

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JERMAINE IZELMAURI MATTHEWS,

Defendant-Appellant.

UNPUBLISHED

May 26, 2005

No. 252034

Oakland Circuit Court

LC No. 2002-187140-FC

Before: Neff, P.J., and Owens and Fort Hood, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of unarmed robbery, MCL 750.520b, and two counts of second-degree criminal sexual conduct, MCL 750.520c. Defendant was sentenced to three consecutive sentences of 13 to 22.5 years' imprisonment.¹ We affirm defendant's convictions, but remand for resentencing.

Defendant's convictions arise out of the sexual assault of a young girl he encountered when she was walking home from school. The victim left school at approximately 11:00 a.m. and walked home where she would be picked up for work at a school sponsored medical training program. On the way home, the victim saw defendant. Defendant caught up to the victim and asked her questions as she walked home. When she arrived at her home, defendant took the victim's arm and followed her into her home. Defendant was wearing a coat, and the victim could not tell if defendant had a weapon. However, she did not invite him into the home, and defendant made the victim feel nervous. Once inside the home, the two went into the basement and played pool. Eventually, defendant undressed the victim and had inappropriate sexual contact with her without her consent. The victim testified that defendant began to undress himself, but took a \$100 from her and left the home. The victim called her mother, who worked near the home, who dialed 911. Defendant was carrying a \$100 bill when he was apprehended by police a short distance from the home.

Defendant was taken to the police station where he was interviewed on three different occasions. The interviews were videotaped. Defendant asserted that he requested counsel prior

¹ Defendant's sentence reflected his status as a habitual offender, second offense. MCL 769.10.

to the interviews and requested counsel during the interviews, but police ignored his requests. The police and the prosecution asserted that a clear and unequivocal assertion of the right to counsel did not occur. Following a *Walker*² hearing, the trial court denied defendant's motion to suppress his statements, ruling as follows:

The record should reflect that the Court did preside over the evidentiary hearing in this matter.

The Court took the additional opportunity to totally review the transcript, video, rather, that was prepared.

I want to again thank both counsel for their stipulations relative to the specific portions of the video that were deemed to be at issue between counsel. As the Court indicated, it felt duty-bound to review the entire videotape.

And the Court notes that the instant motion to suppress statements was filed by defendant. The Court conducted a complete walker [sic] hearing. After reviewing over three hours of interview tape, videotape, and considering the duration and conditions of detention, the manifested attitude of the police toward the defendant, defendant's mental and physical state, any diverse pressures, and the absence of counsel, the Court finds that defendant's constitutional rights were not violated. Defendant's statements were voluntary and were not coerced by the police officers.

Defendant never made an unequivocal request for counsel in the first interview. The officers did not force defendant to write a statement. The second interview was stopped once defendant stated that he wanted to talk to an attorney. Defendant initiated the third interview.

The officer's conduct in this Court's opinion was proper and [d]efendant's statements were made voluntary [sic]. For those reasons and for the reason as set forth by the People, the Court respectfully denies [d]efendant's motion.

Defendant first argues that he was denied his Fifth Amendment right to counsel during his custodial interrogation, and therefore, the trial court erred in refusing to suppress his statements to the police. We disagree. Although the trial court's ruling on a motion to suppress evidence is reviewed de novo, we will not disturb the trial court's factual findings unless they are clearly erroneous. *People v Kowalski*, 230 Mich App 464, 471-472; 584 NW2d 613 (1998).

Based on the Fifth Amendment of the United States Constitution, a suspect subject to custodial interrogation has the right to consult with an attorney and to have counsel present during questioning. *Davis v United States*, 512 US 452, 457; 114 S Ct 2350; 129 L Ed 2d 362 (1994). The police must explain the *Miranda*³ rights to the suspect before questioning begins.

