

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MELVIN HOBBS,

Defendant-Appellant.

UNPUBLISHED

October 14, 2004

No. 244913

Wayne Circuit Court

LC No. 02-006585

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN DAVID CURELLEY,

Defendant-Appellant.

No. 244914

Wayne Circuit Court

LC No. 02-006585

Before: Cavanagh, P.J., and Fitzgerald and Meter, JJ.

PER CURIAM.

In this case arising out of a home invasion during which the victim, Aretha Benson, was asphyxiated to death by smothering or strangulation,¹ defendants Melvin Hobbs and John David Curelley appeal as of right their jury convictions of first-degree felony murder, MCL 750.316(1)(b), and first-degree home invasion, MCL 750.110a(2). We affirm.

On appeal, both defendants raise allegations of prosecutorial misconduct. Hobbs argues that the prosecutor erred by introducing a written statement made by Henry Woodard, Curelley's uncle, and arguing it as substantive evidence because it was hearsay. See MRE 801. According to Hobbs, it was improper for the prosecutor to bring up Woodard's extra-judicial written

¹ The assistant medical examiner who performed the autopsy on Aretha Benson concluded that the cause of death was manual strangulation, but stated that he had not ruled out smothering.

statement because it was not being raised to challenge any contrary testimony made from the witness stand. Rather, the prosecutor was improperly trying to introduce the statement itself as proof of guilt. Hobbs also argues that the prosecutor engaged in misconduct when he stated that defendants “cast lots” for the stolen goods because there was no evidence that Hobbs got any money from the sale of the goods and the comment improperly appealed to the jurors’ religious beliefs. Further, both Hobbs and Curelley argue that the prosecutor engaged in misconduct when he implied that defendants intended to rape the victim, which was thwarted by the landlord arriving at the house, because there was no evidence that a rape was intended or attempted. None of these preceding claims of prosecutorial misconduct have merit.

Counsel did not object to any of the alleged instances of prosecutorial misconduct; therefore, the issues are forfeited unless defendant establishes plain error that affected his substantial rights. *People v Carter*, 462 Mich 206, 216; 612 NW2d 144 (2000); *People v Barber*, 255 Mich App 288, 296; 659 NW2d 674 (2003). Prosecutorial misconduct issues are reviewed case by case. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996). This Court must examine the pertinent portion of the record and evaluate the prosecutor’s remarks in context to determine whether the defendant was denied a fair and impartial trial. *Id.*

We first address Hobbs’ argument regarding Woodard’s statement. Under *People v Stanaway*, 446 Mich 643, 684-693; 521 NW2d 557 (1994), “[a] prosecutor cannot use a statement that directly tends to inculcate the defendant under the guise of impeachment when there is no other testimony from the witness for which his credibility is relevant to the case.” *People v Kilbourn*, 454 Mich 677, 682; 563 NW2d 669 (1997); see, also, MRE 607. In other words, “impeachment should be disallowed when (1) the substance of the statement purportedly used to impeach the credibility of the witness is relevant to the central issue of the case, and (2) there is no other testimony from the witness for which his credibility was relevant to the case.” *Kilbourn*, *supra* at 683.

Here, the statement used by the prosecutor to impeach Woodard’s credibility was relevant to a central issue in the case – Hobbs’ presence during the victim’s murder. But, Woodard offered testimony, other than the impeachment statement, for which his credibility had relevance to the case. Specifically, he provided testimony pertaining to defendants’ possession of the victim’s cell phone and bracelet. This testimony tended to corroborate another witness’s testimony that Curelley tried to sell those items to her and her mother. Therefore, the prior inconsistent statements were admissible despite their tendency to inculcate Hobbs. See *id.* The admission of the prior statements for impeachment purposes was also proper because Woodard claimed not to remember his prior statements. See *People v Lyles*, 148 Mich App 583, 588-590; 385 NW2d 676 (1986). Additionally, the jury was instructed regarding the proper use of Woodard’s testimony. Accordingly, plain error affecting substantial rights has not been established. See *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Turning to Hobbs’ arguments regarding the mention of casting lots, we acknowledge that a jury’s deliberations are confined to the evidence presented, and an attorney may not argue or refer to facts not of the record. *People v Knolton*, 86 Mich App 424, 428; 272 NW2d 669 (1978). Nor may the prosecution inject unfounded prejudicial innuendo into the proceedings. *People v Pearson*, 123 Mich App 462, 464; 332 NW2d 574 (1983). However, the prosecutor is free to argue the evidence and all reasonable inferences from the evidence as it relates to the parties’ theories of the case. *People v Fields*, 450 Mich 94, 116; 538 NW2d 356 (1995); *People*

v Fisher, 220 Mich App 133, 156; 559 NW2d 318 (1996). Moreover, if a prosecutor’s question is based upon prior testimony, it is not an impermissible injection of innuendo. *Pearson, supra*.

