

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BENJAMIN FRENCH,

Defendant-Appellant.

UNPUBLISHED

January 14, 2014

No. 308774

Ingham Circuit Court

LC No. 11-000197-FC

Before: OWENS, P.J., and BORRELLO and GLEICHER, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of two counts of first-degree murder, MCL 750.316, conspiracy to commit first-degree murder, MCL 750.157a, armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to serve concurrent prison terms of life without parole for the conspiracy and murder convictions and 12 to 25 years for the armed robbery conviction, and a consecutive two-year prison term for the felony-firearm conviction. We affirm.

This case arises out of the killing of two men who were shot in the head while inside a house they shared with others. The murder weapon was a nine-millimeter handgun owned by the father of defendant's coconspirator, David Marion, Jr. The investigation of the case involved law enforcement personnel from the Lansing Police, the Michigan State Police, and the Federal Bureau of Investigation.

Defendant first argues on appeal that the trial court erred in failing to suppress evidence of phone calls recorded between him and his coconspirator that originated in Illinois because the actions of the police in recording the phone calls constituted illegal eavesdropping. We disagree. We review de novo a trial court's decision regarding a suppression hearing, and we review for clear error the trial court's findings of fact at a suppression hearing. *People v Short*, 289 Mich App 538, 542; 797 NW2d 665 (2010).

Both the Michigan and United States Constitutions provide protections for individuals from unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, § 11. However, the United States Supreme Court has made it clear that the Fourth Amendment does not require a warrant to monitor and record phone calls when one party to the conversation consents. *United States v Caceres*, 440 US 741, 750; 99 S Ct 1465; 59 L Ed 2d 733 (1979); see also *People v*

Collins, 438 Mich 8, 23-24; 475 NW2d 684 (1991). Michigan’s Supreme Court has also held that the Michigan Constitution’s protection against unreasonable searches is construed to provide the same protection as the United States Constitution, absent “‘compelling reason’ to impose a different interpretation.” *Collins*, 438 Mich at 25-26. And our Supreme Court in *Collins* found that there was no compelling reason to afford greater protection than the Fourth Amendment provided in the context of “warrantless participant monitoring.” *Id.* at 40 (“What a confidant who hears it chooses to do with a secret—whether he whispers it, records it, or broadcasts it—is beyond the control of the teller. We reject the notion that a wrongdoer has a constitutionally protected expectation that his confidant will be unable to repeat accurately and credibly the communicated secret.”). Accordingly, because Marion, Jr. agreed to place monitored and recorded phone calls to defendant and signed the FBI’s consent form, the monitoring and recording of the phone calls did not violate the state and federal protections against unreasonable searches.

Nevertheless, defendant argues that because the phone calls originated in Illinois, the law of that jurisdiction would apply and the phone calls should be suppressed. Although the entire investigation was a joint operation between the Lansing Police, the Michigan State Police, and the FBI and the state police were present during the phone calls, the authorization to record the phone calls was obtained by federal agents pursuant to FBI protocol and the phone calls were made with the assistance of the FBI at the FBI office. Thus, at least with regard to the recording of the phone calls, the operation appears to be federal and federal law would apply. See *People v Sobczak-Obetts*, 253 Mich App 97, 103-104; 654 NW2d 337 (2002); *People v Paladino*, 204 Mich App 505, 508; 516 NW2d 113 (1994).¹ As discussed, the recording of the phone calls with Marion, Jr.’s consent did not violate defendant’s federal constitutional rights. Further, aside from citing nonbinding federal circuit court decisions, defendant fails to support his proposition that Illinois law applies. However, even under Illinois law, the recorded phone calls would still be admissible. Evidence of eavesdropping obtained in violation of Illinois law but in accordance with federal law is admissible “absent evidence of collusion between federal and state agents to avoid the requirements of state law.” *People v Coleman*, 227 Ill 2d 426, 439; 882 NE2d 1025 (2008). Collusion is defined as “a secret agreement” or “secret cooperation for a fraudulent or deceitful purpose.” *Id.* (quotation marks and citations omitted). There was no evidence of collusion in this case. The FBI became involved in the case and decided to lead the investigation when the Lansing Police contacted it for assistance two days after the homicides occurred and before defendant or Marion, Jr. were even identified as suspects. See *id.* (noting that collusion is less likely where a federal investigation is in progress). Defendant has failed to establish that the FBI’s involvement was part of a secret plan to circumvent Illinois law. Thus, the trial court did not err in denying defendant’s motion to suppress the phone calls.

