

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

MARCO L. WEST,

Defendant-Appellant.

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UNPUBLISHED

August 27, 2002

No. 229708

Wayne Circuit Court

LC No. 95-006682

Before: Holbrook, Jr., P.J., and Jansen and Wilder, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of second-degree murder, MCL 750.317, under an aiding and abetting theory, MCL 767.39. Defendant was sentenced to fifteen to thirty years' imprisonment. We affirm.

I. Facts

In early November 1994 the victim, George Jefferson Davidson, was found murdered in the trunk of his car. He had died from both strangulation and a severed carotid artery. In March 1995, the police received information from a confidential informant that led them to seek the arrest of Willie Varner and his cousin, Lorenzo Green. Varner was arrested soon after the police received the confidential information and was released after providing the police with a statement. After evading the police for several months, Green turned himself in and implicated defendant in the murder. Thereafter, defendant turned himself in. At trial, Detroit Police Department Lieutenant John Morrell testified that defendant's arrest was sought based on Green's statements, and that defendant was taken into custody on the murder charge as well as some other outstanding warrants.

The day after defendant was arrested, Lt. Morell read defendant his *Miranda* rights, had him sign a Constitutional Rights Certificate of Notification form, and began to question him regarding the incident. Defendant initially denied involvement in the murder, but later in the day admitted to some involvement. Because it was late in the day, Lt. Morell decided to resume the interview again the next day. As the interview resumed, Lt. Morell read defendant his *Miranda*<sup>1</sup>

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

rights and had him sign a Constitutional Rights Certificate of Notification form. Defendant asked to call his mother and after he did so, defendant gave a statement that Lt. Morell wrote down. Defendant signed each page of the written statement. Defendant was never denied food or drink.

Defendant and Lt. Morell differ as to whether defendant requested a lawyer during his interrogation. Lt. Morell maintains that defendant asked twice *whether* he should get a lawyer, and that he told defendant that the choice was his. In addition, Lt. Morell maintains that at one point during his interrogation of defendant he asked defendant if he wanted to speak to an attorney and was told no. On the other hand, defendant maintains that he repeatedly asked for a lawyer during the questioning.

Defendant indicated in his statement that Green had told him that some guys had paid him to do something, but he did not know if he should do it because it involved a friend of his. Later that day, Green went to defendant's house with a truck and picked up defendant. Defendant maintained that he was initially unwilling to get into the truck because he thought it was probably stolen and he was on probation. Also, there was a bag on the seat of the truck with keys and handcuffs in it.

Defendant and Green went and picked up the victim. The defendant indicated that Green then dropped him off at home, but called shortly thereafter to tell defendant to go to a particular apartment. When defendant arrived, Green was "stripping" the victim's car. Defendant then went to his mother's house and, about twenty minutes later, Green pulled up in the victim's car and ordered defendant to get him a knife and some rope or wire. Defendant heard some bumping in the trunk, Green opened the trunk and defendant saw a person inside the trunk, kicking. Green told defendant to watch out to see if anyone was coming. A car drove by and defendant warned Green, who immediately closed the trunk. Green then asked for a knife and when defendant did not provide one, Green became upset and threatened to "smoke" both defendant and the victim. However, Green then told defendant that he did not need a knife and began choking the victim. When that was unsuccessful, however, Green slit the victim's throat.

After the murder, defendant and Green drove the car, with the victim in the trunk, to a shopping center in order to show it to another person. After that meeting, the car and body were abandoned in the parking lot and later found by a security guard.

Prior to trial, defendant moved for an evidentiary hearing to suppress the statements he made, arguing both that the statements were involuntary and that they were obtained in violation of his right to counsel. The trial court denied the motion to suppress, finding that because defendant's request for counsel was ambiguous his right to counsel was not violated. Defendant later requested a new attorney because he did not believe his attorney was spending adequate time on his case. The trial court denied defendant's motion for new counsel. Finally, at the conclusion of Lt. Morell's trial testimony, defendant moved for a mistrial on the basis that Lt. Morell's reference to the fact that defendant had other pending warrants for his arrest was prejudicial. The trial court denied the motion, but offered to provide a cautionary instruction to the jury. Defense counsel rejected the trial court's offer to give a cautionary instruction.

## II. Analysis

### A. Sufficiency of the Evidence

Defendant first contends that the prosecution presented insufficient evidence to support defendant's conviction of second-degree murder. We disagree. We review claims of sufficiency of the evidence by considering the evidence in the light most favorable to the prosecution and determining whether a rational trier of fact could have found that the essential elements of the charged crime were proved beyond a reasonable doubt. *People v DeKorte*, 233 Mich App 564, 567; 593 NW2d 203.

