STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 9, 1999
v	No. 207775 Oakland Circuit Court
MICHAEL PITTMAN, Defendant-Appellant.	LC No. 97-152785 FC

Before: Collins, P.J., and Jansen and White, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree criminal sexual conduct, MCL 750.520b(1)(c); MSA 788(2)(1)(c), first-degree home invasion, MCL 750.110a(2); MSA 28.350(a)(2), and unarmed robbery, MCL 750.530; MSA 28.798. He was sentenced as a third habitual offender, MCL 769.11; MSA 28.1083, to concurrent prison terms of sixty to ninety years for the criminal sexual conduct conviction, twenty to forty years for the home invasion conviction, and fifteen to thirty years for the unarmed robbery conviction. These sentences were ordered to run consecutively to time imposed for defendant's violation of his parole that was in effect at the time of the present offenses. Defendant appeals as of right and we affirm.

Defendant first argues that the trial court erred in denying a *Walker*[1] hearing concerning the voluntariness of his partial confession.[2] Defendant moved pretrial to suppress his police statement, arguing that the police failed to honor defendant's request to speak with a lawyer and that the statement was not voluntary. Defendant also denied that he ever made the incriminating statement to the police. The trial court ruled that whether defendant had made the statement was a question for the jury and that his denial was inconsistent with a claim that the statement was made involuntarily. By the trial court's view, defendant was not challenging voluntariness and thus was not entitled to a *Walker* hearing. Whether defendant was entitled to a *Walker* hearing presents a question of law. Questions of law are reviewed de novo. *People v Ward*, 230 Mich App 95, 98; 583 NW2d 495 (1998).

The trial court relied on *People v Spivey*, 109 Mich App 36; 310 NW2d 807 (1981), where this Court held that it was not error to decline to hold a *Walker* hearing when the defendant did not challenge the voluntariness of his confession, but instead claimed that the police fabricated a few

sentences and inserted them into the confession. This Court held that, "whether the statement had been made at all, remain[ed] for the determination of the trier of fact." *Id.* at 37. Although *Spivey* only expresses the proposition that a defendant is not entitled to a *Walker* hearing unless the defendant challenges the voluntariness of the statement, the trial court interpreted this to preclude defendant, who denied making the statement, from also claiming in the alternative that, if the statement was made, it was involuntary. However, even where a defendant denies making a statement, if he also challenges it on voluntariness grounds, due process requires the use of procedures "fully adequate to insure a reliable and clear-cut determination of the voluntariness of the confession." *Boles v Stevenson*, 379 US 43, 44-45; 85 S Ct 174; 13 L Ed 2d 109 (1964); *Lee v Mississippi*, 332 US 742, 745; 68 S Ct 300, 92 L Ed 330 (1948) ("A conviction resulting from . . . use of a coerced confession . . . is no less void because the accused testified at some point in the proceeding that he had never in fact confessed, voluntarily or involuntarily"); *People v Neal*, 182 Mich App 368, 371-373; 451 NW2d 639 (1990) (it was error not to decide the issue of voluntariness before trial when the defendant denied making a statement that he signed); *People v Weatherspoon*, 171 Mich App 549, 554-555; 431 NW2d 75 (1988) (it was not error to refuse to hold a pretrial hearing on voluntariness where the defendant denied making the statement, but upon the jury's implicit finding that the statement had been made, a post-trial hearing on voluntariness was required).

