

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRIAN KEITH CRON,

Defendant-Appellant.

UNPUBLISHED

September 17, 1999

No. 210252

Kalkaska Circuit Court

LC No. 97-001691 FC

Before: McDonald, P.J., and Neff and Smolenski, JJ.

PER CURIAM.

Defendant appeals of right his jury conviction of three counts of first-degree criminal sexual conduct, MCL 750.520b; MSA 28.788(2). Defendant was sentenced to three concurrent terms of twenty-five to fifty years' imprisonment. We affirm.

The victim in this case, who was eleven years old at the time, testified that her half-brother arranged her to meet defendant. The victim and defendant subsequently engaged in sexual intercourse on three occasions in 1997.

Defendant first contends that the trial court committed error requiring reversal when it concluded that defendant was not in custody when he was interrogated by the police. Defendant also contends for the first time on appeal that his confession was involuntary. This Court reviews de novo a trial court's determination regarding whether a defendant was in custody, with due deference being given to the trial court's determination of historical facts. *People v Mendez*, 225 Mich App 381, 382; 571 NW2d 528 (1997). Since defendant did not challenge the voluntariness of his statements in the trial court, review on appeal is for plain error that was decisive of the outcome of the case. *People v Grant*, 445 Mich 535, 553; 520 NW2d 123 (1994).

In determining whether a defendant was in custody at the time of the interrogation, we look at the totality of the circumstances, with the key question being whether the defendant reasonably believed that he was not free to leave. *Mendez, supra* at 382-383. Here, the totality of the circumstances supports the trial court's determination that defendant was not in custody. Defendant was told he was not under arrest and that he would not be arrested that night. Defendant was not placed under arrest

even after he made incriminating statements. Defendant agreed to speak to the police outside his house while sitting in a police car. Given the nature of the offense and the fact that other people were present inside defendant's house, it was reasonable to conduct the questioning outside the house. The police vehicle in which the questioning took place had a relatively open interior with bucket seats in front and no partition between the front and back seats. Michigan State Police trooper Brett Gooding testified that defendant was cooperative during the conversation in the vehicle, did not ask the police to stop questioning him and did not indicate that he wanted to leave the vehicle. Furthermore, Gooding testified that after the conversation, defendant led the police to his residence to obtain evidence. Under these circumstances, we conclude that defendant did not reasonably believe that he was in custody. Therefore, the police were not required to give *Miranda*¹ warnings before questioning defendant, and the statements he made were properly admitted.

Furthermore, defendant affirmatively stated at the hearing to suppress the statements that he was not challenging the voluntariness of his statements to the police, and no *Walker*² hearing was conducted. Because defendant failed to develop a factual record to support this claim, we conclude that the issue has been abandoned. See *People v Howard*, 226 Mich App 528, 537; 575 NW2d 16 (1997).

Defendant next contends that the prosecutor violated defendant's marital privilege, presented unsworn hearsay testimony that denied him his right of confrontation, brought out testimony regarding a witness' guilty plea, and commented on this plea in closing argument. This Court reviews claims of prosecutorial misconduct on a case-by-case basis within the context of the particular facts of the case to determine whether the defendant was denied a fair and impartial trial. *Id.* at 544. Specific claims raised by a defendant on appeal that were not objected to in the trial court are not reviewed "unless a curative instruction could not have eliminated the prejudicial effect or where failure to consider the issue would result in a miscarriage of justice." *Id.*

Defendant argues that the prosecutor violated a pretrial ruling of the trial court by presenting testimony that the police had initiated their investigation based on information related to them by defendant's wife. Defendant claims that this testimony effectively violated his marital privilege. MCL 600.2162; MSA 27A.2162. In *People v Fisher*, 442 Mich 560, 575; 503 NW2d 50 (1993), our Supreme Court held that the marital privilege statute contained a "narrow testimonial privilege only" and that "the spouse must testify for the privilege to apply." Defendant's wife did not testify and no confidential marital communications were disclosed; therefore, neither aspect of the privilege was violated.

Next, defendant contends that the prosecution elicited unsworn hearsay from one of its witnesses, trooper Gooding, regarding statements by defendant's wife, Amy Cron. The operative colloquy between the prosecutor and Gooding was as follows:

Q. Trooper, my question is, as a result of contact that you had from a person by the name of Amy Cron, did you then initiate some kind of an investigation? This would be late at night on the 30th of April?

