STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 13, 2002
v	No. 234112 Kent Circuit Court
CHAD EDWARD-JOHN MALESKI, Defendant-Appellant.	LC No. 00-004017-FC

Before: Murphy, P.J., and Hood and Murray, JJ.

PER CURIAM.

Defendant was convicted after a joint jury trial with codefendant James Rivero of first-degree felony murder, MCL 750.316(1)(b), unarmed robbery, MCL 750.530, carjacking, MCL 750.529a, and kidnapping, MCL 750.349. He was sentenced to life in prison for murder, as well as concurrent prison sentences of ten to fifteen years, twenty-five to fifty years, and twenty-five to fifty years, respectively, for unarmed robbery, carjacking, and kidnapping. The trial court denied defendant's motion for new trial, and he now appeals by right. We affirm.

The evidence at trial indicated that defendant participated with Joshua Rogers, Mark Kopp and James Rivero in the beating, robbery, and carjacking perpetrated against the victim outside a bowling alley in the city of Grand Rapids. The victim, after being severely beaten, was stuffed into the trunk of his own car and driven to a remote location in Mecosta County, where he was repeatedly stabbed with scissors and left to die. Trial testimony also indicated that while the victim was likely beaten into a helpless condition in the bowling alley parking lot, he survived even the stab wounds but died from blunt force injuries to his abdomen and head after several hours without medical attention. Defendant, Kopp, and Rivero were apprehended the next morning after the police stopped Kopp for a traffic violation while he was driving the victim's car.

Defendant gave two statements to the police, which he moved to suppress before trial. At the suppression hearing and on appeal, defendant argues that he did not effectively waive his rights as set forth by *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966), because he was too intoxicated to understand them, because the police did not read a statement waiver, and because he never positively stated he waived his rights. Defendant further argues that because of a four- or five-hour gap between his initial statement and a second statement after

taking police to the victim's body, the second statement should be suppressed because the police failed to reread the *Miranda* warnings. The trial court found that both of defendant's statements were voluntary, and that defendant voluntarily, knowingly, and intelligently waived his constitutional rights to silence and counsel. Further, the trial court concluded that fresh *Miranda* warnings were not required before defendant's second statement, and accordingly, it denied defendant's motion to suppress. We agree with the trial court.

When considering a motion to suppress a statement, the trial court must determine, based on the totality of the circumstances, whether a defendant's statement was voluntary, and whether defendant made a voluntary, knowing, and intelligent waiver of his constitutional rights to silence and to counsel. *People v Cheatham*, 453 Mich 1, 27 (Boyle, J.), 44 (Weaver, J.); 551 NW2d 355 (1996); *People v Snider*, 239 Mich App 393, 416; 608 NW2d 502 (2000). This Court must review the entire record de novo, but factual determinations of the trial court will not be set aside unless clearly erroneous. MCR 2.613(C); *People v Daoud*, 462 Mich 621, 629; 614 NW2d 152 (2000). A factual finding is clearly erroneous if the appellate court is left with a definite and firm conviction that a mistake has been made, giving due deference to the trial court's superior ability to determine credibility. *People v Sexton (After Remand*), 461 Mich 746, 752; 609 NW2d 822 (2000).

Constitutional due process, and the common law, require that for the statement of the accused in a criminal trial to be admitted as evidence at trial it must have been freely and voluntarily made. *Daoud*, *supra* at 630-631; *People v Walker (On Rehearing)*, 374 Mich 331, 333; 132 NW2d 87 (1965). A statement is voluntary if, under the totality of the circumstances, it is "the product of an essentially free and unconstrained choice by its maker," rather than one where the defendant's "will has been overborne and his capacity for self-determination critically impaired." *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988), quoting *Culombe v Connecticut*, 367 US 568, 602; 81 S Ct 1860; 6 L Ed 2d 1037 (1961). A court must decide whether a statement is voluntary by reviewing all of the circumstances surrounding its making, with no single factor being determinative, 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. *Sexton*, *supra* at 752-753.

