STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 28, 2001
v	No. 213426 Wayne Circuit Court
ARTHUR L. KEELER, Defendant-Appellant.	Criminal Division LC No. 97-007992

Before: Hoekstra, P.J., and Saad and Whitbeck, JJ.

PER CURIAM.

Defendant was convicted by jury of first-degree criminal sexual conduct (CSC), MCL 750.520b(1)(f), and third-degree CSC, MCL 750.520d(1)(b). The trial court sentenced defendant to concurrent prison terms of ten to twenty years for the first-degree CSC conviction, and five to fifteen years for the third-degree CSC conviction. Defendant appeals as of right. We affirm defendant's conviction, but remand to the trial court for resolution of the dispute at sentencing over the proper score for prior record variable 5 and correction of the sentencing information report.

This case arises from the complainant's reports that defendant sexually assaulted her. Defendant and the complainant had lived together in a romantic relationship. The complainant testified that, during the course of that relationship, defendant became verbally, then physically, abusive toward her. According to the complainant, this abuse peaked when, in the early morning of July 29, 1997, at defendant's apartment, defendant physically abused her and forcibly penetrated her with his penis, and then later that day forced her to perform oral sex on him. After a jury trial, defendant was convicted of first- and third-degree CSC.

Defendant first argues on appeal that the trial court erred in admitting hearsay regarding defendant's past bad acts. Defendant claims that the trial court's reliance on MRE 803(3) in overruling defendant's objection to complainant's coworker's hearsay testimony as a statement of then-existing state of mind was improper. According to defendant, the declarant's statements about being struck, bruised, threatened, raped, and that she had to fight to get out of the apartment were statements of memory or belief offered to prove the thing remembered or believed, which is explicitly recognized as inadmissible by MRE 803(3). We agree that the trial court erred in admitting the hearsay testimony; however, reversal is not required.

The then-existing state of mind exception to the general rule against admitting hearsay applies to statements "of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed[.]" MRE 803(3).[1] Under the rule, "a statement explaining a past sequence of events (from the standpoint of the declarant at the time of the statement) is not a then existing physical condition within the meaning of the rule but, rather, a 'statement of memory or belief' that is explicitly excluded from the exception." *People v Hackney*, 183 Mich App 516, 527, n 2; 455 NW2d 358 (1990).

Here, the coworker's testimony that the complainant said that defendant had fought with her, struck her, and raped her was not the retelling of the declarant's then-existing state of mind or emotion, but rather, of the complainant's "statement of memory or belief to prove the fact remembered or believed," precisely what MRE 803(3) explicitly excludes from its exception to the hearsay prohibition. Thus, the trial court abused its discretion in admitting the evidence. *People v Bahoda*, 448 Mich 261, 288; 531 NW2d 659 (1995).

However, evidentiary error is normally subject to a harmless-error analysis. *People v Lukity*, 460 Mich 484; 596 NW2d 607 (1999). A defendant pressing a claim of preserved, nonconstitutional error "has the burden of establishing a miscarriage of justice under a 'more probable than not' standard." *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999), citing *Lukity*, *supra*.

In this case, the coworker's testimony at issue was wholly cumulative of the complainant's own account of events. Competent testimony that is duplicative of improperly admitted testimony can militate against the conclusion that a party was harmed by the error. See, e.g., *People v McRunels*, 237 Mich App 168, 185; 603 NW2d 95 (1999). Further, the accounts of a single witness can suffice to persuade a jury of a defendant's guilt beyond a reasonable doubt. See *People v Jelks*, 33 Mich App 425, 432; 190 NW2d 291 (1971). Because one witness alone can satisfy the evidentiary burden for conviction, improperly admitted cumulative evidence from another witness may often be considered harmless. In this instance, we conclude that defendant has not established a miscarriage of justice. We cannot say that the improperly admitted evidence more probably than not affected the outcome. *Lukity*, *supra* at 495.

