STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DERRICK EDWARD COOLEY,

Defendant-Appellee.

UNPUBLISHED
May 23, 1997

No. 142599
Recorder's Court
LC No. 83-006571

Before: Holbrook, Jr., P.J., and MacKenzie and Murphy, JJ.

PER CURIAM.

In 1985, defendant was convicted by a jury of second-degree murder, MCL 750.317; MSA 28.549, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant's convictions arose from the shooting death of Larry Farmer in September 1983. Defendant was sentenced to serve prison terms of fifty to one-hundred years and two years, respectively. He appeals by leave granted and we affirm.

On appeal, defendant argues that the trial court abused its discretion in refusing to suppress his custodial statement as the fruit of prearraignment delay. We disagree. In *People v Cipriano*, 431 Mich 315, 333; 429 NW2d 781 (1988), our Supreme Court held that "unnecessary delay" prior to arraignment is only one factor to be taken into account in evaluating the voluntariness of a confession. The test of voluntariness should be whether, considering the totality of all the surrounding circumstances, the confession is "the product of an essentially free and unconstrained choice by its maker," or whether the accused's "will has been overborne and his capacity for self-determination critically impaired." *Id.* at 333-334. *Cipriano* is to be given full retroactive effect. See e.g., *People v Spinks*, 184 Mich App 559, 563; 458 NW2d 899 (1990); *People v Feldmann*, 181 Mich App 523, 531-532; 449 NW2d 692 (1989).

Here, defendant moved to suppress his custodial statement on the grounds that it was involuntary. After an evidentiary hearing, the trial court denied the motion. In reviewing a trial court's determination regarding voluntariness, this Court examines the record and makes an independent determination. However, we defer to the trial court's superior ability to view the evidence and the

witnesses and will not disturb the court's findings unless they are clearly erroneous. *People v Krause*, 206 Mich App 421, 423; 522 NW2d 667 (1994). A finding is clearly erroneous if it leaves this Court with a definite and firm conviction that a mistake has been made. *People v Kvam*, 160 Mich App 189, 196; 408 NW2d 71 (1987). After reviewing the record, we find that the trial court's findings were not clearly erroneous.

Defendant contends that the trial court's decision regarding the voluntariness of the statement is not entitled to any deference because it was "based on the erroneous finding that the statement was not the fruit of a delay in arraignment." We disagree. Defendant was in the hospital until the evening of September 3, 1983. Sergeant Joseph Alex testified that he decided not to question defendant during that time because defendant was having trouble speaking. Defendant does not dispute Alex's contention. Thus, the first time that the police had an opportunity to interrogate defendant regarding Farmer's death was three days after he was arrested. Under such circumstances, it was not improper for Alex to question defendant without immediately taking him before a magistrate for arraignment.

Nor was there an undue period of delay following the interrogation. Sergeant Alex testified that he would have released defendant after the interrogation were it not for the fact that defendant was also in custody on the unrelated murder charge. Thus, defendant was essentially discharged from custody on the current offense on September 4, 1983. Regardless, the delay following the interrogation could not possibly have effected the voluntariness of the statement since the statement had already been obtained. See, e.g., *People v Livingston*, 57 Mich App 726, 731; 226 NW2d 704 (1975).

Defendant next argues that he is entitled to a new trial because the trial court gave erroneous and misleading instructions to the jury. Defense counsel did not object to the jury instructions. Under such circumstances, our review is limited to whether relief is necessary to avoid manifest injustice. *People v Haywood*, 209 Mich App 217, 230; 543 NW2d 317 (1995).

Jury instructions are to be read in their entirety rather than extracted piecemeal to establish error. *People v Dabish*, 181 Mich App 469, 478; 450 NW2d 44 (1989). The reviewing court must balance the general tenor of the instructions in their entirety against the potentially misleading effect of a single isolated sentence. *People v Freedland*, 178 Mich App 761, 766; 444 NW2d 250 (1989). Even if somewhat imperfect, instructions do not create error if they fairly presented the issues to be tried and sufficiently protected the defendant's rights. *People v Perry*, 218 Mich App 520, 526; 554 NW2d 362 (1996). We agree that, according the trial transcripts, the trial court made several misstatements in instructing the jury on self-defense and voluntary manslaughter. As a whole, however, the instructions fairly presented the issues to be tried. Therefore, no manifest injustice occurred.

