STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 18, 2004
v	No. 240357 Wayne Circuit Court
MARIO EVANS, Defendant-Appellant.	LC No. 01-003333

Before: Hoekstra, P.J., and Fitzgerald and White, JJ.

PER CURIAM.

Defendant appeals as of right his convictions of second-degree murder, MCL 750.317, and possession of a firearm by a felon, MCL 750.224f. The trial court sentenced defendant to 65 to 120 years' imprisonment for the second-degree murder conviction, and to forty to sixty months' imprisonment for the possession of a firearm by a felon conviction, the sentences to be served consecutively to an unrelated sentence. We affirm defendant's convictions, but remand for amendment of the judgment of sentence.

Defendant first claims that the trial court should have suppressed his inculpatory statement, in which he admitted shooting the victim, because he made the statement after being detained by the police, without arraignment, for more than eighty-six hours. We disagree.

We review de novo a trial court's ultimate decision on a motion to suppress; however, we review for clear error the trial court's underlying findings of fact. *People v Beuschlein*, 245 Mich App 744, 748; 630 NW2d 921 (2001). A finding of fact is clearly erroneous if, after a review of the record, we are left with a definite and firm conviction that the trial court made a mistake. *People v Manning*, 243 Mich App 615, 620; 624 NW2d 746 (2000); *People v Givans*, 227 Mich App 113, 119; 575 NW2d 84 (1997).

"A delay of more than forty-eight hours between an arrest without a warrant and a probable cause arraignment shifts the burden to the government to show the existence of a bona fide emergency or other extraordinary circumstances." *Manning, supra* at 631, citing *Riverside Co v McLaughlin*, 500 US 44, 56-57; 111 S Ct 1661; 114 L Ed 2d 49 (1991). "Absent such a showing, the delay is unreasonable per se under the Fourth Amendment." *Id.* Nevertheless, such a delay does not necessarily require the suppression of statements obtained while a person is in police custody during the delay. *Manning, supra* at 631-632, 643. Instead, the proper analysis is

whether the accused's statement was obtained voluntarily as determined by the factors listed in *People v Cipriano,* 431 Mich 315, 333-334; 429 NW2d 781 (1988), and unreasonable delay before arraignment is only one of the factors that should be considered in determining whether a defendant's custodial statement was voluntary. *Id.*; *Manning, supra* at 634-635, 643.

The test of voluntariness is whether, "considering the totality of all the surrounding circumstances, the confession is the product of an essentially free and unconstrained choice by its maker, or whether the accused's will has been overborne and his capacity for self-determination critically impaired." *Cipriano, supra* at 333-334 (internal quotations and citation omitted). In *Cipriano, supra*, our Supreme Court set forth the following nonexclusive list of factors to consider in determining whether a statement is voluntarily made:

> In determining whether a statement is voluntary, the trial court should consider, among other things, the following factors: 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. [*Id.* at 334.]

In *Manning, supra*, this Court explained:

> 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, a result that is directly contrary to *Cipriano* and that … *Riverside Co* [does not require]." [*Id.* at 643.]

Here, defendant was detained for over eighty-six hours before he confessed, and a magistrate issued an arrest warrant based on probable cause more than four days following defendant's arrest. Therefore, a judicial determination of probable cause was made well outside the forty-eight hour time frame set forth by the United States Supreme Court in *Riverside Co, supra*, and adopted by this Court in *Manning, supra.* Thus, the burden shifted to the government to show the existence of a bona fide emergency or other extraordinary circumstances. *Riverside Co, supra* at 57; *Manning, supra* at 631. However, the record is devoid of any such circumstances. The testimony indicates that the delay may have been used to gather evidence against defendant. One officer testified at the *Walker*[1] hearing that the police held defendant in order to locate the witness needed to prove the case, and another officer testified that during the delay, the police attempted to verify information contained in defendant's first statement. A

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

delay for the purpose of gathering additional evidence to justify an arrest constitutes unreasonable delay. *Manning, supra* at 630, citing *Riverside Co, supra* at 56-57. Accordingly, the delay between defendant's arrest and the probable cause determination was unreasonable and without justification, and thus, presumptively violative of the Fourth Amendment.

