STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 21, 2009
v	No. 284190 Genesee Circuit Court
TIMOTHY EARL FIELDS, Defendant-Appellant.	LC No. 06-018312-FC

Before: Davis, P.J., and Murphy and Fort Hood, JJ.

PER CURIAM.

Defendant was convicted by a jury of three counts of assault with intent to commit murder, MCL 750.83, two counts of assault with intent to do great bodily harm less than murder, MCL 750.84, possession of marijuana, MCL 333.7403(2)(d), felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b.[1] He was sentenced as an habitual offender, second offense, MCL 769.10, to concurrent prison terms of 562 to 950 months for each assault with intent to commit murder conviction, 96 to 180 months for each conviction of assault with intent to do great bodily harm conviction, and 48 to 90 months for the felon-in-possession conviction, to be served consecutive to a two-year term of imprisonment for the felony-firearm conviction.[2] He appeals as of right. We affirm.

Officers from the Genesee County Sheriff's Department drug enforcement team executed a search warrant at defendant's home on February 9, 2006. Two of the officers were in uniform, others wore raid gear, and all officers and vehicles present were clearly marked as being from the "Shariff's Department." The officers initially attempted to approach the house with stealth until a motion light came on and revealed a surveillance camera. Officers then yelled, "police, search warrant" and forced open the house doors, whereupon they encountered defendant, who fired shots at them, injuring one of the officers. The officers retreated and some further exchanges of gunfire ensued. Defendant eventually surrendered peacefully. No other occupants were found in the house, but officers found a .45 handgun and 25 or 25 spent .45 casings, as well as 14 individually-wrapped packets of marijuana and a digital scale. Defendant was found to have $1,825 on his person and gunshot residue on his hands. DNA testing of the handgun revealed that defendant's DNA was the most prevalent DNA sample found on the gun.

[1] Defendant was acquitted of an additional charge of operating or maintaining a drug house.

[2] He was fined $250 for the possession of marijuana conviction.

Sergeant David Dwyre advised defendant of his *Miranda*[3] rights and attempted to interview defendant. Defendant asserted his right to remain silent and his right to counsel, and he told Dwyre the name of an attorney he intended to contact. Dwyre terminated the interview, but later returned to swab defendant's hands to conduct the test for the presence of gunshot residue. Dwyre offered to replace a bandage on defendant's hand at that time. Dwyre further explained to defendant the nature of the gunshot residue test, after which defendant told Dwyre that he had never fired a gun. Defendant then told Dwyre that "the vice" began shooting at him.

At trial, defendant maintained that he mistakenly believed that the men entering his house were unlawful intruders, and he attributed his confused state of mind to the side effects of Vicodin. Defendant had been prescribed Vicodin, which can cause fatigue and dizziness, after injuring his hand in a snowblower incident. Witnesses testified that they had been with defendant earlier that evening, and defendant had become sleepy after taking Vicodin. Defendant testified that he had received death threats from Faith Shaw, who admitted that she had threatened to have defendant beaten up but denied calling him on the day of the raid. Defendant reiterated his belief that officers had been intruders carrying out Shaw's threats in a recorded telephone call he made from jail.

Defendant was initially tried in March 2007, but a mistrial was declared because the jury was unable to reach a verdict. Defendant was subsequently retried in January 2008. The second jury convicted defendant of three counts of assault with intent to commit murder, two counts of the lesser offense of assault with intent to do great bodily harm less than murder, felon in possession of a firearm, and felony-firearm. It also found him guilty of possession of marijuana, but acquitted him of operating or maintaining a drug house.

Defendant first argues that the trial court erred in permitting Detective Lieutenant Kevin Shanlian to testify about an interview he conducted with Christina Bruce Mason. Shanlian identified Mason as a possible witness because she had frequent telephone contact with defendant, and he interviewed her after she was arrested on outstanding warrants the same day Shanlian received defendant's telephone records. Defendant contends that Shanlian's testimony of Mason's statements violated his Sixth Amendment right to confrontation[4], and furthermore it constituted inadmissible hearsay. We agree with defendant, but these allegations of error were not preserved below, and we find that they did not violate his substantial rights. See *People v Pipes*, 475 Mich 267, 274; 715 NW2d 290 (2006).

Mason's statements were introduced to prove the truth of matters asserted and were therefore hearsay. *People v McLaughlin*, 258 Mich App 635, 651; 672 NW2d 860 (2003). Mason's statements were also testimonial, because they were made under circumstances clearly intended to gather information to be used for a criminal prosecution. *Crawford v Washington*, 541 US 36, 51-52; 124 S Ct 1354; 158 L Ed 2d 177 (2004); *People v Lonsby*, 268 Mich App 375, 377; 707 NW2d 610 (2005). But Mason's statements were not made under oath and subject to the crucible of cross-examination or to the penalty of perjury. Her statements were therefore not admissible under MRE 803(d)(1)(A), nor were they admissible under MRE 613 because Mason's testimony was not presented at defendant's second trial, so there was no testimony to

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

[4] US Const, Am VI; Const 1963, art 1, § 20.

impeach. Finally, Mason's testimony from defendant's first trial was not presented at his second, and he did not have the opportunity to cross-examine her at his second trial. Admission of her testimony was plain error.

