

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
March 21, 2013

v

TROY BENZ TIMARAC,

Defendant-Appellant.

No. 304323
Wayne Circuit Court
LC No. 09-001844-FC

Before: MURPHY, C.J., and O’CONNELL and BECKERING, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of manslaughter, MCL 750.321. The trial court sentenced defendant to 36 months’ to 15 years’ imprisonment. He appeals by right. We affirm.

Defendant’s conviction arose from the death of Richard Colson, who died after being severely beaten during an apparent attempt by defendant and his cohorts to steal Xanax and ecstasy pills from Colson, their drug dealer. Defendant first argues that the prosecution failed to disclose potentially exculpatory evidence. We disagree.

“This Court reviews de novo a defendant’s claim of a constitutional due-process violation.” *People v Jackson*, 292 Mich App 583, 590; 808 NW2d 541 (2011). The prosecution violates a defendant’s due process rights when it fails to disclose any exculpatory and material evidence in its possession, regardless of whether the defendant requests the evidence. *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963); *Jackson*, 292 Mich App at 590-591. “[U]ndisclosed evidence will be deemed material only if it ‘could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.’” *People v Lester*, 232 Mich App 262, 282; 591 NW2d 267 (1998), quoting *Kyles v Whitley*, 514 US 419, 435; 115 S Ct 1555; 131 L Ed 2d 490 (1995).

To establish a *Brady* violation, a defendant must prove:

- (1) that the state possessed evidence favorable to the defendant;
- (2) that the defendant did not possess the evidence nor could the defendant have obtained it with any reasonable diligence;
- (3) that the prosecution suppressed the favorable evidence; and
- (4) that had the evidence been disclosed to the defense, a

reasonable probability exists that the outcome of the proceedings would have been different. *People v Cox*, 268 Mich App 440, 448; 709 NW2d 152 (2005).

In this case, even if we assume that the prosecution suppressed the clothing evidence at issue, we conclude that the evidence was not potentially exculpatory. First, defendant told police that the clothes did not belong to him. Furthermore, even assuming the clothes belonged to defendant, the evidence was not favorable to defendant, and there was not a reasonable probability that the proceedings would have been different if the police had kept or tested the evidence. At trial, defendant repeatedly argued that he had attempted to pull the victim out of the van in order to protect him from co-defendant Michael Albane's and Jared Kienbaum's attack. Defendant admitted to driving the van and pulling the victim out of the van. Therefore, the blood or lack of blood on the clothes could not have been favorable to defendant's theory of the case. Therefore, a lack of blood on the clothes would either be a mere coincidence or indicate that defendant was not wearing those clothes at the time of the incident.

Moreover, even assuming that a lack of blood on the evidence may have exonerated defendant, the police department did not act in bad faith by destroying it. "Failure to preserve evidentiary material that *may* have exonerated the defendant will not constitute a denial of due process unless bad faith on the part of the police is shown." *People v Hanks*, 276 Mich App 91, 95; 740 NW2d 530 (2007), quoting *People v Hunter*, 201 Mich App 671, 677; 506 NW2d 611 (1993), citing *Arizona v Youngblood*, 488 US 51, 57; 109 S Ct 333; 102 L Ed 2d 281 (1988) (emphasis added). The evidence was stored in the police department's general property section, rather than the homicide section, because the case was not classified as a homicide until after the victim died. The property section, for some unknown reason, destroyed the evidence. Although the destruction of evidence may indicate miscommunication and possibly poor procedure, it does not demonstrate bad faith on the part of the police department.

Defendant next argues that the trial court erred by failing to suppress his post-*Miranda*¹ statement. We disagree.

When we review a trial court's factual findings with respect to a motion to suppress, we defer to the trial court unless the court's findings are clearly erroneous. A finding is clearly erroneous if this Court is left with a definite and firm conviction that a mistake has been made. We review de novo a trial court's ultimate decision on a motion to suppress. [*People v Elliott*, 295 Mich App 623, 631; 815 NW2d 575 (2012), lv granted 491 Mich 938; 815 NW2d 129 (2012) (citations and quotation marks omitted).]

