STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARTIN SHAWN MCLOUTH,

Defendant-Appellant.

UNPUBLISHED
October 1, 1999

No. 199310
Eaton Circuit Court
LC No. 96-000228 FC

Before: Murphy, P.J., and Doctoroff and Neff, JJ.

PER CURIAM.

After a jury trial, defendant was convicted of three counts of first-degree criminal sexual conduct, MCL 750.520b(1)(f); MSA 28.788(2)(1)(f). Defendant was sentenced to three concurrent terms of thirty to fifty years in prison. He appeals as of right. We affirm defendant's convictions and sentences, but remand for the deletion of the indication on defendant's judgment of sentence that his sentence was enhanced pursuant to MCL 769.10; MSA 28.1082.

Defendant first argues that the trial court erred in amending his judgment of sentence to indicate that his sentence was enhanced because he was a second habitual offender, MCL 769.10; MSA 28.1082. We agree. This issue presents a question of law, which we review de novo. *People v Sierb*, 456 Mich 519, 522; 581 NW2d 219 (1998).

A prosecutor must file notice of his intent to seek an enhanced sentence within twenty-one days of the arraignment or the filing of the underlying charge. MCL 769.13(1); MSA 28.1085(1); *People v Ellis*, 224 Mich App 752, 754-755; 569 NW2d 917 (1997); *People v Bollinger*, 224 Mich App 491, 492; 569 NW2d 646 (1997). The prosecutor may not amend the information to allege prior convictions outside the twenty-one day period. *Ellis*, *supra* at 755-757. Here, the prosecutor did not file notice of his intent to seek an enhanced sentence under MCL 769.10; MSA 28.1082. Thus, the trial court erred when it amended the judgment of sentence to indicate that defendant's sentence was enhanced pursuant to MCL 769.10; MSA 28.1082, and we remand to the trial court for the deletion of the habitual offender information from defendant's judgment of sentence. Contrary to defendant's argument, he is not entitled to resentencing where the sentencing judge did not change the original

sentence when the judgment of sentence was amended, and where there is no indication in the record that the sentencing judge enhanced defendant's sentence pursuant to MCL 769.10; MSA 28.1082.

Defendant next argues that the trial court erred in admitting Dr. Segan's testimony that sexual assault victims often ask to wash up after the assault. We disagree. We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *People v Lugo*, 214 Mich App 699, 709; 542 NW2d 921 (1995).

The trial court ruled that Dr. Segan was qualified to testify as an expert in the field of human medicine. Defendant asserts that the trial court abused its discretion in admitting Dr. Segan's testimony that it was his experience that some patients who have been sexually assaulted shower before they come to the hospital or ask to wash up at the hospital. Contrary to defendant's argument, *People v Beckley*, 434 Mich 691; 456 NW2d 391 (1990), which dealt with the admissibility of expert testimony regarding rape trauma syndrome in child sexual abuse cases to rebut an inference that the victim's behavior was inconsistent with that of an actual sexual abuse victim, is not applicable here. Dr. Segan was not qualified as an expert in child sexual abuse, and was not asked to provide expert testimony regarding the characteristics of sexually abused children. Rather, he merely was asked to recall his experiences with sexual abuse victims he has treated. Thus, we find no error in the admission of the challenged testimony.

Defendant next argues that the trial court erred in admitting his day planner into evidence because the planner was not relevant. We disagree.

Complainant testified that defendant was carrying a black planner before the assault. Defendant denied carrying the planner. A black planner was later seized at defendant's residence, and was admitted into evidence. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. The planner was relevant because it corroborated complainant's version of the events and made it more probable that complainant, rather than defendant, was telling the truth at trial. Thus, the trial court did not abuse its discretion in admitting the planner into evidence.

Defendant further argues that the prosecutor used the planner for an improper purpose when he asked defendant to show him in the planner the telephone number of defendant's friend, Abdul, who, defendant testified, had delivered marijuana to defendant in the park. However, we find no error in the prosecutor's questioning. The prosecutor's request was not an improper attempt to elicit evidence of other criminal conduct, but was an attempt to impeach defendant's testimony that he did not know Abdul's telephone number and, thus, cast doubt on defendant's version of the assault.

Next, defendant contends that the trial court erred in admitting Detective Prueter's testimony that defendant refused to give a written or tape recorded statement after his arrest. This issue was not preserved for review because the record does not indicate that defense counsel objected to the admission of Officer Prueter's testimony that defendant refused to give a written or recorded statement.

However, this Court may consider constitutional questions for the first time on appeal. *People v Zinn*, 217 Mich App 340, 344; 551 NW2d 704 (1996).

Generally, a defendant's exercise of his right to remain silent cannot be used against him to impeach his exculpatory story. *Doyle v Ohio*, 426 US 610; 96 S Ct 2240; 49 L Ed 2d 91 (1976); *People v McReavy*, 436 Mich 197, 201; 462 NW2d 1 (1990). However, where it is clear from the testimony that a defendant was generally prepared to talk to the police, "his statements, the manner in which he phrased those statements, and his varying degrees of candor all were fit matters for the jury to consider." *People v Sholl*, 453 Mich 730, 738; 556 NW2d 851 (1996). Here, Officer Prueter's testimony indicated that defendant waived his *Miranda* rights and agreed to talk to the police. Thus, the fact that, after giving an oral statement, defendant refused to give a written or recorded statement, was a "fit matter for the jury to consider" to give the jury the full picture of the circumstances surrounding the statement. *Id.*

Furthermore, even if the admission of the testimony was error, the error was harmless beyond a reasonable doubt where the reference to defendant's refusal to give a written or recorded statement was brief, was not repeated, and where no prejudicial inference from the testimony was argued by the prosecutor. *People v Graves*, 458 Mich 476, 482; 581 NW2d 229 (1998); *People v Anderson (After Remand)*, 446 Mich 392, 405-406; 521 NW2d 538 (1994).

