

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID EDWARD ESTEP,

Defendant-Appellant.

UNPUBLISHED

June 30, 1998

No. 202110

Genesee Circuit Court

LC No. 92-037290 FH

ON REMAND

ON REHEARING

Before: Kelly, P.J., and Reilly and Jansen, JJ.

PER CURIAM.

Defendant was charged with second-degree murder, MCL 750.317; MSA 28.549, and use of a firearm during the commission of a felony (felony-firearm), MCL 750.227(b); MSA 28.424(2). A jury convicted defendant of voluntary manslaughter, MCL 750.321; MSA 28.553, and felony-firearm. The trial court sentenced defendant as an habitual third-time offender, MCL 769.11; MSA 28.1083, to eighteen to thirty years' imprisonment, to be served consecutively to the mandatory two-year sentence for the felony-firearm conviction.

Defendant appealed his convictions as of right, contending, that the trial court erred in rejecting the plea agreement that he had entered into with the prosecutor. By the terms of the bargain, defendant agreed to plead guilty to the crime of careless use of a firearm resulting in death, MCL 752.861; MSA 28.436(21), a two-year misdemeanor. The trial court refused to accept defendant's guilty plea to that felony because the family of the victim expressed strong opposition to it. In an unpublished opinion, released June 11, 1996, we held that, in light of the revisions to MCR 6.301 and MCR 6.302, the adoption of the staff comments to MCR 6.301(B), and this Court's decision in *People v Grove*, 208 Mich App 574; 528 NW2d 796 (1995)¹, the trial court did not have discretion to reject defendant's guilty plea, primarily because defendant's sentencing was not part of the underlying plea agreement. *People v Estep*, unpublished opinion per curiam of the Court of Appeals, issued June 11, 1996 (Docket No. 167806). Therefore, we reversed defendant's convictions and remanded the case for acceptance of defendant's guilty plea, as consistent with the opinion.

The prosecutor applied for leave to appeal this panel's decision. In lieu of granting leave, the Supreme Court remanded this matter to the trial court to determine "whether the prosecutor in off-the-record discussions with defense counsel or defendant expressly conditioned any plea offer on the concurrence of the victim's family." *People v Estep*, 453 Mich 917; 554 NW2d 910 (1996). At the hearing on this matter, witnesses for the prosecution, including the Genesee County Prosecutor and the assistant prosecutor in charge of the case, testified that the plea agreement was conditioned on the acquiescence of the victim's family, a fact of which defendant's attorney had been apprised. However, the defense attorney could not recall whether the plea agreement had been conditioned on the family's approval. The trial court resolved this matter against defendant, finding that the plea disposition was actually conditioned on the family's approval.

By order dated February 28, 1997, the Supreme Court, in lieu of granting leave to appeal, vacated the judgment of the Court of Appeals and remanded the case to this Court for reconsideration in light of the findings of the circuit court.

On appeal after remand, defendant argues that the trial court abused its discretion by rejecting the plea agreement. In light of the Supreme Court's decision in *People v Grove*, 455 Mich 439; 566 NW2d 547 (1997), we must disagree. In *Grove*, the defendant had been charged with first-degree criminal sexual conduct,² a charge carrying a possible maximum sentence of life imprisonment,³ and second-degree criminal sexual conduct,⁴ which carries a maximum fifteen-year sentence.⁵ Defendant agreed to plead guilty to fourth-degree criminal sexual conduct,⁶ a misdemeanor carrying a maximum sentence of two years' imprisonment and a \$500 fine.⁷ In exchange, the prosecutor was to dismiss the other charges against defendant and recommend that he serve not more than one year in the county jail. *Id.* at 444-445. The trial court rejected the proposed plea agreement, because the victim, who was the defendant's fifteen-year-old daughter, recommended that defendant serve prison time, and the cap as recommended by the prosecutor would not allow for prison time. *Id.* at 446. Subsequently, a jury convicted the defendant of one count of second-degree criminal sexual conduct. *Id.* at 447. This Court reversed the defendant's conviction on the basis that "a trial court retains the option to reject a defendant's underlying guilty plea only when the plea agreement includes a specific sentence disposition," and the *Grove* defendant's plea agreement included only a prosecutorial sentence recommendation. *People v Grove*, 208 Mich App 574, 579; 528 NW2d 796 (1995). The Supreme Court reversed, stating, "[T]he decision whether to accept or reject a bargained plea, on the basis of whether acceptance of the proffered plea presents an undue interference with the judge's sentencing discretion, given the facts of the individual case, is a proper exercise of the trial court's discretion." 455 Mich at 460.⁸

In this case, on reconsideration we find that the trial court did not abuse its discretion by rejecting the plea agreement. Defendant was originally charged with second-degree murder, an offense that carries a potential sentence of life imprisonment. MCL 750.317; MSA 28.549. Motivated by the strong objections of the victim's family, the trial court rejected the proposed plea of careless use of a firearm resulting in death, which effectively would have constrained the trial court's sentencing discretion by reducing the maximum potential sentence to imprisonment for only two years. MCL 752.862; MSA 28.436(21). As in *Grove*, we find that the trial court's rejection of defendant's guilty plea "reflected

[its] understanding of the plea agreement, considering the facts and the interests of the victim, as a substantial hinderance of [its] ability to impose an appropriate sentence under the plea bargain where the offense to which the defendant agreed to plead guilty . . . is a two-year maximum misdemeanor, while the originally charged offense[] w[as] subject to a sentence of life or any term of years.” *Id.* at 463-464. After *Grove*, it is clear that the trial court has discretion to reject a plea where the sentencing potential differs substantially from that posed by the originally charged offense, even where the plea agreement contains no suggested sentence. Accordingly, we find that the trial court did not abuse its discretion by rejecting defendant’s plea based on the victim’s family’s desire for harsher sentencing.

