STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 18, 2002
v	No. 230862 Ingham Circuit Court
SEMAJ DION BEAL, Defendant-Appellant.	LC No. 99-074774-FC

Before: Owens, P.J., and Sawyer and Cooper, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted from his convictions of first-degree premeditated murder, MCL 750.316(1)(a), first-degree felony murder, MCL 750.316(1)(b), possession of a firearm during the commission of a felony, MCL 750.227b, unlawfully driving away a motor vehicle, MCL 750.413, and felon in possession of a firearm, MCL 750.224f. He was sentenced to two years' imprisonment for the felony-firearm conviction, to be served before and consecutive to two concurrent prison terms of life for the murder convictions, and thirty-eight to sixty months each for the UDAA and felon in possession convictions. We remand for an amended judgment of sentence indicating a single conviction and sentence for first-degree murder, supported by the alternative theories of premeditation and felony-murder, but otherwise affirm in all other respects.

This case arises from a homicide that took place in Lansing in February 1999. The prosecutor's theory of the case was that defendant fatally shot the victim pursuant to a plan to steal the victim's car, a black Beretta. Defendant admitted shooting at the victim twice, explaining that this was in response to an unwanted sexual advance, and driving away in the victim's car, but suggested that he did so without knowing how seriously the victim was hurt. Defense counsel conceded that defendant shot and killed the victim, but styled defendant's actions as a spur-of-the-moment defense to a serious sexual assault.

The victim was found dead on February 26, 1999. Defendant was arrested in Chicago later that day, when two Chicago police officers stopped defendant in the victim's Beretta and a routine check turned up that the car had been reported stolen. The forensic pathologist testified that the victim had suffered one gunshot wound to the right side of his head, and another to the front of the chest.

On appeal, defendant argues that the trial court erred in denying his motion to suppress his statements to the police, in rejecting his argument that the murder and felony-firearm verdicts were contrary to the great weight of the evidence, and in entering separate convictions and sentences for premeditated murder and felony murder. We will consider each claim of error in turn.

I. Motion to Suppress Defendant's Statements

Defendant argues that the trial court erred in denying his motion to suppress the statements that he made to the police. We disagree.

"Statements of an accused made during custodial interrogation are inadmissible unless the accused voluntarily, knowingly, and intelligently waives his Fifth Amendment rights." *People v Howard*, 226 Mich App 528, 538; 575 NW2d 16 (1997), citing *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966), and *People v Garwood*, 205 Mich App 553, 555-556; 517 NW2d 843 (1994).

The decision whether to admit evidence is within the trial court's discretion and is reviewed on appeal for an abuse of discretion. *People v Bahoda*, 448 Mich 261, 288; 531 NW2d 659 (1995). "An appellate court must give deference to the trial court's findings at a suppression hearing. Although engaging in de novo review of the entire record, [the reviewing court] will not disturb a trial court's factual findings regarding a knowing and intelligent waiver of *Miranda* rights unless that ruling is found to be clearly erroneous." *People v Cheatham*, 453 Mich 1, 29-30; 551 NW2d 355 (1996) (Boyle, J., joined by Brickley, C.J., and Riley, J., and by Weaver, J., in pertinent part) (citations and internal quotation marks omitted).

"Whether a waiver was voluntary and whether an otherwise voluntary waiver was knowingly and intelligently tendered form separate prongs of a two-part test for a valid waiver of *Miranda* rights." *People v Abraham*, 234 Mich App 640, 644-645; 599 NW2d 736 (1999). "Both inquiries must proceed through examination of the totality of the circumstances surrounding the interrogation. The state has the burden of proving by a preponderance of the evidence that there was a valid waiver of the suspect's rights." *Id.* at 645 (citations omitted).

A. Voluntary Waiver

In his brief on appeal, defendant incorrectly asserts that the question of voluntariness focuses on the suspect's state of mind. In fact, "the voluntariness prong is determined solely by examining police conduct." *Howard, supra* at 538.

At the *Walker*[1] hearing, defendant testified that, from the evening of his arrest until he was interviewed the next day, he was provided with no food or drink, that he felt intimidated when he initially signed a waiver of his *Miranda* rights, and that before he provided statements at a second interview the police had beaten him and threatened him with a gun.

