

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DONALD KLINE,

Defendant-Appellant.

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UNPUBLISHED

August 3, 2001

No. 212106

Wayne Circuit Court

Criminal Division

LC No. 97-000003

Before: Bandstra, C.J., and White and Collins, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317, for the strangulation death of his girlfriend. He was subsequently sentenced to thirty-five to sixty years' imprisonment and now appeals as of right. We affirm.

I

Defendant first argues that the trial court erred in both denying his motion to quash the district court's decision to bind him over for trial on a charge of first-degree premeditated murder, MCL 750.316, and in determining that there was probable cause to support his arrest. These issues, however, were previously raised by defendant in a pretrial application for leave to appeal which this Court denied for "lack of merit in the grounds presented." Both matters are therefore governed by the law of the case doctrine, which bars reconsideration of an issue by an equal or subordinate court during subsequent proceedings in the same case. See, e.g., *People v Hayden*, 132 Mich App 273, 297; 348 NW2d 672 (1984) and *People v Douglas*, 122 Mich App 526, 528-529; 332 NW2d 521 (1983) (each holding that denial of a motion to remand for "lack of merit" in the grounds presented constitutes the law of the case, barring further review in this Court). Consequently, we do not review these issues further. Nevertheless, even if we were to construe the order as not barring further consideration of the merits of the issue on a claim of appeal, we are satisfied that there was a sufficient showing of probable cause, with respect to both the arrest and the bind over.

II

Defendant next argues that the prosecution failed to present sufficient evidence at trial to sustain his conviction of second-degree murder. In reviewing this issue, this Court must view the evidence in the light most favorable to the prosecution and determine whether a rational trier

of fact could find that the essential elements of the crime were proved beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 722-723; 597 NW2d 73 (1999). With respect to the crime of second-degree murder, this requires a finding of proof sufficient to establish that the defendant caused the death of the victim and that the killing was done with malice and without justification. See *People v Goecke*, 457 Mich 442, 463-464; 579 NW2d 868 (1998). Concerning these proofs, defendant argues only that there was insufficient evidence linking him to the crime to support a rational trier of fact in finding that it was he who committed the offense. We do not agree.

Although there was no physical or direct evidence that defendant committed this crime, circumstantial evidence and the reasonable inferences arising therefrom may be sufficient to support a conviction. See *People v Drayton*, 168 Mich App 174, 176; 423 NW2d 606 (1988). Here, the evidence indicated that the decedent died from manual strangulation. Defendant was the decedent's boyfriend, however, the decedent had recently told a next-door neighbor that she was unhappy with their relationship. Defendant was also unhappy with the decedent's behavior because she was allegedly going out with other men and using crack cocaine. Moreover, the decedent's body was found in the backyard of the house where both defendant and the decedent resided, clad in the same clothes that the decedent had been wearing the previous day. Additionally, after defendant was arrested the decedent's purse, which contained her cigarettes and make-up, was found in the room that she and defendant shared. According to the decedent's mother, her daughter never went anywhere without her purse, cigarettes, and make-up. This evidence suggests that, contrary to defendant's claims, the decedent had returned home alive on the night she was killed. Moreover, following his arrest, defendant told police that he was "going to end the relationship" because "[s]he was making me crazy," and, when asked how he was going to end the relationship, he stated, "I just ended it." During this interview, defendant also revealed the manner in which the decedent was killed, although, according to police, that information had not yet been revealed to him.

Viewed most favorably to the prosecution, the foregoing evidence was sufficient to enable a rational trier of fact to find beyond a reasonable doubt that it was defendant who killed the victim.

### III

Defendant next argues that the trial court erred in admitting into evidence the investigating officer's hand-written notes concerning statements made by defendant during two separate custodial interviews. Defendant contends that the notes were inadmissible hearsay because they did not meet the foundational requirements of the recorded recollection exception, MRE 803(5). We disagree.

