STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 30, 1999
v WADE WATTS, JR., Defendant-Appellant.	No. 207874 Recorder's Court LC No. 97-000670

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v MICHAEL ARNOLD, Defendant-Appellant.	No. 207875 Recorder's Court LC No. 97-000670

Before: Doctoroff, P.J., and Smolenski and Whitbeck, JJ.

PER CURIAM.

Defendants Watts and Arnold were both charged with possession with intent to deliver 50 or more but less 225 grams of heroin, MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii). Following a joint trial with separate juries, defendant Watts was convicted of delivery of less than 50 grams of heroin, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv), and sentenced to 3 to 20 years' imprisonment. Defendant Arnold was convicted of possession with intent to deliver less than 50 grams of heroin, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv), and sentenced to 1-1/2 to 20 years' imprisonment. Defendants now appeal as of right. We affirm.

Docket No. 207874

Defendant Watts first argues that the trial court erred in denying his motion to suppress his statement to the police. We disagree.

Whether a defendant's statement is knowing, intelligent and voluntary is a question of law which the court must determine under the totality of the circumstances. *People v Cheatham*, 453 Mich 1, 27, 44; 551 NW2d 355 (1996); *People v Etheridge*, 196 Mich App 43, 57; 492 NW2d 490 (1992). It is the prosecutor's burden to show that the defendant knowingly, intelligently and voluntarily waived his Fifth Amendment rights by a preponderance of the evidence. *Cheatham*, *supra* at 27. When reviewing a trial court's decision with respect to whether a defendant voluntarily, knowingly and intelligently waived his *Miranda*[1] rights, we review the entire record de novo, but will not disturb the trial court's factual findings unless they are clearly erroneous. *People v Sexton*, 458 Mich 43, 68; 580 NW2d 404 (1998); *Cheatham*, *supra* at 30. A finding is clearly erroneous if it leaves this Court with a definite and firm conviction that a mistake has been made. *People v Givans*, 227 Mich App 113, 119; 575 NW2d 84 (1997).

In the instant case, Officer Stephens testified that, at the scene of the arrest, he orally informed defendant of his *Miranda* rights and defendant also read his rights from a form. Officer Stephens further testified that, at the precinct, he again read defendant his rights from a form and that defendant read the form himself before signing the form. Defendant also signed the written statement prepared by Officer Stephens. Although defendant claims that he did not know how to read and contends that he was not informed of his *Miranda* rights, Officer Stephens testified that, before defendant Watts signed the form, Watts indicated that he understood the rights. Furthermore, the trial judge found that defendant Watt's testimony that he merely signed a blank piece of paper at the precinct was not credible. Finally, there is no merit in defendant Watt's claim that he was denied his right to compulsory process when a defense witness asserted her Fifth Amendment right not to testify because of the risk of self-incrimination. *People v Paasche*, 207 Mich App 698, 708-709; 525 NW2d 914 (1994). Accordingly, we find no error in the trial court's determination that defendant knowingly, intelligently, and voluntarily waived his *Miranda* rights.

Defendant Watts next argues that prosecutorial misconduct denied him a fair trial. However, because defendant Watts did not object to the allegedly improper remarks at trial, review is foreclosed unless an objection could not have cured the error or a failure to review the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Here, defendant contends that certain statements made by the prosecutor during his closing arguments shifted the burden of proof to defendant, improperly commented on defendant's failure to testify, and denigrated defense counsel. However, our review of the record indicates that any error that may have resulted from the statements could have been cured by an appropriate instruction. *Id.* Furthermore, our failure to further review the issue will not result in a miscarriage of justice. *Id.*

Finally, defendant Watts argues that the trial court improperly sentenced defendant on the basis of the court's belief that defendant was guilty of possession with intent to deliver more than 50 grams, but less than 225 grams, of heroin, a charge of which defendant was acquitted. We disagree. The trial court's sentencing decisions are reviewed for an abuse of discretion. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990).

We do not believe the court improperly sentenced defendant Watts on the basis of a belief that he was guilty of the higher charge merely because the judge stated that the amount of heroin found at the home was "substantial" and that he believed defendant was "the person that was controlling this operation." The judge was merely commenting on the evidence presented at trial. Furthermore, the sentence imposed was well within the guidelines range for the offense of which defendant was convicted. Accordingly, we conclude that the trial court did not abuse its discretion in sentencing defendant Watts.

Docket. No. 207875

Defendant Arnold argues that the trial court erred in admitting into evidence two guns and ammunition found at the house. We disagree. A trial court's decision to admit evidence is reviewed for an abuse of discretion. *People v Lugo,* 214 Mich App 699, 709; 542 NW2d 921 (1995).

Defendant Arnold argues that the evidence was not relevant. However, as the trial court determined, the evidence was relevant to the issue of intent to deliver. MRE 401. Furthermore, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. MRE 403. Accordingly, the trial court did not abuse its discretion in admitting the guns and ammunition into evidence.

Affirmed.

/s/ Martin M. Doctoroff
/s/ Michael R. Smolenski
/s/ William C. Whitbeck

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