

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FRED C. PROCTOR,

Defendant-Appellant.

UNPUBLISHED

October 7, 1997

No. 188435

Oakland Circuit Court

LC No. 95-137359-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HARRY C. CAMP,

Defendant-Appellant.

No. 188436

Oakland Circuit Court

LC No. 95-137360-FC

Before: Corrigan, C.J., and Markey and Markman, JJ.

PER CURIAM.

Defendant Proctor appeals as of right from his jury trial convictions of first-degree felony murder, MCL 750.316; MSA 28.548, armed robbery, MCL 750.529; MSA 28.797, and two counts of possessing a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The court sentenced defendant on his convictions for armed robbery and felony-firearm, but it vacated these sentences¹ and imposed a term of imprisonment for defendant's natural life regarding the first-degree felony-murder conviction and a consecutive term of two years' imprisonment for defendant's felony-firearm conviction. The court also ordered defendant to pay a total of \$400,000 in restitution to the victim's family, representing \$100,000 for each of the victim's three children and the victim's wife.

Defendant Camp appeals as of right from his jury trial convictions of armed robbery, MCL 750.529; MSA 28.797, and first-degree felony-murder, MCL 750.316; MSA 28.548. The court vacated defendant Camp's original sentence of imprisonment for defendant's natural life on the armed robbery conviction and instead sentenced Camp to a term of natural life for the first-degree felony-murder conviction. The court also ordered defendant Camp, although indigent, to pay restitution of \$400,000 in the event that Camp earns money while working in prison or for the future sale of any articles or books regarding this murder. We affirm.

I.

Defendant Proctor argues that the trial court abused its discretion by failing to determine his earning ability, financial resources and other economic circumstances before ordering him to pay restitution to the victim's family and by failing to hold a hearing on this issue after defendant objected. We disagree.

A trial court's restitution award constitutes a sentencing matter that will not be reversed on appeal absent an abuse of discretion. *People v White*, 212 Mich App 298, 317; 536 NW2d 876 (1995).

Under §§ 16 and 17 of the Crime Victim's Rights Act, the court is not required to hold an evidentiary hearing but it is required to consider the following factors before ordering restitution:

In determining the amount of restitution, the court shall consider the defendant's earning ability, financial resources, and any other special circumstances that may have a bearing on the defendant's ability to pay. [§ 16, MCL 780.766(13); MSA 28.1287(766)(13).]

* * *

The court, in determining whether to order restitution under [MCL 780.766; MSA 28.1287(766)] and the amount of that restitution, shall consider the amount of the loss sustained by any victim as a result of the offense, the financial resources and earning ability of the defendant, the financial needs of the defendant and the defendant's dependents, and such other factors as the court considers appropriate. [MCL 780.767(1); MSA 28.1287(767)(1).]

Our Supreme Court in *People v Grant*, 455 Mich 221, 224-225 n 4,²; 565 NW2d 389 (1997), recently affirmed that the Crime Victim's Rights Act "does not expressly state that a sentencing judge is required to hold a separate hearing or make express findings regarding a defendant's ability to pay restitution at imposition *absent a timely assertion by the defendant that he is unable to pay or disputes the amount of restitution.*" (Emphasis added.) Although neither § 16 nor § 17 mandates a separate hearing, the defendant's timely challenge to the "amount or type of restitution" requires the court to resolve the dispute "by a preponderance of the evidence." MCL 780.767(4); MSA 28.1287(767)(4); *Grant*, *supra* at 235.

In the case at bar, defendant challenged the court's restitution award by arguing that it needed to initially make a finding that defendant Proctor had the ability to pay the restitution, particularly given that defendant, as an indigent, received appointed counsel. Counsel also asked the court to explain the basis for ordering restitution; "I don't know how the Court came to the figures of I believe it's \$400,000 relative to restitution without any kind of a hearing." The court responded as follows:

He is in—well just for the record, he is in business, that's number one. He does have some vehicles, number two. He did purchase a new house, number three. I do not have any indication as to the value of those assets or as to the totality of the ownership or the value of the business.

Our review of defendant Proctor's presentence investigation report establishes that the trial court obtained this information from the report. "A judge is entitled to rely on the information in the presentence report, which is presumed to be accurate unless the defendant effectively challenges the accuracy of the factual information." *Grant, supra* at 233-234. (Citations omitted.) Before sentencing, both defendant and defense counsel informed the court that the report was factually accurate, except for defendant's contention that the investigator's version of the facts relative to the crime on page 6 was incorrect. Because defendant challenged neither the amount nor type of restitution, he was not entitled to a hearing under MCL 780.767(4); MSA 28.1287(767)(4).³

Even though the court was not required to hold an evidentiary hearing, we believe that the court properly considered defendant's ability to pay under §§ 16(13) and 17(1). *People v Law*, 223 Mich App 585, 590-591; ___ NW2d ___ (1997), citing *People v Hart*, 211 Mich App 703, 707; 536 NW2d 605 (1995). Specifically, the court relied on information regarding defendant Proctor's business and personal assets⁴ and defendant's minimal child support obligations for the five children he has sired. The court also noted that it was impossible to measure the value of the victim who died in a senseless act of random violence. We believe that these statements on the record satisfied the enumerated factors in §§ 16(13) and 17(1).

