

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LUTHER THOMAS JENKINS,

Defendant-Appellant.

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UNPUBLISHED

March 20, 2007

No. 266328

Wayne Circuit Court

LC No. 05-002325-01

Before: Markey, P.J., and Murphy and Kelly, JJ.

PER CURIAM.

Defendant appeals by right his convictions of four counts of first-degree murder, MCL 750.316(1)(a), and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to mandatory life imprisonment for each of the first-degree murder convictions and two years' imprisonment for the felony-firearm conviction. We affirm.

Defendant first argues that the prosecution committed misconduct and denied him a fair trial by failing to timely disclose the results of the DNA analysis. We disagree.

Generally, preserved issues of prosecutorial misconduct are reviewed on a case-by-case basis to determine whether defendant was denied a fair and impartial trial. *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001). Defendant in this case has waived appellate review of this issue. Waiver is defined as “the ‘intentional relinquishment or abandonment of a known right.’” *People v Carines*, 460 Mich 750, 762 n 7; 597 NW2d 130 (1999) (citation omitted). A defendant who waives his rights may not seek appellate review of a claimed deprivation of those rights, because waiver extinguishes error. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). Thus, “[a] defendant may not waive objection to an issue before the trial court and then raise it as an error before this Court.” *People v Fetterley*, 229 Mich App 511, 520; 583 NW2d 199 (1998).

The record below reveals that although defense counsel was aware that the DNA analysis was not available before voir dire, she agreed to proceed with the jury selection without it. The prosecution indicated that it expected the test results to be delivered on the same day and agreed to provide defendant with a copy. On the second day of trial, defendant moved for exclusion of the evidence, arguing that the prosecution had failed to provide the evidence before trial. The prosecution responded that the DNA analysis was not complete but that it expected a copy of the results before lunch break. The trial court reserved ruling but strongly indicated that it would

exclude the evidence if it were not provided to defendant. Before the lunch break, the prosecutor delivered the DNA analysis report to defendant, who again renewed his motion to exclude it. The trial court denied the motion, reasoning that the prosecution would not call its DNA expert until the last day of trial and indicating that defendant could complete an independent analysis of the evidence in that time period.

On the third day of trial, defense counsel informed the trial court that she had contacted an outside DNA laboratory and that independent analysis on the evidence could be completed by October 7, 2005. The trial court ordered additional funding so that the testing could be completed on time. Additionally, the prosecution agreed to provide defendant with additional material for the independent testing to be completed. On October 7, 2005, the fifth day of trial, defense counsel indicated that she had spoken with the independent DNA expert “concerning his review of the DNA file, and I will not be calling him as a witness.”

Based on this record, we conclude that defendant waived any potential error regarding the late disclosure of the DNA analysis by agreeing to proceed to trial without it and by then declining to present his own expert to testify regarding the independent DNA testing. Defendant’s affirmative decisions to proceed with trial and then to not present his own DNA expert’s testimony effectively preclude appellate review of this issue. *Carter, supra* at 214-215.

Nonetheless, our review of defendant’s claim of error on appeal reveals that the prosecution’s delivering the DNA results on the second day of trial did not deny defendant a fair and impartial trial. Defendant’s main contention of error in the present case relates solely to the prosecution’s alleged failure to *timely* disclose the DNA evidence, not that the prosecution withheld the evidence. Furthermore, defendant completed but declined to introduce an independent analysis of the evidence. Nothing in the lower court record suggests that had the DNA evidence been disclosed to defendant earlier, a reasonable probability existed that the outcome of the proceedings would have been different. Because the prosecution’s late disclosure of the DNA analysis did not deprive defendant of a fair and impartial trial, defendant is not entitled to appellate relief on this claim of alleged error.

Defendant next argues that the prosecution committed misconduct when it elicited testimony regarding defendant’s prior bad acts. We disagree.

