

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOE TILLMAN, III,

Defendant-Appellant.

UNPUBLISHED

January 30, 1998

No. 190077

Saginaw Circuit Court

LC No. 94-008977-FC

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHNNY WALKER EZELL,

Defendant-Appellant.

No. 190937

Saginaw Circuit Court

LC No. 94-008976-FC

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Before: Fitzgerald, P.J., and O’Connell and Whitbeck, JJ.

PER CURIAM.

Following trial, a jury convicted defendants of first-degree murder, MCL 750.316; MSA 28.548, armed robbery, MCL 750.529; MSA 28.797, and conspiracy to commit both first-degree murder and armed robbery, MCL 750.157a; MSA 28.354(1). The trial court sentenced defendant Joe Tillman, III (“Tillman”) to life imprisonment without the possibility of parole for the first-degree murder conviction and to life imprisonment for the conviction of conspiracy to commit armed robbery. The trial court dismissed Tillman’s convictions for armed robbery and conspiracy to commit first-degree murder on double jeopardy grounds. The trial court sentenced defendant Johnny Walker Ezell (“Ezell”) to life imprisonment without the possibility of parole for the first-degree murder conviction and concurrent terms of life imprisonment for the remaining convictions. Defendants filed separate appeals as of right, and we consolidated for review. We affirm.

## I

Tillman first argues that the trial court made several instructional errors in its charge to the jury. In particular, Tillman claims the court erred in denying his request to give a voluntary manslaughter instruction. We disagree. Contrary to Tillman's argument, voluntary manslaughter is a cognate lesser included offense of murder and not a necessarily included offense. *People v Pouncey*, 437 Mich 382, 388; 471 NW2d 346 (1991). A cognate lesser included offense shares several elements with, and is in the same class of offenses as, the greater crime. However, unlike a necessarily included offense, a cognate lesser included offense contains some elements not found in the greater offense. *Id.* at 387 and n 4. Voluntary manslaughter is a cognate lesser included offense to murder because it includes the element of provocation not required for a murder conviction. See *id.* at 388. A trial court must only to give an instruction on a cognate lesser offense if it is consistent with the evidence and defendant's theory of the case. *People v Lemons*, 454 Mich 234, 254; 562 NW2d 447 (1997).<sup>1</sup> Voluntary manslaughter requires a showing that the killing was done in the heat of passion caused by adequate provocation. *Pouncey, supra*.

In this case, there was no evidence of heat of passion or provocation. In addition, Tillman's theory of the case was that he was not present at the killing. Tillman did not assert that he killed in the heat of passion or provocation. Tillman lists several other offenses on which he asserts the jury should have been instructed. However, Tillman abandoned these arguments because he makes no showing as to why failure to review these unrequested instructions would constitute manifest injustice or even why these instructions should have been given. *People v Kent*, 194 Mich App 206, 209-210; 486 NW2d 110 (1992).

## II

Tillman also argues that the trial court erred in refusing to give a cautionary instruction regarding Ezell's statement to a witness about killing someone. However, the record indicates that the trial court gave a cautionary instruction. Tillman argues that the trial court erred in failing to instruct the jury that its verdict had to be unanimous as to the grounds upon which he could be convicted. The trial court gave a very clear and specific instruction on the need for the verdict to be unanimous. Manifest injustice will not result if we decline to review these unpreserved issues further. *People v Torres (On Remand)*, 222 Mich App 411, 423; 564 NW2d 149 (1997).

## III

Tillman argues that the trial court used an improper method in conducting the jury voir dire. Tillman did not preserve this issue through an objection in the trial court. *People v Lewis*, 160 Mich App 20, 32; 408 NW2d 94 (1987). In any event, the trial court's practice was not in violation of MCR 2.511 and was not the "struck jury" method the Michigan Supreme Court condemned in *People v Miller*, 411 Mich 321; 307 NW2d 335 (1981).

## IV

Defendants claim that the trial court abused its discretion in admitting the testimony of a witness who said that, a few days prior to the killing, defendants, the witness and others were listening to rap music and talking about how they would kill someone. The witness said that she did not take the talk seriously. A statement of general intent is not a prior act for purposes of MRE 404(b), but is instead an admission of a party-opponent. Admissibility is determined by the statement's relevance and by whether its probative value is outweighed by its possible prejudicial effect. *People v Milton*, 186 Mich App 574, 576; 465 NW2d 371 (1990). The evidence about which defendants complain had minimal relevance to this case as there was no talk of beating someone to death -- the manner of death in the instant case -- or of targeting the victim. The relevance of the testimony was that defendants were willing to kill someone. The possible prejudicial effect was also minimal, as the witness said that everyone present at the time was talking about killing someone and that she did not take it seriously. The trial court did not abuse its discretion in admitting this testimony as its possible prejudicial effect did not outweigh its probative value.

## V

Tillman claims that the trial court erred in admitting the statement of Ezell after the killing that, "We done killed us a motherfucker." Tillman did not object below and did not preserve this issue. *People v Considine*, 196 Mich App 160, 162; 492 NW2d 465 (1992). In any event, that statement was admissible against Ezell in this joint trial as an admission by a party-opponent. MRE 801(d)(2)(A).

