

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EUGENE McKINNEY,

Defendant-Appellant.

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UNPUBLISHED

October 3, 2000

No. 209535

Wayne Circuit Court

Criminal Division

LC No. 96-008523

Before: Hoekstra, P.J., and Cavanagh and White, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of three counts of first-degree felony murder, MCL 750.316(b); MSA 28.548(b). The trial court sentenced defendant to three mandatory terms of life imprisonment without parole. Defendant appeals as of right. We affirm.

This case arises out of the burning of a private residence in the City of Detroit, in October 1996. At codefendant Paula Bailey's instigation, defendant and codefendant Todd Daniels intentionally set fire to a house in which Bailey's ex-boyfriend and several others lived. Three children were killed in the fire. Seven others, three adults and four other children, escaped from the fire by jumping from a second-story window.

I

Defendant first argues that the trial court erred in its instructions to the jury. This Court reviews jury instructions in their entirety to determine if there is error requiring reversal. Even if jury instructions are imperfect, there is no error if they fairly presented the issues to be tried and sufficiently protected the defendant's rights. *People v Whitney*, 228 Mich App 230, 252-253; 578 NW2d 329 (1998).

Defendant contends that the trial court erred in denying his request for an instruction on involuntary manslaughter. Both voluntary manslaughter and involuntary manslaughter are cognate lesser included offenses of murder. *People v Cheeks*, 216 Mich App 470, 479; 549 NW2d 584 (1996). The trial court is required to give an instruction for a cognate lesser included offense if: (1) the principal offense and the lesser offense are of the same class or category, and (2) the evidence adduced at trial

would support a conviction of the lesser offense. *Id.* There must be more than a modicum of evidence; there must be sufficient evidence that the defendant could be convicted of the lesser offense. *Id.* at 479-480.

Involuntary manslaughter has been defined as the killing of another without malice and unintentionally, but (1) in doing some unlawful act not amounting to a felony<sup>1</sup> nor naturally tending to cause death or great bodily harm, or (2) in negligently doing some act lawful in itself, or (3) by the negligent omission to perform a legal duty. *People v Booker (After Remand)*, 208 Mich App 163, 170; 527 NW2d 42 (1994). After carefully reviewing the record, we conclude that the evidence did not support an instruction on involuntary manslaughter. See *People v Beach*, 429 Mich 450, 475-480; 418 NW2d 861 (1988). Defendant's conduct was not negligent; he admitted in his confession that he intentionally set fire to the residence without knowing whether the house was occupied. Furthermore, the conduct in this case, the burning of a dwelling house in the middle of the night, does naturally tend to cause death or great bodily harm. See *id.* at 477. Therefore, because there was no evidence tending to negate the existence of malice or that the criminal act of burning a dwelling house in the middle of the night naturally tended to cause death or great bodily harm, there was no evidence adduced at trial supporting a conviction of involuntary manslaughter and the trial court did not err in refusing to instruct the jury on that cognate lesser included offense. *Id.* at 477-480; see also *People v Bailey*, 451 Mich 657, 673-674; 549 NW2d 325 (1996).

We also reject defendant's claim that the trial court's reasonable doubt instruction was erroneous because it failed to inform the jury that reasonable doubt requires a "moral certainty" of guilt. The court instructed the jury on reasonable doubt in strict accordance with CJI2d 3.2, which adequately conveys the concept of reasonable doubt. *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 552 NW2d 493 (1996).

## II

Next, defendant challenges the admissibility of his confession, claiming that he did not receive his *Miranda*<sup>2</sup> rights before giving his statement to police or that he did not knowingly and intelligently waive those rights and, therefore, his confession was involuntary. When reviewing a trial court's determination of the voluntariness of a confession, this Court must examine the entire record and make an independent determination. *People v Howard*, 226 Mich App 528, 543; 575 NW2d 16 (1997). However, deference is given to the trial court's assessment of the weight of the evidence and credibility of the witnesses, and the trial court's findings will not be reversed unless they are clearly erroneous. *Id.*

Statements of an accused made during custodial interrogation are inadmissible unless the accused voluntarily, knowingly, and intelligently waived his Fifth Amendment rights. *People v Abraham*, 234 Mich App 640, 644; 599 NW2d 736 (1999). The prosecutor must establish a valid

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<sup>1</sup> In *People v Beach*, 429 Mich 450, 476, n 11; 418 NW2d 861 (1988), the Supreme Court left open the question whether the unlawful act could be a felony in light of the Court's decision in *People v Aaron*, 409 Mich 672; 299 NW2d 304 (1980).

<sup>2</sup> *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

waiver by a preponderance of the evidence. *Id.* at 645. The prosecutor need only present evidence sufficient to demonstrate that, prior to any questioning, the accused was warned and understood that he had a right to remain silent, that his statements could be used against him, and that he had the right to the presence of counsel. *Id.* at 647.

