

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES MARLOW, JR.,

Defendant-Appellant.

UNPUBLISHED

April 20, 2001

No. 218900

Saginaw Circuit Court

LC No. 98-016283-FC

Before: Cavanagh, P.J., and Markey and Collins, JJ.

PER CURIAM.

Defendant was convicted by a jury of two counts of first degree criminal sexual conduct, MCL 750.520b; MSA 28.788(2), assault with a dangerous weapon, MCL 750.82; MSA 28.277, and extortion, MCL 750.213; MSA 28.410. He was sentenced as a third habitual offender, MCL 769.11; MSA 28.1083, to concurrent prison terms of twenty to forty years each for the CSC convictions, five to eight years for the assault conviction, and ten to forty years for the extortion conviction. He appeals by right. We affirm defendant's convictions, but remand for further proceedings regarding defendant's status as an habitual offender.

I

Defendant first argues that the trial court erroneously granted the prosecutor's motion to strike his insanity defense because he was unable to provide expert testimony in support of that offense. We agree that the trial court erred, but conclude that the error was harmless.

A person may be found legally insane if, "as a result of a mental illness, . . . that person lacks substantial capacity either to appreciate the nature and quality or the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law." MCL 768.21a; MSA 28.1044(1). To properly present an insanity defense, a defendant must: (1) provide notice to the prosecution of his intent to assert the defense; (2) identify the witnesses the defendant intends to call at trial in support of that defense; and (3) submit to a court-ordered psychiatric evaluation and any independent expert evaluation requested by the prosecution. MCL 768.20a(1) - (4); MSA 28.1043(1)(1) - (4); MCL 768.21(1); MSA 28.1044(1). Although a defendant *may* obtain an independent evaluation by his own expert, so long as he submits the report to the prosecution, MCL 768.20a(3) and (6); MSA 28.1043(1)(3) and (6) (emphasis added), there is no

statutory requirement that a defendant *must* produce at least one expert witness on his behalf in order to present a defense of insanity.

Furthermore, decisions from this state have recognized that non-expert testimony may be presented in support of a defense of insanity. In *People v Drossart*, 99 Mich App 66, 73; 297 NW2d 863 (1980), this Court stated:

Both the expert and lay witness may express their opinions on the mental condition of the accused at the time of the charged offense, although, in the latter case, the witness must base his opinion on "the facts and circumstances within [his] own knowledge". *People v Cole*, 382 Mich 695, 707; 172 NW2d 354 (1969).

The foregoing statement is in accord with MRE 701 that governs opinion testimony by a non-expert. See, also, MRE 704.

Furthermore, in *People v VanDiver*, 79 Mich App 539, 541; 261 NW2d 78 (1977), this Court observed:

Where evidence supportive of an insanity defense is introduced at trial, it is for the trier of fact to determine whether the accused was sane or insane at the time of the charged offense. *People v Duffy*, 67 Mich App 266, 269; 240 NW2d 771 (1976).

The mere assertion of an insanity defense does not alone entitle an accused to jury consideration of that defense. *People v Blocker*, 45 Mich App 138; 206 NW2d 229 (1973). Yet the quantum of evidence necessary to create a jury question on the subject of a defendant's sanity is not great. *People v Krugman*, [377 Mich 559; 141 NW2d 33 (1966)], *People v Neumann*, [35 Mich App 193, 195; 192 NW2d 345 (1971)]. As a general rule, the question of the sufficiency of evidence is to be resolved by the jury unless there is no evidence at all upon a material point. *People v Abernathy*, 253 Mich 583, 587; 235 NW 261 (1931).

In *People v Grant*, 445 Mich 535, 537; 520 NW2d 123 (1994), the defendant challenged the trial court's failure to give a preliminary jury instruction on insanity before witness testimony in accordance with MCL 768.29a(1); MSA 1052(1)(1). Although the defendant did not present an expert witness on his behalf, the Court in *Grant* held that the trial court's failure to give the instruction was error, *id.* at 538 n 4, 542-543, thus implicitly recognizing that expert testimony was not necessarily required in order to present an insanity defense.

