# STATE OF MICHIGAN

# COURT OF APPEALS

| | |
|---|---|
| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>June 26, 2001 |
| v | No. 217338<br>Wayne Circuit Court |
| JAMES LIDDELL,<br><br>Defendant-Appellant. | Criminal Division<br>LC No. 97-008742 |

Before: Smolenski, P.J., and McDonald and Jansen, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to cause great bodily harm less than murder, MCL 750.84, and possession of a firearm during the commission of a felony, MCL 750.227b.[1] The trial court sentenced defendant to a term of 3 to 10 years' imprisonment for the assault conviction and a consecutive two-year term for the felony-firearm conviction, with credit for 467 days served. He appeals as of right. We affirm.

Defendant's convictions arise from the shooting death of Anthony Jenkins. The prosecutor's trial theory was that defendant shot and killed Jenkins, without justification or excuse, in a drug-related dispute. Defendant claimed that he was the victim of an attempted armed robbery and that he shot Jenkins in self-defense. Defendant's first trial ended when the trial court granted his request for a mistrial. Defendant now argues that double jeopardy barred his retrial on the same charges and argues that the trial court erroneously denied his motion to dismiss. We review double jeopardy questions de novo. *People v Mackle*, 241 Mich App 583, 592; 617 NW2d 339 (2000).

Both the United States and Michigan Constitutions prohibit placing a defendant twice in jeopardy for a single offense. US Const, Am V; Const 1963, art 1, sec 15; *People v Torres*, 452 Mich 43, 63; 549 NW2d 540 (1996). These guarantees are substantially identical and protect a defendant against both successive prosecutions for the same offense and multiple punishments

[1] Defendant was originally charged with first-degree murder, MCL 750.316. The trial court entered a directed verdict on this charge during trial and allowed the prosecutor to amend the information to charge defendant with the crime of assault with intent to murder. Defendant was subsequently convicted of assault with intent to cause great bodily harm less than murder.

for the same offense. *Id.* at 64. Yet, the Michigan Constitution affords somewhat broader protections than does the federal constitution. *Mackle*, *supra* at 593. It is clear that "[w]here a defendant deliberately chooses to seek termination of proceedings against him on a legal technicality unrelated to his factual guilt or innocence, the double jeopardy clause does not bar his retrial." *People v Knez*, 173 Mich App 402, 404; 433 NW2d 423 (1988). Thus, a mistrial granted at the defendant's own request or with his consent, unless provoked by intentional prosecutorial conduct, waives double jeopardy protections. *People v Dawson*, 431 Mich 234, 236, 253; 427 NW2d 886 (1988); *People v Tracey*, 221 Mich App 321, 326; 561 NW2d 133 (1997); *People v Gaval*, 202 Mich App 51, 53; 507 NW2d 786 (1993). Here, there is no dispute that the trial court ordered a mistrial at defendant's request. Therefore, the question becomes whether defendant's request for a mistrial was provoked by intentional prosecutorial misconduct. *Tracey*, *supra* at 327-328.

There is no dispute that defendant was not provided with a copy of the evidence technician's report, which prompted the trial court to grant defendant's request for a mistrial. It is apparent from the record that the evidence technician's report was not supplied to defense counsel because the report was not provided to the officer-in-charge or to assistant prosecutor David McClorey. That mistake was not uncovered due, in part, to the fact that McClorey suffered a heart attack during the weeks before trial. The mistake was compounded when McClorey's replacement, Dana Wessel, took over the case and assumed that McClorey had misplaced the report and that a copy had already been provided to defense counsel. Under these circumstances, the prosecutor's conduct can be described as nothing more than negligent. There is no indication that the prosecutor, who "vehemently" opposed the mistrial, intentionally withheld the technician's report in an effort to goad defendant into requesting a mistrial. Prosecutor Wessel indicated, and defendant offered nothing to contradict her assertion, that the failure to provide the report was inadvertent. Accordingly, under *Dawson*, the trial court properly denied defendant's motion to dismiss on double jeopardy grounds.