For a writing to be admissible under MRE 803(5), it must meet three prerequisites: (1) it must pertain to matters about which the declarant once had knowledge; (2) the declarant must now have insufficient recollection as to such matters; and (3) it must be shown to have been made by the declarant or, if made by another, to have been examined by the declarant and shown to accurately reflect the declarant's knowledge when the matter was fresh in the declarant's memory. *People v Hoffman*, 205 Mich App 1, 15-16; 518 NW2d 817 (1994). Our review of the lower court record and the officer's testimony regarding the notes leads us to conclude that the three prerequisites to MRE 803(5) were fulfilled.

Nonetheless, we agree that the trial court erred in allowing these notes to be introduced into evidence as an exhibit. Although the trial court properly permitted the officer to read her notes into evidence under MRE 803(5), the rule does not permit the document itself to be received as an exhibit unless offered by an adverse party. However, any error in admitting the notes does not require reversal because defendant has not shown that it is more probable than not that such error was outcome determinative, i.e., that it undermined the reliability of the verdict. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). Defendant does not contend that the written notes differed from the officer's testimony in any material respect. Accordingly, given the cumulative nature of the information contained in these notes, we do not believe their admission resulted in a miscarriage of justice, or otherwise harmed defendant's right to a fair trial, such that appellate relief is warranted. See, e.g., *People v Smith*, 456 Mich 543, 555; 581 NW2d 654 (1998).

#### IV

Defendant next argues that the trial court abused its discretion in denying both his request for substitute counsel, and that he be permitted to represent himself. Again we disagree. Defendant's request for substitute counsel was not supported by a showing of good cause. See *People v Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991). Although defendant expressed dissatisfaction with counsel, he failed to identify a legitimate difference of opinion between himself and his attorney with regard to the conduct of his defense. Furthermore, as the trial court observed, there was no showing that appointed counsel was unprepared or otherwise unable to properly represent defendant. Thus, defendant's request for substitute counsel was properly denied.

We also find that the trial court sufficiently complied with both *People v Anderson*, 398 Mich 361, 367-368; 247 NW2d 857 (1976) and MCR 6.005(D) when denying defendant's request to represent himself. See *People v Adkins (After Remand)*, 452 Mich 702, 723, 726-727; 551 NW2d 108 (1996). As the trial court properly found, in light of the unusual circumstances presented in this case, including defendant's prior conduct, any attempt at self-representation would have been "a miscarriage of justice," as well as an undue inconvenience to the administration of justice.

#### V

Next, we find no merit to defendant's claim that he was denied the right to a fair trial because the trial court did not allow him to call a psychiatrist who had treated both him and the decedent at the Northville State Hospital. The testimony was sought for the purpose of showing defendant's mental state when he left Northville and that defendant had a good relationship with the decedent while the two were hospitalized. However, as noted by the trial court, the proposed testimony would not have aided the jury, particularly considering that defendant's mental state was not at issue and there was ample evidence of defendant's good relationship with the decedent while hospitalized. Therefore, given the irrelevant and cumulative nature of the proffered testimony, we find the evidence to have been properly excluded pursuant to MRE 403.

## VI

Defendant next argues that his conviction should be reversed because the police conducted an illegal search of his room during which they seized a bag, which the trial court improperly allowed into evidence. Because defendant did not raise this issue below, appellate relief is precluded absent a showing of plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 764-765; 597 NW2d 130 (1999). Defendant does not contend that the allegedly illegal search and seizure produced any incriminating evidence. Therefore, he has not shown that his substantial rights were affected. Accordingly, reversal is not warranted on the basis of this unpreserved issue.

## VII

Defendant next argues that the trial court erred in permitting Tina McGee to testify that shortly before her death, the decedent told McGee that defendant had stated that someone would be "terminated" if the decedent ever left him. Although we agree that admission of this evidence was error, we find such error to be harmless.

