STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 25, 2006
v	No. 259867 Benzie Circuit Court
JOHN THOMAS ROBERTSON, Defendant-Appellant.	LC No. 03-001865-FC

Before: Davis, P.J., and Sawyer and Schuette, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for second-degree murder, 750.317, unlawfully driving away an automobile, 750.413, and felony-firearm, 750.227b. The jury found defendant not guilty of first-degree murder or armed robbery. Defendant was sentenced as a third-offense habitual offender, MCL 769.11, to life imprisonment for second-degree murder, to 57 months' to 10 years' imprisonment for unlawfully driving away an automobile, and to four years for felony-firearm. We reverse defendant's felony-firearm sentence and remand for resentencing to two years. We otherwise affirm.

This case arose out of the shooting death of Lillian Mae Ross, defendant's grandmother. Defendant and a friend, Robert Eckstein, provided similar stories of a journey that involved, in pertinent part, Eckstein stealing a car that turned out to contain a handgun. Eckstein and defendant drove to defendant's grandmother's house for the purpose of obtaining money from her, although they never actually told her so. Instead, they initially asked for help getting another of their vehicles unstuck, whereupon Ross recommended that they call the police for help. Defendant, apparently fearing incarceration if the police were called, struck Ross on the head with the gun, dragged her down a hall to her bedroom, and shot her in the neck. Defendant and Eckstein then took Ross' car and left the state. Eckstein was taken into custody in Okalahoma, and defendant was taken into custody in Las Cruces, New Mexico. Defendant's custodial statements confessing to killing Ross were admitted into evidence.

Defendant first argues that he was denied a fair trial by the trial court's refusal to permit expert testimony that he had a mental illness that precluded him from forming the specific intent to commit first-degree premeditated or second-degree murder. We disagree.

There is no record of a ruling on this issue adverse to defendant, but because there is some indication that a decision might have been made off the record in chambers, we presume

there was an adverse ruling. A trial court's decision whether to admit evidence is ordinarily reviewed for an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). However, preliminary legal questions whether the evidence is admissible are reviewed de novo. *Id*. Our Supreme Court has explained that a criminal defendant may not "introduce evidence of mental abnormalities short of legal insanity to avoid or reduce criminal responsibility by negating specific intent." *People v Carpenter*, 464 Mich 223, 226; 627 NW2d 276 (2001). Defendant's argument is that *Carpenter* was wrongly decided. We decline to address this argument. *Carpenter* is binding precedent on this Court. *People v Tierney*, 266 Mich App 687, 713; 703 NW2d 204 (2005). Unless our Supreme Court overrules *Carpenter*, this Court remains bound to apply it. *People v Mitchell*, 428 Mich 364, 369-370; 408 NW2d 798 (1987). Even if there had clearly been a ruling adverse to defendant on the record, evidence of mental deficiency less than insanity is not admissible to negate specific intent.

Defendant next argues that the trial court erred in refusing to suppress his custodial statements to police. Defendant objects to the police officers' failure to obtain an explicit waiver of his constitutional right against coerced self-incrimination. We review a trial court's findings of fact at a suppression hearing for clear error. *People v Mendez*, 225 Mich App 381, 382; 571 NW2d 528 (1997). Although defendant did not explicitly state, in so many words, "I understand and waive my rights," we find his statements voluntary and therefore admissible.

"Statements of an accused made during custodial interrogation are inadmissible unless the accused voluntarily, knowingly, and intelligently waived his Fifth Amendment rights." *People v Harris*, 261 Mich App 44, 55; 680 NW2d 17 (2004), citing *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966). The proper inquiry is not whether the police provided any "talismanic incantation," but rather on a case-by-case analysis whether the defendant, under the circumstances, was actually given a reasonable appraisal of his rights. *California v Prysock*, 453 US 355, 359-361; 101 S Ct 2806; 69 L Ed 2d 696 (1981). Here, defendant was actually advised before he was questioned "that he had a right to remain silent, that his statements could be used against him, and that he had the right to retained or appointed counsel." *Harris*, *supra* at 55, citing *Dickerson v United States*, 530 US 428, 435; 120 S Ct 2326; 147 L Ed 2d 405 (2000). Defendant twice indicated that he understood these rights, and he then agreed to answer questions anyway. Our review of both the transcript and the video recording of his interrogation fails to suggest that defendant was unwilling to talk to the police officers. Defendant was adequately apprised of his rights, indicated his understanding of them, and voluntarily gave statements to the police after signifying that understanding, so his confession was admissible.

