

STATE OF MICHIGAN

COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MOSES RABBIT KIRSCHKE,

Defendant-Appellant.

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UNPUBLISHED

July 8, 2008

No. 276126

St. Clair Circuit Court

LC No. 06-000258-FC

Before: Owens, P.J., and O'Connell and Davis, JJ.

PER CURIAM.

Defendant appeals by right his convictions following a jury trial of two counts of armed robbery, MCL 750.529. We affirm.

Defendant first argues that the trial court erred in finding his custodial statements voluntary. We disagree. Although our review is de novo, we “will not disturb a trial court’s factual findings regarding a knowing and intelligent waiver of *Miranda*<sup>1</sup> rights ‘unless that ruling is found to be clearly erroneous.’” *People v Cheatham*, 453 Mich 1, 30; 551 NW2d 355 (1996), quoting *People v Burrell*, 417 Mich 439, 448; 339 NW2d 403 (1983). Clear error exists if based on the entire record, the reviewing court “is left with a definite and firm conviction that a mistake has been made.” *People v Galloway*, 259 Mich App 634, 638; 675 NW2d 883 (2003).

“Statements of an accused made during custodial interrogation are inadmissible unless the accused voluntarily, knowingly, and intelligently waives his Fifth Amendment rights.” *People v Abraham*, 234 Mich App 640, 644; 599 NW2d 736 (1999). The prosecution bears the burden to show by a preponderance of the evidence that a waiver is made voluntarily, knowingly, and intelligently. *People v Daoud*, 462 Mich 621, 633-634; 614 NW2d 152 (2000). *Miranda* rights have been properly waived only when the ““totality of the circumstances surrounding the interrogation” reveal both an uncoerced choice and the requisite level of comprehension.” *Id.*, 635, quoting *Moran v Burbine*, 475 US 412, 421; 106 S Ct 1135; 89 L Ed 2d 410 (1986), quoting *Fare v Michael C*, 442 US 707, 725; 99 S Ct 2560; 61 L Ed 2d 197 (1979).

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<sup>1</sup> *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

Defendant primarily contends that his statements were coerced due to the five-hour duration of the interview. However, he does not contend that he was physically threatened or abused. One of the interviewing officers testified at trial that the duration of the interview was dictated by several factors, including background discussions, the complexity of the circumstances of the crimes, that multiple crimes were involved, the number of people talking, and questions asked by defendant. The record reveals that the interrogation was not simply about the two armed robberies at issue in the present trial, but also involved questions about at least two other robberies. Additionally, the officers provided defendant with food and water and permitted him to contact his girlfriend. Under the circumstances, we do not find the trial court's determination that five hours was not excessive clearly erroneous.

Defendant next argues that his statements were involuntary based on promises of leniency. However, the officers testified that they never implied to defendant that he would receive a lesser sentence or a lesser charge by speaking with him. Although Detective David Patterson admitted the term bundle or package was used, he explained it was in the context of presenting everything to the prosecutor's officer "all in one bundle." Defendant conceded that although he believed he "would receive a package deal if [he] made certain statements," the interrogating officers "didn't use those exact words" and that they did not promise him any specific amount of time. Based on this evidence, we find no clear error in the trial court's assessment that defendant was not promised leniency. Defendant's claims of psychological coercion are similarly without support. He was repeatedly told to be honest and truthful and not to make an admission to something he did not do. Additionally, defendant was questioned regarding other robberies during the same interview, but never admitted to having committed them. Accordingly, we find no error in the trial court's conclusion that "[t]here was nothing that was occurring here that represented coercion or such police activity."

Although defendant contends that he did not understand his *Miranda* rights because he was intoxicated, this argument is waived based on his testimony at the *Walker*<sup>2</sup> hearing where he testified that he understood his *Miranda* rights. A defendant may not take a position in the trial court and then argue to the contrary on appeal. *Czymbor's Timber, Inc v Saginaw*, 269 Mich App 551, 556; 711 NW2d 442 (2006). In any event, being under the influence of intoxicants does not per se render a statement involuntary. *People v Lumley*, 154 Mich App 618, 624; 398 NW2d 474 (1986). In fact, "absent police coercion, a defendant's mental state alone can never render the confession involuntary." *Cheatham, supra* at 16. Although defendant testified that he was intoxicated on "marijuana, Tequila, beer, and a couple Ecstasy pills," the evidence indicates that defendant could not have been seriously impaired. At trial, Deputy Joe Hernandez testified that he had followed defendant's car for quite some distance. On cross-examination, Hernandez agreed that defendant's vehicle was not swerving, it was immediately pulled over after Hernandez turned on his lights, defendant did not try to run or flee, and defendant was "very cooperative." Accordingly, it is highly unlikely that defendant's statements were rendered involuntary by either drugs or alcohol. Under these facts, the trial court's findings that the statements and waivers were voluntarily made do not appear to be clearly erroneous.

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<sup>2</sup> *People v Walker*, 374 Mich 331; 132 NW2d 87 (1965).