The trial court admitted the testimony under MRE 803(3), as evidence of the decedent's then existing state of mind. However, although statements indicative of the declarant's state of mind are generally admissible when that state is in issue in the case, the decedent's state of mind was not "in issue" in this case. See *People v White*, 401 Mich 482, 502-503; 257 NW2d 912 (1977); cf. *People v Fisher*, 449 Mich 441, 450; 537 NW2d 577 (1995) (where the decedent's statements of marital discord were found to be admissible on the issue of the defendant spouse's state of mind). Moreover, even assuming that the challenged testimony was relevant on this point, the probative value of such testimony was substantially outweighed by the danger of unfair prejudice. MRE 403; *People v Sabin (After Remand)*, 463 Mich 43, 58; 614 NW2d 888 (2000). Despite the trial court's limiting instruction, there was a substantial danger that the jury would accept McGee's statement as somehow reflecting on defendant's state of mind rather than the victim's, i.e., as a true indication of the defendant's intentions, actions or culpability. *White*, *supra* at 505.

Nevertheless, a trial court's error in the admission of evidence is not a ground for reversal unless, when considering the error and its effect in light of the strength and weight of the untainted evidence, it affirmatively appears that it is more probable than not that a different outcome would have resulted without the error. *Lukity*, *supra* at 495-496. Examined in the context of the untainted evidence, we conclude that any error in the admission of McGee's testimony was harmless. As discussed in Part II of this opinion, there was a significant amount of evidence aside from this testimony establishing that defendant committed the offense.

## VIII

Next, we find that the trial court did not err in admitting Anna Quaglia's testimony acknowledging that she violated hospital policy by assisting defendant in leaving the Northville State Hospital, prior to his official discharge, in order to visit the decedent. Contrary to defendant's contention, Quaglia's testimony was relevant because it was probative of the close relationship between defendant and the decedent. MRE 401; *People v Crawford*, 458 Mich 376,

388; 582 NW2d 785 (1998). Moreover, the probative value of the testimony was not substantially outweighed by the danger of unfair prejudice. MRE 403; *Sabin, supra*.

## IX

Defendant next argues that the trial court abused its discretion in granting a jury view after the jury had retired to deliberate. Defendant contends that this viewing constituted evidence that was improperly introduced after the proofs and closing arguments were complete, and without his presence or appropriate instruction from the court concerning the permissible use of such evidence. We disagree.

Initially, we note that as a result of his disorderly and disruptive conduct during trial, defendant waived his right to be present during the jury view. *People v Mallory*, 421 Mich 229, 245; 365 NW2d 673 (1984); see also MCR 6.414(D). Furthermore, because defendant did not object to the court's instructions regarding the appropriate use of the viewing by the jury, he must establish plain error affecting his substantial rights. *Carines, supra* at 763. We find no such error here.

In defining plain error, the United States Supreme Court has explained that the error must be clear under current law. See *United States v Olano*, 507 US 725, 734; 113 S Ct 1770; 123 L Ed 2d 508 (1993). Because the question whether a jury view actually constitutes evidence was left undecided in *Mallory, supra*, we find that defendant has failed to show that the trial court's failure to offer additional instruction with respect to the viewing was plain error, i.e., error that is "clear or obvious." See *Carines, supra*; *Mallory, supra* at 248, n 13. Nonetheless, even were we to assume the alleged error to be plain, defendant has offered nothing to establish that this error "affected the outcome of the lower court proceedings." *Carines, supra*. Accordingly, defendant's unpreserved claim of error does not merit reversal.

We similarly reject defendant's contention that the trial court improperly shaped the jury's deliberations by permitting a viewing only of the home's exterior. Again, defendant failed to object to the limitations imposed by the court and the issue is therefore not preserved. Accordingly, because defendant has failed to show that the trial court's decision in this regard affected the outcome of the lower court proceedings, he has forfeited any further appellate consideration of the issue. *Id.* at 763-764.

