STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL TODD SUPPES,

Defendant-Appellant.

UNPUBLISHED
June 23, 1998

No. 185352
Saginaw Circuit Court
LC No. 94-009523-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEVEN LAWRENCE WATSON,

Defendant-Appellant.

No. 185355
Saginaw Circuit Court
LC No. 94-009524-FC

Before: Hood, P.J., and Markman and Talbot, JJ.

PER CURIAM.

Defendants were tried in a joint trial before a single jury. Both defendants were convicted by a jury of assault with intent to do great bodily harm, MCL 750.84; MSA 28.279; obstruction of justice, MCL 750.505; MSA 28.773; and, possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant Watson was also convicted of inducing a minor to commit a felony, MCL 750.157c, MSA 28.354(3). Defendant Suppes was sentenced to concurrent prison terms of 80 to 120 months for the assault with intent to do great bodily harm conviction, 40 to 60 months for the obstruction of justice conviction, and a consecutive 2-year term for the felony-firearm conviction. Defendant Watson was sentenced to concurrent prison terms of 80 to 120 months each for the assault with intent to do great bodily harm conviction and the solicitation of a minor conviction, 40 to

60 months for the obstruction of justice conviction, and a consecutive 2-year term for the felony-firearm conviction. Defendants Suppes and Watson each appeal as of right. Their appeals have been consolidated. We affirm.

Testimony at trial indicated that defendants were drinking with a group of people on the day of July 12, 1994. Defendants discussed their dislike for the victim, a police informant who had informed on them regarding a cocaine sale. The information provided by the victim had led to criminal charges, which were pending at the time of the incident. A sixteen-year-old youth who was drinking with defendants accepted an offer of money to murder the informant. The group then left the party in Suppes' car, drove to Watson's father's house, picked up a revolver and some bullets, and drove to the victim's house. The youth knocked on the door and when the victim answered, the youth fired three shots at him. One of the shots struck the informant in the face. The group drove away in Suppes' car and Watson tossed the revolver into a river.

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Defendant Suppes first argues that his convictions must be reversed due to the admission of evidence that a witness feared for his safety as a result of testifying. We disagree. To preserve an evidentiary issue for appellate review, a party must make a timely objection at trial specifying the same ground as is asserted on appeal. MRE 103(a)(1); *People v Considine*, 196 Mich App 160, 162; 492 NW2d 465 (1992). In this case, defendant Suppes failed to preserve this allegation of error by objecting to the testimony at trial. Absent a proper objection, this Court may take notice of plain errors affecting substantial rights. MRE 103(d). We are not persuaded that the error now alleged on appeal was a plain error affecting substantial rights. Accordingly, we decline to review this issue.

Defendant Suppes next contends that the prosecutor's improper argument with respect to this evidence denied them a fair and impartial trial. We disagree. Appellate review of improper prosecutorial remarks is generally precluded absent objection by counsel because the trial court is otherwise deprived of an opportunity to cure the error. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). An exception exists if a curative instruction could not have eliminated the prejudicial effect or where failure to consider the issue would result in a miscarriage of justice. *Id.* Here, defendant Suppes failed to object to the prosecutor's remarks at trial. We are persuaded that a curative instruction could have eliminated any unfair prejudice and that our failure to consider the issue would not result in a miscarriage of justice. Accordingly, we decline to review this issue.

Next, defendant Suppes argues that he was denied a fair trial when the prosecutor argued that his prior inconsistent statements to the police could be used as substantive evidence of his guilt. We disagree. Again, this issue is not preserved for appeal because defendant Suppes failed to object to the prosecutor's remarks at trial. *Stanaway*, *supra* at 687. The prior inconsistent statement at issue was made by defendant Suppes and offered into evidence by the prosecution. As a statement by a party opponent it was non-hearsay admissible as substantive evidence of defendant Suppes' guilt. MRE 801(d)(2)(A); see also *People v Hodges*, 179 Mich App 629, 632-633; 446 NW2d 325 (1989). Accordingly, manifest injustice will not result from our decision not to review this issue. *Stanaway*, *supra* at 687.

Defendant Suppes also argues that the unfair prejudicial effect of the prosecutor's "misconduct" was compounded by the trial court's instructions to the jury on the law regarding its use of his statements and the prior inconsistent statements of witnesses. We disagree. Defendant Suppes suggests that the trial court's instructions could have misled the jury into believing that it could use his prior inconsistent statements as substantive evidence of his guilt. Because defendant Suppes failed to preserve this issue with an objection at trial, our review is limited to the issue whether relief is necessary to avoid manifest injustice. *People v Haywood*, 209 Mich App 217, 230; 530 NW2d 497 (1995). As noted above, defendant Suppes' prior statements could be considered as substantive evidence of his guilt. Accordingly, manifest injustice will not result from our decision not to review this issue.

