STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 28, 2012
v	No. 300695 Wayne Circuit Court
KARON MALCOM X COLE, Defendant-Appellant.	LC No. 10-006204-FC

Before: OWENS, P.J., and JANSEN and MARKEY, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to 7 to 30 years' imprisonment for the armed robbery conviction and two years' mandatory imprisonment for the felony-firearm conviction. Defendant appeals as of right. We reverse the trial court's order granting defendant a new trial and affirm defendant's convictions and sentences.

Defendant held Charles Wickliffe at gunpoint in Wickliffe's van in the parking lot of Capitol Foods supermarket in Detroit and stole about $180 from him. After his trial, defendant filed this appeal claiming, among other things, ineffective assistance of counsel. This Court remanded to the trial court for the purpose of allowing defendant to move for a new trial based on ineffective assistance of counsel, and for the trial court to make findings of fact and a determination on the record, but retained jurisdiction. *People v Cole*, unpublished order of the Court of Appeals, entered June 14, 2011 (Docket No. 300695). Defendant moved for a new trial in the trial court and, after the *Ginther*[1] hearing was concluded, the trial court granted defendant's motion on the ground that defendant had not received effective assistance of counsel. Defendant filed a motion to dismiss his appeal, stating that the new trial had afforded him complete relief with respect to all of his claims. This Court denied defendant's motion and stated the trial court's opinion and order granting defendant a new trial would be reviewed along with defendant's issues on appeal. *People v Cole*, unpublished order of the Court of Appeals, entered October 28, 2011 (Docket No. 300695).

[1] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

I. PURPORTED RECORDING OF DEFENDANT'S INTERROGATION

Defendant first argues that his right to due process was violated when the police potentially destroyed a recording of his interrogation by police, and that he did not receive effective assistance of counsel because his attorney failed to obtain a copy of the recording, if one existed, or request an adverse inference jury instruction if such a recording existed but had been destroyed. We disagree.

Generally, an issue must be raised, addressed, and decided by a trial court in order to be preserved for appeal. *People v Metamora Water Serv, Inc*, 276 Mich App 376, 383; 741 NW2d 354 (2007) (citing *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 443; 695 NW2d 84 (2005)). Here, defendant raised no objection at trial to the absence or destruction of a recording of his interrogation, nor did he request an adverse inference jury instruction. Therefore, this issue is unpreserved. However, defendant's claims of ineffective assistance of counsel with respect to this issue are preserved because he moved for a new trial, and a *Ginther* hearing was held.

Questions of constitutional law are reviewed de novo on appeal. *People v Armstrong*, 490 Mich ___, ___; ___ NW2d ___ (2011) (slip op at 4) (citing *People v Grant*, 470 Mich 477, 485; 684 NW2d 686 (2004)). However, when constitutional claims are unpreserved, they are reviewed for plain error affecting the defendant's substantial rights. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999). An ineffective assistance of counsel claim is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). "A judge first must find the facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *Id.* The trial court's findings of fact are reviewed under a clearly erroneous standard. *Id.* (citing MCR 2.613(C); MCR 7.211(A)(3)(a)). Constitutional questions involved in ineffective assistance of counsel claims are reviewed do novo. *Id.*

A. DESTRUCTION OF THE VIDEOTAPE

"[S]uppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963). However, this standard is only applied when evidence is known to be favorable to the defendant. *Id.* A different standard applies when the evidence suppressed or destroyed is only *potentially* exculpatory. In those cases, it is the defendant's burden to show that the police acted in bad faith by destroying the evidence. *Arizona v Youngblood*, 488 US 51, 58; 109 S Ct 333; 102 L Ed 2d 281 (1988). This higher standard is applied because courts are unwilling to impose on the police an absolute duty to preserve everything that might possibly be favorable to a defendant, and because courts face the difficult task of "'divining the import of materials whose contents are unknown and, very often, disputed.'" *Id.* (quoting *California v Trombetta*, 467 US 479, 486; 104 S Ct 2528; 81 L Ed 2d 413 (1984)). A finding of bad faith rests on whether the police knew of the apparent exculpatory value of the evidence at the time it was destroyed. *Id.* at 56.