## X

Next, we conclude that the trial court's denial of defendant's request for a bench trial was not error entitling defendant to relief on appeal. There is no constitutional right to waive a jury trial. *People v Kirby*, 440 Mich 485, 487; 487 NW2d 404 (1992). Moreover, as this Court observed in *People v Jones*, 195 Mich App 65, 69; 489 NW2d 106 (1992), because the plain language of MCL 763.3(1) does not require the court to state its reasons for approving or denying a request for a bench trial, "the trial court . . . [may] refuse the request for no reason at

all or for any reason.”<sup>1</sup> As a result, a trial court’s decision whether to grant or deny such a request is not subject to review on appeal.

## XI

Defendant next argues that he was denied the effective assistance of counsel. Again, we disagree.

First, we are not satisfied that counsel was ineffective for failing to impeach the medical examiner with his own medical report which stated that there was no “abnormality” in the decedent’s hyoid bone or with evidence from medical literature that hyoid bone fractures are not rare, but occur in one-third of strangulation cases. Even assuming counsel was deficient in this regard, given the evidence discussed in Part II of this opinion, we do not believe that defendant was prejudiced by such deficiency. *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

Second, because there is nothing in the record to indicate that defendant’s custodial statements were not voluntarily made, we find no basis to conclude that counsel was ineffective in failing to challenge the admissibility of those statements in a pretrial hearing. See *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965). Counsel is not required to argue a meritless motion or make a groundless objection. *People v Rodriguez*, 212 Mich App 351, 356; 538 NW2d 42 (1995).

Defendant also claims that counsel was ineffective because he failed to impeach Officer Childs with her preliminary examination testimony. However, because there has been no showing that presentation of the evidence in question would have substantially benefited defendant, defendant has failed to show that counsel was ineffective. *People v Caballero*, 184 Mich App 636, 640, 642; 459 NW2d 80 (1990).

Next, defendant asserts that trial counsel was ineffective because he stipulated to the introduction of the unredacted preliminary examination testimony of Sarah Mosley. However, because defendant has not demonstrated that the testimony did not qualify for admission under MRE 804(b)(1), he has failed to show that counsel’s stipulation was improper, let alone prejudicial.

Defendant further contends that trial counsel was ineffective because he allowed the jury to learn that he had been a mental patient at Northville State Hospital. Defendant has not shown that counsel’s decision was unsound. We will not substitute our judgment for that of counsel with regard to matters of trial strategy, nor will we assess counsel’s competence with the benefit of hindsight. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999).

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<sup>1</sup> Contrary to defendant assertion, because this statement was essential to the panel’s resolution of that case, it is not mere obiter dictum. See *People v Durfee*, 215 Mich App 677, 685; 547 NW2d 344 (1996). Moreover, there is no conflict between MCL 763.3(1) and MCR 6.401 with respect to waiver of the right to a jury trial; both provide that a defendant is entitled to a bench trial only upon “consent of the prosecutor and approval by the court.”

Similarly, we find no merit in defendant's claim that counsel was ineffective because he failed to cite MRE 803(5) when objecting to the admission of Officer Childs' notes as an exhibit. The record demonstrates that counsel alerted the trial court to the fact that the notes were not admissible under the court rule. Furthermore, as previously discussed, any error in allowing a redacted version of the notes to be received as an exhibit was harmless.<sup>2</sup>

Next, defendant argues that trial counsel was ineffective because he failed to impeach the decedent's mother with a prior statement to police indicating that she had heard her daughter's voice in the background of a message left by defendant on the mother's answering machine sometime after the decedent was alleged by the prosecution to have been killed. Notwithstanding the mother's belief at the time she initially spoke with police, because the evidence at trial demonstrated that the decedent was in fact already dead at the time defendant made the call, we conclude that counsel was not deficient in failing to confront the mother with this prior statement. Counsel was not required to advocate a meritless position. See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

We similarly reject defendant's contention that counsel was ineffective because he failed to object to the prosecutor's allegedly improper questioning during cross-examination of defendant, or to the prosecutor's closing argument. The questions posed by the prosecutor were within the proper scope of cross-examination. Moreover, a review of the prosecutor's remarks in closing argument reveal that they were proper commentary upon the evidence and reasonable inferences arising therefrom. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Thus, counsel was not ineffective for failing to object.

