

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY ODELL WALKER,

Defendant-Appellant.

UNPUBLISHED

December 26, 2000

No. 215039

Saginaw Circuit Court

LC No. 98-015558 FH

Before: Doctoroff, P.J., and Hoekstra and Markey, JJ

PER CURIAM.

After a jury trial, defendant was convicted of possession of less than twenty-five grams of cocaine, MCL 333.7403(2)(a)(v); MSA 14.15(7403)(2)(a)(v), possession of a firearm in the commission of a felony, MCL 750.227b; MSA 28.424(2), and felon in possession of a firearm, MCL 750.224f; MSA 28.421(6). He was sentenced to eighteen to sixty months' imprisonment for the cocaine possession and felon in possession convictions, to be served consecutively to the mandatory two-year term for the felony-firearm conviction. Defendant appeals as of right. We reverse defendant's convictions and remand for a new trial.

Defendant asserts that admissions he allegedly made should have been suppressed because questioning by the police detective violated his Fifth Amendment rights. We review de novo the entire record regarding a defendant's motion to suppress statements, but do not disturb a trial court's factual findings unless there is clear error. *People v Daoud*, 462 Mich 621, 629; 614 NW2d 152 (2000). Whether defendant knowingly and intelligently waived his *Miranda*¹ rights is a question of law. *Id.*

The statements of an accused made during custodial interrogation are inadmissible unless the totality of the circumstances indicate that the accused voluntarily, knowingly and intelligently waived his Fifth Amendment rights. *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966); *People v Abraham*, 234 Mich App 640, 644-645; 599 NW2d 736 (1999). The prosecutor must establish a valid waiver by a preponderance of the evidence. *Abraham, supra* at 645. Admissibility of statements turns not only on whether they were voluntarily made but also

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

on adherence by the police to *Miranda* requirements. *Dickerson v United States*, ___ US ___, 120 S Ct 2326, 2329-2330; 147 L Ed 2d 405 (2000).

The police arrested defendant following a drug raid on his mother's house. After he was taken into custody and read his *Miranda* rights, defendant responded that he had nothing to say, or that he did not wish to speak. The police searched the house, and within about an hour discovered a gun and a plate with cocaine residue. Even though the detective knew defendant did not wish to be questioned, he asked about the gun and the plate without reminding defendant of his rights. According to the detective, defendant stated that he put the gun away the night before and the plate and the cocaine were his.

Once a person in custody unequivocally invokes his Fifth Amendment right to remain silent, the police must discontinue interrogation. *People v Slocum (On Remand)*, 219 Mich App 695, 698-699; 558 NW2d 4 (1996); *People v Jackson*, 158 Mich App 544, 550; 405 NW2d 192 (1987). A defendant's statement made after these rights have been invoked is admissible only if the defendant's rights have been scrupulously honored. *Slocum, supra* at 699. Statements are more likely to be found admissible when (1) the police resumed questioning after a significant period of time, (2) a fresh set of *Miranda* warnings was given, and (3) the subsequent interrogation related to a crime that was not the subject of the earlier interrogation. *Slocum, supra* at 700-701; *People v Catey*, 135 Mich App 714, 725; 356 NW2d 241 (1984).

The facts of this case indicate that the police did not scrupulously honor defendant's invocation of his Fifth Amendment rights. Less than an hour passed between the time the detective first gave defendant his warnings and when he attempted to question defendant regarding the gun and the plate. Further, he did not reread the warnings before resuming questioning. The detective disregarded defendant's unequivocal request to cut off questioning, and asked questions intended to induce defendant to make an incriminating statement. We find that the detective's persistent questioning after defendant invoked his rights constituted a violation of *Miranda* absent a valid waiver of those rights.

We further find that the trial court erred when it determined that defendant's statements were admissible. At the *Walker*² hearing in this case, the trial court addressed only the issue of voluntariness, making no determination whether defendant's rights were scrupulously honored, and making no inquiry into whether defendant made a knowing and intelligent waiver of his rights. The prosecutor had the burden to show the validity of a waiver of defendant's *Miranda* rights by a preponderance of the evidence. *Daoud, supra* at 634. We find no evidence on this record that defendant waived his rights. Even though the trial court failed to conduct a complete analysis of this issue, the available record indicates that the police violated *Miranda*'s requirements by questioning defendant after he asserted his rights and this violation rendered defendant's statements inadmissible. The trial court's failure to suppress defendant's statements was clear error.

² *People v Walker*, 374 Mich 331, 338; 132 NW2d 87 (1965).

Having found that the trial court's admission of defendant's statements was in error, this Court must now determine whether the error was harmless. *Arizona v Fulminante*, 499 US 279, 310; 111 S Ct 1246; 113 L Ed 2d 302 (1991); *People v McRunels*, 237 Mich App 168, 184; 603 NW2d 95 (1999). Erroneous admission of a confession is a nonstructural error that does not justify automatic reversal. *People v Whitehead*, 238 Mich App 1, 7; 604 NW2d 737 (1999). The error is harmless if the court determines beyond a reasonable doubt that there was no reasonable possibility that the erroneously admitted evidence contributed to the conviction. *Id.* at 7-8; *People v Anderson (After Remand)*, 446 Mich 392, 406; 521 NW2d 538 (1994).

In this case, admission of defendant's statements cannot be said to be harmless. Our review of the evidence presented at trial leads to the conclusion that it is probable that, absent the confession, the jury would not have convicted defendant. A confession is like no other evidence:

[T]he defendant's own confession is probably the most probative and damaging evidence that can be admitted against him. The admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct. Certainly, confessions have profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so. [*Fulminante, supra* at 296.]

