

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEREK MIXON, a/k/a TIMOTHY MIXON,

Defendant-Appellant.

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UNPUBLISHED

July 20, 2004

No. 247534

Wayne Circuit Court

LC No. 01-013694-01

Before: Zahra, P.J., and Talbot and Wider, JJ.

PER CURIAM.

A jury convicted defendant of felony murder, MCL 750.316b, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant appeals as of right. We affirm.

**I. Basic Facts and Procedure**

This case arises from an October 23, 2001, armed robbery of a car dealership owned by Joseph and Leonardo Arcome located on Gratiot Avenue in the city of Detroit. The prosecution presented evidence that defendant and Brian Hamilton robbed Joseph at gunpoint inside the dealership office. While the robbery was in progress, Leonardo returned to the office. Leonardo drew a gun and a shootout between him and defendant and Hamilton ensued. Leonardo was shot, allegedly by Hamilton, and died shortly after from his wounds.

Defendant was shot twice in the shootout. He and Hamilton ran out of the office, and by coincidence, encountered an acquaintance, Shawn Walker, driving in his car. Defendant got into Walker's car, and told Walker he had been shot while robbing a car lot. Walker drove defendant to Detroit Receiving Hospital.

Police questioned defendant at the hospital concerning his gunshot wounds. After determining that defendant had lied about how he was shot, Sergeant Marian Stevenson of the Detroit Police Department met defendant at the Detroit Receiving Hospital where he was being released into police custody. Defendant was taken to the ninth precinct's homicide division to participate in lineups. A witness identified defendant as one of the persons who had run from the car lot.

On October 25, 2001, Sergeant Stevenson received word that defendant wished to speak

with her. Stevenson met with defendant, and discovered defendant did not have his prescribed pain medication. Stevenson spoke to the officer at the ninth precinct front desk, who indicated that the medications had been ordered, but not picked up from the pharmacy.

Defendant was read his constitutional rights and signed a waiver of those rights, indicating that he wished to speak with Stevenson about the incident at the car lot. Stevenson testified that defendant did not appear to be in pain and had no difficulty communicating. More specifically, Stevenson indicated that she had a “good conversation” with defendant for roughly an hour and a half. Stevenson also stated that the only complaint she heard from defendant was that he “kind of hurt.” Stevenson also indicated that defendant was “very cooperative” with her in making his statement. At trial, Stevenson read into the record the following from defendant’s written statement.

Q. What can you tell me about the shooting of Leo Arcome on Wednesday [October 23, 2002]?

A. Me and Brian . . . went to the auto place . . . . And Brian told me to ask for the key to the other car. When he went to get the keys, we followed him in. Brian went first, I followed him.

Q. What happened next?

A. Brian pulled his gun and I started searching his pockets.

Q. Then what?

A. Brian was looking around for something. I was looking out the window. I saw the white guy pull up [Leo Arcome]. He pulled up close to the parking lot. I heard him say who’s in there? I was trying to leave, but the white man pulled his gun. So. I closed the door. And the white man started shooting through the door. That’s when I got hit. And Brian started shooting then.

Q. What happened next?

A. I fell. I got up. I think the white guy ran off. We started running. We ran one way. The white guy ran the other way. That’s when we ran to the light blue Lincoln and they took me to the hospital.

## II. Involuntary Confession

Defendant first argues his confession was involuntary because he was in “extreme pain” and forced to continue his interrogation without pain medication.

### A. Standard of Review

On appeal from a ruling on a motion to suppress evidence of a confession, deference is given to the trial court’s findings. An appellate court will not disturb the trial court’s factual findings unless they are clearly erroneous. *People v Kowalski*, 230 Mich App 464, 471-472; 584

NW2d 613 (1998). This Court must affirm unless left with a definite and firm conviction that mistake was made, *People v Sexton (After Remand)*, 461 Mich 746, 752; 609 NW2d 822 (2000).

## B. Analysis

Defendant argues his “extreme pain” impaired his ability to make a free and unconstrained choice to speak with the police. *People v Peerenboom*, 224 Mich App 195, 198; 568 NW2d 153 (1997). In determining voluntariness, the court should consider all the circumstances, 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. *People v Sexton*, 458 Mich 43, 66; 580 NW2d 404 (1998).

At his *Walker* hearing,<sup>1</sup> defendant testified that he was in “extreme pain” when he was at the hospital, and when he was transported to the ninth precinct. Also, that he was given morphine for the pain. Defendant testified that he told Stevenson that he should not have been released from the hospital because he was in extreme pain. Also that on October 24, defendant asked Stevenson where his prescription for pain medication was, but it was not provided to him. Further, that on the next day, when defendant met with Stevenson, another police officer told him he would not receive the medication until he answered a few questions. Defendant testified to the following:

Q. How did you feel when they said that to you [i.e., that you would have to answer questions before getting the prescription]?

A. I felt like my rights was being violated in some type of way. I didn’t know what type of way it was, and I asked them for a lawyer.

Q. Was a lawyer provided to you?

A. No.

Q. Did they continue to question you?

A. Yes.

Q. Why did you answer questions if you felt your rights were being violated?

A. Well, I was in extreme pain. I felt the only way I could get some medication is I tell them what they wanted to hear. So, that’s what I did.