To prove the offense of second-degree murder, the prosecution must show (1) that a death occurred, (2) that the death was caused by the defendant, and (3) that the killing was done with malice, and (4) without justification or excuse. *People v Porter*, 169 Mich App 190, 192; 425 NW2d 514 (1988). 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." *People v Mayhew*, 236 Mich App 112, 125; 600 NW2d 370 (1999), quoting *People v Goecke*, 457 Mich 442, 464; 579 NW2d 868 (1998). Defendant was prosecuted under an aiding and abetting theory. The aiding and abetting statute provides that "[e]very person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission may hereafter be prosecuted, indicted, tried, and on conviction shall be punished as if he had directly committed such offense." MCL 767.39. The elements necessary to support a finding of aiding and abetting are: (1) the crime was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement. *People v Carines*, 460 Mich 750, 780; 597 NW2d 130 (1999). The prosecution presented sufficient evidence that defendant had knowledge that Green intended to commit murder and that defendant assisted Green in the commission of the murder.

Green drove to the defendant's home with the victim in the trunk of his truck and asked defendant for a knife and some rope or wire. If he did not already know, Defendant became aware that the victim was in the trunk when Green opened it. Defendant complied with Green's request to serve as a lookout to ensure that passersby would not be able to see the victim in the open trunk. After the murder, defendant participated in showing someone that the victim had been killed and made no attempt to notify the authorities of Green's actions.

Circumstantial evidence and reasonable inferences arising from the evidence are sufficient to establish the elements of second-degree murder. *People v Nash*, 110 Mich App 428, 453; 313 NW2d 307 (1981). Credibility of the witnesses is a matter for the trier of fact to ascertain. *People v Vaughn*, 186 Mich App 376, 380; 465 NW2d 365 (1990). The jury ruled accordingly. Therefore, this evidence, when viewed in a light most favorable to the prosecution, was sufficient to convict defendant of second-degree murder.

## B. Suppression of Defendant's Statements

Defendant next contends that the trial court erred in failing to suppress defendant's statements. We disagree. "A trial court's findings of fact following a suppression hearing will not be disturbed by an appellate court unless the findings are clearly erroneous." *People v Givans*, 227 Mich App 113, 119; 575 NW2d 84 (1997), citing *People v LoCicero*, 453 Mich 496, 500; 556 NW2d 498 (1996). Factual findings are considered clearly erroneous if upon review of the record there is a definite and firm conviction that a mistake was made. *Givans, supra*, 227 Mich App 113. Further, a trial court's conclusion of law is reviewed de novo. *People v Snider*, 239 Mich App 393, 406; 608 NW2d 502 (2000).

Voluntariness of statements are determined by the totality of the circumstances. *People v Manning*, 243 Mich App 615, 634; 624 NW2d 746 (2000). If the confession is the product of an essentially free and unconstrained choice, then the statement was voluntary. *Manning, supra*, 243 Mich App 635. However, if the accused individual's will has been overborne and the capacity for self determination critically impaired, then the statement was not voluntary. *Id.*

In determining whether a statement is voluntary, the trial court must consider the following factors: the age of the accused; the lack of education or intelligence level; the extent of 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. *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988).

Defendant's statement was voluntary. Defendant admitted that at no time was he denied food or drink. No force or coercion was employed by the police. Lt. Morell read defendant his *Miranda* rights, and had defendant sign a Constitutional Rights Certificate of Notification form both before he questioned defendant on May 24, 1995, and before he secured defendant's written statement on May 25, 1995. Moreover, defendant was not precluded from communicating with others if he so desired, as demonstrated by the fact that he was able to speak with his mother prior to giving his final statement.

When viewing the totality of the circumstances, we conclude that the trial court did not clearly err in finding that defendant's statements were given voluntarily.

## C. Denial of Defendant's Motion for Mistrial

Defendant also claims that the trial court erred in denying his motion for a mistrial. We disagree. We review a trial court's grant or denial of a motion for a mistrial for an abuse of discretion. *People v Wolverton*, 227 Mich App 72, 75; 574 NW2d 703 (1997). A motion for mistrial should be granted only if there is an irregularity that is prejudicial to the defendant's rights and impairs his ability to receive a fair trial. *People v Stewart (On Remand)*, 219 Mich

App 38, 43; 555 NW2d 715 (1996); *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995).

Defendant moved for a mistrial based upon Lt. Morell's comment in front of the jury that defendant had been taken into custody, not only for the murder charge, but because he had outstanding warrants as well. The use of a defendant's prior bad acts as character evidence is improper, except as allowed by MRE 404(b),<sup>2</sup> because of the danger of conviction based on a defendant's history of misconduct. *People v Starr*, 457 Mich 490, 496; 577 NW 2d 673 (1998). Therefore, upon request, a trial court is required to provide a limiting instruction to the jury. *Starr, supra*, 457 Mich 498; *People v VanderVliet*, 444 Mich 52, 75; 508 NW2d 114 (1993).