Next, defendant argues that his convictions should be reversed and the case dismissed on the basis of a 180-day rule violation. Recently, this Court held, in *People v Bell*, 209 Mich App 273; 530 NW2d 167 (1995), that, because the purpose of the 180-day rule is to dispose of untried charges against prison inmates so that sentences may run concurrently, the rule is inapplicable where a defendant is serving a mandatory life sentence for an unrelated conviction. *Id.* at 279. Here, defendant Cooley is serving a mandatory life sentence for an unrelated murder conviction; therefore, the 180-day rule has no

application to this matter. In any event, were we to consider the merits of this issue, we would conclude that the prosecutor proceeded promptly to retry the case after defendant moved for substitution of counsel and the court granted a mistrial of the first trial. *Id.*; *People v Hendershot,* 357 Mich 300, 303-304; 98 NW2d 568 (1959).

Defendant next contends that the trial court abused its discretion in refusing to appoint substitute counsel on the first day of defendant's retrial when counsel refused to move for dismissal on the basis of the 180-day rule. An indigent defendant is guaranteed the right to counsel; however, he is not entitled to have the attorney of his choice appointed simply by requesting that the attorney originally appointed be replaced. *People v Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991). Appointment of substitute counsel is warranted only upon a showing of good cause and where substitution will not unreasonably disrupt the judicial process. Good cause exists where a legitimate difference of opinion develops between a defendant and his appointed counsel with regard to a fundamental trial tactic. *Id.*

Here, defense counsel properly determined that the motion to dismiss would have been futile. At the time defendant made his request, the case had been pending for seventeen months and defense counsel was the third attorney appointed to represent defendant. Thus, substitution would have seriously disrupted the judicial process. Having brought a similar motion prior to the start of his first jury trial, defendant was well aware of the requirement that the prosecutor must make a good faith effort to bring the case to trial within 180-days. Yet, he did not raise the issue again until the morning his second trial was scheduled to commence. Defendant did not assert that his attorney was inadequate, lacking in diligence, or disinterested in the case. *People v Meyers (On Remand)*, 124 Mich App 148, 166; 335 NW2d 189 (1983). Although defense counsel disagreed with defendant about the propriety of a 180-day rule motion, there was no evidence suggesting a breakdown of the attorney-client relationship. Accordingly, the trial court did not abuse its discretion in denying defendant's request.

Defendant next raises several challenges to his sentence. First, he argues that he is entitled to be resentenced because the trial court, while agreeing with the prosecutor that the guidelines were improperly calculated, refused to recalculate them. In light of *People v Mitchell*, 454 Mich 145, 176; ___ NW2d ___ (1997), in which the Michigan Supreme Court held that errors regarding guidelines calculation do not present a reviewable issue on appeal, we decline to address this issue. Second, defendant argues that the trial court relied on erroneous information in imposing sentence. At sentencing, the trial court stated that a departure from the guidelines was appropriate in this case because, among other reasons, defendant had been convicted of unarmed robbery and he had a "long history of violence." Defendant did not object to these assertions at sentencing, but on appeal counters that, although he was charged with unarmed robbery in 1977, he pleaded guilty to attempted larceny, and that, other than a conviction of first-degree murder for an "execution style" killing committed less than a month before the current offense, he had not been convicted of a violent offense. While we agree that the trial court misstated the nature of defendant's conviction in 1977 and overstated the documented length of defendant's violent past, we are not persuaded that, as a consequence, the trial court's sentencing decision was based on an "extensively and materially false" foundation, such that appellate review is required. See *Mitchell, supra* at 177 n 39. Indeed, we find it unlikely that the court would have imposed a different sentence had it not misread this particular aspect of defendant's history,

given the court's statement that a sentencing guideline departure was appropriate primarily because "[t]he evidence in this case indicates an execution type murder and that the defendant is a danger to the community." Thus, the factual errors cited by the trial court do not warrant resentencing. Third, defendant asserts that his sentence is disproportionate under *People v Milbourn,* 435 Mich 630; 461 NW2d 1 (1990). Considering the circumstances of this offender and this offense, we find no abuse of discretion by the court in departing from the guidelines to impose a sentence of fifty to one-hundred years.