Further, if the accused was in police custody, a statement of a defendant may not be used by the prosecutor as evidence unless he demonstrates that, prior to any questioning, the accused was warned that he had a right to remain silent, that his statements could be used against him, and that he had the right to retained or appointed counsel. *Daoud*, *supra* at 633. The prosecutor must prove by the preponderance of the evidence that the defendant voluntarily, knowingly, and intelligently waived his constitutional rights to silence and counsel before the defendant's statements made during custodial interrogation may be admitted in evidence. *Id.* at 634. A court must apply an objective standard to determine by the "totality of circumstances" involved, including the education, experience, and conduct of the defendant and the credibility of the police, whether a defendant's waiver of Fifth Amendment rights was voluntary, knowing, and intelligent. *Id.* at 633-634. Furthermore, the analysis must be bifurcated: 1) whether the waiver was "voluntary," and 2) whether the waiver was "knowing" and "intelligent." *Id.* at 639.

Whether a waiver is "voluntary" depends on the absence of police coercion, and here there was no evidence of police coercion. *Id.* at 635. Defendant's waiver was "knowing" and "intelligent" if defendant was aware of his available options, but he need not comprehend the ramifications of exercising or waiving his rights. *Id.* at 636.

In the present case, whether defendant was able to understand his available options as set forth in the *Miranda* warnings, or whether he was too intoxicated to comprehend his rights, was a question of fact that the trial court was required to determine at the motion to suppress. The credibility of witnesses is a key factor in finding facts that are contested. In *Daoud*, *supra* at 629, our Supreme Court, quoting *Cheatham*, *supra* at 30, opined that "[c]redibility is crucial in determining a defendant's level of comprehension, and the trial judge is in the best position to make this assessment." Here, the trial court expressly found that defendant was not intoxicated, and that considering defendant's prior experiences in juvenile court, the police "effectively" communicated to him his rights under *Miranda*. The trial court's factual finding was supported by police testimony, and therefore it was not clearly erroneous. Further our independent review of the record does not create a definite and firm conviction that the trial court made a mistake by finding that defendant's statements were voluntary.

Defendant's argument that his statements should have been suppressed because the police failed to read a statement of waiver to him and that he failed to make a positive statement waiving his rights is without merit. The prosecutor correctly notes that *Miranda* does not require that the police read a statement of waiver before custodial interrogation, but rather requires that the suspect "be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." *Miranda*, *supra* at 479. Further, although waiver will not be presumed from a silent record, *id.* at 475, and the prosecutor must prove defendant waived his rights to silence and counsel by the preponderance of evidence, *Daoud*, *supra* at 634, the trial court here properly found that defendant was aware that by signing the *Miranda* warning card he was waiving his rights, and that defendant's act of signing his name on the card constituted an express waiver of his rights.

Moreover, this Court has held that *Miranda* does not necessarily require an explicit statement by a defendant waiving his rights, but rather it is a question of fact whether the defendant actually waived his rights. *People v Matthews*, 22 Mich App 619, 627, 630-631; 178 NW2d 94 (1970). In *People v Brannon*, 194 Mich App 121, 130-131; 486 NW2d 83 (1992), this Court held an effective waiver of *Miranda* rights from a deaf defendant did not require an oral recitation. The issue was also addressed by the United States Supreme Court in *North Carolina v Butler*, 441 US 369; 99 S Ct 1755; 60 L Ed 2d 286 (1979), where the defendant indicated he understood his rights and waived them, but refused to sign the FBI's "advice of rights" form. The Supreme Court held that an explicit statement of waiver is unnecessary if, based on all the facts and circumstances, the defendant, in fact, voluntarily and knowingly waived his rights. *Id.* at 374-375. The Court opined:

> An express written or oral statement of waiver of the right to remain silent or of the right to counsel is usually strong proof of the validity of that waiver, but is not inevitably either necessary or sufficient to establish waiver. The question is not one of form, but rather whether the defendant, in fact, knowingly and voluntarily waived the rights delineated in the *Miranda* case. . . . The courts must presume that a defendant did not waive his rights; the prosecution's burden is great; but in at least some cases, waiver can be clearly inferred from the actions and words of the person interrogated. [*Id.* at 373.]

Here, as noted above, the trial court found that defendant, in fact, understood his rights and waived them. This conclusion was supported by the uncontradicted testimony of the police that they read defendant his *Miranda* rights, and that defendant both verbally and nonverbally acknowledged that he understood his rights; by the internal content of defendant's statements; by defendant's knowledge of his rights based on past experience in juvenile court; and by defendant signing the police *Miranda* card, which contained language that defendant was willing to talk to police. Thus, the trial court did not clearly err by finding, based on the totality of circumstances, that defendant's statements were voluntary and uncoerced, and that defendant sufficiently understood his rights to knowingly and intelligently waive them.