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

The trial court recognized that defendant's assertions created a pure credibility question, then resolved the credibility contest in favor of the police, describing defendant's account as "a complete fabrication." The court further observed that although defendant maintained that he had been intimidated throughout the first interview, defendant had never asserted precisely how this intimidation came about. The court concluded, "[Defendant's] demeanor while he was testifying was of somebody looking for ways he could avoid telling the truth. I do not believe [defendant's] story of a beating, I do not believe his story of a gun being held to his head, and I do not believe that he was deprived of food or water or sleep."

"Credibility is a matter for the trier of fact to ascertain. We will not resolve it anew." *People v Vaughn*, 186 Mich App 376, 380; 465 NW2d 365 (1990). On appeal, defendant merely asserts that he offered his statements in response to force, threats, and intimidation, but neither summarizes the evidence in this regard nor explains why this case warrants our disturbing the trial court's credibility determination. This failure of presentation forfeits appellate consideration of this argument. See MCR 7.212(C)(7) (factual assertions must be accompanied by record citations), and *People v Mackle*, 241 Mich App 583, 604 n 4; 617 NW2d 339 (2000) ("A party may not merely state a position and then leave it to this Court to discover and rationalize the basis for the claim.").

Defendant additionally argues that his statements should have been suppressed because nearly twenty-four hours elapsed from the time that the police initially stopped him in Chicago to the conclusion of his interviews with the police, during which time he was not arraigned. We disagree. Defendant cites *People v Bohm*, 49 Mich App 244; 212 NW2d 61 (1973), for the proposition that undue delay in arraigning a suspect can constitute police misconduct for purposes of regarding a confession as involuntary. This Court in that case did recognize such a principle. *Id.* at 252-253. However, in that case, this Court concluded that three days between arrest and arraignment did not constitute an unreasonable delay, where one of the days was a Sunday and another was a legal holiday. *Id.* Because in this case defendant spoke to the police after only a single day's detention, *Bohm* in fact suggests that defendant's statements were not tainted by any excessive delay. Further, a bit of leeway was appropriate in this instance, where arraignment of defendant on the instant charges meant securing his release from incarceration in Illinois and transporting him across state lines. The trial court did not clearly err in concluding that the police held defendant for legally valid reasons, not as a tool of coercion. *Id.* at 253.

Defendant also cites *People v Jordan*, 149 Mich App 568; 386 NW2d 594 (1986), but that case is also unavailing. There, the juvenile suspect was questioned in the course of detention that was unlawful under a specific statutory provision requiring that juvenile arrestees be taken immediately to the juvenile court. *Id.* at 572-574, citing MCL 764.27 and MCL 712A.16. Defendant cites no legislation that likewise rendered his period of detention unlawful. MCL 764.13 in fact prescribes that where a person is arrested without a warrant, the police, "without unnecessary delay," take the arrestee before a magistrate of the judicial district in which the alleged offense was committed.

We agree with the trial court that the delay in this case was not unreasonable, and that it was not imposed on defendant in order to coerce a confession.

B. Knowing and Intelligent Waiver

To establish a knowing and intelligent waiver of *Miranda* rights, the prosecution must prove no less, and no more, than that the "accused understood that he did not have to speak, that he had the right to the presence of counsel, and that the state could use what he said in a later trial against him." *Abraham, supra* at 647 (internal quotation marks and citation omitted).

Defendant testified at the *Walker* hearing that he had not understood that he had a right to have an attorney present during questioning. In order to stop questioning through exercise of the right to counsel, the suspect must clearly and unambiguously request a lawyer. *Davis v United States*, 512 US 452, 459; 114 S Ct 2350; 129 L Ed 2d 362 (1994). The trial court observed that when defendant initially expressed some lack of understanding on this point when questioned by the police, the officer explained that "it means . . . if you say that I don't want to talk to you, I just want to talk to an attorney, then, we're not gonna talk to you, okay? What we want to do is read you your rights, we want to . . . ask you some questions . . . , and . . . in order to do that, we need to read you your rights, you need to say that you understand it, and you're willing to talk to us."

The trial court explained its interpretation of this evidence as follows:

> That seems like a very clear waiver of rights. However, the Defendant has now testified that he did not understand any of those rights, and that testimony is simply not credible. In fact, I think he inadvertently slipped at one point in his testimony on redirect and said, "I should have asked for my attorney."
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> The explanation was a reasonable explanation. It's probably not the explanation an attorney would have given, but I don't think police officers are held to that standard. It did set forth for [defendant] what he was entitled to, and he said that he understood that.

