STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 25, 2000
v	No. 206968 Wayne Circuit Court
ALVIN L. CRAWFORD, Defendant-Appellant.	LC No. 96-08353 AFTER REMAND

Before: Whitbeck, P.J., and White, and Wilder, JJ.

PER CURIAM.

Defendant was convicted following a jury trial of kidnapping, MCL 750.349; MSA 28.581, carjacking, MCL 750.529a; MSA 28.797(a); two counts of armed robbery, MCL 750.529; MSA 28.797, three counts of first-degree criminal sexual conduct (CSC), MCL 750.520b(1)(e); MSA 28.788(2)(1)(e), and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced as an habitual offender, fourth, to fifty to eighty years' imprisonment,[1] consecutive to two years' imprisonment for felony-firearm. He appeals as of right. We affirm.

I

Defendant first argues that the trial court erred in failing to suppress lineup identification evidence. We review a trial court's decision to admit an out-of-court identification for clear error. *People v Burrell*, 417 Mich 439, 448; 339 NW2d 403 (1983); *People v Barclay*, 208 Mich App 670, 675; 528 NW2d 842 (1995). Where a defendant attacks a lineup as impermissibly suggestive, its fairness is evaluated in light of the total circumstances in order to determine whether the procedure was so impermissibly suggestive as to render the identification irreparably unreliable. *Stovall v Denno*, 388 US 293, 301-302; 87 S Ct 1967; 18 L Ed 2d 1199 (1967); *People v Winters*, 225 Mich App 718,

[1] The trial court enhanced the sentence pursuant to MCL 769.12; MSA 28.1084.

725; 571 NW2d 764 (1997). If counsel was present at the lineup, the defendant bears the burden of showing that the lineup was impermissibly suggestive.[2] *People v McElhaney*, 215 Mich App 269, 286; 545 NW2d 18 (1996); *People v Rivard*, 59 Mich App 530, 534; 230 NW2d 6 (1975).

Detroit Police Investigator James Sanford testified at a *Wade*[3] hearing that he conducted two separate lineups, did not speak to either complainant before the lineups, that each complainant visually identified defendant immediately, within seconds, and that complainant Blunt also made a voice identification of defendant at the first lineup. Sanford testified in response to questioning regarding defendant being the only lineup participant with a shaved head that the other participants had very short hair, and that, in any event, the assailant had been wearing a panty-hose stocking cap during the alleged incidents. Defendant's height of 5'10" falls in the mid-range of the participants' heights.[4] The only legal argument defendant makes and supports with authority is that the trial court either misapplied or failed to apply the eight factors of *People v Kachar*, 400 Mich 78, 95-96; 252 NW2d 807 (1977).[5]

Under these circumstances, we agree with the trial court's determination that there was no indication that the lineups were suggestive or the identifications questionable, and with its determination that because the lineups were not suggestive, there was no need to address the *Kachar* factors. We find no error.

II

Defendant next argues that the trial court erred in determining that his confession was voluntary.

An accused's statements during custodial interrogation are inadmissible unless the accused voluntarily, knowingly and intelligently waived his Fifth Amendment right against self-incrimination. *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966); *People v Abraham*, 234 Mich App 640, 644; 599 NW2d 736 (1999). The prosecution must establish a valid waiver by a preponderance of the evidence. *Abraham, supra* at 645.

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[2] Defendant has not argued, nor is there indication in the record, that counsel was not present at the lineup, thus defendant bore the burden of showing that the lineup was impermissibly suggestive.

[3] *United States v Wade*, 388 US 218; 87 S Ct 1926; 18 L Ed 2d 1149 (1967).

[4] Defendant's appellate brief states that the lineup participants' heights ranged from 5'5" to 6'1", but does not state what defendant's height is, nor does it make a specific argument regarding height disparities or cite authority in that regard. Defendant's arrest record and sentencing information report state that defendant is 5'10". Defendant's appellate brief makes no argument regarding the voice identification, nor does it cite authority in that regard.

[5] *Kachar, supra*, was not signed by a majority of justices, but the Supreme Court adopted the use of its factors in *People v Gray*, 457 Mich 107, 117 n 11; 577 NW2d 92 (1998).