Defendant next argues that the trial court erred in admitting evidence of defendant's bad character. We disagree. Defendant objected to the challenged evidence on the grounds of hearsay, not inadmissible bad acts. "To preserve an evidentiary issue for review, a party opposing the admission of evidence must object at trial and specify the same ground for objection that it asserts on appeal." *People v Aldrich*, 246 Mich App 101, 116; 631 NW2d 67 (2001). Thus, this issue is not preserved. In any event, the evidence was properly admitted.

[1] There was no attempt to offer the testimony as an excited utterance, MRE 803(2), and thus no finding by the trial court concerning whether the declarant was under the stress of the matter about which she was speaking at the time. Because the evidence shows that the complainant did not burst on the scene with her revelations, but accused defendant of rape only after considerable time, reflection, and encouragement from her coworkers, it is doubtful that her declarations would have been admissible under that exception.

MRE 404(b)(1) establishes that evidence of other bad acts is not admissible to prove a person's character, or behavior consistent with those other wrongs, but provides that such uncharged conduct may be admissible for other purposes, "such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material . . . ." See also *People v VanderVliet*, 444 Mich 52; 508 NW2d 114 (1993), as amended 445 Mich 1205; 520 NW2d 338 (1994).

Here, the evidence of defendant's pattern of violence against the complainant was offered for a proper purpose. A jury is entitled to hear the "complete story" of the matter in issue. *People v Sholl*, 453 Mich 730, 742; 556 NW2d 851 (1996), quoting *People v Delgado*, 404 Mich 76, 83; 273 NW2d 395 (1978). In other words, "'[e]vidence of other criminal acts is admissible when so blended or connected with the crime of which defendant is accused that proof of one incidentally involves the other or explains the circumstances of the crime.'" *Scholl, supra*, quoting with approval *State v Villavicencio*, 95 Ariz 199, 201; 388 P2d 245 (1964). In the present case, the evidence of which defendant complains brought to light not bad acts wholly apart from the charged conduct, but rather acts constituting an escalating pattern of violence and other abuse by defendant against the complainant. Likewise, as in *Scholl*, "a jury was called upon to decide what happened during a private event between two persons. The more the jurors knew about the full transaction, the better equipped they were to perform their sworn duty." *Scholl, supra* at 742. Defendant's argument is without merit.[2]

Next, defendant argues that the trial court erred in admitting testimony that defendant refused to speak to the police because that evidence allowed the jury to infer guilt from defendant's silence, in violation of defendant's constitutional rights. This issue is not preserved because the side bar conference, after a police officer testified that he told defendant that he needed to speak to him, but defendant refused, was conducted off the record and the transcript does not reveal its substance. Because this issue is unpreserved, "[t]he defendant must show a plain error that affected substantial rights. The reviewing court should reverse only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Carines*, *supra* at 774.

Here, even assuming that error occurred when a police officer testified that he called defendant, but that defendant refused to talk to him, we find reversal unnecessary. It is difficult to see how the jury could have inferred guilt for the crime of criminal sexual assault from the incidental mention of defendant's initial disinclination to cooperate with the police. The defense conceded that defendant had acted poorly toward the complainant and that his misconduct included physical abuse of the complainant. With that admission before the jury, it should have

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[2] We note that the prosecutor, in closing argument, properly pointed out that the evidence of a pattern of violence against complainant supported the conclusion that defendant felt no restraint in acting on his abusive urges. A prosecutor enjoys wide latitude in fashioning arguments, and may argue the evidence and all reasonable inferences from it. *Bahoda, supra* at 282. A prosecutor need not confine argument to the "'blandest of all possible terms.'" *People v Marji*, 180 Mich App 525, 538; 447 NW2d 835 (1989), quoting *People v Cowell*, 44 Mich App 623, 628-629; 205 NW2d 600 (1973).

been easy for the jurors to reason that an abusive man, whose victim-girlfriend made a police report, would be silent when the police initially inquired of him, whether or not sexual misconduct was part of the abuse. In other words, to the extent that defendant's silence indicated a guilty mind, a basis for that guilty mind other than sexual assault was already before the jury. Besides, there was no further mention of defendant's disinclination to talk, and the circumstances of what mention there was indicated a generally uncooperative attitude, not silence where a reasonable person would be expected to speak. We do not find that this brief indication that the defendant refused to talk to the police seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Carines, supra* at 763, 774.