Defendant further testified that after the interview with Stevenson, he asked to be returned to the hospital. Defendant was returned to hospital and given his prescription.

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<sup>1</sup> *People v Walker (On Rehearing)*, 374 Mich 331, 337-338; 132 NW2d 87 (1965).

Notwithstanding defendant's testimony, we conclude that the trial court did not clearly err in finding that defendant was not in "extreme pain" when giving his statement to police. In contrast to defendant's testimony, Sergeant Stevenson testified that defendant did not request medication and did not appear to be in extreme pain. Moreover, the trial court observed that defendant neatly wrote in detail about the robbery and neatly signed his statement. These characteristics about the written statement are inconsistent with defendant's claim of "extreme pain." Thus, the trial court's finding that defendant was not in "extreme pain" at the time relevant to his giving his statement to police is not clearly erroneous.

Further, we conclude that defendant's pain did not impair his ability to make a free and unconstrained choice to speak with the police. At the outset, defendant was fully apprised of his constitutional rights, and signed a waiver of those rights before any questioning by police. Defendant admitted during his *Walker* hearing that he was able to provide very specific answers to the questions posed by officers. He also stated that he was telling the truth when he provided answers during interrogation. Therefore, we are not left with a definite and firm conviction that defendant's confession was involuntary, and reversal is not required on this basis.

Defendant also argues that the trial court erred in ruling that defendant lied at his *Walker* hearing about requesting counsel before his interrogation. 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 will not be reversed unless they are clearly erroneous. *People v Shipley*, 256 Mich App 367, 372-373; 662 NW2d 856 (2003). Here, the trial court found that the signed statement of confession along with the signed waiver of constitutional rights supported the conclusion that defendant had never requested counsel. The trial court properly weighed defendant's alleged request for counsel before interrogation against the evidence that defendant waived his right to counsel. Therefore, we decline to reverse defendant's convictions on this issue, giving due deference to the trial court's ruling that defendant never requested counsel.

### III. Prosecutorial Misconduct

Defendant argues that the prosecutor improperly argued to the jury that the intent element of felony murder was presumptively satisfied by the commission of an armed robbery.

#### A. Standard of review

A claim of prosecutorial misconduct not preserved by a timely and specific objection during trial is subject to limited review for plain error which affected the defendant's substantial rights. *People v Moorer*, \_\_\_ Mich App \_\_\_; \_\_\_ NW2d \_\_\_ (2004); see *People v Carines*, 460 Mich 750, 763, 774; 597 NW2d 130 (1999).

#### B. Analysis

When reviewing a claim of prosecutorial misconduct, this Court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. *People v Bahoda*, 448 Mich 261, 267; 531 NW2d 659 (1995). Further, the propriety of a prosecutor's remarks will depend upon the particular facts of each case. *People v Johnson*, 187 Mich App 621, 625; 468 NW2d 307 (1991). "A prosecutor's clear misstatement of the law that remains uncorrected may deprive a defendant of a fair trial." *People v Grayer*, 252 Mich App 349, 357; 651 NW2d 818

(2002). However, if the jury is correctly instructed on the law by the trial court, an erroneous legal argument made by the prosecutor can be cured. *Id.*

The prosecutor made the following statement in regard to felony murder:

And our position to you is going to be very simple. Is that whenever you go in teamed with a partner both armed with handguns to take property that does not belong to you by force during an armed robbery that you are creating a situation which *by its own definition* is one that creates a very high risk of death or great bodily harm . . . . And quite simply put, an armed robbery *always* satisfies the third prong of second degree murder. And that is a person who creates a situation where there is a high risk of death or great bodily harm. [Emphasis added.]

Defendant correctly notes that *People v Aaron*, 409 Mich 672, 728; 299 NW2d 304 (1980), abolished the common-law felony murder rule that a defendant was guilty of murder for a homicide that occurred during the course of a felony if he had the intent to commit the underlying felony. Thus, the malice necessary for a felony murder conviction cannot be inferred from the intent to commit the underlying felony alone. *People v Dumas*, 454 Mich 390, 398; 563 NW2d 31 (1997). Instead, the prosecution must establish one of the three intents that define malice in every murder case: (1) the intent to kill, (2) the intent to do great bodily harm, or (3) a wanton and willful disregard of the likelihood that the natural tendency of the defendant's act is to cause death or great bodily harm, i.e., depraved heart murder. *Id.* at 396.

While arguably the prosecutor misstated the law by claiming that, "an armed robbery *always* satisfies the third prong of second degree murder," we nonetheless conclude defendant failed to establish plain error affecting his substantial rights. Any misstatements of law during the prosecution's opening and closing remarks were cured by the trial court's proper instructions concerning the felony murder charge. Defendant was not deprived of a fair trial from the misstatements of law by the prosecutor where they were corrected by the trial court. See *Grayer*, *supra* at 357. Moreover, the trial court specifically instructed the jury that only the court's instructions were to be followed. Jurors are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Therefore, defendant failed to show the alleged error affected his right to fair trial. *Carines*, *supra*.

Affirmed.

/s/ Brian K. Zahra  
/s/ Michael J. Talbot  
/s/ Kurtis T. Wilder