

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CAREY JEAN GRAY,

Defendant-Appellant.

UNPUBLISHED

September 25, 1998

No. 193026

Recorder's Court

LC No. 95-003598

Before: White, P.J., and Hood and Gage, JJ.

PER CURIAM.

Defendant appeals as of right from her jury trial conviction of involuntary manslaughter, MCL 750.321; MSA 28.553. Defendant was sentenced to six to fifteen years in prison. We affirm.

Defendant first argues that she is entitled to a new trial based on the denial of the effective assistance of counsel because trial counsel failed to investigate witnesses, failed to hire an expert to question the autopsy report and fell asleep during trial. We disagree.

The record demonstrates that counsel was effective in his examination and cross-examination of witnesses, eliciting testimony favorable to defendant. Defendant did not seek a *Ginther*¹ hearing in the trial court, and her motion for *Ginther* hearing filed in this Court was not substantiated by an adequate offer of proof. Defendant does not identify the witnesses she claims to have asked counsel to investigate, and makes no offer of proof regarding their testimony. Similarly, defendant asserts that trial counsel should have hired an expert on shaken baby syndrome but offers no support for the proposition that she would have benefited by the expert's testimony. In sum, there is no basis to conclude that trial counsel would have uncovered additional evidence favorable to defendant had he hired an expert or pursued other witnesses. Further, the allegation that counsel was sleeping during trial is unsupported except by the assertion that "defendant's family has a video tape where defense counsel is sleeping during trial." The video tape has not been offered or described in an affidavit by a person who has viewed it. We are not told when counsel was allegedly sleeping or for how long.

Defendant has failed to show that the actions of her trial attorney were not sound trial strategy and has failed to establish the requisite prejudice, that absent the alleged errors, there was a reasonable probability that the jurors would have had a reasonable doubt about her guilt. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995); *People v Pickens*, 446 Mich 298, 312; 521 NW2d 797 (1994).

Defendant next argues that her sentence of six to fifteen years is disproportionate to circumstances of this case. We disagree.

Appellate review of sentencing is limited to determining whether the trial court abused its discretion. *People v Milbourn*, 435 Mich 630; 461 NW2d 508 (1995); *People v Odendahl*, 200 Mich App 539, 540-541; 505 NW2d 16 (1993). A sentence must be proportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Poppa*, 193 Mich App 184, 187; 483 NW2d 667 (1992). Where the sentence is not proportionate, the sentencing court has abused its discretion. *Id.* Sentences within the recommended sentencing guidelines range are presumptively proportionate. *People v Price*, 214 Mich App 538, 548; 543 NW2d 49 (1995).

Defendant's sentence of 72 to 180 months' imprisonment is within the recommended sentencing guidelines range of twenty-four to eighty-four months for the minimum term. The sentence is therefore presumptively proportionate. Nonetheless, when imposing a sentence, "the sentencing court is required to state on the record the criteria considered and the facts supporting the sentence imposed in order to aid the appellate review of sentences imposed. Where the sentence imposed is within the recommended guidelines range, reference to the guidelines alone constitutes sufficient explanation." *People v Adams*, 195 Mich App 267, 280; 489 NW2d 192 (1992), mod on other grounds 441 Mich 916 (1993). In sentencing defendant, the trial judge referred to the sentencing guidelines. This reference constitutes sufficient explanation of defendant's sentence, and we conclude that defendant has failed to overcome the presumption that her sentence was proportionate to the crime of which she was convicted.

Defendant lastly argues that the trial court erred in determining that her second statement to police was voluntary. We disagree.

In reviewing a trial court's findings regarding the voluntariness of a defendant's confession, this Court must examine the entire record and make an independent determination on the issue of voluntariness. *People v DeLisle*, 183 Mich App 713, 719; 455 NW2d 401 (1990). However, the trial court's findings will not be reversed unless they are clearly erroneous. *Id.* A finding is clearly erroneous if this Court is left with a definite and firm conviction that a mistake has been made. *Id.*

Defendant provided Detroit police officer Felix Kirk with two statements while in custody. Defendant argues that the second of these statements was the result of coercion, that she gave the statement to Officer Kirk only after being threatened with lifetime imprisonment, and that the statement was therefore involuntarily made and should have been suppressed.

On December 23, 1994, while in custody, defendant gave a statement to Kirk. After he became aware that the decedent died as a result of Shaken Baby Syndrome, Kirk again spoke with defendant on December 24, 1994, while she was still in custody. Kirk told defendant that he knew her explanation of the day before was not the truth, and asked her if she had omitted anything from her statement. Defendant replied that she had, and proceeded to give another statement to Kirk wherein she admitted to shaking the decedent for approximately one and one-half minutes, during which time his eyes rolled to the back of his head.

The Court, in *People v Cipriano*, 431 Mich 315, 319; 429 NW2d 781 (1988), delineated an extensive list of factors for the trial court to consider when determining whether a statement is voluntary:

... the age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse. [*Id.* at 334.]

In the present case, defendant was twenty-three years old at the time of her arrest. Defendant was arrested on December 23, 1994, and was first interrogated on the same day. She had no prior criminal record, although she did testify at the *Walker*² hearing that she had been read her rights in 1989. At the time of her arrest, defendant had completed her education through the ninth grade, and could read and write. According to Kirk, defendant read aloud the Notification of Constitutional Rights Form, and placed her initials adjacent to her rights as they appeared on the form, indicating that she understood them. She appeared slightly nervous during questioning, but did not appear to be fatigued, under the influence of drugs or alcohol, and did not indicate to Kirk that she was hungry, thirsty or in need of bathroom facilities.

We conclude that defendant was of sufficient intellectual capacity to knowingly and voluntarily give a statement to police while in custody. Defendant read her rights aloud from the Constitutional Rights Notification Form and placed her initials beside each of the rights, indicating she understood them. Defendant appeared to be alert and not in need of any food, water, or medical attention during the interrogation. She did ask Kirk during the second interrogation whether she should have a lawyer, but she did not request counsel or otherwise indicate that she desired to have counsel present before she gave her second statement to police. According to defendant, Kirk treated her respectfully during the questioning. Thus, our review of the record indicates that defendant understood her rights, knowingly and voluntarily waived these rights, and knowingly and voluntarily provided Kirk with a statement. As such, the failure of the trial court to suppress the second statement was not clearly erroneous.

Affirmed.

/s/ Helene N. White

/s/ Harold Hood

/s/ Hilda R. Gage

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

² *People v Walker (On Reh)*, 374 Mich 331; 132 NW2d 87 (1965).