STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 29, 1999
v	No. 206910 Kent Circuit Court
JAMES CHARLES BROWN, Defendant-Appellant.	LC No. 97-004617 FC

Before: Griffin, P.J., and Wilder and R. J. Danhof,* JJ.

PER CURIAM.

Defendant appeals by right from his jury trial convictions of assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to two years' imprisonment for the felony-firearm conviction and, as a fourth habitual offender, to a consecutive term of eight to twenty years' imprisonment for assault with intent to do great bodily harm. We affirm.

Defendant first argues that he did not knowingly and intelligently waive his *Miranda*[1] rights, and the trial court therefore erred by denying his motion to suppress a taped statement he made during custodial police interrogation. We review the record de novo, but will not disturb a trial court's factual findings regarding a knowing and intelligent waiver of *Miranda* rights unless its ruling is clearly erroneous. *People v Cheatham*, 453 Mich 1, 30; 551 NW2d 355 (1996). A waiver "must have been made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it." *Moran v Burbine*, 475 US 412, 421; 106 S Ct 1135, 1140-1141; 89 L Ed 2d 410 (1986). Whether a statement was made knowingly and intelligently depends "on the totality of the circumstances, including the defendant's intelligence and capacity to understand the warnings given." *People v Howard*, 226 Mich App 528, 538; 575 NW2d 16 (1997).

A police officer testified that during a taped interview he advised defendant of his constitutional rights by reading them from a pre-printed card, and that defendant appeared to understand the rights and responded affirmatively when asked if he understood them. Although

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

defendant said that people in Grand Rapids do not have constitutional rights, the officer explained to him when a person had to be advised of such rights, after which defendant proceeded to discuss the matter at hand. Defendant yawned during the interview, but nothing in the record indicates that he was sleep deprived or unable to comprehend what he was doing. Defendant was thirty-six years old, appeared to understand the questions asked, and as a fourth habitual offender had had previous interactions with the police. Based on the totality of the circumstances, we find that the trial court's determination that defendant knowingly and intelligently waived his *Miranda* rights is not clearly erroneous.

Defendant next contends that the trial court erred when it admitted into evidence a photograph depicting the victim's wound. To determine the admissibility of photographs, the first inquiry is whether the evidence is relevant under MRE 401. *People v Mills*, 450 Mich 61, 66; 537 NW2d 909 (1995), modified 450 Mich 1212 (1995). If relevant, it must be determined whether the evidence should be excluded under MRE 403, which addresses whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. *Id.* Whether to admit photographs is within the sole discretion of the trial court. *Id.* at 76. Photographs are not excludable merely because they are gruesome or because a witness can testify about what they depict. *Id.*

Although the victim and an emergency room physician testified about the nature and extent of the wounds, the photograph was important to help the jury understand facts of consequence to the determination of whether defendant committed assault with intent to commit murder, MCL 750.83; MSA 28.278, as charged. It shows the nature and extent of the injuries, relevant to the intent aspect of the charge, and corroborates the victim's testimony that he was shot while fleeing and the doctor's testimony about the injury. The photograph is relevant under MRE 401. Furthermore, it is more probative than prejudicial under MRE 403 because it accurately depicts the victim's injuries, illustrates defendant's intent and corroborates the witnesses' testimony. We find that the trial court did not abuse its discretion by admitting the photograph.

Next, defendant argues that he was denied effective assistance of counsel because his trial attorney failed to object to (1) testimony relating to on-the-scene identification procedures used by the police, and (2) the alleged lack of foundation for the admission of the taped statement. "To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced [him] that it deprived [him] of a fair trial." *People v McMillan*, 213 Mich App 134, 141; 539 NW2d 553 (1995). Because defendant failed to move for a new trial or an evidentiary hearing on the basis of ineffective assistance of counsel, our review is limited to mistakes apparent on the record. *Id.*

Defense counsel's failure to object to on-the-scene identification testimony did not prejudice defendant to the extent of depriving him of a fair trial because the victim and a witness identified defendant in court as the individual who shot the victim. Because the record lacks sufficient detail to address defendant's argument regarding lack of foundation for admission of the taped statement, our review is foreclosed.

Defendant next maintains that resentencing is required because the trial court did not follow MCL 769.13(6); MSA 28.1085(6), requiring the court to resolve challenges to the accuracy or constitutional validity of prior convictions, nor make any findings that defendant was a fourth felony offender, MCL 769.13(5); MSA 28.1085(5). Defendant did not challenge the accuracy or validity of his prior convictions by written motion as required by MCL 769.13(4); MSA 28.1085(4) and did not object at sentencing to being sentenced as a fourth habitual offender. Because defendant has not preserved this issue for appeal, we need not address it. *Vander Bossche v Valley Pub*, 203 Mich App 632, 641; 513 NW2d 225 (1994); *People v Jones*, 83 Mich App 559, 568; 269 NW2d 224 (1978).

Finally, defendant argues that the trial court erred when it sentenced him as a fourth habitual offender to eight to twenty years' imprisonment for assault with intent to commit great bodily harm less than murder. We disagree. An appellate court reviews a sentencing court's imposition of a particular sentence for an abuse of discretion, *People v Fetterley*, 229 Mich App 511, 525; 583 NW2d 199 (1998), which exists when "the sentence imposed does not reasonably reflect the seriousness of the circumstances surrounding the offense and the offender," *People v Castillo*, 230 Mich App 442, 447; 584 NW2d 606 (1998). This Court's review of habitual offender sentences is limited to determining whether the imposed sentence violates the principle of proportionality, without reference to sentencing guidelines. *People v Gatewood (On Remand)*, 216 Mich App 559, 560; 550 NW2d 265 (1996). The principle of proportionality "requires sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender." *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). Whether to impose an increased sentence as authorized by the habitual offender act is discretionary with the sentencing court. *People v Bewersdorf*, 438 Mich 55, 66; 475 NW2d 231 (1991).

Based on the record and the circumstances in this case, we find that the sentence imposed reasonably reflects the seriousness of the circumstances surrounding the offense and defendant, and thus the trial court did not abuse its discretion when it sentenced defendant as an habitual offender to eight to twenty years' incarceration.

Affirmed.

/s/ Richard Allen Griffin
/s/ Kurtis T. Wilder
/s/ Robert J. Danhof

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