Defendant next argues that the trial court erred in granting the prosecutor's motion to amend the information. Specifically, defendant claims that he did not have notice that he would be required to defend against a charge of assault with intent to commit murder. We disagree. An information may be amended at any time before, during, or after trial to cure any defect, imperfection, or omission in form or substance, including a variance between the information and the proofs, as long as the accused is not prejudiced by the new amendment. MCL 767.76; *People v Higuera*, 244 Mich App 429, 444; 625 NW2d 444 (2001); *People v Stricklin*, 162 Mich App 623, 633; 413 NW2d 457 (1987). The controlling question is whether an amendment would be prejudicial to the accused. *People v Covington*, 132 Mich App 79, 86; 346 NW2d 903 (1984); *People v Fuzi*, 46 Mich App 204, 209-210; 208 NW2d 47 (1973). A defendant is not prejudiced by an amendment to the information when the original information was sufficient to inform the defendant and the court of the nature of the charge. *Covington*, *supra* at 86; *People v Mahone*, 97 Mich App 192, 195; 293 NW2d 618 (1980).

Here, the information was sufficient to apprise defendant of the charge against which he was called upon to defend. The amendment did not require that defendant disprove or defend against new or additional elements. Instead, the charge of assault with intent to commit murder and the charge of which defendant was convicted, assault with intent to cause great bodily harm

less than murder, were both inherent in the original charge of first-degree murder. The factual basis for both the original and amended charges was that defendant pointed his gun at the victim and shot at him. Defendant was well aware of the prosecutor's theory that he pointed his gun at the victim and repeatedly shot at him with the intent to kill him. Moreover, defendant admitted that he pointed his gun at the victim and shot at him. The only dispute was whether defendant acted in self-defense. Under these circumstances, defendant was fully aware that he would be required to defend against a charge that he pointed his gun at the victim and tried to shoot him. In other words, defendant was fully aware that he was accused of assaulting the victim. Therefore, defendant was not prejudiced by amendment of the charge from first-degree murder to assault with intent to commit murder. The original information was sufficient to inform defendant of the nature of the charge against him. *Covington, supra* at 86. The trial court did not abuse its discretion in amending the information. *People v Kurzinski*, 26 Mich App 671, 674; 182 NW2d 779 (1970).

Defendant next argues that the trial court abused its discretion in admitting the testimony of Officer Walencewicz that defendant had been observed in an area known for drug trafficking, thereby implying that defendant was a drug dealer. We find no abuse of discretion in the trial court's admission of this testimony. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998).

In *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), our Supreme Court held that evidence of other crimes, wrongs, or acts is admissible under MRE 404(b) if such evidence is (1) offered for a proper purpose rather than to prove the defendant's character or propensity to commit the crime, (2) relevant to an issue or fact of consequence at trial, and (3) sufficiently probative to prevail under the balancing test of MRE 403. Establishing motive is among the purposes for which prior acts evidence is expressly admissible. MRE 404(b). Here, the prosecutor sought to admit testimony indicating that defendant frequented an area known for drug trafficking. That testimony gave rise to the implication that defendant was a drug dealer in the area and that he killed the victim, another drug dealer, in a dispute over drug territory. As previously indicated, evidence to establish motive is admissible under MRE 404(b). Therefore, the evidence was offered for a proper purpose and was relevant with regard to the question of motive. Additionally, the probative value of the evidence was not substantially outweighed by its potential for unfair prejudice, especially in light of the limiting instruction given by the trial court. Accordingly, this issue does not warrant reversal.

Finally, defendant claims that the trial court erred in admitting his confession because police failed to provide *Miranda*[2] warnings before taking the statement and because he was not mentally capable of understanding or intelligently waiving his constitutional rights. Although engaging in a de novo review of the entire record, we will not disturb a trial court's factual findings regarding a knowing and intelligent waiver of *Miranda* rights unless that ruling is clearly erroneous. *People v Daoud*, 462 Mich 621, 629; 614 NW2d 152 (2000). A finding is clearly erroneous if it leaves the reviewing 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).