Defendant next argues that he was denied effective assistance of counsel because (1) counsel failed to move to exclude his police statement on the basis that it was fruit of an illegal arrest, (2) counsel failed to object to the jury instructions, (3) counsel failed to object to certain misstatements of the trial court in imposing sentence, and (4) counsel suggested to the jury that defendant lied on the witness stand. We find no merit to these claims. To establish a claim of ineffective assistance of counsel, the defendant must prove that counsel's performance fell below an objective standard of reasonableness and that, but for counsel's error, there was a reasonable probability that the result of the proceeding would have been different. *People v Pickens,* 446 Mich 298; 521 NW2d 797 (1994).

Defendant argues that counsel was ineffective in failing to move to suppress his police statement as fruit of an illegal arrest. At the evidentiary hearing, Sergeant Alex testified that he did not arraign defendant following the interview because he did not feel that he had enough evidence to obtain a warrant. Probable cause exists if the facts available to the officer at the moment of arrest would justify a fair-minded person of average intelligence to believe that the suspected person has committed a felony. *People v Thomas,* 191 Mich App 576, 579; 478 NW2d 712 (1991). Therefore, Sergeant Alex's personal belief regarding the existence or nonexistence of probable cause is irrelevant. Our review of the record indicates that probable cause existed to believe that a felony was committed and that defendant committed it.[1] *Thomas, supra* at 579. Accordingly, a motion to suppress on the basis of an illegal arrest would have been futile. Counsel is not required to argue a frivolous or meritless motion. *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991). Also, because we have held that defendant was not prejudiced by the trial court's misstatements during jury instructions and during sentencing, an objection would in all likelihood have had no impact on the result of the trial or on defendant's sentence. Thus, defendant has not established entitlement to appellate relief because of counsel's failure to object.

Finally, a lawyer does not render ineffective assistance of counsel by conceding certain points at trial. Only a complete concession of guilt constitutes ineffective assistance of counsel. *People v Emerson (After Remand),* 203 Mich App 345, 349; 512 NW2d 3 (1994). Here, defendant's trial testimony directly contradicted his own police statement and the testimony of the various prosecution witnesses. Thus, defense counsel was faced with explaining to the jury why defendant might choose to lie to the police. Given the circumstances, counsel's strategy was reasonable under the circumstances. however, neither had a significant likelihood of success. *People v LaVearn,* 448 Mich 207, 214-216; 528 NW2d 721 (1995). See also *United States v Harris*, 761 F2d 394, 401-402 (CA 7, 1985). At no point did defense counsel admit that defendant was guilty of the charged offense. Accordingly, we

conclude that defendant has not overcome the presumption that his counsel's performance was constitutionally adequate.

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Barbara B. MacKenzie
/s/ William B. Murphy

[1] Here, Officers Charles Reed and William McDonald responded to the scene of the shooting and discovered blood on the porch and sidewalk of defendant's house. Defendant's mother told Officer Reed that she heard shots fired from behind the house. When Reed walked to the back of the house, he saw a bloody body lying in the alley. Defendant's parents gave the officer a description of defendant and told the officers that their son had knocked on the door and said that he had been shot in the face. Thereafter, Reed and McDonald responded to a radio report indicating that a man was at a local hospital seeking treatment for a gunshot wound to the face. At the hospital, Officers McDonald and Reed were directed to a treatment room where they encountered defendant lying on a gurney. Underneath the gurney were clothes matching the description provided to the officers by defendant's parents. According to Officer Reed, defendant's clothes were covered in burrs similar to those growing in a lot near the alley where Farmer's body had been discovered. The officers learned that defendant had registered at the hospital under an assumed name. Ammunition was seized from defendant's pockets.