However, although we do not approve of such an unreasonable delay, we conclude that the trial court did not clearly err in finding that defendant voluntarily provided his statement to the police. In holding that defendant's statement was voluntary, the trial court accepted the word of the officers who testified that defendant did not ask for a lawyer and that they advised defendant of his *Miranda*[2] rights. The trial court found defendant's testimony to lack credibility. We are not left with a definite and firm conviction that the trial court erred in allowing defendant's statement into evidence. See *Manning, supra* at 620. Indeed, police officers testified that they advised defendant of his constitutional rights before questioning him, that defendant read the constitutional rights form and initialed by each number and signed the form, that defendant acknowledged understanding those rights, was cooperative and did not appear under the influence of alcohol or drugs. Further police testimony indicated that defendant did not ask to speak to a lawyer, was alert, not sleepy, did not complain about being tired, was eighteen or nineteen years old and had had previous contacts with the police, including arrests. There was also testimony concerning the delay in the arraignment. There is no evidence that the police subjected defendant to continuous or prolonged interrogation or intimidating police conduct during the detention, nor is there any indication in the record of physical abuse or threats of physical abuse. Defendant testified that he was twenty-one years old,[3] and while detained he was tired because he did not get much sleep due to the conditions where he was detained. He testified that he asked for an attorney on more than one occasion. Defendant admitted that the police advised him of his *Miranda* rights, that he could read and write, that his initials and signature were on the proffered documents, and stated that he just "said anything" so he could go home. The trial court was faced with a credibility contest and determined that the police testimony was more credible. Issues of credibility should be left to the trial court, which has a superior opportunity to evaluate matters of credibility. *People v Sexton (After Remand),* 461 Mich 746, 752; 609 NW2d 822 (2000). Given this record, and having examined the totality of the circumstances surrounding defendant's statement, *id.* at 752-753, we conclude that the trial court did not clearly err in determining that defendant's statement was voluntary.

Defendant also contends that *Manning, supra,* is distinguishable from the case at bar because the record in *Manning* showed that the police had probable cause to detain the defendant when he was arrested whereas, in the instant case, the police used the prearraignment delay to gather evidence to establish probable cause. Defendant contends that detention without probable cause to arrest implicates the traditional "fruit of the poisonous tree" analysis, and not the totality of the circumstances test employed by *Cipriano*. We need not address this contention because *Manning* is not distinguishable from the instant case on the basis alleged.

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

[3] Defendant's birth date was April 16, 1980, and he confessed on March 4, 2001.

On this Court's own motion pursuant to MCR 7.216(A)(5) and in light of *People v McKinney*, 251 Mich App 205; 650 NW2d 353 (2002), vacated 468 Mich 926; 663 NW2d 469 (2003), this case was remanded to the trial court for "further fact-finding regarding the issue whether defendant's statements should have been suppressed as the product of an illegal arrest." After an evidentiary hearing, the trial court determined that probable cause to make the initial arrest existed. We agree.

"A police officer may arrest an individual without a warrant if a felony has been committed and the officer has probable cause to believe that the individual committed the felony." *People v Kelly*, 231 Mich App 627, 631; 588 NW2d 480 (1998), citing MCL 764.15(c); and *People v Champion*, 452 Mich 92, 115; 549 NW2d 849 (1996); see generally MCL 764.15. "In reviewing a challenged finding of probable cause, an appellate court must determine whether the facts available to the arresting officer at the moment of arrest would justify a fair-minded person of average intelligence in believing that the suspected individual had committed the felony." *Kelly, supra*.

