

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL BERNARD LITTLE,

Defendant-Appellant.

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UNPUBLISHED

March 21, 2000

No. 210564

Washtenaw Circuit Court

LC No. 96-006409 FC

Before: Gage, P.J., and Fitzgerald and Markey, JJ.

PER CURIAM.

After a jury trial, defendant was convicted of seven counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b; MSA 28.788(2), and one count of first-degree home invasion, MCL 750.110a; MSA 28.305(a). The trial court sentenced defendant to concurrent terms of forty to sixty years for each of the CSC I convictions, and ten to twenty years for the first-degree home invasion conviction. Defendant appeals as of right, and we affirm.

I

Defendant first contends that the jury likely failed to render a unanimous verdict because the victim testified to at least nine distinct acts of penetration when defendant was charged with only seven penetrations, and the trial court failed to properly instruct the jury that it must unanimously agree which of these acts the prosecutor proved beyond a reasonable doubt. At trial, defendant neither objected to the trial court's jury instructions, nor requested a specific unanimity instruction. Absent such an objection or instructional offer by defendant, we may grant relief only in cases of manifest injustice. *People v Gadomski*, 232 Mich App 24, 30; 592 NW2d 75 (1998).

The Michigan Constitution guarantees criminal defendants a unanimous jury verdict. Const 1963, art 1, § 14; *Gadomski, supra*. To protect a defendant's right to a unanimous verdict, it is the trial court's duty to properly instruct the jury with respect to the unanimity requirement. *People v Cooks*, 446 Mich 503, 511; 521 NW2d 275 (1994); *People v Smielewski*, 235 Mich App 196, 201; 596 NW2d 636 (1999). A specific unanimity instruction is not required, however, in all cases in which more than one act is presented as evidence of the actus reus of a single criminal offense. The critical

inquiry is whether either party has presented evidence that *materially* distinguishes any of the alleged multiple acts from the others. *Id.* at 512 (emphasis in original). When the state offers evidence of multiple acts by a defendant, each of which would satisfy the actus reus element of a single charged offense, the trial court is required to instruct the jury that it must unanimously agree on the same specific act only if the acts are materially distinct or there is reason to believe the jurors may be confused or disagree about the factual basis of the defendant's guilt. *Id.* at 530.

In the instant case, the prosecutor charged defendant with seven counts of CSC I, while the victim's testimony described ten distinct penetrations by defendant. Regarding counts two (vaginal penetration by defendant's finger), three (anal penetration by bottle), four (oral penetration by defendant's penis), eight (vaginal penetration by gun) and nine (anal penetration by defendant's penis), however, the victim's trial testimony described only one incident each of these manners of penetration. Under these circumstances, no danger existed that the jury could have been confused regarding on which of defendant's acts to base his convictions for counts two through four and eight and nine.

Regarding counts one (vaginal penetration by defendant's penis) and seven (vaginal penetration by bottle), the victim testified to three distinct occasions of vaginal penetration by defendant's penis, and two placements of a bottle inside her vagina. The several acts of vaginal penetration by defendant's penis were not materially distinct or conceptually distinguishable from one another. Likewise, the two acts of vaginal penetration by bottle were virtually identical. Furthermore, the parties did not offer materially distinct proofs with respect to either the three acts of penile penetration or the two penetrations by bottle that would raise the possibility that different jurors might have been convinced that different of these acts actually occurred. *Cook, supra* at 524.

Because our review of the record reveals absolutely no indication of jury confusion regarding the factual bases of defendant's guilt of the many CSC I charges, we conclude that defendant suffered no manifest injustice arising from the trial court's failure to read the jury a specific unanimity instruction.

## II

Defendant next challenges the trial court's determination that he voluntarily provided a written statement to police. This Court must give deference to the trial court's findings at a suppression hearing. Although we engage in a de novo review of the entire record, we may not disturb the trial court's factual findings regarding a knowing and intelligent waiver of *Miranda* rights unless the findings are clearly erroneous. *People v Cheatham*, 453 Mich 1, 29-30; 551 NW2d 355 (1996).