Lt. Morell's statement did not prejudice defendant's rights. First, the trial court offered to give a cautionary instruction to the jury which defendant rejected. Second, in the statement that defendant gave to the police that was read into evidence, defendant stated that he originally did not want to help Green because he was on probation. Third, defendant gave a statement attempting to explain the extent of his participation in the murder; he did not deny his involvement. Defendant did not suffer prejudice because of the statement, and we conclude from review of the record that defendant received a fair trial. Thus, the trial court did not abuse its discretion in denying the motion.

#### D. Right to Confrontation

Defendant claims that Lt. Morell's testimony, that he arrested defendant for the murder based on the statement made by Green that implicated defendant, denied defendant his right to confrontation at trial. We disagree. This issue was not preserved by a timely objection, and therefore, we review this claim to determine whether there was plain error affecting defendant's substantial rights. *Carines, supra*.

A defendant has a constitutional right to confront the witness against him. US Const, Am VI; Const 1963, art 1, § 20. Allowing a jury to hear an unedited incriminating statement at a joint trial by a nontestifying codefendant violates a defendant's right to confrontation. *People v Frazier*, 446 Mich 539, 544; 521 NW2d 291 (1994); citing *Bruton v United States*, 391 US 123, 135-136; 88 S Ct 1620; 20 L Ed 2d 476 (1968). Statements made by a nontestifying codefendant at a joint trial are often suspect because the declarant is attempting to shift blame. *Frazier, supra*, 446 Mich 545; citing *Bruton, supra*, 391 US 135-136. Further, a nontestifying codefendant's statement may not be admitted even if the defendant confessed to committing the crime. *Frazier, supra*, 446 Mich 546; citing *Cruz v New York*, 481 US 186, 192-194; 107 S Ct 1714; 95 L Ed 2d 162 (1987).

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<sup>2</sup> MRE 404(b) is an inclusionary rule that is not violated unless evidence is offered solely to establish the criminal propensity of an individual to show that he acted in conformity therewith. *People v VanderVliet*, 444 Mich 52, 64-65; 508 NW2d 114 (1993). Therefore, "evidence of other crimes, wrongs, or acts is admissible under MRE 404(b) if the evidence is '(1) offered for a proper purpose and not 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 outweigh danger of unfair prejudice, MRE 403.'" *People v Aguwa*, 245 Mich App 1, 7; 626 NW2d 176 (2001), quoting *People v Ho*, 231 Mich App 178, 185-186; 585 NW2d 357 (1998).

Here, Green's statement was not admitted; rather, testimony from Lt. Morell established that the statement caused defendant to be considered a suspect. Because defendant was able to confront Lt. Morell through his counsel's cross-examination, defendant's right to confrontation was not violated. Moreover, even if Lt. Morell's testimony violated defendant's right to confrontation, such error would not warrant reversal because defendant has not shown either that he is actually innocent or that any such error had a serious affect on the fairness, integrity or public reputation of judicial proceedings. *Carines, supra* at 763.

E. Request for Substitute Counsel

Finally, defendant asserts that the trial court erred in denying defendant's request for substitute counsel. We disagree. A trial court's decision to grant a continuance to allow substitute counsel is reviewed for an abuse of discretion. *People v Echavarria*, 233 Mich App 356, 368-369; 592 NW2d 737.

The trial court must consider the following factors in its decision to deny a defendant's motion for a continuance to obtain another attorney: (1) whether the defendant is asserting a constitutional right, (2) whether the defendant has a legitimate reason for asserting the right, such as a bona fide dispute with his attorney, (3) whether the defendant was negligent in asserting his right, (4) whether the defendant is merely attempting to delay trial, and (5) whether the defendant demonstrated prejudice resulting from the trial court's decision. *Echavarria, supra*, 233 Mich App 369.

Defendant claimed he was unhappy with the amount of time that he had spent with defense counsel in preparing the case. However, this unhappiness with his counsel was insufficient to support his request to substitute counsel in light of the other relevant factors. First, defendant was negligent in failing to assert his right to counsel earlier than the day of trial. Although defendant's right to choose counsel is an essential element of the Sixth Amendment right to assistance of counsel, this right is not absolute. *People v Kryzstopaniec*, 170 Mich App 588, 598; 429 NW2d 828 (1988). The defendant's right to alternate counsel is balanced with the public's interest in the prompt and efficient administration of justice in order to determine whether the defendant's right to counsel has been violated. *Kryzstopaniec, supra*, 170 Mich App 598. The trial court recognized that granting defendant's motion would have been extremely disruptive to the trial, which was finally beginning four years after the crime had been committed. Moreover, defendant admitted to the trial court that his defense counsel was a competent lawyer and that defense counsel had prepared adequately for the case. Under these circumstances the trial court did not abuse its discretion in failing to grant defendant's motion for a continuance to obtain another attorney.

Affirmed.

/s/ Donald E. Holbrook, Jr.  
/s/ Kathleen Jansen  
/s/ Kurtis T. Wilder