The United States Supreme Court has ruled that where prior un-*Mirandized* custodial interrogation is not coercive, such questioning does not preclude the admission of a post-*Miranda* statement. *Oregon v Elstad*, 470 US 298, 308, 310-318; 105 S Ct 1285; 84 L Ed 2d 222 (1985). In *Elstad*, the Court held that if an unwarned first statement was voluntary, the second statement is admissible if also voluntary and provided after *Miranda* warnings. *Elstad*,

¹ *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

470 US at 318. The second statement is admissible because, [o]nce warned, the suspect is free to exercise his own volition in deciding whether or not to make a statement to the authorities. *Id.* at 308. The Supreme Court held:

We must conclude that, absent deliberately coercive or improper tactics in obtaining the initial statement, the mere fact that a suspect has made an unwarned admission does not warrant a presumption of compulsion. A subsequent administration of *Miranda* warnings to a suspect who has given a voluntary but unwarned statement ordinarily should suffice to remove the conditions that precluded admission of the earlier statement. In such circumstances, the finder of fact may reasonably conclude that the suspect made a rational and intelligent choice whether to waive or invoke his rights. [*Id.* at 314.]

In this case, defendant has not shown deliberately coercive or improper tactics by the police. Rather, the record reflects that defendant initiated the session with Brooks and repeatedly indicated that he wished to speak and had changed his mind about waiting for counsel. Under *Elstad*, the subsequent administration of *Miranda* warnings sufficed here such that defendant's statement after the *Miranda* warnings is admissible.

Next, defendant argues the prosecution engaged in misconduct by suggesting to the jury that defense counsel was intentionally misleading them. We disagree.

This Court reviews issues of prosecutorial misconduct de novo to determine whether the prosecutor's statements denied the defendant a fair and impartial trial. *People v Bennett*, 290 Mich App 465, 475; 802 NW2d 627 (2010). "[T]he test for prosecutorial misconduct is whether a defendant was denied a fair and impartial trial." A prosecutor compromises a defendant's right to a fair trial when he "interjects issues broader than the guilt or innocence of the accused." *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). This Court must read a prosecutor's statements as a whole and evaluate the statements in light of the evidence presented at trial and the defendant's argument. *People v Brown*, 279 Mich App 116, 135; 755 NW2d 664 (2008), habeas granted on other grounds, 868 F Supp 2d 608 (2012). A prosecutor's statements "must be considered in light of defense counsel's comments." *People v Unger*, 278 Mich App 210, 238; 749 NW2d 272 (2008).

A prosecutor is "free to argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case. However, a prosecutor may not suggest that defense counsel is intentionally attempting to mislead the jury." *Id.* at 236 (citations and quotation marks omitted).

When the prosecutor argues that the defense counsel himself is intentionally trying to mislead the jury, he is in effect stating that defense counsel does not believe his own client. This argument undermines the defendant's presumption of innocence. Such an argument impermissibly shifts the focus from the evidence itself to the defense counsel's personality. [*Id.*, quoting *People v Wise*, 134 Mich App 82, 101; 351 NW2d 255 (1984)].

In this case, while questioning Keinbaum, who testified against defendant, defense counsel was attempting to read a hearsay statement of a non-testifying witness in order to proffer a theory that someone else had fatally struck Colson in a later incident when the prosecutor commented that “[defense counsel is] just making things up.” Even if this comment was improper, the trial court’s curative instruction following the improper comment cured the error. The trial court instructed the jury that the attorneys’ statements were not evidence and that the jury must begin with the presumption that defendant is innocent. Courts presume that jurors follow their instructions. *People v Breidenbach*, 489 Mich 1, 13; 798 NW2d 738 (2011). Therefore, the prosecutor’s statements did not compromise defendant’s right to a fair and impartial trial.