> In determining whether a statement is voluntary, the trial court should consider, among other things, the following factors: the age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse. [*People v Sexton*, 458 Mich 43, 66; 580 NW2d 404 (1998), quoting *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988).]

"The absence or presence of any one of these factors is not necessarily conclusive on the issue of voluntariness. The ultimate test of admissibility is whether the totality of the circumstances surrounding the making of the confession indicates that it was freely and voluntarily made." *Cipriano*, *supra* at 334. In reviewing the trial court's determination that defendant's confession was voluntary we examine the entire record and make an independent determination. *Sexton*, *supra* at 68. We review the trial court's findings for clear error, MCR 2.613 (c); however the trial court's "[a]pplication of constitutional standards" "is not entitled to the same deference" as the trial court's factual findings, *People v Truong (After Remand)*, 218 Mich App 325, 334; 553 NW2d 692 (1996), quoting *People v Bordeau*, 206 Mich App 89, 92; 520 NW2d 374 (1994), overruled in part on other grounds, *People v Edgett*, 220 Mich App 686, 692-693; 560 NW2d 360 (1996).

Defendant argues that his testimony that he was held for over six hours was not only credible, but borne out by police testimony. Defendant notes that he was arrested while entering a vehicle connected to robbery, carjacking, and criminal sexual conduct and that "there was no way the police were going to release him." He argues that the delay in arraignment was clearly "employed as a tool to extract a statement." He argues that his confession was obtained only by threats, coercion and delay, and that there was further prejudice because the confession was used as a basis for a search warrant, which produced physical evidence introduced at trial.

The lower court record reveals that the alleged offenses occurred on October 3, 1996, defendant was arrested on the morning of October 4, 1996, a Friday, and interviewed that day, and was arraigned on October 7, 1996, a Monday.

The trial court conducted a *Walker*[6] hearing, recited the *Cipriano* factors quoted above and the following other factors, "duration and conditions of the detention, the physical and mental state of the

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

defendant; any diverse pressure which saps or sustains a defendant's power of resistance; absence or presence of counsel," and determined the statements were voluntary.[7]

The trial court's factual findings are supported by the record and not clearly erroneous. The record supports that there was conflicting evidence and that the trial court's determination of voluntariness was largely dependent on the witnesses' credibility. The trial court could reasonably conclude in light of the testimony that defendant's confession was voluntary, that his confession was not

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[7] The court found:

> A lot of what I find the defendant saying is highly incredible about that. I cannot believe that he was kept, as he said, in an interview room for six hours and made no statement. Then at intervals he was made to undress, you know, in this area where all these people are. For what reason, I don't know. But, any way [sic], those are all credibility issues.
>
> But, beyond all that, we have a situation where the defendant's education is that of an advanced degree. He's 39 years of age. He himself admits that he must have had possibly four prior convictions involving armed robbery. That certainly would indicate that he has some degree of previous experience with police and police activities.
>
> The nature and extent of the questioning here was not very long . . . There's nothing here to indicate that he was in any way coerced . . . .
>
> As indicated, he was advised of his rights. There's no indication that he did not understand those rights. As a matter of fact, just watching him on the witness stand here I don't think there was any concern about that.
>
> There's no indication that he was injured, drugged, or intoxicated, or ill health, deprived of sleep or medical attention, or any of those kind of factors. Certainly no physical abuse, or not threatened in any kind of way.
>
> All this is allegedly based on him being promised or not promised some things here.
>
> * * *
>
> He himself admits that he did not specifically ask for a lawyer. So, I don't see any Miranda type violation.
>
> He admits that he made the statements and what's contained in the statements there.
>
> So, the overall circumstances here, just to sum it up, is to say that by of [sic] the Cipriano and other circumstances that give guidance on these issues, I find that the statements were voluntary. That they were not in violation of Miranda.

coerced by reason of threats, promises, or delay, and that defendant was fully advised of his *Miranda* rights. Under these circumstances, we defer to the trial court's findings, *People v Joyner*, 93 Mich App 554, 558; 287 NW2d 286 (1979), and conclude there was no error.

III

Defendant next argues that several of the prosecutor's remarks in opening statement constituted improper vouching for witnesses' credibility, were highly prejudicial, and could not have been cured by instruction. He argues that the prosecutor told the jury that the complainant was a very nervous person who does not speak in public, asked the jury to understand that she was nervous rather than deceptive, stated that police officer witnesses would appear tired because they were working twelve-hour shifts due to a public emergency, and told the jury that "it seems like a strong case," and that "your job should be easy."