Because defendant failed to object to the prosecution’s actions, our review is limited to ascertaining whether there was plain error affecting defendant’s substantial rights. *Carines, supra* at 763-764. To avoid forfeiture under the plain error rule, a defendant must show that: (1) there was an error; (2) the error was plain, i.e., clear or obvious; and (3) the error impacted substantial rights by affecting the outcome of the proceedings. Reversal is then warranted only if the error resulted in the conviction of an innocent defendant or seriously affected the fairness, integrity or public reputation of judicial proceedings. *Id.*

Defendant alleges that the prosecutor improperly elicited certain testimony that was inadmissible under MRE 404(b). Defendant challenges the following: (1) Aletha Stewart’s testimony indicating that she made a “statutory rape complaint” to police because of the nine year age difference between defendant and victim Gloria Pitts; (2) witnesses Wade Hamilton, Jr. and Walter Johnson, Jr.’s stating that defendant possessed a silver handgun before December 18,

2004; and (3) the testimony of Wade Hamilton, Sr. that he had previously seen defendant push and hit Gloria.

To be admissible under MRE 404(b)(1), other acts evidence, (1) must be offered for a proper purpose, i.e., to prove something other than character or a propensity theory; (2) must be relevant under MRE 402, as enforced through MRE 104(b), and (3) the evidence's probative value must not be substantially outweighed by the danger of unfair prejudice. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). Further, "the trial court, upon request, may provide a limiting instruction under Rule 105." *Id.*

A review of the challenged testimony in the present case reveals that the prosecution did not elicit it for the improper purpose of showing defendant's criminal propensity or bad character. Instead, it was used to explain the circumstances surrounding defendant's strained relationship with Gloria, raise the inference that defendant had a motive, as well as the necessary intent and premeditation to commit first-degree murder, and to corroborate defendant's confessing that he used a handgun to shoot Gloria and Alicia Nicole Jackson. Furthermore, the evidence was relevant to the prosecution's theory of the case. Evidence is relevant if it has any tendency to make a fact of consequence to the action more or less likely than it would be in the absence of such evidence. MRE 401. Testimony that defendant often fought with Gloria, who was nine years younger than defendant, and that defendant was known to carry a handgun, made the prosecution's theory that defendant committed all four murders more likely than it would be in the absence of such evidence. Finally, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. MRE 403. See *People v McGuffey*, 251 Mich App 155, 163; 649 NW2d 801 (2002) (noting that unfair prejudice exists when there is a tendency that the evidence will be given undue or preemptive weight, or when it would be inequitable to allow use of the evidence). The relatively brief length of each witness's testimony in the context of the other evidence the prosecution introduced does not suggest that the jury gave the challenged testimony undue weight. Consequently, defendant has failed to show that it was plain error for the prosecution to elicit the challenged testimony.

Moreover, even assuming that it was error for the prosecution to elicit the challenged testimony, defendant has failed to show how the evidence affected the outcome of the proceedings in light of his confession and the significant amount of serological, DNA and gunshot residue evidence introduced at trial. *Carines, supra* at 763. Finally, because any potential prejudice the testimony might have caused could have been cured by an instruction given after a timely objection, we will not find error warranting reversal. *People v Ackerman*, 257 Mich App 434, 449; 669 NW2d 818 (2003). Thus, defendant's claim regarding the alleged instances of prosecutorial misconduct does not warrant relief on appeal.

Similarly, we conclude that defendant's claim of ineffective assistance of counsel predicated on defense counsel's failure to object to the challenged testimony also fails because there is no indication that defense counsel's objection would have been successful and because defendant has failed to establish the requisite prejudice. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000).

Defendant next argues that the trial court erred in denying his motion to suppress his inculpatory statements to police. We disagree.

The trial court's ultimate decision on a motion to suppress is reviewed de novo on appeal. *People v Akins*, 259 Mich App 545, 563; 675 NW2d 863 (2003). However, this Court will not disturb a trial court's factual findings with respect to a *Walker*<sup>1</sup> hearing unless those findings are clearly erroneous. *People v Daoud*, 462 Mich 621, 629-630; 614 NW2d 152 (2000).

