STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TERRANCE KEITH THOMAS,

Defendant-Appellant.

UNPUBLISHED
February 4, 2000

No. 214035
Kent Circuit Court
LC No. 97-006309-FC

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

PER CURIAM.

Defendant Terrance Keith Thomas was convicted in a jury trial of criminal sexual conduct, first degree, MCL 750.520b; MSA 28.788(2), and home invasion, first degree, MCL 750.110a(2); MSA 28.305(a)(2). He was sentenced to six to twenty-five years' imprisonment and three to twenty years' imprisonment, respectively, the sentences to run concurrently. Defendant appeals as of right. We affirm.

I

This appeal arises out of an incident that occurred on May 3, 1997, in Grand Rapids. The victim knew defendant as a friend. She was asleep early in the morning of May 3 when she awoke to find someone on top of her, kissing her. She could not see who the person was because it was dark. At some point, the victim realized that defendant was the person on top of her. She began hitting defendant and screaming at him to get off of her. Defendant covered the victim's mouth and told her to shut up. They fell to the floor, where defendant pulled the victim's panties to one side and penetrated her with his penis. He then got up, apologized to her, told her to "keep this between you and me." Defendant then left. The victim woke her mother, Pamela Simmons, who had slept through the incident because of medication she was taking. Shortly thereafter, the police were summoned.

After the police left, defendant returned to the house and asked Simmons to let him speak with the victim. When Simmons refused, defendant spoke with Simmons, first denying that anything happened, then admitting that he had sexually assaulted the victim. He claimed that he had been

drinking and that he had a crush on the victim. He told Simmons that he could not go to prison because he had a child.

The victim admitted that she initially told the police that she did not want to pursue a prosecution. She claimed that she was reluctant to prosecute because she was afraid of defendant. She described one incident in which a friend of defendant's put a cigarette near her face as if to burn her and told her she was cursed because she "got Keith locked up." In addition, the victim did not go to the doctor until more than a week after the assault. A physician who examined the victim, testified that he found no evidence of trauma in the victim's genitalia. He also testified, however, that most trauma from sexual assaults will heal within a week.

William Corner, a Grand Rapids police officer, investigated the incident. In the course of his investigation, he interviewed defendant while defendant was being detained on other charges. Initially, defendant denied being acquainted with the victim, other than knowing who she was and that she lived in his neighborhood. He then admitted that he had been at the victim's house once.

Defendant testified on his own behalf, admitting that he knew the victim, but denying that he had nonconsensual sex with her. He claimed that on May 3, he went to the victim's house because she was going to get him a job interview. He knocked on the door and the victim let him in. After the victim let him in, they went to the basement, where they had sex. He left without going to the job interview because, he testified, the victim threatened to tell defendant's girlfriend about what had happened. He admitted that he had lied to the police about his familiarity with the victim; he said he had lied because he was scared.

II

Defendant claims that the prosecutor engaged in misconduct when (1) she implied to the jury that defendant had tried to intimidate the victim, and (2) she attempted to introduce unrelated criminal conduct. We disagree.

On appeal defendant complains of eight incidents of prosecutorial conduct. However, at trial he objected to only two of them; in each case, the objection was sustained. Unpreserved claims of prosecutorial misconduct are precluded from review by this Court unless failure to consider the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). We have reviewed the six unpreserved incidents of alleged misconduct and find no error necessitating reversal. Declining to review these claims does not result in a miscarriage of justice.[1]

The test of preserved prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995). Prosecutorial misconduct issues are decided case by case, and the reviewing court must examine the pertinent portion of the record to determine whether the defendant was denied a fair and impartial trial. *People v Legrone*, 205 Mich App 77, 82-83; 517 NW2d 270 (1994).

Both of defendant's preserved claims of misconduct go to the alleged improper introduction of evidence. A defendant's right to a fair trial may be violated when the prosecutor interjects issues broader than the guilt or innocence of the accused. *People v Rice (On Remand)*, 235 Mich App 429, 438; 597 NW2d 843 (1999). However, evidence of threats made by the defendant are admissible to show consciousness of guilt. *People v Sholl*, 453 Mich 730, 740; 556 NW2d 851 (1996). Evidence of threats made to a witness may be admissible, even if the threats are not connected to a defendant, to explain inconsistencies in a witness' behavior. *People v Clark*, 124 Mich App 410, 412-413; 335 NW2d 53 (1983). In the case of threats made by third parties, a limiting instruction can shield a defendant from any potential prejudice. *Id*.

Defendant first points to the victim's testimony about her fear of defendant. She was asked why she had told the police that she did not want anything bad to happen to defendant. She replied that she was scared of defendant. When asked if she had heard defendant brag about anything that would make the victim believe he could be a threat to her, she responded that defendant and "Anthony" had been involved in armed robberies. This evidence was objected to, the testimony stricken, and the jury instructed to disregard it. We presume that the jury follows the court's instructions. *People v Hana*, 447 Mich 325, 351; 524 NW2d 682 (1994). Although the evidence of defendant's involvement in other crimes was improper, its admission was rendered harmless by the court's prompt instruction to disregard.

Shortly after the testimony noted above, the prosecutor asked if people other than defendant had threatened her on his behalf; she responded in the affirmative. Defendant objected and the court sustained the objection, adding, "We don't know whether they were acting with or without the defendant's knowledge, at least unless there is some knowledge of it." No further relief was requested by defendant. The prosecutor followed by asking whether the victim had been threatened by others. This evidence was admissible to show why the victim was justifiably fearful of the consequences of bringing charges and to explain why she might have given inconsistent statements to the police. Thus, although the original form of the question was incorrect because it assumed facts not in evidence, the question as modified was proper.