¹ These cases discuss the “joint activity” rule, which states that “in a joint operation between the state and federal government, state law governs the validity of a search warrant in a state court.” *Sobczak-Obetts*, 253 Mich App at 103 (quotation marks and citations omitted). Although our Supreme Court has noted its disapproval of this rule, see *People v Sobczak-Obetts*, 463 Mich 687, 700-701 n 12; 625 NW2d 764 (2002), it declined to specifically address the propriety of it; thus, this rule is still binding precedent. See *Sobczak-Obetts*, 253 Mich App at 104-105.

Defendant also argues that the trial court erred in denying his motion to suppress his post-arrest confession, because his warrantless arrest was illegal since the police lacked probable cause that he committed a crime. We disagree. “A police officer may arrest an individual without a warrant if a felony has been committed and the officer has probable cause to believe that individual committed the felony.” *People v Kelly*, 231 Mich App 627, 631; 588 NW2d 480 (1998). The validity of an arrest is determined by whether probable cause to arrest existed at the time the officer made the arrest. *People v Lyon*, 227 Mich App 599, 611; 577 NW2d 124 (1998). Probable cause entails “a probability or substantial chance of criminal activity, not an actual showing of criminal activity.” *Id.*, citing *Illinois v Gates*, 462 US 213, 243 n 13; 103 S Ct 2317; 76 L Ed 2d 527 (1983). A court evaluating probable cause “must determine whether the facts available to the arresting officer at the moment of arrest would justify a fair-minded person of average intelligence in believing that the suspected individual had committed the felony.” *Kelly*, 231 Mich App at 631. Probable cause to arrest must be based on reasonably trustworthy information that would warrant a man of reasonable caution to believe an offense has been committed. *People v MacLeod*, 254 Mich App 222, 227-228; 656 NW2d 844 (2002).

Here, the police had probable cause to arrest defendant. Marion, Jr. stated during a police interview that he and defendant went to the home of the two victims to purchase marijuana. Marion, Jr. explained that defendant raised his arm and Marion, Jr. heard a pop while one of the victims fell to the ground. The following day, Marion, Jr. identified defendant as the individual that killed the two victims with a nine-millimeter handgun. However, defendant argues that Marion, Jr.’s statements to the police were not reliable as he was a codefendant and an informer. Information from an informant may establish probable cause for an arrest if an informant can provide specific information underlying the informant’s conclusion that the suspect committed the crime, the police are able to describe the underlying circumstances which convinced them that the informant was reliable or credible, and if the information from the informant, with other information the police possess, “would create an honest belief that probable cause existed in the mind of a reasonable and prudent person.” *People v Casey*, 102 Mich App 595, 599; 302 NW2d 248 (1980). Marion, Jr. was able to provide detailed descriptions of defendant’s involvement in the crime, while also implicating himself. He told the police he took the nine-millimeter handgun from his father, and the commander of the State Police Major Crimes Unit, Jamie Corona confirmed that his father owned a nine-millimeter handgun. His father admitted that he kept a trigger lock on the handgun, and there were pry marks on the trigger guard where the lock was formerly engaged. Corona also confirmed that the bullet casings at the scene matched the nine-millimeter handgun. Additionally, Marion, Jr. made phone calls to defendant in which defendant did not deny killing the two men. Marion, Jr.’s detailed statements and implication of guilt lend support to his credibility and his statements, along with the other evidence, would warrant a reasonable person to believe that defendant committed the offense. Thus, because the police had probable cause to arrest defendant, the trial court did not err in denying defendant’s motion to suppress his post-arrest confession.

Defendant next argues that the trial court improperly limited his closing argument. We disagree. We review a trial court’s ruling with regard to closing arguments for an abuse of discretion. *People v Lacalamita*, 286 Mich App 467, 472; 780 NW2d 311 (2009).

