first argues that the trial judge should have been disqualified because he presided over defendant's plea proceeding. We disagree. The fact that a trial judge has previously heard the defendant proffer a factual basis for the charge of which he was ultimately convicted does not demonstrate bias or an appearance of bias. See *People v Wilkens*, 139 Mich App 778, 786; 362 NW2d 862 (1984). Therefore, in this case in which defendant merely pleaded no contest, disqualification is not warranted merely because the trial court presided over defendant's plea proceeding and jury trial.

Defendant next argues that the trial court erred by admitting a statement defendant made to James Murphy, a Livingston County Sheriff's Department corrections officer. We disagree. Statements of an accused made during custodial interrogation are inadmissible unless the accused voluntarily, knowingly, and intelligently waived his Fifth Amendment rights. *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602, 1612; 16 L Ed 2d 694, reh den 385 US 890; 87 S Ct 11; 17 L Ed 2d 121 (1966). Police conduct constitutes an interrogation triggering *Miranda* when the conduct constitutes express questioning or a practice which the police knew or reasonably should have known was likely to invoke an incriminating response. *People v Anderson*, 209 Mich App 527, 532-533; 531 NW2d 780 (1995). Interrogation, for purposes of *Miranda*, refers to express questioning or its functional equivalent. *Id.*, 532. Here, Murphy simply asked defendant how he was. It was defendant who initiated a brief discussion about the case. Based on the circumstances of the conversation, Murphy could not have known that his question was likely to invoke an incriminating response. Further, defendant's statement was not initiated by the police. The *Miranda* requirement does not apply to "a person who is not a police officer and is not acting in concert with or at the request of the police." *Anderson, supra*. Murphy was a corrections officer, whose duties do not include the interrogation of criminal suspects, nor was there evidence that he was working at the behest of the police. Hence, no *Miranda* violation occurred.

Defendant next argues that his custodial confession to Detective Alan Steinaway should have been suppressed. Defendant maintains that, because he was arrested in his house without a warrant, the arrest was illegal and his subsequent statement should be suppressed as a result. However, the exclusionary rule does not bar the introduction of a defendant's confession made outside his home, even though the statement is made after an unconstitutional entry into the defendant's home to arrest him, where the police have probable cause to arrest the defendant for committing a crime. *New York v Harris*, 495 US 14; 110 S Ct 1640; 109 L Ed 2d 13 (1993); *People v Dowdy*, 211 Mich App 562, 568-570; 536 NW2d 794 (1995). Probable cause to arrest exists where the facts and circumstances within an officer's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that a felony has been or is being committed. MCL 764.15(1)(d); MSA 28.874(1)(d); *People v Champion*, 452 Mich 92, 115; 549 NW2d 849 (1996), citing *Brinegar v United States*, 338 US 160, 175; 69 S Ct 1302; 93 L Ed 1879 (1949). Here, Steinaway said that he and Kelly Zurba, a nurse, questioned the victim at the hospital on the night of the incident. The victim indicated that defendant had licked her vagina and put his finger inside her vagina and that defendant had forced her to perform fellatio. This information would justify a reasonable person of average intelligence in believing that defendant committed a felony. *Dowdy, supra* at 570. Thus, the confession is admissible because probable cause to arrest defendant existed.

Defendant also contends that the confession was involuntary. Viewing the totality of circumstances surrounding its making, *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988), we disagree. Defendant was twenty-two years old, and according to his psychologist, his intelligence level was normal. The interview lasted approximately one hour and fifteen minutes. Defendant had previous contact with the police as a result of a prior criminal sexual conduct conviction and a domestic violence incident. Although Steinaway indicated that defendant was teary eyed when he discussed that he had been sexually abused by his parents, there is no indication on the record that

defendant's emotions affected his mental state in such a manner to render his confession involuntary. Additionally, even though defendant was taken from his home at 5:30 a.m., there is no indication that his confession was the product of sleep deprivation. See *People v Young*, 212 Mich App 630, 635; 538 NW2d 456 (1995), remanded on other grounds 453 Mich 973 (1996). Further, contrary to defendant's assertions, Steinaway denied threatening or physically abusing defendant, and the trial court found Steinaway's testimony credible. Moreover, the court assessed little weight to expert psychological testimony introduced by defendant. Deference is given to the trial court's assessment of the weight of the evidence and credibility of witnesses, and the trial court's findings will not be reversed unless they are clearly erroneous. *Id.* at 634. Based on the foregoing, we find that defendant's confession was voluntary.

