STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 1, 2009
v	No. 285285 Muskegon Circuit Court
VICTOR LLOYD JACKSON, Defendant-Appellant.	LC No. 07-055439-FH

Before: Servitto, P.J., and Fitzgerald and Bandstra, JJ.

PER CURIAM.

Defendant Victor Jackson appeals as of right his jury trial conviction for one count of second-degree criminal sexual conduct with a person under 13 years of age, MCL 750.520c(1)(a).[1] We affirm.

Defendant first argues that trial counsel was ineffective for failing to object to, and affirmatively contributing to, the admission of evidence that defendant was sexually abused as a child, and by failing to object to the prosecution's propensity argument. We disagree. Because defendant failed to preserve this issue, our review is limited to errors apparent on the record. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002).

"Effective assistance of counsel is presumed, and defendant bears a heavy burden to prove otherwise." *People v Dixon*, 263 Mich App 393, 396; 688 NW2d 308 (2004). A defendant seeking a new trial on the ground that trial counsel was ineffective must prove (1) that counsel's performance fell below an objective standard of reasonableness, and (2) that it is reasonably probable that the outcome would have been different, but for counsel's errors. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007). "Defendant must [also] overcome the strong presumption that counsel's performance was sound trial strategy." *Dixon*, *supra* at 396.

Having reviewed the record, we find that defense counsel had a sound, strategic reason for seeking admission of, and not objecting to, evidence that defendant was sexually abused as a child. After the victim reported defendant's sexual misconduct, defendant was interviewed twice

[1] The jury acquitted defendant of two other counts of second-degree criminal sexual conduct.

by police. During the first interview, in the driveway of the home in which defendant was residing, defendant revealed that he had been sexually abused by a foster parent during his childhood. The second interview was conducted at the Michigan State Police Post, and was recorded on a DVD. At the outset of this interview, defendant continuously denied the victim's allegations. Defendant was then questioned about the sexual abuse he experienced as a child by his foster parent. Subsequently, defendant admitted that the victim touched his penis on three separate occasions, but he indicated that the victim was the aggressor. Defendant was asked to write this confession on a voluntary statement form. Before trial, defense counsel moved to suppress the statement. Counsel argued alternatively that if the statement was deemed admissible, the entire recording of the second interview should be admitted under the rule of completeness in order to put the written statement into its proper context. Following a *Walker*[2] hearing, the trial court ruled that defendant's statement was admissible; it also ruled that the entire recorded interview would be presented to the jury.

The only evidence implicating defendant was the victim's testimony and defendant's confession. Therefore, as part of his trial strategy, defendant needed the jury to view the entire recorded interview to substantiate his argument that his own written statement was false. Defense counsel used the interview to show the jury that defendant was provided with suggestions about what may have happened between him and the victim, which defendant then repeated in his statement, and that police used the foster care incident to coerce defendant into making the false confessions. Without the interview containing information of defendant's own abuse as a child to give context to the false, written confession, the jury may have accepted the confession on its face and convicted defendant of all three counts with which he was charged, rather than just one. Defense counsel also questioned defendant on direct examination about the foster care incident, to show the jury that defendant would never sexually abuse another child knowing how traumatic his own sexual abuse experience was. Defense counsel's use of evidence relating to defendant's own sexual abuse as a child was a matter of trial strategy, which this Court will not second-guess. *People v Dendel*, 481 Mich 114, 140; 748 NW2d 859 (2008) (judicial scrutiny of counsel's performance is to be highly deferential and will not be second-guessed).

Further, defense counsel was not ineffective for failing to object to the prosecution's admission of testimony and questioning of witnesses regarding the foster care incident. Because defense counsel requested admission of the foster care incident, the prosecution was permitted to ask questions regarding that incident. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995); *People v Lipps*, 167 Mich App 99, 108; 421 NW2d 586 (1988) (holding that the prosecution may examine witnesses on matters introduced by defendant). It would therefore have been futile to object to the prosecution's elicitation of such testimony. *People v Goodin*, 257 Mich App 425, 433; 668 NW2d 392 (2003) ("Defense counsel is not required to make a meritless motion or a futile objection."). Moreover, the prosecution's introduction of evidence does not unfairly affect the outcome of the proceedings if it is a "fair response" to an issue raised by defense counsel. *People v Jones*, 468 Mich 345, 353-360; 662 NW2d 376 (2003). Thus,

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

defense counsel was not ineffective for failing to object to the prosecution's questioning. *Goodin*, *supra* at 433.

In addition, defense counsel was not ineffective for failing to object to the prosecution's argument regarding the cycle of violence, and specifically to a comment that "[t]oday's perpetrator was yesterday's victim." The prosecutor's argument in this regard was brief and was made in response to defense counsel's arguments, and on the record, we cannot conclude that but for defense counsel's failure to object to the argument, the outcome of the proceedings would have been different. *Frazier*, *supra.* Moreover, to the extent that the argument may have been prejudicial, any prejudice was dispelled by the trial court's instructions to the jury to base its verdict only on the evidence, that the "[e]vidence consists of the sworn testimony of the witnesses and the exhibits that were admitted into evidence," and that the lawyers' statements and questions are not evidence. Jurors are presumed to follow their instructions. *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008). In reaching our conclusion, we are not bound by, and do not find persuasive, the unpublished authorities cited by defendant, each of which is easily distinguished on its facts. MCR 7.215(C)(1).