Hobbs argues that the language used – “casting lots” – was intended to evoke the Biblical image of the soldiers who jeered at Christ as he went to his crucifixion and divided his clothes among them by casting lots. This was allegedly improper because a prosecutor may not appeal to the jury’s religious convictions and thereby run the risk of appealing to their passion or prejudice. *People v Rohn*, 98 Mich App 593, 597; 296 NW2d 315 (1980), overruled on other grounds *People v Perry*, 460 Mich 55, 64; 594 NW2d 477 (1999); *George v Travelers Indemnity Co*, 81 Mich App 106, 114; 265 NW2d 59 (1978). We conclude that only by taking the remarks out of context could one infer that the prosecutor was attempting to appeal to the jury’s religious beliefs. This reference to a practice mentioned throughout the Bible was not an attempt to appeal to the jury’s religious beliefs.

Hobbs also argues that the “casting lots” comments were improper because there was no evidence that defendant even received any of the money from the sale of the computer. We agree that the comments may have implied that Hobbs was equally involved in the acquisition of the property. See *Knolton, supra*. However, whether he actually received any money from the sale of the computer was not outcome determinative in light of the weight of the other evidence presented. Therefore, any such error was harmless.

Turning to defendants’ arguments regarding the prosecutor’s mention of rape in his closing arguments, a thorough review of the record reveals that it was Curelley’s counsel who initially and repeatedly raised the possibility that the victim was raped. Even though Hobbs did not inject the issue into the trial, the testimony elicited regarding the rape kit and the bed sheets was discussed in the presence of both juries. Under these circumstances, it was permissible for the prosecutor to comment on and draw reasonable inferences from the testimony that had been presented in an effort to explain how the rape related to a theory of defense that had been raised. See *Fisher, supra*. The prosecutor was not impermissibly injecting innuendo. See *Pearson, supra*.

Hobbs also argues that defense counsel’s (1) failure to object to the introduction of Woodard’s statement, (2) failure to object to comments regarding rape and the casting of lots, and (3) failure to request an instruction on the offense of receiving or concealing stolen property² as a necessarily lesser included offense of larceny, which was the predicate offense for the charge of felony murder, constituted ineffective assistance of counsel. We disagree. Because defendant failed to move for a new trial or *Ginther*³ hearing, our review is limited to the existing record. See *People v Sabin (On Second Rem)*, 242 Mich App 656, 658; 620 NW2d 19 (2000).

To establish a claim of ineffective assistance of counsel, a defendant must affirmatively show that counsel’s performance fell below an objective standard of reasonableness and that, but for defense counsel’s errors, there was a reasonable probability that the result of the proceedings

² MCL 750.535.

³ *People v Ginther*, 390 Mich 436, 443-444; 212 NW2d 922 (1973).

would have been different and that the result was fundamentally unfair and unreliable. *People v Pickens*, 446 Mich 298, 303, 312; 521 NW2d 797 (1994); *People v Poole*, 218 Mich App 702, 718; 555 NW2d 485 (1996). Effective assistance of counsel is presumed and the defendant bears the burden of proving otherwise. *People v Rocky*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Here, given our determination that the allegations of prosecutorial misconduct are without merit, it follows that trial counsel's failure to object to these alleged instances of misconduct did not deprive defendant of the effective assistance of counsel. See *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998).

Hobbs also argues on appeal that the jury should have been instructed on the lesser offense of receiving or concealing stolen property. The determination whether an offense is a lesser included offense is a question of law subject to de novo review. *People v Mendoza*, 468 Mich 527, 531; 664 NW2d 685 (2003). Because this appeal was not pending at the time *People v Cornell*, 466 Mich 335; 646 NW2d 127 (2002) was decided, its holding does not apply to this case. *People v Fletcher*, 260 Mich App 531, 557; 679 NW2d 127 (2004).

The predicate felony to a felony murder charge is not a lesser included offense but an element of the charge. *People v Sanders (On Remand)*, 190 Mich App 389, 392; 476 NW2d 157 (1991). It would have been futile for defense counsel to request an instruction on the crime of receiving or concealing stolen property because it is not a lesser included offense of felony murder. The key element of culpability in receiving or concealing stolen property is, as the name implies, the receiving or concealing stolen property. This element is clearly absent from the elements of felony murder. MCL 750.316(1)(b); *People v McCrady*, 244 Mich App 27, 30-31; 624 NW2d 761 (2000). A defendant *can* commit felony murder without committing the crime of receiving or concealing stolen property. See *Sanders, supra* at 391. Thus, defense counsel's failure to request the instruction did not deprive defendant of the effective assistance of counsel. See *Fike, supra*.