Next, defendant argues that the trial court committed reversible error in failing to disqualify the jury panel after a police captain was excused after informing the panel he would be biased due to his professional contact with the defendant. We disagree.

Under MCR 6.414(A), the trial court must take appropriate steps to ensure that the jurors will not be exposed to information or influences that might affect their ability to render an impartial verdict on the evidence presented in court. Reversible error will not be presumed because a juror is exposed to prejudicial remarks made by a stranger or bystander; error only occurs where actual prejudice can be shown. *People v Dean*, 103 Mich App 1, 5; 302 NW2d 317 (1981). See also *People v Nick*, 360 Mich 219; 103 NW2d 435 (1960). In the absence of a showing of actual prejudice, it is within the court’s discretion in dealing with the problem to ask the jurors whether what they had heard would prejudice their view of the defendant’s guilt or innocence and to give a cautionary instruction to ignore any such comments. *Id.*, at 5. A trial court’s determination of a juror’s ability to render an impartial verdict will be reversed only where an appellate court finds a clear abuse of discretion. *People v Johnson*, 103 Mich App 825, 830; 303 NW2d 908 (1981).

In this case, defendant has failed to show that he was actually prejudiced by Captain Peek’s remarks. Moreover, defendant testified at trial that he had prior convictions for attempted uttering and publishing, attempted breaking and entering and attempted larceny from a building. In light of defendant’s admission that he had prior contacts with the criminal justice system, Captain Peek’s remarks are nothing more than harmless error. Therefore, the trial court did not abuse its discretion in refusing to dismiss the jury panel.

Defendant next argues that he was denied the effective assistance of counsel by his attorney’s failure to argue that a statement in a lab report was an admissible prior consistent statement. A claim of ineffective assistance of counsel is reviewed de novo. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). In *People v Pickens*, 446 Mich 298; 521 NW2d 797, reh den sub nom *People v Wallace*, 447 Mich 1202 (1994), Michigan adopted the federal standard articulated in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674, reh den 467 US 1267; 104 S Ct 3562; 82 L Ed 864 (1984), for determining whether a defendant was denied the effective assistance of counsel. Under this standard, a defendant is denied the effective assistance of counsel if (1) counsel’s performance fell below an objective standard of reasonableness and (2) that the representation prejudiced the defendant as to deprive him of a fair trial. *Id.*, at 302-303.

Defendant claims the statement, a police lab report describing the blood splattering at the crime scene, was consistent with his witness's testimony describing the position of the parties at the scene of the crime. At the time the statement was made, the witness was defendant's wife. The prosecution attacked the witness's credibility with a charge of recently fabricating her testimony when asked if she had spoken with others or to her husband prior to testifying. Defendant asserts this prior consistent statement should have been used to rehabilitate the witness's credibility. Use of such a statement requires that (1) the impeachment of the sworn testimony attacked the witness as having a motive for changing or falsifying her testimony so as to have been of recent contrivance or fabrication, and (2) the earlier consistent statement was given at a time prior to the existence of any fact which would motivate bias, interest, or corruption. *People v Edwards*, 139 Mich App 711, 716; 362 NW2d 775 (1984).

Defendant has failed to show the existence of any fact which would motivate bias, interest, or corruption arising after the witness gave the statement which was included in the report. The witness was married to defendant at the time the statement was made. Thus, the witness's statement in the lab report was not a prior consistent statement admissible to rebut a charge of recent fabrication. Therefore, defendant was not denied the effective assistance of counsel by defense counsel's failure to argue that a statement in a lab report was an admissible prior consistent statement.

Next, defendant argues that the sentencing judge abused his discretion by apparently rejecting defendant's challenge to the twenty-five point scoring of OV3 in the presentencing report, and correspondingly, imposing a disproportionately harsh sentence on defendant.

In *People v Mitchell*, 454 Mich 145, 176-177; 560 NW2d 600 (1997), the Supreme Court held that appellate review is not available for claims of error based on alleged misinterpretation or misapplication of the scoring guidelines. See *People v Raby*, 456 Mich 487; 572 NW2d 644 (1998). Further, the current sentencing guidelines used by the trial courts do not have the force of law. Therefore, a claim of a miscalculated variable is not in itself a claim of legal error. *Id.*, at 175. Application of the guidelines states a cognizable claim on appeal only where (1) a factual predicate is wholly unsupported, (2) a factual predicate is materially false, and (3) the sentence is disproportionate. *Id.*, at 175. Defendant's claims do not meet these requirements.