The court additionally stated that what interest defendant showed in having an attorney was "not a clear and unambiguous request to have an attorney." The court further observed that, upon resuming questioning after an interruption of approximately two hours, the police reminded defendant that they had explained his rights, and elicited from him that he still understood them and was prepared to talk.

On appeal, defendant encourages this Court to reinterpret this evidence and arrive at the conclusion that it indicates that defendant never fully understood his right to counsel. Because the police officer explained that the questioning would cease if defendant requested an attorney, and because defendant repeatedly thereafter indicated that he understood his rights, we conclude that the trial court did not clearly err in finding that defendant did not ask for a lawyer, and in fact knowingly waived his right to counsel.

II. Great Weight of the Evidence

Defendant argues that the trial court erred in rejecting his argument that he was entitled to a new trial because his convictions of murder and felony-firearm[2] were against the great weight of the evidence. We disagree.

"The standard of appellate review regarding a trial judge's decision to grant or deny a motion for a new trial is 'entrusted to the discretion of the trial court and that decision will not be disturbed on appeal without a showing of an abuse of discretion . . . .'" *People v Lemmon*, 456 Mich 625, 648 n 27; 576 NW2d 129 (1998), quoting *People v Hampton*, 407 Mich 354, 373; 285 NW2d 284 (1979). A trial court's factual findings are reviewed for clear error, while its application of the law to the facts is reviewed de novo. *People v Barrera*, 451 Mich 261, 269; 547 NW2d 280 (1996).

"A trial judge does not sit as the thirteenth juror in ruling on motions for a new trial and may grant a new trial only if the evidence preponderates heavily against the verdict so that it would be a miscarriage of justice to allow the verdict to stand." *Lemmon*, *supra* at 627. "[A]bsent exceptional circumstances, issues of witness credibility are for the jury, and the trial court may not substitute its view of the credibility 'for the . . . jury determination thereof.'" *Id.* at 642, quoting *Sloan v Kramer-Orloff Co*, 371 Mich 403, 411; 124 NW2d 255 (1963). An example of such exceptional circumstances is "'[w]here a witness's testimony is material and is so inherently implausible that it could not be believed by a reasonable juror,' or where the witness' testimony has been seriously 'impeached' and the case marked by 'uncertainties and discrepancies.'" *Lemmon*, *supra* at 644, quoting respectively *United States v Garcia*, 978 F2d 746, 748 (CA 1, 1992), and United *States v Martinez*, 763 F2d 1297, 1313 (CA 11, 1985).

Further, this Court owes great deference to both the jury in deciding the case initially, and to the trial court in denying posttrial relief on the basis of the great weight of the evidence, in that this Court shares with neither the benefit of actually observing witnesses. See *People v Vaughn*, 186 Mich App 376, 380; 465 NW2d 365 (1990) (credibility is a matter for the trier of fact to ascertain) and *Zeeland Farm Services, Inc v JBL Enterprises, Inc*, 219 Mich App 190, 195; 555 NW2d 733 (1996) ("An appellate court recognizes the jury's and the judge's unique opportunity to observe the witnesses, as well as the factfinder's responsibility to determine the credibility and weight of trial testimony."). We accordingly consider defendant's arguments for this issue with a keen sensitivity to our limited prerogative as an appellate tribunal to reweigh evidence already passed upon by the jury and trial court.

In denying the motion for new trial, the trial court stated that it remembered the trial "very clearly," and that the evidence against defendant was "overwhelming," citing in particular defendant's statement to the police. The court added, "This Court specifically finds it was not against the great weight of the evidence."

[2] Defendant offers no discussion focusing specifically on his felony-firearm conviction. Defendant evidently feels that if this murder convictions fall the felony-firearm conviction must fall with them. If so, defendant reasons in error. Felony-firearm may also be predicated on felon in possession, the evidentiary basis for which conviction defendant does not challenge on appeal. See *People v Dillard*, 246 Mich App 163; 631 NW2d 755 (2001).