Defendant next argues that his life sentence for second-degree murder is invalid because the trial court relied on impermissible considerations in imposing it. We disagree. "If the trial court's sentence is within the appropriate guidelines range, the Court of Appeals must affirm the sentence unless the trial court erred in scoring the guidelines or relied on inaccurate information in determining the defendant's sentence." *People v Babcock*, 469 Mich 247, 261; 666 NW2d 231 (2003). Defendant's prior record variable (PRV) score was 45 points and his offense variable (OV) score was 231 points, so his ultimate PRV level is D, and his OV level is III. Second-degree murder, MCL 650.317, is a "class M2" felony with a statutory maximum sentence of life. MCL 777.16p. The sentencing guidelines grid for "class M2" offenses provides a minimum sentence range of 270 to 450 months or life in box III-D. MCL 777.61. Because defendant was

sentenced as a third-offense habitual offender, the upper limit of this range is increased by fifty percent. MCL 777.21(3)(b). Therefore, defendant's minimum sentence range under the statutory guidelines is 270 to 675 months or life, as correctly stated on defendant's sentencing information report after correction by the trial court. Because a life sentence is an appropriate sentence within the correctly scored guidelines, and there is no allegation that the trial court relied on inaccurate information, we must affirm the sentence with no further inquiry. *Babcock*, *supra*.

Defendant also argues that his four-year sentence for felony-firearm is an impermissible sentence. We agree. The felony-firearm statute provides a fixed, mandatory two-year sentence for the first offense, a five-year sentence for the second offense, and a ten-year sentence for any further offenses. MCL 750.227b(1). The habitual offender act, MCL 769.11, does not apply to felony-firearm. *People v Honeycutt*, 163 Mich App 757, 759-762; 415 NW2d 12 (1987). There is no indication that defendant was previously convicted of felony-firearm. Therefore, any sentence other than two years was unauthorized. Defendant's felony-firearm sentence must be reduced to two years.

Defendant next argues that he was denied a fair trial by several instances of prosecutorial misconduct. "We review de novo unpreserved claims of prosecutorial misconduct to determine whether defendant was denied a fair trial." *People v Wilson*, 265 Mich App 386, 393; 695 NW2d 351 (2005). Any alleged impropriety is viewed on a case-by-case basis in the context of all other facts and evidence in the case. *People v Bahoda*, 448 Mich 261, 267 n 7; 531 NW2d 659 (1995). We find one of the prosecutor's remarks immoderate, but we find nothing in the record to indicate that defendant was prejudiced thereby or denied a fair trial.

In his opening statement, the prosecutor noted that Eckstein was a thief, a convicted felon, and "not the prosecution's favorite kind of witness." During closing argument, the prosecutor observed that in his opinion, Eckstein "turned out to be a very credible witness." Defendant contends that this constituted improper vouching. We disagree. A prosecutor may not "vouch for the credibility of his witnesses to the effect that he has some special knowledge concerning a witness' truthfulness." *Bahoda*, *supra* at 276. However, a prosecutor may argue, on the basis of evidence presented, that a witness is worthy of belief, especially where that witness' credibility is actually debated. *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004). Here, there was ample testimony presented that Eckstein was deceitful, "a creep," and a manipulator. Part of defendant's trial strategy was to discredit Eckstein. It was not improper vouching for the prosecutor to urge the jury to find Eckstein worthy of belief on the basis of other evidence presented in the case, such as other testimony harmonious with Eckstein's and the fact that Eckstein's life sentence meant he had no motivation to lie, even if he was of poor character generally.