II.

Defendant Proctor also argues that the trial court abused its discretion in permitting a jury to view his tattoos, including a swastika, because the swastika tattoo was substantially more prejudicial than probative, and the prosecution's witness testified that the man he saw driving the U-Haul truck used by the murder suspects did not have the same tattoos on his arm as defendant. We disagree. The decision whether to admit evidence is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *People v McAlister*, 203 Mich App 495, 505; 513 NW2d 431 (1994). Similarly, we will not reverse a trial court's assessment of the probative value and prejudicial effect of evidence absent an abuse of discretion. *Gillam v Lloyd*, 172 Mich App 563, 586; 432 NW2d 356 (1989).

Here, the identity of the person driving the U-Haul truck was a material fact at trial because the U-Haul truck was seen very near the victim's Acura Legend, and the witness saw the driver's tattoos because the driver was not wearing a jacket despite the winter weather. Also, the driver asked the witness for directions to defendant Proctor's new address. Although the witness was unable to match

defendant Proctor's tattoos with the tattoos he saw on the U-Haul driver, it was extremely relevant for the witness to determine whether defendant Proctor bore the tattoos he saw on the driver's arm in order to assist the trier of fact in determining the driver's identity. See *People v Kozlow*, 38 Mich App 517, 524-525; 196 NW2d 792 (1972).

Moreover, the probative value of the tattoo evidence was not substantially outweighed by its potential prejudicial effect. See, generally, *People v Mills*, 450 Mich 61, 74-76; 537 NW2d 909, modified and remanded 450 Mich 1212 (1995). While two of defendant Proctor's tattoos were neutral (i.e., the panther and the motorcycle), the swastika denoted racial hatred and genocide. Its potential prejudicial impact cannot be denied. The instant offense does not involve race, gender, or discrimination issues, however. Defendant Proctor was also given the opportunity to cover the offending tattoo. Thus, an unprejudiced person, considering the facts upon which the trial court acted, would not say that the trial court's ruling was unjustified. We find no abuse of discretion.

III.

Defendant Camp argues that the trial court erred in denying his motion to suppress his custodial statement to the police because the record does not support the conclusion that defendant reinitiated discussions with the police after exercising his constitutional right to counsel. We disagree.

We independently review whether a defendant's confession was voluntary except that, to the extent that a resolution of disputed factual questions depends upon witness credibility or the weight of the evidence, we ordinarily defer to the trial court's superior ability to evaluate credibility and weigh evidence. *People v Young*, 212 Mich App 630, 634; 538 NW2d 456 (1995), remanded on other grounds 453 Mich 973 (1996). We will not reverse these findings unless they are clearly erroneous, i.e., when this Court is left with a definite and firm conviction that a mistake has been made. *People v Haywood*, 209 Mich App 217, 225-226; 530 NW2d 497 (1995); *Gillam, supra*.

Our review of the record reveals the trial court did not clearly err in finding that defendant reopened communication with the police after initially exercising his right to counsel. Defendant Camp, Officer Thibodeau, and Detective Lingenfelter testified at the *Walker*⁵ hearing. The officer testified that after reading defendant his *Miranda*⁶ rights, defendant indicated that he wanted an attorney. The officer ceased talking to defendant, but several minutes later, defendant asked Thibodeau where defendant Proctor was. Officer Thibodeau responded that if defendant was not going to talk to him, then he was not going to talk to defendant. After another few minutes, defendant asked Thibodeau what questions he had for defendant. Officer Thibodeau reiterated the *Miranda* warning, and defendant said that he understood his rights and would talk. Defendant then admitted that he pawned the victim's gold ring at a pawn shop on Telegraph and Five Mile Road. Defendant also said that he was in the wrong place at the wrong time. The conversation then ended. Detective Lingenfelter also testified that he read the *Miranda* warnings to defendant again before talking to him, that defendant stated he knew his rights, and that he would talk with Lingenfelter without an attorney. After he waived his *Miranda* rights at the police station, defendant gave the police a lengthy statement.

According to defendant Camp, officer Thibodeau questioned him about the ring before reading him his *Miranda* rights. It was after defendant asked for a lawyer that the officer again asked him about

the ring that defendant admitted pawning it. Only then did defendant Camp ask about defendant Proctor's whereabouts. Defendant claims he asked for an attorney as soon as he arrived at the police station, but he was told that an attorney was unavailable. Defendant also testified that he gave the police a statement because they said they would release him after he did so.