Statements of an accused made during custodial interrogation are inadmissible unless the accused voluntarily, knowingly and intelligently waives his Fifth Amendment rights. Whether a waiver of *Miranda* rights is voluntary and whether an otherwise voluntary waiver is knowing and intelligent are separate questions. The voluntariness prong is determined solely by examining police conduct. *People v Howard*, 226 Mich App 528, 538; 575 NW2d 16 (1997).

In determining whether a statement is voluntary, the trial court should consider, among other things, the following factors: 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. [*People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988).]

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.*

After reviewing de novo the suppression hearing testimony, we agree with the trial court that defendant voluntarily signed his written statement. Even according to defendant's own suppression hearing testimony, none of the factors enumerated by the *Cipriano* Court indicate involuntariness in the instant case. Defendant was eighteen years old at the time of the interview. Defendant apparently had not completed school at the time of the interview, but obtained his GED at some point prior to the January 1997 sentencing date. The lower court record indicates that defendant was arrested several times prior to his arrest in the instant case. Defendant was not subjected to lengthy questioning by the police, at most an approximate two-hour interview. Defendant also spent only approximately two or 2 ½ hours in postarrest custody before his interview. As the trial court implicitly found, and which finding was substantiated by suppression hearing testimony, the police did inform defendant of his *Miranda* rights prior to beginning any questioning, and defendant indicated that he understood these rights and agreed to waive them. While defendant claimed that the arresting officers beat and kicked him, resulting in injuries to his eyes and mouth, defendant never complained to the interrogating officers that he was in pain or in need of medical attention. No indication exists that defendant was otherwise in ill health, intoxicated, drugged or fatigued. While defendant denied eating all the allegedly stale food he was furnished during the interview, the officers undisputedly did permit defendant to order and did provide defendant with food. Importantly, defendant himself acknowledged that at no time during the interrogation did anyone physically abuse him or threaten him with abuse. Even accepting defendant's allegations that an officer yelled at defendant or misrepresented that the police had discovered incriminating evidence at the victim's apartment, these behaviors do not constitute "pressures which may sap or sustain the suspect's powers of resistance or self-control." *People v Hicks*, 185 Mich App 107, 112-113; 460 NW2d 569 (1990).

Because no indication exists that the interrogating officers engaged in unduly coercive police misconduct, we find no error in the trial court's denial of defendant's motion to suppress his written statement.

### III

Defendant also argues that in light of his statement to police that at the time of the charged crimes he was with his cousin, his trial counsel's failure to investigate and file notice of an alibi witness constituted ineffective assistance of counsel. Defendant did not move for a new trial or request an evidentiary hearing concerning defense counsel's effectiveness. This Court's review of defendant's ineffective assistance claim is therefore limited to errors apparent on the record. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999); *People v Wilson*, 196 Mich App 604, 612; 493 NW2d 471 (1992). To establish that he received ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Ineffective assistance of counsel can take the form of failure to call witnesses only if the failure deprives the defendant of a substantial defense that might have made a difference in the outcome of the trial. *People v Hyland*, 212 Mich App 701, 710-711; 538 NW2d 465 (1995), vacated in part on other grounds 453 Mich 902; 554 NW2d 899 (1996).

During defendant's police interview, he indicated that his cousin Michelle Brooks might have seen him at the time of the charged crimes. The interviewing officer testified that although he visited what he believed was Michelle Brooks' address and called the phone number for that address, he never successfully contacted anyone. The lower court record is devoid of any suggestion that Michelle Brooks would have bolstered defendant's claim that he was not at the scene of the crime, and defendant on appeal fails to substantiate that Brooks would have placed him elsewhere than at the crime scene. Under these circumstances, we cannot conclude that defendant suffered any prejudice arising from his defense counsel's allegedly unreasonable failure to further investigate Brooks' testimony. Moreover, given the strong evidence against defendant, including the victim's testimony and the DNA evidence, we conclude that alibi testimony from Brooks would have made no difference in the outcome of defendant's trial. Because defendant failed to establish that defense counsel's conduct deprived him of a substantial defense or that he was otherwise prejudiced in any way, his claim of ineffective assistance must fail. *Pickens, supra; Hyland, supra.*

#### IV

Defendant further asserts that the cumulative effect of the trial court's improper, confusing jury instructions, defendant's improperly admitted statement to the police, and defense counsel's failure to investigate the potential alibi defense deprived defendant of a fair trial. Because we have found no errors with respect to any of the above issues, however, a cumulative effect of errors is incapable of being found. *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999).

