STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LOMORRIS AUSTIN KOREAN MCGHEE,

Defendant-Appellant.

UNPUBLISHED
October 26, 1999

No. 198442
Recorder's Court
LC No. 95-007690

Before: O'Connell, P.J., and Talbot and Zahra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree felony murder (larceny from the person),[1] MCL 750.316(1)(b); MSA 28.548(1)(b), second-degree murder, MCL 750.317; MSA 28.549, armed robbery, MCL 750.529; MSA 28.797, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). After the second-degree murder count was vacated, defendant was sentenced to life in prison for the felony-murder and armed robbery convictions and to two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm.

On appeal, defendant first argues that he was denied due process of law by the trial court's failure to sua sponte recuse itself from the hearing to suppress his custodial statement. Defendant contends that the trial court was predisposed to disbelieve his testimony because defendant had appeared before the court on prior occasions. However, defendant failed to preserve this issue because he neither objected nor moved the court to recuse itself from the suppression determination. See *People v Mixon*, 170 Mich App 508, 514; 429 NW2d 197 (1988), modified on other grounds 433 Mich 852 (1989). Therefore, our review is limited to whether defendant has demonstrated a plain error that affected his substantial rights (i.e., that the error caused prejudice by affecting the outcome of the proceedings). *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

After a contextual review of the record, we conclude that the trial court based its credibility determination on the testimony elicited at the suppression hearing; not on what defendant had done or said during past proceedings. In the absence of other evidence, defendant has failed to establish the "personal" bias usually required to maintain a claim for disqualification under both the court rule and the

constitution. MCR 2.003(B)(1); *Cain v Dep't of Corrections*, 451 Mich 470, 494-499; 548 NW2d 210 (1996); see also *People v White*, 411 Mich 366, 386; 308 NW2d 138 (1981) (that a judge has presided over unrelated proceedings involving the same defendant does not establish bias or prejudice). Consequently, defendant has not demonstrated plain error, and accordingly has forfeited review of this issue. *Carines*, *supra* at 763.

Next, defendant contends that the trial court erred in ruling that his statement to police was made voluntarily after a valid waiver of his rights protecting against self-incrimination. Defendant challenges the voluntariness of his statement solely on grounds that it was improperly induced by threats, physical abuse, and promises of leniency. We disagree. While the voluntariness of a statement is a question for the trial court, this Court must examine the entire record and make and independent determination. *People v Sexton*, 458 Mich 43, 68; 580 NW2d 404 (1998); *People v Jobson*, 205 Mich App 708, 710; 518 NW2d 526 (1994). However, this Court defers to the trial court's findings unless they are clearly erroneous. *Id.* In these cases, "[c]redibility is crucial . . . and the trial judge is in the best position to make this assessment." *People v Cheatham*, 453 Mich 1, 30; 551 NW2d 355 (1996).

"Statements of an accused made during custodial interrogation are inadmissible unless the accused voluntarily, knowingly, and intelligently waives his Fifth Amendment rights." *People v Howard*, 226 Mich App 528, 538; 575 NW2d 16 (1997), citing *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966). "The burden is on the state to prove by a preponderance of the evidence that the suspect properly waived his rights." *Cheatham, supra* at 27. Whether the waiver is voluntary "is determined solely by examining police conduct." *Howard, supra* at 538. A waiver is voluntary only where it is a "product of free and deliberate choice rather than intimidation, coercion, or deception." *Moran v Burbine*, 475 US 412, 421; 106 S Ct 1135; 89 L Ed 2d 410 (1986); *People v Bender*, 452 Mich 594, 604; 551 NW2d 71 (1996).

In the present case, there was conflicting testimony concerning the circumstances under which defendant gave his statement. Defendant testified that a police officer punched him in the face during the interrogation and that other officers made promises of leniency if defendant would fabricate a story and testify to it in court. In sharp contrast, the police officers testified that defendant was neither assaulted, intimidated, coerced, nor promised favorable treatment. The trial court attached no credibility to defendant's version of events, and we defer to the trial court's superior ability to make that assessment absent any indication that the determination was clearly erroneous. *Cheatham, supra* at 29-30. Therefore, we find that the prosecution established, by a preponderance of the evidence, that defendant's statement was voluntary, and obtained after he knowingly, and intelligently waived his Fifth Amendment rights.