² *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

³ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

Id. If the suspect subsequently waives his right to counsel, the police are free to question him. If, however, a suspect clearly and unequivocally requests counsel at any time during the interview, he is not subject to further questioning unless a lawyer has been made available or the suspect himself reinitiates conversation. *Id.* at 458-459.

Review of defendant's brief on appeal reveals that defendant removes various requests for counsel from the transcript and cites to the statements in isolation. Moreover, we do not have the benefit of the videotapes of the interviews because they were not provided on appeal. However, based on our review of the statements⁴ of requests for counsel *in context*, we cannot conclude that the trial court's factual conclusions were clearly erroneous, *Kowalski, supra*, and therefore, the trial court did not err in denying the motion to suppress.

Defendant was interviewed by Sergeant Frank three times. Each time, Frank informed defendant of his right to counsel. A review of the record demonstrates that, during the first interview, defendant did not make a clear and unequivocal request for counsel. Defendant did, however, make such a request during the second interview, and the interrogation ended immediately. During the third interview, which defendant initiated, defendant discussed obtaining counsel, but did not make a clear and unequivocal request. Though the record indicates that Frank sought to manipulate defendant during the interrogation and was not entirely forthcoming in response to some of defendant's questions, it is clear that defendant knew how to make a clear and unequivocal request for counsel and chose not to do so.

It is also clear that defendant wanted to continue talking to Frank to convince him of his innocence. Defendant indicated that he "wanted to talk to [police] and see exactly what's going on." Additionally, defendant wanted to know what conduct could be characterized as criminal sexual conduct because he opined that he merely "hugged" the victim, and therefore, there was no rape. Defendant wanted to speak to police and his lawyer at the same time. However, police advised him of his rights and indicated that his lawyer would not allow an interview to occur and further stated that police could not make the decision for defendant. With this knowledge, defendant did not invoke a clear and unequivocal request for counsel or exercise his right to remain silent.⁵ See *People v Adams*, 245 Mich App 226, 239; 627 NW2d 623 (2001) (Defendant's statement of "Can I talk to [a lawyer] right now" was not clear and unequivocal under the circumstances where, in context, defendant indicated that he was thinking and making

⁴ The prosecutor provided the transcripts of the statements as an appendix to the brief on appeal, and the transcripts are not contained in the lower court record. However, defendant does not dispute the accuracy of the prosecutor's appendix. Consequently, we utilized the transcripts to complete our review.

⁵ Indeed, the crux of the interviews as a whole indicate that defendant believed that any acts that occurred could not be considered a crime and thought the male police officers would identify with him. Defendant told police that he had "luck" with women because he had appeared on the Jenny Jones television show and appeared in magazines with his cousin, Jalen Rose. Defendant also told police that, "I mean, me and you, we know what it takes for a man to actually to take this from a woman." On the record as a whole, it appeared that defendant did not provide a clear and unequivocal assertion of the right to counsel because he believed he could talk his way out of the situation.

inquiry about the process.). It appeared that defendant wanted to make statements because he believed that he could convince police of his innocence because they understood how women acted. Consequently, the trial court did not err in denying the motion to suppress the statements.⁶

Defendant next argues that he was denied a fair and impartial trial by the prosecutor's failure to redact a statement from defendant's videotaped interrogation. Before trial, the trial court had ordered the prosecutor to redact the statement, and he inadvertently failed to do so. Defendant moved for a mistrial and his motion was denied. We review a trial court's ruling on a request for a mistrial for an abuse of discretion. *People v Wells*, 238 Mich App 383, 390; 605 NW2d 374 (1999).

A mistrial shall be declared only for an irregularity that prejudices the defendant and deprives him of a fair trial. *People v Griffin*, 235 Mich App 27, 36; 597 NW2d 176 (1999). Defendant was not denied a fair trial. The statement was a miniscule part of a 2½ hour long, heavily redacted videotape. Neither the trial court nor the prosecutor heard the statement while watching the videotape at trial. Thus, it is unlikely that members of the jury heard the statement. Furthermore, the remark was redacted out of the transcript of the interview that was admitted as an exhibit and was redacted out of the videotape before the jury began its deliberations.⁷ Therefore, the trial court did not abuse its discretion in denying defendant's motion for a mistrial.

