STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEVEN SHORT,

Defendant-Appellant.

UNPUBLISHED
February 15, 2000

No. 208017
Lapeer Circuit Court
LC No. 96-005952-FH

Before: Hood, P.J., and Smolenski and Talbot, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to commit murder, MCL 750.83; MSA 28.278, and second-degree criminal sexual conduct, MCL 750.520c; MSA 28.788(3).[1] The trial court sentenced defendant to concurrent terms of fifteen to forty years' imprisonment for the assault conviction and five to fifteen years' imprisonment for the CSC conviction. Defendant appeals as of right. We affirm.

Defendant first argues that he was denied his right to a fair and impartial jury when the trial court refused to grant his motion for a mistrial on the ground that all prospective jurors had learned that he had withdrawn a guilty plea in the same case. We disagree. This Court reviews a trial court's denial of a motion for a mistrial for an abuse of discretion. *People v Wolverton*, 227 Mich App 72, 75; 574 NW2d 703 (1997). An abuse of discretion will be found only where the trial court's denial of the motion has deprived the defendant of a fair and impartial trial. *Id*.

The right to a jury trial guarantees to the criminally accused a fair trial by a panel of impartial jurors. *People v Jendrzejewski*, 455 Mich 495, 501; 566 NW2d 530 (1997). It is well settled that a vacated plea may not be used as substantive evidence of the defendant's guilt or to impeach the defendant if he testifies at trial. See MRE 410(1); *People v George*, 69 Mich App 403, 405; 245 NW2d 65 (1976). When a juror has been exposed to a news article or broadcast covering inadmissible evidence about the defendant, the determination whether prejudice warranting a new trial exists turns on the special facts of each case, and the question is left largely to the determination and

discretion of the trial court. *People v Grove*, 455 Mich 439, 472; 566 NW2d 547 (1997), quoting 23A CJS, Criminal Law, § 1441, p 386. "Due process does not require a new trial every time a juror has been placed in a potentially compromising situation." *Id.*, quoting *Smith v Phillips*, 455 US 209, 217; 102 S Ct 940; 71 L Ed 2d 78 (1982). "Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen." *Id.*

After a thorough review of the voir dire and trial proceedings, we find no prejudice. Defendant pleaded guilty but mentally ill to a charge of assault with intent to do great bodily harm, but later withdrew the plea after hiring another attorney. At the commencement of the first day of voir dire, and during questioning by defense counsel, a potential juror spontaneously announced that she read in the newspaper that defendant had withdrawn his "guilty plea" and would raise the defense of temporary insanity at trial. Defense counsel did not move for a mistrial at this time and, instead, questioned prospective jurors further as to whether that information would affect their ability to decide the case fairly and impartially and whether they would be open minded about the defense of insanity. The trial court instructed potential jurors three times during voir dire that they were not to consider the withdrawn plea as evidence at trial, and any juror that expressed the slightest reservation in their ability to do so was dismissed from the panel. In lieu of granting defendant's motion for a mistrial made for the first time on the second day of voir dire, the trial court indicated that it would and did give an additional cautionary instruction regarding the withdrawn plea at the conclusion of the trial. Further, neither the defense nor the prosecution mentioned the withdrawn plea at trial, and any prejudice resulting from the jury's knowledge of the plea was dissipated by defendant's theory and admission at trial that he committed the acts in question, but was temporarily insane.[2] Under these circumstances, we find that the trial court took the necessary precautions to protect the integrity of the proceedings and to ensure that defendant received a fair trial. See *People v Daniel*, 207 Mich App 47, 57; 523 NW2d 830 (1994).

Defendant next argues that his fifteen-year minimum sentence for assault with intent to commit murder is disproportionately severe. We disagree. Defendant's sentence is presumptively proportionate because it fell within the recommended minimum guidelines' range of eight to fifteen years. *People v Hogan*, 225 Mich App 431, 437; 571 NW2d 737 (1997). In light of defendant's brutal attack on the victim, we find that his lack of criminal history and mental illness or disability do not present unusual circumstances sufficient to overcome the presumption. *People v Piotrowski*, 211 Mich App 527, 532-533; 536 NW2d 293 (1995); see also MCL 768.36; MSA 28.1059. Accordingly, the sentencing court did not abuse its discretion in imposing defendant's sentence. *People v Milbourn*, 435 Mich 630, 634-636; 461 NW2d 1 (1990); *People v Castillo*, 230 Mich App 442, 447; 584 NW2d 606 (1998).

Defendant also contends that his sentence for assault with intent to commit murder is invalid because the sentencing court mistakenly believed that it was required to impose a fifteen-year minimum sentence. We disagree. A defendant is entitled to resentencing where the court fails to exercise its discretion because of a mistaken belief in the law. *People v Miles*, 454 Mich 90, 96; 559 NW2d 299 (1997). *People v Green*, 205 Mich App 342, 346; 517 NW2d 782 (1994). In this case, we are not

convinced that the trial court's statement that "the guidelines require that . . . I give you a minimum of fifteen years . . . .", establishes that it incorrectly believed it had to impose a fifteen-year minimum term. A contextual review of the entire sentencing proceedings reveals that the trial court was aware of its sentencing discretion. This awareness is evidenced by the trial court's statement that it could sentence outside the guidelines by imposing a term of life imprisonment. Moreover, the court affirmatively stated that it would not deviate from the guidelines, and the minimum guidelines' range in this case was eight to fifteen years. Accordingly, the court's decision to remain within the guidelines would "require" that it impose no more than a fifteen-year minimum term. Our reading of the court's statements is also consistent with the fifteen-year sentence recommended by the probation department. Consequently, because there is "no clear evidence that the sentencing court believed it lacked discretion, the presumption that a trial court knows the law must prevail." *People v Alexander*, 234 Mich App 665, 675; 599 NW2d 749 (1999).

Affirmed.

/s/ Harold Hood
/s/ Michael R. Smolenski
/s/ Michael J. Talbot

[1] The jury acquitted defendant of the additional charge of assault with intent to maim. MCL 750.86; MSA 28.281.

[2] The cases defendant cites for the proposition that a cautionary instruction is insufficient to protect against the risk that the jury will view the plea as dispositive evidence of guilt are inapposite. *People v Street*, 288 Mich 406; 284 NW2d 929 (1939); *People v Trombley*, 67 Mich App 88, 92-93; 240 NW2d 279 (1976). Unlike those cases, the prosecutor did not interject the issue into the trial during opening argument or for impeachment purposes, each juror indicated that the withdrawn plea would not affect their ability to remain impartial, the plea was never mentioned at trial, and defendant admitted that he committed the acts in question.