STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 24, 2000
v	No. 207983 Saginaw Circuit Court
AUGUST MCKINLEY WILLIAMS, Defendant-Appellant.	LC No. 97-013451 FC

Before: Kelly, P.J., and Markey and Collins, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree premeditated murder MCL 750.316; MSA 28.548, first-degree felony murder, MCL 750.316; MSA 28.548, carjacking, MCL 750.529a; MSA 28.797a, armed robbery, MCL 750.529; MSA 28.797, kidnapping, MCL 750.349; MSA 28.581, first-degree criminal sexual conduct, MCL 750.520b; MSA 28.788(2), conspiracy, MCL 750.157a; MSA 28.354(1), and felony-firearm, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to life in prison without the possibility of parole for the first degree murder convictions. The court vacated the convictions for armed robbery, kidnapping and CSC-I. Defendant was sentenced to life imprisonment for the conspiracy conviction and also for the carjacking conviction. These sentences are to run concurrently with the first-degree murder sentence. Defendant was sentenced to a mandatory two years' imprisonment for the felony firearm conviction that is to run consecutively with the other sentences. He appeals as of right. We affirm.

I.

Facts

On January 3, 1997, 18-year-old Karen King was home on winter break from college. At approximately 6:30 p.m., she took the family's 1991 Chevrolet Blazer to a local grocery store. As she left the store, she was approached by two men who had been standing near a pay telephone. The taller of the two men grabbed Karen as she was getting into the Blazer. A struggle ensued, and Karen was thrown into the Blazer and abducted. These events were witnessed by a passerby who did not immediately call police. After the witness told his mother what he had seen, she reported the incident.

On the night of January 3, 1997, defendant was in the possession of the Blazer. He went to the house of his friend Emmitt Davis. Another man, Courtney Noel, was also at the house. Defendant showed Noel the victim cowering in the back seat of the Blazer. Defendant's cousin and accomplice, Shytour Williams, was also in the Blazer. Defendant showed Noel "some kind of cap gun or something." Defendant told Noel that he was "going to do this bitch." He gave Noel $20 out of Karen's purse. Davis received two of Karen's identification cards from defendant. Another person at the house, Vontysha Houston, testified that she witnessed defendant giving the identification cards to Davis, and that he stated, "She's won't need them." Houston told her mother what she had seen and her mother notified police.

Tina Gray testified that, on January 3, 1997, between 7:00 and 9:00 p.m., she was driving past Euclid Street, the road where Karen's body was found, and she witnessed two men standing near a white Blazer. One of the men was holding a woman who did not appear to be embracing the man. A few moments later, the Blazer sped by. Gray identified defendant and Shytour as the occupants of the Blazer.

After the incident on Euclid Street, defendant and Shytour went to the home of Sonja Armstrong. Armstrong testified that they had a CD player and car phone that were later identified as matching the description of items Karen had in her possession prior to her abduction. Defendant's cousin, Kelly Barber, testified that he gave her rings that Karen's father later identified as hers. Another cousin, Shivonny Williams, testified that defendant had a flare gun that was taped together. Defendant admitted to "snapping her neck.," and told Williams, "I had to take her out because she seent [sic] my face." Defendant further stated, "Man, I had sex with her."

Karen's body was discovered on January 4, 1997. She had been beaten, raped, stabbed and, ultimately, strangled. The Blazer was recovered the same day. At the scene, officers recovered several of the victim's identification and credit cards, as well as a flare gun matching the one in defendant and Shytour's possession. When defendant was arrested several days later, he had the victim's pager in his possession. A search of the Blazer revealed traces of the victim's blood. A semen stain was matched to defendant and the victim through DNA testing.

II.

Jury Selection

Defendant first argues that the trial court abused its discretion by denying his request to excuse three prospective jurors for cause. This Court reviews a trial court's decision to deny a challenge for cause in jury selection for an abuse of discretion. *People v Legrone*, 205 Mich App 77, 81; 517 NW2d 270 (1994).