Lastly, defendant argues that his sentence is improper because it departs upward from the sentencing guidelines range. We agree. We review a trial court's determination that certain factors constituted substantial and compelling reasons for departure from the sentencing guidelines range for an abuse of discretion. *People v Babcock*, 469 Mich 247, 264-265; 666 NW2d 231 (2003).

The sentencing guidelines range for defendant's convictions was 43 to 107.5 months' imprisonment. Defendant was sentenced to 13 to 22.5 years' imprisonment. Pursuant to MCL 769.34(3), a court may depart from the appropriate sentencing guidelines range if the court has a substantial and compelling reason for the departure. The factors utilized to support a finding that substantial and compelling reasons exist for the departure must be objective and verifiable. *People v Geno*, 261 Mich App 624, 635-636; 683 NW2d 687 (2004). "Objective and verifiable factors are those that are external to the minds of the judge, defendant, and others involved in making the decision, and are capable of being confirmed." *Id.* at 636.

The trial court gave four reasons for its departure. First, less than five years before his present conviction, defendant was previously convicted of assault with intent to commit sexual

⁶ Defendant contends that he made a request for counsel prior to the commencement of the first statement that was not recorded on videotape. The trial court did not make a finding that this assertion was credible.

⁷ We also note that the redacted first interview contains the statement that defendant "just left this jail cell two or three weeks ago" based on outstanding tickets. It is equally as plausible that any reference to being through "this before" could be construed as referring to the time spent in jail for outstanding tickets.

penetration involving an underage girl. Second, the victim in the present case was “young, defenseless, [and] innocent,” “well below the normal social skills of a teenager her age,” and “unable to cope with the manipulative acts by defendant on the date in question.” Because these reasons were taken into account when determining the appropriate sentence range, they may not be used as reason for departure. “The court shall not base a departure on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range” MCL 769.34(3)(b).⁸ Defendant was assessed 25 points for OV-13 for a pattern of criminal activity involving three or more crimes against a person in the last five years. He was also assessed 10 points for OV-4 for causing serious psychological injury to the victim requiring professional treatment and five points for OV-10 for exploiting the victim’s vulnerability.

The trial court’s third reason for departure was defendant’s lack of remorse. However, lack of remorse “is a subjective factor that a trial court may not consider in determining whether a departure from the sentence mandated by statute is justified.” *People v Daniel*, 462 Mich 1, 6; 609 NW2d 557 (2000).

The trial court’s fourth reason for departure was defendant’s lies to police. Our Supreme Court has determined that “the reasons justifying departure should ‘keenly’ or irresistibly’ grab our attention, and we should recognize them as being ‘of considerable worth’ in deciding the length of a sentence” and that substantial and compelling reasons will be found only in “exceptional cases.” *Babcock, supra*, 257. Defendant’s lies to police do not render his case exceptional nor do they “keenly or irresistibly grab” this Court’s attention. The reasons proffered by the trial court do not constitute a substantial and compelling basis for departure because they were not objective and verifiable and the trial court did not conclude that certain factors were given inadequate weight. Consequently, the trial court abused its discretion in departing from the sentencing guidelines range. *Babcock, supra*.

We affirm defendant’s convictions, but remand for resentencing. We do not retain jurisdiction.

/s/ Janet T. Neff
/s/ Donald S. Owens
/s/ Karen M. Fort Hood

⁸ We note that the remainder of this statutory provision provides that a departure shall not be based on an offense characteristic taken into account in determining the sentence range *unless* the court concludes that the characteristic was given inadequate or disproportionate weight. MCL 760.34(3)(b). The trial court did not state that certain variables were given inadequate weight.