Here, a police officer testified at the evidentiary hearing that while at the scene of a fatal shooting, he took a statement from the brother of the deceased who indicated that he saw three guys running down the street and one walking through the alley, past a four-door white Cadillac, got into the back seat of that car and left. One of the guys wore a big jacket, a skull cap, and a "hoodie" and was 6'1'', dark skinned, and a little heavy set. The officer also took a statement from the decedent's mother, who indicated that she saw a scuffle in the alley, heard gunshots, and saw there black males leaving the area. She gave a similar description of the tall suspect. The officer and his partner went to the area where the car had supposedly been parked and spoke with a person who said that the vehicle belonged to defendant and gave the police defendant's address. When they went to the given address, they saw no Cadillac and nobody answered when they knocked. The officer's partner testified that he spoke with another brother of the decedent and he said when he heard gunshots from the alley, he went to the door and saw "three black guys" running from the alley, and he gave a description of each of the men. That officer testified that he wrote up a teletype that was issued to all units of the Detroit police department because "we felt we had enough probable cause to arrest these individuals for investigation of a critical shooting that had happened earlier." Examining the facts available to the police, a fair-minded person of average intelligence would believe that defendant was involved in the commission of a felony. Because the police had probable cause to arrest defendant, the arrest was not illegal. Thus, *Manning, supra*, cannot be distinguished from the instant case on the basis of illegal arrest.

Defendant next claims that the prosecutor committed misconduct by improperly mischaracterizing the evidence when he remarked during closing argument:

> He's a liar. He's a theft [sic]. And today, he's a murderer.
>
> He lies on the stand. Commits crimes; he's been convicted. Had several contacts with the police. He knows how the system works.
>
> But because he wanted to have a little fun that day, murder was on his list.

Defendant contends that the argument was improper because evidence of defendant's prior crimes and prior police contacts were only admissible to impeach defendant's credibility, not to prove defendant's propensity to commit a crime. Because defendant did not object to the challenged remarks, our review is precluded unless defendant demonstrates a plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763-764, 774; 597 NW2d 130 (1999); *People v Watson*, 245 Mich App 572, 586, 588; 629 NW2d 411 (2001).

In *Watson, supra*, this Court explained:

> We review claims of prosecutorial misconduct case by case, examining the remarks in context, to determine whether the defendant received a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995); *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995). However, a defendant's unpreserved claims of prosecutorial misconduct are reviewed for plain error. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). In order to avoid forfeiture of an unpreserved claim, the defendant must demonstrate plain error that was outcome determinative. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). "No error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction." *Schutte*, *supra* at 721. [*Id.* at 586.]

When making argument to the jury, a prosecutor has wide latitude and may argue the evidence and reasonable inferences from it. *Bahoda, supra* at 282. However, "a prosecutor may not argue facts not in evidence or mischaracterize the evidence presented." *Watson, supra* at 588. Generally, evidence tending to show that a defendant committed other criminal offenses is inadmissible with regard to the issue of the defendant's guilt or innocence. *People v Mitchell*, 223 Mich App 395, 397-398; 566 NW2d 312 (1997); MRE 404(b)(1).

Arguably, defendant's claim that the prosecution's argument was improper has merit. However, the prosecutor's argument did not affect defendant's substantial rights, and thus, under plain error analysis, defendant's claim fails. *Carines, supra* at 763-764. The trial court instructed the jury regarding the presumption of innocence, the burden of proof, and that argument by the lawyers is not evidence. Also, argument concerning defendant's past criminal conviction for receiving stolen property was unlikely to have affected the trial outcome in light of the overwhelming evidence against defendant, including the admission of his confession wherein he admitted shooting the victim. Under these circumstances, the argument did not affect defendant's substantial rights. *Carines, supra* at 763-764. Any prejudicial effect of the remarks was cured by the instruction or could have been cured by a further timely cautionary instruction. *Watson, supra* at 586. Moreover, even if defendant could establish plain error that affected his substantial rights, reversal is unwarranted because, given defendant's confession, any alleged error did not result in the conviction of an actually innocent defendant or did not seriously affect the fairness, integrity or public reputation of the proceedings. *Carines, supra*.

To the extent that defendant claims that the trial court erred in failing to sua sponte provide a limiting instruction concerning the admission of his prior conviction, we disagree. "[I]n the absence of request or proper objection under present Michigan law, there is no absolute requirement that the trial judge give limiting instructions, even though such an instruction should

have been given." *People v Chism*, 390 Mich 104, 120-121; 211 NW2d 193 (1973); see *People v Rice (On Remand)*, 235 Mich App 429, 444; 597 NW2d 843 (1999); MCL 768.29 ("The failure of the court to instruct on any point of law shall not be ground for setting aside the verdict of the jury unless such instruction is requested by the accused."); see also *People v DerMartzex*, 390 Mich 410; 213 NW2d 97 (1973) (defense counsel may have declined to request a limiting instruction to avoid highlighting the prior acts to the jury). A failure to instruct "where there was no request for such instruction and no objection to the failure to instruct" is not reversible error. *Chism, supra* at 121.

