

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
August 28, 2012

v

TODD MICHAEL PINK,

Defendant-Appellant.

No. 304909
Macomb Circuit Court
LC No. 2010-002942-FC

Before: MURRAY, P.J., and FORT HOOD and BORRELLO, JJ.

PER CURIAM.

Defendant's convictions arise from the murders of his girlfriend and her son and the assault with intent to murder the girlfriend's daughter and her roommate.¹ He appeals by right. We affirm defendant's convictions, but remand for the correction of the judgment of sentence.

Defendant attended a festival with his girlfriend, her two children, and his girlfriend's roommate. Defendant was involved in two different altercations at the festival, and the group decided to leave the event. During the ride back home, an argument occurred. Defendant telephoned his father and asked him to meet at the girlfriend's residence. After the group arrived at the home, defendant spoke with his father, but drove himself away from the home. Defendant went to his father's residence, took a firearm, and returned to his girlfriend's residence. The roommate saw defendant approaching the front door and walked toward the door to open it. Defendant burst through the door and shot the roommate. He then shot his girlfriend, and she died at the home. Defendant's gun jammed, and he utilized kitchen utensils to kill his girlfriend's son and seriously injure her daughter. Despite being shot, the roommate survived. He was unconscious, but regained consciousness to hear whimpering. The roommate carried the girl out of the home and went to a neighbor's home to call police.

¹ Defendant was convicted, following a jury trial, of two counts of first-degree premeditated murder, MCL 750.316(1)(a), two counts of first-degree felony murder, MCL 750.316(1)(b), six counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, two counts of assault with intent to commit murder, MCL 750.83, resisting and obstructing a police officer, MCL 750.81d(1), and first-degree home invasion, MCL 750.110a(2).

Defendant drove away from the residence and waived to neighborhood children when he departed. He then telephoned his sister and confessed to killing four people. Defendant's sister instructed defendant to meet at her home. There, defendant again admitted to killing four people to his sister and brother-in-law. Defendant's parents also arrived at the home. Defendant had blood on his pants and had a weapon. His brother-in-law telephoned police. The family was cleared from the home by police, but defendant was physically removed from the home by a SWAT team.

At the police station, a man representing himself as an attorney² asked to speak with defendant, but was advised by the desk officer that the facility was not equipped for attorney-client interviews. Defendant was initially too inebriated to be interviewed by police. After a lapse in time, he was questioned by police. Before the interview, defendant was advised that a man representing himself as an attorney came into the station to see defendant, but left. Defendant asked to contact his mother to determine if the family attorney was attempting to reach defendant, but police were only able to leave a message. Defendant was advised of and waived his *Miranda*³ rights. He made admissions to police regarding his acquisition of a gun, but refused to admit that he consciously recalled the events that occurred in his girlfriend's home. However, when shown photographs and asked if he was responsible for what transpired, defendant responded affirmatively. Defendant was convicted as charged.

Defendant first alleges that he was deprived of due process of law when police officers failed to advise that counsel attempted to visit him before the custodial interrogation. We disagree. "We review for clear error a trial court's findings of fact in a suppression hearing, but we review de novo its ultimate decision on a motion to suppress." *People v Hyde*, 285 Mich App 428, 436; 775 NW2d 833 (2009) (footnote omitted). A finding of fact is clearly erroneous if, upon a review on the entire record, this Court is left with a definite and firm conviction that a mistake occurred. *People v Roberts*, 292 Mich App 492, 503; 808 NW2d 290 (2011). The trial court's resolution of conflicting evidence presented during a suppression hearing is entitled to deference, and we do not resolve credibility determinations anew. *People v Geno*, 261 Mich App 625, 629; 683 NW2d 687 (2004). When the trial court fails to make credibility assessments in accordance with the factual predicate for the defendant's claimed due process violation, the defendant's argument is unsupported. *Id.*

Defendant asserts that the police "effectively concealed that retained counsel was available" by essentially opining that his counsel was incompetent or untruthful. Additionally, defendant claims that the "context of the exchange" demonstrates that defendant was independently unaware that counsel was available for consultation prior to questioning. Finally, it is alleged that the error in admission of defendant's statement was not harmless because the

² Counsel for defendant at trial apparently was the individual who went to the police station. He did not have another attorney represent defendant at this hearing to allow him to testify. Rather, the trial attorney made oral, unsworn representations on the record. The officer's testimony conflicted with the attorney's version of events.

³ *Miranda v Arizona*, 396 US 868; 24 L Ed 2d 122; 90 S Ct 140 (1969).

admission that he left the premises and returned with a gun established the element of premeditation to support the first-degree murder conviction.

