

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALLEN WALTER EARL,

Defendant-Appellant.

UNPUBLISHED

March 16, 1999

No. 203255

Washtenaw Circuit Court

LC No. 96-006121 FH

Before: Kelly, P.J., and Gribbs and Fitzgerald, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of third-degree criminal sexual conduct, MCL 750.520d; MSA 28.788(4), and sentenced as a second-felony habitual offender, MCL 769.10; MSA 28.1082, to a term of 8 to 22-1/2 years of imprisonment. He appeals as of right. We affirm, but remand for clerical correction of the presentence report.

First, we reject defendant's argument that the district court abused its discretion in binding him over for trial. *People v Selwa*, 214 Mich App 451, 456; 543 NW2d 321 (1995). Ample evidence was presented at the preliminary examination to establish probable cause that defendant sexually assaulted the victim using force or coercion. MCL 766.13; MSA 28.931; MCL 750.520d(1)(b); MSA 28.788(4)(1)(b); *People v Melotik*, 221 Mich App 190, 197; 561 NW2d 453 (1997); *People v Hutner*, 209 Mich App 280; 530 NW2d 174 (1995).

Next, the trial court did not clearly err in denying defendant's motion to suppress his statements to a police officer while having his fingerprints taken. The record indicates that the statements were made spontaneously and voluntarily. Because defendant was not subject to a custodial interrogation at the time the statements were made, *Miranda* warnings were not necessary. *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966); *People v Anderson*, 209 Mich App 527, 531-533; 531 NW2d 780 (1995).

Further, we conclude that the trial court did not abuse its discretion in denying defendant's motion for a continuance so that defendant could obtain a transcript of the evidentiary hearing on his motion to suppress. *People v Lawton*, 196 Mich App 341, 348; 492 NW2d 810 (1992). Further,

defendant has not shown any prejudice resulting from the trial court's denial of the requested continuance. *Id.* Accordingly, relief is not warranted.

Nor did the trial court err in excusing the victim's mother from testifying at trial. The record indicates that the witness was threatened and severely beaten as a result of her anticipated testimony. This constituted good cause for striking the witness from testifying. MCL 767.40a(4); MSA 28.980(1)(4); *Lawton, supra* at 356. Further, by not moving for a new trial, defendant failed to preserve for appeal the issue of prejudice allegedly resulting from the striking of the witness. *Id.* Moreover, there is no basis in the record for concluding that defendant was prejudiced by the witness' absence where the witness was not present during the charged assault and there is no indication that the witness could have provided testimony favorable to defendant.

Next, defendant argues that the trial court abused its discretion in denying his motion for a mistrial after the prosecutor referred to the alleged prior rape of the victim's mother during closing argument. We disagree. The jury was immediately instructed to disregard the statement. While the statement was improper, we do not believe that it was deliberately injected into the proceedings in bad faith, particularly where the jury was already aware of the alleged rape incident from other testimony. Under the circumstances, we believe that the trial court's instruction to disregard the statement was sufficient to cure any prejudice. Hence, the trial court did not abuse its discretion in denying defendant's motion for a mistrial. *People v Wolverton*, 227 Mich App 72, 75; 574 NW2d 703 (1997).

Defendant also argues that he was denied a fair trial because of prosecutorial misconduct. Because defendant did not object to any of the prosecutor's allegedly improper remarks, appellate review of this issue is foreclosed absent a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994); *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996). Viewing the challenged remarks in context, the prosecutor did not improperly vouch for the truthfulness of witnesses, or proffer an improper argument to inflame the jury. *People v Bahoda*, 448 Mich 261, 276, 282-283; 531 NW2d 659 (1995); *McElhaney, supra*, at 284. Further, the prosecutor did not impermissibly shift the burden of proof to defendant. *People v Fields*, 450 Mich 94, 111-112 n 21; 538 NW2d 356 (1995). Because we conclude that defendant was not denied a fair and impartial trial because of prosecutorial misconduct, *People v Allen*, 201 Mich App 98, 104; 505 NW2d 869 (1993), a miscarriage of justice will not result from our failure to grant appellate relief. *McElhaney, supra*.

Defendant's claim that the prosecutor knowingly used perjured testimony at trial is not supported by the record. Moreover, the apparent inconsistencies in the police officer's testimony were not material. MCL 750.422; MSA 28.664; *People v Honeyman*, 215 Mich App 687, 691; 546 NW2d 719 (1996). Appellate relief is not warranted on the basis of this issue.

We further conclude that the trial court did not abuse its discretion in ruling that the prosecutor's witness list was timely filed, or in finding that the prosecutor's motion to admit evidence under MRE 404(b) was also timely. MRE 404(b)(2).

Defendant's claim that he is entitled to a hearing pursuant to *Franks v Delaware*, 438 US 154; 98 S Ct 2674; 57 L Ed 2d 667(1978), due to an alleged inaccuracy in the police report, is without merit. We find that *Franks* has no applicability in this context. In any event, defendant was not prejudiced by the allegedly inaccurate information because the charge based on the information was dismissed before the preliminary examination. MCR 6.112(F). See also MCL 767.46; MSA 28.986; MCL 767.76; MSA 1016.

Defendant raises several allegations of error with regard to sentencing. The trial court did not err in relying on information in the presentence report in order to establish defendant's status as an habitual offender where defendant did not object to the accuracy of the information at sentencing. MCL 769.13(5)(c); MSA 28.1085(5)(c). However, because the trial court determined that certain challenged information in the presentence report was inaccurate and irrelevant, we remand for clerical correction of the presentence report and for transmittal of a corrected copy to the Department of Corrections. MCL 771.14(5); MSA 28.1114(5); *People v Martinez (After Remand)*, 210 Mich App 199, 202-203; 532 NW2d 863 (1995); *People v Swartz*, 171 Mich App 364, 380-381; 429 NW2d 905 (1988).

Defendant also argues that the trial court erred in failing to articulate its reasons for the habitual offender sentence. The purpose of the articulation requirement is to aid appellate review and avoid injustice on the basis of error at sentencing. *People v Terry*, 224 Mich App 447, 455; 569 NW2d 641 (1997). Here, it is clear that the sentence was individualized and based on defendant's past record, his habitual offender status, and the circumstances of this offense. The record clearly reveals the trial court's familiarity with the appropriate factors and indicates that the trial court was in agreement with the probation department's recommendation. Defendant's sentence for habitual-second was within the guidelines range for the underlying offense and is presumptively proportionate. *People v Beneson*, 192 Mich App 469, 471; 481 NW2d 799 (1992). We fail to see how a remand for more specific articulation could serve any purpose. *Id.*

We affirm defendant's conviction, but remand for clerical correction of the presentence report. We do not retain jurisdiction.

/s/ Michael J. Kelly
/s/ Roman S. Gribbs
/s/ E. Thomas Fitzgerald