

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RANDALL ARNEZ DURR,

Defendant-Appellant.

UNPUBLISHED

August 19, 2008

No. 277877

Wayne Circuit Court

LC No. 06-000099-01

Before: Davis, P.J., and Wilder and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to 25 to 40 years in prison for the second-degree murder conviction and two years in prison for the felony-firearm conviction. For the reasons set forth in this opinion, we affirm the convictions and sentences of defendant.

This appeal arises out of the shooting death of Khali Badawi, who was the proprietor of a Dollar Tree and More store. On November 13, 2005, Badawi was shot three times, once in the neck, once in the chest and once in the back. His body was discovered inside the store, inside a glass booth. After initial photographs and evidence was gathered at the scene, the case was assigned to Detroit Police Officer Karen Miller.

Miller began questioning people in the neighborhood, and eventually after “tips had come in,” Miller sought defendant who had been named by a neighbor as someone who had confessed to shooting the victim. Defendant was 16 at the time, so Miller made contact with defendant’s mother and arranged a meeting with defendant and his mother the next day at the juvenile courthouse. Defendant’s mother arrived at the meeting the next day, but defendant refused to come inside and was walking up and down the street. Miller then went outside and brought the defendant inside the courthouse. At this time, Miller stated that she arrested defendant on “suspicion of homicide” and further stated she “needed to interrogate him and ask him questions.”

Defendant’s mother was present during the questioning and she and defendant both read and signed a statement advising defendant of his constitutional rights. During the interrogation, defendant denied any role in the shooting. Miller then told defendant that he was going to be arrested for homicide and taken to juvenile hall. Defendant’s mother then left and while Miller

was going to process defendant's transfer, defendant told Miller that he "wanted to tell [her] everything that happened." Miller then called defendant's mother back into the room, resumed the interrogation and defendant confessed both orally and in writing to shooting Badawi.

On appeal, defendant contends that his statement should have been excluded from evidence because it was subject to an illegal arrest, it was obtained in violation of his right to counsel, and that police officers failed to comply with the procedural requirements for arresting a minor.

Defendant's first claim that his confession was obtained pursuant to an illegal arrest because it was made without probable cause, is not supported by the evidence. Due to the fact that defendant did not raise this objection at trial, he failed to preserve this issue for appeal, so we review the existing record only for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *People v Bauder*, 269 Mich App 174, 177-178; 712 NW2d 506 (2005); MRE 103(a)(1).

At trial it is the prosecutor's burden to demonstrate probable cause. *People v Tierney*, 266 Mich App 687, 705; 703 NW2d 204 (2005). Probable cause exists when a "fair-minded person of average intelligence [believes] that the suspected individual [] committed the felony." *Id.* at 687. Probable cause may be based on information supplied by named or unnamed persons. *People v Keller*, 479 Mich 467, 482; 739 NW2d 505 (2007); MCL 780.653. If the person is named, there should be indication that the informant has personal knowledge. If the person is unnamed, there should also be some indication that the informant is credible or the information is reliable. *Keller, supra* at 482.

In this case, Miller testified that she based her arrest of defendant on "several tips that came in" and on the statement of one of defendant's acquaintances, Crystal Hyter. No information regarding the tips was elucidated at trial. Hyter confirmed at trial that she told Miller that she knew defendant from school, had heard from other people that he was involved in the shooting, and heard *from* defendant that he shot the victim. Hyter was a named informant with personal knowledge of defendant and the shooting. *Id.*

There is no evidence regarding the identity of the other individuals who supplied the tips to Miller. According to Miller, however, this evidence was corroborated by Hyter's statement. Thus, there was evidence that the information was reliable. While it is not known whether the individuals who made the tips had personal knowledge of the shooting, it is not apparent on the record that Miller lacked the information to support probable cause. *Carines, supra* at 763. On the contrary, defendant's admission of guilt to Hyter together with other evidence obtained by Miller, constituted probable cause to effectuate an arrest of defendant. Therefore, there was no plain error in admitting the statement made pursuant to defendant's arrest.

Defendant next argues that the confession was obtained in violation of his right to counsel. This issue was also unpreserved on appeal and is reviewed for plain error affecting substantial rights. *Carines, supra* at 763.

Defendant was 16 years old at the time of the offense. He was interrogated in the presence of his mother. Both defendant and his mother were read and signed a statement of defendant's *Miranda*¹ rights. Defendant's mother testified at trial as follows: "I . . . did ask the detective. I asked her, 'He needs a lawyer, is that not right?' I said, '[H]e needs a lawyer before he should speak.' . . . I asked her – I said – '[H]e need[s] a lawyer, right, before he speaks.'" She further testified that Miller said, "No, he's trying to help himself." Defendant's mother was satisfied with this result. Defendant never said anything about a lawyer and continued to answer Miller's questions and both defendant and his mother signed the confession, which was written out by Miller.

If a criminal defendant invokes his constitutional right to counsel, the interrogation must be terminated until counsel is present. *People v McBride*, 273 Mich App 238, 258; 729 NW2d 551, rev'd on other grounds 480 Mich 1047 (2008). The invocation, however, must be unequivocal. *Id.* at 259. If a "reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel," there is no requirement to terminate the interrogation and defendant's subsequent statements are not excludable. *Id.* (quoting *Davis v United States*, 512 US 452, 457; 114 S Ct 2350; 129 L Ed 2d 362 (1994)).

Defendant's mother's statement was equivocal. She testified that rather than requesting an attorney, she asked Miller whether defendant needed a lawyer. Miller had reason to believe that this mere inquiry into defendant's right to counsel was not an unambiguous or unequivocal invocation of the right to counsel. *Id.* Thus, it was not plain error for the trial court to admit defendant's statement made after the inquiry.

