

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

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PEOPLE OF THE STATE OF MICHIGAN,  
  
Plaintiff-Appellee,

UNPUBLISHED  
June 3, 2014

v

DONALD SUTTLE JR.,  
  
Defendant-Appellant.

No. 314773  
Ingham Circuit Court  
LC No. 12-000560-FC

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Before: STEPHENS, P.J., and HOEKSTRA and METER, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317, and sentenced as a habitual offender, second offense, MCL 769.10, to serve 400 months to 600 months in prison, with credit for 251 days served. Defendant appeals as of right. We affirm.

**I. BACKGROUND**

In the early hours of January 1, 2012, Travis Peterson was beaten to death in front of the Grand Traverse Pie Company on Washington Square in Lansing. Peterson was with his cousin, Trent Roberts, and Roberts' co-worker, Dominique Thomas, celebrating New Years Eve and after visiting multiple bars, they arrived at Brannigan Brothers at approximately 1:00 am. They were rather intoxicated. Roberts testified at defendant's trial that he remembered Peterson arguing with a man at Brannigan's and that he and Thomas were approached by another man and told to leave. Outside Brannigan's Roberts saw his cousin, Peterson arguing again with the same man he had argued with inside. There were two additional men standing near Peterson who Roberts believed were bouncers at Brannigan's. Roberts testified that one of the men approached Peterson with a collapsible baton in an aggressive posture. Roberts' attention however was then distracted by a fourth man who grabbed his arm and directed him to keep moving. Roberts lost sight of his cousin and the other three men, but then saw his cousin move quickly down the block with the three men running after him. Roberts witnessed the men surround his cousin and one of them, a black male, swing the baton at his cousin. Roberts approached his cousin after the other men had left the scene and saw that he was bleeding from the nose, ears and mouth.

Many other individuals who were celebrating New Year's witnessed the incident between Peterson and the men from Brannigan's. Bryan Selleck was with his fiancée Samantha Meldrum and a group of friends that night. Selleck knew Peterson and had a clear recollection of the

defendant's participation in Peterson's beating. He testified to seeing Peterson, who appeared in a hurry, wishing him Happy New Year and then watching five men run out of Brannigan Brothers after Peterson. Selleck testified that Peterson got into a squatting position and said he did not want any trouble. Selleck then witnessed one man throw a punch that knocked Peterson to the ground and the other men kick and punch Peterson. Selleck said four of the men left, but one black male stayed behind. According to Selleck, the black male pulled out a retractable baton, swung it with his right hand and struck Peterson somewhere above Peterson's shoulders. Selleck said he clearly saw the face of the black male and identified him as the defendant. Selleck additionally identified defendant from a photographic lineup. Other pedestrians testified to witnessing a black male with a baton at the scene strike Peterson. Brannigan Brother's employees also testified to defendant having a baton earlier that night in Brannigan's. Emergency personnel testified that Peterson suffered cardiac arrest while en route to the hospital. Peterson's autopsy revealed his cause of death was from multiple cranial cerebral injuries and the manner of death was homicide.

The jury in this case was instructed on both second-degree murder and the lesser offense of involuntary manslaughter. They were also given the "aider and abettor" instruction for each of these crimes. The jury returned with a verdict of second-degree murder.

## II. SUFFICIENCY OF EVIDENCE

Defendant first argues that there was insufficient evidence to support his conviction. When reviewing a sufficiency challenge, the record "evidence is reviewed de novo, in a light most favorable to the prosecution, to determine whether the evidence would justify a rational jury's finding that the defendant was guilty beyond a reasonable doubt." *People v McGhee*, 268 Mich App 600, 622; 709 NW2d 595 (2005). All conflicts in the evidence must be resolved in favor of the prosecution. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended on other grounds 441 Mich 1201 (1992). This Court does not revisit credibility issues on appeal. *People v Milstead*, 250 Mich App 391, 404; 648 NW2d 648 (2002). Rather, in approaching a sufficiency challenge we "draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

Defendant argues that there was insufficient evidence presented on the "identity" element of the crime. See *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976) ("Identity" . . . is always an essential element in a criminal prosecution[.]). Defendant asserts that Bryan Selleck, the only eyewitness to the murder who identified defendant as the perpetrator, provided incredible and unreliable testimony because his testimony was contradictory with regard to whether he consumed two glasses of champagne. Defendant asserts that when Selleck testified at trial, he "obstinately refused to admit to consuming any alcohol that night even when he was confronted with his prior contradictory statement."

