STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 16, 2001
v	No. 215007 Eaton Circuit Court
SHAWN GALE ROSENBROOK, Defendant-Appellant.	LC No. 97-020404-FC

Before: K. F. Kelly, P.J., and White and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right his convictions of second-degree murder, MCL 750.317, and conspiracy to commit larceny, MCL 750.157(a) and MCL 750.357, following a jury trial. We affirm.

Defendant's convictions arise from the shooting death of Chuck Hadley, a marijuana dealer in the Charlotte area, at defendant's father's house in Bellevue on November 25, 1997, two days before Thanksgiving. Originally, defendant, then eighteen years old, and his friend Matthew Harton, seventeen years old, planned to "gank" Hadley (i.e., steal or rob him of his drugs or money), but they eventually decided to kill him to take over his drug territory. Harton was a member of a gang in Charlotte called the Jungle People Vice Lords, which is affiliated with the Vice Lords and nationally affiliated with the "People Nation." Tim Rodriguez, the self-styled leader of the gang, appointed Harton as the enforcer of gang discipline and encouraged him to recruit new members. Defendant was not a member of the gang, but Harton sought to recruit him with Rodriguez's approval. Although defendant and Rodriguez never discussed the plan to kill Hadley, Rodriguez approved of Harton's and defendant's plan to kill Hadley. Rodriguez provided the weapon, a .22 caliber handgun.

On the evening of the Tuesday before Thanksgiving 1997, defendant lured Hadley to his father's house under the pretext of "hooking" Hadley up with marijuana. Meanwhile, Harton drove from Charlotte to Bellevue and waited for defendant to arrive with Hadley. Harton then emerged from the darkness and shot Hadley to death. After the shooting, Harton gave defendant the gun to hide, and then helped defendant move the body to a gravel pit area behind the house. Defendant picked up the shell casings, and Harton washed the blood from the driveway. Defendant and Harton split the money that was taken from Hadley's wallet. On the following

evening, defendant and his friend, Michael Rahe, moved the body to some tall grass next to a pond on Mr. Handricks' farm, a neighbor of defendant's father.

On the following day, defendant told his father of his involvement in Hadley's shooting death. Defendant's father contacted Detective Benden of the Charlotte Police Department and informed him that defendant had been an eyewitness to Hadley's murder. Later that day, Detectives Benden and Kellogg tape-recorded an interview with defendant in which defendant denied that he knew that Harton was going to shoot Hadley, claiming only that he and Harton had discussed "ganking" Hadley for his money or drugs. As a result of defendant's interview, the police arrested Harton, Rodriguez and the other gang members. On the following day, the detectives continued their investigation and re-interviewed defendant to focus on why Harton happened to be present at defendant's father's house. After the second interview, defendant was arrested and charged with open murder, conspiracy to commit open murder, and felony-firearm.

Subsequently, defendant was interviewed by Michigan State Police Sergeant John Palmatier for the purpose of a polygraph examination on December 4 and 11, 1997. In the first statement to Palmatier, defendant claimed that he and Harton planned only to "gank" Hadley, and that he was surprised when Harton shot him. However, in the second statement to Palmatier, defendant admitted that before the murder, he, Harton and Joshua Hansen, another member of the gang, had talked about killing Hadley to take over his drug territory. The prosecutor then charged defendant with first-degree premeditated murder, conspiracy to murder, and felony-firearm. After a jury trial, defendant was convicted of the lesser included offenses of second-degree murder and conspiracy to commit larceny from a person, but acquitted of the felony-firearm charge.

I

On appeal, defendant first claims that he was denied a fair trial when Sergeant Palmatier testified that he believed that Harton was telling the truth. We disagree. Our review of the trial transcript reveals that the testimony in question falls within the "invited error" rule. *People v Collins*, 63 Mich App 376, 381-382; 234 NW2d 531 (1975). Specifically, defense counsel, while questioning Sergeant Palmatier about how he used Harton's statement in his interrogation of defendant, elicited Palmatier's testimony that he believed that Harton was telling the truth. The record indicates that defense counsel plainly expected Palmatier's response to his line of questioning. As the prosecution notes, defense counsel's questions and Palmatier's responses were consistent with their previous exchange during the *Walker*[1] hearing. Thus, defense counsel clearly anticipated Palmatier's responses to his questions. In addition, defense counsel, immediately after eliciting Palmatier's testimony that he believed that Harton was telling the truth, attempted to call into question Palmatier's basis for believing Harton. In the context of his cross-examination, it is evident that defense counsel purposely elicited Palmatier's testimony that he believed that Harton was telling the truth in order to show that Palmatier improperly prejudged defendant's guilt. As "invited error," defendant waived the issue, and thus there is no "error" to review. *People v Carter*, 462 Mich 206, 215-219; 612 NW2d 144 (2000).

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[1] *People v Walker (On Rehearing)*, 374 Mich 331, 338; 132 NW2d 87 (1965).

