STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 24, 2012
v	No. 302037 Oakland Circuit Court
ROBERT JOSEPH MCMAHON, Defendant-Appellant.	LC No. 2010-233010-FC

Before: DONOFRIO, P.J., and RONAYNE KRAUSE and BOONSTRA, JJ.

PER CURIAM.

Defendant appeals as of right his convictions of bank robbery, MCL 750.531, and two counts of armed robbery, MCL 750.529. Defendant was convicted following a bench trial and was sentenced to concurrent terms of 126 months to 20 years' imprisonment for each of his three convictions. Defendant was given credit for 137 days served. We affirm.

I. DOUBLE JEOPARDY

Defendant first contends that his convictions of both bank robbery and armed robbery violated the double jeopardy clause of the state and federal constitution, in that they amounted to multiple punishments for the same offense. A double jeopardy challenge presents a question of constitutional law that we review de novo. *People v Lett*, 466 Mich 206, 212; 644 NW2d 743 (2002).

The Double Jeopardy Clause protects individuals in relevant part from "multiple punishments for the same offense." *People v Smith*, 478 Mich 292, 299; 733 NW2d 351 (2007) (citation omitted). The "same elements" test set forth in *Blockburger v United States*, 284 US 299, 304; 52 S Ct 180; 76 L Ed 306 (1932), governs the question raised by defendant here. *Smith*, 478 Mich at 324. Under the *Blockburger* "same elements" test, "two offenses are not the 'same offense' if each requires proof of an element that the other does not." *People v Chambers*, 277 Mich App 1, 5; 742 NW2d 610 (2007).

MCL 750.529 provides as follows:

> A person who engages in conduct proscribed under [MCL 750.530] and who in the course of engaging in that conduct, possesses a dangerous weapon or an article used or fashioned in a manner to lead any person present to reasonably believe the article is a

dangerous weapon, or who represents orally or otherwise that he or she is in possession of a dangerous weapon, is guilty of a felony punishable by imprisonment for life or for any term of years. If an aggravated assault or serious injury is inflicted by any person while violating this section, the person shall be sentenced to a minimum term of imprisonment of not less than 2 years.

MCL 750.530 proscribes unarmed robbery and provides in relevant part:

(1) A person who, in the course of committing a larceny of any money or other property that may be the subject of larceny, uses force or violence against any person who is present, or who assaults or puts the person in fear, is guilty of a felony punishable by imprisonment for not more than 15 years.

Therefore, in order to support a conviction of armed robbery under MCL 750.529, a prosecutor must prove the following elements:

> (1) the defendant, in the course of committing a larceny [] of any money or other property that may be the subject of a larceny, used force or violence against any person who was present or assaulted or put the person in fear, and (2) the defendant, in the course of committing the larceny, either possessed a dangerous weapon, possessed an article used or fashioned in a manner to lead any person present to reasonably believe that the article was a dangerous weapon, or represented orally or otherwise that he or she was in possession of a dangerous weapon. [*Chambers*, 277 Mich App at 7.]

MCL 750.531 is entitled "bank, safe, and vault robbery" and it provides in relevant part as follows:

> Any person who, with intent to commit the crime of larceny, or any felony, shall confine, maim, injure or wound, or attempt, or threaten to confine, kill, maim, injure or wound, or shall put in fear any person for the purpose of stealing from any building, bank, safe or other depository of money, bond or other valuables, or shall by intimidation, fear or threats compel, or attempt to compel any person to disclose or surrender the means of opening any building, bank, safe, vault or other depository of money, bonds, or other valuables, or shall attempt to break, burn, blow up or otherwise injure or destroy any safe, vault or other depository of money, bonds or other valuables in any building or place, shall, whether he succeeds or fails in the perpetration of such larceny or felony, be guilty of a felony. . . .

The crime of bank robbery thus can be committed in two forms: the assaultive form of bank robbery, or the non-assaultive form of safe-breaking. *People v Cambell*, 165 Mich App 1, 6; 418 NW2d 404 (1987). Because "the proper role of a court is simply to *apply* the terms of the statute to the circumstances in a particular case", *People v McIntire*, 461 Mich 147, 153; 599 NW2d 102 (1999), we focus our double jeopardy analysis on whether the assaultive form of bank robbery and armed robbery are overlapping offenses.