At the time the jury was impaneled, defendant had one peremptory challenge remaining. Generally, a defendant must exhaust his peremptory challenges in order to preserve an objection to the jury selection procedure. *People v Jendrzejewski*, 455 Mich 495, 514 n 19; 566 NW2d 530 (1997);

People v Taylor, 195 Mich App 57, 59-60; 489 NW2d 99 (1992). This is not, however, an absolute requirement. *People v Colon*, 233 Mich App 295, 300; 591 NW2d 692 (1998).

Defendant objected to dismissal of juror 14, who expressed an inability to serve because of the graphic nature and emotional strain of the case. Defendant expressed concern that a prospective replacement juror was a young female like the victim. Defense counsel stated that he did not want any individuals like the victim on the jury, if possible, and that he would have used his peremptory challenges differently. The court then gave defendant one additional peremptory challenge. Under the circumstances of this case, defendant has sufficiently preserved his challenge to the trial court's method of jury selection.

A criminal defendant has a constitutional right to be tried by a fair and impartial jury. US Const, Am VI; Const 1963, art 1, § 20; *Duncan v Louisiana*, 391 US 145, 149; 88 S Ct 1444; 20 L Ed 2d 491 (1968); *People v Daoust*, 228 Mich App 1, 7; 577 NW2d 179 (1998). A defendant is denied his right to an impartial jury when a juror removable for cause is allowed to serve on the jury. *Id.*, 8-9.

MCR 2.511(D) sets forth the criteria for excusing a juror for cause:

> **(D) Challenges for Cause.** The parties may challenge jurors for cause, and the court shall rule on each challenge. A juror challenged for cause may be directed to answer questions pertinent to the inquiry. It is grounds for a challenge for cause that the person:
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> (1) is not qualified to be a juror;
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> (2) has been convicted of a felony;
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> (3) is biased for or against a party or attorney;
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> (4) shows a state of mind that will prevent the person from rendering a just verdict, or has formed a positive opinion on the facts of the case or on what the outcome should be;
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> (5) has opinions or conscientious scruples that would improperly influence the person's verdict;
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> (6) has been subpoenaed as a witness in the action;
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> (7) has already sat on a trial of the same issue;
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> (8) has served as a grand or petit juror in a criminal case based on the same transaction;
>
> (9) is related within the ninth degree (civil law) of consanguinity or affinity to one of the parties or attorneys;

> (10) is the guardian, conservator, ward, landlord, tenant, employer, employee, partner, or client of a party or attorney;
>
> (11) is or has been a party adverse to the challenging party or attorney in a civil action, or has complained of or has been accused by that party in a criminal prosecution;
>
> (12) has a financial interest other than that of a taxpayer in the outcome of the action;
>
> (13) is interested in a question like the issue to be tried.
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> Exemption from jury service is the privilege of the person exempt, not a ground for challenge.

In determining whether an error in refusing a challenge for cause merits reversal, this Court applies a four-part test. There must be a clear and independent showing on the record that 1) the court improperly denied a challenge for cause, 2) the aggrieved party exhausted all peremptory challenges, 3) the party demonstrated the desire to excuse another subsequently summoned juror, and 4) the juror whom the party wished later to excuse was objectionable. *People v Lee*, 212 Mich App 228, 248-249; 537 NW2d 233 (1995).

We are unconvinced that defendant was not afforded an impartial jury. Essentially, defendant argues that three prospective jurors were exposed to pretrial publicity sufficient to render them impartial. Thus, when the court declined to remove each for cause, defendant was forced to unnecessarily expend a peremptory challenge. We disagree.

The first prospective juror challenged by defendant was Dr. Michael Schultz. When asked by the court whether he had heard anything about the case, Schultz indicated that he learned about the case from articles in the local newspaper and from conversations with patients and coworkers. He stated that the articles seemed "so clear-cut" and consistent. He also indicated that the recent case involving Shytour seemed to "close the case" in his mind. Additionally, his wife had had a conversation with an assistant of the medical examiner who had performed the autopsy, and she had described the gruesome nature of the injuries and that there was definite evidence of sexual abuse. Schultz also indicated that a patient of one of his partners was a spokesperson for the King family.