However, Mason's testimony regarding defendant's sale of drugs was only relevant to his charges of operating a drug house or possession of drugs with the intent to deliver. Defendant was acquitted of these charges and convicted of the lesser offense of simple possession of marijuana. Clearly, the jury was not influenced by Mason's testimony in this regard. Mason's statement that she was afraid to reveal information about defendant was brief, isolated, and purely subjective and uncorroborated opinion presented in a lengthy trial detailing evidence of the police raid and investigation. Given the jury's clear disregard of Mason's reference to defendant's drug dealing, we are persuaded that the admission of her testimony, while erroneous, did not violate defendant's substantial rights.

Defendant next asserts that his statements to Dwyre should have been suppressed as violative of his *Miranda* rights, arguing that Dwyre unconstitutionally reinitiated questioning after defendant had asserted his rights to silence and to counsel. We disagree.

"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." *People v Akins*, 259 Mich App 545, 564; 675 NW2d 863 (2003). If a suspect asserts his or her right to counsel or to silence, police questioning must cease. *Montejo v Louisiana*, ___ US ___; 129 S Ct 2079, 2089-2090; ___ L Ed 2d ___ (2009). If the suspect has asserted the right to counsel, no further interrogation may take place unless counsel is present; furthermore, the procedure for establishing a valid waiver of Fifth Amendment and Sixth Amendment rights is the same. *Id*. at 2090. However, "the purpose of the rule is to preclude the State from badgering defendants into waiving their previously asserted rights." *Id*. at 2089. Consequently, the rule does not apply to noncustodial or noninterrogative interactions between defendants and law enforcement. *Id*. at 2090.

The evidence simply does not show that any interrogation took place after defendant invoked his constitutional rights. Defendant asked Dwyre what the gunshot residue test was, and Dwyre answered; defendant then stated "that he never shot a gun." Dwyre then continued the conversation by telling defendant that he "thought you were going to say that you were being robbed and you didn't know it was the police," after which defendant began crying and again stated that he never shot a gun. After the gunshot residue test was completed, defendant asked Dwyre what he would do, and said that "they were trying to kill me," further explaining that "the vice, they just started shooting." Dwyre then left the room; Dwyre also referred defendant for a psychiatric evaluation and had him placed in anti-suicide garb. While Dwyre's conversation with defendant could be considered words reasonably likely to elicit an incriminating response, it was defendant who initiated the conversation both before and after the gunshot residue test. A suspect may waive his rights by initiating further communication after asserting his *Miranda* rights. *People v Black*, 203 Mich App 428, 430; 513 NW2d 152 (1994). Under the circumstances, suppression of defendant's statements was not required. Defendant does not otherwise contest the voluntariness of his statements.[5]

[5] Therefore, we decline to consider his request for a *Walker* hearing, the purpose of which is to

Defendant next argues that the prosecutor improperly vouched for the credibility of Lieutenant Green and, by extension, the credibility of all the officers. Because defendant did not object to the prosecutor's remarks at trial, this issue is not preserved. *People v Kelly*, 231 Mich App 627, 638; 588 NW2d 480 (1998). In any event, the extent of the prosecutor's allegedly improper vouching was to tell the jury during opening argument that Green, the officer in charge of the case, was seated beside her, and to explain that "Lieutenant Green and I ask that you listen carefully to all of the evidence, and there'll be a lot of evidence for you to consider." This did not amount to a suggestion that the government had some special knowledge that a witness's testimony is truthful. *People v Knapp*, 244 Mich App 361, 382; 624 NW2d 227 (2001). Rather, it was merely an explanation of Green's role in the matter and a request to pay attention to "all" of the evidence. We find no impropriety.[6]

Defendant finally argues that the trial court improperly limited his cross-examination of Dwyre regarding his recorded telephone calls to his brother from jail; specifically, defendants' statements about Shaw's threats. We disagree.

Defense counsel apparently intended to contrast defendant's statements with Dwyre's testimony that defendant had said that "the vice" was trying to shoot at him. The trial court held that "the tape pretty much speaks for itself" and sustained the prosecutor's objections under MRE 1002, the "best evidence" rule, to that line of questioning. MRE 1002 provides that the content of a writing, recording, or photograph must be proved by the original writing, recording, or photograph, except as otherwise provided by statute or the rules of evidence. Here, defendant's recorded calls were played for the jury, so the trial court correctly found that there was no basis for proving the contents of calls through any other means. The right to confront witnesses is not unlimited. *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993). Defense counsel's apparent intent was to have Dwyre openly acknowledge that defendant had told another person that he believed the intrusion into his home was related to Shaw's threat. However, the pertinent evidence was introduced, and defense counsel was free to argue to the jury that defendant's statements in those calls were more credible than Dwyre's testimony. Defendant was not precluded from attempting to undermine Dwyre's testimony or from putting on a meaningful defense.

Affirmed.

/s/ Alton T. Davis
/s/ William B. Murphy
/s/ Karen M. Fort Hood

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determine the voluntariness of a defendant's statement before admitting it into evidence. *People v Ray*, 431 Mich 260, 269; 430 NW2d 626 (1988).

[6] Consequently, defense counsel could not have been ineffective for failing to object, because any such objection would have been meritless. *People v Unger*, 278 Mich App 210, 255; 749 NW2d 272 (2008).