Defendant next argues that the police did not comply with the procedural requirements of MCL 764.27 and MCR 3.933(A) for arresting a minor. This issue was also unpreserved on appeal and is reviewed for plain error affecting substantial rights. *Carines, supra* at 763.

MCL 764.27 requires that "if a child less than 17 years of age is arrested, with or without a warrant, the child shall be taken immediately before the family division of the circuit court of the county where the offense is alleged to have been committed," and the arresting officer must immediately file a petition under MCL 712A. MCR 3.933 states that if an officer arrests a juvenile without a court order, the officer *may*:

- (1) issue a citation or ticket to appear at a date and time to be set by the court and release the juvenile;
- (2) accept a written promise of the parent, guardian, or legal custodian to bring the juvenile to court, if requested, at a date and time to be set by the court, and release the juvenile to the parent, guardian, or legal custodian; or
- (3) take the juvenile into custody and submit a petition, if:

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

(a) the officer has reason to believe that because of the nature of the offense, the interest of the juvenile or the interest of the public would not be protected by release of the juvenile, or

(b) a parent, guardian, or legal custodian cannot be located or has refused to take custody of the juvenile. [MCR 3.933(A)]

Because defendant did not object on these grounds at trial, there was no evidence adduced regarding whether these procedures were followed. Miller testified, however, that after she detained defendant, she took him into the juvenile courthouse where he was arrested. No record was made of whether Miller brought defendant before a judge or filed a petition after arresting defendant. Defendant argues that this lack of evidence is sufficient to prove an error requiring reversal. On the contrary, there can be no plain error in the court's admission of defendant's statement in the absence of evidence supporting defendant's claim that the statement was made in violation of a statute and a court rule. Simply put, in the absence of any evidence that there was a violation of a statute or court rule, we cannot grant the relief requested.

Defendant also argues that he was denied the effective assistance of counsel because his attorney failed to object to the foregoing claimed errors. Because there were no errors committed, trial counsel's performance was not deficient for failing to object. *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005). See also, *People v Dendel*, 481 Mich 114; 748 NW2d 859, 865 (2008) for the proposition that a defendant claiming ineffective assistance of counsel must demonstrate both deficient performance and actual prejudice. We find that even assuming counsel's performance to be deficient, defendant has failed to demonstrate that he was prejudiced by counsel's performance. Consequently, his claim of ineffective assistance of counsel is without merit.

Defendant also argues that the trial court abused its discretion when it admitted a photograph of the victim's dead body into evidence.

The photograph depicts the victim's body lying face down with one leg under his body. There is a bloodstain on the floor near the victim's head. There are no visible wounds; the victim's face is not visible.

This Court reviews a trial court's decision to admit evidence for an abuse of discretion. *People v Pattison*, 276 Mich App 613, 615; 741 NW2d 558 (2007). Preliminary questions of law are reviewed de novo. *Id.* A court abuses its discretion when it selects a course outside of the range of principled outcomes. *People v Shahideh*, 277 Mich App 111, 118; 743 NW2d 233 (2007). Nevertheless, an erroneous evidentiary ruling does not require reversal unless it "affirmatively appear[s] that it is more probable than not that the error was outcome determinative." *People v Lukity*, 460 Mich 484, 488, 495-496; 596 NW2d 607 (1999); MCL 769.26; MCR 2.613(A); MRE 103.

The decision to admit or exclude photographs is within the sole discretion of the trial court. *People v Mills*, 450 Mich 61, 76; 537 NW2d 909 (1995). As with all evidence, a photograph must be relevant to be admissible. *People v Unger*, 278 Mich App 210, 257; 749 NW2d 272 (2008); MRE 401. Relevant evidence may, however, be excluded if the probative value of the photograph is substantially outweighed by the danger of unfair prejudice. *Mills*,

supra at 76; *Unger, supra* at 257; MRE 403. “Gruesomeness alone need not cause exclusion.” *Mills, supra* at 76; *People v Ho*, 231 Mich App 178, 188; 585 NW2d 357 (1998). But if the photograph is introduced merely to “arouse the sympathies or prejudices of the jury” it may require reversal. *Ho, supra* at 188. Finally, the mere fact that a photograph depicts a scene more vividly than, or is merely corroborative of, existing oral testimony does not render it inadmissible. *Mills, supra* at 77.

Defendant argues that there was no legitimate purpose to admit the photograph because proof of the manner of the shooting was immaterial to the case. He argues that because he was charged with felony murder, such a charge does not require the prosecutor to prove intent, and that he did not dispute the nature of the shooting. He further argues that even if the photograph has a proper evidentiary purpose, its probative value is substantially outweighed by its danger for unfair prejudice.

Contrary to defendant’s assertion, felony murder has an intent element: “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.” *People v Smith*, 478 Mich 292, 318; 733 NW2d 351 (2007). Further, the jury was instructed on second-degree murder and manslaughter in addition to felony murder; the jury convicted him of second-degree murder. Additionally, the photograph was corroborative of, and helpful to portray, the medical examiner’s testimony that the victim was kneeling at the time he was shot. *Mills, supra* at 77. Thus, defendant’s intent and the manner in which he shot the victim were relevant in this case, and the photograph was relevant to these issues.

Finally, the possibility of prejudice arising from this photograph is very low. Defendant erroneously contends on appeal that there is a visible wound on the victim’s neck. There is, in fact, no aspect of that photograph that is actually gruesome. It merely depicts the position of the victim’s body. Thus, the photograph was relevant and material and not more prejudicial than probative. *Unger, supra* at 257; MRE 401; MRE 403.

Affirmed.

/s/ Alton T. Davis
/s/ Kurtis T. Wilder
/s/ Stephen L. Borrello