Defendant's next claim is that the prosecutor made impermissible references to his failure to testify at trial during rebuttal argument. Specifically, defendant objects to the prosecution's heavy reliance on his admissions combined with the statement: "There has been no evidence to the contrary." Defendant believes this argument implicated his decision not to testify to dispute the fact that his admissions were voluntary. Because defendant failed to timely object, the alleged prosecutorial misconduct is reviewed for plain error affecting substantial rights. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). Only if plain error resulted in the conviction of an actually innocent defendant or "seriously affected the fairness, integrity, or public reputation of judicial proceedings" is reversal warranted. *Id.* "Questions of misconduct by the prosecutor are decided case by case. On review, this Court examines the pertinent portion of the record and evaluates the prosecutor's remarks in context to determine whether the defendant was denied a fair and impartial trial." *People v Legrone*, 205 Mich App 77, 82-83; 517 NW2d 270 (1994). We find that, in context, the prosecutor's statement was proper.

During closing argument, defense counsel stated:

We all know that when a bank gets robbed, that's big news. And the chances are there is going to be something in the local paper about it. That shouldn't come as any big surprise. Certain facts, certain details are going to be reported. Maybe not everything, but lots of stuff. Is it so hard to imagine that somebody might know something about that?

The prosecutor's rebuttal was as follows (the complained of comments are in italics):

Some of the interesting and most significant parts of all of this are, one, we have this defendant confessing to and admitting to these crimes in his statements, in the phone call that was made during the bank to the, to the laser sight. He knew it. He knew it. You've heard no evidence. It's not been admitted, anything to do with newspaper.

So again, is it possible. Maybe it's possible. That's not the standard. That's not been admitted into evidence. You need to focus and pay attention to what came in. What I'm saying to you isn't evidence. That's evidence. That's evidence. (Indicating). You can consider this stuff. *You saw him, just to give you a sample, you saw him admit to these things. There has been no evidence to the contrary.* He knew things only that person would have known.

It is clear in context that the prosecutor was referring to the fact that no newspaper or media report was ever entered into evidence to show that the knowledge defendant demonstrated during his interview came from a media source. Thus, the comments were a proper attack on the credibility of defendant's theory that he could have learned facts about the crime scenes from some basis other than being the perpetrator. See *Callon*, *supra* at 331. We find that defendant was not denied a fair trial. *Legrone*, *supra* at 82-83.

Defendant next claims he was denied effective assistance of counsel. “When no *Ginther*<sup>3</sup> hearing has been conducted, our review of the defendant’s claim of ineffective assistance of counsel is limited to mistakes that are apparent on the record.” *People v Mack*, 265 Mich App 122, 125; 695 NW2d 342 (2005). To succeed on a claim of ineffective assistance of counsel, trial counsel’s performance must fall below an objective standard of reasonableness and, but for those errors, there must be a reasonable probability that the outcome of trial could be different. *People v Knapp*, 244 Mich App 361, 385; 624 NW2d 227 (2001). Defendant must overcome the presumption that his counsel’s assistance was based on sound trial strategy. *People v Rice (On Remand)*, 235 Mich App 429, 444; 597 NW2d 843 (1999). This Court does not assess counsel’s competence based on hindsight, and will not second-guess matters of trial strategy. *Id.*, 444-445.

Defendant first argues that his trial counsel was ineffective for failing to sever the two armed robbery charges because they were unrelated. Even if defendant would have been entitled to severance had it been requested, trial counsel clearly intended to keep them together as a matter of strategy. He used cross-examination and closing argument to highlight the differences between the two robberies to cast reasonable doubt on the likelihood that defendant was the perpetrator responsible for both. Although the strategy was unsuccessful, we do not find it unsound. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996). Moreover, had the robberies been tried separately, a jury might not have been able to consider those differences, making separate convictions more likely. Therefore, defendant has failed to show a reasonable probability that the outcome of trial could be different and reversal is not required. *Knapp, supra* at 385.

Defendant’s final claim of ineffective assistance of counsel is that trial counsel should have called an expert witness to testify regarding false confessions. “Counsel’s decision whether to call a witness is presumed to be a strategic one for which this Court will not substitute its judgment.” *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003). There is also no indication in the lower court record that defendant’s confession was coerced or unreliable. Moreover, defendant offers no proof that an expert witness would have testified favorably to the defense if one had been called by his trial counsel. “Accordingly, defendant has not established the factual predicate for his claim,” i.e., defendant has not shown a reasonable probability that the result of the proceedings would have been different but for trial counsel’s failure to call an expert witness. *Id.*, 455-456.

Because we previously found no prosecutorial misconduct, we find that trial counsel could not have been ineffective for failing to raise objections on the basis of prosecutorial misconduct. Trial counsel is not ineffective for failing to raise a futile objection or to advocate a meritless position. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998); *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). Similarly, because we find no prejudicial error, there can be no cumulative effect of errors that requires reversal. *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (2000).

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<sup>3</sup> *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

Affirmed.

/s/ Donald S. Owens  
/s/ Peter D. O'Connell  
/s/ Alton T. Davis