## VI

Tillman argues that we should reverse his convictions because there was a systematic exclusion of blacks from the jury array. There was no objection in the trial court on such a basis and Tillman thus did not preserve this issue. *People v Dixon*, 217 Mich App 400, 404; 552 NW2d 663 (1996). In addition, Tillman did not preserve this claim for appellate review because he did not create *any* factual record to support the claim. *Id.* Tillman further argues that he was denied effective assistance of counsel when his trial counsel failed to assess the jury array prior to trial. Tillman has utterly failed to demonstrate that his counsel's performance fell below an objective standard of reasonableness or that it so prejudiced him as to deny him a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). In particular, even on appeal, Tillman failed to present *any* evidence to support a need for trial counsel to have brought a motion regarding the jury array. The law does not require trial counsel to file a frivolous motion. *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991).

## VII

Defendants argue that the trial court abused its discretion in admitting certain photographs of the victim at the crime scene. We disagree. The jury can view photographs to determine the credibility of both lay and expert witnesses. *People v Mills*, 450 Mich 61, 72-73; 537 NW2d 909 (1995), modified on other grounds 450 Mich 1212 (1995). Even when a defendant does not dispute an element of the crime, the prosecutor still has the burden of proving every element of the crime beyond a reasonable doubt. *Id.* at 69. The photographs in this case were relevant to the issue of intent, since the

charge was murder and intent to kill is an element of first-degree murder. *People v Haywood*, 209 Mich App 217, 229; 530 NW2d 497 (1995).

The photographs showed the nature of the victim's injuries. They were therefore relevant to the jury's determination of whether defendants inflicted those injuries with an intent to kill. Also, aspects of the photographs tended to corroborate testimony about the circumstances in which the victim's body was discovered and the testimony from a witness in which she asserted that defendants had told her about killing the victim. Defendants have not shown that the danger of unfair prejudice in connection with admission of those photographs "substantially outweighed" their probative value. *Mills, supra* at 74-75.

## VIII

Defendants argue that the trial court abused its discretion in finding that witness Donald Curry ("Curry") was unavailable as a witness for trial. We disagree. *People v Hayward*, 127 Mich App 50, 58; 338 NW2d 549 (1983). The trial court properly found that a loss of memory is a valid reason for finding a witness unavailable. *Id.* at 56. Curry claimed not to remember the night in question and testified in a recalcitrant, if not contemptuous, manner that supported the admission of his prior testimony. See *People v Walton*, 76 Mich App 1, 5; 255 NW2d 640 (1977). In particular, when the prosecutor gave Curry an opportunity to review his preliminary examination testimony to refresh his memory, Curry refused to even look at the transcript. Defense counsel had an opportunity to question Curry at the preliminary examination and a similar motive at the prior hearing to develop or challenge Curry's testimony. The prosecution made a good faith effort to present Curry as a witness at trial. Therefore, the trial court's admission of this testimony did not violate the Confrontation Clause. See *People v Dye*, 431 Mich 58, 64-67 (Levin, J., joined by Cavanagh and Archer, JJ.), 93 (Brickley, J., concurring in this part of Justice Levin's opinion); 427 NW2d 501 (1988).

## IX

Ezell argues that the trial court erred in denying his motion to suppress the statement he gave to the police without prior *Miranda*<sup>2</sup> warnings. In particular, Ezell argues that the trial court erred in finding that he was not "in custody" at the time of his statement and, therefore, erred in finding that *Miranda* warnings were not necessary. The police must give *Miranda* warnings only when a person is subjected to custodial interrogation. *People v McElhaney*, 215 Mich App 269, 278; 545 NW2d 18 (1996). Custodial interrogation includes questioning by police after they take a person into custody. *People v Anderson*, 209 Mich App 527, 532; 531 NW2d 780 (1995). A person is in custody when the police deprive that person of freedom of action in a significant manner. *McElhaney, supra*. The key question is whether a person reasonably could have believed that the person was not free to leave. *Id.* Where there is no "custody," the fact that the person is the "focus" of an investigation does not require the reading of *Miranda* warnings. *People v Hill*, 429 Mich 382, 391; 415 NW2d 193 (1987). To determine whether the defendant was in custody at the time of an interrogation, the court must examine the totality of the circumstances. *People v Williams*, 171 Mich App 234, 237; 429 NW2d 649 (1988).

Here, the trial court did not err in finding that Ezell was not “in custody” for purposes of *Miranda* warnings when he gave his statement. Ezell requested that the police come to talk with him and voluntarily agreed to go to the police station for an interview. Notably, the United States Supreme Court has determined that where a person is not in custody or otherwise deprived of freedom of action in any significant way, the mere fact that voluntary questioning occurs at the police station does not require the administration of *Miranda* warnings. *Oregon v Mathiason*, 429 US 492, 493-495; 97 S Ct 711; 50 L Ed2d 714 (1977). Here, Ezell went to the police station in an unmarked car with police officers who were not in uniform. The police officers did not handcuff Ezell or tell him that he could not leave. The police officers put Ezell into a room with a door leading to the hallway and stairway. Viewing the totality of the circumstances, we hold that the trial court correctly determined that Ezell was not in custodial interrogation until he requested an attorney. *Williams*, *supra* at 237.

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Peter D. O’Connell

/s/ William C. Whitbeck

<sup>1</sup> A requested instruction on a necessarily included lesser offense must be given regardless of the evidence presented in a particular case. *Lemons*, *supra* at 253-254.

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