

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

OMAR WARLICK,

Defendant-Appellant.

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UNPUBLISHED

July 29, 2004

No. 247213

Wayne Circuit Court

LC No. 02-011724-01

Before: Murphy, P.J., and Griffin and White, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of first-degree felony murder, MCL 750.316(1)(b), and was sentenced to life imprisonment. He appeals as of right. We affirm.

I. Sufficiency of the Evidence

Defendant first argues that the evidence was insufficient to establish the requisite malice to support his conviction of felony murder. We disagree.

In determining whether sufficient evidence has been presented to sustain a conviction, an appellate court is required to view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Jaffray*, 445 Mich 287, 296; 519 NW2d 108 (1994).

The elements of felony murder are: (1) the killing of a human being, (2) with 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 (i.e., malice), (3) while committing an enumerated felony. *People v Carines*, 460 Mich 750, 758-759; 597 NW2d 130 (1999). The facts and circumstances of the killing may give rise to an inference of malice. *Id.* at 759.

The evidence established that the victim was shot and killed during a robbery in a bar. Afterward, defendant was found hiding in the bar, and the gun used to shoot the victim was found approximately twenty feet away. Defendant gave a statement admitting his participation in the offense as part of a planned robbery. Although defendant denied shooting the victim, gunshot residue was found on defendant's hands, face, and clothing shortly after the offense. In

his police statement, defendant claimed that his partner, Spoon, shot the victim with a nine-millimeter handgun that Spoon owned. The prosecution proceeded under alternate theories that defendant was guilty of felony murder because he either shot the victim himself or aided and abetted Spoon.

Defendant's admitted participation in the offense, together with the gunshot residue found on defendant's hands, face, and clothing, and his proximity to the murder weapon, viewed most favorably to the prosecution, was sufficient to enable the jury to infer that defendant shot the victim, intending to kill him, 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. Similarly, even if the jury was not persuaded that defendant actually fired the gun, the evidence showing his participation in the planned robbery with Spoon, together with his knowledge that Spoon was armed with a gun, was sufficient to show that defendant participated in the crime with knowledge of Spoon's intent to kill or cause great bodily harm, thereby establishing that defendant acted in wanton and willful disregard sufficient to support a finding of malice under an aiding and abetting theory. *People v Riley (After Remand)*, 468 Mich 135, 140-141; 659 NW2d 611 (2003).

## II. Admissibility of Defendant's Confession

Next, defendant argues that the trial court erred in denying his motion to suppress his custodial statement. Defendant maintains that the statement was involuntary. We disagree.

When reviewing a trial court's determination of voluntariness, this Court must examine the entire record and make an independent determination. *People v Sexton*, 458 Mich 43, 68; 580 NW2d 404 (1998). This Court will affirm unless left with a definite and firm conviction that a mistake was made. *People v Sexton (After Remand)*, 461 Mich 746, 752; 609 NW2d 822 (2000). If resolution of a disputed factual question turns on the credibility of witnesses or the weight of evidence, this Court will defer to the trial court, which has a superior opportunity to evaluate these matters. *Id.*

As this Court explained in *People v Akins*, 259 Mich App 545, 564; 675 NW2d 863 (2003):

A statement obtained from a defendant during a custodial interrogation is admissible only if the defendant voluntarily, knowingly, and intelligently waived his Fifth Amendment rights. A confession or waiver of constitutional rights must be made without intimidation, coercion, or deception, and must be the product of an essentially free and unconstrained choice by its maker. The burden is on the prosecution to prove voluntariness by a preponderance of the evidence. In [*People v*] *Cipriano*, [431 Mich 315, 334; 429 NW2d 781 (1988),] our Supreme Court set forth a nonexhaustive list of factors that should be considered in determining the voluntariness of a statement:

“[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 necessarily conclusive on the issue of voluntariness.  
[Citations omitted.]

The ultimate test of admissibility is whether the totality of the circumstances surrounding the making of the confession indicates that it was freely and voluntarily made. *Id.*

Here, the undisputed evidence established that defendant had an eleventh grade education and could read and understand English. He was advised of his constitutional rights and signed an advice of rights form. He was not under the influence of any intoxicants and was provided with food. These factors support a finding of voluntariness.

Further, the interrogating officer testified that defendant acknowledged understanding his rights and voluntarily agreed to give a statement, without any promises or coercion. While defendant claimed that he did not understand his rights and was pressured into signing the statement, it is apparent that the trial court found the officer’s testimony more credible. Affording deference to the trial court’s superior opportunity to judge the credibility of the witnesses, we are not left with a definite and firm conviction that the trial court made a mistake in denying defendant’s motion to suppress.

### III. Late Endorsement of a Witness

Defendant argues that the trial court erroneously permitted the prosecutor’s late endorsement of a witness. We disagree.