We review claims of prosecutorial misconduct de novo, evaluating the remarks on a case-by-case basis and in context. *People v Legrone*, 205 Mich App 77, 82; 517 NW2d 270 (1994). The relevant inquiry is whether the defendant was denied a fair and impartial trial. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995). A prosecutor may not vouch for the credibility of witnesses to the effect that he has some special knowledge concerning the witnesses' truthfulness. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995).

Because defendant did not object below, this Court's review is limited to plain errors affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

We conclude that the prosecutor's statements, viewed in context, were not improper. The prosecutor asked the jury to base their verdict on the evidence and told them that they were to decide the facts of the case after all the evidence was submitted. The record does not support that these remarks constituted improper vouching for witnesses' credibility or denied defendant a fair or impartial trial, *Bahoda, supra*. Given that there was no plain error, we have no reason to conclude that any such error affected defendant's substantial rights, meriting reversal. *Carines, supra*.

IV

Defendant next argues that the trial court erred in failing to give proper instructions on identification and reasonable doubt. He asserts that the trial court should have given an instruction cautioning the jury against the grave danger of misidentification based on *People v Franklin Anderson*, 389 Mich 155; 205 NW2d 461 (1973), and that the reasonable doubt instruction was constitutionally deficient and deprived defendant of a fair trial because it did not incorporate the concept of guilt to a moral certainty. Defendant failed to object to the instructions he now challenges, again limiting our review to plain errors that affected his substantial rights. *Carines, supra* at 761-773, 774.

This Court reviews jury instructions in their entirety to determine whether the trial court committed error requiring reversal. *People v Crawford*, 232 Mich App 608, 619-620; 591 NW2d 669 (1998). A trial court must instruct the jury so that it may correctly and intelligently decide the case.

Jury instructions must include all the elements of the charged offenses and must not exclude material issues, defenses, and theories that are supported by the evidence. *Id.* at 620.

Here, the trial court read the standard instructions on reasonable doubt, CJI2d 3.2, and identification, CJI2d 7.8. In *People v Hubbard (After Remand)*, 217 Mich App 459, 486-487; 552 NW2d 493 (1996), this Court rejected a challenge to CJI2d 3.2, holding that the "failure to include 'moral certainty' language in the definition of reasonable doubt does not give rise to error warranting reversal," because the instruction adequately conveyed the concept of reasonable doubt.

Defendant's argument that the trial court's reading of the standard jury instruction on identification, CJI2d 7.8, constituted plain error, is also without merit. The case defendant relies on, *Anderson, supra*, does not support the proposition that the standard jury instruction on identification is inadequate, defective, or that instructing a jury with it constitutes error. The criteria listed in CJI2d 7.8 "are essentially the same ones both the United States and Michigan Supreme Courts have indicated are relevant in determining the reliability of identification evidence." Commentary to CJI2d 7.8, pp 7-20, citing *Manson v Brathwaite*, 432 US 98, 114; 97 S Ct 2243; 53 L Ed 2d 140 (1977); *Neil v Biggers*, 409 US 188; 93 S Ct 375; 34 L Ed 2d 401(1972); and *Kachar*, *supra* at 95-96. We find no error and no reason to reverse on this basis. *Carines, supra* at 774.

V

Defendant next argues that he was denied the effective assistance of counsel by trial counsel's failure to obtain a psychologist for the *Walker* hearing and/or trial to demonstrate that defendant was under duress when he made the statement to police; failure to move to suppress the search warrant authorizing the search of defendant's home; failure to object to or seek proper instructions on reasonable doubt; and failure to either present expert testimony on identification or to seek instructions specifically alerting the jury to the dangers of misidentification.

In order to establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Stanaway*, 446 Mich 643, 687-688, 521 NW2d 557 (1994), citing *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984), and *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994). A reasonable probability is a probability sufficient to undermine the outcome of the proceeding. *Pickens, supra* at 314.