II

Next, defendant claims that the trial court erred in finding that defendant's statements in the November 28, 1997 taped-recorded interview with Detective Benden were given voluntarily. We again disagree.

When reviewing a trial court's determination of voluntariness, this Court must examine the entire record and make an independent determination, *People v Wells*, 238 Mich App 383, 386; 605 NW2d 374 (1999), and will affirm unless left with a definite and firm conviction that a mistake was made, *People v Sexton (After Remand)*, 461 Mich 746, 752; 609 NW2d 822 (2000). Deference is given to the trial court's assessment of the weight of the evidence and credibility of the witnesses, and the trial court's findings will not be reversed unless they are clearly erroneous. *Sexton (After Remand)*, *supra*; *People v Howard*, 226 Mich App 528, 543; 575 NW2d 16 (1997). In determining voluntariness, the court should consider all the circumstances, including: the duration of the defendant's detention and questioning; the age, education, intelligence and experience of the defendant; whether there was unnecessary delay of arraignment; the defendant's mental and physical state; whether the defendant was threatened or abused; and any promises of leniency. *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988). No single factor is determinative. *Sexton (After Remand)*, *supra* at 753. A promise of leniency is merely one factor to be considered in the evaluation of the voluntariness of a defendant's statements. *People v Givans*, 227 Mich App 113, 120; 575 NW2d 84 (1997).

In this case, the trial court did not clearly err in finding that defendant's statements were voluntary. Although defendant claims that his confession was induced by a promise of leniency, the trial court rejected his claim as lacking credibility:

> It does not make any sense to the Court that the defendant would incriminate himself in a robbery, particularly a robbery that ultimately ended up in a murder, under some belief that if he did so he would be allowed to go home and that he would be not arrested or not charged. Ultimately he was arrested and cha[r]ged with murder. And the defendant's statement that he still thought that he was just being in some type of protective custody again does not seem to be reasonable or credible. In fact, it goes contrary to common sense.

Although defendant claims that he gave the statement because he had a "subjective expectation of leniency," the trial court found Detective Benden's testimony more credible. The court also found that its review of the tape did not show that "Detective Benden was prompting or was leading the defendant into saying things," but that "the defendant was making a statement of his own volition." Our review of the record shows that the trial court did not clearly err in finding that defendant's statements in the November 28, 1997 taped-recorded interview were voluntary. *Sexton (After Remand)*, *supra* at 752.

III

Next, defendant claims that he was denied his right to a fair trial because his statements to Sergeant Palmatier at the polygraph examinations on December 4 and 11, 1997 were made pursuant to a plea bargain, and are thus inadmissible under MRE 410. Our Supreme Court has

held that the protections of MRE 410 may be waived. *People v Stevens*, 461 Mich 655, 668-669; 610 NW2d 881 (2000). Even if we accept defendant's argument that these statements were made in the course of plea negotiations, defendant consulted with his attorney before both polygraph examinations and signed a written waiver of his *Miranda* rights acknowledging that his statements could be used against him. Therefore, the trial court did not err in admitting defendant's statements to Sergeant Palmatier on December 4 and 11, 1997.

IV

Defendant next contends that his statements to Sergeant Palmatier were admitted in violation of his Fifth and Sixth Amendment rights. We disagree. With respect to defendant's Sixth Amendment right to counsel, "[t]he existence of a knowing and intelligent waiver of the Sixth Amendment right to counsel depends upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." *People v McElhaney*, 215 Mich App 269, 274; 545 NW2d 18 (1996). The record indicates that defendant agreed to take the polygraph examinations in order to demonstrate his continued cooperation with the police and to show his limited involvement in the homicide. As the trial court noted, "the first statement made to the polygraph operator was at the initiation by the defendant's attorney." The trial court also noted that the second statement was "also given as a result of conversations between the prosecutor and defense attorney." Also, defendant was advised that he could consult with his attorney at any time, and the record shows that defendant did in fact interrupt the proceedings of the second polygraph examination to confer with his attorney. See *McElhaney*, *supra* at 275-276.

Nor is there any basis to defendant's claim that he did not provide a knowing and intelligent waiver of his *Miranda*[2] rights. As the trial court properly found, defendant was advised through his defense attorney that anything he said before, during or after the polygraph examinations could be used against him. We conclude that the trial court did not clearly err in finding that defendant's statements to Sergeant Palmatier before and during the polygraph examinations on December 4 and 11, 1997 were voluntarily given.

Defendant argues that "Detective Palmatier's main objective in administering the polygraph examination was to interrogate the Defendant in an attempt to elicit incriminating statements, as opposed to testing the truthfulness of prior statements." A review of the record indicates the polygraph examinations were administered for the purpose of determining whether defendant was being truthful with regard to his claim of limited involvement in the homicide, not to elicit admissions from defendant. We note our concern that there was some question whether Palmatier's charts supported his assertion that there was a 93% likelihood that defendant was being truthful at the first polygraph examination. However, the trial court found that Palmatier's assertion was not the basis of a ruse to extract a second statement from defendant. Affording the proper deference to the trial court's superior ability to judge credibility, *Sexton (After Remand)*, *supra* at 752, we cannot conclude that the trial court's findings in this regard were clearly erroneous.

