

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FREDRICK LEE RELERFORD,

Defendant-Appellant.

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UNPUBLISHED

May 2, 2006

No. 258963

Genesee Circuit Court

LC No. 04-014346-FC

Before: White, P.J., Whitbeck, C.J., and Davis, J.

PER CURIAM.

Defendant Fredrick Relerford and codefendant Glen Vary were tried jointly, before separate juries, for the murder of Robert Montgomery and assaults against Darwin McMullen. A jury convicted Relerford of first-degree felony murder,<sup>1</sup> second-degree murder,<sup>2</sup> assault with intent to do great bodily harm less than murder,<sup>3</sup> assault with intent to rob while armed,<sup>4</sup> and possession of a firearm during the commission of a felony.<sup>5</sup> The trial court sentenced Relerford to life imprisonment for the first-degree murder conviction, five to ten years' imprisonment for the assault with intent to do great bodily harm conviction, and 25 to 50 years' imprisonment for the assault with intent to rob conviction, those sentences to be served concurrently, but consecutive to a two-year term of imprisonment for the felony-firearm conviction. Relerford appeals as of right, and we vacate his second-degree murder conviction but affirm in all other aspects.

I. Basic Facts And Procedural History

A. Relerford's Statement

Before trial, Relerford moved to suppress his statement to the police, arguing that he did not knowingly and voluntarily waive his *Miranda*<sup>6</sup> rights. In his statement, which was

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<sup>1</sup> MCL 750.316(1)(b).

<sup>2</sup> MCL 750.317.

<sup>3</sup> MCL 750.84.

<sup>4</sup> MCL 750.89.

<sup>5</sup> MCL 750.227b.

<sup>6</sup> *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

videotaped and transcribed, Relerford confessed to shooting McMullen during an attempted robbery and stated that Vary shot and killed Montgomery. At a *Walker*<sup>7</sup> hearing, Relerford argued that his waiver was not voluntary because his father was not present during the interrogation and he did not understand his rights, despite having stated that he did.

At the hearing, Sergeant Shawn Ellis testified that he read Relerford his rights, Relerford stated that he understood each one, and Relerford agreed to waive his rights and speak to Sergeant Ellis. Sergeant Ellis also testified that Relerford appeared to understand all questions that were asked of him, and he did not appear to be mentally impaired. According to Sergeant Ellis, Relerford indicated that he was 18-years-old, had completed the tenth grade, was attending classes to obtain his GED, could read and write, was not taking any medications, was not under a doctor's care, and had not ingested any alcohol or drugs in the previous 24 hours. Sergeant Ellis stated that Relerford never requested an attorney or asked that the interview be stopped. Further, Relerford only indicated at the end of the interview that he wanted to speak with his father, and he was allowed to do so.

Relerford testified that he thought he had to speak to the police because they asked him to come to the police station. He admitted that he was advised of his rights and that he stated he understood them, but he testified that he really did not understand the rights or what it meant to waive his rights. Relerford said that he had no idea why he did not tell the police he did not understand and admitted that nothing affected his ability to understand. Relerford also testified that he asked Sergeant Ellis to explain the rights, but he received no such explanation. He denied telling Sergeant Ellis that he had been advised of his rights before. Relerford further stated that he asked to speak with his father and was told he could when the questioning was finished, but he did not specify at what point during the interview he made that request. Relerford did not testify that he felt obligated to give a statement in order to speak to his father.

The trial court noted that Relerford was 18-years-old, had a tenth-grade education, could read and write, had demonstrated his ability to read at the hearing, and was advised of his rights. The trial court found that Relerford voluntarily and knowingly waived his rights. Accordingly, the trial court declined to suppress Relerford's statement.

#### B. New Evidence

On the morning of the fourth day of trial, Vary's attorney informed the trial court that the prosecutor sought to introduce evidence that Montgomery was killed by a .44-caliber bullet. Apparently, the bullet had been misplaced and was just analyzed the previous day. Counsel stated that, therefore, he had been misled to believe that the .45-caliber handgun found on Julius McElroy, another shooting victim, was the murder weapon, but acknowledged that he did not believe it was done intentionally. Nevertheless, Vary's counsel moved for dismissal because of the standing mandatory discovery request and stated, "Now, this isn't the only thing we haven't been provided in this case," but he did not elaborate. He argued that the evidence changed his theory of the case because he had tried to show throughout trial that Vary did not possess the .45-

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<sup>7</sup> *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

caliber handgun. He also stated that he had a right to know the evidence ahead of time so he could prepare an effective defense.