A

Defendant first argues that a psychologist would have been helpful to show defendant's susceptibility to giving a false confession, and that he was entitled to appointment of an expert at public expense if he could not otherwise proceed safely to trial without the expert. In support, defendant cites his testimony at the *Walker* hearing that he had been held over six hours, sometimes handcuffed to a desk, and repeatedly threatened by police officers. Defendant notes that, although the trial court

discounted his testimony, it did so without the benefit of expert analysis "which would have better put defendant's testimony in context."

Pursuant to the Due Process Clause, "states may not condition the exercise of basic trial and appeal rights on a defendant's ability to pay for such rights." *People v Leonard*, 224 Mich App 569, 580; 569 NW2d 663 (1997). Fundamental fairness requires that the state not deny indigent defendants "an adequate opportunity to present their claims fairly within the adversary system." *Id.*, quoting *Moore v Kemp*, 809 F2d 702, 709 (CA 11, 1987), quoting *Ross v Moffitt*, 417 US 600, 612; 94 S Ct 2437; 41 L Ed 2d 341 (1974). However, a defendant must show a "nexus between the facts of the case and the need for an expert." *People v Jacobsen*, 448 Mich 639, 641; 532 NW2d 838 (1995), quoting with approval 205 Mich App 302, 309; 517 NW2d 323 (1994) (Taylor, J., dissenting). In *Jacobsen, supra* at 641, the Supreme Court determined that the circuit court did not err by denying without prejudice the defendant's motion for appointment of an expert witness where there was no indication that expert testimony would likely benefit the defense. In *Leonard, supra* at 582, this Court found persuasive the following reasoning:

> [A] defendant must demonstrate something more than a mere possibility of assistance from a requested expert; due process does not require the government automatically to provide indigent defendants with expert assistance upon demand. Rather, a fair reading of these precedents is that a defendant must show the trial court that there exists a reasonable probability both that an expert would be of assistance to the defense and that denial of expert assistance would result in a fundamentally unfair trial.

At the start of trial, defendant requested to represent himself and stated that he needed an adjournment for a psychiatric evaluation in order to show that he was under duress when he gave a statement to the police. The trial court denied the request for adjournment. Defendant did not assert an insanity defense at trial, thus he was not entitled to an independent psychiatric evaluation by a clinician of his choice. See *Leonard, supra* at 582, citing MCL 768.20a(3); MSA 28.1043(1)(3). Under the circumstances of this case, we conclude that trial counsel's determination that such testimony would not have assisted the court at the *Walker* hearing or the jury at trial was a matter of trial strategy and not ineffective assistance of counsel.

B

Defendant argues that the search-warrant was defective because it did not supply facts from which a magistrate could find probable cause and, specifically, contained no facts indicating that evidence of the crime was at his home.

A search warrant may not issue unless probable cause exists to justify the search. US Const, Amend IV; Const 1963, art 1, § 11; MCL 780.651; MSA 28.1259(1); *People v Sloan*, 450 Mich 160, 166-167; 538 NW2d 380 (1995). Probable cause must be based on facts presented to the issuing magistrate by oath or affirmation. *Sloan, supra* at 167-168. Probable cause exists when the facts and circumstances would allow a reasonably prudent person to believe that evidence of a crime or contraband sought is in the stated place. *People v Echavarria*, 233 Mich App 356, 366; 592 NW2d

737 (1999). This Court should read the warrant and affidavit with common sense and in a realistic fashion, with deference to the magistrate's determination. *Sloan, supra* at 168, quoting *People v Russo*, 439 Mich 584, 604; 487 NW2d 698 (1992).

Applying this standard, we conclude a reasonably prudent person could conclude from the affidavit that defendant was probably the perpetrator and that the items stolen could probably be found at his address, given the short span of time that had elapsed since commission of the crimes. Trial counsel was thus not ineffective in failing to seek to suppress the search warrant.

C

Defendant also argues that trial counsel was ineffective for failing to seek proper instructions on reasonable doubt. Additionally, defendant argues that where misidentification was the key issue, trial counsel was ineffective in failing to either present expert testimony on identification or to seek instructions based on *Anderson, supra*. As discussed above, the standard jury instructions the trial court read on reasonable doubt and identification were not defective or inadequate. Thus, trial counsel acted reasonably by not objecting to these instructions and requesting special instructions. Defendant has provided no authority to support his argument that counsel was ineffective for failing to obtain an expert to advance the defense of misidentification, and there is no reason to believe that such testimony would have affected the outcome of the case.

