# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>December 3, 2002 |
| v | No. 229164<br>Wayne Circuit Court |
| HAROLD C. MIDDLEBROOKS,<br><br>Defendant-Appellant. | LC No. 97-005694-01 |

Before: O'Connell, P.J., and White and B. B. MacKenzie*, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to twenty-five to fifty years in prison for the murder conviction, and a consecutive two-year term for the felony-firearm conviction, with credit for time served. He appeals as of right. We affirm.

This case stems from the shooting death of a 19-year-old man in a neighborhood field[1] during the early morning hours of May 17, 1997. On May 15, a witness saw defendant and the decedent have a loud and heated argument outside of his workplace, during which defendant said "f___ you" to the decedent. Both parties appeared to be angry. According to defendant's statements to the police, on the day of the incident, he was going to get some marijuana when he saw the decedent and two other individuals, and the group began fighting. Defendant stated that, after the fight, he went home, got his mother's boyfriend, who gave him a nine-millimeter gun, and walked to the field. The decedent's brother and another witness testified at trial that they saw defendant in the area, walking toward the field, carrying a gun. In his statement to the police, defendant said that, once he reached the field, he hid in the bushes and, when he saw the decedent, he jumped out and shot the decedent three times in the back. The autopsy revealed that the decedent was shot twice from the back, at the base of the scalp and on the right elbow, with a

[1] The record refers to the location of the incident in some instances as a "field" and in other instances as an "alley." For purposes of this opinion, we will refer to this area only as a "field."

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

nine-millimeter gun. Four nine-millimeter shell casings were found near the decedent's body. The gun used to kill the decedent was not located, but defendant identified the type of gun used in the murder from police photographs. Ultimately, defendant was tried for first-degree premeditated murder as a result of the decedent's death.

I

Defendant first argues that there was insufficient evidence to convict him of second-degree murder and the related felony-firearm charge, because there was no evidence that he shot the decedent. We disagree.

When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended in part on other grounds 441 Mich 1201 (1992). This Court will not interfere with the trier of fact's role of determining the weight of evidence or the credibility of witnesses. *Id.* at 514. Circumstantial evidence and reasonable inferences arising from the evidence can constitute satisfactory proof of the elements of the crime, *People v Truong (After Remand)*, 218 Mich App 325, 337; 553 NW2d 692 (1996), and 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).

The elements of second-degree murder are: "(1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse." *People v Aldrich*, 246 Mich App 101, 123; 631 NW2d 67 (2001) (citation omitted). Malice includes the intent to kill, the intent to do great bodily harm, or the intent to commit an act in wanton and willful disregard of the likelihood that death or great bodily harm will occur. *Id*.

Viewed in a light most favorable to the prosecution, the evidence was sufficient to enable a rational trier of fact to conclude that defendant committed the crimes. There was evidence that, two days before the incident, defendant and the decedent had a heated argument. Defendant admitted in his statements to the police that, on the day of the incident, he was involved in a fight with the decedent and two of his friends. Defendant, who described himself as being angry, stated that after the fight, he went home and got his mother's boyfriend, who gave him a nine-millimeter gun, and walked to a field. The decedent's brother and another witness saw defendant in the area, walking toward the field, carrying a gun. Defendant stated that after arriving at the field, he hid in the bushes and, when he saw the decedent, he jumped out and shot three times from approximately five or six feet away.

The evidence showed that the decedent was shot twice from more than two feet away with a nine-millimeter weapon. The police also found four nine-millimeter shell casings, all from the same weapon, near the decedent's body. After the shooting, defendant gave the gun back to his mother's boyfriend. Although the murder weapon was never located, defendant identified the type of weapon used from police photographs. This evidence, viewed in a light most favorable to the prosecution, is sufficient to sustain defendant's conviction for second-degree murder.

Defendant claims that the evidence was insufficient to establish his identity given the inconsistencies in certain witnesses' testimony. However, this claim involves issues of credibility, which are left to the trier of fact. *Wolfe, supra*. However, we note that although there were temporal inconsistencies in the testimony of the two witnesses who observed defendant's possession of a gun on the day of the incident, both testified that they saw the decedent lying in the alley *after* they saw defendant in the area with a gun. Further, defendant claims that, in his first statement, he admitted to shooting "Pimp," whom the decedent's brother indicated was the nickname for an individual other than the decedent. However, the evidence shows that defendant told the officer who took his statement that "Pimp" was the decedent's "street name." Moreover, in a subsequent statement, defendant referred to the decedent by name. In sum, this claim does not warrant reversal.[2]

II

Next, defendant argues that the trial court erred by denying his motion to suppress his statements to the police. Defendant contends that his initial statement was coerced by a police polygraph examiner's statement that he had failed the polygraph, especially considering that defendant was only seventeen, had only a tenth-grade education, and had been arrested on the day before his first statement was given.

