STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 27, 2004
v	No. 243440 Wayne Circuit Court
TERRY LEE MORGAN, II, Defendant-Appellant.	LC No. 01-007128

Before: Fort Hood, P.J., and Bandstra and Meter, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction by a jury of two counts of felonious assault, MCL 750.82, and one count each of possession of a short-barreled shotgun, MCL 750.224b, intentionally discharging a firearm from a motor vehicle, MCL 750.234a, possession of a loaded firearm in a vehicle, MCL 750.227c, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced him to (1) 1 ½ to four years' imprisonment each for the two felonious assault convictions and for intentionally discharging a firearm from a motor vehicle, (2) 1 ½ to five years' imprisonment for possessing a short-barreled shotgun, (3) sixteen months to two years' imprisonment for possessing a loaded firearm in a vehicle, and (4) a mandatory consecutive term of two years' imprisonment for felony-firearm. We affirm.

Defendant first argues that the failure of the police to record his custodial statements violated his constitutional due process rights and that the statements therefore should have been suppressed. While defendant acknowledges that this Court held otherwise in *People v Fike,* 228 Mich App 178, 183; 577 NW2d 903 (1998), defendant urges this Court to find that *Fike* was wrongly decided.

We review an unpreserved claim of constitutional error such as the instant one[1] to determine if a plain, i.e., clear or obvious, error occurred that affected the defendant's substantial rights. *People v Carines,* 460 Mich 750, 763-764; 597 NW2d 130 (1999). In *Fike, supra* at 183, this Court determined that police are not required to record electronically custodial interviews

[1] Defendant admits in his appellate brief that "[d]efense counsel did not move to suppress [defendant's] statement based on the failure of the police to record the interrogation."

because the Legislature has not addressed the issue. The Court noted that "'the courts of this state should reject unprincipled creation of state constitutional rights that exceed their federal counterparts'" and concluded that adopting a rule mandating electronic recording of interviews would constitute such an unprincipled creation of rights. *Id.* at 185, quoting *Sitz v Dep't of State Police,* 443 Mich 744, 763; 506 NW2d 209 (1993). We find no basis to disagree with the holding of *Fike*. Moreover, because of the existence of *Fike,* no clear or obvious error occurred with respect to the lack of an electronic recording in the instant case, and reversal is unwarranted. See *Carines, supra* at 763.

Defendant next argues that his statements were involuntary and that the trial court therefore should have suppressed them. We disagree.

When reviewing a trial court's decision whether to suppress a defendant's statement, an appellate court must examine the totality of the circumstances surrounding the statement and must affirm unless left with a definite and firm conviction that the trial court erred. *People v Sexton (After Remand),* 461 Mich 746, 752-753; 609 NW2d 822 (2000). Before a challenged confession may be admitted as evidence, the prosecutor must establish by a preponderance of the evidence that the defendant waived his *Miranda*[2] rights. *People v Daoud*, 462 Mich 621, 632-634; 614 NW2d 152 (2000). The waiver must be voluntary, knowing, and intelligent. *Id.* at 639. Whether the waiver was voluntary depends on the susceptibility of the defendant and whether there was evidence of police coercion. See, generally, *Sexton, supra* at 752-753.

Defendant here places emphasis on the pre-arraignment delay he endured. We initially note that this Court has upheld the admission of a defendant's statement where the defendant claimed he was "arrested, held overnight, and then questioned throughout the next day" but where the court found no coercion. *People v Snider*, 239 Mich App 393, 417-418; 608 NW2d 502 (2000). Moreover, in *People v Manning*, 243 Mich App 615, 631, 643; 624 NW2d 746 (2000), the Court held that, although a delay of more than forty-eight hours between arrest and arraignment is presumptively unreasonable, such a delay does not automatically require the suppression of statements obtained during the detention period. *Id*. at 631, 643. The Court stated the following with regard to the issue of suppression:

> . . . automatic exclusion is not required. . . . The proper analysis is voluntariness under the *Cipriano* [*People v Cipriano,* 431 Mich 315; 429 NW2d 781 (1988)] factors. The delay of more than eighty hours presumptively violated the Fourth Amendment, but an unnecessary delay does not require automatic suppression of the confession. It is *not* automatic that evidence obtained during a Fourth Amendment violation must be excluded. When a confession was obtained during an unreasonable delay before arraignment, in Michigan the *Cipriano* factors still must be applied. The unreasonable delay is but one factor in that analysis. The longer the delay, the greater the probability that the confession will be held involuntary. At some point, a delay will become so long that it alone is enough to make a confession involuntary.