Defendant also makes multiple claims of ineffective assistance of counsel. According to defendant, defense counsel improperly pressured him not to exercise his right to testify, and did so by means including revealing in open court confidential communications between counsel and defendant, in violation of the attorney-client privilege. Defense counsel additionally expressed hostility toward defendant in closing argument, belittled the crime of rape before the jury, failed to object to improper character evidence, and failed to take action when defendant suffered from the denial of prescription medicine while incarcerated. We find without merit defendant's assertion that these actions combined to deny him the effective assistance of counsel.

To warrant a new trial based on a claim of ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness and that the representation so prejudiced him that he was denied a fair trial. *People v Hoag*, 460 Mich 1, 5; 594 NW2d 57 (1999); quoting *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 6747 (1984); People *v Ho*, 231 Mich App 178, 191; 585 NW2d 357 (1998). To demonstrate prejudice, defendant must establish a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. *Hoag, supra* at 6; *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996). Effective assistance of counsel is presumed and defendant bears a heavy burden of proving otherwise. *People v Williams*, 240 Mich App 316, 331; 614 NW2d 647 (2000). We will not second-guess the presumption that a challenged action might be considered sound trial strategy. *Id.* at 331-332; *People v Henry*, 239 Mich App 140, 146; 607 NW2d 767 (1999). This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987).

The decision whether to testify is ultimately the defendant's to make personally, and counsel must respect that decision. See *Rock v Arkansas*, 483 US 44, 52; 107 S Ct 2704; 97 L Ed 2d 37 (1987).[3] Here, while the jury was not present, defense counsel informed the court that at various times throughout the trial defendant demanded to testify, and at other times he agreed not to testify. Defense counsel indicated that, under the circumstances, he advised defendant not to testify. Defendant indicated to the court that, on the advice of his attorney, he would not

[3] But see *People v Toma*, 462 Mich 281, 302-309; 613 NW2d 694 (2000) (where a defendant insists on testifying, counsel's failure to ensure that the jury fully understood the defendant's account of events did not constitute ineffective assistance where even defendant's clarified account was "so unbelievable that defendant was arguably better off letting the jury speculate about what he was really trying to say").

testify, but that he wanted to testify. When the prosecution requested clarification, asking the court to ask defendant if he wished to follow the advice of his attorney and not take the stand, defendant himself stated "[a]bsolutely, one-hundred percent."

Defendant characterizes defense counsel's statements as revealing confidential communications in violation of the attorney-client privilege, and further argues as if to assume that, if that is the case, reversal is required. However, defendant cites no authority for such a proposition. Further, defense counsel revealed only his and defendant's respective postures concerning whether defendant should testify; counsel revealed nothing further concerning the private deliberations of the two, nor anything of an especially private, sensitive, or potentially incriminating nature about defendant, the prosecution received no inculpatory information, and the jury was not present. On appeal, defendant does not argue that he felt genuinely coerced into suppressing his right to testify, nor suggests what testimony defendant might have offered had he gone with his instincts instead of with counsel's advice. We cannot say that the routine matter of putting on the record that counsel had advised defendant not to testify caused counsel to be ineffective. We have reviewed defendant's claims concerning the alleged effect on him and on the court of the handling of the situation and his alleged lack of waiver of the attorney-client privilege, and we conclude that they are simply without merit and deserve no further discussion.