“A statement obtained from a defendant during a custodial interrogation is admissible only if the defendant voluntarily, knowingly, and intelligently waived his Fifth Amendment rights.” *Akins*, *supra* at 564, citing *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966), and *Daoud*, *supra* at 632-633. “[T]he prosecution has the burden of establishing a valid waiver by a preponderance of the evidence.” *Id.* at 634. An effective waiver of *Miranda* has two elements. “First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.” *Id.* at 633, quoting *Moran v Burbine*, 475 US 412, 421; 106 S Ct 1135; 89 L Ed 2d 410 (1986). Thus, only when the totality of the circumstances surrounding the statement reveal “both an uncoerced choice and the requisite level of comprehension” may a court find valid waiver of *Miranda* rights. *Daoud*, *supra* at 633, quoting *Moran*. A court must inquire into all of the circumstances surrounding the interrogation, including evaluating the defendant's age, background, education, experience, and intelligence, to determine whether he has the capacity to understand the *Miranda* warnings explained to him, and the consequences of waiving those rights. *Id.* at 634, quoting *Fare v Michael C*, 442 US 707, 725; 99 S Ct 2560; 61 L Ed 2d 197 (1979). Although whether a waiver is knowing and intelligent depends in part on the suspect's capacity, we must examine the conduct of the police to determine whether a suspect's statement is voluntary. *People v Tierney*, 266 Mich App 687, 707; 703 NW2d 204 (2005).

Defendant argues on appeal that Investigator Barbara Simon threatened and coerced him so as to render his subsequent statements involuntary. Further, defendant contends that he was not advised of his constitutional rights and that was forced to sign the inculpatory statement. But this Court generally defers “to the trial court's superior ability to view the evidence and witnesses and will not disturb its factual findings unless they are clearly erroneous.” *People v Peerenboom*, 224 Mich App 195, 198; 568 NW2d 153 (1997). A factual finding is clearly erroneous if the appellate court is left with a definite and firm conviction that a mistake has been made, giving due deference to the trial court's superior ability to determine credibility. *People v Sexton (After Remand)*, 461 Mich 746, 752; 609 NW2d 822 (2000). Notwithstanding defendant's testimony, a review of the evidence shows that the trial court could properly conclude that defendant's statements were voluntarily made.

The record from the *Walker* hearing supports the trial court's order denying defendant's motion to suppress. Before the police located the four victims' bodies, Simon interviewed 25-year-old defendant in a conference room at police headquarters. Simon initially determined that defendant was neither injured nor under the influence of narcotics or alcohol. Further, defendant told Simon that he had completed the 11<sup>th</sup> grade and that he could read and write. Simon orally

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<sup>1</sup> *People v Walker (On Rehearing)*, 374 Mich 331, 338; 132 NW2d 87 (1965).

advised defendant of his constitutional rights by reading him the standard form. Defendant indicated that he understood each right, initialed each right, and signed the bottom of the form. Defendant then agreed to make a statement to Simon and gave his personal information, including that he lived at 4140 Dickerson with Gloria. Simon then questioned defendant regarding the circumstances of the killings. Simon wrote out each of her questions and defendant's answers and gave defendant the opportunity to correct any of the answers. The record shows that defendant did not make any corrections and that he initialed by each of his answers and signed his name on the bottom of all seven pages of the statement. Simon testified that defendant never requested an attorney during the hour-long interview. Further, the record reveals that the officers did not threaten defendant and that he was not deprived of food, water or the use of the restroom during the interview. Following the statement, defendant agreed to show Simon and other officers where he abandoned Jeep. Viewing the totality of the circumstances, including the police conduct during the interviews, we find that the trial court properly concluded that defendant voluntarily, knowingly, and intelligently waived his Fifth Amendment rights and that his statement was voluntary. *Akins, supra* at 564; see, also, *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988) ("The ultimate test of admissibility is whether the totality of the circumstances surrounding the making of the confession indicates that it was freely and voluntarily made."). Accordingly, the trial court did not err in admitting defendant's statements at trial.

Defendant finally argues that this Court should suppress his statements because the police department failed to make an audio or video recording of the proceedings. This Court, however, has consistently held that there is no requirement, constitutional or otherwise, to video or audio record a defendant's custodial statement and has also rejected the argument that a confession should be suppressed for failing to do so. See *People v Geno*, 261 Mich App 624, 627; 683 NW2d (2004); *People v Fike*, 228 Mich App 178, 185; 577 NW2d 503 (1998). Accordingly, defendant's final claim of error is without merit.

We affirm.

/s/ Jane E. Markey  
/s/ William B. Murphy  
/s/ Kirsten Frank Kelly