Comparison of these two offenses leads to the conclusion that convictions for each require proof of an element the other does not. Our Supreme Court has recently confirmed that the crime of armed robbery encompasses attempts to commit larceny and that no completed larceny is required. *People v Williams*, 491 Mich 164, 172; 814 NW2d 270 (2012). The crimes of armed robbery and bank robbery thus both encompass attempts to commit the crime of larceny. MCL 750.531; *People v Williams*, 288 Mich App 67, 80; 792 NW2d 384 (2010), aff'd by 491 Mich 164 (2012). However, overlap, even substantial overlap, of elements necessary to prove each crime does not suffice to place a defendant in double jeopardy; the test is whether each crime requires proof of an element the other does not. *People v Smith*, 478 Mich 292, 303; 733 NW2d 351 (2007) (citation omitted).

Armed robbery requires proof that the defendant possessed or feigned possession of a dangerous weapon. MCL 750.529. Contrary to defendant's assertion, MCL 750.531 does not require such proof; rather, that statute requires proof that the defendant confined, maimed, injured, wounded, or attempted or threatened those actions in the course of committing the offense. These are elements that are not required to prove armed robbery.[1] Similarly, MCL 750.531 requires proof that the defendant acted with intent to steal property from "any building, bank, safe, vault or other depository of money, bonds, or other valuables." MCL 750.531. Armed robbery does not require such proof. MCL 750.529; *Chambers*, 277 Mich App at 7.

This Court reached the same conclusion in *People v Ford*, 262 Mich App 443, 458; 687 NW2d 119 (2004). There we analyzed whether the defendant was subjected to double jeopardy by his convictions under the bank robbery statute and the pre-2004 amendment version of the armed robbery statute. *Id.* at 121; see also *Chambers*, 277 Mich App at 6-7. We also applied the double jeopardy analysis established in *People v Robideau*, 419 Mich 458, 484; 355 NW2d 592 (1984), overruled by *Smith*, 478 at 319 (2007). While the *Robideau* analysis is no longer used by Michigan Courts, see *Smith*, 478 at 319, the court in *Ford* also analyzed the two offenses under *Blockburger*, and concluded, as we do today, that the offenses each contained elements the other did not. *Ford*, 262 Mich App at 458. The 2004 amendment to the armed robbery statute does not alter this result, because armed robbery still "lacks an element necessary to violate the bank, safe, or vault robbery statute: the intent to steal property from 'any building, bank, safe, vault, or other depository of money, bonds, or other valuables'" and also "contains elements never required to prove bank . . . robbery: the use of a 'dangerous weapon, or any article used or fashioned in a manner to lead the person so assault to reasonably believe it was a dangerous weapon.'" *Id.* at 458 (citations omitted).

Because armed robbery, MCL 750.529, and bank robbery, MCL 750.531, each require proof of a separate and distinct element, convictions under both statutes for the same criminal

[1] Although defendant argues that the Legislature contemplated that the assaultive form of bank-robbery would be accomplished by the use of a weapon, judicial construction of an unambiguous penal statute to require proof of an additional element is neither permitted nor appropriate. See *People v Morey*, 461 Mich 325, 330; 603 NW2d 250 (1999).

transaction do not violate the double jeopardy clause of the state or federal constitution. *Blockburger*, 284 US at 299, 304; *Smith*, 478 Mich at 315-316, 319, 324.

II. ADMISSION OF DEFENDANT'S CONFESSION

Next, defendant contends that the trial court violated his constitutional rights when, following a *Walker*[2] hearing, the court denied his motion to suppress the incriminating statements he made to police during an interrogation. Defendant contends that his statements should have been suppressed because he did not waive his *Miranda*[3] rights knowingly, intelligently, and voluntarily and because his subsequent statements to police were not voluntarily made. Defendant preserved these issues for review when, before trial, he moved to suppress the statements on the same grounds, and the trial court held a *Walker* hearing and denied defendant's motion. *People v Walker (On Rehearing)*, 374 Mich 331, 337-338; 132 NW2d 87 (1965).

