STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES DEVEN HARRIS,

Defendant-Appellant.

UNPUBLISHED
February 14, 1997

No. 181455

Washtenaw Circuit Court
LC No. 94-1943-FC

Before: Markman, P.J., and O'Connell and D. J. Kelly, JJ.*

PER CURIAM.

Defendant appeals by right his jury trial conviction of armed robbery, MCL 750.529; MSA 28.797, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant pled guilty to habitual offender - second felony, MCL 769.10; MSA 28.1082. We affirm.

This matter arises out of a car-jacking. The driver and two passengers of the vehicle in question testified that defendant stole it from them at gunpoint while they were parked at a gas station. Complainants called the police, the police spotted the vehicle and a high-speed chase ensued. It ended when the vehicle crashed and the defendant had to be removed from the vehicle with heavy equipment. Defendant testified at trial and did not dispute that he was driving the stolen vehicle when he was arrested. But he contended that he did not steal the vehicle from complainants and only drove it because his cousin's friend had threatened him.

Defendant's first claim is that the trial court erred in denying his request for a jury instruction on receiving or concealing stolen property (RCSP). At trial, defendant contended that RCSP is a cognate lesser offense of armed robbery. On appeal, he contends that RCSP is a necessarily included lesser offense of armed robbery.[1] RCSP is not a cognate lesser offense of armed robbery. *People v Jackson*, 158 Mich App 544, 558-559; 405 NW2d 192 (1987); *People v Harris*, 82 Mich App 135,

* Circuit judge, sitting on the Court of Appeals by assignment.

137; 266 NW2d 477 (1978) overruled on other grounds *People v Hendricks*, 446 Mich 435, 450, n 20; 521 NW2d 546 (1994). A fortiori, RCSP is not a *necessarily included* lesser offense of armed robbery. See also *Harris*, at 137.[2] Accordingly, defendant's claim that the trial court was obligated to give a jury instruction regarding RCSP because it is a necessarily included lesser offense of armed robbery fails.

Defendant next claims that the trial court erred in denying his motion to suppress an inculpatory statement. In response to police questioning regarding how he got into the vehicle at issue, defendant responded "I told them to get out." Defendant contends that he did not voluntarily waive his rights to counsel and against compelled self-incrimination prior to making this statement. To be effective, a waiver of *Miranda*[3] rights must be knowing and intelligent. *People v Brannon*, 194 Mich App 121, 130; 486 NW2d 83 (1992).

> When reviewing the voluntariness of a statement, we review the trial court's determination after a review of the entire record, and an independent determination is made by this Court. However, great deference is given to the trial court's assessment of the credibility of witnesses, and its findings of fact will not be reversed unless clearly erroneous. [*Brannon*, *supra* at 131.]

Here, defendant, following his car accident, was handcuffed to a gurney in a hospital when a police officer approached him. The officer informed him of his *Miranda* rights and defendant responded that he understood them and was willing to discuss the incident. The officer asked how he got into the vehicle at issue and defendant responded, "I told them to get out." Defendant then indicated that he wanted a lawyer present and the officer immediately discontinued questioning. The officer testified that defendant was alert and provided appropriate and responsive answers to the questions asked. He testified that defendant did not appear to be under the influence of alcohol or narcotics and did not indicate that he needed food, water, or rest. The officer also testified that the head nurse attending defendant indicated that he had received no medication and was alert and responsive. The totality of these circumstances indicate that defendant voluntarily waived his *Miranda* rights. The fact that defendant was sufficiently alert to cut off questioning by requesting counsel is particularly persuasive evidence that his prior waiver of *Miranda* rights was voluntary.[4] Accordingly, the trial court did not err in denying defendant's motion to suppress the statement on this basis.

Finally, defendant claims that he was denied his constitutional right to confrontation by the trial court's refusal to order the prosecution to disclose the criminal records of its witnesses. Specifically at issue are criminal histories available through the Law Enforcement Information Network (LEIN). Trial court rulings regarding discovery in criminal cases are reviewed for an abuse of discretion. *People v Lemcool*, 445 Mich 491, 498; 518 NW2d 437 (1994). In *People v Mack*, 218 Mich App 359, 361-362; 554 NW2d 324 (1996), this Court held that failure to order the prosecution to prepare LEIN reports on its witnesses upon a defendant's request constituted an abuse of discretion.[5] Therefore, under *Mack* (which was decided after the proceedings below in the present case) the trial court's decision not to allow defendant access to LEIN information regarding the prosecution witnesses would constitute error. However, such an error is subject to harmless error analysis. *Mack*, *supra* at 364.

> Harmless-error analysis, when constitutional issues are involved, calls for a two-step inquiry. First, we must determine whether the error is harmless beyond a reasonable doubt. This test is met if the error had no effect on the verdict. Second, we must determine whether the error was so offensive to the maintenance of a sound judicial system that it can never be regarded as harmless. This standard is met when the error was deliberately injected by the prosecutor, if it deprived defendant of a fundamental element of the adversarial process, or if it was particularly persuasive or inflammatory. [*Mack*, at 364; citations omitted.]

Here, convincing evidence supported defendant's conviction of armed robbery. The police found defendant driving the vehicle. Although defendant denied taking the vehicle from the complainants, two of the complainants identified defendant in a line-up, all three complainants testified that they saw defendant take the vehicle and drive away in it, and a police officer testified that defendant told him that he obtained the vehicle when he told the occupants to "get out." In the context of this substantial evidence supporting defendant's conviction, any error in restricting defendant's ability to impeach prosecution witnesses could not have affected the verdict and was therefore harmless beyond a reasonable doubt. See *Mack*, at 364. Moreover, the prosecution submitted additional information on appeal that demonstrates that none of its witnesses had a criminal history; accordingly, any error in denying discovery of LEIN information here was harmless beyond a reasonable doubt. This error was not so offensive to our judicial system that it could never be regarded as harmless. *Id*. Although the prosecutor requested that the court deny the discovery request, any error was the court's alone and was not particularly persuasive or inflammatory in the context of the overwhelming evidence against defendant. See *Mack*, at 364-365. Accordingly, any error in denying defendant's discovery request was harmless and does not require reversal of defendant's conviction.

For these reasons, we affirm defendant's judgment of sentence.

Affirmed.

/s/ Stephen J. Markman
/s/ Peter D. O'Connell
/s/ Daniel J. Kelly

[1] We believe that the difference in defendant's arguments below and on appeal is relatively minor. His essential claim of error is the same: the trial court erroneously failed to instruct the jury regarding a charge on which it was required to instruct. We accordingly find the issue sufficiently preserved to address it on the merits.

[2] Defendant cites *People v Hunter*, 77 Mich App 759; 259 NW2d 216 (1977), in support of his argument that receiving or concealing stolen property is a necessarily included offense of armed

robbery. *Hunter* does not support this proposition; rather, it clearly states that the two charges are distinct offenses. *Hunter*, at 762.

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

[4] Defendant cites *Mincey v Arizona*, 437 US 385; 98 S Ct 2408; 57 L Ed 2d 290 (1978) in support of his position that his waiver was involuntary. However, the present case is readily distinguishable from *Mincey*, in which the defendant was in intensive care; slipped in and out of consciousness; was receiving medication; was attached to tubes, a catheter and intervenous feeding devices; and repeatedly requested that the interrogation stop until he could get a lawyer.

[5] Because we ultimately find that any error regarding this issue was harmless, this holding of *Mack* is not dispositive here. Accordingly, the present matter does not require us to consider whether the *Mack* Court correctly decided this issue.