STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 26, 2000
v	No. 215150 Oakland Circuit Court
TRACI L. MCCALVIN, Defendant-Appellant.	LC No. 98-158846-FC

Before: Cavanagh, P.J., and Talbot and Meter, JJ.

PER CURIAM.

Defendant, who killed someone with her car but claims she did so by accident, appeals by right from her conviction by a jury of second-degree murder, MCL 750.317; MSA 28.549. The trial court sentenced her to fifteen to thirty years in prison. We affirm.

I

Defendant first contends that the trial court erred by failing to suppress a statement she made to a police officer, Christopher Helgert, in which she admitted to trying to scare the victim by driving toward her. Defendant claims that suppression was required because she gave the statement involuntarily. Defendant failed to seek suppression, however, until late in the trial, when the statement had already been elicited and discussed in front of the jury. Thus, we must first examine the timeliness of defendant's motion to suppress.

To properly challenge the voluntariness of a confession, a defendant must ordinarily file a pretrial motion to suppress. *People v Soltis*, 104 Mich App 53, 55; 304 NW2d 811 (1981); *People v Mitchell*, 44 Mich App 679, 683-684; 205 NW2d 876 (1973), reversed on other grounds 402 Mich 506 (1978). However, if there are "special circumstances" justifying the defendant's delay in seeking suppression, a court may entertain a late motion to suppress. *Soltis*, *supra* at 55-58; *Mitchell*, *supra* at 683. A trial court's decision regarding whether to entertain an untimely motion is reviewed by this Court for an abuse of discretion. *Soltis*, *supra* at 55-58; *Mitchell*, *supra* at 683-684.

Here, there were no special circumstances justifying the delay in bringing the motion to suppress. In fact, defense counsel stated at trial that he did not bring a pretrial suppression motion because (1) he did not think the court would grant the motion, and (2) he did not want

Helgert to be able to "gather his forces . . . to respond to the inquiry regarding the voluntariness of the confession in a manner other than he would if confronted by a [j]ury." Defense counsel made no allegation that there were late-discovered factual circumstances that demonstrated the illegality of the confession and justified the late motion to suppress. See *Soltis, supra* at 56, and *Mitchell, supra* at 683. Accordingly, the trial court did not abuse its discretion in denying defendant's motion. *Soltis, supra* at 55-58; *Mitchell, supra* at 683-684.

II

Our rejection of defendant's argument that the trial court should have granted her motion to suppress and that its failure to do so requires reversal is supported by an additional, independent analysis.

The issue is unpreserved for appellate review because the suppression motion was untimely. See *Mitchell, supra* at 683-684; see also *People v Snider*, 239 Mich App 393, 416; 608 NW2d 502 (2000). Nevertheless, this Court reviews unpreserved claims of constitutional error for plain error that affected the defendant's substantial rights. *People v Carines*, 460 Mich 750, 761-764; 597 NW2d 130 (1999). A "'reviewing court should reverse only if the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings.'" *Snider, supra* at 420, quoting *Carines, supra* at 774.

Here, we find no plain error that seriously affected the fairness, integrity, or public reputation of judicial proceedings. To determine whether a statement is voluntary or the result of police coercion, this Court examines the entire record and makes an independent determination of voluntariness by analyzing the totality of the circumstances. *People v Johnson*, 202 Mich App 281, 287; 508 NW2d 509 (1993). Here, the totality of the circumstances surrounding defendant's confession to Helgert indicates that her statement was voluntarily made and properly admitted at trial.

The police read defendant her *Miranda* rights, and defendant initialed and signed a document indicating she was informed of and understood each right. Another police officer who interviewed defendant, Daryl Palmer, testified that defendant read and understood the rights, and defendant admitted at trial that she understood them, even though she had no previous experience with police. Defendant, in her mid-twenties and a high-school graduate at the time of the interview, was also of a sufficient intellectual maturity to understand her rights.

Also, the police did not question defendant for an inordinate amount of time, and defendant conceded at trial that the repeated questioning that occurred helped to refresh her memory. Evidence also indicated that the police gave defendant several breaks during the interviews. According to the police, defendant denied being under the influence of drugs or alcohol, denied being ill or injured, and was offered food and water. In addition, Helgert described defendant's demeanor as quiet, calm, and unemotional. Defense counsel questioned Palmer about defendant's lack of sleep and the late hour of the interview, but no evidence established that defendant was actually sleep-deprived.

The main issues raised by defendant regarding the voluntariness of her confession were various promises and threats allegedly made by Helgert. Defendant testified that Helgert told her

she would go to prison for first-degree murder and that she would lose her children if she did not change her story and admit that she tried to scare the victim by driving toward her. Helgert testified that he thought defendant was giving answers that defied common sense and that he told her they did not match the evidence at the scene of the incident. Helgert said that he never threatened defendant but that he did inform her that if she planned to kill the victim, she could go to prison for first-degree murder and would have no contact with her children. Helgert stated that he only discussed the consequences of a possible conviction so that defendant would be prompted to tell him her side of the story and not leave her fate in the hands of a future court or jury.

