STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID ELLIS,

Defendant-Appellant.

UNPUBLISHED
April 30, 2002

No. 223439
Wayne Circuit Court
LC No. 99-002677

Before: Cooper, P.J., and Griffin and Saad, JJ.

PER CURIAM.

Defendant appeals as of right from a jury trial conviction of first-degree felony murder, MCL 750.316, carjacking, MCL 750.529a, armed robbery, MCL 750.529, and conspiracy to commit carjacking, MCL 750.157a. The trial court sentenced defendant to concurrent sentences of life imprisonment for the felony murder conviction and forty-five to eighty years imprisonment for each of the carjacking, armed robbery and conspiracy to commit carjacking convictions. We affirm.

I. Facts and Procedural History

This case arises from a plan defendant concocted with his daughter, Tekesha Ellis, and his niece, Timarra Bush, to lure an unsuspecting victim to defendant's mother's house for the purpose of injuring him, stealing his car and driving it to South Bend, Indiana. In order to entice the potential victim to the house, the plan called for Bush to convince the victim that she would have sex with him. In carrying out the scheme, defendant, Ellis and Bush walked to the parking lot of a strip club and, on the way, defendant picked up a pipe from a pile of trash. While defendant waited across the street, Ellis and Bush chose a car they liked and waited for its owner to emerge from the club. When the victim walked out to the parking lot, the women initiated a conversation with him and persuaded him to drive them to the house.

When they arrived, Bush led the victim to an upstairs bedroom. Defendant approached them from behind and struck the victim on the head at least seven to ten times with a pipe. Defendant then hog-tied the victim and dragged him to the basement. Defendant continued to beat the victim while Bush and Ellis attempted to clean up the considerable amount of blood upstairs. Defendant, Ellis and Bush then dragged the victim upstairs and placed him in the trunk of the car. The three drove the car toward South Bend while the victim, still alive, kicked at the back seat of the car. At some point, defendant took a wrong turn and Bush suggested they dump

the victim's body in some nearby woods. A bicyclist found the body in a wooded area near I-94 in Kalamazoo on October 18, 1998. Defendant, Ellis and Bush were later arrested in South Bend.

In exchange for their testimony at defendant's trial, Ellis and Bush pleaded guilty to charges of second-degree murder and conspiracy to commit carjacking. The plea agreements provided for sentences of fifteen to thirty years imprisonment for second-degree murder and ten to twenty years imprisonment for conspiracy to commit carjacking. As noted above, the jury convicted defendant of felony murder, carjacking, armed robbery and conspiracy to commit carjacking and the trial court sentenced defendants accordingly.

I. Analysis

A. Suppression of Defendant's Police Statement

Defendant contends that the trial court erred by failing to suppress his statement to police because the police officers ignored his repeated requests to discontinue questioning and to allow him to speak to a lawyer.

The trial court held a *Walker*[1] hearing to determine whether defendant voluntarily made the statement to police. At a *Walker* hearing, "[a] trial court must view the totality of the circumstances in deciding whether a defendant's statement was knowing, intelligent, and voluntary." *People v Manning*, 243 Mich App 615, 620; 624 NW2d 746 (2000). On appeal, this Court conducts a de novo review of the entire record. *People v Daoud*, 462 Mich 621, 629; 614 NW2d 152 (2000). However,

> This Court will not reverse the trial court's findings regarding those circumstances unless they were clearly erroneous. A finding is clearly erroneous if it leaves us with a definite and firm conviction that the trial court made a mistake. [*Manning*, *supra* at 620.]

Sergeant Shari Oliver and Lieutenant Delmin Christian interviewed defendant following his arrest and testified at his *Walker* hearing. The officers testified that they twice advised defendant of his *Miranda*[2] rights, that defendant signed a waiver of rights form and never asked for an attorney. Similarly, during his taped statement, defendant acknowledged that the officers informed him of his rights, that he signed the waiver form and that he was giving the statement voluntarily. In contrast, defendant testified that he repeatedly asked for a lawyer and asserted his right to remain silent, but that the officers ignored him. Defendant offered contradictory testimony regarding whether he signed the waiver of rights form, but ultimately identified his signature on the form presented by Lieutenant Christian. However, defendant maintained that Lieutenant Christian frequently stopped the tape during his statement, particularly when defendant requested an attorney.