Defendant's argument concerning his "second" statement also lacks merit. The failure of the police to repeat the *Miranda* warnings before a second statement does not preclude a finding, based on the totality of circumstances, that defendant voluntarily, knowingly, and intelligently waived his Fifth Amendment rights to silence and counsel. *People v Littlejohn*, 197 Mich App 220, 223; 495 NW2d 171 (1992); *People v Godboldo*, 158 Mich App 603, 605; 405 NW2d 114 (1986). In *Godboldo*, the defendant waived his *Miranda* rights and gave the police a four-page statement. *Id.* at 605. Two hours later, the defendant was interviewed again without fresh *Miranda* warnings but after acknowledging he remembered his rights. *Id.* This Court opined:

> [T]he failure to reread a defendant's *Miranda* rights prior to each interrogation does not render his subsequent statements inadmissible as evidence against him. Rather, a factual question is raised as to whether the statements were voluntary. As we have previously noted, we find that the defendant's statements here were indeed voluntary, and thus no error occurred in denying the motion to suppress. [*Id.* at 607.]

In *People v Ray*, 431 Mich 260, 276; 430 NW2d 626 (1988), the Michigan Supreme Court held that fresh *Miranda* warnings were unnecessary before a post-polygraph interview. Instead, our Supreme Court adopted the test set forth in *Wyrick v Fields*, 459 US 42, 47; 103 S Ct 394, 396; 74 L Ed 2d 214 (1982), which provided that "the admissibility of such statements is to be resolved by a review as to whether in the 'totality of circumstances' the waiver of the Fifth Amendment right could be considered knowing and voluntary." *Ray*, *supra* at 276.

If a suspect at any point after waiving his rights thereafter invokes his right against self-incrimination or to have counsel present, questioning by the police must cease. *Miranda, supra* at 473-474. The police must "scrupulously honor" a defendant's invocation of his right to remain silent. *People v Kowalski*, 230 Mich App 464, 476; 584 NW2d 613 (1998). Further, if

after waiver, a defendant invokes his right to counsel during custodial interrogation, questioning must stop until the defendant has counsel present or unless the defendant initiates further communication with the police. *People v Paintman*, 412 Mich 518, 525; 315 NW2d 418 (1982). On the other hand, if an accused validly waives his Fifth Amendment rights, the police may continue to question him until and unless he clearly invokes his rights. An ambiguous or equivocal reference regarding counsel does not require that the police cease questioning or clarify whether the accused wants counsel. *People v Adams*, 245 Mich App 226, 237-238; 627 NW2d 623 (2001).

In the present case, as discussed above, the trial court did not clearly err by finding that defendant's initial statement was voluntary and preceded by a voluntary, knowing, and intelligent waiver of his Fifth Amendment rights. No evidence was submitted to the trial court that thereafter defendant sought to invoke his rights either fully or partially. Rather, the evidence established that during the time between the end of defendant's first statement and the start of his second statement, defendant continued to cooperate and communicate with the police by directing them to the victim's body. Thus, the totality of circumstances supported the trial court's finding that defendant's second statement was also voluntary, and made after a knowing and intelligent waiver of his Fifth Amendment rights. The trial court did not clearly err by denying defendant's motion to suppress his second statement.

Defendant next argues that the evidence was insufficient to sustain his conviction for felony murder and kidnapping, claiming he was merely present, and that no evidence showed that he was aware the victim was still alive when he directed the others involved to the location in Mecosta County to dispose of the victim's body. The trial court rejected defendant's sufficiency argument, finding that the evidence supported the conclusion that defendant was an active participant in one way or another of all phases of the criminal episode. The trial court noted that Rivero told the police that defendant was a participant in the beating at the bowling alley, while defendant admitted taking money from the victim while Kopp and Rogers beat him, and defendant also was aware before the robbery that the plan included stealing the victim's car. Further, the trial court found that the very act of stuffing the victim into his car trunk constituted secret confinement, which defendant subsequently affirmatively aided. Moreover, defendant's participation in abandoning the victim in a remote location away from medical attention after his severe beating proved that defendant acted in willful and wanton disregard of serious injury or death to the victim. Finally, the trial court found that the evidence showed that the victim was alive when taken to Mecosta County, and that the jury could conclude this fact was apparent to all participants. The trial court noted that even if the jury found that the victim died before he was finally abandoned, the victim's secret confinement at the bowling alley was sufficient to leave the question for the jury. Again, we agree with the trial court for the reasons discussed below.