We review a trial court's ruling at a suppression hearing for clear error. *People v Aldrich*, 246 Mich App 101, 116; 631 NW2d 67 (2001). "Where a trial court's decision concerned a mixed question of fact and law, the court's findings are reviewed for clear error, while its application of the law to the facts is reviewed de novo." *Id*. "A finding is clearly erroneous if it leaves this Court with a definite and firm conviction that a mistake was made." *People v Shipley*, 256 Mich App 367, 373; 662 NW2d 856 (2003). In conducting this review, "deference is given to the trial court's assessment of the weight of the evidence and credibility of the witnesses." *Id*.

"The Fifth Amendment and Const 1963, art 1, § 17 provide that no person shall be compelled to be a witness against himself in a criminal trial." *People v Schollaert*, 194 Mich App 158, 164; 486 NW2d 312 (1992). Pursuant to the Fifth Amendment, statements of an accused made during "custodial interrogation" are not admissible unless the prosecution shows that before any questioning, the accused was advised of his constitutional rights and he voluntarily, knowingly, and intelligently waived those rights. *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966). Specifically, before any questioning an accused must be "warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." *Id*.

The test for voluntariness of a waiver and the test for voluntariness of a statement to police is the same. See *People v Ryan*, 295 Mich App 388; ___ NW2d ___ (2012); *People v Daoud*, 462 Mich 621, 635; 614 NW2d 152 (2000). The determination of voluntariness "should be whether, considering the totality of all the surrounding circumstances, the confession is 'the product of an essentially free and unconstrained choice by its maker' or whether the accused's

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

[3] *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

'will has been overborne and his capacity for self determination critically impaired.'" *People v Cipriano*, 431 Mich 315, 333-334; 429 NW2d 781 (1988) (quotation omitted).

> In determining whether a statement is voluntary, the trial court should consider, among other things, the following factors: the 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. [*Id*. at 334 (citations omitted).]

The presence or absence of one of these factors is not dispositive. *Id*. Rather, voluntariness of a statement depends on the totality of the circumstances. *Id*. In this case, after applying the *Cipriano* factors, we conclude that the trial court did not clearly err in finding that defendant voluntarily waived his *Miranda* rights and made voluntary statements to police.

The record shows that defendant was a 22-year-old college student who had significant previous experience with police in general, and with one of the detectives in particular. Defendant's interrogation was of approximately one hour's duration and took place in two segments. Police initially terminated the interview after less than thirty minutes after defendant stated that he did not want to talk and did not feel well; however, defendant reinitiated the interrogation. Defendant was not held for a significant amount of time before the interrogation and he does not contend that police delayed bringing him before a magistrate. Police informed defendant of his constitutional rights before the interrogation and at times during the interrogation police reminded defendant that he could invoke his rights at any time. Defendant acknowledged having been read his rights and he signed a waiver form wherein he acknowledged that he was apprised of his rights and he agreed to waive those rights and speak with police. Defendant was not deprived of sleep, food, or necessary medical attention. Finally, defendant was not physically abused or threatened with abuse during the interrogation.

We hold that defendant's confession was freely and voluntarily made under the totality of the circumstances. Although defendant claims that he was high on Xanax, one of the interviewing detectives testified that defendant did not show signs of being under the influence of any drugs, defendant was able to engage in conversation and make logical responses to the officers' questions, and defendant had previously taken Xanax and maintained the cognitive ability to attend college while taking the drug. The trial court was provided with a video recording of the interview and was able to view the conduct of defendant and the officers for itself. The trial court determined that defendant's conduct was "consistent with understanding what was going on" and that the officers never threatened, coerced, or made impermissible promises of leniency to defendant. The record supports the trial court's finding that defendant's will was not overborne or his capacity for self-determination critically impaired.