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

Further, if resolution of a disputed factual question turns on the credibility of witnesses, we will defer to the trial court, which had a superior opportunity to evaluate these matters. *People v Sexton (After Remand),* 461 Mich 746, 752; 609 NW2d 822 (2000).

Statements of an accused made during a custodial interrogation are inadmissible unless 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; 599 NW2d 736 (1999). This inquiry has two distinct dimensions: (1) the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception; and (2) the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. *Daoud, supra* at 633, quoting *Moran v Burbine*, 475 US 412, 421; 106 S Ct 1135; 89 L Ed 2d 410 (1986). The prosecutor must establish a valid waiver by a preponderance of the evidence. *Daoud, supra* at 634; *Abraham, supra* at 645.

First, defendant argues that the trial court erred in determining that *Miranda* warnings were given before his statement was taken. We disagree. The trial judge determined, as a factual matter, that police advised defendant of his *Miranda* rights before taking his statement. Officer Quick testified that he advised defendant of his *Miranda* rights using the standard constitutional rights form. Officer Quick also testified that he read defendant's *Miranda* rights aloud from the form. After reading each right to defendant, Officer Quick asked defendant to read each right, and then asked defendant if he understood each right. Defendant read each right aloud and indicated that he understood his rights. Defendant then signed the advice of rights form. Furthermore, Investigator James Fischer testified that he verbally informed defendant of his *Miranda* rights. After he read defendant his rights, Investigator Fischer asked defendant if he understood those rights, and defendant "said, yes, he understood his rights." Defendant then signed the advice of rights form. Although defendant denied that police read him his *Miranda* rights before taking his statement, the trial court's finding on this issue is not clearly erroneous in light of Officer Quick and Investigator Fischer's testimony. There is no indication in the record that defendant was threatened or abused or that promises were made to him in exchange for the statement. Further, there is no indication that there was a lengthy detention prior to the statement or that defendant was intoxicated when he made the statement. In sum, we find that defendant's statement was voluntarily made.

Defendant also claims that the trial court erred in determining that he had the mental ability to understand and waive his *Miranda* rights. We disagree. A determination of whether a suspect's waiver of *Miranda* rights was knowing and intelligent requires an inquiry into the suspect's level of understanding, irrespective of police behavior. *Daoud, supra* at 636.

> To waive rights intelligently and knowingly, one must at least understand basically what those rights encompass and minimally what their waiver will entail. The mental state that is necessary to validly waive *Miranda* rights involves being cognizant at all times of the State's intention to use one's statements to secure a conviction and of the fact that one can stand mute and request a lawyer. [*Id*. at 640-641, quoting *In re WC,* 167 Ill 2d 307, 328; 657 NE2d 908 (1995).]

The trial judge determined, as a factual matter, that defendant had the mental ability to understand and waive his *Miranda* rights. This finding is not clearly erroneous. The prosecutor's expert, clinical psychologist Donald Aytch, testified that defendant had some learning disabilities and "moderate deficits" in his academic skills. However, Aytch testified that defendant had adequate reading skills and was able to understand basic material and print. In fact, Aytch read the *Miranda* rights to defendant, one at a time, and defendant was able to correctly paraphrase each right "without much difficulty at all." Aytch opined that, "based on academic or intellectual skills that [defendant] had adequate cognitive ability to form a simple basic layman's understanding of his Miranda rights and so he was able to validly waive his rights and offer his version of what occurred." This conclusion was not contradicted by defendant's expert, Dr. Patricia Wallace. She testified that defendant's reading comprehension skills were poor, but defendant "understands clearly what is being said to him," and defendant would understand his constitutional rights if they were read out loud to him by police officers. In light of Aytch and Wallace's testimony, the trial court did not err in finding that defendant, whose rights had been read to him by the police officers, had the mental ability to understand and waive his *Miranda* rights. The trial court properly denied defendant's motion to suppress his confession.

Affirmed.

/s/ Michael R. Smolenski
/s/ Gary R. McDonald
/s/ Kathleen Jansen