The prosecutor stated that all the new evidence would show was that the bullet taken from Montgomery matched a spent bullet slug found at the scene. It could not be used to show that the same gun was used to shoot both Montgomery and McMullen. The prosecutor also stated that all parties read the initial ballistics report incorrectly, leading to the erroneous conclusion that the .45-caliber handgun found on McElroy was the murder weapon. She noted that the report did not actually state that conclusion. Relerford's attorney joined in the motion to dismiss because he understood the .45-caliber handgun to be the murder weapon. He stated, "I'm looking at a report that indicates that some test shots from bullets that matched the gun, so that is part of what led me to believe that perhaps the .45 was, in fact, the murder weapon." But Relerford's attorney also believed that the prosecutor did not intentionally withhold the evidence.

The trial court stated that the evidence only showed that one gun fired the fatal shot at Montgomery and that one of its spent bullets landed in the street. It noted that witnesses testified that they heard multiple shots. The trial court did not see a problem with the fact that the .45-caliber handgun was no longer alleged to be the murder weapon. The trial court concluded that the prosecutor did not withhold the evidence given that she had just found out about it herself. The trial court denied the motion to dismiss, but it did give Relerford and Vary an opportunity to speak with Sergeant Crichton before he testified.

Sergeant Crichton testified that one of the spent bullet slugs found at the crime scene was a .44-caliber slug, and the bullet retrieved from Montgomery was also a .44-caliber slug. He determined by microscopic analysis that the same gun fired the two slugs. The .45-caliber handgun found on McElroy could not have fired the .44-caliber bullet that killed Montgomery. Sergeant Crichton also testified that the two other spent slugs found at the crime scene were .45-caliber and were fired from the same gun and that the .45-caliber shell casing found at the scene in the street and the one discovered in the car appeared to match. Sergeant Crichton stated that his initial report only concluded that the .45-caliber shell casing found at the scene was fired from the .45-caliber handgun found on McElroy. Thus, according to Sergeant Crichton, any interpretation of the report as concluding that the .45-caliber handgun was the murder weapon was the reader's mistake.

## II. Relerford's Statement

### A. Standard Of Review

Relerford argues that the trial court erred in finding that he voluntarily waived his *Miranda* rights before giving a statement to the police. We review for clear error the trial court's findings at a suppression hearing.<sup>8</sup> The trial court's resolution of a factual issue is entitled to deference, particularly where it involves the credibility of witnesses whose testimony conflicts.<sup>9</sup>

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<sup>8</sup> *People v Farrow*, 461 Mich 202, 209; 600 NW2d 634 (1999).

<sup>9</sup> *Id.*

## B. Legal Standards

In order to determine whether a waiver is knowing and voluntary, the trial court must look at the totality of the circumstances surrounding the interrogation.<sup>10</sup> “[T]he prosecution has the burden of establishing a valid waiver by a preponderance of the evidence.”<sup>11</sup>

A waiver is voluntary if it was the product of a free and deliberate choice rather than intimidation, coercion, or deception.<sup>12</sup> It requires the absence of police coercion.<sup>13</sup> The trial court should consider factors such as the duration of the defendant’s detention and questioning; the age, education, intelligence, and experience of the defendant; whether there was unnecessary delay of arraignment; the defendant’s mental and physical state; whether the defendant was threatened or abused; and any promises of leniency.<sup>14</sup>

To establish that a waiver was made knowingly, the prosecution ““must present evidence sufficient to demonstrate that the accused understood that he did not have to speak, that he had the right to the presence of counsel, and that the state could use what he said in a later trial against him.””<sup>15</sup> However, the defendant need not understand the ramifications and consequences of choosing to waive his rights.<sup>16</sup> Factors such as the defendant’s age, education, and experience are appropriate for the trial court to consider.<sup>17</sup>

## C. The Record

The record does not support Relerford’s contention that he testified that Sergeant Ellis told him that he would not be permitted to see his father until after making a statement. Relerford gave no such testimony at the suppression hearing. Rather, he testified that when he asked to speak with his father, he was told that he could do so when the questioning was through. The record indicates that Relerford did not ask to see his father until after he confessed. Although Relerford also notes that his father was not present during the interrogation, his father’s presence was not required because Relerford was an adult at the time. Relerford also asserts that this case amounted to a swearing contest between himself and Sergeant Ellis concerning whether he understood his rights. However, credibility issues between witnesses are

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<sup>10</sup> *People v Daoud*, 462 Mich 621, 633-634; 614 NW2d 152 (2000).

<sup>11</sup> *Id.* at 634.

<sup>12</sup> *Id.* at 635.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 634; *People v Akins*, 259 Mich App 545, 564; 675 NW2d 863 (2003); *People v Shipley*, 256 Mich App 367, 373; 662 NW2d 856 (2003).

<sup>15</sup> *Daoud*, *supra* at 637, quoting *People v Cheatham*, 453 Mich 1, 29; 551 NW2d 355 (1996).

<sup>16</sup> *Id.* at 636.