Next, Curelley argues that the trial court erred in denying his motion to suppress his allegedly involuntary statement to police where he testified that Officer Anthony Jackson beat him during his interrogation. We disagree. This Court reviews the voluntariness of a defendant's confession by looking at the totality of the circumstances and we will not reverse the lower court's finding unless it is clearly erroneous. *People v Shipley*, 256 Mich App 367, 372; 662 NW2d 856 (2003).

Voluntariness is determined by examining the totality of all the circumstances surrounding a statement to determine if it was "the product of an essentially free and unconstrained choice by its maker." *People v Cipriano*, 431 Mich 315, 333-334; 429 NW2d 781 (1988). The list of factors to be considered include

the age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused

was physically abused; and whether the suspect was threatened with abuse. [*Id.* at 334 (citations omitted).]

The absence or presence of any one factor is not conclusive on the issue of voluntariness. *Id.* “The ultimate test of admissibility is whether the totality of the circumstances surrounding the making of the confession indicates that it was freely and voluntarily made.” *Id.*

Here, considering the totality of the circumstances, we are not left with a definite and firm conviction that a mistake has been made. At the time of questioning, Curelley was twenty-years-old with an eleventh grade education. He was held for at most three hours, and then he was questioned for at most one hour. Although Curelley stated that he had been awake since the previous morning and had not eaten since that evening, he did not claim that he was deprived of food or sleep, and we agree with the court that it was not unreasonable for him to have been without food or sleep for that length of time. There is no dispute that Curelley was advised of his *Miranda*⁴ rights. Although he claimed that he did not understand that by signing the Constitutional Rights Form provided by the police he was waiving his rights and agreeing to give a statement, he stated that he read the form, understood it, and signed it several times. He did not claim that he was coerced by any means to sign that form. Thus, it is reasonable to conclude that he understood the ramifications of signing the form.

The trial court was confronted with the conflicting testimony of Curelley and Officer Jackson regarding whether Officer Jackson used violence, whether Curelley was deprived of the use of the bathroom, whether Curelley was intoxicated, and whether the statement had been previously prepared. Thus, determination of the voluntariness of Curelley’s statement depended in large part on the court’s ability to determine each witness’s credibility. See *People v Carigon*, 128 Mich App 802, 810; 341 NW2d 803 (1983). We give deference to the court’s finding that Officer Jackson’s testimony was more credible. *Id.* Accordingly, we agree with the court that Curelley’s statement was not obtained by any improper means. See *id.* at 805.

Curelley also argues that the voir dire of the prospective jurors by the court deprived him of a fair trial because the court’s questioning had the effect of intimidating the jurors into withholding any possible prejudices. Curelley’s counsel did not object to the trial court’s alleged misconduct during voir dire. Indeed, he expressly stated that he was “satisfied” with the jury. Where a defendant fails to object to the court’s voir dire and expressly states his satisfaction with the jury, the defendant has waived appellate review of his claim that the voir dire of the prospective jurors by the court deprived the defendant of a fair trial. *People v White*, 168 Mich App 596, 604; 425 NW2d 193 (1988). Waiver by affirmative approval extinguishes any claimed error and precludes appellate review. *Carter, supra* at 208-209, 213-219.

Last, Curelley argues that the trial court erred and denied him his right to confront the witnesses against him, US Const Ams, VI and XIV; Const 1963, art I, § 20, when the court allowed the prosecutor to question a witness about a hearsay statement Hobbs made to her that

⁴ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

implicated Curelley's participation in the crimes charged. We disagree. Constitutional issues are reviewed de novo. *People v Beasley*, 239 Mich App 548, 557; 609 NW2d 581 (2000).

The challenged testimony included: “[Hobbs] was like, ‘John, tell him how you said you killed that girl.’ And that’s when John start describing. He said he put a pillow over her face, he sat on her head and he watched TV, the Maury Povich show.” Hobbs’ statement was not inadmissible hearsay because Curelley “manifested an adoption or belief in its truth” by immediately describing how he killed the victim. See MRE 801(d)(2)(B). “[A]doptive admissions are admissible when it clearly appears that the defendant understood and unambiguously assented to the statement made.” *People v Dietrich*, 87 Mich App 116, 131; 274 NW2d 472 (1978), rev’d on other grounds 412 Mich 904 (1982). Here, it is clear that Curelley adopted and assented to Hobbs’ statement. See *id.* Curelley’s response demonstrates that he heard Hobbs’ statement, and had the ability and motivation to respond to it. See *id.* Additionally, the statement was not hearsay because the statement was admissible to show the statement’s effect on Curelley and to show what induced him to confess to his cousin. See *People v Byrd*, 207 Mich App 599, 603; 525 NW2d 507 (1994); *People v Flaherty*, 165 Mich App 113, 122; 418 NW2d 695 (1987).

Affirmed.

/s/ Mark J. Cavanagh
/s/ E. Thomas Fitzgerald
/s/ Patrick M. Meter