Finally, defendant argues that the trial court improperly scored offense variable one, two, and eight (OV 1, OV 2, OV 8). We disagree.

This Court reviews a trial court’s offense variable scoring to determine whether the court properly exercised its discretion and whether the record adequately supported a particular score. *People v Steele*, 283 Mich App 472, 490; 769 NW2d 256 (2009). “A trial court has discretion to determine the number of points assigned for a particular offense variable, provided that evidence of record adequately supports a particular score. This Court will uphold a sentencing court’s scoring decision if it is supported by record evidence.” *People v Jamison*, 292 Mich App 440, 443; 807 NW2d 427 (2011) (quotations and citations omitted). “A sentencing court may consider all record evidence before it when calculating the guidelines” *People v Johnson*, 298 Mich App 128, 131; 826 NW2d 170 (2012), lv app pending (quoting *People v Ratkov (After Remand)*, 201 Mich App 123, 125; 505 NW2d 886 (1993)).

“This Court must affirm a sentence that is within the legislative guidelines range unless the trial court erred in scoring the sentencing guidelines or relied on inaccurate information in determining the defendant’s sentence.” *Jamison*, 292 Mich App at 443. An erroneous score that would result in a different recommended range requires resentencing. *People v Jackson*, 487 Mich 783, 792; 790 NW2d 340 (2010).

MCL 777.31, which codified offense variable 1, provides, in part:

(1) Offense variable 1 is aggravated use of a weapon. Score offense variable 1 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:

(a) A firearm was discharged at or toward a human being or a victim was cut or stabbed with a knife or other cutting or stabbing weapon ... 25 points

(b) A firearm was pointed at or toward a victim or the victim had a reasonable apprehension of an immediate battery when threatened with a knife or other cutting or stabbing weapon ... 15 points

(c) *The victim was touched by any other type of weapon* ... 10 points

(d) A weapon was displayed or implied ... 5 points

(e) No aggravated use of a weapon occurred ... 0 points

(2) All of the following apply to scoring offense variable 1:

* * *

(c) Score 5 points if an offender used an object to suggest the presence of a weapon.

In this case, the record contains sufficient evidence that Kienbaum touched the victim with a flashlight that he used as a weapon during the assault. A 10-point score is appropriate where a person uses an “instrument or device used for attack [] in a fight or in combat” during the offense. *People v Lange*, 251 Mich App 247, 257; 650 NW2d 691 (2002). The record contains defendant’s recorded confession. During defendant’s confession, he stated that Kienbaum used a flashlight to hit the victim. Additionally, the medical examiner testified that the victim’s death was caused by one significant blow to the head. In the medical examiner’s opinion, the blow to the head was not caused by a punch, a kick, or multiple punches and kicks.

The record also contains sufficient evidence that the weapon was potentially lethal. MCL 777.32(1)(e) provides that a trial court should score one point for OV 2 if “[t]he offender possessed or used any other potentially lethal weapon.” The medical examiner testified that the victim died from a blunt force trauma caused by a single devastating blow to the head. The weapon’s potentially lethal nature was demonstrated when the victim died.

There was also sufficient record evidence that defendant asported the victim for purposes of OV 8. MCL 777.38(1)(a) “directs the trial court to add fifteen points in scoring OV 8 if a victim was asported to another place of greater danger or to a situation of greater danger or was held captive beyond the time necessary to commit the offense.” *People v Spanke*, 254 Mich App 642, 646-647; 658 NW2d 504 (2003) (quotations and citations omitted). Asportation does not require the use of force, and the movement can even be voluntary. *Id.* at 647-648. Therefore, the victim’s initial consent to the change of locations is not relevant. Furthermore, Kienbaum testified that defendant continued to drive after the victim became nervous and attempted to escape and after his codefendants attacked the victim.

Affirmed.

/s/ William B. Murphy
/s/ Peter D. O’Connell
/s/ Jane M. Beckering