VI

Defendant next argues that the trial court abused its discretion by denying him the right to represent himself at trial.

A criminal defendant's right to represent himself is implicitly guaranteed by the United States Constitution, US Const, Am VI, and explicitly guaranteed by the Michigan Constitution and statute, Const 1963, art 1, § 13, and MCL 763.1; MSA 28.854. *People v Adkins*, 452 Mich 702, 720; 551 NW2d 108 (1996). However, the right is not absolute, and defendant must meet several requirements before he may proceed in propria persona. *People v Donny Ray Anderson*, 398 Mich 361, 367; 247 NW2d 857 (1976); *People v Ahumada*, 222 Mich App 612, 616; 564 NW2d 188 (1997). First, a defendant's request to represent himself must be unequivocal. *Adkins, supra* at 722; citing *Donny Ray Anderson, supra* at 366-367. Neither a request to proceed in propria persona with standby counsel nor a request to discharge appointed counsel constitutes an unequivocal request by a defendant to represent himself. *People v Dennany*, 445 Mich 412, 446, 458; 519 NW2d 128 (1994). Second, the trial court must determine that the assertion of the right is knowing, intelligent and voluntary. *Adkins, supra* at 722. Third, the trial court must determine that the defendant's self-representation will not disrupt, inconvenience or burden the court. *Donny Ray Anderson, supra* at 368. Fourth, the trial court must comply with the requirements of MCR 6.005. *Adkins, supra* at 722.

Defendant made a request to represent himself at the first day of trial, before opening statements. The record supports that defendant's request was not unequivocal and that self-representation would have disrupted and burdened the court. In addition to requesting to represent

himself, defendant stated to the trial court that "I already know representing myself would be a big mistake," and also stated that, if he could not represent himself, he should be allowed to act as his own co-counsel. The trial court permitted the latter request. Further, the trial court noted that defendant had changed lawyers several times, waited until the morning of trial to raise the issue of self-representation, and only did so because he was dissatisfied with the course of plea negotiations and the trial court's *Cobbs*[8] evaluation of a minimum of eighteen years, in addition to two years for felony-firearm. Under these circumstances, we find no error.[9]

VII

Defendant argues that his kidnapping conviction must be reversed because there was insufficient evidence to prove asportation independent of the other offenses charged. Defendant argues that where a car is used in the perpetration of an underlying offense, its movement has been held generally to be incidental to the underlying offense, and not part of the kidnapping. Defendant argues that he moved the complainant in order to commit the coequal offenses of criminal sexual conduct, and that when those offenses were complete, he released the complainant.

To determine whether sufficient evidence has been presented to sustain a conviction, we must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992). The elements of false imprisonment/forcible confinement kidnapping, are 1) a forcible confinement of another within the state, 2) done willfully, maliciously and without lawful authority, 3) against the will of the person confined or imprisoned, and 4) with an asportation of the victim that is not merely incidental to an underlying crime, unless the crime involves murder, extortion or taking a hostage. *People v Wesley*, 421 Mich 375, 383, 386; 365 NW2d 692 (1984).

The victim's testimony that defendant had her pull a knit cap over her eyes, and drove her around against her will for about six hours, during which time he stopped several times to commit criminal sexual misconduct, was sufficient evidence for a reasonable jury to find beyond a reasonable doubt that there was some movement of the victim taken in furtherance of the kidnapping that was not merely incidental to the commission of the underlying offenses of CSC or armed robbery. Although the acts of CSC occurred during this time period, the asportation was far beyond that which must be

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[8] *People v Cobbs*, 443 Mich 276; 505 NW2d 208 (1993).

[9] In a footnote in his appellate brief, defendant acknowledges that the trial court allowed him to serve as his own co-counsel, but argues that the trial court failed to indicate to defendant what participation he could make in the trial as co-counsel. As defendant cites no authority in support of this argument, it is not addressed beyond noting that the trial court did at least cursorily inform defendant that his counsel would make the decisions as to what to do in the case.

regarded as incidental to the commission of CSC. See *People v Green*, 228 Mich App 684, 697; 580 NW2d 444 (1998).