Defendant next contends that the trial court committed error requiring reversal by denying his motion to suppress his written confession. We review a trial court's factual findings for clear error, but review its ultimate decision on a motion to suppress de novo. *People v Bolduc*, 263 Mich App 430, 436; 688 NW2d 316 (2004); *People v Custer*, 248 Mich App 552, 558; 640 NW2d 576 (2001).

To protect a defendant's Fifth Amendment right against self-incrimination, custodial interrogation must be preceded by advice to the accused that "he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966). "It is well settled that *Miranda* warnings need be given only in situations involving a custodial interrogation." *People v Coomer*, 245 Mich App 206, 219; 627 NW2d 612 (2001). "Custodial interrogation" is "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda*, *supra* at 444-445; *Coomer*, *supra* at 219. When determining whether defendant was in custody at the time of interrogation, this Court reviews "the totality of the circumstances . . . with the key question being whether the accused reasonably could have believed that []he was not free to leave." *Id*.; see also *People v Roark*, 214 Mich App 421, 423; 543 NW2d 23 (1995). The determination whether an accused was in custody at the time of his statement "depends on the objective circumstances of the interrogation rather than the subjective views harbored by either the interrogating officers or the person being questioned." *Id*. at 219-220.

As previously noted, the trial court denied defendant's motion to suppress, concluding that defendant was not in custody when he made either his verbal or written confession. The record supports the trial court's decision. The evidence presented at the *Walker* hearing showed that (1) defendant asked for the second interview to be arranged, (2) defendant voluntarily drove to the police post, (3) defendant walked around the building three times trying to get inside the post, (4) the front door of the building was not locked behind defendant after he was admitted into the building (5) defendant was told at the beginning of the interview that the door was unlocked and that he was free to leave at any time, (6) defendant was told that he should read his

constitutional rights printed at the top of the voluntary statement form before writing his statement, (7) defendant was given the opportunity to read his rights, (8) defendant was left alone in the room to write down his statement, and (9) defendant was never arrested or otherwise detained until after giving his written statement. Considering the evidence presented, we cannot say that the trial court's finding that defendant was not in custody at the time of his interview was clearly erroneous. Thus, defendant was not improperly interviewed without the benefits of *Miranda* warnings. *Id.* at 219.

We reject defendant's argument that a reasonable person in defendant's position would have believed he was locked inside the post. In reaching its conclusion, we note that the trial court discredited defendant's testimony at the *Walker* hearing and credited the interviewing officer's testimony that he did not lock the door behind defendant and did not see anyone else lock the door. This Court defers to "the trial court's superior ability to view the evidence and the demeanor of the witnesses and will not disturb the trial court's findings unless they are clearly erroneous." *People v Johnson*, 202 Mich App 281, 288; 508 NW2d 509 (1993).

We also reject the argument that even if defendant was not in custody initially, he was in custody after he began making admissions and the interviewing officer said "we'll get this thing done with when it makes sense to me." Based on the totality of the circumstances, the trial court's factual finding regarding custody was not clearly erroneous. Although defendant testified that the officer's statement caused him to believe that he had to make up a story in order to secure his release, the determination whether defendant was in custody is to be based on the objective circumstances and not on defendant's subjective beliefs. *Miranda*, *supra* at 444-445; *Coomer*, *supra* at 219.

Defendant argues further that the trial court erred by admitting his written statement into evidence, because that statement, which was made after defendant was presented with *Miranda* warnings, was not voluntary. The voluntary nature of a statement is determined by examining police conduct. *People v Abraham*, 234 Mich App 640, 645; 599 NW2d 736 (1999). Only if the totality of the circumstances surrounding the interrogation reveals that the waiver was both voluntarily and knowingly and intelligently made may a waiver of *Miranda* rights be found. *People v Daoud*, 462 Mich 621, 634; 614 NW2d 152 (2000).

> In determining voluntariness, the court should consider all the circumstances, including: "[1] the age of the accused; [2] his lack of education or his intelligence level; [3] the extent of his previous experience with the police; [4] the repeated or prolonged nature of the questioning; [5] the length of the detention of the accused before he gave the statement in question; [6] the lack of any advice to the accused of his constitutional rights; [7] whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; [8] whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; [9] whether the accused was deprived of food, sleep, or medical attention; [10] whether the accused was physically abused; and [11] whether the suspect was threatened with abuse." No single factor is determinative. "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." [*People v Tierney*, 266 Mich App 687, 708; 703 NW2d 204 (2005) (citations omitted).]