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

V

Next, the trial court properly denied defendant's motion to dismiss all the charges or to grant him a new trial based upon the alleged failure of the prosecutor to disclose exculpatory evidence. *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963); *People v Stanaway*, 446 Mich 643, 666; 521 NW2d 557 (1994); *People v Lester*, 232 Mich App 262, 280; 591 NW2d 267 (1998). Contrary to defendant's claim, he suffered no prejudice by the failure of the prosecution to comply with the discovery rules by informing the defense that the police had interviewed Handricks and searched his premises in December 1997. As the trial court pointed out, defendant suffered no prejudice because the evidence was not lost, but was presented at trial. Further, we note that Handricks' testimony did not contradict Rahe's testimony that he saw defendant hide a bag of his bloody clothes in Handricks' barn on the Wednesday night before Thanksgiving. Nor was Handricks' testimony inconsistent with Rahe's testimony that defendant was inside Handricks' house for about ten minutes and told him (Rahe) that Handricks told defendant to remove the body from his property. Accordingly, the trial court did not err in denying defendant's motion for a new trial on the basis of the prosecutor's failure to disclose exculpatory information.

VI

The trial court also did not abuse its discretion in denying defendant's motion to determine Harton's competency to testify, or, in the alternative, to order an independent psychological examination of his competency under MRE 601. *People v Breck*, 230 Mich App 450, 457; 584 NW2d 602 (1998); *People v Coddington*, 188 Mich App 584, 597; 470 NW2d 478 (1991). Contrary to defendant's claim, there was no overwhelming medical and psychiatric evidence that Harton was "a sociopathic liar with no sense of obligation to testify truthfully," nor was there any evidence indicative of a "compelling reason" to warrant a psychological evaluation. See *People v Payne*, 90 Mich App 713; 282 NW2d 456 (1979). As the prosecution observes, Harton testified at the preliminary examination and at trial, and there was no indication that he was not competent to testify. Further, we note that Harton's testimony was corroborated by the physical evidence surrounding Hadley's murder and the testimony given by Joshua Hansen and Mike Rahe, as well as by defendant's own admissions.

VII

Finally, there was sufficient evidence to find defendant guilty of second-degree murder, MCL 750.317.

When reviewing a claim of insufficient evidence following a jury trial, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 478 (1992), amended 441 Mich 1201 (1992). A prosecutor need not negate every reasonable theory of innocence, but must only prove his own theory beyond a reasonable doubt in the face of whatever contradictory evidence the defendant provides. *People v Quinn*, 219 Mich App 571, 574; 557 NW2d 151 (1996). Circumstantial evidence and the reasonable inferences which arise from the evidence can constitute satisfactory proof of the elements of the crime. *People v Carines*, 460 Mich 750, 757;

597 NW2d 130 (1999). All conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

In *People v Mayhew*, 236 Mich App 112, 125; 600 NW2d 370 (1999), this Court discussed the elements of second-degree murder:

> The offense of second-degree murder consists of the following elements: "(1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse." *People v Goecke*, 457 Mich 442, 463-464; 579 NW2d 868 (1998). . . . The element of malice is defined as "the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm." *Id*. at 464. Malice for second-degree murder can be inferred from evidence that the defendant "intentionally set in motion a force likely to cause death or great bodily harm." *People v Djordjevic*, 230 Mich App 459, 462; 584 NW2d 610 (1998). The offense of second-degree murder does not require an actual intent to harm or kill, but only the intent to do an act that is in obvious disregard of life-endangering consequences. *Goecke, supra* at 466.

In this case, the evidence viewed in a light most favorable to the prosecution was sufficient to prove the essential elements of second-degree murder beyond a reasonable doubt. Before the murder, defendant and Harton talked about killing Hadley to take over his territory as a drug dealer. Specifically, the evidence established that defendant agreed to set up Hadley by arranging to sell him one-half pound of marijuana at the house of defendant's father, who was out of town at the time of the killing. Defendant lured Hadley to his absent father's house on the pretext of selling him marijuana. At the house, Harton shot Hadley four times in the head. Defendant and Harton then split approximately $500 that defendant took from Hadley's wallet. Thereafter, defendant assisted Harton in covering the body in plastic and dragging it to a gravel pit and disposing of the shell casings, the murder weapon and the bloody plastic wrap in a dumpster. After the murder, defendant admitted to his friend, Michael Rahe, that "Me and Matt killed Chuck" before they moved the body to tall grass next to a pond on Mr. Handricks' farm. Accordingly, the evidence was sufficient to convict defendant of second-degree murder.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Helene N. White
/s/ Michael J. Talbot