Nor has defendant overcome the strong presumption of trial strategy where defense counsel stated during closing argument that "[h]e often behaves like a fool, like an idiot" and that "[h]e can be obnoxious." From the beginning, the defense strategy was to concede that defendant behaved poorly toward the complainant, while reminding the jury that the issue was not whether defendant misbehaved, but whether his misbehavior took the form of committing the charged offenses. In light of the evidence that the complainant constantly displayed bruises of defendant's making, and that she was especially upset on the day of the alleged offenses, it was sound strategy for counsel to credit the jury's natural tendency to feel irritation at defendant, and sympathy for the complainant, to demonstrate by counsel's example that one can share in those legitimate feelings while still harboring a reasonable doubt regarding the charged conduct. Indeed, defense counsel went on to say, "as you can see, I'm not justifying what he's done. What I'm saying is that he's committed an offense but I don't think it's the offense with which he's charged. . . . I think that what he's done has been guilty of domestic abuse, domestic assault." Given the evidence with which he was confronted, defense counsel engaged in sound strategy by conceding that defendant was an unsympathetic character.

Defendant next points to a moment in cross-examination of the complaining witness, arguing that it suggested to the jury that defense counsel, and thus defendant, did not consider rape a serious offense. Having reviewed the comment in question, we conclude that if the jury took counsel's quip as anything more than a moment of gratuitous levity, the quip should have served to remind the jury that defendant and the complainant had a history of consensual sexual relations, such that sexual initiative was not itself inherently offensive. Further, to the extent that defendant takes issue with defense counsel's failure to object to the improper character evidence regarding defendant's bad acts, we have already found that the testimony at issue was not about extraneous bad acts, but about the course of conduct culminating in the charged offenses. "Counsel is not obligated to make futile objections." *People v Meadows*, 175 Mich App 355, 362; 437 NW2d 405 (1989).

Defendant also argues that withholding his prescription medicines from him while he was incarcerated rendered him incompetent to stand trial and that defense counsel's failure to take action to ensure that defendant had continued access to his medicines rendered counsel ineffective. Again, defendant's argument is without merit.

A criminal defendant is presumed competent to stand trial. MCL 330.2020(1). A defendant is incompetent to stand trial "only if he is incapable because of his mental condition of understanding the nature and object of the proceedings against him or of assisting in his defense in a rational manner." *Id*. "The issue of incompetence to stand trial may be raised by the defense, court, or prosecution." MCL 330.2024.

Here, neither the defense, nor the court, nor the prosecution raised the issue of defendant's competency to stand trial. Moreover, this Court has already remanded the case to the trial court to entertain a motion for an evidentiary hearing on the claims of incompetence and ineffective assistance of counsel, but defendant failed to proffer appropriate evidence of his condition at the time of trial, and thus the trial court denied the motion for an evidentiary hearing. Having reviewed defendant's arguments and citations to the record, we conclude that defendant again fails to present sufficient evidence of his mental incapacity, or of defense counsel's failure to tend to the matter adequately, to warrant an evidentiary hearing.

Next, defendant argues that the trial court improperly precluded the reading back of testimony because the court stated during jury selection that there would be no transcript during their time in court and that they had to rely on their memories. According to defendant, these remarks had the effect of improperly preventing the jury from even asking to review testimony. Defendant claims that the trial court abused its discretion resulting in a structural defect that defies harmless error analysis.

The decision whether to allow a jury to re-examine selected testimony is left to the sound discretion of the trial court. *People v Carter*, 462 Mich 206, 218; 612 NW2d 144 (2000), citing MCR 6.414(H) and *People v Howe*, 392 Mich 670, 675; 221 NW2d 350 (1974). A trial court must exercise its discretion to assure fairness and to refuse unreasonable requests to review certain testimony or evidence; but, it cannot simply refuse to grant the jury's reasonable request MCR 6.414(H); *Howe*, *supra* at 676. However, "[t]he court may order the jury to deliberate further without the requested review, so long as the possibility of having the testimony or evidence reviewed at a later time is not foreclosed." MCR 6.414(H).