In a jury trial, the Sixth and Fourteenth Amendments combine to require that every essential element of the charged offense be proven beyond a reasonable doubt. *People v Bearss*, 463 Mich 623, 629; 625 NW2d 10 (2001). Thus, in a criminal case, due process requires that a prosecutor introduce evidence sufficient to justify a rational factfinder in concluding that the defendant is guilty beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597

NW2d 73 (1999). In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecutor and determine whether a rational factfinder could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 513-514; 489 NW2d 748 (1992), mod 441 Mich 1201 (1992). This standard of review for the sufficiency of evidence is deferential, and this Court must make all reasonable inferences and resolve evidence or credibility conflicts in favor of the jury verdict. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). Circumstantial evidence and reasonable inferences therefrom may constitute sufficient evidence to find all the elements of an offense beyond a reasonable doubt. *Id.* Further, 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. *Id.*

The elements of felony murder are: (1) the killing of a human being, (2) with malice – the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result, (3) while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in MCL 750.316(1)(b), including the underlying charged offenses here of unarmed robbery, carjacking, and kidnapping. *People v Carines*, 460 Mich 750, 758-759; 597 NW2d 130 (1999). Defendant concedes that sufficient evidence established he was guilty of unarmed robbery and carjacking and that a human being was killed. The only contested element is malice.

In the present case, defendant was tried on the theory that he was guilty as an aider and abettor. To establish that a person has criminal liability as an aider and abettor it must be shown (1) that the crime was committed by someone, (2) that the accused performed acts or gave encouragement that assisted the commission of the crime, and (3) that the accused intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement. MCL 767.39; *Carines*, *supra* at 757. While "mere presence" is insufficient to establish criminal liability, *People v Wilson*, 196 Mich App 604, 614; 493 NW2d 471 (1992), assistance sufficient for criminal liability "includes the actual or constructive presence of an accessory, in preconcert with the principal, for the purpose of rendering assistance, if necessary," *People v Palmer*, 392 Mich 370, 378; 220 NW2d 393 (1974).

The intent of an aider and abettor may be inferred from circumstantial evidence, including a close association between the defendant and the principal, the defendant's participation in the planning or execution of the crime, and evidence of flight after the crime. *Carines*, *supra* at 757-758. Further, malice necessary for felony murder may be inferred where the participants are acting intentionally or recklessly in pursuit of a common plan that includes killing or infliction of great bodily harm. *Id.* at 759. Moreover, because of the difficulty of proving a person's state of mind, proof of intent may be satisfied by minimal circumstantial evidence. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999).

Applying the foregoing analysis to the present case, it is readily apparent that more than ample evidence was presented at trial for a rational jury to find all of the elements of felony murder were proven beyond a reasonable doubt, including malice. The evidence established that defendant was acting in concert with his codefendants before the offense, defendant was aware of

a plan to "beat a black man's butt for his car," and defendant either participated in beating the victim or took money from the victim while two others were beating him. After the carjacking, robbery, and beating of the victim, defendant continued acting in concert with his codefendants when they tried to conceal the crime by changing their bloodied clothes, and defendant directed the codefendants to a remote out-of-county location to dispose of the victim. It is this latter action, according to the testimony of the forensic pathologist, which resulted in the victim's death by depriving him of necessary medical attention. Therefore, the evidence, viewed in a light favorable to the prosecution, supported an inference that defendant was acting intentionally in pursuit of a common plan to commit robbery and carjacking, and that a savage beating likely to result in death or great bodily harm was within the scope of the common plan. In summary, the evidence supported an inference that defendant acted intentionally with callous indifference to human life sufficient to prove him guilty of felony murder beyond a reasonable doubt.