Because defendant has failed to provide this Court with the recordings or transcripts of his oral statements to the police, or with a copy of his own written statement, all of which were admitted into evidence, defendant has forfeited appellate consideration of his argument predicated on the great weight of the evidence. See MCR 7.210(A) and (B)(1). Nonetheless, review of defendant's arguments as presented, and of the trial testimony, are sufficient for resolution of this issue.

Defendant challenges only the intent elements of his murder convictions, admitting that he shot at the victim but characterizing the evidence that he did so with the requisite state of mind as "weak." We disagree with that characterization, and also note that defendant points to nothing in the evidence that could be considered exculpatory.

First-degree premeditated murder requires that the actor specifically intended to kill the victim. *People v Marsack*, 231 Mich App 364, 370; 586 NW2d 234 (1998). "Premeditation and deliberation require sufficient time to allow the defendant to take a second look." *Id.* at 370-371. First-degree felony murder requires that the actor intended to kill, intended to cause great bodily harm, or acted with a reckless disregard for the natural tendency of his or her actions to place the victim in serious risk of death or great bodily harm. *People v Thew*, 201 Mich App 78, 85; 506 NW2d 547 (1993).

"An actor's intent may be inferred from all of the facts and circumstances, and because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient." *People v Fetterley*, 229 Mich App 511, 517-518; 583 NW2d 199 (1998) (citations omitted). Pertinent considerations include whether the defendant had a weapon at hand as if in preparation for a homicide, and whether the defendant's actions after the event comported with those of a person bearing criminal responsibility in the matter. See *People v Youngblood*, 165 Mich App 381, 387; 418 NW2d 472 (1988).

In this case, that defendant came to the victim's home with a gun in his possession is not in dispute. Defendant rhetorically attacks the evidence that suggested that one of the victim's gunshot wounds came from an angle of forty-five degrees, but neither provides any reasoning concerning how that testimony must be considered so inherently flawed as to warrant appellate discrediting, nor suggests that the evidence suggests that that wound resulted from a bullet approaching from any different angle. This cursory argument lends no support to defendant's argument that his convictions were contrary to the great weight of the evidence.

Further, even crediting defendant's explanation for why he shot the victim, which it bears repeating that no juror was obliged to do, *Lemmon, supra* at 642, defendant described at worst an unwanted sexual advance, not any kind of attack such as might justify resort to lethal force. Moreover, defendant's behavior after the incident—driving away in the victim's car while doing nothing to inform the authorities, or that might otherwise have helped the victim survive the shooting—comported very much with the prosecutor's murder theory and not at all with defendant's self-defense posture.

Defendant also relies in part on his challenge to the admissibility of his statements to the police, suggesting that without that evidence the case against him is greatly weakened. Be that as it may, because we have concluded that the trial court correctly admitted defendant's statements, we conclude here that they properly informed the jury's, and the trial court's, sense

of the extent to which defendant's conviction comported with the great weight of the evidence. We further reiterate that the case against defendant was strong enough without those statements to satisfy this Court that there was a reasonable evidentiary basis for defendant's murder convictions.

Additionally, we observe that an acquaintance of defendant testified that defendant had announced an intention to kill a man for his Beretta, which testimony defendant does not acknowledge, let alone attempt to refute, on appeal.

This record well supports the trial court's conclusion that defendant was not entitled to a new trial in light of the great weight of the evidence.

III. Double Jeopardy

Defendant argues that the trial court erred in entering separate convictions of, and sentences for, premeditated and felony murder, where defendant was charged in connection with only a single murder. We agree, and the prosecutor on appeal concedes the point.

Separate convictions and sentences for both premeditated murder and felony murder, both of which were charged in connection with a single instance of criminal conduct, violate the rule against double jeopardy.[3] *People v Bigelow*, 229 Mich App 218, 220; 581 NW2d 744 (1998). The way to avoid the double-jeopardy problem where a defendant is convicted of both premeditated murder and felony murder for the same crime is to let the judgment of sentence reflect a single conviction and a single sentence for first-degree murder, but to reflect also that the conviction and sentence are supported by the two separate theories. *Id.* at 220-221. For these reasons, we remand this case to the trial court for the ministerial task of correcting the judgment of sentence so that it comports with *Bigelow*.

Affirmed, but remanded for issuance of a corrected judgment of sentence. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ David H. Sawyer
/s/ Jessica R. Cooper

[3] US Const, Ams V and XIV; Const 1963, art 1, § 15.