Regardless of how the sentencing judge interpreted the facts surrounding the conviction, we do not believe that defendant's sentence for the voluntary manslaughter conviction is disproportionate given the circumstances surrounding this matter. *People v Cutchall*, 200 Mich App 396, 409-10; 504 NW2d 666 (1993). Defendant has failed to overcome the presumption of proportionality; therefore, the trial court did not abuse its discretion in sentencing defendant. *People v Milbourn*, 435 Mich 630, 654; 461 NW2d 1 (1990).

The next issue is whether the defendant was denied a fair trial by the prosecutor's misconduct. After reviewing the record, we do not believe that defendant was denied a fair trial by the alleged instances of prosecutorial misconduct. The prosecutor's remarks did not rise to the level of impropriety which necessitates reversal. *People v Mack*, 190 Mich App 7, 19; 475 NW2d 830 (1991). See also *People v Marji*, 180 Mich App 525, 539; 447 NW2d 835 (1989).

As to defendant's claim of instructional error, while erroneous jury instructions which pertain to a basic and controlling issue in the case would result in a miscarriage of justice, there is no error if an imperfect jury instruction fairly presents to the jury the issues to be tried and sufficiently protects the rights of the defendant. *People v Federico*, 146 Mich App 776, 785; 381 NW2d 819 (1985). A review of the court's instruction in its entirety reveals that the court adequately informed the jury that it was to consider any prior inconsistent statements only for determining the witnesses' credibility. Thus, even if the court's instruction was imperfect, it fairly presented to the jury the law on the use of prior inconsistent statements for impeachment purposes.

Defendant next asserts that the trial court erred in overruling defendant's objection to the prosecutor's urging of the jury to use the impeachment evidence in a substantive fashion. The prosecutor argued in his closing argument that the witness, "even though he denies it, in terms of credibility" stated in his statement to the police that "they" (referring to defendant and his wife) handed the phone to the victim, indicating defendant was aware of the victim's presence in the home prior to any alleged assault on the defendant's wife. Defense counsel objected. In response, the court left it up to the jury to use its own judgment as to how the evidence should be used. These actions by the trial court were erroneous. *People v King*, 58 Mich App 390, 396-97; 228 NW2d 391 (1975). See also *People v Kelly*, 386 Mich 330, 337; 192 NW2d 494 (1971). However, in light of our conclusions above regarding the later given jury instruction, defendant was not prejudiced. This Court has held that where a trial court gives an erroneous instruction to the jury and later expressly repudiates the incorrect instruction and corrects the error in a timely manner, the defendant is not prejudiced. *People v Hardesty*, 139 Mich App 124, 132; 362 NW2d 787 (1984). Further, the prosecutor, in his closing remarks, prefaced his argument by indicating the statement should be examined "in terms of credibility." Therefore, the court's comments did not unduly influence the jury.

Finally, defendant claims the statements made by the prosecutor in his closing argument denied him a fair trial. Defendant objected to the statements when made, therefore, the issue is preserved. When reviewing a prosecutor's comments for impropriety, the Court must examine the pertinent portion of the record and evaluate the prosecutor's remarks in context. *People v Legrone*, 205 Mich App 77, 82; 517 NW2d 270 (1994). See *People v Saunders*, 189 Mich App 494, 496; 473 NW2d 755 (1991). As stated above, in light of his preface when introducing the witness's statement into his argument, the prosecutor's comments did not deprive defendant of a fair trial.

Affirmed.

/s/ Michael J. Kelly
/s/ Maureen Pulte Reilly
/s/ Kathleen Jansen

¹ This opinion was later reversed by the Michigan Supreme Court. See *People v Grove*, 455 Mich 439; 566 NW2d 547 (1992).

² MCL 750.520b(1)(a); MSA 28.788(2)(1)(a).

³ MCL 750.520b(2); MSA 28.788(2)(2).

⁴ MCL 750.520c(1)(a); MSA 28.788(3)(1)(a).

⁵ MCL 750.520c(2); MSA 28.788(3)(2).

⁶ MCL 750.520e; MSA 28.788(5).

⁷ MCL 750.520e(2); MSA 28.788(5)(2).

⁸ The Supreme Court found that MCR 6.302(C)(3)(a) specifically authorized the trial court to reject a plea agreement that included either a sentence agreement, or a sentence recommendation. *Id.* at 455-456. Additionally, the Supreme Court noted that, contrary to the defendant's argument, nothing in *People v Killebrew*, 416 Mich 189; 330 NW2d 834 (1982), "suggests a limitation on the trial court's option to reject a plea agreement in which the agreement did not provide for a specific sentence disposition." *Id.* at 456. Lastly, the Supreme Court stated that the "interests served by the nolle prosequi statute," MCL 767.29; MSA 28.969, which requires the trial court to grant leave before a nolle prosequi may be entered, "would be defeated" if the prosecutor and defendant could compel the trial court to accept an underlying plea "no matter how severe the departure from the original charge and its sentencing framework." *Id.* at 459-460.