STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ERIC LEON WILLIAMS,

Defendant-Appellant.

UNPUBLISHED
June 10, 1997

No. 181468
Calhoun Circuit
LC No. 94-001863 FC

Before: Young, P.J., and Doctoroff and Cavanagh, JJ.

PER CURIAM.

Defendant appeals as of right his conviction by jury of three counts of assault with intent to murder, MCL 750.83; MSA 28.278, one count of armed robbery, MCL 750.529; MSA 28.797, and four counts of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to twenty-five to fifty years' imprisonment for each of the assault with intent to murder convictions, twenty-five to fifty years' imprisonment for the armed robbery conviction, and two years' imprisonment for each of the felony-firearm convictions. We affirm.

This case arises out of a shooting occurring in the parking lot of a Battle Creek Meijer store at approximately 1:25 a.m. on May 21, 1994. Three Meijer store detectives witnessed defendant place a pair of boots belonging to Meijer on his feet and leave the store without paying for the boots. Defendant's actions were also captured on videotape by the store's security cameras. The store detectives followed defendant and his companion into the store's parking lot where they confronted defendant regarding the boots. Defendant's companion pulled a gun from his jacket and pointed it at one of the store detectives. The other two detectives sought cover in the parking lot. Defendant obtained the gun from his companion and proceeded to fire four bullets from the gun. Defendant and his companion then left the parking lot in a vehicle driven by another male who had been in the store with them. Defendant was subsequently arrested and made videotaped statements regarding these events to a Battle Creek police officer.

I

Defendant contends that the trial court erred in allowing the jury to view portions of a videotaped interview of defendant by a Battle Creek police officer following defendant's arrest. Defendant claims that the statements made by the police officer during the interview contained inadmissible hearsay and served to introduce evidence which may not have otherwise been introduced.

Statements made by the police officer during the videotaped interview are not hearsay. Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). Hearsay is inadmissible as substantive evidence except as provided in the rules of evidence. MRE 802; *People v Poole*, 444 Mich 151, 167; 506 NW2d 505 (1993). In *People v Johnson*, 100 Mich App 594; 300 NW2d 332 (1980), the trial court admitted a previously recorded statement by the defendant which also contained a police officer's comments summarizing the charges against the defendant. This Court held that the police officer's statements were not hearsay because they were offered to put the defendant's statements in the appropriate context, not to prove the truth of the matter asserted. *Id.* at 599. In the present case, the trial judge instructed the jury that the officer's statements were not substantive evidence to be considered by the jury. As in *Johnson*, the officer's statements were not offered for their truth and therefore were not hearsay. The trial court did not abuse its discretion in admitting the videotaped interview of defendant, including the questions asked of defendant by the police officer.

II

Next, defendant argues that his statements made during questioning by the police were obtained in violation of his Fifth and Sixth Amendment rights to counsel. Defendant claims that he requested an attorney when he arrived at the police station and again at his arraignment. Therefore, defendant contends that his Fifth and Sixth Amendment rights to counsel were violated when the police interviewed defendant without an attorney present after his arraignment. Defendant failed to preserve this issue for appeal.

The videotaped interview of defendant reveals defendant's receipt and subsequent waiver of his *Miranda*[1] rights before he was questioned by the police regarding the shooting. Therefore, despite defendant's request for an attorney at his arraignment, defendant subsequently waived his Fifth Amendment right to counsel by voluntarily waiving his *Miranda* rights before his interview with the police. See *People v Smielewski*, 214 Mich App 55, 61; 542 NW2d 293 (1995). Defendant's statements to police were not obtained in violation of his Fifth Amendment rights.

However, based on the record provided, defendant's statement may have been taken in violation of his Sixth Amendment right to counsel. Once a defendant invokes his Sixth Amendment right to counsel at arraignment, he cannot be interrogated until counsel is made available unless the defendant subsequently initiates communication with the police. *People v Anderson (After Remand)*, 446 Mich 392, 402; 521 NW2d 538 (1994), cert den ___ US ___; 115 S Ct 1175; 130 L Ed 2d 1128 (1995). Although defendant attached an affidavit to his appellate brief indicating that at no time between his arrest and the videotaped interview did he request to speak to any police officer, the lower court record is devoid of information regarding who initiated defendant's interview. Therefore, because it is

impossible to determine on the basis of the record provided whether defendant's interview was initiated by himself or the police, this Court cannot determine whether such interview was conducted in violation of defendant's Sixth Amendment rights.

Nevertheless, the erroneous admission of statements obtained in violation of the Sixth Amendment right to counsel is subject to harmless error analysis. Such an error is harmless if this Court determines that there is no reasonable possibility that the evidence complained of might have contributed to the conviction. *Id*. at 406. In *Anderson*, our Supreme Court found that the admission of the defendant's statements obtained in violation of his Sixth Amendment rights could not be said to be harmless beyond a reasonable doubt considering the "obviously prejudicial and inculpatory nature" of the statements. *Id*. at 407. Because, in the present case, defendant's statements were exculpatory in nature, we conclude that there is no reasonable possibility that the evidence complained of contributed to defendant's conviction, and their admission was harmless beyond a reasonable doubt.

Defendant did not raise this issue in the trial court. Because defendant waived his *Miranda* rights before making statements in a videotaped interview, and the admission of defendant's statements was harmless beyond a reasonable doubt, the alleged error could not be decisive to the outcome of the case. See *People v Grant*, 445 Mich 535, 553; 520 NW2d 123 (1994). Therefore, reversal is not required.