Defendant's argument that the evidence was insufficient to sustain his conviction for kidnapping also fails. Although MCL 750.349 establishes several different forms of kidnapping, *People v Wesley*, 421 Mich 375, 383; 365 NW2d 692 (1984), defendant was prosecuted and convicted under the alternative theories of (1) secret confinement or (2) forcible seizure or confinement, with intent to secretly confine. *People v Jaffray*, 445 Mich 287, 299; 519 NW2d 108 (1994); *People v Hoffman*, 225 Mich App 103, 111-112; 570 NW2d 146 (1997). The elements of secret confinement kidnapping are that defendant, either alone or by aiding and abetting others, (1) willfully, maliciously, and without legal authority, (2) secretly confined or imprisoned another person, (3) using force or without consent. *Jaffray*, *supra* at 305. The elements of forcible kidnapping applied to the present case are: (1) a forcible seizure or confinement of another, (2) done willfully, maliciously and without lawful authority, and (3) with the specific intent to cause such person to be secretly confined or imprisoned. *Wesley*, *supra* at 389. Neither of these forms of kidnapping requires proof of asportation or movement incidental to the kidnapping, *id.* at 390-391, and secret confinement kidnapping is a general intent crime, *Jaffray*, *supra* at 298. Thus, "the critical factor peculiar to this form of the statutorily proscribed behavior is the degree of the victim's isolation as a result of the accused's conduct, not the specific intent of the accused." *Id.* at 305, n 30. The difference between the two alternatives is that in secret confinement "a kidnapping conviction may be premised on a showing of confinement that in fact is secret" and the other alternative depends "upon a showing of forcible seizure or confinement with intent to secretly confine, whether or not the confinement remains a secret." *Id.* at 300-301.

Here, the evidence overwhelmingly established that the victim was in fact willfully, maliciously, forcibly, and secretly confined against his will, first in the trunk of his own automobile, and then in a remote field where he was left to die. Furthermore, defendant admitted that he knowingly assisted the victim's secret confinement by directing other defendants to a remote location where the secret confinement could continue. To the extent the victim must have been alive while secretly confined, the physical evidence, the pathologist's testimony, and the statement of Rivero were more than sufficient to support an inference that the victim was living when confined to his car's trunk and when left in the remote field. As a general intent crime that defendant assisted in committing, it is not necessary to prove what defendant's specific intent may have been because the secret confinement in fact occurred.

Moreover, a rational view of the evidence, in the light most favorable to the prosecution, also supported a conclusion that defendant was aware that the victim was alive. What happened to the victim before being put in the trunk was always referred to by defendant and the other participants as a beating and not a killing. The pathologist's testimony supported an inference that the victim survived for several hours after the initial beating. Rivero's statement that the victim was moaning for help when the trunk was opened in the field further supports an inference that the victim was alive and an inference that it also would have been readily apparent to defendant. Also, Rivero's statement that before opening the trunk in the field, Rogers got out of the car with scissors, and that Kopp and defendant got out of the car with him, raised an inference that all three believed the victim was still alive. The jury could also have inferred that defendant intended to secretly confine the victim to avoid apprehension. Thus, the evidence was sufficient to find defendant guilty of forcible seizure or confinement, with intent to secretly confine.

Next, defendant argues he was denied a fair and impartial trial as a result of pretrial publicity when the trial court failed to grant his motion for change of venue. We disagree. Defendant failed to preserve this issue by not obtaining a ruling from the trial court on his motion and not objecting to the composition of the jury after it was seated. *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000). Alleged error by the trial court in granting or denying a motion for a change of venue is reviewed on appeal for an abuse of discretion, *People v Jendrzejewski*, 455 Mich 495, 500; 566 NW2d 530 (1997), but defendant's claim that he was denied a fair and impartial trial because jurors were tainted by pretrial publicity raises a constitutional issue subject to de novo review, *People v Manser*, 250 Mich App 21, 24; 645 NW2d 65 (2002). However, because the alleged error was not preserved, appellate review is for plain error affecting defendant's substantial rights. *People v Milstead*, 250 Mich App 391, 402; 648 NW2d 648 (2002). Reversal is warranted only when plain error results in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Carines*, *supra* at 763.