In light of the foregoing, we conclude that the trial court erred in precluding defendant from presenting a defense of insanity solely because he was unable to present expert testimony in support of that defense. We conclude, however, that the error was harmless. MCL 769.26; MSA 28.1096; MCR 2.613(A).

Because our Supreme Court has explicitly stated that "there is no constitutional right to assert an insanity defense[,]" *People v Hayes*, 421 Mich App 271, 279; 364 NW2d 635 (1984), we review this issue as a preserved, nonconstitutional error. An error of this type is presumed to

be harmless and the defendant bears the burden of showing that the error resulted in a miscarriage of justice. *People v Lukity*, 460 Mich 484, 494-496, 596 NW2d 607 (1999). To justify reversal, defendant must show that it is “more probable than not that a different outcome would have resulted without the error.” *Id.* at 495.

In the instant case, defendant alleges no specific prejudice from the trial court’s decision other than stating that “the defense called only 5 of the 26 witnesses listed on his notice of insanity defense and, presumably, according to the court’s ruling, did not try to elicit testimony from those witnesses as to the defendant’s lack of sanity.” We note, however, that defendant failed to make an offer of proof to establish the substantive nature of the testimony excluded pursuant to MRE 103(a)(2). More significantly, although the trial court barred defendant from presenting a defense of insanity, it did not preclude him from presenting a defense of diminished capacity, or preclude evidence in support of a theory that defendant was guilty but mentally ill, and defendant does not allege that the trial court improperly prevented him from presenting any evidence in support of these theories. In rendering its verdict, the jury rejected the option of finding defendant guilty but mentally ill. Furthermore, the jury was instructed that it could not convict defendant of extortion if it found that he was not able to form the requisite specific intent to commit the crime, yet found him guilty of that offense. In light of these verdicts, we do not conclude that it is more probable than not that a different outcome would have resulted had defendant been allowed to present a defense of insanity. *Lukity, supra*. Accordingly, reversal is not required.

## II

Defendant next argues that the prosecutor committed misconduct by improperly encouraging police witnesses to testify concerning the circumstances of his arrest and by erroneously characterizing the facts and the law pertaining to his case. Defendant did not object to the prosecutor’s questioning of police witnesses concerning the circumstances surrounding his arrest, or to the prosecutor’s characterization of the facts. Therefore, these issues are not preserved. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Because any error could have been cured by a timely objection and appropriate instruction, we conclude that these issues do not warrant appellate relief. *People v Schutte*, 240 Mich App 713, 720-721; 613 NW2d 370 (2000). Further, although defendant asserts that the prosecutor erroneously stated the law with respect to the intent required to commit assault with intent to commit great bodily harm, the fact that the jury acquitted defendant of that offense demonstrates that any error was harmless. We also note that the trial court specifically instructed the jury that it was to disregard any statements by the attorneys regarding the law that differed from the court’s instructions.

## III

Defendant next argues that his statement to the police was erroneously admitted at trial where it was obtained in violation of his rights under the Fifth Amendment and *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966), and *Michigan v Mosley*, 423 US 96; 96 S Ct 321; 46 L Ed 2d 313 (1975). We disagree.

The prosecutor may not use custodial statements as evidence unless he demonstrates that before any questioning, the accused was warned that he had a right to remain silent, that his