Whether a defendant's statement was knowing, intelligent, and voluntary is a question of law that a court evaluates under the totality of the circumstances. *People v Cheatham*, 453 Mich 1, 27, 44; 551 NW2d 355 (1996); *People v Garvin*, 235 Mich App 90, 96; 597 NW2d 194 (1999). 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 of fact will not be disturbed unless they are clearly erroneous. *People v Sexton (After Remand)*, 461 Mich 746, 752; 609 NW2d 822 (2000). A finding is clearly erroneous if it leaves the reviewing court with a definite and firm conviction that a mistake has been made. *People v Givans*, 227 Mich App 113, 119; 575 NW2d 84 (1997).

Statements of a defendant made during a custodial interrogation are inadmissible unless the defendant voluntarily, knowingly, and intelligently waived his Fifth Amendment rights. *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966); *People v Abraham*, 234 Mich App 640, 644; 599 NW2d 736 (1999). Whether a statement was voluntary is determined by examining police conduct, while whether it was made knowingly and intelligently depends in part upon the defendant's capacity. *People v Howard*, 226 Mich App 528, 538; 575 NW2d 16 (1997). The prosecutor must establish a valid waiver by a preponderance of the evidence. *Abraham, supra* at 645.

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[2] Within this issue, defendant suggests that this Court should not consider his inculpatory statements made to the police in determining whether the evidence was sufficient to sustain his convictions. However, the statements were admitted into evidence and, when determining whether sufficient evidence was presented to support a conviction, this Court considers all the evidence admitted at trial. See *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended in part on other grounds 441 Mich 1201 (1992). The independent issue regarding the admissibility of defendant's statements is addressed in part II, *infra*.

In determining whether a statement was freely and voluntarily made, this Court considers the totality of the circumstances in light of the following nonexhaustive list of factors set forth by our Supreme Court in *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988):

> [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 a 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.

No single factor is conclusive. *Id.*; *People v Fike*, 228 Mich App 178, 181-182; 577 NW2d 903 (1998).

Viewing the totality of the circumstances, we conclude that the trial court did not clearly err in finding that defendant's statements were voluntarily made. Initially, we are not persuaded that the police polygraph examiner's statement to defendant regarding the results of the police polygraph examination was so coercive that it caused him to involuntarily confess to the crime. See *People v Emanuel*, 98 Mich App 163, 180-181 and n 5; 295 NW2d 875 (1980). The polygraph examiner, who took defendant's first statement, testified at the hearing that defendant was advised that he did not have to take the test or give a statement. In addition, the polygraph examiner asked defendant a series of questions, and determined that he was coherent and rational and not suffering from any debilitation or impairment. Defendant was advised of his polygraph and *Miranda* rights before he was questioned, and he testified that he understood those rights after they were read aloud and explained to him. Defendant then wrote out a statement.

Further, at the hearing, the two officers who took defendant's subsequent statements testified that, before defendant gave each statement, he and the officers read out loud the constitutional rights, and defendant indicated that he understood those rights, initialed each right, and signed the written waiver of his rights. There was no allegation or evidence that defendant was threatened, abused, ill, intoxicated, or deprived of sleep, food, or drink. Further, the record shows that defendant was seventeen years old, had completed the tenth grade, was enrolled in adult education, and had not been diagnosed with any psychological problems. Although defendant claimed that he apprised the officers that he had attended special education classes, there was no evidence submitted to support that claim.[3] Moreover, the evidence showed that

[3] In any event, although a defendant's mental condition is certainly relevant to a determination of his susceptibility to police coercion, mere examination of the defendant's subjective state of mind can never conclude the due process inquiry. *Colorado v Connelly*, 479 US 157, 163-165; 107 S Ct 515; 93 L Ed 2d 473 (1986). A showing of police coercion must also be made before a confession will be suppressed as involuntary. *Id.*

defendant could read and write. Indeed, defendant read verbatim his constitutional rights out loud to the officers, and also wrote his first statement, which was coherent and logical. Further, the fact that no evidence was introduced that defendant had a criminal history is but one factor to consider. *Cipriano, supra*.

