STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 5, 2001
v	No. 215198 Wayne Circuit Court
GERALD N. FELTON, Defendant-Appellant.	LC No. 98-002004

Before: Bandstra, C.J., and Griffin and Collins, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree premeditated murder, MCL 750.316(1)(a); MSA 28.548(1)(a), and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), in connection with the shooting death of DeJuan Betts. The trial court sentenced defendant to a mandatory term of life imprisonment without parole for the murder conviction, to be served consecutively to the mandatory two-year prison term for his felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant argues that the trial court erred in determining that the second of two statements allegedly made by him following his arrest was voluntarily given and thus admissible as evidence at trial. Defendant contends that the interrogating officer's failure to readvise him of his *Miranda*[1] rights following a two-hour interruption between the two statements precluded a finding of voluntariness, which in turn required suppression of the second statement. Contrary to defendant's assertion, however, the failure to readvise a defendant of his *Miranda* rights before each interrogation does not in itself render a subsequent statement inadmissible. *People v Littlejohn*, 197 Mich App 220, 223; 495 NW2d 171 (1992); *People v Godboldo*, 158 Mich App 603, 605-607; 405 NW2d 114 (1986). Rather, in such circumstances the question remains whether the statement was voluntary. *Id*. at 607.

Whether a defendant's statement was voluntarily given is a question of law that a court must determine under the totality of the circumstances. *People v Etheridge*, 196 Mich App 43, 57; 492 NW2d 490 (1992). In reviewing the trial court's decision, this Court examines the entire

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

record and makes an independent determination of voluntariness. *People v Marshall*, 204 Mich App 584, 587; 517 NW2d 554 (1994). However, this Court gives deference to the trial court's superior ability to view the evidence and the witnesses and will not disturb that court's findings unless they are clearly erroneous. *Id.*

Defendant acknowledged during the *Walker*[2] hearing that before he gave his first statement, he was advised of rights under *Miranda*, he understood those rights, and he signed an advice of rights form. Defendant further acknowledged that his second conversation with the police began only two hours after he was advised of his rights under *Miranda*. See *Godboldo, supra* at 606. Further, Officer Monica Childs, who took both of defendant's statements, testified that before taking defendant's second statement, she reminded him that he had been given these rights earlier and asked him whether he continued to understand those rights. According to Childs, defendant answered in the affirmative and then initialed that portion of the statement wherein his answers to those questions had been typed. Although defendant testified that he did not make the second statement and suggested that his signature on that document was garnered through "trickery" by the police, the trial court did not find this testimony to be credible. We find no error in the trial court's factual findings or its conclusion that defendant's statement was voluntarily given.

Defendant further argues that aside from any consideration of voluntariness, his statements to the police should have been excluded as the fruits of an unlawful arrest because, he contends, when he was arrested at his home, the officers did not show him an arrest warrant. However, in the trial court, defendant did not move to suppress his statement on the basis that it was the fruit of an unlawful arrest, but only on the ground that his statement was not voluntary. Indeed, at the *Walker* hearing, defense counsel conceded that he was not arguing that defendant was arrested illegally, and the court made no finding in that regard. Because defendant failed to preserve this issue, our review is limited to determining whether defendant has demonstrated a plain error that affected his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

"[T]he exclusionary rule was not intended to grant criminal suspects protection for statements made outside their premises where the police have probable cause to arrest the suspects for committing a crime." *People v Dowdy*, 211 Mich App 562, 570; 536 NW2d 794 (1995), citing *New York v Harris*, 495 US 14; 110 S Ct 1640; 109 L Ed 2d 13 (1990). Here, defendant does not argue, and the record does not show, that the police lacked probable cause to arrest him. Thus, even assuming that defendant was arrested in his home without an arrest warrant, he has not demonstrated plain error by the court in admitting his statement that, as discussed above, the court properly determined was voluntarily given at the police station. Accordingly, reversal on this basis not required. *Carines, supra.*

Defendant next argues that the trial court erred in allowing into evidence testimony that he was known to carry a handgun and had at times sold illegal drugs. Defendant contends that the testimony constituted evidence of prior bad acts, which is inadmissible under MRE 404(b).

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[2] *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

Again, because defendant failed to preserve this issue by objecting to the testimony he now challenges on appeal, our review is limited to determining whether defendant has demonstrated a plain error that affected substantial rights. *Carines*, *supra*.

Here, Randy Johnson testified that shortly after Betts was killed, Johnson received a telephone call from defendant, who informed him that he had witnessed the shooting and had, in an effort to aid his fallen friend, fired several rounds from his own weapon at the automobile claimed by defendant to have been driven by the real killers. Although Johnson acknowledged that defendant was in the habit of carrying a gun, any prejudice to defendant from Johnson's statement, beyond that from defendant's own comments to Johnson, was minimal. Because defendant has failed to show that any error in admitting the testimony concerning defendant's gun possession affected his substantial rights, reversal is not required.

Similarly, defendant is not entitled to relief on the basis of the admission of testimony indicating that he had previously engaged in the sale of illegal drugs. This testimony came during Officer Childs' reading of defendant's signed statement into the record. Although this testimony possessed little, if any, relevance to the issues to be decided at trial, given the cursory manner in which these statements were presented, and considering that the prosecutor did not highlight or otherwise use these statements to argue defendant's guilt or to imply bad character, we conclude that defendant has not demonstrated that he suffered any prejudice as a result of challenged testimony.