Defendant Suppes next argues that the trial court reversibly erred in admitting into evidence his statements to the police made in the absence *Miranda*[1] warnings. We disagree. *Miranda* warnings are not required unless the accused is subject to a custodial interrogation. *People v Anderson*, 209 Mich App 527, 532; 531 NW2d 780 (1995). A custodial interrogation is a questioning initiated by law enforcement officers after the accused has been taken into custody or otherwise deprived of his freedom of action in any significant way. *People v Hill*, 429 Mich 382, 387; 415 NW2d 193 (1987), quoting *Miranda*, *supra* at 444. To determine whether a defendant was in custody at the time of the interrogation, we look at the totality of the circumstances, with the key question being whether the defendant reasonably believed that he was not free to leave. *People v Mendez*, 225 Mich App 381, 382-383; 571 NW2d 528 (1997).

Whether a defendant was in custody is a mixed question of law and fact that must be answered independently by the reviewing court after de novo review. *Id.* at 382. However, the circumstances surrounding the interrogation itself are distinctly factual and a reviewing court will defer to the trial court's finding of historical fact absent clear error. *Id.* A finding of historical fact is clearly erroneous if, after a review of the entire record, an appellate court is left with a definite and firm conviction that a mistake has been made. *Id*. In this case, a police officer and other witnesses testified that defendant Suppes went to the police station voluntarily. There was also evidence that his statements were made spontaneously and not in response to any questions. The trial court ruled that defendant Suppes was not subject to a custodial interrogation. This ruling was based on its finding that when defendant Suppes was at the police station he was free to stay or leave at his choosing. On review of the record, we conclude that the trial court's finding that defendant Suppes was free to leave was not clearly erroneous. Therefore, the trial court did not err in its conclusion that he was not in custody. *Mendez*, *supra* at 382. Accordingly, no *Miranda* warnings were required. *Anderson*, *supra* at 532.

Next, defendant Suppes contends that the trial court erred in denying his motion for a mistrial which was based on the prosecution's alleged improper argument regarding the penal consequences of a conviction on a lesser included offense. We disagree. The grant or denial of a motion for mistrial rests within the sound discretion of the trial court. An abuse of that discretion will be found only where the trial court's denial of the motion has deprived the defendant of a fair and impartial trial. *People v Wolverton*, 227 Mich App 72, 75; ___ NW2d ___ (1997). The record reveals that the intention and meaning of the prosecutor's allegedly improper remark was ambiguous. Viewed in context, the record supports an interpretation that the prosecutor was referring to the fact that the touching element of

assault and battery may be satisfied by a "mere touching" without causing harm, i.e., "minor consequences." We believe that the trial court was in the best position to interpret the prosecutor's remark and weigh its effect on the jury. On this record, we conclude that the trial court did not abuse its discretion.

Finally, defendant Suppes argues that his 80 to 120 month sentence for assault with intent to do great bodily harm was disproportionately severe. We disagree. Sentencing decisions are subject to review by this Court on an abuse of discretion standard. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990). A sentence constitutes an abuse of the trial court's discretion if it violates the principle of proportionality. The principle of proportionality requires sentences to be "proportionate to the seriousness of the circumstances surrounding the offense and the offender." *Id.* at 636.

In this case, defendant Suppes' minimum sentence exceeded the minimum sentence range indicated by the sentencing guidelines. Where the guidelines' calculation differs from the trial court's intended sentence, the judge is alerted that the sentence falls outside a normative range and should be evaluated to assure that it is not unfairly disparate, has a rational basis, and is not disproportionate. *People v Mitchell*, 454 Mich 145, 177; 560 NW2d 600 (1997). The sentencing guidelines do not convey substantive rights, but are merely a tool to assist the trial court in its exercise of discretion. *People v Potts*, 436 Mich 295, 303; 461 NW2d 647 (1990). The trial court may exceed the guidelines when to do so would not violate the principle of proportionality. *Milbourn*, *supra* at 659-660. On some occasions, the offender's conduct will be so extraordinary in degree that it is beyond the anticipated range of behavior treated in the guidelines. *Id.* at 660 n 27; see also *People v Merriweather*, 447 Mich 799, 805-808; 527 NW2d 460 (1994). In imposing sentence, the trial court noted that this was "the most aggravated assault with intent to do great bodily harm case" that it had ever seen. For the same reasons as were noted on the record by the trial court, we hold that defendant Suppes' sentence did not violate the principle of proportionality.