A prosecutor’s late endorsement of a witness is permitted at any time upon leave of the court and for good cause shown. *People v Canter*, 197 Mich App 550, 563; 496 NW2d 336 (1992). A trial court’s decision to permit the prosecutor to add witnesses to be called at trial is reviewed for an abuse of discretion. *People v Callon*, 256 Mich App 312, 326; 662 NW2d 501 (2003); *Canter*, *supra* at 563. An abuse of discretion is found when the trial court’s decision is so grossly contrary to fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias, or when an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling. *Callon*, *supra* at 326. To establish that the trial court abused its discretion, a defendant must demonstrate that the trial court’s ruling resulted in prejudice. *Id.* at 328.

Here, where testimony at the preliminary examination disclosed that a gunshot residue test was performed on defendant, and the defense also received reports more than a month before trial indicating that a gunshot residue test had been administered, the trial court did not abuse its discretion in allowing the prosecutor to add as a witness the person who administered the test, but who inadvertently was omitted from the prosecutor’s original witness list. *Callon*, *supra* at 327. Moreover, it is apparent that defendant was not prejudiced by the late endorsement because

he had advance notice that a gunshot residue test had been administered, and defense counsel was able to effectively cross-examine the witness.

#### IV. Discovery Violations

Defendant argues that reversal is required because of repeated discovery violations. We disagree.

Defendant argues that the prosecutor failed to provide necessary discovery, contrary to *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963). In order to establish a *Brady* violation, a defendant must prove: (1) that the state possessed evidence favorable to the defendant; (2) that he neither possessed the evidence nor could he have obtained it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. *People v Lester*, 232 Mich App 262, 281-282; 591 NW2d 267 (1998).

In this case, defendant has not established that the prosecutor possessed or suppressed any favorable evidence. Moreover, defendant could have obtained the challenged discovery materials with reasonable diligence. The materials were contained in a police folder, which defense counsel had the opportunity to review more than two months before trial, but neglected to do so until the eve of trial.

We also reject defendant's claim that the trial court erred in refusing to dismiss the case because of a discovery violation. A trial court's decision regarding an appropriate remedy for a discovery violation is reviewed for an abuse of discretion. *People v Davie (After Remand)*, 225 Mich App 592, 597-598; 571 NW2d 229 (1997). In this case, the trial court denied defendant's request for dismissal because defendant was unable to demonstrate prejudice, but the court informed defendant that he could renew his request for dismissal if something developed during trial showing that defendant was unfairly prejudiced. The trial court properly exercised its discretion in fashioning a remedy for any discovery violation.

#### V. Prosecutorial Misconduct

Next, defendant argues that misconduct by the prosecutor deprived him of a fair trial. We disagree. Because defendant did not preserve this issue by objecting to the challenged comments below, we review this issue for plain error affecting defendant's substantial rights. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000), abrogated in part on other grounds by *Crawford v Washington*, 541 US \_\_\_\_; 124 S Ct 1354; 158 L Ed 2d 177 (2004). Viewed in context, the prosecutor's remarks did not urge the jurors to convict defendant as part of their civic duty, nor did the prosecutor improperly attempt to shift the burden of proof. *People v Abraham*, 256 Mich App 265, 273; 662 NW2d 836 (2003); *People v Green*, 131 Mich App 232, 237; 345 NW2d 676 (1983). Defendant has not shown error, plain or otherwise.

#### VI. Ineffective Assistance of Counsel

A defendant seeking a new trial on the ground that trial counsel was ineffective bears a heavy burden. To justify reversal under either the federal or state constitutions, a convicted

defendant must satisfy the two-part test articulated in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made an error so serious that counsel was not performing as the "counsel" guaranteed by the Sixth Amendment. The defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. Second, the defendant must show that the deficient performance prejudiced the defense. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001).

Defense counsel was not ineffective for failing to object to the prosecutor's remarks. As we concluded in part V of this opinion, defendant has not shown that the prosecutor's remarks were improper, and counsel was not required to make a meritless objection. *People v Torres (On Remand)*, 222 Mich App 411, 425; 564 NW2d 149 (1997).

The record does not factually support defendant's claim that defense counsel erroneously advised him not to testify. Because the record fails to disclose what advice defendant received concerning his testimony and why the advice was given, appellate review of this issue is foreclosed. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). Further, defendant has not demonstrated that remand for an evidentiary hearing concerning this issue is warranted. *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973). And, because the trial court did not have a duty to ascertain on the record that defendant was knowingly waiving his right to testify, *People v Bell*, 209 Mich App 273, 277; 530 NW2d 167 (1995), defense counsel was not ineffective for failing to obtain a knowing and express waiver of this right.

## VII. Admissibility of the 911 Call

Erin Walker's testimony that she listened to a recording of a 911 call, and that it was a recording of her telephone conversation with a 911 operator on the day of the offense, was sufficient to satisfy the authentication requirement. MRE 901(a); *People v Berkey*, 437 Mich 40, 52; 467 NW2d 6 (1991). Therefore, the trial court did not abuse its discretion in admitting the tape. *People v Taylor*, 252 Mich App 519, 521; 652 NW2d 526 (2002).

Affirmed.

/s/ William B. Murphy  
/s/ Richard Allen Griffin