STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRIAN CHARLES BUSH,

Defendant-Appellant.

UNPUBLISHED
January 29, 1999

No. 203918
Saginaw Circuit Court
LC No. 96-011917 FC

Before: Griffin, P.J., and McDonald and White, JJ.

PER CURIAM.

Defendant appeals of right from his jury conviction for first-degree felony murder, MCL 750.316; MSA 28.548, larceny from the person, MCL 750.357; MSA 28.589, and unlawful driving away an automobile (UDAA), MCL 750.413; MSA 28.645. We affirm.

This case arose from the murder of defendant's grandmother and the use of her assets to obtain cocaine. Defendant was sentenced to mandatory life imprisonment without parole for the felony murder conviction and two to five years' imprisonment for the UDAA conviction. The larceny from the person conviction was vacated due to the felony murder sentence.

Defendant first contends that the trial court abused its discretion by admitting his statements to the police into evidence. Defendant claims his statements were involuntary because he had been using cocaine and alcohol for four days during which time he had not slept or eaten. Defendant insists that the police should have been aware of his alleged intoxicated state and that because of this condition, he was unable to voluntarily waive his constitutional rights. The trial court conducted a pretrial hearing pursuant to *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965), and concluded that defendant had voluntarily, knowingly, and intelligently waived his rights. When reviewing a trial court's determination of voluntariness, this Court engages in a de novo review of the trial court record but will not disturb the trial court's findings unless they are clearly erroneous. *People v Cheatham*, 453 Mich 1, 30; 551 NW2d 355 (1996). In making this determination, this Court defers to the trial court's superior ability to assess the weight of the evidence and the credibility of the witnesses. *People v Howard*, 226 Mich App 528, 543; 575 NW2d 16 (1997). This Court evaluates the totality of the circumstances to determine if the defendant's confession results from his free and unconstrained choice

or whether the defendant's will has been overborne and his capacity for self-determination has been critically impaired. *People v Cipriano*, 431 Mich 315, 333-334; 429 NW2d 781 (1988), quoting *Culombe v Connecticut*, 367 US 568, 602; 81 S Ct 1860; 6 L Ed 2d 1037 (1961).

Defendant's own testimony established that his waiver was voluntary, knowing, and intelligent. Defendant admitted that he had asked to speak to the police. Defendant acknowledged that the police read him his *Miranda*[1] rights and that he signed a waiver form. Although defendant asserts that he trusted the officer who took the statement and thought he was speaking "off the record," he did not describe any police coercion, overreaching, or dissembling. Defendant admitted being familiar with his rights and stated that they had been read to him on most of the prior twelve occasions when he had been arrested. Defendant even mentioned two of the rights: the right to remain silent and the right to an attorney. The police testified that defendant repeatedly asked to speak to a specific police officer he had dealt with in the past, and this officer described how, while he was reading defendant his rights, defendant indicated that the officer could dispense with the recitation because he was already familiar with them. This was consistent with the officer's testimony that defendant appeared to understand his rights and what he was doing when he waived them. Further, we reject defendant's contention that his request that the interview not be taped is tantamount to an assertion of his right to remain silent or to terminate the interview or demonstrates a lack of understanding that this statement could be used against him. The trial court concluded that defendant had known what he was doing and that his waiver was voluntary, knowing, and intelligent. We defer to the trial court's ability to judge credibility, particularly where, as here, our independent review of the record does not disclose that the trial court's finding was clearly erroneous. *Cipriano, supra* at 339.

Defendant next contends that his counsel was ineffective for failing to pursue a defense of drug or alcohol intoxication. Defendant did not move for an evidentiary hearing or a remand on this issue. Where there has been no motion for new trial or evidentiary hearing in the trial court, this Court will still consider a claim of ineffective assistance of counsel; however, review on appeal is limited to facts apparent on the record. *People v Fike*, 228 Mich App 178, 181; 577 NW2d 903 (1998). The issue of ineffective assistance of counsel is reviewed using the test set forth in *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994):

> [T]o find that a defendant's right to effective assistance of counsel was so undermined that it justifies reversal of an otherwise valid conviction, a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial.

Defendant must overcome the strong presumption that his counsel's actions were valid decisions of trial strategy, and he must further show that but for the claimed error there is a reasonable probability that the outcome of the trial would have been different. *People v Torres*, 222 Mich App 411, 424; 564 NW2d 149 (1997).

