

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EDDIE RICHARD WILLIS,

Defendant-Appellant.

UNPUBLISHED
October 22, 1996

No. 179736
LC No. 93-7380-FC

Before: Corrigan, P.J., and Taylor and D. A. Johnston,* JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction on three counts of second-degree murder, MCL 750.317; MSA 28.549, and one count of possessing a firearm while committing a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to parolable life imprisonment for each of the murder counts and two years for the felony-firearm count. We affirm.

Late in the evening of January 29, 1993, defendant was drinking with three companions at a residence. Following an argument with one of his companions, defendant shot that person three times, killing her. Defendant quickly shot each of the other two eyewitnesses once through the head, killing them. Defendant later confessed to the shootings and testified at trial that he had been drinking throughout that day, and that he was intoxicated at the time of the shootings and lost control.

On appeal, defendant first contends that the trial court erred by admitting his confession, claiming that his waiver of *Miranda*¹ rights and subsequent confession were improperly compelled by police trickery, and were thus involuntary. During questioning, one of the interviewing officers faked a test for detecting gun powder residue on defendant's hands and then falsely told defendant that the "results" revealed that he had recently fired a handgun. Thinking he was caught, defendant waived his *Miranda* rights and confessed to the shootings.

*Circuit judge, sitting on the Court of Appeals by assignment.

Given the totality of these circumstances surrounding the making of the statement, we cannot say that trial court clearly erred in finding defendant's confession was voluntary. *People v Cipriano*, 431 Mich 315, 334, 339; 429 NW2d 781 (1988). We have reviewed defendant's statement and the uncontradicted testimony of the officer who interviewed defendant, and independently determine that defendant's statement was voluntary. *People Young*, 212 Mich App 630, 643; 538 NW2d 456 (1995). First, defendant is a competent adult. Although he has had little formal education, he does not claim to have trouble with the English language nor to have misunderstood the *Miranda* warnings. Second, although defendant claims that he was intoxicated at the time he made his waiver and statement, defendant presented no evidence to support this assertion. Third, uncontradicted testimony shows that defendant was not abused, was not subject to prolonged questioning, and was not in need of food, drink, sleep or medical attention while in police custody.

With regard to the ruse carried out by the police, we cannot say that the misrepresentation to defendant that there was gun powder residue on his hands rendered an otherwise voluntary statement involuntary. *Frazier v Cupp*, 394 US 731; 89 S Ct 1420; 22 L Ed 2d 684 (1969); *People v Hicks*, 185 Mich App 107, 113; 460 NW2d 569 (1990). In *Hicks*, the police falsely informed a suspected murderer that his fingerprints had been found on a sawed-off shotgun. In an attempt to explain the presence of his prints, the suspect stated that he had recently sold such a shotgun. *Id.* at 112. This Court upheld the voluntariness of that statement, noting that the defendant had been given *Miranda* warnings and that the actual admission concerned an unrelated crime. *Id.* at 113. We cannot say that the waiver and confession in the instant case were compelled by the ruse employed by the interviewing officer. On the contrary, defendant confessed to the shootings only after he believed he was caught. The findings of the trial court were not clearly erroneous, and defendant's confession was properly admitted.

Defendant next contends that he was denied a fair trial, claiming that the prosecutor misstated evidence by referring to the faked gun powder residue test during both cross-examination of defendant and in closing argument. Appellate review of improper prosecutorial remarks is generally precluded absent an objection because it deprives the trial court of an opportunity to cure the error. *People v Ullah*, 216 Mich App 669, 679; 550 NW2d 568 (1996). An appellate court will still reverse if a curative instruction could not have eliminated the prejudicial effect of the remarks or where failure to review the issue would result in a miscarriage of justice. Because a curative instruction would have eliminated any prejudicial effect, defendant is not entitled to any relief. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). In any event, we find no error, let alone a miscarriage of justice, *id.*, as the prosecutor never referred to the faked gun powder test as having been genuine, but only to show the effect on defendant of being told the purported results.

Defendant next contends that he was denied the effective assistance of counsel at trial. In order to establish that counsel was ineffective, defendant must show that, but for counsel's error, there is a reasonable probability that the result of the proceeding would have been different *and* that the result of the proceeding was fundamentally unfair or unreliable. *People v Poole*, ___ Mich App ___ (Docket No. 169867, issued 9/17/96) slip op at 7. Defendant argues that his counsel erred by failing to object below to the errors defendant has claimed in this appeal. Given our conclusions set forth above that

there were no such errors, we find defendant's claim to be without merit. Defendant relies on *People v Davis*, 102 Mich App 403; 301 NW2d 871 (1980), for the proposition that his counsel's failure to argue that intoxication precluded an effective waiver of rights constituted ineffective assistance. Defendant's reliance on *Davis* is misplaced. In *Davis*, there was ample independent evidence that the defendant was intoxicated when he was arrested and confessed. Here, defendant relies solely on his own bald assertion. We further note that nothing in the record reveals that defendant's counsel acted improperly at any stage of the proceedings below. Defendant was not denied the effective assistance of counsel.

Finally, defendant contends that his parolable life sentences violate proportionality. The trial court did not abuse its discretion in sentencing defendant to life in prison for each of the three murders. The sentences imposed by the trial court were within the guidelines, which recommended a sentence of twelve to twenty-five years, or life imprisonment, and are therefore presumptively proportionate. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987). Defendant argues that his lack of prior offenses, age, alcoholism and lack of education all militate for a lesser sentence; however, we note that in fashioning the sentences the trial court took explicit note of these factors as well as defendant's employment status and general health. We find that the sentences were proportionate because defendant gunned down three drinking companions without provocation. He shot his first victim at least twice, and murdered the other two with a bullet to the head of each, ostensibly to eliminate eyewitnesses to the first murder. The sentences imposed reflected the seriousness of the matter. *People v Houston*, 448 Mich 312, 320; 532 NW2d 508 (1995).

Affirmed.

/s/ Maura D. Corrigan
/s/ Clifford W. Taylor
/s/ Donald A. Johnston

¹ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).