In this case, the prosecutor established by a preponderance of the evidence that defendant was informed and understood that he did not have to speak, that he had the right to the presence of counsel, and that the state could use what he said in a later trial against him and that defendant waived those rights. See *id.* Therefore, defendant was informed of his *Miranda* rights and there was a valid, knowing, and intelligent waiver of those rights. *Id.* Although defense counsel apparently claimed below that defendant did not fully appreciate the ramifications of talking to the police, this Court has previously indicated that an accused need not fully appreciate the ramifications of talking to the police in order to effect a valid waiver of *Miranda* rights. *Id.* Lack of foresight is insufficient to render an otherwise proper waiver invalid. *Id.*

Although compliance with *Miranda* is necessary to establishing that a defendant's waiver was knowing and intelligent, it is not dispositive of the voluntariness issue. See *People v Wright*, 441 Mich 140, 146-147; 490 NW2d 351 (1992). In determining voluntariness, the court should consider all the circumstances, including: the duration of the defendant's detention and questioning; the age, education, intelligence, and experience of the defendant; whether there was unnecessary delay of arraignment; the defendant's mental and physical state; whether the defendant was threatened or abused; and any promises of leniency. See *People v Haywood*, 209 Mich App 217, 226; 530 NW2d 497 (1995). No single factor is determinative. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998).

The undisputed evidence indicates that: (1) defendant appeared rational and was able to engage in a normal "give and take conversation" with the investigative officer; (2) defendant did not appear to be impaired in any way; (3) defendant did not complain of physical distress; (4) defendant had a tenth grade education; (5) defendant was informed of his constitutional rights and stated that he understood them; (6) defendant voluntarily waived those rights and made a statement to the officer; (7) defendant did not ask for food or water; (8) defendant did not complain of police mistreatment; (9) defendant was not promised anything in exchange for his statement; and (10) defendant was not threatened. In fact, defendant was very forthcoming with his statement. Although the officer did not ask defendant how long he had been awake prior to the statement, there was no indication that he appeared drowsy during the interview or that he complained of being tired prior to his statement. Under these circumstances, defendant's confession was voluntarily made. See *Haywood*, *supra* at 225-226.

### III

Defendant next contends that he was denied a fair trial by several instances of allegedly improper conduct on the part of the prosecutor. As he admits, however, defendant did not object at trial to the comments of which he now complains. To preserve for appeal an argument that the prosecutor committed misconduct during trial, a defendant must object to the conduct at trial on the same ground as he asserts on appeal. In the absence of a proper objection, review is precluded unless a curative instruction could not have eliminated the prejudicial effect or the failure to consider the issue

would result in a miscarriage of justice. *People v Nantelle*, 215 Mich App 77, 86-87; 544 NW2d 667 (1996).

First, defendant claims that the prosecutor posed an improperly argumentative question to potential jurors during voir dire. Viewing the prosecutor's question in context, it is clear that the question was designed to ferret out jurors who did not understand the elements of murder, specifically, the intent element required for that crime. This was not improper. Cf. *People v Dunham*, 220 Mich App 268, 270; 559 NW2d 360 (1996). In any event, a timely objection and curative instruction would have eliminated any possible prejudice that may have resulted from the prosecutor's conduct and a miscarriage of justice will not result from our failure to review this issue further.

Next, defendant claims that, during opening argument, the prosecutor improperly invited the jurors to put themselves in the victims' position. However, the prosecutor's comments, in the context of the complete opening argument, were not an appeal to the jury to place themselves in the victims' position or to sympathize with the victims. It appears that the prosecutor's remarks were no more than proper comments, although somewhat colorfully conveyed, regarding the evidence the prosecutor intended to present at trial. See *People v Mayhew*, 236 Mich App 112, 123; 600 NW2d 370 (1999). We conclude that any possible prejudice could have been cured by an instruction and our failure to further review the issue will not result in a miscarriage of justice.

Defendant next claims that the prosecutor deliberately elicited statements of defendant's codefendants in violation of the trial court's pre-trial ruling that those statements would not be admitted at trial. Although defendant is correct that the trial court ruled that the prosecutor would not be allowed to introduce the codefendants' statements to the police at defendant's trial, the court did not rule that the statements of the codefendants to each other that were overheard by the witness, Consuella Lewis, would be suppressed. The prosecutor did elicit testimony from Lewis regarding statements made by the codefendants to each other and defendant; however, the codefendants' statements to police were not elicited by the prosecutor at trial. Therefore, defendant's claim that the prosecutor intentionally violated the trial court's pretrial order must fail. Moreover, defendant did not raise the admissibility of the testimony at issue in his statement of questions presented to this Court. Therefore, any claim that these statements were inadmissible is not preserved for appellate review. See MCR 7.212(C)(5); *People v Price*, 214 Mich App 538, 548; 543 NW2d 49 (1995).