The trial court erred in denying defendant's request for a *Walker* hearing and the usual remedy for the erroneous denial of a *Walker* hearing would be a remand to hold one. *Neil, supra* at 373. However, this type of error is subject to harmless error analysis. *Arizona v Fulminante*, 499 US 279, 306-312; 111 S Ct 1246; 113 L Ed 2d 302 (1991); *People v Howard*, 226 Mich App 528, 542; 575 NW2d 16 (1997) (the erroneous admission of an involuntary confession at trial is subject to harmless error analysis). Defendant's only bases for challenging the voluntariness of his statement stemmed from the police version of events that indicated: (1) at some point defendant asked for an attorney, and (2) the questioning took place between 2:35 a.m. and 4:40 a.m. However, the testimony at trial revealed that defendant was given his *Miranda*[3] warnings and the interview was terminated when he asked for an attorney. The time of the interview was dictated by the conclusion of a search pursuant to a warrant, and there was nothing to indicate that defendant had been deliberately deprived of sleep. It is clear that defendant advances no arguable basis on which his statement could be considered involuntary based on the totality of the circumstances. *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988).

Moreover, the evidence of defendant's guilt that did not stem from his statement was, by itself, overwhelming. Defendant was photographed only minutes after the assault using the victim's automatic teller machine card, which was undisputedly stolen by the rapist, who also forced the victim to give him her personal identification number to the ATM card. Additionally, defendant had shoes and a mask in his closet which matched those worn by the rapist. Given these facts, there is no reasonable probability that the admission of defendant's statement might have contributed to the conviction. *People v Anderson (After Remand)*, 446 Mich 392, 405-406; 521 NW2d 538 (1994). Therefore, we decline to remand for a *Walker* hearing because the failure to hold such a hearing was harmless beyond a reasonable doubt. *Fulminante, supra* at 295, 310; *Anderson, supra* at 406.

Defendant next contends that he is entitled to a remand for an evidentiary hearing regarding whether items seized from his apartment during the execution of a search warrant should have been suppressed. We note that defendant had a hearing below, but did not request an evidentiary hearing in connection with his motion to suppress the fruits of this search based on (1) the sufficiency of the facts in the affidavit with regard to the magistrate's finding of probable cause, and (2) that items seized from his apartment were beyond the scope of the warrant. The trial court denied defendant's challenge to the items allegedly beyond the warrant's scope because defendant failed to identify those items or support his position with legal authority. The balance of defendant's motion required the trial court to examine the four corners of the affidavit and determine if "a person of reasonable caution would conclude that contraband or evidence of criminal conduct will be found in the place to be searched." *People v Chandler*, 211 Mich App 604, 612; 536 NW2d 799 (1995); see also, *People v Sloan*, 450 Mich 160, 168, 180-184; 538 NW2d 380 (1995). Therefore, not only was no evidentiary hearing ever requested, an evidentiary hearing would not have been appropriate.[4] Because this issue is unpreserved and our review reveals that no manifest injustice will arise if we decline to address it further, we so decline. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994).

Defendant next contends that his convictions should be reversed because the prosecutor, during closing and rebuttal arguments, stressed that defense counsel had presented no evidence to contradict the prosecution's evidence. In reviewing a claim of prosecutorial misconduct, the prosecutor's remarks are examined in context to determine whether they denied defendant a fair trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995).

A prosecutor may not attempt to shift the burden of proof to the defendant by suggesting that the defendant must prove something or present a reasonable explanation for damaging evidence. *People v Guenther*, 188 Mich App 174, 180; 437 469 NW2d 59 (1991). However, "it is permissible for a prosecutor to observe that evidence against the defendant is uncontroverted or undisputed." *People v Godbold*, 230 Mich App 508, 521; 585 NW2d 13 (1998). We find it unnecessary to analyze whether the prosecutor's remarks were confined to their proper context or whether they crossed the line to either unfair burden-shifting or improper comment on defendant's right to remain silent. The remarks at issue were clearly not of such magnitude as to overcome the trial court's contemporaneous and repeated instructions to the jury on the presumption of innocence and that every defendant has an absolute right not to testify, which must not be considered or be allowed to affect the verdict. Thus, the trial court's instructions were sufficient to dispel any unfair inference the jury might have otherwise drawn from these comments. *People v Figgures*, 451 Mich 390, 400; 547 NW2d 673 (1996); *Bahoda, supra* at 281.