III

Defendant also argues that the delay of his arraignment for more than fifty hours after his arrest undermined the voluntariness of his statements to police, and therefore the statements should have been suppressed. Because defendant did not raise this issue below, the record does not reveal the exact length of time between defendant's arrest and arraignment. However, the warrant authorizing defendant's arrest is dated May 22, 1994, and defendant's arraignment was held at 11:48 a.m. on May 23, 1994.

The requirement of a prompt arraignment is addressed in MCL 764.13; MSA 28.871(1) and MCL 764.26; MSA 28.885. MCL 764.13; MSA 28.871(1) states as follows:

> A peace officer who has arrested a person for an offense without a warrant shall without unnecessary delay take the person arrested before a magistrate of the judicial district in which the offense is charged to have been committed, and shall present to the magistrate a complaint stating the charge against the person arrested.

MCL 764.26; MSA 28.885 provides:

> Every person charged with a felony shall, without unnecessary delay after his arrest, be taken before a magistrate or other judicial officer and, after being informed as to his rights, shall be given an opportunity publicly to make any statement and answer any questions regarding the charge that he may desire to answer.

Neither statute defines the phrase "unnecessary delay."

Defendant claims that because his arraignment was delayed for more than fifty hours after he was taken into custody, the statements he made after his arraignment should be suppressed as involuntary. Defendant relies on *People v Cipriano*, 431 Mich 315, 335; 429 NW2d 781 (1988), for the proposition that "[a]n arrested suspect should not be subjected to prolonged, unexplained delay prior to arraignment; and such delay should be a signal to the trial court that the voluntariness of a confession obtained during this period may have been impaired."

However, defendant's statements are not deemed involuntary merely because defendant waited more than fifty hours between his arrest and his arraignment. First, the statements that were admitted at trial were made to the police after defendant's arraignment, not during the period between his arrest and his arraignment which is addressed in *Cipriano*. In addition, the *Cipriano* Court stated that "Michigan's prearraignment delay statutes have never included a directive by the Legislature that failure to comply will render inadmissible a confession voluntarily given." *Id*. at 333. Rather, unnecessary delay in arraignment is only one of the factors that should be considered in evaluating the voluntariness of a confession. *Id*. The focus should not be just on the length of the delay, but rather on what occurred during the delay and its effect on the accused. An otherwise competent confession should not be excluded solely because of a delay in arraignment. *Id*. at 335. Furthermore, a confession or other incriminating evidence should be suppressed as a result of an unreasonable delay in arraignment only where the delay was used as a tool to extract a confession or evidence. A delay between a defendant's arrest and arraignment does not provide a basis for suppressing a defendant's statements absent evidence that the police used coercive techniques upon the defendant or that his statement was other than voluntary. *People v Lumsden*, 168 Mich App 286, 294-295; 423 NW2d 645 (1988).

Defendant makes no claim that events occurring during the delay between his arrest and his arraignment rendered his statements involuntary or that the police used coercive techniques to obtain his statement. Even if defendant were subjected to an unnecessary delay between the time of his arrest and his arraignment, this fact alone does not render his post-arraignment statement to police involuntary. See *Cipriano, supra* at 333.

Because the mere fact that there was a delay of more than fifty hours between defendant's arrest and arraignment is insufficient to render defendant's subsequent statements to police involuntary, the alleged error could not be decisive to the outcome of the case. See *Grant, supra* at 553. Therefore, we find no error requiring reversal.

IV

Defendant argues that because his trial counsel failed to move to suppress the videotaped statements made to police by defendant, defendant was denied effective assistance of counsel. To establish ineffective assistance of counsel, a defendant must show both a failure of counsel and that the failure prejudiced the defendant. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). The defendant must establish that there was a reasonable probability that, but for the error, the

result of the proceedings would have been different. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995).

As discussed above, there is no reasonable possibility that the admission of defendant's statements to the police contributed to defendant's convictions. Therefore, it cannot be said that counsel's failure to move to suppress such evidence could have prejudiced defendant or that there was a reasonable probability that, but for the error, the result of the proceedings would have been different. See *id.* Defendant was not denied effective assistance of counsel.

V

Finally, defendant contends that he was denied due process of law because the prosecution failed to produce a videotape showing the Meijer parking lot at the time of the shooting which may have been favorable to defendant. Defendant made a motion for a mistrial based on the prosecution's failure to produce the videotape, which the trial court denied.

In *Arizona v Youngblood*, 488 US 51, 58; 109 S Ct 333; 102 L Ed 2d 281 (1988), the Supreme Court held that "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." Where there is no showing of any intentional suppression of the evidence by the police or the prosecution, there is no error. *People v Bendix*, 58 Mich App 276, 282; 227 NW2d 316 (1975).

In the present case, the evidence was not destroyed by the police or the prosecution, but through Meijer's routine policy of reusing security camera videotapes every two weeks. Defendant presents no evidence that either the police or the prosecution intentionally destroyed or suppressed evidence. Because there was no evidence of bad faith on the part of the police or the prosecutor, or that the prosecutor intentionally destroyed or suppressed the videotape, defendant was not prejudiced and the trial court did not abuse its discretion in denying defendant's motion for a mistrial. Cf. *People v Hardaway*, 67 Mich App 82; 240 NW2d 276 (1976).

Affirmed.

/s/ Robert P. Young, Jr.
/s/ Martin M. Doctoroff
/s/ Mark J. Cavanagh

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