Initially, Schultz indicated that he had formed an opinion about the case. When asked by the court whether he believed he could set his opinion aside and decide this case solely based on the evidence as presented, Schultz replied, "I would certainly try. It would be difficult because of the -- some of the graphic representations that I've heard particularly from the autopsy, and I'm not sure that I could. I would honestly try." The court pressed further, "Okay. But the real question is, you know, you've been bombarded with this -- this stuff. Do you think you could really give these parties a fair and impartial hearing?" Schultz replied, "Yes, I think I could."

The prosecution also asked whether Schultz could make a judgment based solely upon the evidence and the testimony. Schultz replied, "Yes." However, when defense counsel asked whether Schultz would want someone like himself as a juror on his case, he replied, "No." The court then asked Schultz:

> Doctor, let me ask you a question. If, in the course of the trial, if you're selected as a juror and in the course of trial, evidence was not brought forth to substantiate some of the things that you may have heard, would you be able to set aside what you heard and say hey, it never proved out, there's no testimony to that effect?

Schultz replied, "Yes." The court declined defense counsel's request that Schultz to be excused for cause. After Schultz was seated in the jury box, defense counsel used one of his peremptory challenges and Schultz was excused.

Defendant argues that prospective juror Tamara Toskey should have been excused for cause. Toskey initially indicated that she was aware of this case through the intense media coverage surrounding the victim's death. When asked whether she had formulated an opinion as to defendant's guilt or innocence, Toskey replied that, since defendant was older, bigger and stronger than Shytour, "something could have been done." When the court asked whether she would you be able to set that aside and decide the case based solely on the evidence, Toskey replied that she "freaked out" at R-rated movies and that she was concerned about the graphic photographs. The court acknowledged that, indeed, some of the photographs would be graphic, but asked whether Toskey could make a decision based on what she heard in the courtroom. Toskey answered that she could.

Defense counsel asked that Toskey be excused for cause because she was predisposed to convict defendant, and because she would have a problem viewing the evidence due to its graphic content. The court denied the motion to excuse for cause without prejudice, thus, allowing defense counsel the opportunity to revisit the issue at voir dire. At the close of voir dire, defense counsel used a peremptory challenge to excuse Toskey.

While it is true that Schultz and Toskey admitted to being exposed to pretrial media reports about the crime, both indicated that they would be able to set aside any preconceived opinions and render a decision based on what transpired at trial. Although both Schultz and Toskey initially indicated apprehension about being able to render an impartial decision, when questioned by the court, they professed that they would be able to reach a fair decision based solely on the trial testimony and exhibits.

Our Supreme Court has stated that juror exposure to information or newspaper accounts of the crime for which he has been charged does not in itself establish a presumption that a defendant has been deprived of a fair trial by virtue of pretrial publicity. *Jendrzejewski, supra* at 502. Similarly, this Court has stated that "[i]t is not necessary that [jurors] be without impression or opinion. They must, however, be able to lay aside their impressions and base their verdict on the evidence." *People v Bloom*, 15 Mich App 463, 473; 166 NW2d 691 (1969).

Schultz and Toskey indicated that they would be able to set aside any preconceived opinions and render a fair and just decision. Thus, the first prong of the *Lee* four-part test, that the court improperly denied the challenges for cause, has not been met. Further, although we have ruled that defendant was not required to exhaust all of his peremptory challenges to preserve this issue, the second prong of the *Lee* test requires defendant to do so in order to establish reversible error. The third prong of the test requires that defendant show a desire to excuse another subsequently summoned juror. *Lee*, *supra* at 248-249. The fourth prong requires that this subsequent juror be objectionable. *Id.* The record is devoid of defendant's desire to excuse a subsequent juror who was objectionable. The fact that defendant retained a peremptory challenge when the jury was impaneled is evidence of defendant's approval of the jury.

This is further indicated by defendant's objection to the removal of juror White near the end of voir dire, after she had been questioned and seated in the jury box. When asked by the court if there were any objections, defense counsel replied that he might have used his peremptory challenges differently. Nevertheless, the fact remains that once Ms. White was excused, defendant received another peremptory challenge that he ultimately did not use. Since neither Schultz nor Toskey falls within any of the categories outlined in MCR 2.511(D), and since defendant did not exhaust all of his peremptory challenges, the test set forth in *Lee*, *supra*, has not been met. The trial court did not abuse its discretion in not excusing jurors Schultz or Toskey for cause.