Defendant next argues that the trial court erred in refusing to admit his earlier exculpatory statement, under MRE 106, for contemporaneous consideration with his later inculpatory statement. Defendant further contends that the trial court erred in failing to allow defense counsel to elicit testimony concerning the circumstances surrounding the taking of the earlier statement, thus precluding defendant from challenging the reliability of the second statement by informing the jurors of the manner in which the first statement was obtained. This Court reviews the trial court's decision to admit or exclude evidence for an abuse of discretion and will reverse only where there is a clear abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998).

As noted by this Court in *Moody v Pulte Homes, Inc*, 125 Mich App 739, 747; 337 NW2d 283 (1983), mod on other grounds 423 Mich 150 (1985), MRE 106 was "designed to prevent unfairness which may result if a statement is taken out of context." Here, although the two statements were clearly contradictory, there was nothing in defendant's second statement which could not be accurately understood without consideration of defendant's earlier statement. Further, defendant was allowed to elicit testimony concerning the circumstances surrounding the taking of the second statement, which was the only statement admitted into evidence. Moreover, even assuming that the differences between the statements were relevant to the jurors' determination whether to believe defendant's second statement, given that the jury was made aware that defendant had given an earlier statement that differed substantially from the one read into the record and that they were made aware of defendant's alternative version of events through the testimony of at least two other witnesses, any error in the court's failure to admit the earlier statement or testimony regarding the circumstances surrounding the taking of that

statement did not undermine the reliability of the verdict and was, therefore, harmless. See MCL 769.26; MSA 28.1096; *People v Elston*, 462 Mich 751, 766; 614 NW2d 595 (2000).

Defendant next argues that the court abused its discretion in admitting several photographs of the crime scene. Defendant contends that the photographs were irrelevant, cumulative, and gruesome. Again, we review a trial court's decision to admit or exclude evidence for an abuse of discretion. *Starr, supra*.

"'Photographs that are merely calculated to arouse the sympathies or prejudices of the jury are properly excluded, particularly if they are not substantially necessary or instructive to show material facts or conditions.'" *People v Mills*, 450 Mich 61, 77; 537 NW2d 909 (1995), mod on other grounds 450 Mich 1212 (1995), quoting 29 Am Jur 2d, Evidence § 787, pp 860-861. However, photographs offered for a proper evidentiary purpose "'are not rendered inadmissible merely because they bring vividly to the jurors the details of a gruesome or shocking accident or crime, even though they may tend to arouse the passion or prejudice of the jurors.'" *Id.*.

Here, the trial court found that the photographs were relevant with regard to defendant's intent and his claim that the shooting was accidental, and that their probative value was not substantially outweighed by unfair prejudice. We find no error in this ruling. Most of the photographs depict the victim, although lying on the ground, essentially seated on his bicycle with one foot still resting on the pedals and his cap still on his head One depicts the victim's head wound. Because these photographs tend to contradict defendant's claim of a struggle with the victim, the photographic evidence was highly probative with regard to the credibility of defendant's claim that the shooting was accidental and thus bore strongly on the issue of intent.

Moreover, although defendant claims that the photographs were cumulative because the circumstances depicted in each of the disputed photographs were adequately described by the medical examiner's testimony, we note that photographs are not excludable simply because a witness can orally testify about the information contained in the photographs. *Mills, supra* at 76. Photographs may be used to corroborate or further explain witness testimony where relevant and probative. *Id.* "The proper inquiry is always whether the probative value of the photographs is substantially outweighed by unfair prejudice." *Id.* Given the relatively strong probative value of the photographic evidence, the risk of unfair prejudice did not substantially outweigh its probative value. MRE 403. Accordingly, the trial court did not abuse its discretion in admitting the photographs.

Defendant next argues that the trial court erred in refusing to allow Officer Reed to testify regarding statements made to him by Charles Bates, the local postman, indicating that he had on several "prior occasions" seen an individual matching the description of Betts' attacker given by witness Mary Pelichet, entering a house located around the corner from the scene of the shooting. Defendant sought admission of the disputed statement under MRE 803(1), the present sense impression exception to the rule against hearsay. However, Bates' statements to Reed, which indicated merely that he had seen this individual previously entering or leaving the subject house, were not admissible as a present sense impression because the statements were not made while Bates was perceiving the event or immediately thereafter. MRE 803(1); *People v Jensen*, 222

Mich App 575, 581; 564 NW2d 192 (1997), vacated in part on other grounds 456 Mich 935 (1998).

Finally, we find no merit in defendant's arguments that a legislatively mandated life sentence without the possibility of parole, such as required under MCL 750.316(1)(a); MSA 28.548(1)(a) and imposed in this case, is a determinate sentence which the Legislature was without authority to require under Article 4, § 45 of the Michigan Constitution, and that such a sentence inherently constitutes cruel and unusual punishment. While the Michigan Constitution "plainly authorizes indeterminate sentencing, it includes no *prohibition* against a statute *requiring* determinate sentencing as a punishment for crime." *People v Cooper*, 236 Mich App 643, 661; 601 NW2d 409 (1999); see also *People v Snider*, 239 Mich App 393, 426; 608 NW2d 502 (2000) (holding mandatory nonparolable life sentence for first-degree premeditated murder to be constitutional as "there is nothing in Const 1963, art 4, § 45 requiring indeterminate sentencing for particular crimes."). Further, the appellate courts of this state have long held that the imposition of a mandatory, nonparolable life sentence under the statute proscribing first-degree murder does not constitute cruel and unusual punishment. *People v Hall*, 396 Mich 650, 657; 242 NW2d 377 (1976); *People v Smith*, 108 Mich App 338, 345; 310 NW2d 235 (1981).

Affirmed.

/s/ Richard A. Bandstra
/s/ Richard Allen Griffin
/s/ Jeffrey G. Collins