Defendant next argues that the trial court erred in failing to give proper jury instructions regarding similar acts evidence and reasonable doubt. We disagree.

A trial court is required to instruct the jury concerning the law applicable to the case and to fully and fairly present the case to the jury in an understandable manner. MCL 768.29; MSA 28.1052; *People v Daoust*, 228 Mich App 1, 14; 577 NW2d 179 (1998). Even if the instructions were somewhat imperfect, there is no error if the instructions fairly presented the issues to be tried and sufficiently protected the defendant's rights. *Id.* Here, defendant did not object to the instructions he now claims were erroneous. Thus, he has waived error unless relief is necessary to avoid manifest injustice. *People v Swint*, 225 Mich App 353, 376; 572 NW2d 666 (1997).

Defendant first argues that the trial court erred in failing to give a proper limiting instruction after the prosecutor elicited evidence from him that he engaged in homosexual acts with his roommate. However, where defendant failed to request such an instruction and has not shown that manifest injustice resulted from the failure to give the instruction, we find no error requiring reversal. *Swint, supra*.

Defendant also asserts that the trial court's reasonable doubt instruction was erroneous because it failed to inform the jury that reasonable doubt required a "moral certainty" of guilt. However, the omission of "moral certainty" language from a reasonable doubt instruction does not give rise to error requiring reversal. *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 552 NW2d 493 (1996). A reasonable doubt instruction, when read in its entirety, must leave no doubt in the mind of the reviewing court that the jury understood the burden that was placed on the prosecutor and what

constituted a reasonable doubt. *Id.* We have reviewed the trial court's reasonable doubt instruction and conclude that it adequately presented the concept of reasonable doubt to the jury.

Next, defendant claims that he was denied the effective assistance of counsel. We disagree. To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that the representation prejudiced the defendant to the extent that it denied him a fair trial. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). To demonstrate prejudice, the defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). With respect to the alleged errors that defendant did not raise at the *Ginther*[1] hearing, our review is limited to the mistakes apparent on the record. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995).

We have carefully reviewed the alleged instances of ineffective assistance of counsel, and find no error requiring reversal. Defendant has not overcome the strong presumption that counsel's performance constituted sound trial strategy. *Stanaway, supra* at 687. Nor has he shown that, but for the alleged errors of counsel, the result of the proceedings would have been different. *Id.*

Similarly, after having reviewed the alleged instances of prosecutorial misconduct, we conclude that the prosecutor's conduct did not deny defendant a fair and impartial trial. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996). Furthermore, any prejudice that may have resulted from the alleged conduct or remarks of the prosecutor could have been cured by an instruction had defendant objected at trial, and our failure to further review the issue will not result in a miscarriage of justice. Thus, we find no error requiring reversal. *McElhaney, supra*.

Defendant also argues that cumulative error denied him a fair trial. Although one error in a trial may not necessarily provide a basis for reversal, it is possible that the cumulative effect of a number of minor errors may add up to error requiring reversal. *Daoust, supra* at 16. However, because we have found no error on any single issue, we find no error in defendant's argument.

Finally, defendant asserts that his sentences amounted to cruel and unusual punishment and were excessive because the maximum sentences exceeded his life expectancy. We disagree.

Defendant claims that his sentences were excessive under *People v Moore*, 432 Mich 311, 329; 439 NW2d 684 (1989), which held that a "term of years" sentence must be less than life, and must be "something that is reasonably possible for a defendant to actually serve." However, *Moore* was decided before *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990) and *People v Merriweather*, 447 Mich 799; 527 NW2d 460 (1994), which now provide the standards for reviewing a sentence on appeal. *People v Lemons*, 454 Mich 234, 257; 562 NW2d 447 (1997). According to *Merriweather*, a sentence that falls within the permissible range of sentences for the offense at issue, and is indeterminate, is lawful as long as it is proportional under *Milbourn*. *Merriweather, supra* at 809. First-degree criminal sexual conduct is punishable by imprisonment for life or any term of years. MCL 750.520b(2); MSA 28.788(2)(2). Thus, defendant's thirty to fifty year sentences fell within the permissible range of sentences. Furthermore, defendant's sentences were

"proportionate to the seriousness of the circumstances surrounding the offense and the offender." *Milbourn, supra* at 635-636. Defendant's sentences fall within the guidelines and, therefore, are presumed to be proportionate. *People v Rivera,* 216 Mich App 648, 652; 550 NW2d 593 (1996). Defendant has not presented any unusual circumstances to overcome the presumption of proportionality. *People v Sharp,* 192 Mich App 501, 505-506; 481 NW2d 773 (1992). Moreover, a sentence that is proportionate is not cruel and unusual punishment. *People*

v Terry, 224 Mich App 447, 456; 569 NW2d 641 (1997).

Affirmed.

/s/ William B. Murphy
/s/ Martin M. Doctoroff
/s/ Janet T. Neff

[1] *People v Ginther,* 390 Mich 436, 442-444; 212 NW2d 922 (1973).