

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WORDEN E. GRAY,

Defendant-Appellant.

UNPUBLISHED

April 1, 1997

No. 178832

Oakland Circuit Court

LC No. 93-127811-FC

Before: McDonald, P.J., and Griffin and Bandstra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of first-degree murder, MCL 750.316; MSA 28.548, and two counts of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to life imprisonment for the murder convictions, and two years' imprisonment for the felony-firearm convictions. Defendant now appeals as of right. We affirm.

Defendant first argues that his constitutional rights were violated by the introduction of his confession at trial. Defendant alleges that the confession was obtained after he had asserted his right to counsel and his right to remain silent. Defendant requested and received a *Walker*¹ hearing regarding the admissibility of his statement. The trial court ruled that defendant's statements were admissible at trial. When reviewing a trial court's findings in a *Walker* hearing, this Court must examine the entire record and make an independent determination on the issue of voluntariness. *People v Robinson*, 386 Mich 551, 557; 194 NW2d 709 (1972); *People v Young*, 212 Mich App 630, 634; 538 NW2d 456 (1995). However, we must give deference to the trial court's findings. *People v Cheatham*, 453 Mich 1, 29; 551 NW2d 355 (1996). This Court will not disturb a trial court's factual findings regarding a voluntary, knowing and intelligent waiver of *Miranda*² rights unless that ruling is found to be clearly erroneous. *Id.* at 30; *People v Armstrong*, 207 Mich App 211, 214; 523 NW2d 828 (1994). A finding is clearly erroneous if it leaves this Court with a definite and firm conviction that a mistake has been made. *People v McElhaney*, 215 Mich App 269, 273; 545 NW2d 18 (1996).

We find that defendant's confession was not taken in violation of his right to counsel. Where a defendant unequivocally invokes his right to counsel, the police must cease questioning him until an attorney is present. *People v Granderson*, 212 Mich App 673, 678; 538 NW2d 471 (1995) (citing *Edwards v Arizona*, 451 US 477; 101 S Ct 1880; 68 L Ed 2d 378 (1981)). However, the trial court found that defendant did not request an attorney before he was questioned. This conclusion was supported by the testimony of the officers at the hearing but conflicted with defendant's testimony. Obviously, resolution of this issue required a determination as to the relative credibility of the officers and defendant. "If there is conflicting evidence and the determination of voluntariness is largely dependent upon the credibility of witnesses, the appellate court should defer to the trial court's findings." *People v Catey*, 135 Mich App 714, 721; 356 NW2d 241 (1984). Because the trial court's finding on this issue was not clearly erroneous, it will not be disturbed.

Defendant also argues that his statement was taken in violation of his right to remain silent. Defendant did not argue this issue at his *Walker* hearing, but this Court may review it if it is outcome determinative. *Catey, supra* at 722. "This Court has recognized that . . . a suspect is free at any time to exercise his right to remain silent, and all interrogation must cease if such right is asserted." *Id.* However, "[o]nce a defendant chooses to remain silent, the police are permitted to seek a clarification of an equivocal exercise of that right." *Id.* at 726. Here, the trial court found that defendant's remark, "I don't want to make any statements at this time," was equivocal. While the trial court only addressed this question as it related to defendant's right to counsel, it applies equally to his right to remain silent. Defendant's invocation of his right to remain silent was qualified; he did not want to make a statement "at this time." Under these circumstances, the police properly sought to clarify this issue. See *People v Todd*, 186 Mich App 625, 628-629; 465 NW2d 380 (1990); *Catey, supra* at 723-724. Thus, the police questioning did not violate defendant's right to remain silent. The trial court properly found that defendant's subsequent waiver of his rights was valid, and his statement was therefore admissible.

Defendant also argues that he was intoxicated at the time he gave his statement. "While advanced intoxication . . . may preclude an effective waiver, . . . the fact that a person was narcotized or under the influence of drugs is not dispositive of the issue of voluntariness." *People v Leighty*, 161 Mich App 565, 571; 411 NW2d 778 (1987). Because there was conflicting evidence on the question of defendant's intoxication, the trial court's finding that defendant knowingly and voluntarily waived his rights was not clearly erroneous.

Defendant next argues that his postarrest, post-*Miranda* silence was improperly used against him. A defendant's postarrest, post-*Miranda* silence may not be used against him, except for certain limited impeachment purposes.³ *People v Sutton (After Remand)*, 436 Mich 575, 592-593; 464 NW2d 276 (1990). This result stems from the court's recognition that it would be unfair to advise a defendant that he has a right to remain silent, and then penalize him for exercising that right. *Id.*

We must first determine whether evidence of defendant's postarrest silence was erroneously introduced at trial. Because this issue was not raised at trial, it is reviewed de novo. *Catey, supra* at 722. If the evidence was introduced in violation of defendant's constitutional rights, then this Court must reverse unless the prosecution can show beyond a reasonable doubt that there is no reasonable

possibility that the evidence complained of might have contributed to the conviction. *People v Anderson (After Remand)*, 446 Mich 392, 405-406; 521 NW2d 538 (1994).

