

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT LAWRENCE WILKENS, JR.,

Defendant-Appellant.

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UNPUBLISHED

August 8, 2006

No. 260031

Washtenaw Circuit Court

LC No. 03-000370-FC

Before: Cavanagh, P.J., and Smolenski and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right from a conviction after a jury trial for first-degree criminal sexual conduct, MCL 750.520b(1)(e) (weapon used). He was sentenced to 337 months' to 60 years' imprisonment. We affirm.

Defendant first argues that the trial court erred in allowing the preliminary examination testimony of a witness to be read into the record at trial. Specifically, defendant argues that the prosecutor did not show the exercise of due diligence in attempting to obtain the witness' appearance at trial. We disagree. This Court reviews the trial court's determination on whether the prosecutor exercised due diligence for an abuse of discretion. *People v Bean*, 457 Mich 677, 684; 580 NW2d 390 (1998).

The Sixth Amendment of the United States Constitution and Section 20 of Article One of the Michigan Constitution give the "accused the right 'to be confronted with the witnesses against him.'" *Id.* at 682. However, testimonial evidence against a defendant may be admitted where the declarant is unavailable and the defendant had "a prior opportunity for cross examination' of the declarant." *People v Bell (On Remand)*, 264 Mich App 58, 61; 689 NW2d 732 (2004), quoting *Crawford v Washington*, 541 US 36, 68; 124 S Ct 1354; 158 L Ed 2d 177 (2004). This Court has concluded that "the constitutional right to confront one's accusers would not be violated by the use of preliminary examination testimony as substantive evidence at trial only if the prosecution had exercised . . . due diligence to produce the absent witness." *Bean*, *supra*; see, also MRE 804(a)(5).

"The test for due diligence is one of reasonableness, i.e., whether diligent good-faith efforts were made to produce the testimony, not whether more stringent efforts would have produced it." *People v James (After Remand)*, 192 Mich App 568, 571; 481 NW2d 715 (1992). In *Bean*, *supra* at 689-690, the Court held that the prosecution failed to demonstrate a good-faith

effort to produce an absent witness at trial. The Court found that the police made several contacts to a house where the witness once lived, but that had been boarded up and was empty. The police were also told that the witness had left the state, but the police failed to attempt to contact the witness or his mother in the area where they were said to have moved. Although the Court noted that the police made efforts to locate the witness, these efforts consisted of repeated contacts with sources the police already knew were not useful. *Id.* at 689. The Court concluded that the police failed to exercise due diligence to locate the witness. *Id.*

In this case, we believe that Detective Robert Peto's efforts in attempting to secure the witness' testimony at trial were sufficient. Peto's testimony reflects that he had no indication the witness would not appear at trial as she had, on several occasions, expressed a willingness to testify. Peto had several pre-trial contacts with the witness and, although the witness did not have a residence, Peto was able to locate the witness previously and she indicated each time that she would appear for court. Although Peto heard that the witness was again using drugs before the trial, Peto located the witness again and was assured that she was going to testify. Peto even arranged a place where he would meet the witness on the day of trial to bring her to court. However, at the time of trial, the witness did not show up. Because on several occasions the witness had given the police strong indication that she was going to testify at trial, we conclude that Peto's efforts to locate the witness on the day of trial were reasonable. Thus, the trial court did not abuse its discretion in finding that the prosecution used due diligence to locate the witness.

Defendant next argues that the court abused its discretion in denying his motion for a new trial based on juror misconduct. We disagree. The trial court's decision to deny a motion for a new trial is reviewed for an abuse of discretion. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003).

Defendant argues that the trial court should have granted a new trial because the jurors discussed possible verdicts before deliberations and because the jurors saw leg shackles and corrections officers near defendant during the trial. "A lower court may grant a new trial on any ground that would support appellate reversal of the defendant's conviction or if the court believes that the verdict has resulted in a miscarriage of justice." *People v Crear*, 242 Mich App 158, 167; 618 NW2d 91 (2000). To obtain a new trial based on juror misconduct, the defendant must show that the misconduct "affirmatively prejudiced the defendant's right to a trial before a fair and impartial jury." *People v Fox (After Remand)*, 232 Mich App 541, 558; 591 NW2d 384 (1998).