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[1] *People v Walker (On Rehearing)*, 374 Mich 331, 338; 132 NW2d 87 (1965).

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

The record indicates that, in finding that defendant's statement was clearly voluntary, the trial court found defendant's taped statement and the testimony of the officers more credible than defendant's testimony at his *Walker* hearing. As noted above, "[b]ecause this Court gives ample deference to the trial court, it will not reverse the trial court's findings unless they are clearly erroneous." *People v Snider*, 239 Mich App 393, 417; 608 NW2d 502 (2000). It is also well established that we give significant deference to a trial court's findings at a *Walker* hearing because of the court's superior ability to evaluate the demeanor and credibility of witnesses. *Id*. at 418. Here, there is no basis to overturn the trial court's finding of voluntariness because the record does not show that this finding was clearly erroneous. The trial court's decision was based on its assessment of the credibility of the witnesses and we will not second guess that assessment on appeal.

B. Prosecutorial Misconduct

Defendant argues that the prosecutor violated his due process rights by making an improper civic duty argument and by disparaging defense counsel in front of the jury.

Defendant failed to timely or specifically object to the prosecutor's statements and, therefore, his claims are unpreserved. As this Court explained in *People v Howard*, 226 Mich App 528, 544; 575 NW2d 16 (1997):

> The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. Questions involving prosecutorial misconduct are decided case-by-case, and this Court must evaluate each question within the context of the particular facts of the case. Appellate review of allegedly improper remarks is precluded absent an objection unless a curative instruction could not have eliminated the prejudicial effect or where failure to consider the issue would result in a miscarriage of justice. [Citations omitted.]

During voir dire, the prosecutor commented to a prospective juror that the case "might be . . . an opportunity to do justice for [the victim] and for the People of the State of Michigan." Defendant asserts that the prosecutor's remark constituted an improper civic duty argument. However, in context, the remark clearly was not similar to the "civic duty" closing arguments condemned by our Court in the past, such as arguments asking the jury to rid the community of rapists, *People v Sterling*, 154 Mich App 223; 397 NW2d 182 (1986), or to convict a defendant of murder because "[w]here does it stop after this if a defendant is allowed to kill somebody because he doesn't want to be associated with a homosexual?," *People v Schmitz*, 231 Mich App 521, 533; 586 NW2d 766 (1998). Further, were we to find some similarity between this isolated remark and the various comments in *People v Leverette*, 112 Mich App 142; 315 NW2d 876 (1982), it is clear that, here, any prejudice caused by the prosecutor's reference could have been cured with a timely objection and curative instruction. *People v Hall*, 396 Mich 650, 655; 242 NW2d 377 (1976).

Later during voir dire, the prosecutor told a prospective juror that defense counsel's "job is to try to get [defendant] off." This remark was clearly improper. *People v Hunt*, 68 Mich App 145, 148-149; 242 NW2d 45 (1976). However, unlike in *Hunt*, the prosecutor's single remark, made very early in the proceedings, was not "part of a deliberate course of conduct" and the remainder of the record reveals no "studied purpose to arouse the prejudice of the jury." *Hunt*,

supra at 149; *People v Bahoda*, 448 Mich 261, 271; 531 NW2d 659 (1995), quoting *Cluett v Rosenthal*, 100 Mich 193, 200; 58 NW 1009 (1894). Indeed, an examination of the record does not reveal any other comments by the prosecutor that might be construed as disparaging. Accordingly, reversal is clearly not warranted on the basis of this isolated remark, particularly because, had a timely objection been raised, any possible lingering prejudice could have been cured.

C. Reference to Uncharged Conduct

Defendant next claims that he was denied his right to a fair trial when, during his opening statement, the prosecutor told the jury he would present testimony regarding defendant's participation in uncharged robberies.