“[P]olice must inform a suspect when retained counsel is available for consultation, failing which any statement made by the defendant after the attorney’s arrival would be suppressed.” *People v Sexton*, 458 Mich 43, 53; 580 NW2d 404 (1998). Law enforcement investigators, in the course of a custodial interrogation, cannot “conceal from suspects that counsel has been made available to them and is at their disposal.” *People v Bender*, 452 Mich 594, 621; 551 NW2d 71 (1996). “[O]nce the Sixth Amendment right to counsel has attached a defendant may still validly waive that right to counsel even if the interrogation was initiated by the police.” *People v Crockran*, 292 Mich App 253, 263; 808 NW2d 499 (2011). Suppression is not warranted when it is concluded that a violation of the rule enunciated by the *Bender* Court failed to occur. *Id.*

In *Crockran*, the defendant was apparently the suspect of a crime and consulted an attorney. In a one-week period, there were over 20 phone calls between the defendant and the attorney. Although there was a discussion regarding retaining the attorney, the details had not yet been finalized. *Crockran*, 292 Mich App at 259. The attorney left a message with police about the possibility of arranging the defendant’s surrender. Six days later, the defendant called to advise his attorney that the police had arrived at the defendant’s home. The attorney asked to speak to the police, but before he could do so, the phone went dead. The defendant also told the police that he had a lawyer, and he repeatedly asked the police if he could talk to his lawyer. *Id.* at 260-261. This Court held that the record evidence established an attorney-client relationship between the defendant and the lawyer. Therefore, the police did not conceal “the fact that [the] defendant had counsel available to him and that counsel was at his disposal.” *Id.* at 262.

In the present case, the trial court conducted an evidentiary hearing and concluded that the police complied with the requirement that defendant be informed that someone claiming to be defendant’s attorney visited the police station. It also noted that police were not required to arrange a meeting between the attorney and defendant, were not required to telephone third parties to ascertain the visitor’s identity, and were not required to refrain from expressing an opinion regarding the actions of the purported attorney. The trial court concluded that the police explained the *Miranda* rights to defendant, and defendant knowingly and voluntarily waived those rights.

In light of the record evidence and factual findings, the trial court properly admitted defendant’s statement. *Hyde*, 285 Mich App at 436. There is no evidence of “effective concealment” when the police expressly notified defendant that a man claiming to be an attorney wished to speak to defendant. Police notified defendant of this visit at the start of the interview, and there is no law prohibiting the police from rendering an opinion regarding the actions of counsel.

Moreover, even if we assumed that admission of defendant’s statement was erroneous, reversal is not required. When a confession is erroneously admitted, the reviewing court must examine the remaining evidence against the defendant to determine whether the admission of the confession was harmless beyond a reasonable doubt. *People v Whitehead*, 238 Mich App 1, 10; 604 NW2d 737 (1999). Admission of mere cumulative evidence is not prejudicial. *People v*

Rodriquez (On Remand), 216 Mich App 329, 332; 549 NW2d 359 (1996). In the present case, defendant's acknowledgement that he obtained a gun, returned to the premises, and was responsible for what happened in the home was cumulative to other evidence in the case. Defendant's sister expressly testified that defendant admitted to killing four people. Defendant's brother-in-law also testified that defendant admitted to shooting two people and stabbing the children. Evidence of premeditation was established through the roommate's testimony. He testified that he spent time with defendant earlier in the day and did not see him with a gun. Defendant left the home for an hour and returned with a gun. The roommate testified that defendant kicked the door in and shot him, causing him to blackout. Accordingly, this claim of error does not entitle defendant to appellate relief. *Whitehead*, 238 Mich App at 10; *Rodriquez*, 216 Mich App at 332.

Next, defendant alleges that his due process rights were violated when the jury was empanelled by referencing their juror numbers only. We disagree. Both constitutional and nonconstitutional unpreserved claims are reviewed for outcome-determinative plain error. *People v Armisted*, 295 Mich App 32, 46; 811 NW2d 47 (2011). Defendant must establish plain error that affected substantial rights, and reversal is appropriate only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *People v Lechleitner*, 291 Mich App 56, 59; 804 NW2d 345 (2010).

