

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ISAIAH LARAY CALKINS,

Defendant-Appellant.

UNPUBLISHED

July 27, 2010

No. 290485

Genesee Circuit Court

LC No. 08-021983-FC

Before: MURRAY, P.J., and DONOFRIO and GLEICHER, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of two counts of first-degree criminal sexual conduct (CSC) (under 13), MCL 750.520b(1)(a), and one count of second-degree CSC (under 13), MCL 750.520c(1)(a). This case arises from defendant's sexual assault of his ex-girlfriend's nine year old daughter on various occasions at the apartment they shared in Davison, Michigan during 2007. Because defendant was not denied the effective assistance of counsel following the preliminary examination or at trial, and the prosecutor did not engage in misconduct warranting reversal, we affirm.

Defendant's first issue on appeal is that he was denied the effective assistance of counsel because his trial counsel, Patricia Lazzio, refused to accompany him to a polygraph examination that resulted in defendant being subjected to a custodial interrogation and making incriminating statements later admitted at trial. The prosecutor counters that defendant requested the polygraph examination and that both defendant and his counsel understood she would not be allowed access to defendant during the polygraph examination. The prosecutor also argues that defendant made the incriminating statements in the pre-polygraph interview during which time defendant never requested counsel's presence.

The determination of whether a defendant has been deprived of the effective assistance of counsel is a mixed question of fact and law. *People v Dendel*, 481 Mich 114, 124; 748 NW2d 859 (2008). We review the trial court's factual findings for clear error and review its constitutional determinations de novo. *Id.* Because defendant did not establish a testimonial record regarding the ineffective assistance of counsel claim, review is limited to mistakes apparent on the record. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000).

The Sixth Amendment right to counsel attaches at "the initiation of adversary judicial criminal proceedings" such as a preliminary examination. *Moore v Illinois*, 434 US 220, 231; 98

S Ct 458; 54 L Ed 2d 424 (1977). Once the Sixth Amendment right to counsel attaches, defendant has a right to counsel at all “critical” proceedings, including interrogation. *People v Frazier*, 478 Mich 231, 244 n 11; 733 NW2d 713 (2007). The Sixth Amendment also grants a defendant the right to effective assistance of counsel as part of the right to counsel. *Strickland v Washington*, 466 US 668, 687-688; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Therefore, defendant’s Sixth Amendment right to effective assistance of counsel had attached at the time of his pre-polygraph interview with Police Detective David Dwyre because the interview occurred after the preliminary examination.

Once the Sixth Amendment right to counsel has attached, however, a defendant may still validly waive that right to counsel (and, therefore, the right to effective assistance of counsel), even if the interrogation was initiated by the police. *Montejo v Louisiana*, ___ US ___; 129 S Ct 2079; 173 L Ed 2d 955 (2009). *Montejo* reflects a recent change in the law. Previously, in *Michigan v Jackson*, 475 US 625, 636; 106 S Ct 1404; 89 L Ed 2d 631 (1986), overruled *Montejo*, 129 S Ct at 2090-2091, the United States Supreme Court held that once the Sixth Amendment right to counsel (and the right to effective counsel) attached, a defendant could not validly waive that right to counsel in police initiated custodial interrogation. *Jackson*, 475 US at 636. The holding in *Jackson* was expressly overruled in *Montejo*. *Montejo*, 129 S Ct at 2090. The United States Supreme Court held that the right to counsel may be validly waived in custodial interrogation after the Sixth Amendment right to counsel has attached, even if the interrogation was police initiated. *Montejo*, 129 S Ct at 2090.

A defendant’s constitutional right to counsel may be waived if waiver is voluntary, knowing, and intelligent. *People v McElhaney*, 215 Mich App 269, 274; 545 NW2d 18 (1996). The existence of a knowing and intelligent waiver of the Sixth Amendment right to counsel depends on the particular circumstances of a case, including the background, experience, and conduct of the defendant. *Id.* *Miranda* warnings are sufficient to ensure that a defendant’s waiver of his right to counsel during post-indictment questioning is voluntary, knowing, and intelligent. *Montejo*, 129 S Ct at 2085. An officer is not required to inform the defendant of the gravity of his position and the urgency of his need for a lawyer. *McElhaney*, 215 Mich App at 276.