[2] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

> 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. A trial court cannot, however, give preemptive weight to that one factor. . . . To do so is to adopt a rule of automatic suppression of a confession obtained during the period of delay. . . . [*Manning, supra* at 643 (emphasis in original)].

Accordingly, the issue facing us in the instant case is whether the trial court clearly erred in analyzing and applying the *Cipriano* factors. See *id.* at 620. The *Cipriano* Court set forth the following nonexclusive list of factors for use in determining whether a statement is voluntary:

> the 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. [*Cipriano, supra* at 334; see also *Manning, supra* at 635.]

Here, in holding that defendant's statements were voluntary, the trial court stated, inter alia:

> The Defendant's testimony adduced during the hearing demonstrated that while he had taken . . . crank drugs some days before, he understood where he was and was not confused about any of the questions.
>
> The Court finds that there was a knowing waiver of the Defendant's Miranda Rights. I do not find that the Defendant made any request for an attorney or that questioning ceased [sic] until he could get an attorney.
>
> The Court finds that there was no coercion or inducement on the part of Detective Neidy which caused the Defendant to give his statement. The Defendant had access to food [and] restroom facilities and could have slept if he had wanted to.

We are not left with a definite and firm conviction that the court erred in allowing defendant's statements into evidence. See *Manning, supra* at 620. Indeed, defendant indicated at the suppression hearing that he was old enough to work, marry, and have children. He had completed school through the ninth grade. Moreover, defendant claimed that he repeatedly requested an attorney, an indication that he did understand his rights, despite his assertions to the contrary. Additionally, the incriminating statements occurred within the forty-eight hour window discussed in *Manning*, which suggests that the delay until arraignment was not used as a tool to extract the confessions. Further, despite the claim of intoxication, defendant was able to read and write and follow directions, and he could recall specific details about his police interview. As noted in *People v Feldman*, 181 Mich App 523, 530-531; 449 NW2d 692 (1989),

being intoxicated does not automatically render a statement involuntary. Defendant admitted that he was offered food while in the holding cell, and his cell contained a bed; there is no indication that the police prevented defendant from sleeping. As stated in *People v Wells,* 238 Mich App 383, 388; 605 NW2d 374 (1999), unless there is a causal connection between policy conduct and a defendant's statement, the statement will be considered uncoerced.

There was conflicting testimony regarding whether defendant was promised leniency or requested an attorney. The trial court specifically examined the circumstances surrounding the interrogation and ruled against defendant. Because the court was faced with resolving a credibility contest, and deference is given to a trial court's determination regarding witness credibility, *Sexton, supra* at 752-753, we are not convinced that a mistake occurred. We find that the trial court did not clearly err in concluding that defendant's statements were voluntary and in thus failing to suppress them.

Defendant next argues that the prosecutor failed to present sufficient evidence of intent to kill to bind him over for trial on assault with intent to commit murder. We disagree.

Bindover requires probable cause to believe that a felony was committed and that the defendant committed it. *People v Goecke,* 457 Mich 442, 469; 579 NW2d 868 (1998). Assault with intent to commit murder requires proof that the defendant assaulted someone with the specific intent to murder and proof that, if the assault had been successful, the killing would have constituted murder. *People v Rockwell,* 188 Mich App 405, 411; 470 NW2d 673 (1991). The prosecutor must support each element, *People v Hill,* 433 Mich 464, 469; 446 NW2d 140 (1989); however, this support may involve circumstantial evidence and reasonable inferences drawn from evidence, *People v Greene,* 255 Mich App 426, 444; 661 NW2d 616 (2003). We conclude that the prosecutor presented sufficient evidence of an intent to kill, given evidence that defendant shot at the rear window of the victims' truck while the victims were driving down a street. See, e.g., *People v Brown,* 196 Mich App 153, 159; 492 NW2d 770 (1992) (discussing the nature of assaults involving guns).

