STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 16, 2001
v	No. 219810 Oakland Circuit Court
LARRY EUGENE OVERLA, Defendant-Appellant.	LC No. 98-160416-FC

Before: K. F. Kelly, P.J., and Smolenski and Meter, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree criminal sexual conduct, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a), and second-degree criminal sexual conduct, MCL 750.520c(1)(a); MSA 28.788(3)(1)(a). Those convictions arose from allegations that defendant molested his eleven-year-old niece. He was sentenced as a fourth habitual offender, MCL 769.12; MSA 28.1084, to a term of 20 to 30 years' imprisonment for the first-degree CSC conviction and 10 to 20 years' imprisonment for the second-degree CSC conviction. Defendant appeals as of right. We affirm.

Defendant first contends that the trial court erroneously failed to suppress a statement which he gave to police. Defendant contends that his statement was involuntary because: (1) police held defendant alone in a cold cell for several hours without a telephone, (2) the atmosphere of the police questioning was inherently coercive, (3) defendant was susceptible to suggestion, and (4) the detective promised that, if defendant apologized to the victim's mother, the charges would be dropped and defendant would be released at the state line. This Court's review of the issue of voluntariness must be independent of the trial court's determination. However, we will affirm the trial court's decision unless we are left with a definite and firm conviction that a mistake has been made. *People v Sexton (After Remand),* 461 Mich 746, 752; 609 NW2d 822 (2000).

> The voluntariness of a statement must be determined from all of the facts and circumstances, including the duration of detention, the manifest attitude of the police toward the suspect, the physical and mental state of the suspect, and the pressures which may sap or sustain the suspect's powers of resistance or self-control. [*People v Hicks,* 185 Mich App 107, 113; 460 NW2d 569 (1990).]

Defendant first complains that he was placed alone in a cold cell for several hours without a telephone. The record reveals that police moved defendant from the general holding cell to an individual cell because defendant was using the telephone in the holding cell to call the victim's home. Therefore, the police appropriately moved defendant to a cell which did not contain a telephone.

Defendant next complains that the atmosphere of the police questioning was inherently coercive. Defendant was arrested, without incident, at 4:00 p.m., and questioning commenced around 10:00 p.m. Therefore, he was not detained for an excessive period of time prior to questioning. There is no dispute that defendant was advised of his *Miranda*[1] rights prior to questioning and that he understood and waived those rights. Defendant was only questioned for two hours. He was thirty years old at the time he made the statement, had his GED, and was well-acquainted with the criminal justice system. Defendant admitted that he was neither threatened nor abused by the police, and he acknowledged that the detective treated him fairly during the interview process. Additionally, defendant was given water during the interview and allowed to visit the bathroom on two occasions. Our review of the record reveals that the atmosphere of the police questioning was not inherently coercive.

Defendant next complains that he was unduly susceptible to suggestion at the time he made the statement. Although the record indicates that defendant was "agitated" when first brought into the interview room, there is no indication that defendant was out of touch with reality at the time he made the statement. In fact, the record indicates that defendant calmed down prior to making his statement and was able to coherently discuss topics such as poetry and philosophy. There is no indication that defendant was exhausted, hungry, on drugs or intoxicated at the time he made the statement. Defendant was neither suffering from an emergency medical condition nor was there any indication that defendant was in pain. We cannot conclude from these facts that defendant was so susceptible to suggestion as to render his statement involuntary.

Finally, defendant complains that his statement was involuntary because it was motivated by false promises. Defendant claims that the detective told him that, if he apologized to the victim's mother, the charges would be dropped and defendant would be released at the state line. The trial court found that defendant's testimony in this regard was not credible. We must accord deference to the trial court's assessment of the credibility of witnesses. *Sexton*, *supra* at 752. After reviewing the totality of the circumstances, we are not convinced that defendant's statement was involuntary. Thus, the trial court did not err in ruling that defendant's statement was admissible.

Defendant next contends that he was denied a fair trial because he was required to wear restraints in the jury's presence.

> Freedom from shackling is an important component of a fair trial. Consequently, the shackling of a defendant during trial is permitted only in extraordinary circumstances. Restraints should be permitted only to prevent the

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

> escape of the defendant, to prevent the defendant from injuring others in the courtroom, or to maintain an orderly trial. This Court reviews a decision to restrain a defendant for an abuse of discretion under the totality of the circumstances. [*People v Dixon*, 217 Mich App 400, 404-405; 552 NW2d 663 (1996) (citations omitted).]

Because defense counsel did not object to the fact that defendant was restrained during trial and actually acknowledged that restraints were necessary, this issue is not preserved for appellate review. *People v Solomon (Amended Opinion)*, 220 Mich App 527, 531-532; 560 NW2d 651 (1996). In any event, the record indicates that the restraints were necessary both for courtroom security and for defendant's own protection. Defendant admits a history of self-mutilation. Shortly before trial, defendant attempted to remove his own intestines with a spoon. The trial court understandably allowed the restraints to prevent defendant from further injuring himself. Additionally, it appears from the record that the jury was unable to see the restraints. In order to justify reversal based on the presence of restraints during trial, defendant must show that prejudice resulted. *Solomon*, *supra* at 532; *People v Robinson*, 172 Mich App 650, 654; 432 NW2d 390 (1988). Because the jury could not see the restraints, defendant has not shown that he was prejudiced by being required to wear them during trial. *Id.*

Defendant next contends that the prosecutor engaged in misconduct during closing arguments which denied defendant a fair trial. Because defendant did not object to the challenged remarks below, they are not preserved for this Court's review. Therefore, defendant must show that he was prejudiced by plain error, and a reviewing court should reverse defendant's conviction only if he is actually innocent or the plain error seriously affected the fairness, integrity, or public reputation of the proceedings. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial, and claims of prosecutorial misconduct are decided on a case by case basis. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995). This Court examines the record and evaluates the allegedly improper remarks in context. *Id*. It is well-settled that it is improper for the prosecutor to appeal to the jury to sympathize with the victim. *People v Dalessandro*, 165 Mich App 569, 581; 419 NW2d 609 (1988). However, we do not believe that the prosecutor attempted to do so during closing arguments. Rather, the prosecutor attempted to show, through a recitation of the evidence presented at trial, that the victim had no motive to fabricate her testimony. There is nothing improper about such an argument.

Finally, we reject defendant's claim that his sentences violate the principle of proportionality. Because the sentencing guidelines do not apply to habitual offenders, this Court's review of defendant's sentences is limited to considering whether the sentence violates the principle of proportionality set forth in *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990); *People v Gatewood (On Remand)*, 216 Mich App 559, 560; 550 NW2d 265 (1996). We conclude that the trial court did not abuse its discretion when imposing the sentences in this matter. Defendant, thirty years old at the time of the instant offense, has a lengthy criminal history. In addition to juvenile convictions, he has multiple adult criminal convictions, including convictions for attempted armed robbery, assault with a dangerous weapon, second-degree retail

fraud, unlawfully driving away a motor vehicle, receiving stolen property over $100, and forgery of a state warrant. Moreover, defendant committed the instant offenses within weeks of being released from prison after serving the maximum sentence on a prior conviction. Although the record reflects that defendant suffered from borderline personality disorder and had a difficult childhood, it is also clear that defendant is unable to conform his conduct to the law. Thus, protection of society was a paramount concern in this case. Apart from defendant's substantial criminal history, the circumstances of the instant offenses also supported lengthy sentences. Under the circumstances, defendant's sentences do not constitute an abuse of discretion.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Michael R. Smolenski
/s/ Patrick M. Meter