Contrary to defendant's argument on appeal, the interview in this case differed from the interview deemed coercive in *Lynumn v Illinois*, 372 US 528; 83 S Ct 917; 9 L Ed 2d 922 (1963), in which the police explicitly told the defendant that her children would be taken from her if she did not cooperate. It also differed from the interview deemed coercive in *United States v Tingle*, 658 F2d 1332 (CA 9, 1981), in which the police told the defendant (1) that the maximum punishment for the charged crimes would preclude her from seeing her children, (2) that her cooperation would be communicated to the prosecutor, and (3) that if she refused to cooperate, the prosecutor would be told that she was "stubborn or hard-headed." Indeed, in the instant case, Helgert's testimony showed that he merely informed defendant that if a judge or jury believed that she intended to kill the victim and she went to prison for first-degree murder, she would not have contact with her children. Moreover, the record in this case, in contrast to the record in *Tingle*, does not reflect that defendant felt great psychological distress during the interview with Helgert. Again, Helgert described defendant as quiet, calm, and unemotional during the interview. The interview in this case simply did not rise to the level of coercion requiring reversal in *Lynumn* and *Tingle*. Helgert's testimony suggests that he merely informed defendant of the consequences of the charges involved in light of the victim's death, should defendant be convicted, and did not make any promises in exchange for cooperation.

Defendant also testified that Helgert said the prosecutor would likely drop or reduce the charges against her if she admitted to trying to scare the victim. No testimony on the issue of dropped or reduced charges was elicited from Helgert. The issue would likely have been explored further at a *Walker* hearing, had defense counsel requested such a hearing. Nonetheless, even if defendant's assertion were accepted as true by the trial court, Helgert's alleged statement did not constitute a *promise* of leniency. Instead, Helgert's alleged statement expressed only a *potential* for leniency. See *People v Carigon*, 128 Mich App 802, 810-811; 341 NW2d 803 (1983). In fact, Helgert explicitly denied making any promises to defendant other than promising that she could call her mother. Even if the statement *were* characterized as a promise of leniency, such a promise does not render a confession inadmissible but is only one factor in evaluating voluntariness. *People v Givans*, 227 Mich App 113, 120; 575 NW2d 84 (1997). Rather, it is the totality of the circumstances surrounding the confession that indicates whether it was freely made. *Sexton, supra*, 461 Mich 752. In this case, the totality of the circumstances discussed above indicates that defendant's confession was made to Helgert voluntarily and without

coercion. Accordingly, we can discern no plain error in this case that affected defendant's substantial rights and that mandates reversal.[1] *Carines, supra* at 761-764, 774.

III

Defendant additionally argues that her trial attorney rendered ineffective assistance of counsel by failing to move to timely suppress her confession.

Defendant failed to object to defense counsel's performance below and did not move below for an evidentiary hearing on this issue.[2] See *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973). Therefore, "in determining whether defendant has overcome the presumption that counsel was effective, [this Court's] review is limited to the facts apparent in the lower court record." *People v Fike*, 228 Mich App 178, 181; 577 NW2d 903 (1998).

To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that the deficient performance denied the defendant a fair trial. *People v Smith*, 456 Mich 543, 556; 581 NW2d 654 (1998); *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991). The defendant must overcome a presumption that the challenged action was sound trial strategy, *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994), and must establish a reasonable probability that but for counsel's error or errors, the result of the proceedings would have been different. *Id*. at 687-688.

Defense counsel explained on the record that he deliberately chose not to bring a suppression motion prior to trial because he thought he would elicit more truthful testimony from Helgert during trial and because he thought the motion would be denied. Defendant concedes in her appellate brief that defense counsel's action constituted trial strategy. Given our discussion

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[1] We note that there is even a *third* basis on which to reject defendant's argument that the trial court should have granted her motion to suppress and that its failure to do so requires reversal. Indeed, defendant affirmatively *waived* this issue by raising the confession herself as a trial tactic. Defense counsel specifically explained that he did not move for suppression because he wanted to question Helgert about his procedures in front of the jury. Therefore, this was not simply a matter of failing to make a timely assertion of a right; it was an "intentional relinquishment or abandonment of a known right." *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000), quoting *Carines, supra*, 460 Mich 762-763 n 7, and *United States v Olano*, 507 US 725, 733; 113 S Ct 1770; 123 L Ed 2d 508 (1993). Defendant's use of the statement and her deliberate choice not to move to suppress it effectively waived the issue. This necessarily differs from issue forfeiture. *Id.*

[2] Defendant suggests that we should remand now for an evidentiary hearing. We decline to do so, for two reasons. First, defendant should not have waited until this case was being heard on the merits to seek a remand. See *People v Bright*, 126 Mich App 606, 610; 337 NW2d 596 (1983). Moreover, defendant has failed to demonstrate through an affidavit or offer of proof that facts elicited during an evidentiary hearing would support her ineffective assistance claim. See MCR 7.211(C)(1)(a)(ii).

in part II of this opinion, we cannot say that this admitted strategy was unsound (i.e., counsel acted reasonably in surmising that a pretrial suppression motion would have been denied). Moreover, "this Court will not second-guess counsel regarding matters of trial strategy, and even if defense counsel was ultimately mistaken, this Court will not assess counsel's competence with the benefit of hindsight." *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999).

In addition, counsel's actions did not prejudice defendant because, as explained in part II, the statement was properly admitted under the totality of the circumstances. Therefore, any motion by defense counsel to suppress the confession would have been futile, even if timely made. A claim of ineffective assistance of counsel fails if the desired action would have been futile. *People v Armstrong*, 175 Mich App 181, 186; 437 NW2d 343 (1989). We find no basis for reversal.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Michael J. Talbot
/s/ Patrick M. Meter