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Defendant Watson's arguments on appeal are nearly identical to those raised by defendant Suppes. Like defendant Suppes, defendant Watson first argues that his conviction must be reversed due to the admission of evidence that a witness feared for his safety as a result of testifying. Defendant Watson failed to preserve this allegation of error by objecting to the testimony on the same ground as he now asserts on appeal. MRE 103(a)(1); *Considine*, *supra* at 162. At trial, he objected on the ground that the prosecutor's questions to the witness were outside the scope of redirect. We are persuaded that the error now alleged on appeal was not a plain error affecting substantial rights. MRE 103(d)(1). Accordingly, we decline to review this issue.

Similarly, defendant Watson's argument regarding the prosecutor's alleged improper remarks with respect to this evidence was not preserved by an objection at trial. *Stanaway*, *supra* at 687. Because we are persuaded that a curative instruction could have eliminated any unfair prejudice and that our failure to consider the issue would not result in a miscarriage of justice, we decline to review this issue.

Next, defendant Watson argues that he was denied a fair trial when the prosecutor argued that his prior inconsistent statements to the police could be used as substantive evidence of his guilt. The prior inconsistent statements referred to by defendant Watson were non-hearsay statements by a party opponent offered by the prosecution. As such, they were substantive evidence of defendant Watson's guilt. MRE 801(d)(2)(A); see also *Hodges*, *supra* at 632-633. Moreover, although defendant Watson's prior inconsistent statement suggested an alibi, neither the prosecution nor the trial court informed the jury of an "original intention" on the part of defendant Watson to present an alibi witness or alibi defense. Cf. *People v Holland*, 179 Mich App 184, 191; 445 NW2d 206 (1989); *People v Shannon*, 88 Mich App 138, 140-145; 276 NW2d 546 (1979). Accordingly, manifest injustice will not result from our decision not to review this issue. For the same reason, defendant Watson's argument regarding the trial court's instructions to the jury on the law regarding its use of defendant Watson's statements and the prior inconsistent statements of witnesses is also without merit.

Defendant Watson next contends that the trial court reversibly erred in admitting into evidence his statements to the police made in the absence *Miranda* warnings, and after he had clearly expressed his desire to consult with counsel. We disagree.

At the mid-trial hearing on the admissibility of defendant Watson's statement, a police detective testified that he went to defendant Watson's house to talk with him about the incident. When the officer asked to speak to defendant Watson, he was told that defendant Watson was going to call an attorney on the telephone. When defendant Watson informed the detective that he could not get through to his attorney, the detective asked him to come to the police station. The detective then explained that he would request a warrant for defendant Watson's arrest at a later time if defendant Watson did not accompany him to the police station voluntarily. Defendant Watson elected to go with the detective to the station.

In a custodial interrogation, where the accused requests counsel, interrogation must cease when counsel is requested, and police officials may not reinitiate interrogation without counsel present, regardless of whether the accused has consulted with counsel. *Minnick v Mississippi*, 498 US 146; 111 S Ct 486; 112 L Ed 2d 489 (1990). Here, the trial court ruled that defendant Watson was not subject to a custodial interrogation. This ruling was based on its finding that when defendant Watson was at the police station he was free to stay or leave at his choosing. On review of the record, we conclude that the trial court's finding that defendant Watson was free to leave was not clearly erroneous. Therefore, the trial court did not err in its conclusion that he was not in custody. *Mendez*, *supra* at 382. Accordingly, defendant Watson's expression of desire to consult with counsel was of no moment, cf. *Minnick*, *supra*, and no *Miranda* warnings were required, *Anderson*, *supra* at 532.

Next, like defendant Suppes, defendant Watson contends that the trial court erred in denying his motion for a mistrial based on the prosecution's alleged improper argument regarding the penal consequences of a conviction on a lesser included offense. However, for the reasons noted above, we conclude that the trial court did not abuse its discretion in denying the motion.

Finally, defendant Watson argues that his 80 to 120 month sentence for assault with intent to do great bodily harm was disproportionately severe. We disagree. A sentence within the sentencing

guidelines can only be disproportionate if unusual circumstances exist. *Milbourn*, *supra* at 661. Such a sentence is presumptively proportionate. *People v Rivera*, 216 Mich App 648, 652; 550 NW2d 593 (1996). If a defendant believes that such unusual circumstances exist, the defendant must present those circumstances in open court to be considered by the sentencing judge before sentencing. If this is not done, the defendant may not raise the issue on appeal. *People v Sharp*, 192 Mich App 501, 505-506; 481 NW2d 773 (1992). At sentencing, defendant Watson presented no evidence of "unusual circumstances" rendering this sentence disproportionate. Accordingly, we will not consider this issue on appeal.

Affirmed

/s/ Harold Hood
/s/ Stephen J. Markman
/s/ Michael J. Talbot

[1] See *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694.