STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GLEN J. SMOGOLESKI a/k/a GLEN O. SMOGOLESKI,

Defendant-Appellant.

UNPUBLISHED
January 14, 1997

No. 169702
LC No. 93-011179-FC

Before: MacKenzie, P.J., and Wahls and Markey, JJ.

PER CURIAM.

Defendant was convicted of assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279 and pleaded guilty to habitual offender fourth, MCL 769.12; MSA 28.1084. Defendant was sentenced to fifteen to thirty years' imprisonment. He appeals as of right. We affirm.

Defendant first argues that the prosecution improperly introduced evidence of the complainant's prior consistent statements to the police and used this statement in closing argument to bolster the complainant's credibility. We find no reversible error. Initially we note that contrary to defendant's argument, the statement was not inadmissible hearsay because it was not offered for the truth of the matter asserted. MRE 801(C). Furthermore, defendant failed to object at trial to the use of this statement or the closing argument. If given the opportunity, the trial court could have instructed the jury that the statement should not be considered to bolster the complainant's credibility. Error cannot be predicated on the prosecution's remarks when the defendant fails to object and a timely instruction could have cured any potential error. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

Defendant next argues that he was denied a fair trial where a police officer testified that the complainant said she did not want defendant to go "back to prison." We disagree. While it is generally improper for police officers to offer unresponsive testimony of a defendant's prior criminal conviction, we do not find error here. First, the reference to defendant's prior incarceration was not intentionally injected by the prosecution. *People v Von Everett*, 156 Mich App 615, 622; 402 NW2d 773

(1986). Second, defendant failed to object to the testimony and a curative instruction could have been given. *People v Barker*, 161 Mich App 296, 306; 409 NW2d 813 (1987). Finally, in light of the strong evidence against defendant, including his tape recorded admissions to the complainant, reversal is not warranted on this basis. *People v Holly*, 129 Mich App 405, 416; 341 NW2d 823 (1983).

Defendant also argues that the trial court erred in allowing the complainant to testify that others had told her that defendant said he wished he had "finished the job." We disagree. Under this issue, defendant initially argues that the statement was inadmissible hearsay. However, defendant's argument on appeal assumes as its premise that the statement was offered to show the complainant's state of mind. Thus, where the statement is not offered to prove the truth of the matter asserted, it is not inadmissible hearsay. Further, the underlying statement of defendant is admissible as an admission of a party opponent pursuant to MRE 801(d)(2)(A). Defendant further argues that this evidence was inadmissible under MRE 403. Defendant did not object on this ground below and therefore, this argument is not preserved for appeal. *People v Winchell*, 171 Mich App 662, 665; 430 NW2d 812 (1988).

Defendant argues that his confession to the police should have been suppressed because he was severely intoxicated at the time the statement was made and therefore could not have voluntarily waived his *Miranda*[1] rights. We disagree. Although advanced intoxication from drugs or alcohol can render a waiver of *Miranda* rights ineffective, the fact that a person was intoxicated is not dispositive of voluntariness. *People v Leighty*, 161 Mich App 565, 571; 411 NW2d 778 (1987). In light of the conflicting testimony presented to the trial court regarding defendant's level of intoxication at the time the statement was made, it cannot be said that the trial court clearly erred in finding defendant voluntarily waived his *Miranda* rights. *People v Crawford*, 89 Mich App 30, 34; 279 NW2d 560 (1979).

Defendant finally argues that his sentence violates the principle of proportionality. We disagree. Defendant's substantial criminal history supports the sentence imposed by the trial court. Furthermore, the evidence demonstrated that defendant beat, choked and anally raped the complainant with the intent to make her suffer. Defendant's fifteen-year minimum sentence, considered in light of the trial court's statutory authority to impose a life term, leaves substantial room for a harsher sentence for more egregious offenses. The trial court did not abuse its discretion in sentencing defendant. *People v Odendahl*, 200 Mich App 539, 540-541; 505 NW2d 16 (1993).

Affirmed.

/s/ Barbara B. MacKenzie
/s/ Myron H. Wahls
/s/ Jane E. Markey

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