STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 14, 2004
v	No. 250337 St. Joseph Circuit Court
ALONZO LEE MAST, Defendant-Appellant.	LC No. 03-011525-FH

Before: Murphy, P.J., and White and Kelly, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree home invasion, MCL 750.110(a)(2), and second-degree criminal sexual conduct (CSC), MCL 750.520c(1)(c). He was sentenced to concurrent prison terms of seven to twenty years for the home invasion conviction, and 71 to 180 months for the CSC conviction. He appeals as of right, and we affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

Defendant argues that the trial court erred by failing to sua sponte exclude his first custodial police statement. He argues that "extreme intoxication" rendered his waiver of his right against self-incrimination and the statement itself involuntary. Because defendant did not challenge the admissibility of his statement at trial, we review this unpreserved issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Although the question whether a statement was voluntarily made and whether the waiver of *Miranda*[1] rights was voluntary are distinct issues, the analysis of voluntariness involves the same inquiry. *People v Daoud*, 462 Mich 621, 635-639; 614 NW2d 152 (2000). In this case, testimony at trial suggested that defendant may have been intoxicated when he waived his rights and gave his first statement. But defendant testified that he did not feel "drunk" and did not believe he was intoxicated. Moreover, intoxication is only one aspect of the totality of circumstances that are considered in assessing voluntariness. *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988). Because defendant testified at trial that he was not intoxicated, does

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

not argue any other factor as affecting the question of voluntariness, and no evidentiary record was developed below that focused specifically on the question of voluntariness, defendant has not shown that the admission of his statement was "plain error" affecting his substantial rights.

Defendant also claims that trial counsel was ineffective for failing to pursue suppression of his first statement. Because defendant did not move for an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), our review of this issue is limited to errors apparent on the record. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997).

Defendant has not overcome the presumption that counsel's action was sound trial strategy. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). The statement was inculpatory in the sense that defendant acknowledged going into the victim's home, waking the victim, pulling his pants down to urinate, and "bear-hugging" her. However, counsel was confronted with strong evidence (apart from defendant's statements) that defendant was the person who entered the victim's home, that he woke her, and that he exposed his underwear during the encounter. Because of the strength of the prosecution's evidence, trial counsel's decision to present a defense theory that conceded these facts, but disputed a sexual intent, was not objectively unreasonable. Defendant's first statement was consistent with this defense. Trial counsel may have decided not to pursue suppression of the statement because it was consistent with the defense he intended to present. Therefore, defendant has not overcome the presumption of sound strategy.

Defendant asserts in his brief that he "is making a motion to remand." But he is unclear whether the motion he seeks is remand for a *Ginther* hearing or a *Walker*[2] hearing. In any event, he did not file a proper motion to remand in this Court, MCR 7.211(C)(1)(a), nor does he even cite this rule or attempt to meet its requirements. Accordingly, a remand is not warranted.

Lastly, defendant challenges the sentencing court's scoring of offense variable (OV) 7, which was scored at fifty points for aggravated physical abuse. Fifty points may be scored for OV 7 where "[a] victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." MCL 777.37(a). Defendant's statements and conduct toward the victim during the offense provide sufficient support for a score of fifty points on the basis that defendant's conduct was designed to substantially increase the fear and anxiety the victim suffered during the offense. *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003).

Affirmed.

/s/ William B. Murphy
/s/ Helene N. White
/s/ Kirsten Frank Kelly

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