VIII

Defendant's final arguments concern his sentence. He asserts that the trial court's fifty to eighty year sentence was harsh, created an appearance of impropriety and vindictiveness for defendant's exercise of his constitutional right to a jury trial, denied defendant due process and is disproportionate in that it is ten years higher than the maximum sentence under the sentencing guidelines would have been, and more than 2 ½times the eighteen-year minimum the trial court gave as a *Cobbs* evaluation. Defendant argues that the court's vindictiveness was evident in the court's referring to him as "public enemy number one" before trial and at sentencing. Defendant argues that there were "no great revelations at trial; nothing significant was produced in court after the *Cobbs* evaluation that would have impacted on sentencing," and that "[p]recluding prosecutors from seeking sentences exceeding prior plea offers, where there is no objective basis for enhancement, is not unfair to the People, who have the investigative resources of the police behind them."

Whether to impose an increased sentence as authorized by the habitual offender act, MCL 769.10 *et seq.*; MSA 28.1082 *et seq.*, is within the sentencing court's discretion. *People v Bewersdorf*, 438 Mich 55, 66; 475 NW2d 231 (1991). The sentencing guidelines do not apply to habitual offenders, thus this Court's review of an habitual offender sentence is limited to considering whether the sentence violates the principle of proportionality of *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). *People v Gatewood (On Remand)*, 216 Mich App 559, 560; 550 NW2d 265 (1996).

We reject defendant's argument that the court's sentence was the product of vindictiveness or an intent to punish defendant for going to trial. The pre-trial hearing at which defendant alleges the trial court referred to him as "public enemy number one" occurred on January 24, 1997. The hearing transcript reveals that defendant's counsel stated that defendant no longer wanted him to represent him, that he had filed the motions to suppress defendant's statement to the police and motion for a *Wade* hearing and visited defendant for the third time the night before, at which time defendant was unhappy because he had filed only two motions, and would not talk to counsel. Defendant stated that counsel had done nothing for him, that he had been in jail for four months and did not even know what the charges against him were, and that he knew that the charges had been reduced, but did not know which ones. The trial court stated the various charges to defendant, recited his prior convictions and made the remark defendant challenges.[10] The trial court allowed defendant's counsel to withdraw on the basis of

[10] Defendant asserts that the remark was erroneously transcribed as "puppy here on number one."

> THE COURT: You're charged with armed robbery in three separate counts. You're charged with carjacking in Count IV. You're charged with criminal sexual conduct first degree, weapon used in Count V. You're charged in Count VI with criminal sexual

(continued...)

a breakdown in communication between defendant and counsel, and stated it would appoint other counsel and set another pretrial date.

Defendant's contention that the trial court referred to him for the second time as "public enemy number one" at sentencing does not fully represent what happened, given that it was defendant who stated to the court three times that it had referred to him that way.[11]

(...continued)

> conduct weapon used. And, you're charged in Count VII with the same thing. And, you're charged in Count VIII with kidnapping. You're charged in Count IX with possession of a firearm in the commission of a felony.
>
> And, there is a Count X here with this habitual offender notice. And, this is any of those convictions will be your fourth conviction.
>
> You have an armed robbery conviction back in '85 in Mount Clemens. You have an armed robbery conviction out of Recorder's Court. You have an armed robbery conviction out of Recorder's Court. So, you know, you like [sic] *a puppy here on number one almost.*
>
> What do you think he's supposed to be doing?
>
> THE DEFENDANT: What I [sic] think my attorney supposed [sic] to be doing?
>
> THE COURT: Yes.
>
> THE DEFENDANT: I think my attorney should be representing me, your Honor.
>
> THE COURT: Well, as far as I can tell, that's exactly what he is doing. . . . [Emphasis added.]

[11] At sentencing, defendant said:

> DEFENDANT CRAWFORD: You didn't want to accept the plea. So, and from day one in your courtroom, your Honor, *you considered me public enemy number one.*
>
> So, when I came in I asked you what was I charged with – I didn't ask you what my criminal background was – I asked you what was I faced with today. And, instead of telling me what I was faced with today, you ran off my criminal history.
>
> And, then *you accused me of being public enemy number one*. So, in asking for a fair trial, you were already biased against me.
>
> * * *

(continued...)