Next, defendant argues that trial counsel was ineffective because he failed to seek an instruction limiting the use of Officer Rodney Jackson's testimony that Sarah Mosley had told him that defendant and the decedent "had words" shortly before she was killed was admissible only for purposes of impeachment. However, although we agree that such an instruction would have been appropriate, see MRE 607, because defendant has failed to show that he was prejudiced as a result of the absence of such an instruction, he is entitled to no relief. *Johnson, supra*.

Finally, because suppression of defendant's custodial statements to the police would not have been warranted solely because the police did not electronically record the statements, see *People v Fike*, 228 Mich App 178, 183; 577 NW2d 903 (1998), we hold that counsel was not ineffective for failing to request such relief.

## XII

Next, defendant contends that the trial court erred when it initially took the verdict in his absence. Because defendant failed to preserve this issue with an appropriate objection at trial, he must again demonstrate plain error affecting his substantial rights. *Carines, supra*. However, inasmuch as the trial court subsequently required the jury to formally enter its verdict in defendant's presence and in doing so polled each of the jurors, who in turn assented to the

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<sup>2</sup> See Part III, *supra*.

verdict as entered, we find no such error on this record. See, e.g., *Rice v Wood*, 77 F 3d 1138 (CA 9, 1995).

### XIII

Defendant next argues that the cumulative effect of the foregoing alleged errors requires reversal. However, as discussed above, any errors or arguable errors were of little consequence to the outcome of defendant's trial. *People v Cooper*, 236 Mich App 643, 659-660; 601 NW2d 409 (1999). Accordingly, we do not believe that reversal of defendant's conviction on the basis of cumulative error is warranted.

### XIV

Defendant next argues that he was denied due process of law at sentencing when the trial court failed to resolve his challenges to inaccurate information contained in the presentence investigation report. Again we disagree. Defendant has the right to the use of accurate information at sentencing, and a court must respond to allegations of inaccuracies in one of several ways. See MCR 6.425(D)(3); see also *People v Hoyt*, 185 Mich App 531, 533-536; 462 NW2d 793 (1990). However, when the alleged inaccuracies would have no determinative effect on the sentence, the court's failure to adequately resolve the matter may be considered harmless error. *People v Daniels*, 192 Mich App 658, 675; 482 NW2d 176 (1991). In the present case, defendant challenged the inclusion of a statement indicating that he had previously been convicted of sexually assaulting a male corrections officer, arguing that he was in fact convicted merely of simple assault in connection with the incident. Although the trial court failed to specifically resolve the matter, it is clear that the court regarded the distinction between a sexual assault and a simple assault as irrelevant to the appropriate sentence. *Id.* Thus, re-sentencing is not required. Further, defendant's position with respect to the conviction is already stated in the presentence report, making it unnecessary to remand for correction of the report.

We similarly reject defendant's contention that he is entitled to resentencing as a result of the trial court's incorrect scoring of the sentencing guidelines. Although we agree that the trial court erred in treating defendant's previous acquittal "by reason of insanity" as a prior conviction for purposes of scoring PRV-1, see MCL 330.2050, because defendant's sentence is proportionate to the seriousness of the circumstances surrounding both the offense and the offender, we do not believe that this error provides a basis for relief. See *People v Raby*, 456 Mich 487, 496; 572 NW2d 644 (1998) ("[t]he scoring of the sentencing guidelines is not an end in itself but rather a means to achieve a proportionate sentence").

We affirm.

/s/ Richard A. Bandstra  
/s/ Helen N. White  
/s/ Jeffrey G. Collins