Additionally, a waiver is "knowingly and intelligently" made if evidence supports that the "accused understood that he did not have to speak, that he had the right to the presence of counsel, and that the state could use what he said in a later trial against him." *People v Abraham*, 234 Mich App 640, 647; 599 NW2d 736 (1999). In this case, defendant was a college student who had studied paralegal courses and had extensive previous experience with police. Defendant engaged police during the interrogation and attempted to negotiate with them on multiple occasions. Defendant acknowledged that he was read his rights, and he signed a form waiving those rights. In addition, police repeated to defendant that he did not have to talk, that he could call a lawyer and invoke his rights at any time, and that his statements were being recorded and would be used against him. Further, at the *Walker* hearing, defendant agreed that he was capable of making an informed decision to waive his rights. In sum, the evidence demonstrates that defendant knowingly and intelligently waived his *Miranda* rights because he understood that he did not have to speak, that he had the right to the presence of counsel, and that his statements would be used against him at trial. *Id*. As such, defendant's argument related to a knowing and intelligent waiver fails. The trial court did not clearly err in denying defendant's motion to suppress. *Aldrich*, 246 Mich App at 116.

III. DENIAL OF FIFTH AMENDMENT RIGHTS

Next, defendant contends that police violated his constitutional rights when, during the interrogation, they refused to honor his requests for an attorney and refused to honor his request to remain silent. Whether a criminal defendant waived his Fifth Amendment rights involves a question of law that we review de novo. *People v Gipson*, 287 Mich App 261, 264; 787 NW2d 126 (2010). Because defendant failed to preserve this issue for review by raising it in the lower court, our review is limited to whether plain error affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764, 774; 597 NW2d 130 (1999).

Defendant contends that he invoked his right to counsel on the following three separate occasions during the interrogation:

Defendant.	*being in college . . . I should call my lawyer right now, right*?
	* * *
Defendant.	*I need to - - can I call my lawyer*?
Police.	*You can if you want.*
Police.	*If you want one, you tell us and then we're done talking. . .*
	* * *
Defendant	All right, *I'm thinking I want to talk to* - - (undecipherable). *I think my lawyer* - - it's Saturday, I don't even know if we'll be able to get a hold of him.
Police.	That's fine.

Defendant. This is ridiculous. What's my bond, Greg? [Emphasis added.]

To invoke the right to counsel, an accused must make a statement that can "reasonably be construed to be an expression of a desire for the assistance of an attorney" viewed on an objective standard. *Davis v United States*, 512 US 452, 458-460; 114 S Ct 2350; 129 L Ed 2d 362 (1994). However, an ambiguous reference to an attorney "that a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel," is insufficient to invoke the right to counsel. *Id*. Once a suspect invokes his right to counsel, police must cease all interrogation until counsel has been made available unless the suspect initiates further communication. *Edwards v Arizona*, 451 US 477, 484-485; 101 S Ct 1880; 68 L Ed 2d 378 (1981).

In this case, we find that defendant did not unequivocally invoke his right to counsel. Instead, he made ambiguous references to an attorney "that a reasonable officer in light of the circumstances would have understood only. . . ." as being that defendant might be invoking the right to counsel. *Davis*, 512 US at 458-460. Specifically, in his first reference to an attorney, defendant stated, "being in college . . . I should call my lawyer right now right?" This reference was a question regarding counsel, as opposed to an unequivocal request to speak with an attorney. Similarly, the second time that defendant referenced an attorney, he merely asked if he could call his lawyer, stating, "I need to - - can I call my lawyer?" The detective responded by explaining that defendant could call an attorney if he wanted to and stated "If you want one, you tell us and then we're done talking. . . ." Defendant responded by trying to negotiate with police, and he did not unequivocally state that he wanted to speak with an attorney. Finally, defendant stated, "I'm thinking I want to talk to . . . I think my lawyer . . ." and then changed the subject and started talking to police about his bond. We conclude that defendant did not invoke his right to counsel under the *Davis* standard.

Defendant additionally contends that he invoked his right to silence during the police interview when he stated "I don't want to answer that question" on five separate occasions. In response, the interviewing officers moved on to another question but did not end the interview. "[A] suspect is free at any time to exercise his right to remain silent, and all interrogation must cease if such right is asserted." *People v Catey*, 135 Mich App 714, 722; 356 NW2d 241 (1984). To invoke his Fifth Amendment rights, an accused must "unequivocally" indicate that he wishes to remain silent. *Id*.