Defendant also argues that the court should have excused prospective juror Joseph Revard, who is a part-time police officer. Revard indicated that he had some exposure to this case through the media, but that he did not pay much attention to the details as reported. Revard stated that he would be able to be fair to both the prosecution and defendant in making a decision as a juror.

Revard indicated that he has three family members in law enforcement. He has two brothers on the Saginaw Police Department, and his wife is a 911 supervisor. He did not discuss the case with either of his brothers or his wife. Revard did not know what, if any, involvement his wife had with this case. At the end of questioning, defense counsel moved to excuse Revard for cause based on his knowledge of the case and his status as a police officer with close a working relationship with the prosecution. The court denied the motion without prejudice allowing defense counsel to raise the issue during voir dire. During voir dire, the court held a bench conference with both counsel and then excused Revard. The record does not specifically indicate whether Revard was excused for cause. However, there is no indication that defense counsel expended one of his peremptory challenges. It appears the court left Revard in the pool of prospective jurors and, when he was called to replace an excused juror, the court excused him for cause.

Defendant is not claiming that he had to use a peremptory challenge in order to have Revard dismissed. Rather, defendant argues that the delay in excusing Revard for cause unjustly tampered with his jury selection strategy. This argument is unpersuasive in light of the fact that Revard was not called from the jury pool and seated in the jury box until late in the selection process. Once seated, the court held a discussion with counsel and then proceeded to excuse Revard. This was done without defendant's use of one of his peremptory challenges. The court acted the instant Revard was seated in

the jury box, which indicates that the court was making a final decision on defendant's earlier motion to excuse Revard for cause. We find no abuse of discretion regarding prospective juror Revard.

III.

Competency to Stand Trial

Defendant claims that the trial court's determination that he was competent to stand trial was clearly erroneous. The determination of a defendant's competence is within the trial court's discretion. *People v Newton*, 179 Mich App 484, 488; 446 NW2d 487 (1989).

A competency hearing was held on June 9, 1997. At the hearing, the prosecution presented the report of Dr. Robert Mogy of the Center for Forensic Psychiatry. No other evidence was presented by either party, and defendant did not object to the admission or challenge the conclusion of the report. The trial court concluded that defendant was competent to stand trial based solely on Dr. Mogy's report.

On appeal, defendant argues that it was reversible error for the trial court to make a competency determination based solely on the report issued by Dr. Mogy when, in fact, the presentence investigation report ("PSIR") referred to a mental evaluation of defendant by Michael T. Mack in 1987. Defendant contends that the PSIR directly contradicts Dr. Mogy's evaluation and conclusion. Defendant failed to object to the admission of Dr. Mogy's report, nor did defendant object to the conclusions reached by Dr. Mogy. As such, this issue has not been properly preserved for appellate review. *People v Grant*, 445 Mich 535, 546-547; 520 NW2d 123 (1994).

Nevertheless, we find no abuse of discretion. First, this Court has held that, since competence is an ongoing concern, the trial court should not rely on a prior competency determination. *People v Hamm*, 79 Mich App 281, 289; 261 NW2d 288 (1977). See also *People v Belanger*, 73 Mich App 438; 252 NW2d 472 (1977); *People v Matheson*, 70 Mich App 172; 245 NW2d 551 (1976). Second, the evaluation made by Dr. Mack in 1987 was not the product of a test for competency to stand trial. The evaluation was given while defendant was in junior high school and exhibiting unruly behavior. The PSIR does not contain any information that contradicted Dr. Mogy's findings.

IV.

Ineffective Assistance of Counsel

Next, defendant argues ineffective assistance of counsel for failure to file a motion to quash incriminating statements he made to police. Because defendant failed to preserve this issue, appellate review is precluded unless the prejudicial effect could not have been cured by a cautionary instruction or if the failure to consider the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). By failing to move below for an evidentiary hearing regarding alleged ineffective assistance of counsel, defendant has limited our review to deficiencies apparent on the record. *People v Harris*, 201 Mich App 147, 154; 505 NW2d 889 (1993).