Defendant further claims that the trial court erred in departing upwards from the legislative sentencing guidelines. We disagree. In *People v Babcock*, 469 Mich 247; 666 NW2d 231 (2003), our Supreme Court articulated our standard of review for sentence departures:

> [T]he existence or nonexistence of a particular factor is a factual determination for the sentencing court to determine, and should therefore be reviewed by an appellate court for clear error. The determination that a particular factor is objective and verifiable should be reviewed by the appellate court as a matter of law. A trial court's determination that the objective and verifiable factors present in a particular case constitute substantial and compelling reasons to depart from the statutory minimum sentence shall be reviewed for abuse of discretion. [*Id.* at 264-265 (quotation and citation omitted).]

An abuse of discretion exists when the sentence imposed is not within the range of principled outcomes. *Babcock, supra* at 269. In ascertaining whether the departure was proper, this Court must defer to the trial court's direct knowledge of the facts and familiarity with the offender. *Id.* at 270.

A court may depart from the sentencing guidelines range only if it has a substantial and compelling reason to do so, and it states on the record the reasons for departure. MCL 769.34(3). *People v Hegwood*, 465 Mich 432, 439; 636 NW2d 127 (2001). "[A] substantial and compelling reason must be construed to mean an objective and verifiable reason that keenly or irresistibly grabs our attention; is of considerable worth in deciding the length of a sentence; and exists only in exceptional cases." *Babcock, supra* at 257-258 (quotations and citation omitted). A trial court may not base its departure on a characteristic of the offense or of the offender already considered by a defendant's offense variable and prior record variable scores unless it specifically finds from facts on the record that a disproportionate or inadequate weight was given to the characteristic. MCL 769.34(3)(b); see *Babcock, supra* at 258 n 12.

In the present case, in departing from the legislative guidelines the trial court relied on defendant's criminal history for committing murder, specifically that the guidelines did not take into consideration that this was the second time defendant shot and killed someone under similar circumstances with the same shotgun. Although defendant's prior conviction for first-degree murder is an objective and verifiable factor, it was already taken into consideration in scoring the prior record variables and offense variables, and thus cannot be used a second time to justify a sentencing departure "unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight." MCL 769.34(3)(b). While the fact that defendant was previously

convicted of a felony was considered in the guidelines by PRV 7, MCL 777.57(1)(a) (two or more subsequent or concurrent convictions), and OV 13, MCL 777.43(1)(c),[4] (the offense was a part of a pattern of felonious criminal activity), the trial court indicated that the variables were given inadequate or disproportionate weight by stating that the guidelines failed to "take into consideration that this is the second time he's done it, under similar circumstances, with the same shotgun." The fact that defendant committed two murders, under similar circumstances, i.e., in both cases the evidence established that defendant shot multiple times from a shotgun at close range and that he killed two people he did not know, is such a situation which "keenly" or "irresistibly" grabs our attention. We cannot say that the trial court's determination to depart upward was an abuse of discretion. *Babcock*, *supra* at 264-270.

Defendant also claims, and the prosecution agrees, that the trial court erred in imposing a sentence that runs consecutively to an unrelated sentence because the court lacked the statutory authority to impose such a sentence. We also agree.

Upon de novo review, *People v Alexander*, 234 Mich App 665, 675; 599 NW2d 749 (1999), we conclude that the trial court erred in requiring, without statutory authority, that defendant's sentence in this case to run consecutively to an unrelated sentence on the basis that defendant committed the offenses six months apart and against two different individuals. "A consecutive sentence may be imposed only if specifically authorized by statute." *Id*. We remand to the trial court for correction of the judgment of sentence.

Affirmed, but remanded for further action consistent with this opinion. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ E. Thomas Fitzgerald
/s/ Helene N. White

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[4] Defendant was convicted of carrying a concealed weapon in 1997, receiving or concealing stolen property over $100 in 1999, and first-degree murder and possession of a firearm by a felon in 2001.