At trial, defendant denied attacking the victim or assisting in the attack. Defendant's assertion was rebutted by Selleck, who said that he could see the attacker's face clearly, and that defendant was the man who had attacked the victim, striking him with a baton. Another witness testified that he saw defendant attack the victim but was too far away to see whether defendant used a baton. A number of other witnesses testified that defendant was in possession of a baton shortly before the attack, that defendant was at the scene of the attack, and that a person

matching defendant's description either struck the victim with a baton or participated in the attack.

First, we note that the premise of defendant's argument is factually incorrect. Selleck never "refused to admit to consuming alcohol." Selleck testified on direct examination that he was "sober" on the night of the incident. During cross-examination, he stated that he may have had a drink of champagne, but that he did not think he had because he does not usually drink champagne and had an upset stomach that night. Selleck was then presented with a transcript of an interview that he had with the police immediately after the incident. According to the transcript, Selleck had told the police officer that he had two glasses of champagne. Selleck said that he did not recall having the two glasses of champagne. When asked if he had not been accurate during the police interview, defendant responded, "At that time I would say my memory was a lot fresher, so maybe I did have two glasses of champagne." Thus, contrary to defendant's assertion, Selleck did not refuse to admit anything. Rather, he acknowledged that although he had no present memory of drinking any champagne on the night of the incident, his statement to the police that he did drink champagne was likely accurate because it was made when his memory of the night was still fresh. In any event, the jury, having convicted defendant of murder, necessarily determined that Selleck was credible and that defendant was not credible. Again, we will not interfere with the jury's credibility determinations. *Milstead*, 250 Mich App at 404.

Further, defendant's argument does nothing to undermine the direct identity testimony from another witness, who said that he saw defendant attack the victim, although he was too far away to see whether defendant used a baton during the attack.

Given the testimony that defendant was in possession of a baton shortly before the attack, that defendant was at the scene of the attack, that a person matching defendant's description either struck the victim with a baton or participated in the attack, and that the victim's injuries were consistent with being struck by a baton, a reasonable juror could infer that defendant was the person who committed the murder or aided and abetted the commission of the murder. Accordingly, the evidence, viewed in the light most favorable to the prosecution, was sufficient to support defendant's conviction.

### III. CRUEL OR UNUSUAL PUNISHMENT

Defendant next argues that his sentence constitutes cruel or unusual punishment in violation of the constitutional prohibition against such punishment. In *People v Drohan*, 264 Mich App 77, 91-92; 689 NW2d 750 (2004), however, this Court explained that a sentence falling within the sentencing guidelines range does not constitute cruel or unusual punishment. Because defendant's sentence fell within the sentencing guidelines range, defendant's argument is without merit. Moreover, we conclude that defendant's sentence was proportionate in light of the circumstances surrounding the offense and the offender. A proportionate sentence does not constitute cruel or unusual punishment. *Id.* at 92.

#### IV. STANDARD 4 BRIEF

In his Standard 4 brief, defendant takes issue with the fact that a recording of his police interview was played for the jury. Defendant asserts that the interview should not have been admitted into evidence because the police violated his constitutional rights when they failed to provide him any *Miranda*<sup>1</sup> warning. Defendant also asserts that his counsel rendered ineffective assistance by failing to move to suppress the interview. These arguments are not preserved, and thus are reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

*Miranda* warnings are required when there is a custodial interrogation. *People v Elliott*, 494 Mich 292, 302; 833 NW2d 284 (2013). A custodial interrogation is a “questioning initiated by law enforcement officers after the accused has been taken into custody or otherwise deprived of his freedom of action in any significant way.” *Id.* at 305, quoting *Miranda*, 384 US at 444. Whether an accused was in custody depends on “the totality of the circumstances, with the key question being whether the defendant reasonably believed that he was not free to leave.” *People v Mendez*, 225 Mich App 381, 382-383; 571 NW2d 528 (1997).