<sup>17</sup> *Id.* at 634, 636.

a matter for the trial court, and we afford great deference to the trial court's credibility determinations.<sup>18</sup>

Relerford's interrogation lasted approximately two hours, he was an adult with a tenth-grade education who stated that he could read and write, he had not ingested any drugs or alcohol in the previous 24 hours, he was not on any medications or under a doctor's care, he indicated that he understood each of his rights as they were read to him, and he agreed to waive his rights. Considering the totality of the circumstances, we conclude that the trial court did not clearly err in finding that Relerford knowingly and voluntarily waived his rights. Suppression of his statement was therefore not warranted.

### III. New Evidence

#### A. Standard Of Review

Relerford argues that he was denied a fair trial when the trial court allowed newly discovered evidence to be presented during trial that established that Montgomery was killed with a .44-caliber bullet. Although the parties treat this issue as preserved, at trial, Relerford moved to dismiss the case in its entirety based on a discovery violation. The trial court denied the motion. Relerford never sought to have the newly discovered evidence excluded, which is the basis for his argument on appeal. Because Relerford did not argue below that the evidence should be excluded, this issue is unpreserved, and our review is limited to plain error affecting defendant's substantial rights.<sup>19</sup> (Although defendant asserts in his statement of this issue that defense counsel was ineffective, he makes no such argument in the body of his brief. Therefore, we deem that portion of the issue abandoned.<sup>20</sup>)

#### B. Relerford's Argument

Relerford asserts that he was prejudiced by the admission of the new evidence because the prosecutor had previously maintained that Montgomery was shot with a .45-caliber handgun, and defense counsel had already committed to a theory of defense that Relerford did not fire a weapon. Relerford's argument fails, for several reasons. First, the ballistics report did not conclude that Montgomery was shot with a .45-caliber gun. It only stated that a .45-caliber shell casing found at the scene was fired from a later discovered .45-caliber gun. Relerford drew his own conclusion that a .45-caliber gun was used to shoot Montgomery from the initial report, as did the prosecutor. Second, the prosecutor never contended that only one gun was used in the crimes. Third, Relerford had not yet presented his theory of the case to the jury. The trial evidence strongly suggested that two guns were used, but Relerford was still free to argue that Vary held both of them. And fourth, the issue whether Relerford personally fired a gun was not especially significant, given that the evidence that placed him at the scene showed that he was

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<sup>18</sup> *Daoud, supra* at 629; *Farrow, supra* at 209.

<sup>19</sup> *People v Carines*, 460 Mich 750, 763, 774; 597 NW2d 130 (1999).

<sup>20</sup> *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004).

involved in the robbery, and that the jury was instructed on aiding and abetting. We conclude that Relerford has not shown a plain error affecting his substantial rights.

#### IV. Double Jeopardy

##### A. Assault With Intent To Do Great Bodily Harm; Assault With Intent To Rob While Armed

Relerford argues that his convictions for assault with intent to do great bodily harm and assault with intent to rob while armed, both of which related to the assault of McMullen, violate his double jeopardy protections. We disagree. This Court has previously held that dual convictions for assault with intent to do great bodily harm and assault with intent to rob while armed do not violate double jeopardy principles.<sup>21</sup>

##### B. Second-Degree Murder; Felony Murder

Relerford also argues that his conviction for second-degree murder must be vacated because he was also convicted of felony murder. We agree. Multiple murder convictions arising from the death of a single victim violate double jeopardy.<sup>22</sup> The appropriate remedy is to affirm the conviction for the higher offense and vacate the lower conviction.<sup>23</sup> The trial court stated that Relerford's convictions for these offenses were "merged" for sentencing purposes and did not impose a sentence for the second-degree murder conviction. Although it appears that the trial court recognized that Relerford could not be separately sentenced for second-degree murder, it did not actually vacate the second-degree murder conviction. The prosecutor's reliance on *People v Herndon*,<sup>24</sup> for the proposition that the trial court's remedy was sufficient is misplaced. In *Herndon*, the defendant was only convicted of one count of murder.<sup>25</sup> Accordingly, we remand this case for correction of Relerford's judgment of sentence to show that his second-degree murder conviction is vacated. We affirm in all other aspects.

Affirmed in part, vacated in part, and remanded. We do not retain jurisdiction.

/s/ Helene N. White  
/s/ William C. Whitbeck  
/s/ Alton T. Davis

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<sup>21</sup> *People v Smith*, 152 Mich App 756, 761-762; 394 NW2d 94 (1986).

<sup>22</sup> *People v Clark*, 243 Mich App 424, 429; 622 NW2d 344 (2000).

<sup>23</sup> *People v Herron*, 464 Mich 593, 609; 628 NW2d 528 (2001).

<sup>24</sup> *People v Herndon*, 246 Mich App 371, 392; 633 NW2d 376 (2001).

<sup>25</sup> *Id.*