Defendant also argues that the prosecutor engaged in several instances of misconduct. Defendant first claims that the prosecutor improperly vouched for the credibility of witness James Murphy by indicating that he and Murphy were best friends. A prosecutor may not vouch for the credibility of a witness to the effect that he has some special knowledge that the witness is testifying truthfully. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). In this instance, however, the prosecutor simply brought the relationship to the attention of the jurors in the event that defense counsel asserted that Murphy was biased.

Defendant also takes issue with the prosecutor's use of the term "child molester," and the phrase "sick, perverse and grotesque sexual desires." However, prosecutors may use "hard language" when it is supported by evidence and are not required to phrase arguments in the blandest of all possible terms. *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996). Thus, we do not find the prosecutor's language objectionable.

Defendant also claims that the prosecutor improperly questioned the defendant regarding his sexual attraction to children. Although it was improper for the prosecutor to attempt to intentionally inject at trial information concerning defendant that the trial court had previously ruled inadmissible, *Bahoda, supra* at 266, the jurors were instructed to not consider this evidence when making their decision. Jurors are presumed to have followed a court's instruction until the contrary is clearly shown. *People v McAlister*, 203 Mich App 495, 504; 513 NW2d 431 (1994). No such showing has been made in this case.

Finally, defendant raises three issues related to his sentences. First, defendant claims that the trial court did not specifically explain the characteristics of the offense and the offender that would justify a departure from the guidelines. However, in addition to filing a departure evaluation and a separate memorandum regarding the guideline departure, the trial court gave a lengthy explanation of the reason for its departure during the sentencing hearing. Thus, this claim is without merit.

Second, defendant contends that the sentence imposed violates *People v Moore*, 432 Mich 311; 439 NW2d 684 (1989), which held that it is an abuse of discretion for a trial court to impose a sentence that a defendant does not have a reasonable prospect of actually serving. Defendant was twenty-two years old when sentenced to a minimum prison term of sixty years, and therefore, will be in his early eighties when his minimum term ends. This Court has held that it is reasonable to expect that a

defendant may live into his eighties in prison. *People v Cramer*, 201 Mich App 590; 507 NW2d 447 (1993). Therefore, we find no violation of *Moore*.

Last, defendant contends that his sentence is disproportionate. We disagree. Defendant has a prior juvenile adjudication for second-degree criminal sexual conduct arising out of his sexual assault upon the ten-year-old son of his foster parents. Defendant also admitted to sexually assaulting his five-year old sister and five of her friends. In addition to considering defendant's criminal history, the court focused on defendant's likelihood of committing a similar offense again, failed attempts to deter defendant, and protection of society, all of which are not reflected in the guidelines recommendation but are sufficient reasons for departure from the recommended guidelines range. *People v Houghteling*, 183 Mich App 805, 810-811; 455 NW2d 440 (1990) (1991); *People v Miller*, 165 Mich App 32, 51; 418 NW2d 668 (1987), remanded on other grounds 434 Mich 915 (1990). Considering the seriousness of the circumstances surrounding the offense and the offender, the sentence imposed does not constitute an abuse of discretion. *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990).

Affirmed.

/s/ Maura D. Corrigan
/s/ Martin M. Doctoroff
/s/ E. Thomas Fitzgerald

¹ Defendant indicated that he would have withdrawn his plea even if the court had accepted the plea agreement because he had discovered erroneous information in the reports relating to the incident.