Before trial, defendant moved for a change of venue alleging that negative pretrial publicity would make it impossible to seat an impartial jury. Attached to the motion were several articles from *The Grand Rapids Press* printed from the date the four suspects were arrested, March 17, 2000, through the preliminary examination in mid-April, as well as numerous letters to the editor published on the paper's public commentary page. The articles reported details of the offense, the troubled backgrounds of the four suspects, and reported that the victim was a well-liked, mild-mannered retiree. Of course, the fact that three of the suspects were white teens and the victim was a black man who was savagely beaten made the case a compelling news story in the community. One headline read, "Black leaders suspect killing was hate crime," but the accompanying story also reported that the police called the offense "a senseless, random act of violence," for which there was no indication of racial motivation (*The Grand Rapids Press*, March 28, 2000).

Defendant, however, never insisted on a ruling from the trial court on his motion for change of venue. Counsel did not raise the issue before or after the selection of jurors. The trial court, however, noted that a front-page newspaper article published on the eve of trial was

regrettable and had come "very close to making it impossible to select juries to try this particular case." The trial court addressed its concern by inquiring of prospective jurors if they had read the most recent article and summarily excusing those who had. At the conclusion of juror voir dire, defense counsel expressed no challenge to the jury that eventually was impaneled. Because the trial court was not called upon to exercise its discretion concerning the motion for change of venue, there can be no abuse of discretion. See, e.g., *People v Rice (On Remand)*, 235 Mich App 429, 438-439; 597 NW2d 843 (1999).

Furthermore, this Court has found a waiver, as opposed to mere forfeiture, in similar circumstances, where the defendant's pretrial motion for change of venue based on pretrial publicity was denied, but where after voir dire, counsel expressed satisfaction with the jury impaneled and failed to renew the motion. *People v Clark*, 243 Mich App 424, 426; 622 NW2d 344 (2000). Regardless of whether defendant waived the argument, we find no error.

Without question, a defendant in a criminal case has an absolute right to have a fair and impartial jury decide his guilt or innocence. *Jendrzejewski*, *supra* at 501. The general rule, however, is that prospective jurors are presumed to be impartial and a juror's answer under oath that he or she can set aside preconceived opinions and decide the case based on the evidence at trial is sufficient to protect a defendant's right to a fair trial. *Id.* at 517. Furthermore, pretrial publicity alone is insufficient to require a change of venue to guarantee a fair and impartial jury. *Id.* at 502. Rather, a defendant must demonstrate either a pattern of strong community animus against him and publicity so extensive and inflammatory that jurors would be unable to remain impartial after being exposed to it, or that the jury was actually prejudiced, or that the atmosphere surrounding the trial created a probability of bias. *People v Hack*, 219 Mich App 299, 311; 556 NW2d 187 (1997).

Defendant points to nothing in the record to indicate actual bias on the part of the jury, nor does he argue that the atmosphere of the courtroom created a presumption of bias. Instead, defendant argues that because some prospective jurors acknowledged having read a recent newspaper article, and were excused without further inquiry by the trial court, jurors that were seated harbored undisclosed information sufficient to overcome the presumption of impartiality. Defendant's argument must be rejected because the pretrial publicity in this case was far less extensive or prejudicial than cases where similar arguments have been rejected. *Jendrzejewski*, *supra* at 502-504. Moreover, the value protected by the Constitution is lack of impartiality, not an empty mind. *Id.* at 519.

In summary, defendant has failed to meet his burden of proving that clear error affected his substantial rights. Defendant was not denied a fair and impartial trial as a result of pretrial publicity.

Last, defendant argues that his constitutional rights under the Confrontation Clause were denied when the statements of his non-testifying codefendant were admitted at their joint trial. We need not reach the merits of defendant's claim because he waived any error by stipulating to the admission of his codefendant's statements as substantive evidence at their joint trial. *People v Riley*, 465 Mich 442, 448-449; 636 NW2d 514 (2001). Defendant's attorney noted on the record that he specifically advised defendant that he believed parts of Rivero's statements would

help defendant's case but some parts would hurt defendant's case. Defendant acknowledged such advice and affirmed that it was his decision to proceed with a joint trial and agreed that codefendant Rivero's statements would be received as substantive evidence. Defendant's actions constituted an "intentional relinquishment or abandonment of a known right," thus waiving and extinguishing any alleged error. *Id.* at 449.

Affirmed.

/s/ William B. Murphy
/s/ Harold Hood
/s/ Christopher M. Murray