Next, defendant argues that the prosecutor improperly expressed personal knowledge of defendant's guilt during closing argument. A prosecutor may argue the credibility of the witnesses and the guilt of the defendant, but may not support the argument with the authority or prestige of the prosecutor's office or the prosecutor's personal knowledge. *People v Smith*, 158 Mich App 220, 231; 405 NW2d 156 (1987). In this case the prosecutor was not expressing his personal knowledge or belief. He was simply arguing what he believed the evidence showed. A prosecutor is free to argue the evidence and all reasonable inferences from the evidence as they relate to the prosecution's theory of the case. *People v Fisher*, 220 Mich App 133, 156; 559 NW2d 318 (1996).

Defendant also contends that he was denied a fair trial by the prosecutor's characterization, during rebuttal argument, of his defense as one of "desperation." However, this brief remark, taken in

context, was nothing more than a response to the comments made by defense counsel during closing argument. Otherwise improper prosecutorial remarks may not require reversal if they address issues raised by defense counsel. See *People v Kennebrew*, 220 Mich App 601, 607-608; 560 NW2d 354 (1996); *People v Simon*, 174 Mich App 649, 655; 436 NW2d 695 (1989). We conclude that any possible prejudice could have been cured by an instruction and our failure to further review the issue will not result in a miscarriage of justice.

Defendant next claims that the prosecutor made an improper civic duty argument to the jury during his closing statement. A prosecutor may not urge the jurors to convict the defendant as part of their civic duty. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). However, the prosecutor's remarks in this case, taken in context, do not appear to be inappropriate. The prosecutor was simply indicating that everyone had played their part in this proceeding, including the prosecutor, the judge, and defense counsel, and that the case was now in the jury's hands. This does not amount to an improper civic duty argument and any possible prejudice could have been cured by a timely objection and instruction.

Lastly, defendant asserts that the prosecutor denied him a fair trial by eliciting testimony that all three codefendants had been arrested in connection with this incident. After carefully reviewing the record, we conclude that our failure to review this issue will not result in manifest injustice and any possible prejudice caused to defendant by the disputed testimony could have been cured by an instruction to the jury. Furthermore, because defendant failed to raise the admissibility of the testimony at issue in his statement of questions presented to this Court, any claim that the testimony was inadmissible is not preserved for our review. See MCR 7.212(C)(5); *Price*, *supra* at 548.

#### IV

Next, defendant claims that the trial court failed to ascertain on the record whether he intelligently and knowingly waived his right to testify at trial. However, this Court has held that there is no requirement that there be a waiver of a defendant's right to testify on the record and that the trial court has no duty to advise a defendant of his right to testify or determine whether a defendant made a knowing and intelligent waiver of the right. *People v Harris*, 190 Mich App 652, 661-662; 476 NW2d 767 (1991); *People v Simmons*, 140 Mich App 681, 684-685; 364 NW2d 783 (1985). Even if we were to apply the rule of law recognized by some federal circuit courts that a trial court is required to make such an inquiry under certain exceptional, narrowly drawn circumstances, see *Brown v Artuz*, 124 F3d 73, 79, n2 (CA 2, 1997), this case does not fit within one of the exceptional, narrowly drawn circumstances recognized in those federal circuits.

#### V

Defendant further asserts that he was denied the effective assistance of counsel. Because defendant did not request a *Ginther*<sup>3</sup> hearing, our review is limited to mistakes apparent on the record. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997). After carefully reviewing the

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<sup>3</sup> *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

record, we find that defendant has not sustained his burden of proving ineffective assistance of counsel. Defendant has failed to show that his counsel's performance fell below an objective standard of reasonableness or that the representation so prejudiced him that it deprived him of a fair trial. See *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994).

## VI

Defendant also claims that he was denied due process and a fair trial because of the cumulative effect of several alleged errors. See *supra*. However, we have concluded that no errors occurred at trial; thus, we reject the argument that the cumulative effect of the errors requires reversal. See *People v Maleski*, 220 Mich App 518, 525; 560 NW2d 71 (1996).

## VII

Lastly, defendant's mandatory life sentences do not constitute cruel or unusual punishment and there is no merit to defendant's assertion that those sentences are unconstitutional because they constitute determinate sentences. *People v Hall*, 396 Mich 650, 657-658; 242 NW2d 377 (1976); *People v Snider*, 239 Mich App 393, 426-428; 608 NW2d 502 (2000).

Affirmed.

/s/ Joel P. Hoekstra  
/s/ Mark J. Cavanagh  
/s/ Helene N. White