Defendant also claims that the prosecutor presented insufficient evidence of a specific intent to kill at trial. We disagree.

We review a claim of insufficient evidence de novo, *People v Lueth,* 253 Mich App 670, 680; 660 NW2d 322 (2002), viewing the evidence "in a light most favorable to the prosecution." *People v Johnson,* 460 Mich 720, 723; 597 NW2d 73 (1999), citing *People v Hampton,* 407 Mich 354; 285 NW2d 284 (1979). Because state of mind is difficult to prove, minimal circumstantial evidence is sufficient. *People v McRunels,* 237 Mich App 168, 181; 603 NW2d 95 (1999). Given the testimony about the nature of the weapon used and the manner in which it was used, see, generally, *Brown, supra* at 159, the prosecutor presented sufficient evidence of defendant's intent to kill. We note that a trial court may not assess weight of the evidence or witness credibility when deciding a motion for directed verdict. *People v Mehall,* 454 Mich 1, 6; 557 NW2d 110 (1997).

Defendant next claims that he was denied a fair trial when the court refused to grant a mistrial after one of the prosecution's witnesses made an unsolicited remark regarding defendant's statement to police that he had previously killed two people. The comment was

elicited during cross-examination of a police officer by defense counsel. We disagree that an error requiring reversal occurred.

We review for an abuse of discretion a court's decision to deny a mistrial. *People v Dennis*, 464 Mich 567, 572; 628 NW2d 502 (2001). A mistrial should only be granted where a trial irregularity is prejudicial to a defendant's rights and impairs the defendant's ability to obtain a fair trial. *People v Griffis*, 218 Mich App 95, 100; 553 NW2d 642 (1996). Generally, "'[a]n unresponsive, volunteered answer to a proper question'" does not warrant a mistrial. *People v Griffin*, 235 Mich App 27, 36; 597 NW2d 176 (1999), quoting *People v Haywood*, 209 Mich App 217, 228; 830 NW2d 497 (1995).

Because a jury is generally presumed to follow instructions to disregard evidence, *Dennis, supra* at 581, the court's decision to give a limiting instruction rather than grant a mistrial was justified and, thus, not an abuse of discretion. There is no evidence here to counter the presumption that the jury followed the court's instruction to disregard the officer's statement. We note that the jury convicted defendant of two counts of the lesser charge of felonious assault, when there was ample evidence to convict defendant of assault with intent to murder. Where a defendant is unable to demonstrate prejudice, the court does not abuse its discretion by denying a request for a mistrial. *Griffis, supra* at 100.

Defendant lastly argues that the trial court abused its discretion when it allowed a witness to testify at trial after he was seen reading an unidentified transcript containing testimony of other witnesses. We disagree.

A trial court has discretion whether to exclude the testimony of a witness who has violated a sequestration order. *People v Solak*, 146 Mich App 659, 669; 382 NW2d 495 (1985). A sequestration order prevents a witness from conforming his testimony to the evidence. *People v Stanley*, 71 Mich App 56, 61; 246 NW2d 418 (1976). When a witness's testimony is not related to other evidence presented, the court does not abuse its discretion by admitting the witness' testimony even though the witness violated a sequestration order. See, e.g., *People v Boose*, 109 Mich App 455, 475; 311 NW2d 390 (1981). Moreover, a defendant must demonstrate that prejudice resulted from the violation of the order in order to obtain appellate relief. *People v King*, 215 Mich App 301, 309; 544 NW2d 765 (1996). Here, defendant has failed to demonstrate how he was prejudiced. First, there was no definitive evidence regarding the nature of the transcript the witness was seen reading and no basis on which to conclude that the witness was influenced by the transcript. Additionally, we cannot conclude that the witness' testimony, even assuming that he was influenced by the unspecified transcript, affected the outcome of the case, considering the essentially cumulative nature of his testimony.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Richard A. Bandstra
/s/ Patrick M. Meter