We first note police have no constitutional duty to record conversations with a defendant. *People v Fike*, 228 Mich App 178, 183-186; 577 NW2d 903 (1998). However, if a recording that could potentially exculpate a defendant was, in fact, made, destruction or suppression of it would be subject to the standard of *Youngblood*. Here, because the contents of a recording of defendant's interrogation, if one is or ever has been in existence, are disputed, the *Youngblood* standard, requiring a showing of bad faith on the part of the police, applies.

Officer Rico Hardy, the officer in charge of defendant's case, testified as follows, with respect to defendant's interrogation, during the preliminary examination:

> *Q.* Was this taped; is there any other record made of your contact with my client?
>
> *A.* Not that I know of, no.
>
> *Q.* Okay. So, you don't have a taping equipment or an environment where you can actually tape to verify what happened?
>
> *A.* No, it could have been at the Southwest District.
>
> *Q.* Is that where you were the Southwest District?
>
> *A.* Yes.
>
> *Q.* Okay, you could have taped it but you didn't?
>
> *A.* I don't tape it, I think the room is automatically taped already.
>
> *Q.* Okay. So you're saying there is a recorded record of what happened on this day in question when you were talking to my client?
>
> *A.* It might be, it last just ten days.
>
> *Q.* Okay. And, in cases where cases are brought, aren't these provided as a matter of course, to the prosecution and to defense counsel?
>
> *A.* Not all the time.
>
> *Q.* So, you may have it, we just haven't been provided it through a discovery request, fair to say?
>
> *A.* I don't have it, no.
>
> *Q.* You don't have it. If there is such a record, and I'm sure the Court will order it; but I'm just asking you, if there is such a court record, you would give that to counsel, both of us; is that correct?
>
> *A.* Yes.

Hardy then testified at trial:

> *Q.* Now you said that there was an interrogation room when you met with my client, is that correct?
>
> *A.* Correct.
>
> *Q.* And when you met with my client in the interrogation room – is that interrogation room set up to tape statements?
>
> *A.* I think it is. I'm not sure. I don't work at Southwest.
>
> *Q.* I understand. Well, would that have been important for you to ask, because an armed robbery is a serious crime, isn't it?
>
> *A.* Yes.
>
> *Q.* And in fact a car jacking is a very serious crime, isn't it?
>
> *A.* Yes.
>
> *Q.* Okay, and I would assume – the political term of the day is transparency. You wanted transparency, didn't you?
>
> *A.* Yes.
>
> *Q.* Okay. So did you ask the officers at Southwest whether you could tape that statement so there would be no question?
>
> *A.* No, I didn't.

Additionally, Officer Dana Russell, who was also involved in defendant's case and effected his arrest, testified at trial that she was aware at least some of the rooms at the Southwest District had recording capability, but that she did not know whether the room in which defendant was interrogated had recording capability. Furthermore, defendant's trial counsel testified at the *Ginther* hearing that he had contacted the prosecutor regarding the existence of a tape and was told "[t]here was no tape produced and there would be no tape produced at trial." Finally, a June 16, 2011, the Detroit Police Department's response to a FOIA request by defendant's appellate counsel for defendant's interrogation tape indicated there was no record currently in existence matching the description of the request.

Based on the foregoing facts, defendant has not shown that there was ever a recording made of his interrogation. Hardy's testimony about the recording practices of the Southwest District was speculative, and neither Hardy nor Russell works regularly at Southwest. Additionally, even if a recording was made, police testimony points not toward bad faith here but, rather, complete ignorance about whether a tape was ever made. There is no evidence Hardy or Russell ever knew if a recording was made of defendant's interrogation, let alone its potentially exculpatory value at the time it was destroyed (if it ever existed). Furthermore, any

destruction of such a tape appears to have been completed as a matter of routine after 10 days, rather than upon any specific instruction that could constitute bad faith. Under these facts, we cannot conclude there was any bad faith on the part of police, or even that there was a recording made of defendant's interrogation in the first place. We hold, therefore, defendant has failed to meet his burden with respect to his claim that his due process rights were violated by the destruction of a recording of his interrogation.