The trial court ruled that defendant reopened communications with the police after he initially exercised his right to counsel. We agree. Defendant's inquiry regarding what officer Thibodeau was planning to ask him could reasonably be construed as relating to the circumstances of the investigation, particularly in light of defendant's desire to know where defendant Proctor was located. Thus, defendant initiated further communication with the police after invoking his right to counsel, he was given his *Miranda* warnings again, and we find no circumstances characteristic of an attempt to erode defendant Camp's exercise of his *Miranda* rights. *People v Paintman*, 412 Mich 518, 525; 315 NW2d 418 (1982); *People v Slocum (On Remand)*, 219 Mich App 695, 700-701; 558 NW2d 4 (1996). The *Walker* hearing became a credibility contest, and this Court defers to the trial court's resolution of that issue.

IV.

Defendant Camp further argues that the trial court abused its discretion in denying his motion for a mistrial after police witnesses testified that they found a briefcase in the U-Haul containing numerous car titles and that the gun seized from defendant Proctor's new house was stolen, as this evidence permitted the jury to infer that defendant was engaged in other, uncharged criminal activity. We find no abuse of discretion. *People v Cunningham*, 215 Mich App 652, 654; 546 NW2d 715 (1996).

The court should grant a mistrial only for an irregularity at trial that is prejudicial to the defendant's rights and impairs his ability to receive a fair trial. *Id.* Evidence of another crime is admissible if it is relevant to an issue other than character or propensity, it is relevant to an issue or fact of consequence at trial, and its probative value is not substantially outweighed by the danger of unfair prejudice. MRE 404(b); *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993). A police officer's volunteered and unresponsive answer to a proper question that offers inadmissible evidence tying a defendant to other crimes can be highly prejudicial. *People v Holly*, 129 Mich App 405, 414-416; 341 NW2d 823 (1983). We will not automatically reverse the conviction, however, if there exists overwhelming evidence of the defendant's guilt, thereby making the error harmless. *Id.* at 416.

Here, the court noted that defendant Camp did not object to the original testimony from the police officer regarding the titles he found in the briefcase taken from the U-Haul. Defendant only objected when the court asked the officer a question that the jury submitted, and the witness again mentioned the titles. Notably, the testimony at trial indicated that the briefcase belonged to defendant Proctor, not defendant Camp, and that Proctor ran an auto towing and repair business. Thus, the jury could reasonably infer that the titles in Proctor's briefcase stemmed from his business dealings, not that the titles were from stolen vehicles. Defendant Camp's counsel failed, however, to argue this scenario to the jury or to request a cautionary instruction as the trial court suggested.

Also, Lieutenant Harris' testimony that the gun used to kill the victim was not registered and had been reported stolen was volunteered information. We find, however, that there was no evidence either establishing that the gun was stolen or linking defendant Camp to the gun. Although this brief testimony may have been prejudicial, we find that it did not impair defendant's ability to receive a fair trial in light of the overwhelming evidence against defendant Camp. *Cunningham, supra; Holly, supra*. Accordingly, we find no abuse of discretion.

Affirmed.

/s/ Maura D. Corrigan

/s/ Jane E. Markey

/s/ Stephen J. Markman

¹ Defendant Proctor was originally sentenced to a term of natural life for the armed robbery conviction and to two years' imprisonment for the felony-firearm conviction, but the court vacated those sentences on double jeopardy grounds at the prosecutor's request. The court followed the same procedure with defendant Camp.

² The Supreme Court reversed this Court's decision remanding the case to the trial court for an evidentiary hearing on the issue of restitution where the defendant had entered a plea agreement including restitution as a condition of the plea. *People v Grant*, 210 Mich App 467; 534 NW2d 149 (1995).

³ Notably, the *Grant* Court also recognized that in keeping with the requirement of Const 1963, art 1, § 24, that all crime victims shall have the "right to restitution," the Legislature has recently amended §§ 16 and 17, effective June 1, 1997, to delete all previous references to a defendant's ability to pay restitution. *Id.* at 239-240 n 24. The federal restitution statute, 18 USC § 3664(f)(1)(a), has also been amended to read: "the court shall order restitution to each victim in the full amount of each victim's losses as determined by the court *and without consideration of the economic circumstances of the defendant*." *Id.* (Emphasis added.) According to our Supreme Court in *Grant*, "[w]hile this revised statute was not in effect at the time of the instant defendant's order of restitution, the Legislature has indicated its intent to carry out the mandate of art 1, § 24 by authorizing that restitution be imposed at the time of sentencing without regard to the defendants' ability to pay." *Id.* We do not apply the amended statute to the case at bar, but we are cognizant of the Legislature's desire to focus on ensuring restitution to crime victims, not on the defendant's ability to pay. Thus, we presume that under the new statute, evidentiary hearings such as the one defendant seeks will not be granted.

⁴ Whether these assets were transferred to defendant's wife as a means of eluding the restitution order or whether they were never defendant's assets can be determined during the course of any collection action when the victim's family attempts to enforce the restitution order.

⁵ *People v Walker*, 374 Mich 331; 132 NW2d 87 (1965).

⁶ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