In this case, the prosecutor compounded the effect of the admitted statements by repeatedly referring to defendant's admissions in his closing argument. It is probable that the confession, along with the prosecution's focus on that evidence, contributed to the conviction. We reverse defendant's convictions and remand for a new trial.

Although this single issue is dispositive, defendant's other two issues merit discussion. On the first morning of trial, defendant requested that appointed counsel be withdrawn due to a breakdown in their relationship. That motion was denied. When defendant retained his own attorney the next day, the new defense counsel requested a two-day continuance to prepare. That motion was also denied. Defendant asserts that the trial court abused its discretion in denying the continuance, and that as a result, he received ineffective assistance of counsel due to lack of preparation.

We review for abuse of discretion a trial court's decision on a motion to withdraw or a request for a continuance. *In re Withdrawal of Attorney (Cain v Dep't of Corrections)*, 234 Mich App 421, 431; 594 NW2d 514 (1999); *People v Williams*, 386 Mich 565, 575; 194 NW2d 337 (1972). When reviewing such decisions, we consider whether the defendant (1) is asserting a constitutional right, (2) has a legitimate reason for asserting the right, such as a bona fide dispute with his attorney, (3) was negligent in asserting his right, (4) is merely attempting to delay trial, and (5) demonstrated prejudice resulting from the trial court's decision. *People v Echavarria*, 233 Mich App 356, 369; 592 NW2d 737 (1999).

The right to effective counsel, the right to present a defense, and the right to a fair trial are all guaranteed by the United States and Michigan Constitutions. US Const, Am VI; Const 1963,

art 1, §§ 17, 20. Good cause for obtaining substitute counsel exists where a legitimate difference of opinion develops between a defendant and his appointed counsel with regard to a fundamental trial tactic. *People v Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991). However, a mere allegation that a defendant lacks confidence in his attorney, unsupported by a substantial reason, does not amount to adequate cause, particularly when the request is belated. *People v Tucker*, 181 Mich App 246, 255; 448 NW2d 811 (1989).

Here, defendant stated that defense counsel had not talked to him, had not explained anything to him, and had not investigated anything, yet the court made no further inquiry and merely concluded that the attorney was competent. However, while defendant's statements indicate his dissatisfaction, and may attest to counsel's performance, nothing in the record indicates that there was a breakdown of their relationship, and thus no legitimate reason for withdrawal is provided in the record.

Likewise, defendant has not clearly demonstrated any prejudice resulting from the court's denial of his request for a continuance. A lack of preparation by counsel can provide a basis for reversal if it results in ineffectiveness of counsel. *People v Storch*, 176 Mich App 414, 426-427; 440 NW2d 14 (1989). However, to establish ineffective assistance of counsel, a defendant must demonstrate that his case was prejudiced by his counsel's lack of preparation. *People v Mitchell*, 454 Mich 145, 164; 560 NW2d 600 (1997). Defendant does not assert how the outcome of the trial would have been different nor does he specifically note ways in which a continuance would have helped his case. Although the reasons articulated by the trial court for denying defendant's motions are unsupported by any findings of fact, we cannot conclude that the court's denial of substitute counsel or of a continuance warrants reversal.

Finally, defendant claims that his right to a fair trial by an impartial jury was denied when, at the end of closing arguments, a juror expressed fears that gang members were in the courtroom and that defendant had access to the jurors' names and addresses. Defense counsel moved for a mistrial when the prosecution refused to agree to reducing the panel to eleven jurors. The trial court denied the motion and refused to allow a hearing with the juror to determine the effect of her fears on her ability to render an impartial verdict.

The United States Constitution guarantees a criminal defendant a fair trial by an impartial jury. US Const, Am VI; Const 1963, art I, § 20; *People v Glass*, 235 Mich App 455, 464; 597 NW2d 876 (1999). A trial court must safeguard this right, and may declare a mistrial where it discovers that one or more jurors might be biased. *People v Johnson*, 103 Mich App 825, 829; 303 NW2d 908 (1981). A defendant is denied his right to an impartial jury when a juror removable for cause is allowed to serve on the jury. *People v Daoust*, 228 Mich App 1, 8-9; 577 NW2d 279 (1998).

It is imperative that the court allow the elicitation of enough information so that it can make an independent determination of a juror's ability to be impartial. *People v Tyburski*, 445 Mich 606, 620; 518 NW2d 441 (1994). The trial court abuses its discretion if it does not adequately question jurors regarding potential bias so that challenges for cause, or even peremptory challenges, can be intelligently exercised. *Id.* at 619. The same standard applies to challenges made after the jury is impaneled. *Rice v Winkelman Bros Apparel, Inc*, 13 Mich App 281, 287; 164 NW2d 417 (1968).

In this case, the trial court knew of the potential for bias on the part of juror, but refused to conduct any interrogation to see how and to what extent the juror's ability to render a just verdict was affected. While the trial court is entitled to broad discretion in its examination of a challenged juror, that discretion is abused where the court makes *no* examination and rules summarily that the juror should not be excused. Although we find that the trial court abused its discretion by failing to conduct an examination of the potentially biased juror, our reversal of defendant's convictions obviates the need to address whether that abuse of discretion warranted relief.

Reversed and remanded for a new trial. We do not retain jurisdiction.

/s/ Martin M. Doctoroff

/s/ Joel P. Hoekstra

/s/ Jane E. Markey