statements could be used against him, and that he had the right to retained or appointed counsel. *Dickerson v United States*, 530 US 428; 120 S Ct 2326, 2330-2331; 147 L Ed 2d 405 (2000); *Miranda, supra* at 444; *People v Daoud*, 462 Mich 621, 632-633; 614 NW2d 152 (2000). Once an accused invokes his Fifth Amendment rights, his invocation of those rights must be “scrupulously honored,” and the police must discontinue interrogation. *Minnick v Mississippi*, 498 US 146, 150; 111 S Ct 486; 112 L Ed 2d 489 (1990); *Edwards v Arizona*, 451 US 477, 484-485; 101 S Ct 1880; 68 L Ed 2d 378 (1981); *Mosley, supra* at 103-106; see, also, *People v Paintman*, 412 Mich 518, 525; 315 NW2d 418 (1982). However, in order to trigger the requirement that the police discontinue questioning, a defendant’s invocation of his right to remain silent must be unequivocal. *Mosley, supra*; *United States v Hurst*, 228 F3d 751, 760 (CA 6, 2000); see, also, *People v Davis*, 191 Mich App 29, 36; 477 NW2d 438 (1991). Additionally, the police are permitted to seek clarification of an equivocal exercise of the right to remain silent. *People v Catey*, 135 Mich App 714, 726; 356 NW2d 241 (1984).

In the instant case, although defendant appears to have indicated at times that he wished to stop talking to the police, the circumstances surrounding his statements indicate that these assertions were equivocal at best. When the police officers properly attempted to determine whether defendant did, in fact, wish to invoke his right to cease questioning, defendant interrupted them and continued to speak. Under the circumstances, defendant did not unequivocally assert his right to remain silent and, accordingly, the trial court did not err in admitting defendant’s custodial statement.

#### IV

Defendant also asserts that the trial court improperly refused to admit a “love letter” the complainant wrote to defendant and an enclosed semi-nude photograph of the complainant. We disagree.

Even if relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or needless presentation of cumulative evidence. MRE 403; *People v Sabin (After Remand)*, 463 Mich 43, 58; 614 NW2d 888 (2000). Here, as the trial court observed, the letter had little probative value because of the length of time that elapsed between the charged offenses and the date the letter was sent. Even then, the trial court allowed defendant to impeach the complainant and question her concerning the letter and photograph. Under the circumstances, the trial court did not abuse its discretion.

#### V

Defendant also argues that the trial court erroneously instructed the jury on the use of fingerprint evidence when the prosecution’s fingerprint expert testified that he was unable to match defendant’s fingerprints to any items seized during the search of defendant’s home. Defendant did not object to the trial court’s instruction at trial. Because the instruction itself correctly states the law and because defendant has not shown any prejudice resulting from the instruction, we hold that this unpreserved issue does not warrant appellate relief. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

## VI

Defendant argues that he is entitled to resentencing because the trial court failed to articulate sufficient rationale for the sentences imposed and erroneously sentenced him as a third habitual offender, MCL 769.11; MSA 28.1083. He also asserts that his sentences are disproportionate under *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). Because the trial court indicated that it was sentencing defendant within the sentencing guidelines as scored for the underlying CSC offenses, and also commented on the brutality of defendant's conduct as the rationale for its sentencing decisions, we conclude that the articulation requirement was satisfied. *People v Broden*, 428 Mich 343, 354; 408 NW2d 789 (1987); *People v Bailey (On Remand)*, 218 Mich App 645, 646-647; 554 NW2d 391 (1996). We agree, however, that the presentence report is plainly inconsistent insofar as identifying whether defendant has one or two prior felony convictions. Because resolution of this issue will affect defendant's status as either a second or third habitual offender, we remand for a determination of defendant's actual habitual offender status. If the trial court determines that defendant is actually only a second habitual offender under MCL 769.10; MSA 28.1082, defendant shall be resentenced. If the trial court determines that defendant is actually a third habitual offender, the presentence report should be corrected accordingly. We shall retain jurisdiction for purposes of reviewing defendant's proportionality issue following a determination of his actual habitual offender status.

We affirm defendant's convictions and remand for further proceedings consistent with this opinion. The trial court is instructed to complete any further proceedings within 63 days of the date of this opinion. We retain jurisdiction.

/s/ Mark J. Cavanagh  
/s/ Jane E. Markey  
/s/ Jeffrey G. Collins