In this case, we conclude that defendant did not "unequivocally" indicate that he wished to remain silent; rather, he indicated that he did not want to provide answers to specific questions. Defendant did not indicate that he wanted to cut off all questioning and stop the interrogation. In fact, when defendant *did* indicate that he wished to cease talking to the detectives, they immediately terminated the interview, only returning when defendant indicated that he wished to resume negotiations. As such, the detectives did not violate defendant's right to remain silent, and the trial court did not violate his constitutional rights by admitting defendant's incriminating statements.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant raises several claims that his trial counsel was ineffective at the *Walker* hearing. The question of whether defendant received ineffective assistance of counsel presents a mixed question of fact and constitutional law. *People v Armstrong*, 490 Mich 281, 289; 806 NW2d 676 (2011). To establish ineffective assistance, a defendant must show that counsel's performance fell below an objective standard of reasonableness and there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Id.* at 289-90. Whether defense counsel's performance was deficient is measured against an objective standard of reasonableness. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000).[4]

Defendant contends that trial counsel should have called his mother to testify to rebut detective Drumb's testimony that defendant was "lucid" during the interrogation. Defendant has failed to articulate how his counsel was defective for failing to call this witness. The decision whether or not to call a witness is presumed to be a matter of trial strategy. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2008). The failure to call a witness can constitute ineffective assistance of counsel only if it deprives defendant of a substantial defense. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). Here, defendant fails to articulate how his mother's testimony would undercut Drumb's testimony that defendant was "lucid" during the interrogation. Additionally, the trial court was able to view the interrogation and could observe defendant's coherence for itself. Defendant has not demonstrated that he was deprived of a substantial defense.

Defendant also contends that his trial counsel was ineffective for failing to call expert witnesses to testify regarding the adverse effects of his Xanax use or his history of mental health problems. However, defendant has not demonstrated the existence of an expert witness that would have testified favorably on behalf of defendant. We first note that mere speculation by a defendant that an independent expert could have provided favorable testimony is insufficient to show that defendant was deprived of a substantial defense. *Payne,* 285 Mich App at 190. This is especially true when the trial court was able to judge defendant's lucidity and coherence for itself.

Finally, defendant argues that his counsel failed to introduce his psychiatric records and substance abuse history to the trial court during the *Walker* hearing. Defendant states that he had received court-ordered mental health and substance abuse treatment in the past and had relapsed and discontinued treatment a month prior to his offense. We note at first that counsel's decision

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[4] Defendant attaches several items to his brief on appeal in support of his claim of ineffective assistance. These items were not made part of the lower court record. This Court's review is limited to the lower court record and it will not consider items attached to defendant's appellate brief that were not part of the lower court record. *People v Shively*, 230 Mich App 626, 629 n 1; 584 NW2d 740 (1998), lv den 459 Mich 980 (1999). Thus this Court will not consider the substance of the affidavits and materials attached to defendant's brief in support of his ineffectiveness claim.

not to present records of failure to comply with court-ordered treatment could easily be viewed as a strategic decision, since evidence that defendant has failed to comply with previous rehabilitative efforts was not necessarily favorable to defendant. Further, defendant has failed to articulate how he was prejudiced by his counsel's alleged failure. The trial court observed that defendant informed the interviewing officers that he was not on drugs, that he had taken a breathalyzer that morning and was not intoxicated on alcohol, and that there was nothing in his prior history to indicate that could not understand his *Miranda* rights. The trial court specifically stated that it did not find anything in the interview that would indicate that defendant was under the influence of drugs or was otherwise ill or incoherent. His counsel's alleged failure to introduce records of defendant's past struggle with drugs was not outcome determinative, because the trial court determined that he was *currently* able to waive his *Miranda* rights.

Affirmed.

/s/ Pat M. Donofrio
/s/ Amy Ronayne Krause
/s/ Mark T. Boonstra