#### V

Lastly, defendant contends that the trial court imposed disproportionate sentences. We review the trial court's sentencing determination for an abuse of discretion, which will not be found when the court imposes a sentence proportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990).

With respect to defendant's CSC I convictions, the sentencing guidelines calculated in this case recommended minimum sentences between fifteen and thirty years, which the trial court exceeded by imposing concurrent sentences of forty to sixty years.<sup>1</sup> Even though sentences that depart from the sentencing guidelines are subject to careful scrutiny on appeal, the key test of proportionality is not whether the sentence departs from or adheres to the recommended range, but whether it reflects the seriousness of the matter. *People v Cain*, 238 Mich App 95, 132; \_\_\_ NW2d \_\_\_ (1999). The guidelines' range bears no necessary relationship to the percentage of cases that are off the grid. *People v Merriweather*, 447 Mich 799, 807-808; 527 NW2d 460 (1994). In order to facilitate appellate review, the trial court must articulate its reasons for departing from the guidelines range both on the record and on the sentencing information report. *People v Rockey*, 237 Mich App 74, 79; 601 NW2d 887 (1999).

The record reveals that in determining appropriate sentences, the trial court considered defendant's background together with the nature and number of defendant's criminal acts. The trial court wrote on a sentencing information report departure evaluation that "[t]his is the most assaultive, brutal, cruel & sadistic assault this court has tried or can imagine. The OV score of 160 is far beyond any normal range." The court explained further at defendant's sentencing hearing.

[T]he sentencing guidelines for the offense variable they're up to fifty plus and the defendant's score for an offense variable was 160. I don't think I've ever seen a score that much in excess of the printed guidelines, the printed variables.

The probation department report says by the probation officer, this is one of the most assaultive, brutal, cruel and sadistic sexual assaults this writer has written a report on. And I have to tell you this is the most assaultive, brutal, cruel and sadistic sexual assault I've heard.

You not only assaulted this woman in every imaginable way, you tortured her throughout the night. I have such vivid recollections of the trial testimony, not just plunging a capped coke bottle into her vagina but asking her how she wanted to die and sticking the barrel of a gun up her vagina and threatening to pull the trigger. It's just difficult for me to imagine one human being doing that to another.

. . . It's—what happened to her is not only every woman's but every person's nightmare to have somebody break into their house in the middle of the night and subject them to this torture for hours.

\* \* \*

. . . I have determined that this is a case where a Court would be justified in exceeding the guidelines. The guideline is that I should reserve the top of the guideline for the worst of the criminal sexual conduct first degree cases that appear before me and I do that. But I have to say that there is no way that the guidelines also contemplate the severity of this offense.

Because the trial court properly incorporated into its sentencing determination the extreme circumstances involved in the underlying crimes, which could not have been contemplated in the guidelines' formulation, we find the sentences imposed by the trial court proportionate to defendant and his crimes. *Milbourn, supra* at 657, 660.

Affirmed.

/s/ Hilda R. Gage

/s/ E. Thomas Fitzgerald

/s/ Jane E. Markey

<sup>1</sup> The sentencing guidelines do not apply to defendant's home invasion conviction. *People v St John*, 230 Mich App 644, 649; 585 NW2d 849 (1998). The trial court's imposition of a ten to twenty year sentence for defendant's home invasion conviction fell within the twenty-year limit established by the Legislature. MCL 750.110a(4); MSA 28.305(a)(4).