B. EFFECTIVE ASSISTANCE OF COUNSEL

To prove ineffective assistance of counsel, a defendant must show counsel's performance was deficient, and the deficiency resulted in prejudice to the defendant. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001) (citing *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984)). To show deficiency, a defendant must establish counsel's performance fell below an objective standard of reasonableness. *People v Gardner*, 482 Mich 41, 50 n 11; 753 NW2d 78 (2008) (citing *Strickland*, 466 US at 688). To show prejudice, a defendant must demonstrate a reasonable probability of a different outcome were it not for counsel's deficiency. *Grant*, 470 Mich at 486 (citing *Strickland*, 466 US at 694). There is a "strong presumption that counsel's performance constituted sound trial strategy." *Carbin*, 463 Mich at 600 (citing *Strickland*, 466 US at 690). Counsel's performance must be evaluated without the benefit of hindsight. *Grant*, 470 Mich at 485 (citing *Strickland*, 466 US at 689).

1. FAILURE TO OBTAIN THE VIDEOTAPE

Here, trial counsel testified at the *Ginther* hearing that he felt he had made a sufficient inquiry into the possible existence of a tape at the preliminary examination. Additionally, counsel followed up with the prosecution about a possible recording and was told none existed. The trial court held, and we agree, that for defense counsel to rely on the prosecutor's statement, rather than to attempt to obtain a copy of any recording through a discovery request, in light of his knowledge that an alleged statement given by defendant would be produced at trial, falls below an objective standard of reasonableness.

However, defendant cannot meet the second prong of *Strickland* here, in that he cannot show the likelihood of a different outcome if not for counsel's deficiency. There is no evidence indicating that any recording of defendant's interrogation was actually made. Hardy never requested that a recording be made, no witness could testify that the interrogation had been automatically recorded, and a FOIA request for the recording returned no results. Therefore, no recording would have been produced, and defendant could not have presented a recording at trial that would have exculpated him. Even if a recording existed, Hardy testified it would have been destroyed after 10 days. Because the preliminary examination took place 25 days after defendant's interrogation, by that time any recording would have been destroyed, precluding its production. Accordingly, any discovery request would have been futile and failed to change the outcome of defendant's trial.

2. FAILURE TO REQUEST AN ADVERSE INFERENCE INSTRUCTION

A defendant is only entitled to an adverse inference jury instruction regarding failure to produce evidence when bad faith can be shown. *People v Davis*, 199 Mich App 502, 515; 503

NW2d 457 (1993). Here, as discussed above, there is no evidence of bad faith on the part of the police or the prosecution. The trial court held that the police did act in bad faith, stating:

> In light of the fact that some representation was made that the interview may very well have been reduced to a video or audio recording, and that the People had failed to present that video or audio recording in discovery of this matter, or to give some reasonable explanation as to why it did not exist, other than the blanket statement of the police officer that it would have customarily been destroyed within ten days' time, the Court finds that the police in this matter did act in bad faith, and therefore, Standard Criminal Jury Instruction 5.12 should have been given. The end result of that, therefore, would be that the jury panel would have been acting under the guidance of Standard Jury Instruction 5.12 and then would have inferred that had the video or audio recording of the statement been provided, that it would have been contrary to the content of the written interview statement obtained by the police.

There are two problems with the trial court's assessment. The first is that the court is, contrary to law, placing the burden on the police to show they did not act in bad faith, rather than on the defendant to show that they did. *Youngblood*, 488 US at 58. Second, the court appears to be imposing a duty on the police to preserve all recordings made, regardless of police awareness of exculpatory value, for longer than 10 days. Although the wisdom of a police practice that automatically records every interview, and then automatically deletes them 10 days later, is questionable, it does not automatically warrant a finding of bad faith, particularly in light of the fact that defendants are not constitutionally entitled to have their interviews recorded. *Fike*, 228 Mich App at 183-186. More importantly, this is the precise type of duty considered, and rejected, in *Youngblood*, 488 US at 58.

