

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RONALD J. GERRIOR,

Defendant-Appellant.

UNPUBLISHED

July 8, 1997

No. 188795

Recorder's Court

LC No. 90-000831-FC

Before: Markey, P.J., and Bandstra and Hoekstra, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of guilty but mentally ill to two counts of second-degree murder, MCL 750.317; MSA 28.549, and guilty of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The trial court sentenced defendant to concurrent terms of twenty-five to forty years' imprisonment for the murder convictions, and to the statutory consecutive two-year term for the felony firearm conviction. We affirm.

Defendant's first issue on appeal is that the trial court erred when it refused to dismiss his second trial for the reason that double jeopardy protections barred his retrial for the same offense because retrial was necessitated by the intentional misconduct of the trial prosecutor at the first trial. We disagree. We review a trial court's determination of a double jeopardy issue *de novo*. *People v White*, 212 Mich App 298, 304-305; 536 NW2d 876 (1995).

Defendant attempts to expand his right to be free from double jeopardy following the declaration of a mistrial due to intentional prosecutor misconduct to include the reversal of a conviction by an appellate court for prosecutorial misconduct. Double jeopardy bars retrial when a mistrial is prompted by intentional prosecutorial misconduct. *People v Dawson*, 431 Mich 234, 253; 427 NW2d 886 (1988). However, double jeopardy principles preclude a retrial following reversal on appeal only when the reversal is based on insufficiency of the evidence. *People v Langley*, 187 Mich App 147; 466 NW2d 724 (1991). Here, defendant's reversal on appeal based on prosecutorial misconduct does not prohibit his retrial.

Defendant next argues that he is entitled to resentencing because the prosecutor was vindictive when he recommended a harsher sentence following defendant's second trial. We disagree. This Court reviews sentencing issues for an abuse of discretion. *People v Milbourn*, 435 Mich 630, 635-637, 654-655; 461 NW2d 1 (1990).

Defendant was sentenced to concurrent terms of twenty to forty years' imprisonment for his murder convictions following his first trial. Defendant was tried and sentenced on retrial by a different judge to concurrent terms of twenty-five to forty years' imprisonment for his murder convictions. Defendant submits that the second trial judge must have been influenced by the prosecutor's request for a thirty-year minimum sentence on one count and a life sentence on the other count, especially since she failed to sufficiently articulate on the record her reasons for imposing the sentence that she did. We find no support in the record for defendant's position. The judge who sentenced defendant after his second trial was not bound by the sentence set after defendant's first trial, and no presumption of vindictiveness arises from the mere fact that a greater minimum term was imposed. *People v Mazzie*, 429 Mich 29, 33; 413 NW2d 1 (1987).

We also find from our review of the record that the trial court sufficiently articulated on the record reasons justifying her imposition of defendant's twenty-five to forty year sentences. The court indicated that defendant's acts were savage, deliberate, and brutal. The court noted that there was a great need to protect society from the type of violence displayed by defendant, and that other potential offenders need to be deterred from committing similar acts of domestic violence. We do agree with defendant, however, that the sentencing information report regarding defendant's second sentencing incorrectly indicates that defendant received minimum terms of twenty years, but we decline to remand to correct the report because guidelines calculations do not have the force of law. *People v Mitchell*, 454 Mich 145; 176-177; 560 NW2d 600 (1997). Furthermore, defendant's judgment of sentence correctly reflects the sentence imposed.

Finally, defendant argues that the prosecutor at his second trial again committed misconduct. We disagree. We test claims of prosecutorial misconduct to determine whether the defendant was denied a fair trial, *People v Ullah*, 216 Mich App 669, 681; 550 NW2d 568 (1996), and we review prosecutorial misconduct issues on a case-by-case basis, examining the pertinent portion of the record and evaluating a prosecutor's remarks in context. *People v LeGrone*, 205 Mich App 77, 82; 517 NW2d 270 (1994).

Defendant claims error from the prosecutor's remarks in closing argument that the defenses advanced by defendant were inconsistent. Defendant objected to the prosecutor's argument, and the trial court gave the jury a cautionary instruction which clearly indicated that defendant may properly advance alternative theories in his defense. Defendant argues that the trial court's instruction was not effective because it was given the day after the prosecutor's argument. To the contrary, we conclude that the court's clear instruction cured any taint introduced by the prosecutor's argument.

Defendant also argues that the prosecutor unfairly took advantage in closing argument of the fact that defendant was indigent by indicating that defendant's expert psychologist, whom the prosecutor

knew to be court-appointed because defendant's funds ran out after the first trial, held only a limited license, while the prosecution's expert witness was a fully-licensed psychiatrist. We find no support in the record for defendant's contention. The prosecutor did not mention the experts' credentials at closing argument. We find that the prosecutor properly argued only facts that were adduced at trial, and reasonable inferences therefrom regarding which experts were worthy of belief. *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996).

Affirmed.

/s/ Jane E. Markey

/s/ Joel P. Hoekstra

I concur in result only.

/s/ Richard A. Bandstra