For a defendant, the purpose of closing argument is to allow him to comment on the evidence and to argue his theories to the jury. *People v Finley*, 161 Mich App 1, 9; 410 NW2d

282 (1987). A defendant's closing argument is a basic aspect of trial where the defendant attempts to persuade the jury of reasonable doubt of his guilt by presenting a version of the case, argue inferences from the evidence, and demonstrate weaknesses of the prosecutor's arguments. *Herring v New York*, 422 US 853, 858-859, 861-862; 95 S Ct 2550; 45 L Ed 2d 593 (1975).

Defendant cites *People v Thomas*, 390 Mich 93, 94-95; 210 NW2d 776 (1973), where the Court found that the defendant was denied his due process right to a hearing and right to the assistance of counsel when he was precluded from presenting a closing argument. However, here, defendant was not precluded from making his closing argument. The trial court merely limited a portion of it. Specifically, defendant was commenting during closing argument that a portion of his interview by a Michigan State Police detective, who conducted a polygraph examination of defendant, was not recorded, arguing that defendant's words were distorted in the detective's testimony. When defense counsel stated with respect to the interview that the detective "had the ability to make a record of it," the court called both counsel to the bench. Defendant finished his closing argument without further reference to an unrecorded interview. After closing argument, and outside the presence of the jury, defense counsel place his objection to the court's ruling on the record and moved for a mistrial. Counsel argued that he believed he was denied his right to comment on a matter that was in evidence. The trial court denied the motion for a mistrial, stating that it had allowed defense counsel to mention "three or four times" the failure to record part of the interview, but indicated that counsel's continued arguments regarding the failure to record the interview related to the portion of the interview when a polygraph examination was conducted and evidence of that was not admissible at trial.

A trial court has wide discretion and power in matters of trial conduct, such as limiting closing argument. *Barnett v Hidalgo*, 268 Mich App 157, 170; 706 NW2d 869 (2005), judgment rev'd on other grounds 478 Mich 151 (2007). Avoiding the possibility that the jury may infer that part of the interview was a polygraph examination was a reasonable justification for the trial court's action. See *People v Jones*, 468 Mich 345, 354; 662 NW2d 376 (2003) (finding that it was inappropriate for the prosecutor to ask about the polygraph test); *People v Ortiz-Kehoe*, 237 Mich App 508, 514; 603 NW2d 802 (1999) (noting that testimony concerning the polygraph was inadmissible). Further defendant was provided with a sufficient opportunity to comment to the jury on the unrecorded interview. Thus, the trial court did not err in limiting defendant's closing argument.

Lastly, defendant argues that his trial counsel provided ineffective assistance because he did not properly conduct plea negotiations. We disagree. "The denial of effective assistance of counsel is a mixed question of fact and constitutional law, which are reviewed, respectively, for clear error and de novo." *People v Brown*, 279 Mich App 116, 140; 755 NW2d 664 (2008).

A defendant's right to counsel is guaranteed by the United States and Michigan Constitutions. US Const, Am VI; Const 1963 art 1, § 20. To establish a claim of ineffective assistance of counsel a defendant must show (1) that counsel's performance was deficient and (2) that counsel's deficient performance prejudiced the defense. *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

Contrary to what defendant seems to suggest, "there is no constitutional right to plea bargain," and a prosecutor is not required to offer a plea. *Weatherford v Bursey*, 429 US 545,

561; 97 S Ct 837; 51 L Ed 2d 30 (1977). Here, defendant was never offered a plea. As the United States Supreme Court explained, the issue of ineffective assistance of counsel does not arise where “no plea offer is made.” *Lafler v Cooper*, 566 US ___, ___; 132 S Ct 1376, 1387; 182 L Ed 2d 398 (2012). Contrary to defendant’s argument, there is no law requiring defendant’s counsel to generate a favorable plea; only to advise him regarding actual offers. Accordingly, defendant has failed to demonstrate ineffective assistance of counsel.

Defendant further argues that the trial court erred in denying his request for an evidentiary hearing to determine whether his trial counsel provided ineffective assistance during the plea process. However, because no plea offer was made to defendant, the issue of ineffective assistance of counsel does not arise, and there is no need to develop a factual record.

Affirmed.

/s/ Donald S. Owens
/s/ Stephen L. Borrello
/s/ Elizabeth L. Gleicher