Defense counsel did not raise an objection to the remarks until the day after opening statements. Specifically, defense counsel requested that the trial court prohibit the prosecutor from presenting the other acts evidence because defendant did not receive advance notice under MRE 404(b)(2). After further argument, the trial court agreed with defense counsel and ruled the other acts evidence inadmissible because of the prosecutor's failure to give defendant notice. Notwithstanding the trial court's grant of defense counsel's requested relief, defendant now claims that the prosecutor's remark entitles him to a new trial. Defendant did not move for a mistrial before the trial court, but appears to allege error in the trial court's failure to declare a mistrial *sua sponte*.

Our courts have long held that a *sua sponte* declaration of a mistrial is discretionary and is appropriate only if the trial court determines that "emergent circumstances exist that 'justice . . . cannot be achieved without aborting the trial . . . .'" *People v Clark*, 453 Mich 572, 581 n 6; 556 NW2d 820 (1996), quoting *People v Henley*, 26 Mich App 15, 29; 182 NW2d 19 (1970) (Opinion of Mallett, J.). Indeed, "trial judges [should] refrain from declaring a mistrial until 'a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings.'" *People v Hicks*, 447 Mich 819, 829; 528 NW2d 136 (1994), quoting *United States v Jorn*, 400 US 470, 485; 91 S Ct 547; 27 L Ed 2d 543 (1971).

Here, defendant has not shown that manifest necessity existed to justify a *sua sponte* order of a mistrial. *People v Tracey*, 221 Mich App 321; 561 NW2d 133 (1997). Further, while MRE 404(b)(2) required the prosecutor to properly notify defendant, defense counsel did not establish intentional misconduct in the failure to give notice. Also, the record reflects that the prosecutor believed the evidence would be admissible under MRE 404(b)(1), and the court agreed it was arguably relevant. While the trial court ultimately deemed the evidence inadmissible, defendant has not shown that the prosecutor's comment so tainted the proceedings that ending the trial was the appropriate remedy.

Moreover, were we to find that the prosecutor's failure to provide notice to defendant regarding the introduction of the other acts evidence constituted plain error, *People v Hawkins*, 245 Mich App 439, 453; 628 NW2d 105 (2001), reversal is clearly unwarranted. The trial court granted the relief defendant requested, evidence on the matter was not admitted and defendant has failed to show that he "is actually innocent or the error seriously affected the fairness,

integrity, or public reputation of judicial proceedings." *Id*., quoting *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

D. Right of Confrontation

"The Sixth Amendment of the United States Constitution, and § 20 of article 1 of the Michigan Constitution of 1963, grant an accused the right 'to be confronted with the witnesses against him.'" *People v Bean*, 457 Mich 677, 682; 580 NW2d 390 (1998). Defendant complains that the trial court deprived him of his right of confrontation by precluding him from cross examining Ellis and Bush about the potential life sentences they avoided by pleading guilty to lesser charges and testifying against defendant. Both Ellis and Bush testified that they were initially charged with first-degree murder and other offenses but that, in exchange for their testimony at defendant's trial, they pleaded guilty to second-degree murder and conspiracy to commit carjacking. They further testified that they received sentences of fifteen to thirty years imprisonment for second-degree murder and ten to twenty years for the conspiracy.

Defense counsel moved the trial court to permit him to elicit additional testimony from the women that their original charge of first-degree murder carried a potential sentence of non-parolable life imprisonment. The trial court denied the motion because "these witnesses were originally charged with the same thing that [defendant] is on trial for and giving that information would be tantamount to telling the exact penalty that the [d]efendant was facing." During cross examination, Ellis testified that there was a significant difference between her plea agreement sentence and the maximum sentence for the first-degree murder charge which she avoided. Ellis further acknowledged that her plea agreement was a "good deal" and that there was such a difference in her potential sentence that she willingly accepted the sentence in the plea agreement. Bush also admitted that there was a "very substantial difference" between the sentence she received under the plea agreement and the potential sentence for a conviction under the original charges. Moreover, Bush agreed that the difference was so significant that she willingly agreed to plead guilty and accept the sentencing arrangement.