Here, to the extent that the trial court gave the jury the impression that any review of testimony was flatly foreclosed, the court erred. However, defendant cites no authority that supports the argument that this specific error is a structural defect that defies harmless error analysis. Especially because there was no objection from the defense, and there is no indication that the jury ever wished to review testimony, harmless error analysis is appropriate. See *People v Graves*, 458 Mich 476, 481; 581 NW2d 229 (1998), quoting *People v Belanger*, 454 Mich 571, 575; 563 NW2d 665 (1997) ("'[r]ules of automatic reversal are disfavored, for a host of obvious reasons'"). Nor does defendant suggest any way in which he might have been aided had the jury felt that review of testimony was possible. Indeed, in light of the parade of adverse testimony, defendant might have benefited from any misconception the jury had to the effect that no review of testimony was possible. Because the court's unchallenged exaggeration concerning the unavailability of a transcript, done in the service of admonishing the prospective jurors to listen

with extreme care, was neither grossly violative of judgment nor a perversity of will, *People v Laws*, 218 Mich App 447, 456; 554 NW2d 586 (1996), and because defendant fails to show how he was prejudiced by the court's exaggeration, *Carines, supra*, we reject this claim of error.

Defendant further argues that the trial court erred in admitting defendant's use of the word "niggers" during his statement to the police. According to defendant, his use of that word did not relate to the charged conduct at all, but was extremely prejudicial.

MRE 403 provides that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

Because the evidence in this case suggests that defendant's hostility toward the complainant stemmed in part from his hostility toward black persons and the complainant's open association with some black persons while at work, defendant's choice of derogatory terminology when referring to the black race was relevant as part of the "complete story" that the jury was entitled to hear. *Sholl, supra* at 742. The trial court's ruling cannot be considered wholly lacking in justification, and thus cannot be considered an abuse of discretion.[4] See *Laws, supra* at 455 ("An abuse of discretion exists only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling.").

Defendant also argues that "the court improperly allowed the prosecution to do what the defense was prohibited from doing." In essence, defendant claims that the trial court gave the prosecution an unfair evidentiary advantage by prohibiting the defense from eliciting evidence from the complainant concerning her recent divorce and move from Texas, while tacitly allowing the prosecution to bring these matters to the jury's attention as it wished. We find defendant's argument without merit.

Defendant cites no pertinent authority that stands for the proposition that a trial court's decisions concerning subject matter that one party may or may not develop at trial must apply equally to the opposing party. See *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999) ("[W]here a party fails to cite any supporting legal authority for its position, the issue is deemed abandoned."); *Head v Phillips Camper Sales & Rental, Inc*, 234 Mich App 94, 116; 593 NW2d 595 (1999) ("This Court will not search for authority to sustain or reject a party's position."). Moreover, defendant nowhere suggests how any cross-examination of the complainant concerning her origins or marital history could have helped the defense. Further, if defense counsel had some evidentiary benefit to gain from cross-examining the witness concerning her move from Texas to Michigan, because the prosecutor opened the door to that line of questioning, presumably defense counsel would have been permitted that cross-examination had counsel endeavored to do so. Defendant is entitled to no relief.

[4] Defendant alternatively argues that the trial court should have excluded the offensive word as improper character evidence, citing MRE 404(a). However, that ground for objection was not presented to the trial court, and thus is not preserved for appeal. *Aldrich, supra*. Regardless, we find no merit in this contention.

Defendant next raises a number of arguments regarding his sentencing. A trial court's determination of the existence or nonexistence of facts affecting the sentencing decision is reviewed for clear error. *People v Fields*, 448 Mich 58, 77; 528 NW2d 176 (1995). "Provided that permissible factors are considered, appellate review of prison sentences is limited to whether the sentencing court abused its discretion." *Aldrich*, *supra* at 126.

Defendant challenged on the record the factual basis for the scoring of prior record variable 5. The trial court acknowledged defendant's disagreement with the list of prior convictions recited by the prosecutor with regard to the scoring of PRV 5, but thereafter allowed ten points, rather than zero points, for PRV 5. The court also announced that two PRV items would be adjusted downward, PRV 2 from ten to zero, and PRV 6 from fifteen to zero. PRV 7 was originally ten and was to remain at ten. The original string of numbers composing the PRV items added up to thirty-five, but the revised numbers added up to twenty.