(...continued)

DEFENDANT CRAWFORD: So, I'm saying these things that you did in your courtroom, your Honor, didn't allow me the opportunity to represent myself, didn't allow me the chance for a fair trial, didn't allow me the opportunity to go through anything, because you were set against me from the word go.

By stating I'm public enemy number one, I can't receive a fair trial in your courtroom. By your attitude, I can't receive a fair trial in your courtroom. Because these counts are very serious. I can fire fifty thousand attorneys if I want you [sic]. It's not you that's facing prison, it's me. [Emphasis added.]

*** * ***

The trial court noted in passing sentence:

In this particular case you have been convicted of two counts of Robbery Armed, three counts of Criminal Sexual Conduct, one count of Carjacking, once [sic] count of Kidnapping, and Felony Firearm.

You also were on parole for having been convicted as a Habitual Third for Robbery Armed offenses, where you had been sentenced to a term of 10 to 30 years. And, apparently, that did not get your attention.

Within a few months or so after you are released on parole you're back into the same kind of conduct, perhaps escalated in a way because of the kidnapping and the carjacking and the CSC that was involved with this that endangered the lives of at least two people. And, who can even think in terms of the ultimate effect it has on the victims of this particular crime?

You are a society's worst nightmare. *If I called you public enemy number one, that might have been a misstatement because that might not even sum up the concern that I may have*. The fact that you were on parole, had been locked up, had been released, and then get back out there preying upon people in this way.

I'm going to sentence you to, on the [two] charge[s] of Robbery Armed [and] all three of [the Criminal Sexual Conduct charges] and the Kidnapping, to each of those to a concurrent term of 35 to 70 years.

And, on the charge of Carjacking and Kidnapping, I'm going to sentence you to a term of 40 to 70 years. And, the Felony Firearm is to be consecutive to the Carjacking, for two years for [sic] that.

(continued...)

In *People v Rivers,* 147 Mich App 56, 60-61; 382 NW2d 731 (1985), this Court rejected the defendant's argument that the trial court abused its discretion in imposing a more severe sentence for a single breaking and entering sentence than was offered before trial for that count and two criminal sexual conduct counts, noting:

> It is not per se unconstitutional for a defendant to receive a higher sentence on a trial conviction than was promised him if he would plead guilty. While confronting a defendant with the risk of more serious punishment may discourage defendant's assertion of his constitutional right to trial by jury, the imposition of these difficult choices is an inevitable and permissible attribute of a system that tolerates plea negotiation. *Bordenkircher v Hayes,* 434 US 357; 98 S Ct 663; 54 L Ed 2d 604 (1978), *reh den* 435 US 918; 98 S Ct 1477; 55 L Ed 2d 511 (1978). Nevertheless, courts have vacated sentences which were higher than what was promised if defendant pled guilty where the record supported any inference that the higher sentence was based on a defendant's decision to go to trial rather than to plead guilty. See Anno: *Propriety of sentencing justice's consideration of defendant's failure or refusal to accept plea bargain,* 100 ALR3d 834.

Further, as defendant acknowledges, *People v Cobbs,* 443 Mich 276, 283; 505 NW2d 208 (1993), notes that the judge's sentencing discretion is not bound by the judge's preliminary evaluation of the case "since additional facts may emerge during later proceedings, in the presentence report, through the allocution afforded to the prosecutor and the victim, or from other sources."

The record in the instant case does not support that the trial court's sentence was imposed as a penalty for defendant having asserted his right to a jury trial. The trial court's sentence is not disproportionate to the offenses and offender in light of defendant's criminal history, including his prior incarceration and parole status at the time of the instant crimes, the nature of the prior felony convictions (armed robbery), and the extensive and violent nature of the instant crimes.

Lastly, defendant argues that the two year mandatory term for the felony-firearm conviction violates the Const 1963, art 4, § 45, regarding indeterminate sentences. This Court rejected such an argument in *People v Cooper,* 236 Mich App 643, 660-664; 601 NW2d 409 (1999).

Affirmed.

(...continued)

> I'm also, since this is a Habitual Fourth, I'm going to set aside those sentences, and sentence you as a Habitual Fourth to a minimum of 50 years – [Emphasis added.]

/s/ William C. Whitbeck
/s/ Helene N. White
/s/ Kurtis T. Wilder