STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

AARON STINCHCOMBE,

Defendant-Appellant.

UNPUBLISHED
July 18, 1997

No. 194229
Oakland Circuit Court
LC No. 95-140914-FC

Before: Corrigan, C.J., and Michael J. Kelly and Hoekstra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of one count of first-degree premeditated murder, MCL 750.316; MSA 28.548, one count of first-degree felony murder, MCL 750.316; MSA 28.548, and two counts of second-degree murder, MCL 750.317; MSA 28.549. Recognizing a double jeopardy problem, the trial court only sentenced defendant for the first-degree murder convictions; he received imprisonment for life without parole. Defendant now appeals as of right. We affirm his first-degree murder convictions and sentences, and vacate his second-degree murder convictions.

Defendant first argues that his *Miranda*[1] waivers and confession were involuntary, and that his confession was taken in violation of his right to remain silent and his right to counsel. A *Walker*[2] hearing was held on the issues, and the trial court found that his statements were admissible. Upon review, we defer to the trial court's factual findings unless they are clearly erroneous, but make an independent determination on the issue of voluntariness. *People v Cheatham*, 453 Mich 1, 29-30; 551 NW2d 355 (1996).

Here, the trial court found that defendant was not in custody at the time he made his initial confession and, thus, *Miranda* did not apply. This ruling by the trial court was not clearly erroneous. The evidence at the *Walker* hearing established that defendant went to the police station voluntarily, and that his cooperation remained purely voluntary throughout the time that he was making his confessions. Thus, the police were not required to give defendant *Miranda* warnings. *People v Anderson*, 209 Mich App 527, 532; 531 NW2d 780 (1995). Defendant's claim is without merit.

Further, even if it was necessary to review whether defendant's statements violated his *Miranda* rights, there is no evidence to support his claims. At no time did defendant make any request for counsel, nor did he indicate in any manner that he did not wish to speak with the police. Defendant would have us construe his initial refusal to take a polygraph examination to be a request for counsel and an assertion of his right to remain silent. We find this argument unpersuasive. A refusal to take a polygraph examination simply does not equal a request for an attorney, or a desire to end police questioning. Thus, we find that the police did not violate defendant's right to counsel or his right to remain silent.

Defendant also argues that his confession was rendered involuntary when the police repeatedly requested that he take a polygraph examination. However, there was nothing improper about the requests in this case. If defendant tired of the requests, he had the option of stopping the questioning at any time. In addition, the transcript of defendant's conversation with the police belies his contention that the police somehow wore him down or pressured him into agreeing to take a polygraph examination. In fact, defendant effectively volunteered to take a polygraph after the police had moved on to other subjects. We conclude that defendant's waivers of his *Miranda* rights, his agreement to take a polygraph, and his confession were all voluntary.

Defendant next argues that the police improperly searched his clothing without a warrant. The police analyzed defendant's clothing and found fibers from his clothing on the victims' clothing and vice-versa. Although defendant failed to raise this issue at trial, he now argues that this fiber evidence should not have been admitted. Generally, this Court will not review an issue raised for the first time on appeal. *People v Newcomb*, 190 Mich App 424, 431; 476 NW2d 749 (1991). However, if an important constitutional question is involved and is decisive to the case, appellate review is appropriate. *Id*. We conclude that this issue was not decisive to this case. The other evidence against defendant, including his detailed confession, was overwhelming. The fiber evidence defendant contests added almost nothing to the prosecution's case when defendant's confession is considered. Thus, we conclude that any error in the admission of this evidence was not even remotely decisive to the outcome of this case.

Defendant next argues that he was denied a fair trial based on prosecutorial misconduct. Defendant failed to object to most of the remarks which he now suggests were improper. Absent an objection at trial, appellate review of improper remarks is precluded unless a curative instruction could not have eliminated the prejudicial effect or the failure to consider the issue would result in a miscarriage of justice. *People v Nantelle*, 215 Mich App 77, 87; 544 NW2d 667 (1996).

With regard to defendant's unpreserved claims of prosecutorial misconduct, most of the prosecutor's remarks were proper. While she did refer to the crimes as "horrifying" and "evil," these were in fact accurate descriptions based on the evidence. Such remarks are not improper. *People v Hoffman*, 205 Mich App 1, 21-22; 518 NW2d 817 (1994). She also described defendant's demeanor during his confession as "cold" and "remorseless." Again, these remarks were proper as they were based on the evidence and were relevant to the charge of first-degree murder. *People v Paquette*, 214 Mich App 336, 342-343; 543 NW2d 342 (1995). The only remarks that may have been improper were those which characterized defendant himself as evil or a monster. However, we conclude that any prejudice from these remarks could have been eliminated by an appropriate

instruction. In light of the overwhelming evidence of defendant's guilt, we also conclude that our failure to review this issue will not result in a miscarriage of justice. *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996).

Defendant did object to the prosecutor's remark that "[t]his is first-degree murder. It's as plain as it gets." Viewing this remark in context to determine whether defendant was denied a fair and impartial trial, *Paquette, supra*, it is clear that the prosecutor was arguing defendant's guilt based on the evidence, rather than on some personal belief. Thus, this argument was proper, and reversal is not required. See *People v Swartz*, 171 Mich App 364, 369-371; 429 NW2d 905 (1988).

Defendant next argues that he was denied the effective assistance of counsel. In order to establish such a claim, defendant must show that his counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced him as to deny him a fair trial. *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994). Defendant claims that his attorney erred by failing to move to suppress the evidence obtained as a result of the search of his clothing, and by failing to object to some of the prosecutor's remarks. In light of the overwhelming evidence of defendant's guilt, defendant cannot establish that any of these alleged deficiencies prejudiced his right to a fair trial. *Launsburry, supra* at 361-362.

Finally, defendant argues that his judgment of sentence is inaccurate and must be corrected because defendant cannot be convicted of four-counts of murder where only two victims are involved. We agree. See *People v Passeno*, 195 Mich App 91, 95-96; 489 NW2d 152 (1992). Recognizing this, the trial court only sentenced defendant on the first-degree murder counts. Technically, however, the trial court should have vacated the two second-degree murder convictions. *Id.* Because the trial court failed to do so, we now vacate defendant's second-degree murder convictions.[3]

Defendant also complains that the habitual offender charge against him appears on his judgment of sentence despite the fact that the charge was dismissed. The judgment of sentence states that the habitual offender charge was dismissed. Defendant cites no authority that this notation is improper and, consequently, we decline to order it stricken.

Defendant's convictions and sentences on his first-degree murder convictions are hereby affirmed. His second-degree murder convictions are vacated.

/s/ Maura D. Corrigan
/s/ Michael J. Kelly
/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; 132 NW2d 87 (1965).

[3] The judgment of sentence currently reflects, incorrectly, that defendant was convicted of four counts of first-degree murder, instead of two counts of first-degree murder and two counts of second-degree murder. It should now reflect only two first-degree murder convictions.