Defendant contends that it was misconduct for the prosecutor to mention the large blood trail left on the floor in Ross' house and to opine that Ross might have died from the initial blow. The former remark was amply supported by the evidence. The prosecutor agrees that the latter remark was gratuitous. However, Eckstein testified that he initially believed Ross actually had been killed by the first blow, and in any event the remark tended, if anything, to undermine the prosecutor's own case for first-degree premeditated murder. The prosecution's theory was that defendant premeditated in the time between first striking Ross and then shooting her, so killing her at once would be incompatible with premeditation. We see no impropriety in either remark.

Defendant also contends that the prosecutor impermissibly personally attacked defendant and trial counsel by asserting that defendant "would have [the jury] focus on anything but the truth" and that defendant should not have compared himself to Senator John McCain. When viewed in context, these remarks were properly responsive to defendant's arguments. The prosecutor merely pointed out that certain of defendant's arguments had no bearing on whether defendant actually committed any of the elements of the charged offenses.

Defendant contends that the prosecutor committed misconduct by telling the jury that the voluntariness of defendant's videotaped confession in Las Cruces had already been determined, otherwise the jury would not be viewing it, and by telling the jury that "[i]nherently you don't" lie when "confessing to crimes." This Court has found it to be poor practice for a trial court to inform a jury of its previous determination that a statement was voluntary. *People v Williams*, 46 Mich App 165, 169-170; 207 NW2d 480 (1973). However, defendant was afforded ample opportunity to show and argue that the statements, even if voluntary, were nevertheless unreliable or untrue. The trial court instructed the jury to determine whether defendant actually made those statements and that it should give those statements "whatever weight you think it deserves" in light of the circumstances of how they were made and the other evidence in the case. Under the circumstances of the case, the prosecutor's statement to the jury that defendant's confession had been deemed voluntary was not prejudicial.

Defendant contends that the prosecutor made an improper civic duty argument and appeal to sympathy during closing argument by twice referring to the four minutes Ross likely lived between the time defendant struck her with the gun and the time he shot her. A prosecutor may not "appeal to the jury's civic duty by injecting issues broader than guilt or innocence," although the prosecutor is free to argue "all inferences relating to his theory of the case." *Thomas*, *supra* at 455-456. "Appeals to the jury to sympathize with the victim constitute improper argument." *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001).

We agree that it was improper for the prosecutor to state that he considered "ask[ing] you what you thought about for four minutes. And would it be something different if it's the last four minutes of your life and you weren't thinking about the excruciating pain from a giant hole in your neck at the time?" However, there was no debate that defendant actually killed Ross. The trial court instructed the jury not to "let sympathy or prejudice influence [its] decision." The gravamen of the prosecutor's appeal to the jury was for the jury to find defendant guilty of first-degree murder, whereas defense counsel's contention was that defendant was, at most, only guilty of second-degree murder. The jury in fact found defendant *not* guilty of first-degree murder. Therefore, although these statements went beyond proper argument, "it is highly probable that" they "did not contribute to the verdict." *People v Mitchell* (*After Remand*), 231 Mich App 335, 339; 586 NW2d 119 (1998). It is therefore harmless. Because this is the only error we find, we decline to consider defendant's argument concerning cumulative errors.

Defendant finally contends that, if we affirm his convictions and sentences because of trial counsel's failure to preserve these issues by properly objecting, he received ineffective assistance of counsel. A claim of ineffective assistance of counsel requires a defendant to show that counsel's performance fell below an objectively reasonable standard and that if counsel had not erred there is a reasonable probability that the outcome would have been different. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003). Our decision today does not depend on trial counsel's lack of objection. Because defendant was not in any way prejudiced, and

because defendant raises no other assertions of error by trial counsel, defendant was not denied effective assistance of counsel.

Affirmed.

/s/ Alton T. Davis
/s/ David H. Sawyer
/s/ Bill Schuette