The sentencing information report in the record, bearing the trial court's signature, does not reflect any of these adjustments, including the one of which defendant makes issue on appeal. However, the sentencing range indicated reflects an adjustment from 180-360 months to 120-300 months, which corresponds perfectly to the understanding of the parties at sentencing in light of the revised numbers, and defendant's actual minimum sentence for CSC I is ten years, reflecting the downward-adjusted calculation under the guidelines. It thus appears that the SIR was revised only to reflect the result of the revised scores, but not to show the actual corrected scores that accounted for that result.

A criminal defendant has a due process right to be sentenced on the basis of accurate information. *People v Hoyt*, 185 Mich App 531, 533; 462 NW2d 793 (1990), citing US Const, Am XIV, Const 1963, art 1, § 17; *Townsend v Burke*, 334 US 736, 740-741; 68 S Ct 1252; 92 L Ed 1690 (1948), and *People v Malkowski*, 385 Mich 244, 249; 188 NW2d 559 (1971). When a defendant alleges inaccuracies in a presentence report, the trial court must respond to the challenge, by resolving the factual question on the record, or, in the interests of expediency, by simply accepting the defendant's challenge or else wholly disregarding the challenged information. *People v Newcomb*, 190 Mich App 424, 427; 476 NW2d 749 (1991). "The court must make a finding on defendant's challenge on the record, and, when it finds challenged information to be inaccurate or irrelevant, it must strike that information from the presentence investigation report before sending it to the Department of Corrections." *Hoyt*, *supra* at 535, citing MCR 6.425(A)-(D).

In this case, the trial court erred both in failing to resolve satisfactorily defendant's challenge to the factual premises behind PRV 5, and in failing to correct the specific scores for PRV 2 and 6 to reflect the court's downward adjustments. Because the score for PRV 5 was based in part on evidence not of record, the trial court did not satisfactorily resolve the dispute, and thus remand is necessary for resolution of the dispute attendant to PRV 5. Moreover, the SIR is internally inconsistent, indicating level B for prior offenses, where the numbers add up to level C. Because only part of the SIR reflects the trial court's decision to adjust downward two of the PRV items, remand is necessary so the SIR may be replaced with one that is accurate in every detail. See *People v Turner*, 181 Mich App 680, 683; 449 NW2d 680 (1989) ("A court speaks through its written orders, not its oral statements.")

However, even if defendant were to get the benefit of having PRV 5 scored at five, as defense counsel suggested at sentencing, and also of the downward adjustments announced by the court, then defendant's total shifts from twenty to fifteen, keeping the prior record level at level B (1-24 points). Thus, there would have been no difference in the recommended minimum sentence range under the guidelines, and therefore resentencing is not required.

Defendant separately alleges error because the trial court did not specially state the reasons behind the sentences it imposed. We find no merit in this issue where the trial court afforded detailed attention to several of the scoring variables attendant to the sentencing calculation and imposed the minimum sentence under the sentencing guidelines. Sentences within the guidelines are presumptively proportionate to their crimes. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987); see *People v Bowens*, 119 Mich App 470, 474; 326 NW2d 406 (1982), quoting *People v Krist*, 107 Mich App 701, 706; 309 NW2d 708 (1981)[5] ("To . . . require . . . verbal descriptions of obvious mental processes . . . elevates form over substance and creates an unnecessary burden to an already overformalized record-making procedure.")

Further, we find without merit defendant's argument that his sentence, which is within the guidelines, is disproportionate. Given that the evidence suggested that defendant forcibly raped the complainant, as the culmination of a pattern of escalating verbal and physical abuse, the minimum sentence of ten years well reflects the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

Although defendant asks in passing that further sentencing procedures on remand be assigned to a different judge, nothing in the record suggests that the trial judge exhibited any "actual bias or prejudice against defendant," *People v Fox (After Remand)*, 232 Mich App 541, 559; 591 NW2d 384 (1998), citing *People v Gomez*, 229 Mich App 329, 331; 581 NW2d 289 (1998), and thus remand to a different judge is not warranted.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Henry William Saad
/s/ William C. Whitbeck

[5] Rev'd on other grounds, 413 Mich 937; 320 NW2d 667 (1982).