STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LEE THAN KNIGHT,

Defendant-Appellant.

UNPUBLISHED
May 9, 1997

No. 191064
Oakland Circuit Court
LC No. 95-138050-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DWAYNE G. BARTON,

Defendant-Appellant.

No. 191065
Oakland Circuit Court
LC No. 95-138051-FC

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

PER CURIAM.

Following a jury trial, defendants were convicted of assault with intent to murder, MCL 750.83; MSA 28.278, and assault with intent to rob while armed, MCL 750.89; MSA 28.284. Before trial, both defendants pleaded guilty to charges of breaking and entering, MCL 750.110; MSA 28.305, and breaking and entering a coin box, MCL 750.113; MSA 28.308. Defendants were both sentenced to 30 to 60 years' imprisonment for the assault with intent to murder convictions, 30 to 60 years' imprisonment for the assault with intent to rob while armed convictions, five to ten years' imprisonment for the breaking and entering convictions, and six months' imprisonment for the breaking and entering a coin box convictions. Defendants now appeal as of right. We affirm.

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Defendant Knight first argues that the statement he made in a police car before being advised of his *Miranda*[1] rights should not have been admitted into evidence at trial. Although defendant challenged the admissibility of at least one of his statements at trial, he never objected to this particular statement. In the absence of a *Walker*[2] hearing or an objection by defendant, we review this issue only for manifest injustice. *People v Brand*, 106 Mich App 574, 576; 308 NW2d 288 (1981). Here, defendant was not entitled to *Miranda* warnings before his statement because he was not subject to custodial interrogation. The fact that defendant was in a police car when he was questioned does not mean that he was "in custody" for *Miranda* purposes; rather, the key question is whether defendant could have reasonably believed that he was not free to leave. See *People v Roark*, 214 Mich App 421, 423-424; 543 NW2d 23 (1995); *People v Williams*, 171 Mich App 234, 237-238; 429 NW2d 649 (1988). There must be some additional factor in order to create "custody." See, e.g., *Roark, supra*. Here, there is no evidence that the police placed defendant under arrest or indicated to him in any way that he was not free to leave. Thus, we conclude that defendant's statement was admissible, and no manifest injustice will result from our failure to review this issue.

Defendant Knight next argues that his statements at the police station should have been suppressed because the police failed to inform him that an attorney had been retained for him and was waiting to speak with him. The officers' failure to inform defendant of these circumstances may have invalidated defendant's subsequent waiver. *People v Bender*, 452 Mich 594; 551 NW2d 71 (1996); *People v Young*, ___ Mich App ___; ___ NW2d ___ (Docket No. 2000195, issued April 1, 1997), slip op at 2. Although neither *Bender* nor *Young* had been decided at the time of defendant's arrest, this Court decided in *Young*, *supra* at 3, that the rule requiring the police to inform a suspect that an attorney has been retained for him is to be applied retroactively. Thus, the trial court erroneously admitted into evidence defendant's statement made immediately following that waiver. We conclude, however, that the error, if any, was harmless. Here, defendant initially confessed to the crimes while seated in the back seat of a police car. As indicated above, this statement was admissible. After defendant was taken to the police station, his attorney tried to contact him by telephone. The police failed to inform defendant of this fact, as required under *Bender*, *supra*. After defendant made his second confession, however, the police corrected their alleged error by informing defendant that an attorney was waiting to speak with him. Defendant then declined to consult his attorney and made a third, taped confession. Under these circumstances, the evidence of defendant's guilt, including his first and third confessions, was overwhelming. Thus, any error in admitting his second confession was harmless beyond a reasonable doubt. See *People v Jackson*, 158 Mich App 544, 551-552; 405 NW2d 192 (1987).

Defendant next contends that his sentence was disproportionate. We review sentencing issues for an abuse of discretion. *People v Honeyman*, 215 Mich App 687, 697; 546 NW2d 719 (1996). A sentence constitutes an abuse of discretion if it is disproportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). Here, defendant's sentence was double that called for under the sentencing guidelines. Notably, our Supreme Court has recognized that such departures are appropriate in the most egregious cases. *People v Merriweather*, 447 Mich 799, 807-808; 527 NW2d 460 (1994). Here, the trial court stated that it departed from the guidelines because of the extremely brutal nature of the crime and the extent of the victim's injuries. We agree with the trial court that, on a continuum, this

case represents one of the most egregious. We therefore conclude that the trial court did not err in sentencing defendant.

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Defendant Barton first argues that his sentence was disproportionate. We disagree. Both defendants engaged in nearly identical conduct. They were convicted of the same crimes and received identical sentences for the same reasons. Thus, we conclude that, like his co-defendant's sentence, defendant Barton's sentence was proportionate. See *Merriweather, supra* at 807.

Defendant Barton also argues that his confessions were erroneously admitted at trial. We review a trial court's findings regarding the admissibility of a statement for clear error. *Williams, supra* at 237. Defendant claims that all of his confessions should have been suppressed because his first confession was taken in the back seat of a police car before he was given *Miranda* warnings. The trial court found that defendant was not "in custody" for *Miranda* purposes until he was arrested because he voluntarily got into the police car and never asked to leave. As noted above, the mere fact that a suspect is questioned in a police car does not mean the he is "in custody." *Williams, supra* at 237-238. Thus, the trial court's finding on this issue was not clearly erroneous.

Affirmed.

/s/ Jane E. Markey
/s/ Richard A. Bandstra
/s/ Joel P. Hoekstra

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

[2] *People v Walker (On Rehearing)*, 374 Mich 331, 337-339; 132 NW2d 87 (1965).