As a general rule, "[a] trial court is given wide latitude to limit cross-examination." *People v Sawyer*, 222 Mich App 1, 5; 564 NW2d 62 (1997). Accordingly, "[w]hether a trial court has properly limited cross-examination is reviewed for an abuse of discretion." *People v Minor*, 213 Mich App 682, 584; 541 NW2d 576 (1995). However,

> While the scope of cross-examination is a matter left to the sound discretion of the trial court, that discretion must be exercised with due regard for a defendant's constitutional rights. A limitation on cross-examination which prevents a defendant from placing before the jury facts upon which an inference of bias, prejudice or credibility of a witness may be drawn amounts to an abuse of discretion and can constitute a denial of the right of confrontation. If cross-examination of a prosecution witness has been unreasonably limited, a conviction based upon the testimony of such witness should not be sustained. While failure to permit adequate cross-examination constitutes error, reversal is not always required where the error is harmless or no prejudice results. [*People v Holliday*, 144 Mich App 560, 566-567; 376 NW2d 154 (1985).]

Defendant relies primarily on this Court's decision in *People v Mumford*, 183 Mich App 149; 455 NW2d 51 (1990). In *Mumford*, a co-defendant entered into a plea agreement in exchange for his testimony against the defendant. *Id*. at 150-151. Under the agreement, the prosecutor reduced the co-defendant's original charges of delivery of and conspiracy to deliver cocaine in excess of 650 grams to delivery of cocaine between 225 and 650 grams. *Id*. The reduction in the charge also decreased the co-defendant's potential sentence from mandatory life in prison to between ten and thirty years in prison. *Id*. The defendant, who faced the mandatory life sentence on the same charges his co-defendant avoided, moved to cross-examine the co-defendant about the reduction in his sentence. *Id*. at 151. The trial court denied the motion because the testimony would reveal the sentence the defendant would receive if convicted. *Id*.

This court acknowledged that "the jury should not normally be informed of possible punishment if a defendant is convicted," *Id*., quoting *Holliday, supra* at 567. However, the Court emphasized the importance of a defendant's right to cross-examine an informant regarding credibility issues, including "'*any fact* which might have influenced an informant's testimony.'" Id. at 152, quoting *People v Monasterski*, 105 Mich App 645, 657; 307 NW2d 394 (1981) (emphasis in *Mumford*). Further, the Court opined:

> The sentencing consideration received in return for testimony is undeniably a fact which is relevant to a witness' credibility, because it is "[t]he crux of the plea agreement." *People v Manning*, 434 Mich 1, 55-56; 450 NW2d 534 (1990), Levin, J., dissenting. Thus, strict adherence to the rule against informing the jury of defendant's possible punishment upon conviction deprives defendant in this case of the opportunity to present to the jury the most important fact of [the co-defendant's] plea bargain. Application of the rule in this case not only deprives defendant of his constitutional right to confrontation but also leaves the matter to jury speculation. Neither of these results is acceptable. [*Mumford, supra* at 153-154.]

Accordingly, the Court held "that the trial court abused its discretion when it denied defendant's motion to cross-examine [the co-defendant] on all of the details of the plea bargain, including the sentencing consideration [the co-defendant] received in return for his testimony." *Id*. at 154.

The holding in *Mumford* was limited by this Court's holding in *Minor, supra*. In *Minor*, the trial court prevented the defendant from cross-examining a witness, who was with defendant at the time of the crime, regarding a grant of immunity in exchange for his testimony against the defendant at trial. *Id*. at 684. This Court ruled that, pursuant to *Mumford*, the trial court clearly erred by denying the defendant an opportunity to cross-examine regarding the immunity agreement. *Id*. at 684-685. However, the Court declined to reverse the defendant's conviction because the constitutional error was harmless beyond a reasonable doubt and was not "so offensive to the maintenance of a sound judicial process that it can never be regarded as harmless[.]" *Id*. at 685-686. This Court also cited MCL 769.26 to support its decision:

> No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court,

> after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice.