In addition, the three interviews were conducted in separate sessions and were not prolonged, and there is no evidence that defendant was coerced into making an inculpatory statement during the interviews. Indeed, there was testimony that, with regard to the third statement, defendant summoned the officer because he wished to talk more about the incident. Finally, although defendant was arrested several hours before giving his first statement, there is no indication that the delay, or anything that occurred during that time, forced him to confess to a crime he did not commit, or otherwise prohibited him from acting of his own free will. See, e.g., *People v McKinney*, 251 Mich App 205; 650 NW2d 353 (2002). In sum, viewing the totality of the circumstances, the record does not leave us with a firm and definite conviction that a mistake has been made. The trial court did not clearly err in denying defendant's motion to suppress his statements to the police.

We note that, on appeal, defendant also argues that his statements should be suppressed because the police polygraph examiner, who took his first statement, had a propensity to extract false confessions from similarly situated teenagers. To support this claim, defendant has submitted a newspaper article discussing another case in which the same polygraph examiner extracted a confession from a teenager.[4] However, the article is not properly before this Court because it is not part of the lower court record.[5] *People v Canter*, 197 Mich App 550, 556-557; 496 NW2d 336 (1992).

III

Defendant also claims that the trial court erred by allowing a witness to testify that he had seen defendant in possession of a gun around the date of the incident, contrary to MRE 401. Moreover, defendant argues that he should have been granted a mistrial after the witness testified

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[4] According to the article, the police polygraph examiner in this case had previously taken the statement of a suspect in another case, the suspect being an eighteen-year-old with an IQ of 71, who insisted he was innocent. The article states that the examiner gave the suspect a polygraph, which he failed, and the suspect then indicated that he was involved in a murder. The examiner had the suspect write out a statement. The police later released the suspect after DNA evidence established that he did not commit the offense.

[5] We note that, even if we consider the newspaper article presented on appeal, there is no evidence that the polygraph examiner actually *coerced* the suspect into giving a false statement. Rather, the article simply provides that, after the suspect failed the polygraph, he stated that he was involved in the murder. In short, defendant has failed to persuasively demonstrate how evidence relating to a suspect's false confession in an unrelated case shows that his confession in the instant case was improperly obtained, without more information. As such, the inferences defendant is trying to draw between the suspect's false confession in the unrelated case and defendant's statement in this case are highly tenuous, at best.

that defendant tried to sell him a gun and that defendant always carried a gun, contrary to MRE 404(b). We disagree.

The decision whether to admit or exclude evidence is within the trial court's discretion. *People v Sawyer*, 222 Mich App 1, 5; 564 NW2d 62 (1997). An abuse of discretion is found only when an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made. *Id.* Further, this Court reviews a trial court's ruling on a motion for a mistrial for an abuse of discretion. *People v Griffin*, 235 Mich App 27, 36; 597 NW2d 176 (1999). "A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial." *Id*. (citation omitted).

Contrary to defendant's claim, the trial court did not abuse its discretion when it allowed the prosecutor to question the witness regarding whether he had seen defendant carrying a gun around the date of the shooting. "Evidence of a defendant's possession of a weapon of the kind used in the offense with which he is charged is routinely determined by the courts to be direct, relevant evidence of his commission of that offense." *People v Hall*, 433 Mich 573, 580-581; 447 NW2d 580 (1989); see also MRE 401. Further, contrary to defendant's suggestion, evidence is not inadmissible simply because the very nature of the evidence is prejudicial, and defendant has not demonstrated that he was unfairly prejudiced by the evidence. See MRE 403; *People v Mills*, 450 Mich 61, 76; 537 NW2d 909 (1995), modified in part on other grounds 450 Mich 1212 (1995).

We also conclude that the trial court did not abuse its discretion by denying defendant's motion for a mistrial. During trial, the following exchange occurred, in relevant part:

> *Q*. Relating to the dates of May 16th and May 17th – excuse me, May 15th, 16th and 17th, around that time, had you ever seen [defendant] with a gun?
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> * * *
>
> *A*. I've seen him before, one time.
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> * * *
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> *Q*. Where did you see this gun – where on [defendant] did he have it?
>
> *A*. He walked in the store one time, he has [sic] lift his jacket and showed me the gun and *asked me if I wanted to buy one*. [Emphasis added.]