To establish that he did not receive effective assistance of counsel, defendant must show that "(1) the performance of counsel was below an objective standard of reasonableness under prevailing professional norms and (2) a reasonable probability exists that, in the absence of counsel's unprofessional errors, the outcome of the proceedings would have been different." *People v Plummer*, 229 Mich App 293, 307; 581 NW2d 753 (1998). Effective assistance of counsel is presumed, and defendant bears a heavy burden of proving otherwise. *Stanaway*, *supra* at 687.

Prior to trial, counsel stipulated that the statement made by defendant to Saginaw police officers would not be used by the prosecution for any purpose other than rebuttal if defendant testified. Since defendant did not testify, the statement was never admitted and does not appear in the lower court record. Defendant claims that the existence of the statement prevented him from testifying in his own behalf. He further claims that he is "intellectually impaired" and that his confession is void as an involuntary statement.

Whether a defendant's confession was knowing, voluntary, and intelligent is determined by applying an objective standard and examining the totality of the circumstances. *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988); *People v Fike*, 228 Mich App 178, 181; 577 NW2d 903 (1998). Such circumstances may include the age, education, intelligence level, and experience of the defendant, the duration of the defendant's detention and questioning, the defendant's mental and physical state, and whether the defendant was threatened or abused. *Id.*

Our review of the record does not support defendant's contention that his statement was involuntary or that he did not intelligently and knowingly waive his rights. Even if defendant possesses a lower-than-average intelligence level, low intellect alone is not determinative. *Fike*, *supra* at 182. Moreover, defense counsel's stipulation concerning defendant's statement is presumed to be a matter of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999).

V.

Insufficiency of the Evidence

Finally, defendant argues that the evidence was insufficient to support a conviction of felony firearm because the "firearm" here was an inoperable flare gun. We disagree.

When reviewing the sufficiency of the evidence in a criminal case, this Court must view the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt. *People v Vronko*, 228 Mich App 649, 654; 579 NW2d 138 (1998). When deciding this issue, this Court should not interfere with the jury's role of determining the weight of the evidence or the credibility of the witnesses. *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

Michigan's felony-firearm statute reads, in pertinent part, as follows:

> Sec. 227b. (1) A person who carries or has in his or her possession a firearm when he or she commits or attempts to commit a felony, except a violation of section 223, section 227, 227a or 230, is guilty of a felony, and shall be imprisoned for 2 years. Upon a second conviction under this section, the person shall be imprisoned for 5 years. Upon a third or subsequent conviction under this subsection, the person shall be imprisoned for 10 years. [MCL 750.227b(1); MSA 28.424(2)(1).]

This Court has defined a firearm as, "a weapon from which a dangerous projectile may be propelled." *People v Perry*, 172 Mich App 609, 622; 432 NW2d 377 (1988). When the flare gun was recovered, the barrel was shattered and a spent shotgun shell was lodged in the gun's chamber. A firearms expert testified that a flare gun operates in a fashion similar to a shotgun, and that, while a 20-gauge shotgun shell is not the intended projectile for such a gun, under some circumstances, the slug could be fired from a flare gun.

Furthermore, eyewitness testimony established the defendant had possession of the flare gun earlier on the day of the abduction. Shytour was seen in the Blazer holding the flare gun to the victim's head. While the testimony at trial did not positively establish that defendant had the flare gun in his immediate possession during the abduction and death of the victim, one who does not actually possess a firearm may validly be convicted of felony-firearm as an aider and abettor. *People v Eloby (After Remand)*, 215 Mich App 472, 478; 547 NW2d 48 (1996). Because of the continuing nature of the offenses and the fact that the flare gun was seen in defendant and Shytour's possession on the day of and during the abduction, it can reasonably be inferred that defendant possessed the gun during the commission of a felony.

Affirmed.

/s/ Michael J. Kelly
/s/ Jane E. Markey
/s/ Jeffrey G. Collins