Defendant next argues that his minimum sentence of sixty years for first-degree criminal sexual misconduct violates the principle of proportionality and was motivated by an improper desire to send a message to others. Defendant was sentenced as an habitual offender and the egregious circumstances of the instant offenses combined with his prior record (three prior felony convictions and one misdemeanor conviction) indicate "that he has an inability to conform his conduct to the laws of society." *People v Hansford (After Remand)*, 454 Mich 320, 326; 562 NW2d 299 (1997). Because his sentence was within the limits contemplated by the Legislature, under the circumstances we

cannot find that defendant's sentence was disproportionate. *Id.*; *People v Merriweather*, 447 Mich 799, 808-811; 527 NW2d 460 (1994).

As for the contention that the sentencing court was improperly motivated by a desire to send a message to the community, we note that the court simply announced three purposes for defendant's sentence (punishment, societal protection, and deterrence of others from committing similar offenses), which are recognized as legitimate reasons for the imposition of criminal sentences. See *People v Schultz*, 435 Mich 517, 531-532; 460 NW2d 505 (1990); *People v Carson*, 220 Mich App 662, 678; 560 NW2d 657 (1996). Accordingly, both the sentence and the reasons were proper.

Finally, defendant contends that his sixty-year minimum sentence for first-degree criminal sexual conduct must be vacated because the trial court violated the two-thirds rule of *People v Tanner*, 387 Mich 683, 690; 199 NW2d 202 (1972), and then avoided this mistake by increasing the maximum sentence. Defendant correctly observes that the minimum term of his indeterminate sentence may not exceed two-thirds of the maximum, even as a third habitual offender. *People v Wright*, 432 Mich 84, 88-90; 437 NW2d 603 (1989). When a court imposes an indeterminate sentence that violates this rule, and the maximum sentence is otherwise valid, it is the minimum sentence that must be adjusted because this is the portion of the sentence that is unlawful. *People v Thomas*, 447 Mich 390, 392-394; 523 NW2d 215 (1994).

In this case, the trial court first stated on the record that it was sentencing defendant to a term of sixty to eighty years for the criminal sexual conduct conviction. The prosecutor noted the *Tanner* violation, and stated that the sentence had to be sixty to ninety years, if that was the sentence. The trial court then stated, "It's 60 to 90." No written judgment of sentence had been entered at that point. The judgment of sentence signed by the trial court indicates a sentence of sixty to ninety years. The "mere oral pronouncement of the sentence" does not terminate authority to modify the sentence and the court may properly modify the sentence before the sentencing order is issued. *People v Bingaman*, 144 Mich App 152, 158-159; 375 NW2d 370 (1984); cf. *People v Wybrecht*, 222 Mich App 160, 166; NW2d (1997) (a trial court lacks authority to set aside a valid sentence once the defendant begins serving it). Accordingly, defendant is not entitled to a reduction of his minimum term.

Affirmed.

/s/ Jeffrey G. Collins
/s/ Kathleen Jansen
/s/ Helene N. White

[1] *People v Walker*, 374 Mich 331; 132 NW2d 87 (1965).

[2] The offenses were committed on September 25, 1996. About eight months later, an anonymous informant identified defendant as the person in a photograph at an automatic teller machine while he was using the victim's ATM card. Defendant was arrested and interrogated by the police, who claimed that defendant admitted to committing the break-in and robbery, but denied committing a rape.

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

[4] Had defendant challenged the validity of the facts stated in the affidavit supporting the warrant, rather than the sufficiency of the facts in the affidavit, defendant would have been entitled to an evidentiary hearing upon making a substantial preliminary showing that material facts were either included or omitted from the affidavit intentionally or with a reckless disregard for the truth. *Franks v Delaware*, 438 US 154, 155-156; 98 S Ct 2674; 57 L Ed 2d 667 (1978); *People v Sawyer*, 215 Mich App 183, 194; 545 NW2d 6 (1996); *Chandler*, *supra* at 612-613.