Because defendant is unable to show bad faith on the part of the police, counsel's request for an adverse inference instruction would have been futile. Counsel is not ineffective for failure to make a futile motion. *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998) (citing *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991)).

II. DEFENDANT'S CLAIM OF INTOXICATION DURING QUESTIONING

Defendant next claims on appeal that his rights to due process and against compelled self-incrimination were violated by the admission of his waiver and confession, both of which were made while defendant was intoxicated and were therefore involuntary, and that he did not receive effective assistance of counsel when his attorney failed to seek suppression of defendant's statements. We disagree.

Generally, an issue must be raised, addressed, and decided by a trial court in order to be preserved for appeal. *Metamora Water Serv, Inc*, 276 Mich App at 383 (citing *Hines*, 265 Mich App at 443). The procedure for assessing the voluntariness of a defendant's confession is to hold

a *Walker*[2] hearing outside the presence of the jury so that the trial court judge may make a determination on the issue. *People v Ray*, 431 Mich 260, 269; 430 NW2d 626 (1988). The defendant must challenge the voluntariness of a confession before demanding a *Walker* hearing unless there is clear and substantial evidence of "alerting circumstances," such as threats, duress, or a defendant's weakened state, which require a trial court to inquire into the issue of voluntariness sua sponte. *Ray*, 431 Mich at 269, 271. If there are no alerting circumstances and the defendant fails to challenge the issue of voluntariness at trial, the issue is waived. *Id.* at 269. Here, defendant did not raise the issue of the involuntariness of his confession at trial, and there was no evidence indicating any "alerting circumstances." In fact, defendant's position at trial was basically that he never made a statement, so even defendant's testimony that he was crying during questioning, and that Hardy had promised him he could go if he signed the papers, would not suffice to alert the court that defendant's statements were involuntary. Moreover, defendant does not argue on appeal that the trial court should have raised the issue sua sponte. Therefore, this issue is waived. However, defendant's claim of ineffective assistance of counsel made with respect to this issue is preserved and therefore still reviewable.

We review a trial court's determination that a waiver was knowing, intelligent, and voluntary de novo. *People v Gipson*, 287 Mich App 261, 264; 787 NW2d 126 (2010) (citing *People v Tierney*, 266 Mich App 687, 707-708; 703 NW2d 204 (2005)). "When reviewing a trial court's determination of voluntariness, we examine the entire record and make an independent determination." *Id.* (citing *People v Shipley*, 256 Mich App 367, 372; 662 NW2d 856 (2003)). However, review of the trial court's factual findings is for clear error, and this Court will not overturn the trial court's decision "unless left with a definite and firm conviction that a mistake was made." *Id.* (citing *People v Sexton*, 461 Mich 746, 752; 609 NW2d 822 (2000)). "Deference is given to a trial court's assessment of the weight of the evidence and the credibility of the witnesses." *Id.* (citing *Sexton*, 461 Mich at 746).

A. ADMISSION OF DEFENDANT'S WAIVER OF RIGHTS AND CONFESSION GIVEN UNDER INTOXICATION

For a waiver of Fifth Amendment rights to be valid, a defendant must waive them voluntarily, knowingly, and intelligently. *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966); *Gipson*, 287 Mich App at 264. "A waiver is voluntary if it was the product of a free and deliberate choice rather than intimidation, coercion, or deception." *Gipson*, 287 Mich App at 264-265 (citing *Shipley*, 256 Mich App at 373-374). A determination of the voluntariness of a defendant's statements is made by examining the totality of the circumstances surrounding the interrogation. *People v Daoud*, 462 Mich 621, 633-634; 614 NW2d 152 (2000). Factors to be considered under the totality of circumstances analysis include: "the duration of the defendant's detention and questioning; the age, education, intelligence, and experience of the defendant; whether there was unnecessary delay of the arraignment; the defendant's mental and physical state; whether the defendant was threatened or abused; and any promises of leniency." *Gipson*, 287 Mich App at 265 (citing *Shipley*, 256 Mich App at 373-374). "Intoxication from