III

Defendant contends that the court erred in ruling that the statement[2] he made to police was voluntary. We disagree.

The court conducted a pretrial hearing on voluntariness. Corner testified that he interviewed defendant, who was sixteen years old at the time of the interview, while he was held in juvenile detention on other charges. After Corner read defendant his rights, defendant said he understood those rights and agreed to waive them. Corner had spoken to defendant's parents before he was placed in detention; however, he did not ask them for permission to interview defendant once he had been detained. It did not appear to Corner that defendant was under the influence of drugs or alcohol. Corner believed, but was not sure, that defendant had spoken to other officers in the past about serious offenses. The interview terminated when defendant asked for an attorney. Corner admitted on cross-examination that

he did not know if defendant's parents were aware that he had been arrested on other offenses. Corner denied that defendant had asked numerous times to call his parents.

Defendant testified, presenting a somewhat different picture of what occurred. He claimed that when he first spoke to the officers present, they told him that he could receive up to life in prison. He claimed he asked for his parents before the interview began. He was not allowed to speak with his parents at any point. On cross-examination, he admitted that he had been charged in a number of cases as a juvenile, and had been read his rights in many of those cases. He said he had been charged too many times to remember each of the cases. He also said that he did not understand the meaning of a waiver of rights.

The court found that defendant was several months past his sixteenth birthday when questioned about this case, that he had been arrested fourteen times on eighteen different charges since he was thirteen years old, that he admitted being interviewed on numerous occasions, that he was being held on other charges when he was interviewed, that he was read his rights, and that he was not developmentally disabled. The court then denied defendant's motion to suppress based on the totality of the circumstances, concluding that defendant's statement was voluntary, that he understood his rights, that he had experience dealing with the police, and that all the procedural safeguards were followed by police.

In determining whether a confession is voluntary, both the trial court and this Court use a totality of the circumstances test; this analysis applies both to confessions by adults and by juveniles. *Fare v Michael C*, 442 US 707, 724-725; 99 S Ct 2560; 61 L Ed 2d 197 (1979); *People v Sexton*, 458 Mich 43, 67-68; 580 NW2d 404 (1998). The test of voluntariness is whether, considering the totality of the circumstances, the confession is the product of an essentially free and unconstrained choice by its maker, or whether the will of the accused has been overborne and his capacity for self-determination critically impaired. *People v Givans*, 227 Mich App 113, 121; 575 NW2d 84 (1998). In *Givans*, this Court went on to discuss the factors to be considered in determining the voluntariness of a confession:

> The factors that must be considered in applying the totality of the circumstances test to determine the admissibility of a juvenile's confession include (1) whether the requirements of *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1996) have been met and the defendant clearly understands and waives those rights, (2) the degree of police compliance with MCL 764.27; MSA 28.886 and the juvenile court rules, (3) the presence of an adult person, custodian, or guardian, (4) the juvenile defendant's personal background, (5) the accused's age, education, and intelligence level, (6) the extent of the defendant's prior experience with the police, (7) the length of detention before the statement was made, (8) the repeated and prolonged nature of the questioning, and (9) whether the accused was injured, intoxicated, in ill health, physically abused or threatened with abuse, or deprived of food, sleep, or medical attention. *People v Good*, 186 Mich App 180, 189; 463 NW2d 213 (1990). [*Id.*]

In the present case, the court's findings covered the factors listed in *Givans* to the extent that they were contested. An adult or guardian was not present. However, according to Corner, defendant made no request for his parents. In *Givans, supra*, 121, the lack of a parent did not weigh against voluntariness when the juvenile did not request that a parent be present. Although defendant contended that he requested his parents before the interview commenced, the court was entitled to resolve the issue of credibility and give greater weight to Corner's testimony. *People v Howard*, 226 Mich App 528, 543; 575 NW2d 16 (1997). The record indicates that defendant was held on other charges than the charges in the present case and defendant was ultimately accused of first-degree criminal sexual conduct, MCL 750.520(b); MSA 28.788(1). Because defendant was over the age of fifteen, he was charged as an adult under the automatic waiver provisions of MCL 600.606; MSA 27A.606.

Defendant was sixteen years old at the time of the interview; this was the same age as the defendant in *Fare*, in which the Supreme Court found a juvenile's confession to be voluntary. Defendant was not developmentally disabled and had not been in special education. He has extensive experience with the police, having been arrested fourteen times in less than four years. The questioning was not prolonged, and ceased when defendant requested an attorney. There was no evidence that defendant was abused, intoxicated, or threatened when he made his statement. The statement was voluntarily made.

Affirmed.

/s/ William B. Murphy
/s/ Harold Hood
/s/ Janet T. Neff

[1] We also note that one of defendant's claims is that there was misconduct in eliciting evidence from Corner that the victim received intimidating phone calls from others. The portion of the record to which defendant points is defense counsel's cross-examination of Corner, in which counsel directly elicited the testimony now complained of. Even assuming that this testimony was error, this Court will not reverse a conviction on invited error. *People v Haggart*, 142 Mich App 330, 337-338; 370 NW2d 876 (1986).

[2] Defendant's brief on appeal erroneously refers to the statement as a "confession". Defendant did not confess to the crimes or even admit that he had been in the victim's home on the night in question. It was not until he testified at trial that he admitted having sex with the victim, claiming that it was consensual.