STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

JOSHUA K. DAVIS,

Defendant-Appellant.

UNPUBLISHED
July 23, 2002

No. 227330
Wayne Circuit Court
Criminal Division
LC No. 99-006942

Before: Cooper, P.J., and Griffin and Saad, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial conviction of second-degree murder, MCL 750.317. The trial court sentenced defendant to twenty-eight to seventy years' imprisonment. We affirm.

Defendant argues that, at his *Walker*[1] hearing, the trial court erred by sustaining the prosecutor's hearsay objection to Rex Bradley's testimony that defendant asked for an attorney during his first meeting with the police. Specifically, defendant contends that the hearsay rule does not apply because the testimony was not offered to prove the truth of the matter asserted. MRE 801(c). Because defendant failed to raise this issue below, it is not preserved for review. See *People v Grant*, 445 Mich 535, 553; 520 NW2d 123 (1994). Therefore, we review the issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Because a suppression hearing concerns a preliminary question regarding the admissibility of evidence, the rules of evidence do not apply. *People v Richardson*, 204 Mich App 71, 80; 514 NW2d 503 (1994); MRE 104(a).[2] Therefore, while the statement was arguably hearsay, the trial court erred by sustaining the prosecutor's objection on that basis. Significantly, however, the witness offering the disputed testimony later interjected that defendant asked for an attorney when he was detained by the police. Because the information

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

[2] For a discussion about the application of the rules of evidence at suppression and preliminary hearings generally, see Lafave, Israel & King, Criminal Procedure (2d ed), § 10.5(d) p 444, § 14.4(b), pp 163 et seq.

was subsequently received, defendant was not prejudiced by the court's erroneous ruling. Moreover, despite the witness' and defendant's own testimony that defendant requested a lawyer, the court made a credibility determination and concluded that defendant "never requested a lawyer at any time." *People v Daoud*, 462 Mich 621, 629; 614 NW2d 152 (2000); see also *People v Burrell*, 417 Mich 439, 448; 339 NW2d 403 (1983). Therefore, defendant has failed to show that the trial court's error affected his substantial rights.

Defendant raises several claims regarding the trial court's failure to suppress his second statement to the police. Specifically, defendant asserts that his statement should have been suppressed because of excessive prearraignment delay. Further, defendant avers that his attorney was ineffective in failing to raise this issue at the *Walker* hearing and that the trial court abused its discretion by later refusing to reopen the *Walker* hearing to address this issue.

Importantly, defendant did not timely raise the issue of prearraignment delay as a basis for suppressing his second statement to police. Defendant failed to raise the issue at his *Walker* hearing and waited until after trial began to introduce the argument and to again request suppression. A motion to suppress "must be made in advance of trial" and defendant's failure to raise the issue until after his *Walker* hearing and after the start of trial renders this claim unpreserved. *People v Manning*, 243 Mich App 615, 625; 624 NW2d 746 (2000).

Furthermore, the record evidence and applicable case law also render defendant's claims meritless. "After a person is arrested without a warrant, the arresting officer must bring that person before a magistrate for arraignment 'without unnecessary delay.'" *Manning*, *supra* at 622, quoting MCL 764.26. For Fourth Amendment search and seizure purposes, "a delay of more than forty-eight hours after arrest is presumptively unreasonable, absent extraordinary circumstances." *Manning*, *supra* at 623. However, Michigan law does not require the automatic suppression of a confession given during a prearraignment delay. *Manning*, *supra* at 638-641; see also *People v Whitehead*, 238 Mich App 1; 604 NW2d 737 (1999), and *People v McCray*, 210 Mich App 9; 533 NW2d 359 (1995). Rather, a prearraignment delay is merely one factor in the evaluation of the voluntariness of a confession and whether a statement should be suppressed under the Fifth Amendment. *Manning*, *supra* at 638-643; *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988). In *Cipriano*, our Supreme Court recited the following factors to determine voluntariness:

> [T]he age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before the magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse. [*Manning*, *supra* at 635, quoting *Cipriano*, *supra* at 334.]

"In engaging in the balancing process that *Cipriano* outlines, a trial court is free to give greater or lesser weight to any of the *Cipriano* factors, including delay in arraignment," but cannot give preemptive weight to this one factor. *Manning, supra* at 643.

Here, the prosecutor does not dispute that defendant was held for seventy-two hours before he gave the second statement, or that police held him for approximately ninety-six hours before he was arraigned.[3] At defendant's *Walker* hearing, all of the *Cipriano* factors were addressed except, as noted above, defendant failed to raise any issue regarding the prearraignment delay. However, the record clearly reflects that defendant voluntarily waived his right against self-incrimination, even considering defendant's unpreserved arguments regarding the prearraignment delay. *Daoud*, *supra* at 634 and n 10, 636-639, 642-645.

Defendant was twenty-two years old at the time of his arrest and was recently paroled for a juvenile conviction of armed robbery and felony firearm. Defendant is literate and holds a general equivalency diploma and he was advised of his constitutional rights when he made the statement. No evidence suggests that defendant was ill, intoxicated, or under the influence of drugs; there was also no indication that he had been abused or threatened with abuse, or that he had been deprived of food, sleep, medical attention, or any other necessities. Further, no evidence suggests that the police engaged in repeated or prolonged questioning before defendant gave his statement and he clearly knew that he had the right to an attorney.

In sum, while the prosecutor acknowledges that a prearraignment delay occurred, under the totality of the circumstances, defendant's decision to give a second statement was the product of a free and deliberate choice rather than police intimidation, coercion, or deception, notwithstanding any delay in the arraignment. *Daoud*, *supra* at 635, 637, 639.[4] Therefore, suppression on the basis of prearraignment delay was not required and the trial court did not err in denying defendant's motion.

Further, the trial court did not abuse its discretion in denying defendant's untimely request to reopen the hearing. Moreover, because the voluntariness of defendant's second statement was not affected by any delay in arraignment, we conclude that defense counsel was not ineffective for failing to raise the issue of prearraignment delay at the time of the *Walker* hearing. *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998); see also *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995).

Affirmed.

/s/ Jessica R. Cooper
/s/ Richard Allen Griffin
/s/ Henry William Saad

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[3] While the trial court correctly denied defendant's motion to suppress his confession on the basis of this prearraignment delay, as a rule, we disapprove of a lengthy prearraignment delay, including the ninety-six hour delay here.

[4] We find it unnecessary to remand for a new *Walker* hearing because the record is sufficient to decide the issue.