"An 'anonymous jury' is one in which certain information is withheld from the parties, presumably for the safety of the jurors or to prevent harassment by the public." *People v Williams*, 241 Mich App 519, 522; 616 NW2d 710 (2000). However, the use of the anonymous jury must balance the court's recognition of the need to promote the safety of jurors against the interests of the defendant. *Id.* "A challenge to an 'anonymous jury' will only succeed where the record reflects that withholding information precluded meaningful voir dire or that the defendant's presumption of innocence was compromised." *People v Hanks*, 276 Mich App 91, 93; 740 NW2d 530 (2007). The mere reference to jurors by numbers is insufficient to constitute an anonymous jury. *Williams*, 241 Mich App at 523. When the parties still have access to the jurors' biographical information from the juror questionnaires and the use of numbers is not presented to the jury as unusual or extraordinary, the parties are able to conduct meaningful voir dire and the presumption of innocence is not undermined. *Hanks*, 276 Mich App at 94.

The record does not support defendant's claim that the trial court impaneled an anonymous jury. Although the potential jurors were referenced by number only, they were questioned regarding their occupation, marital status, and the occupation of any spouse if applicable. Additionally, the trial court allowed the attorneys to question the jurors regarding their work and life experience as well as their ability to set aside personal experiences and beliefs and follow the instructions provided by the trial court. There is no indication that defendant was

deprived of meaningful voir dire or of the presumption of innocence. *Hanks*, 276 Mich App at 94.⁴ Therefore, this claim of error is without merit.

Defendant also argues that the trial court erred by refusing to dismiss a potential juror for cause. We disagree. During voir dire, defendant's trial counsel told prospective jurors that the case involved the death of a young child and asked if any jurors felt they could not be fair in such a case. The juror seated in seat number seven ("Juror Seven") raised his or her hand indicating that he or she was unsure about remaining impartial. Defense counsel challenged Juror Seven for cause. The trial court, noting that defense counsel did not ask the juror any follow-up questions, examined the juror to determine whether the juror could remain impartial. The trial court asked Juror Seven if he or she could decide the case solely on the evidence; Juror Seven replied in the affirmative. The trial court was satisfied with Juror Seven's response and denied defendant's challenge.

"[A] criminal defendant has a constitutional right to be tried by an impartial jury" *People v Miller*, 482 Mich 540, 547; 759 NW2d 850 (2008), citing US Const, Am VI; Const 1963, art 1, § 20. A four-part test is employed "to determine whether an error in refusing a challenge for cause merits reversal." *People v Lee*, 212 Mich App 228, 248; 537 NW2d 233 (1995).

There must be a clear and independent showing on the record that (1) the court improperly denied a challenge for cause, (2) the aggrieved party exhausted all peremptory challenges, (3) the party demonstrated the desire to excuse another subsequently summoned juror, and (4) the juror whom the party wished later to excuse was objectionable. [*Id.* at 248-249.]

"Jurors are presumptively competent and impartial, and the party alleging the disqualification bears the burden of proving its existence." *People v Johnson*, 245 Mich App 243, 256; 631 NW2d 1 (2001). This Court reviews for an abuse of discretion the trial court's decision to deny a challenge to a prospective juror for cause. *Williams*, 241 Mich App at 521.

The trial court did not abuse its discretion in denying defendant's challenge to Juror Seven. Although Juror Seven initially expressed concerns about his or her ability to decide the case, Juror Seven ultimately assured the trial court that he or she could decide the case solely on the evidence. When evaluating claims that a juror should have been excused for cause, "[i]t is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." *People v Cline*, 276 Mich App 634, 641; 741 NW2d 563 (2007) (quotation omitted). Moreover, "[t]his Court defers to the trial court's superior ability to assess from a venireman's demeanor whether the person would be impartial." *Williams*, 241 Mich App at 522. Thus, we hold that the trial court did not abuse its discretion in declining to excuse Juror Seven. *Id.* In light of our conclusion on this issue, we reject defendant's contention that trial

⁴ Although this Court has "urged" trial courts to advise jurors that the use of numbers in lieu of names is merely logistical, *Hanks*, 276 Mich App at 94, this is only a recommendation and no such requirement has been imposed on Michigan courts.

counsel was ineffective for failing to renew the challenge for cause after the trial court's ruling. *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010) ("Failing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel.")

Lastly, defendant contends that the judgment of sentence must be corrected to reflect that he was convicted of two counts of first-degree murder with each supported by two different theories, and the prosecutor agrees. See *People v Williams*, 475 Mich 101, 103; 715 NW2d 24 (2006). At sentencing, the trial court agreed to merge the sentences for first-degree murder and felony-murder, but when reduced to a judgment, it did not reflect the trial court's ruling. Additionally, defendant contends and the prosecutor concedes that the judgment of sentence incorrectly reflects consecutive sentences regarding felony-firearm. Accordingly, we remand for the ministerial correction of the judgment of sentence.

Affirmed with regard to defendant's convictions, but remanded for correction of the judgment of sentence. We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ Karen M. Fort Hood
/s/ Stephen L. Borrello