Finally, defendant contends that there was insufficient evidence to support his convictions. We disagree.[2] In reviewing the sufficiency of the evidence in a criminal case, we must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). "Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a

crime." *Carines, supra* at 757, quoting *People v Allen*, 201 Mich App 98, 100; 505 NW2d 869 (1993).

The elements of felony murder are (1) the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result, (3) while committing, attempting to commit, or assisting in the commission of one of the felonies enumerated in MCL 750.316; MSA 28.548, among them larceny of any kind. *People v Kelly*, 231 Mich App 627, 642-643; 588 NW2d 480 (1998). The elements of the predicate felony, larceny from the person, are (1) the taking and carrying away of personal property, (2) from the victim's presence or person, (3) with felonious intent, and (4) without the owner's consent. See *People v Gimotty*, 216 Mich App 254, 257-258; 549 NW2d 39 (1996); *People v Adams*, 128 Mich App 25, 32; 339 NW2d 687 (1983). The elements of armed robbery are (1) an assault, (2), a felonious taking of property from the victim's presence or person, (3) while the defendant is armed with a weapon described in the statute." *Carines, supra* at 757, quoting *People v Turner*, 213 Mich App 558, 569; 540 NW2d 728 (1995). Lastly, felony-firearm requires proof that the defendant possessed a firearm during the commission or attempted commission of a felony. *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996).

In the present case, defendant's accomplice testified that on the night in question: defendant told him that defendant wanted to rob somebody; defendant subsequently shot and killed the victim at a gas station; he and defendant took items from the victim's person; and, that he and defendant drove away in the victim's car. One witness placed defendant and his accomplice together a few hours before the crime. Another witness testified: that defendant told him he had committed the crime; that defendant was trying to sell a car stereo system and a gold chain necklace taken from the victim; and, that he saw defendant carrying a .32 caliber handgun – the caliber of bullet removed from the victim's body. Moreover, the defendant's and his accomplice's fingerprints were both found on the victim's car. Finally, from defendant's own statement to the police, which was intended to be exculpatory, the prosecutor established that defendant: was at or near the scene of the crime at the time of the incident; had personal knowledge of where, when, and how the shooting occurred; the number of perpetrators involved; knew the caliber of the murder weapon even before the ballistic results came in; and, had knowledge of the items that were stolen from the victim's person and from the car. Although defendant challenges the credibility of his accomplice and others, these questions are appropriately left to the trier of fact and will not be resolved anew by this Court. *People v Givans*, 227 Mich App 113, 123-124; 575 NW2d 84 (1997). Viewed in a light most favorable to the prosecution, we conclude that this evidence was more than sufficient to establish that defendant committed each of the elements of the charged crimes beyond a reasonable doubt.

Affirmed.

/s/ Peter D. O'Connell
/s/ Michael J. Talbot
/s/ Brian K. Zahra

[1] The felony information listed the predicate felony as "larceny." During its instructions to the jury, the trial court specified that the predicate felony was "larceny from the person" with approval from both the prosecution and defense counsel.

[2] In support of this argument, defendant substantially relies on the fact that a witness whose damaging preliminary examination testimony was read to the jury, provided defendant with an affidavit recanting his testimony after the trial. Armed with this affidavit, defendant filed a motion for a new trial based on newly-discovered evidence, which the trial court denied. While defendant does not challenge this ruling on appeal, his argument presumes, without establishing, that the affidavit is an adequate basis for excluding the witness' prior testimony from this Court's sufficiency analysis. However, "[r]ecanting testimony is suspect and untrustworthy" and the affidavit establishes neither the veracity of the recanted testimony nor the falsity of prior preliminary examination testimony. *People v Canter*, 197 Mich App 550, 560; 496 NW2d 336 (1992). Nevertheless, as detailed below, even without the contested testimony, there was sufficient evidence to establish that defendant committed the charged offenses beyond a reasonable doubt.