Defendant also challenges the following testimony of this witness:

> *Q*. . . . You stated that [defendant] tried to sell you a gun. How long ago was that before this incident?
>
> * * *

*A.* Tell you the truth, *he always used to carry weapons*, but I don't know. [Emphasis added.]

The record demonstrates that the witness' answer regarding defendant's attempt to sell him a gun and that defendant always carried weapons were unsolicited answers to properly asked questions. The prosecutor merely asked the witness *where* defendant was carrying the gun, a question that required a response involving a location. Likewise, the defense asked *when* defendant tried to sell him the gun, a question that required a response involving a time period. Generally, "an unresponsive, volunteered answer to a proper question is not grounds for the granting of a mistrial." *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995). There were no repeated references to defendant's attempt to sell the witness a gun. Further, the mere fact that defendant was known to carry a gun, without more, did not tend to show that he committed the killing at issue. Finally, the trial court provided a strong cautionary instruction to the jury regarding its use of the testimony that defendant carried or had access to guns. The jury is presumed to follow the trial court's instructions. *People v Torres (On Remand)*, 222 Mich App 411, 423; 564 NW2d 149 (1997). Accordingly, defendant has not shown prejudice warranting a mistrial and, thus, the trial court did not abuse its discretion in denying defendant's motion.

IV

Defendant's final claim is that he is entitled to a new trial because the trial court erroneously refused to instruct on the lesser offenses of voluntary manslaughter, MCL 750.321, and killing a person by careless, reckless or negligent discharge of a firearm, MCL 752.861, as requested by defense counsel. We disagree.

Generally, claims of instructional error are reviewed de novo. *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 552 NW2d 593 (1996). This Court reviews jury instructions in their entirety to determine if there is error requiring reversal. *People v Pouncey*, 437 Mich 382, 388; 471 NW2d 346 (1991); *People v Perez-DeLeon*, 224 Mich App 43, 53; 568 NW2d 324 (1997). "The instructions must include all elements of the charged offense and must not exclude material issues, defenses, and theories, if there is evidence to support them." *Perez-DeLeon*, *supra*.

Because this issue was preserved at trial and has been raised on appeal, it is controlled by our Supreme Court's recent decision in *People v Cornell*, 466 Mich 335; 646 NW2d 127 (2002). In *Cornell*, *supra* at 354-355, 357, 359, our Supreme Court concluded that MCL 768.32 only permits instruction on necessarily lesser included offenses, not cognate lesser offenses. See also *People v Reese*, 466 Mich 440, 446; 647 NW2d 498 (2002). Defendant was charged with first-degree premeditated murder. Neither voluntary manslaughter nor careless discharge of a firearm causing death are necessarily lesser included offenses of murder.[6] See *Pouncey*, *supra* at 387;

[6] In light of our Supreme Court's discussion in *People v Cornell*, 466 Mich 335, 342-344; 646 NW2d 127 (2002), concerning Justice Christiancy's opinion in *People v Hanna*, 19 Mich 316, 321-322 (1869), there may be some question whether the *Cornell* Court intended to change the law regarding the obligation to instruct on manslaughter where supported by the evidence in a (continued…)

*People v Heflin*, 434 Mich 482, 496 n 10, 496-497; 456 NW2d 10 (1990); *People v Beach*, 429 Mich 450, 462-463; 418 NW2d 861 (1988); *People v Coddington*, 188 Mich App 584, 605; 470 NW2d 478 (1991). Therefore, an instruction on voluntary manslaughter or reckless discharge of a firearm would not have been proper. *Cornell*, *supra*. Accordingly, no error occurred.

Affirmed.

/s/ Peter D. O'Connell
/s/ Helene N. White
/s/ Barbara B. MacKenzie

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(…continued)

murder case. Recognizing this, we observe that in the instant case, the manslaughter instruction was not supported by the evidence. Even assuming that defendant retrieved the gun after an altercation with the decedent and his friends, the shooting did not occur until after defendant went home, obtained a gun, returned to the field, and then hid in the bushes waiting for the decedent. We cannot say that this provided substantial evidence that defendant acted in the heat of passion, brought on by adequate provocation, and before a reasonable time had elapsed for defendant to regain control. *Cornell*, *supra* at 365 (test for mandatory jury instruction regarding necessarily lesser included offense); see also *People v Elkhoja*, 251 Mich App 417, 445; 651 NW2d 408 (2002) (elements of voluntary manslaughter).