Our Supreme Court rejected an argument similar to defendant's in *People v LaVearn*, 448 Mich 207; 528 NW2d 721 (1995), where it held that the defendant's counsel was not ineffective for choosing not to present a defense of intoxication in a first-degree murder case. The Court reasoned that

defense counsel had made a valid strategic choice between two weak defenses and had opted to present an alternative defense of misidentification that, if successful, offered the possibility of a complete acquittal. *Id.* at 214-216. Defendant likewise was faced with two weak options: first, he could present a defense of intoxication that offered the possibility of a reduction of the offense from first to second-degree murder but that was compromised by the evidence of defendant's purposeful course of action and his own admissions. Alternatively, defendant could claim that although he had initiated an assault on the victim, someone else had actually murdered her. Defendant's counsel chose this latter strategy. This defense offered the possibility of an acquittal on the murder charge and conviction of a four-year felony. This Court will not second-guess trial counsel's choice of strategy. *Id.* at 215-216.

Defendant finally contends that the trial court abused its discretion by allowing certain evidence (handwritten police notes and search warrant documentation) to be admitted at the hearing and at trial where the prosecutor had failed to turn the evidence over to defendant pursuant to a discovery agreement. This Court reviews a trial court's decision regarding the appropriate remedy for noncompliance with a discovery order for an abuse of discretion. *People v Davie (After Remand)*, 225 Mich App 592, 597-598; 571 NW2d 229 (1997). However, where there is a failure to request specific discovery or where there is no objection to the failure to provide discovery, review may be forfeited. *People v Malone*, 193 Mich App 366, 371-372; 483 NW2d 470 (1992), aff'd 445 Mich 369 (1994). In such cases, appellate review is for plain error. *People v Grant*, 445 Mich 535, 546-547, 552-553; 520 NW2d 123 (1994). In this case, defendant objected to the failure to provide the handwritten note but did not object to the tardy provision of the search warrant and supporting documentation.

In *People v Gilmore*, 222 Mich App 442, 448; 564 NW2d 158 (1997), this Court noted that discovery in criminal cases is governed by MCR 6.201(B) which provides, *on request*, for disclosure of: (1) any exculpatory information or evidence known to the prosecutor; (2) any police report concerning the case; (3) any written or recorded statements of the defendant, a codefendant, or an accomplice; (4) any affidavit, warrant, and return pertaining to a search or seizure in connection with the case; and (5) any plea agreement, grant of immunity, or other agreement for testimony in connection with the case. The handwritten notes of the police officer who conducted the interview of defendant might arguably fit into categories (2) or (3), while the documentation connected with the search warrant fits into category (4). These items were not exculpatory, and therefore it must be determined if defendant made a proper request for them. *People v Stanaway*, 446 Mich 643, 666; 521 NW2d 557 (1994).

Even if this Court should consider the failure to turn over copies of the note and the search warrant to be a violation of the discovery request and agreement (as defendant appears to suggest), such a failure does not automatically warrant the sanction of dismissal. *People v Paris*, 166 Mich App 276, 281; 420 NW2d 184 (1988). "Where evidence is suppressed, the proper considerations are whether (1) suppression was deliberate, (2) the evidence was requested, and (3) in retrospect, the defense could have significantly used the evidence." *People v Davis*, 199 Mich App 502, 514; 503 NW2d 457 (1993), citing *Paris, supra* at 283. In this case, there is no indication that suppression was deliberate.

Moreover, it is readily apparent that the defense could not have significantly used the materials because when the materials were provided, defendant did not use them. With respect to the handwritten note, defendant was given a copy of the note, allowed time to review it, and asked if he had any further cross-examination of the police officer based on the notes. Defendant stated he had none. When the prosecutor conducted a brief inquiry of the officer with respect to the notes, defendant was again asked if he desired further cross-examination and again he declined. With respect to the search warrant materials, defendant did not object to the admission of the pawn ticket, and other than requesting copies of the search warrant materials, defendant did not utilize them in any fashion. Defendant has therefore failed to demonstrate prejudicial error amounting to an abuse of the trial court's discretion with respect to either the preserved or unpreserved error. Absent a showing of prejudice, this Court may not reverse defendant's conviction. *People v Mateo*, 453 Mich 203, 215; 551 NW2d 891 (1996).

Affirmed.

/s/ Richard Allen Griffin
/s/ Gary R. McDonald
/s/ Helene N. White

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