"The Sixth Amendment guarantee of the right to a fair trial means that 'one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on the grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial.'" *People v Banks*, 249 Mich App 247, 256; 642 NW2d 351 (2002), quoting *Taylor v Kentucky*, 436 US 478, 485; 98 S Ct 1930; 56 L Ed 2d 468 (1978).

In this case, defendant was not shackled during the trial. Instead, defendant claims he was prejudiced by the jury seeing shackles near him and by guards being in the courtroom. However, defendant has offered no case law to support his assertion that a jury seeing shackles and guards near a defendant is equivalent to actually seeing a defendant shackled during the trial.

It was well within the court's discretion to have guards near defendant, who was undisputedly a prisoner at the time of the trial. Additionally, defendant has not shown how he was prejudiced by the shackles being seen near him. We conclude that the trial court did not abuse its discretion in denying defendant's motion for a new trial on this ground.

Defendant also argues he is entitled to a new trial because a juror claimed that the jury engaged in deliberations before being instructed by the court to begin deliberations. "The fact that the jury violated the express instructions of the court is not in and of itself a ground for reversal. Prejudice is not assumed; it must be shown." *People v Rohrer*, 174 Mich App 732, 739; 436 NW2d 743 (1989). Defendant did not allege any prejudice from the jury's alleged violations of the court's instructions. In fact, trial counsel did not even submit an affidavit of what the jury allegedly deliberated on to the trial court. Accordingly, even if defendant's allegations were true, he has not established any prejudice.

Defendant next argues that the judge's ex parte communications with the jury violated his constitutional rights. The record reflects that the trial court asked defense counsel and the prosecutor to initial a note from the jury and that, in connection with this request, the trial court advised the parties that it had answered a question from the jury. Defense counsel (and the prosecutor) then signed the note without objecting to the trial court's communication to the jury. We conclude that by not only failing to object after the trial court's reference to answering the jury's question but then proceeding to sign the note, defense counsel expressed affirmative approval of the trial court's communication with the jury, thereby effecting a waiver of this issue that extinguished any error. See *People v Carter*, 462 Mich 206, 219-220; 612 NW2d 144 (2000).

Defendant next argues that he was denied effective assistance of counsel by his counsel's failure to move to suppress his statements to the police. We again disagree. Because a *Ginther*<sup>1</sup> hearing was not conducted, this Court's review is limited to mistakes that are apparent from the lower court record. See *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003).

Defendant claims that his statements were obtained in violation of *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602, 16 L Ed 2d 694 (1966). However, "*Miranda* warnings are necessary only when the accused is interrogated while in custody, not simply when he is the focus of an investigation." *People v Herndon*, 246 Mich App 371, 395; 633 NW2d 376 (2001). "[P]olice officers are not required to administer *Miranda* warnings to everyone whom they question. Nor is the requirement of warnings to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect." *People v Mendez*, 225 Mich App 381, 383-384; 571 NW2d 528 (1997), quoting *Oregon v Mathianson*, 429 US 492, 495; 97 S Ct 711; 50 L Ed 2d 714 (1977). Whether a defendant is in custody for purposes of *Miranda* is determined by considering the totality of the circumstances and asking whether a reasonable person in the defendant's position would feel free to leave. *People v Coomer*, 245 Mich App 206, 219; 627 NW2d 612 (2001). This is an

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<sup>1</sup> *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

objective determination that does not depend on the subjective view of the police officer or the defendant. *People v Zahn*, 234 Mich App 438, 449; 594 NW2d 120 (1999).

Here, defendant was questioned by police in his own home, after giving the police consent to search the home. The police and defendant were moving about the home, and defendant was not told that he was under arrest. Although defendant claims that he believed he was in custody at the time of the questioning, defendant's subjective belief is not dispositive. See *id.* A reasonable person in defendant's position would have felt free to leave therefore the police were not required to read defendant *Miranda* warnings before questioning him. See *Coomer, supra*. Because a motion to suppress defendant's statements would have been denied, defendant has not shown counsel was ineffective for failing to file the motion. See *Riley, supra* at 142.