The trial court in this case held that defendant voluntarily gave his written statement. The record supports the trial court's decision. The evidence on the record shows that (1) defendant was 19 years old at the time of the interview; (2) defendant is a high school graduate with an "impressive grade point" average, who can read and write; (3) the interview lasted only 1-1/2 to 1-3/4 hours; (4) the confession was made before defendant was ever arrested; (5) defendant did not appear to be injured or intoxicated or under the influence of anything; (6) although he said he had not had food for some time, defendant also said that he felt "pretty good"; (7) there was no deprivation of any medical needs or sleep needs; (8) there was no physical abuse, nor any threat of such abuse; (9) defendant had plenty of opportunity to persist in his denials; (10) when defendant was asked to write out the statement, the officer's instructions were "to write out exactly what happened," and were not suggestive in any way; and (11) defendant was not taken into custody until after he wrote the statement. We affirm the trial court's denial of defendant's motion to suppress.

Finally, defendant argues that the trial court erred in scoring ten points under offense variable (OV) 19, MCL 777.49. Defendant claims that OV 19 should have been scored at zero points, placing him within an intermediate sanction. A sentencing court has discretion in scoring, and a trial court's scoring of the OVs will be upheld if there is any evidence to support the score. *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006).

OV 19 is scored at ten points where the "offender otherwise interfered with or attempted to interfere with the administration of justice." MCL 777.49. "Our Supreme Court has determined that the phrase 'interfered with or attempted to interfere with the administration of justice' is broader than the concept of obstruction of justice and that conduct subject to scoring under OV 19 'does not have to necessarily rise to the level of a chargeable offense . . . .' *People v Barbee*, 470 Mich 283, 287; 681 NW2d 348 (2004)." *People v Passage*, 277 Mich App 175, 179-180; 743 NW2d 746 (2007).

We note that the statute does not define the term "interfere." We further note that, "[t]he primary goal of judicial interpretation of statutes is to ascertain and give effect to the intent of the Legislature, *People v Williams*, 475 Mich 245, 250; 716 NW2d 208 (2006), and the first criterion in determining intent is the specific language of the statute, *People v Lively*, 470 Mich 248, 253; 680 NW2d 878 (2004). If the plain and ordinary meaning of the language is clear, judicial construction is normally neither necessary nor permitted. *People v Weeder*, 469 Mich 493, 497; 674 NW2d 372 (2004)." *People v Underwood*, 278 Mich App 334, 338; 750 NW2d 612 (2008). Where a statute does not define a term, this Court may look to dictionary definitions. *Allison v AEW Capital Mgmt, LLP*, 481 Mich 419, 427; 751 NW2d 8 (2008). "Interfere" is defined as "to come into opposition or collision so as to hamper, hinder, or obstruct someone or something." *Random House Webster's College Dictionary* (1997). In *Barbee*, *supra* at 285, 288, our Supreme Court held that giving the police a false name in order to avoid arrest constitutes interference with the administration of justice.

In the instant case, the trial court scored OV 19 based on its findings that defendant lied during his first interview by police regarding whether he knew why he was being investigated and that defendant's verbal and written confessions during his second interview were false, as both the victim and the defendant testified that they were false. We hold that defendant's first lie did not constitute interference with the administration of justice. Although defendant admitted at trial that he lied about whether he knew why he was being interviewed, there is no evidence on

the record that this hindered the police investigation in any way. However, we conclude that defendant's false verbal and written statements did hinder the administration of justice, and thus that there is evidence in the record supporting the trial court's scoring of OV 19.

Defendant argues that his false statements did not constitute interference with the administration of justice under OV 19, because, if this Court were to so hold, "the imposition of points under OV-19 . . . would apply in almost every criminal case," because "[d]efendants almost always seek to hide their criminal behavior and rarely step forward to offer evidence proving their guilt." However, this argument is without merit. The case upon which defendant relies, *People v Deline*, 254 Mich App 595, 597-598; 658 NW2d 164 (2003), has been overruled in pertinent part by *Barbee*, *supra* at 283. Contrary to defendant's assertion, our Supreme Court has explained that OV 19 encompasses conduct that interferes with the administration of justice, such as providing a false name, or other false information to law enforcement officers. See, *Id.* Here, defendant testified that he gave false verbal and written statements to police because he believed that he could not leave the police post unless his statement matched that of the victim, and consequently he gave a statement that closely matched what the interviewing officer suggested was the victim's statement, thereby making the victim appear as the aggressor. By doing so, similar to the defendant in *Barbee*, *supra*, defendant wanted to avoid arrest and to be allowed to leave. While it may be true that a general denial of accusation by a defendant cannot support the scoring of OV 19, defendant's actions in this case went beyond mere general denials. Defendant actively lied to the police, providing a false version of events designed to avoid arrest and to impugn the conduct and reputation of the victim. The record shows that defendant's active lies, attempting to portray the victim as the aggressor and designed to thwart prosecution, interfered with the administration of justice. Thus, we affirm the trial court's scoring of OV 19 on this basis. Consequently, we need not address the prosecution's alternative bases for affirmance.

We affirm.

/s/ Deborah A. Servitto
/s/ E. Thomas Fitzgerald
/s/ Richard A. Bandstra