[2] *People v Walker*, 374 Mich 331, 338; 132 NW2d 87 (1965).

alcohol or other substances can affect the validity of a waiver, but is not dispositive." *Gipson*, 287 Mich App at 265 (citing *People v Leighty*, 161 Mich App 565, 571; 411 NW2d 778 (1987)).

The issue of voluntariness of defendant's waiver and confession is waived because it was not raised at trial. *Ray*, 431 Mich at 269. Regardless, the evidence indicates defendant was not intoxicated during his interrogation and, therefore, neither his waiver nor his confession was made involuntarily. At the *Ginther* hearing, defendant's trial counsel testified:

> *Q.* [The Court]: I'm asking you before the preliminary examination did he indicate to you that he was high [on] either drugs or alcohol when this interrogation occurred.
>
> *A.* He did not indicate to me that he was high on drugs or alcohol[,] he indicated a willingness to testify to that.

The trial court later stated:

> And it's evident from the answer that [trial counsel] gave that there was no intoxication and there was no situation where the defendant was under drugs at the time this incident occurred. That's a nonissue. Because it's evidence that what he wanted to do was to get on the stand and lie about that for his own self preservation.

Giving weight to the trial court's ability to assess the weight of the evidence and witness credibility, we hold the trial court's finding that defendant was not intoxicated was not clearly erroneous. We also hold, based on this finding, defendant's waiver of rights and subsequent confession were not involuntary; therefore, his right to due process and against compelled self-incrimination were not violated and his convictions should not be reversed on this ground.

B. EFFECTIVE ASSISTANCE OF COUNSEL

"While a defendant may have the constitutional right to the effective assistance of counsel, this does not encompass the right to assistance of counsel in committing perjury. In fact, an attorney's refusal to knowingly assist in the presentation of perjured testimony is not only consistent with his ethical obligations, but cannot be the basis of a claim of ineffective assistance of counsel." *People v Toma*, 462 Mich 281, 303 n 16; 613 NW2d 694 (2000) (citing *Nix v Whiteside*, 475 US 157, 174-175; 106 S Ct 988; 89 L Ed 2d 123 (1986)).

Trial counsel testified at the *Ginther* hearing that defendant had indicated to him, not that he *was actually* intoxicated during his interview, but that he was *willing to testify* that he was intoxicated. Therefore, counsel was not ineffective in refusing to challenge defendant's statements on the basis of involuntariness and, furthermore, he was ethically obligated not to present testimony he believed would constitute perjury. Because counsel was not ineffective in failing to seek suppression of defendant's statements, defendant is not entitled to a new trial on this ground.

III. ORDER GRANTING DEFENDANT A NEW TRIAL

Defendant finally argues on appeal that the trial court's order granting him a new trial on the ground that he did not receive effective assistance of counsel should be affirmed. We disagree.

Review of a trial court's decision to grant a new trial is for abuse of discretion. *People v Miller*, 482 Mich 540, 544; 759 NW2d 850 (2008) (citing *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003)). "An abuse of discretion occurs only 'when the trial court chooses an outcome falling outside [the] principled range of outcomes.'" *Id.* (quoting *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003)). Underlying factual findings are reviewed for clear error. *Id.* (citing *Cress*, 468 Mich at 691).

The remedy for ineffective assistance of counsel is a new trial. See *Armstrong*, 490 Mich ___ (slip op at 4). Because we have held counsel was not ineffective, we hold the trial court abused its discretion in granting a new trial. Accordingly, the trial court's order granting defendant a new trial is reversed and defendant's convictions and sentences affirmed.

Affirmed in part and reversed in part.

/s/ Donald S. Owens
/s/ Kathleen Jansen
/s/ Jane E. Markey