In this case, defendant has failed to demonstrate that he did not validly waive his right to counsel. Defendant argued to the trial court in his motion to suppress that his incriminating statements to Dwyre were coerced and that he was not read his rights and did not understand them. After a two day *Walker*¹ hearing, the trial court found that defendant’s statements to Dwyre were voluntary and not subject to suppression. Evidence at the hearings indicated that Dwyre gave defendant a paper with his *Miranda*² rights written on it and had defendant read his rights aloud. Defendant admitted to signing a form indicating that he understood his rights and was waiving them, but he still claimed that he did not understand those rights. The record does not support defendant’s position that his waiver of counsel was invalid. We conclude that the trial court did not clearly err in finding that defendant validly waived his right to counsel.

¹ *People v Walker*, 374 Mich 331; 132 NW2d 87 (1965).

² *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

Therefore, defendant may not now claim ineffective assistance.

Defendant's second issue on appeal is that the prosecutor engaged in misconduct by improperly asking the jurors to base their decision on their civic duty, rather than the facts of the case. Because defendant did not preserve this issue in the trial court, this Court reviews it for plain error. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). A defendant must establish that the error was plain, and that the error affected the outcome of the proceedings. *Id.* Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when the error seriously affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence. *Id.*

Prosecutorial misconduct issues are decided on a case-by-case basis, and the reviewing court must examine the record and evaluate a prosecutor's remarks in context. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Brown*, 279 Mich App 116, 135-136; 755 NW2d 664 (2008). A prosecutor may not appeal to the jury's civic duty by injecting issues broader than guilt or innocence or encouraging jurors to suspend their powers of judgment. *Thomas*, 260 Mich App at 455-456. However, a prosecutor has great latitude to argue the evidence and all inferences relating to his theory of the case. *Id.* at 456.

Defendant contends that the following statement by the prosecutor amounted to an improper appeal to the jury's civic duty:

Now, defense counsel will come up and he will argue his facts. I will have an opportunity to come and talk to you for a brief moment after defense counsel makes his statement, but it is no longer a secret. We all know what happened and it's not just Savanna's words. It's in the defendant's own words, the words that he'd like to take back now, but nonetheless, his own words.

When you're done deliberating with this case, once the verdict is handed down by the jury, you're going to go home, and it's only at that time, and the Court will tell you it's only at that time, that you might be permitted to talk to other people about what happened here, and what are you going to tell them. What are you going to tell them?

Well, we had a case, a confession case where the father confessed to sexually molesting his child. Now, is that the kind of case that you feel comfortable in entering a guilty verdict? Yes, but could you, under those facts and circumstances, find the defendant not guilty? Well, that's what you'll decide and that's what you'll be able to talk about later.

So on behalf of the victim, on behalf of the Genesee County prosecutor's office, on behalf of the Davison Township Police Department, I ask you to find the defendant guilty

Although the prosecutor was referring to how the jurors would feel explaining their decision to the community, the prosecutor was not improperly referring to the jurors' civic duty. Instead, the prosecutor explicitly referred to explaining the jurors' decision based on the facts of the case—that defendant confessed to the crime—not their civic duty. Therefore, we conclude that there was nothing improper in the prosecutor's comments. Furthermore, because the prosecutor was not making an improper civic duty argument but was, instead, making an argument on the basis of the evidence in the case, an objection by defense counsel to the prosecutor's statements would have been futile. Counsel is not ineffective for failing to assert a futile objection. *People v Unger*, 278 Mich App 210, 256; 749 NW2d 272 (2008). Defendant has not established that he was denied the effective assistance of counsel at trial.

Affirmed.

/s/ Christopher M. Murray
/s/ Pat M. Donofrio
/s/ Elizabeth L. Gleicher