“As used in our *Miranda* case law, ‘custody’ is a term of art that specifies circumstances that are thought generally to present a serious danger of coercion. In determining whether a person is in custody in this sense, the initial step is to ascertain whether, in light of ‘the objective circumstances of the interrogation,’ a ‘reasonable person [would] have felt he or she was not at liberty to terminate the interrogation and leave.’ And in order to determine how a suspect would have ‘gauge[d]’ his ‘freedom of movement,’ courts must examine ‘all of the circumstances surrounding the interrogation.’ Relevant factors include the location of the questioning, its duration, statements made during the interview, the presence or absence of physical restraints during the questioning, and the release of the interviewee at the end of the questioning.” [*Elliott*, 494 Mich at 307, quoting *Howes v Fields*, 565 US \_\_\_; 132 S Ct 1181, 1189-1190; 182 L Ed 2d 17 (2012).]

In the instant case, defendant points to the following portion of the transcript from his interview, asserting that it shows that he was subjected to a custodial interrogation:

*Officer:* We’ll be back in just a few minutes . . . .

*Defendant:* Okay?

*Officer:* . . . . okay? I have to lock this . . . .

*Defendant:* Okay.

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<sup>1</sup> *Miranda v Arizona*, 384 US 436; 86 S Ct 1602, 16 L Ed 2d 694 (1966).

*Officer:* . . . you can't wonder off.

*Defendant:* Go ahead, go ahead.

*Officer:* I just didn't want you to hear it lock then think somethings [sic] going on alright.

*Defendant:* Alright, go ahead.

Given the totality of the circumstances, we conclude that defendant was not subjected to custodial interrogation until the point when he was told that the door was locked. Defendant came to the police station on his own accord for the interview. Officers told defendant that he was free to leave at anytime and was not under arrest. Defendant was neither handcuffed or restrained in any way, nor was he arrested after the interview. The portion of the transcript cited by defendant does show that his freedom of movement was temporarily restricted. The defendant admittedly did not indicate that he was fearful or apprehensive when the detectives returned from interviewing his girlfriend. However, the record is equally devoid of any repetition by the officer that the defendant was in fact free to terminate the questioning. The defendant's Standard 4 brief appears to argue that the entire transcript should be suppressed. At most, the portions of the interview that occurred after the door was locked would have been suppressed. The defendant did give another recitation of the incident facts in those pages and that portion of the transcript was presented to the jury. However, not only was that recitation consistent with the defendant's statements about the incident made earlier during what was clearly a non-custodial interview, the prosecution did not impeach him from any of the materials after page 43. Additionally the portion played to the jury of the post door locking interrogation included the defendant's offer to assist the police in their investigation.

Given our conclusion that defendant was subjected to a custodial interrogation for 8 pages of a 52 page transcript, a motion to suppress the entire interview would have been without merit. Counsel cannot be faulted for failing to make a futile or meritless objection. *People v Moorer*, 262 Mich App 64, 76; 683 NW2d 736 (2004). Had counsel made such a motion for 8 pages, including the defendant's offers to assist the police, it would have been stricken. The defendant's statements in that excerpt were entirely consistent with his statement in the earlier non-custodial portion and were neither the focus of cross-examination nor closing argument. He did not confess or implicate himself further in that portion of the interview. He cannot demonstrate that any error would have affected the outcome or that he was deprived of any substantial right.

Affirmed.

/s/ Cynthia Diane Stephens

/s/ Joel P. Hoekstra

/s/ Patrick M. Meter