Defendant also argues that his statement to the police should have been suppressed because it was not a signed written statement and the police did not otherwise record it. However, the United States Supreme Court has rejected the idea that due process requires the police to record custodial interrogations. *People v Geno*, 261 Mich App 624, 627; 683 NW2d 687 (2004), citing *California v Trombetta*, 467 US 479; 104 S Ct 2528; 81 L Ed 2d 413 (1984). This Court has also rejected the notion that the Michigan Constitution requires a custodial interrogation to be recorded. See *Geno, supra* at 627-628, citing *People v Fike*, 228 Mich App 178, 185; 577 NW2d 903 (1998).

Defendant also argues that he is entitled to a new trial because the prosecutor asked him to comment on the veracity of the victim and Detective Peto. It is improper for the prosecutor to ask a witness, including the defendant, to comment on the credibility of another witness. *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985). However, the questions "are curable with a limiting instruction" from the court. *People v Messenger*, 221 Mich App 171, 180; 561 NW2d 463 (1997). In this case, there was neither an objection on this ground by defendant nor a request for a curative instruction. This Court will not find error requiring reversal where a curative instruction by the trial court could have alleviated any prejudice to the defendant. *People v Callon*, 256 Mich App 312, 329-330; 662 NW2d 501 (2003). Any prejudice resulting from the questioning could have been cured with an instruction to the jury. *People v Knapp*, 244 Mich App 361, 385; 624 NW2d 227 (2001). Defendant has not shown error requiring reversal.<sup>2</sup>

Defendant finally argues that he is entitled to resentencing because the court wrongly scored offense variables (OVs) 4 and 10. We disagree. This Court reviews the trial court's scoring of a sentencing variable for clear error. *People v Witherspoon*, 257 Mich App 329, 335; 670 NW2d 434 (2003). "Scoring decisions under the sentencing guidelines are not clearly erroneous if 'there is *any* evidence in support' of the decision." *Id.*, quoting *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996) (emphasis in *Witherspoon*).

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<sup>2</sup> Defendant also argues that the cumulative effect of the errors denied him a fair trial. However, any errors we have found we also concluded were not prejudicial to defendant. See *People v McLaughlin*, 258 Mich App 635, 649; 672 NW2d 860 (2003) (to obtain relief for cumulative error a defendant must show serious prejudice that denied the defendant a fair trial).

OV 4 deals with psychological injury to the victim. Defendant was scored ten points on OV 4 for the victim suffering serious psychological injury requiring professional treatment. MCL 777.34. There was evidence to support this scoring decision. The victim stated that she was scared to death by the offense and truly feared that defendant would kill her. She also stated that she was not “out on the street” any more because of the incident. This was sufficient to score OV 4 at ten points. See *People v Apgar*, 264 Mich App 321, 329; 690 NW2d 312 (2004), lv gtd 474 Mich 1099 (2006) (finding that OV 4 was properly scored at ten points because evidence showed that the victim was fearful during her encounter with defendant). The fact that the victim had not yet sought psychological treatment is not dispositive. MCL 777.34(2).

The court also scored OV 10 at 15 points finding that predatory conduct was involved in this crime. Again, this scoring decision was supported by evidence. There was evidence presented that defendant sought out at least two prostitutes and attempted to take them to places outside of town to assault them. The evidence was consistent with defendant choosing the victim in this case because she would be unlikely to report his conduct to the police. Defendant chose the victim while she was on the street working as a prostitute, took her outside of town to a field, and then assaulted her. This pre-offense conduct was sufficient evidence of conduct directed toward the victim “for the primary purpose of victimization.” MCL 777.40(3)(a).

Affirmed.

/s/ Mark J. Cavanagh  
/s/ Michael R. Smolenski  
/s/ Michael J. Talbot