The *Minor* Court observed that, generally, "a claim that the denial of cross-examination has prevented the exploration of a witness' bias is subject to harmless error analysis." *Id*. at 688, citing, among others, *Delaware v Van Arsdall*, 475 US 673, 684; 106 S Ct 1431; 89 L Ed 2d 674 (1986). Accordingly, it could not be considered "'so offensive to the maintenance of justice' that it could never be regarded as harmless." *Id*. at 687. Moreover, the Court reasoned that the witness' testimony was actually favorable to the defendant and, therefore, if the jury was aware of his immunity agreement, it would have made them question defendant's theory of self defense. *Id*. at 687. Further, the Court observed that the witness' "testimony was fully consistent with statements that he had provided to the police before any immunity agreement was reached . . . ." and that considerable testimony from other witnesses established the defendant's guilt. *Id*. at 686-687. Therefore, the Court concluded that the error did not effect the outcome of the proceedings. *Id*. at 687.

Under the harmless error analysis articulated in *Minor*, here, defendant is not entitled to reversal based on the trial court's limitation of defendant's cross-examination of Ellis and Bush. Further, because *Mumford* was decided before November 1, 1990, it is not binding on this Court. MCR 7.215(H)(1). Thus, while the trial court arguably erred by denying defendant his right to elicit all relevant facts regarding the length of sentence Ellis and Bush avoided, we hold that the error, if any, was harmless beyond a reasonable doubt and did not affect the outcome of the proceedings.

As the *Minor* Court observed, the limitation of cross-examination about a witness' plea agreement is not so fundamentally violative of a defendant's constitutional rights that it cannot be considered harmless. *Id*. at 687-688. There is no indication that the prosecutor "deliberately injected the issue into the proceedings" or that the error was "particularly persuasive or inflammatory." *Id*. at 688. Further, similar to *Minor*, evidence of defendant's guilt was overwhelming. The testimony of Ellis and Bush implicating defendant in the carjacking plot corresponded with their statements prior to their plea agreements with the prosecutor. Also, in addition to this testimony, ample evidence established defendant's involvement in the victim's murder and corroborated the testimony of the two women.[3]

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[3] Defendant's mother, Jacqueline Ellis, testified about the circumstantial events surrounding the killing. Further, Sherry Thompson testified that she overheard Ellis and Bush talking about their plan to steal a car with defendant to drive to South Bend. Defendant's acquaintance, Derry Vaughn, testified that he saw defendant driving the victim's car and using the victim's cellular phone in South Bend and that defendant told him that car belonged to his girlfriend. DNA testing established that blood found in defendant's mother's house and in the trunk of the victim's car belonged to the victim. Further testing established that DNA found on clothing in the car trunk partially matched defendant's. Finally, defendant admitted that he hit the victim on the head and that they dumped the victim's body on their way to South Bend. Though blood was found in the basement of the house, defendant told police that he, Ellis and Bush placed the victim in the trunk of his car after the fight in the upstairs bedroom.

Moreover, we do not believe that the trial court's limitation of defendant's cross-examination "deprived him of a more favorable verdict." *Minor*, *supra* at 687. Unlike *Minor*, here, the trial court allowed counsel to elicit considerable testimony from both Ellis and Bush about their plea agreements. Consequently, both witnesses testified not only that they received a favorable plea agreement that reduced their charges, but also acknowledged that their plea agreement sentences were substantially reduced as a result. Moreover, the witnesses testified that their sentence reductions were so significant that they willingly agreed to plead guilty to avoid the harsh penalty they would face if they were tried and convicted. Thus, while the trial court precluded defendant from eliciting testimony about the exact maximum sentence Ellis and Bush could receive under their former charges, the error, if any, was harmless beyond a reasonable doubt.

Defendant was clearly able to establish that both witnesses had significant incentive to testify against defendant. This evidence was also sufficient to permit the jury to draw the inference that the agreements may have influenced Ellis and Bush's testimony. Further, because ample testimony clearly established that there was a substantial difference between Ellis and Bush's potential sentences had they gone to trial, we hold that the jury would not "have received a significantly different impression of [their] credibility" if the trial court allowed testimony about the potential for life sentences. *Van Arsdall*, *supra* at 680. Accordingly, the trial court's limitation of defendant's cross-examination of Bush and Ellis was harmless and reversal is not warranted.

Affirmed.

/s/ Jessica R. Cooper
/s/ Richard Allen Griffin
/s/ Henry William Saad