A. Yes, sir, I did.

Contrary to defendant's contention, this question did not disclose any hearsay information. To the extent that it implied that an out-of-court declaration had been related to Gooding, it was not offered for the truth of the implied assertion, but only to show its effect on Gooding, i.e., why Gooding undertook an investigation. MRE 801(c). Because Gooding did not disclose what information he received from defendant's wife, no hearsay testimony was presented, and, as a result, no miscarriage of justice could occur.

Defendant also contends that prosecutorial misconduct occurred when the prosecutor questioned the victim's mother and half-brother about the latter's guilty plea for his involvement in the incident. Defendant's failure to object to the testimony regarding the guilty plea of the half-brother is understandable since defendant's trial strategy was to show that the half-brother and the victim had set him up. Defendant chose to deal with this disclosure through his cross-examination rather than by objecting to the introduction of evidence regarding the plea agreement. See *People v Dowdy*, 211 Mich App 562, 571-572; 536 NW2d 794 (1995). Moreover, the half-brother's conviction resulted from a guilty plea rather than a separate trial and the jury would not have 'impute[d] guilt to . . . defendant because another jury convicted the accomplice of the same crime.' *Id.* Under these circumstances, we cannot conclude that a miscarriage of justice occurred.

Finally, the prosecutor's comment in closing argument regarding the brother's appearance in prison clothing did not, when considered in context, deny defendant a fair trial since it did not inform the jury of anything that they had not already observed. *People v Bahoda*, 448 Mich 261, 267; 531 NW2d 659 (1995). Furthermore, any prejudice could have been eliminated by a curative instruction..

Defendant next contends that the trial court erred by failing to uphold its pretrial ruling when it permitted Gooding to testify that he began his investigation after receiving information from defendant's wife. We disagree. As we have already concluded, the presentation of this brief testimony did not violate the marital privilege statute because defendant's wife did not testify and the nature of the information she provided to the police was not disclosed. The trial court's decision to admit evidence should not be disturbed absent an abuse of discretion. *People v Daoust*, 228 Mich App 1, 12; 577 NW2d 179 (1998). Here, we find no evidence that the trial court abused its discretion in admitting Gooding's testimony.

Defendant next contends that his trial counsel was ineffective for failing to move for a mistrial or to request a cautionary instruction regarding the testimony about his wife's contact with the police and the victim's half-brother's guilty plea. Defendant did not raise his claim of ineffective assistance in the trial court or by a timely motion to remand, so this issue is not preserved. This Court will consider this issue, but review is limited to mistakes apparent on the existing record. *People v Price*, 214 Mich App 538, 547; 543 NW2d 49 (1995). Defendant must show that his counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced defendant as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). Since the testimony indicating that information provided by defendant's wife triggered the police investigation was proper, an objection or a motion for a mistrial would have been fruitless and counsel is not required to make futile objections. *People v Torres (On Remand)*, 222 Mich App 411, 425; 564 NW2d 149 (1997). Counsel's decision not to object to the testimony regarding the half-brother's guilty plea, and

to instead deal with that testimony through cross-examination, was a matter of trial strategy that we will not second-guess on appeal. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996). Defendant has failed to overcome the presumption that his counsel provided effective assistance. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995).

Defendant finally contends that his sentence was disproportionate. This Court reviews the trial court's sentence for abuse of discretion. An abuse occurs if the sentence is not proportionate to the circumstances of the offense and the offender. *People v Milbourn*, 435 Mich 630, 636, 651; 461 NW2d 1 (1990). The minimum sentence in this case was within the range recommended by the sentencing guidelines and thus was presumptively proportionate. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987); *People v Kennebrew*, 220 Mich App 601, 609; 560 NW2d 354 (1996). The key test of sentence proportionality is whether the sentence reflects the seriousness of the matter. *People v Houston*, 448 Mich 312, 320; 532 NW2d 508 (1995). In this case, defendant committed three separate sexual penetrations on different dates with an eleven-year-old victim. Furthermore, the presentence investigation report indicates that while in jail, defendant attempted to suborn perjury, and also corresponded with another minor girl, offering to help eliminate a witness against her uncle if he was released from jail. Under these circumstances, defendant's sentence was proportionate.

Affirmed.

/s/ Gary R. McDonald

/s/ Janet T. Neff

/s/ Michael R. Smolenski

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).