At trial, both parties brought out the fact that defendant initially declined to make a statement. However, defendant did not, in fact, exercise his right to remain silent. Instead, he indicated that he did not want to make a statement “at this time.” Shortly thereafter, defendant made a statement. Under these circumstances, the prosecution did not use defendant’s silence against him by simply pointing out that he initially declined to make a statement. A defendant’s silence is used against him when the prosecution attempts to use his postarrest, post-*Miranda* silence to impeach his testimony on the stand. *Sutton, supra* at 592-93. Typically, the defendant’s testimony will be exculpatory, and the prosecution will try to introduce evidence of defendant’s silence to suggest that he is lying. Courts do not permit this use of a defendant’s postarrest, post-*Miranda* silence, based on the theory that, after a defendant has been read his rights, his silence “has no probative value because silence in the wake of these warnings may be nothing more than the arrestee’s exercise of these *Miranda* rights.” *Sutton, supra* at 593. Thus, had the prosecution attempted to use defendant’s silence to impeach his trial testimony, defendant’s rights would have been violated. Here, the prosecution did not attempt to make such use of the evidence and defendant’s rights were not violated. See *People v Truong (After Remand)*, 218 Mich App 325, 336-337; 553 NW2d 692 (1996).

Defendant next argues that the prosecutor made improper arguments to the jury. Specifically, defendant argues that the prosecutor asked the jury to consider the penal consequences of his conviction and tried to use sympathy for the victims and defendant’s lack of remorse to convict him. Defendant did not object to the prosecutor’s allegedly improper remarks at trial. Absent an objection at trial, this Court may not review a prosecutor’s improper remarks unless a curative instruction could not have eliminated the prejudicial effect or the failure to consider the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994), cert den sub nom *People v Caruso*, 513 US ___; 115 S Ct 923; 130 L Ed 2d 802 (1995). Here, any error caused by the prosecutor’s remarks could have been cured by an appropriate instruction, and no miscarriage of justice will result from our failure to consider this issue.

Finally, defendant argues he was denied a fair trial when the prosecutor asked him whether he had read the jury instructions on first-degree murder. He argues that this line of questioning impermissibly burdened his right to assist in his own defense. This Court reviews questions of prosecutorial misconduct on a case by case basis and evaluates the prosecutor’s remarks in context. The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *McElhaney, supra* at 283.

Here, the prosecutor’s remarks regarding defendant’s access to and knowledge of the law regarding the elements of first-degree murder were properly directed at impeaching defendant’s credibility. We have held that a defendant’s right to assist in his own defense is chilled when a prosecutor attempts to use the defendant’s exercise of that right as evidence of guilt. *People v Sterling*, 154 Mich App 223, 232; 397 NW2d 182 (1986). In *Sterling*, this Court characterized the prosecutor’s remarks as “a calculated and pervasive strategy of penalizing the defendant for the

exercise of his constitutional rights by characterizing defendant's actions as manipulative abuses of the 'system.'" *Id.* This Court essentially found that the prosecutor's remarks were irrelevant and prejudicial. *Id.* However, the present case is distinguishable from *Sterling*. Here, the prosecutor was not attempting to use defendant's knowledge of the jury instructions as evidence of guilt. Instead, she was using it to impeach defendant's testimony. We believe the appropriate analysis was set out by our Supreme Court in *People v Buckey*, 424 Mich 1; 378 NW2d 432 (1985). The Court in *Buckey* held that a prosecutor's comments regarding the defendant's presence at trial are permissible when they address the defendant's credibility:

Opportunity and motive to fabricate testimony are permissible areas of inquiry of any witness. Both arguments in the instant cases presented the prosecutions' theory that defendants' testimony appeared to be carefully drawn explanations of the testimony presented. [*Id.* at 15.]

The same logic applies here. Because defendant's testimony appears to have been carefully scripted around the elements of first-degree murder, the prosecutor was properly permitted to question defendant regarding defendant's knowledge of those elements. *Buckey* is not inconsistent with *Sterling*; both cases stand for the proposition that such an argument is only proper where it is relevant. Under these circumstances, the prosecutor's questions were proper.

Affirmed.

/s/ Gary R. McDonald
/s/ Richard Allen Griffin
/s/ Richard A. Bandstra

¹ *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

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

³ Here, it is clear that the impeachment exception does not apply.