

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellee,

UNPUBLISHED  
November 27, 2012

v

DEVI LOREN SMITH,

No. 306574  
Wayne Circuit Court  
LC No. 10-010956-FC

Defendant-Appellant.

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Before: JANSEN, P.J., and STEPHENS and RIORDAN, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of first-degree murder, MCL 750.316(1)(a), two counts of torture, MCL 750.85, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to life imprisonment without the possibility of parole for the first-degree murder convictions, 23 to 50 years' imprisonment for the torture convictions, and two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant first argues that the trial court erred in admitting a written statement defendant gave to police and a video recording of his police interrogation. Defendant asserts that he did not knowingly and intelligently waive his *Miranda*<sup>1</sup> rights because he did not know he was being questioned as a criminal defendant and because he did not understand his constitutional rights. We disagree.

We review a trial court's determination that a waiver of Fifth Amendment rights was knowing, intelligent, and voluntary de novo. *People v Gipson*, 287 Mich App 261, 264; 787 NW2d 126 (2010). This Court examines the entire record and makes an independent determination, but the trial court's factual findings are reviewed for clear error and will be affirmed unless the Court is left with a definite and firm conviction that a mistake was made. *Id.* "Deference is given to a trial court's assessment of the weight of the evidence and the credibility of the witnesses." *Id.*

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

“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 McBride*, 273 Mich App 238, 249; 729 NW2d 551 (2006), rev’d in part 480 Mich 1047 (2008). The defendant must have been warned before any questioning that he had the right to remain silent, that anything he said could be used against him in a court of law, that he had the right to the presence of an attorney, and that if he could not afford an attorney one would be appointed for him before any questioning if he so desired. *Id.* at 250 (citation omitted).

The determination whether a defendant has knowingly and intelligently waived his *Miranda* rights depends on the totality of the circumstances. *Id.* at 253. Consideration of the totality of the circumstances includes consideration of the defendant's age, experience, education, background, and intelligence, and the defendant's capacity to understand the *Miranda* warnings, the nature of his rights, and the consequences of waiving his rights. *People v Daoud*, 462 Mich 621, 634; 614 NW2d 152 (2000). “To waive rights intelligently and knowingly, a defendant must at least understand basically what those rights encompass and minimally what their waiver will entail.” *McBride*, 273 Mich App at 254 (citation omitted). To knowingly waive *Miranda* rights, a defendant need not understand the ramifications and consequences of choosing to waive or exercise the rights, but the prosecutor must present evidence sufficient to demonstrate that the defendant understood that he did not have to speak and that he had the right to the presence of counsel during questioning. *Id.* The determination of the validity of a waiver must be made on an objective basis. *Daoud*, 462 Mich at 634.

We review the trial court’s factual findings for clear error. The trial court did not clearly err in its factual findings. Detective Derryck Thomas testified that defendant was interviewed once on September 3, 2010. The interrogation video showed that defendant was given the advice of rights form, and that he read the first right out loud. Defendant stated, “I have the right to remain silent, and that I do have the right to answer any questions put to me.” Thomas then told defendant to initial the form to indicate that he had read the form. Defendant initialed the form next to the right he read aloud. Defendant looked at the form for several more seconds, and then Thomas asked him if he had read the second right and told him to initial the second right. Defendant then initialed the form next to the second right. Thomas told defendant to finish reading the form. After about 30 seconds, Thomas asked if defendant was stuck. Thomas then read the rest of the form aloud to defendant and defendant signed the form. Based on the record, the court did not clearly err in its factual findings.

At the hearing, defendant testified that Thomas told him that he would only be a witness in the homicide case, and never told him that he was a suspect. Defendant also testified that Thomas gave him the advice of rights form, but defendant did not read the rights to himself or aloud. However, the trial court relied on the interrogation video for its findings, and did not rely on defendant’s testimony. “Deference is given to a trial court's assessment of the weight of the evidence and the credibility of the witnesses.” *Gipson*, 287 Mich App at 264.

Based on the trial court’s factual findings, defendant voluntarily, knowingly, and intelligently waived his Fifth Amendment rights. Defendant could read, had a high school education, and had completed some college. Defendant was given his rights, and he read each right or had the rights read to him. Defendant read the first right out loud, and stated, “I have the right to remain silent, and that I do have the right to answer any questions put to me.” The

second portion of defendant's statement was incorrect. However, defendant was required to be warned that he had the right to remain silent, that anything he said could be used against him in a court of law, that he had the right to the presence of an attorney, and that if he could not afford an attorney one would be appointed for him before any questioning if he so desired. *McBride*, 273 Mich App at 250. Defendant clearly read "I have the right to remain silent," out loud, without mistakes. Therefore, defendant's misstatement fails to establish that defendant did not knowingly waive his rights. Defendant read all his rights or had the rights read to him, and he acknowledged that he had an opportunity to read his rights and that he understood them. Therefore, defendant voluntarily, knowingly, and intelligently waived his Fifth Amendment rights after receiving his *Miranda* warnings, and he is not entitled to a new trial.

Defendant next argues that a recording of the 911 call made by a child witness in the case was improperly admitted at trial because it was irrelevant and overly prejudicial. We disagree.

"A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion." *People v Brown*, 294 Mich App 377, 385; 811 NW2d 531 (2011). The trial court abuses its discretion when its decision is outside the range of principled outcomes. *Id.*

"Relevant evidence is generally admissible." *People v Roper*, 286 Mich App 77, 91; 777 NW2d 483 (2009). Evidence is relevant if it has "any tendency to make the existence of any fact which is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. Evidence that affects the credibility of a victim or witness is relevant. *People v King*, \_\_\_ Mich App \_\_\_; \_\_\_ NW2d \_\_\_ (Docket No. 301793) (issued July 31, 2012) (slip op at 5). "[T]he jury is generally entitled to weigh all evidence which might bear on the truth or accuracy of a witness' testimony." *Id.*

"All relevant evidence is prejudicial; only *unfairly* prejudicial evidence may be excluded." *People v Danto*, 294 Mich App 596, 600; \_\_\_ NW2d \_\_\_ (2011). "Unfair prejudice exists when there is a tendency that evidence with little probative value will be given too much weight by the jury." *Id.* Relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." MRE 403; *People v Meissner*, 294 Mich App 438, 451; 812 NW2d 37 (2011).

The trial court did not abuse its discretion when it admitted the recording of the 911 call into evidence. In this case, an eight-year-old girl was in the house while her mother and a close family friend were shot and killed. After the shooting, the child called 911 and reported the incident. The recording of the 911 call was admitted as evidence at defendant's trial. The child also testified at trial regarding the incident.

The 911 call recording was relevant to the proceedings because it had a tendency to make more probable that the homicides occurred in the manner that the child witness testified by corroborating her testimony. See MRE 401. The witness's statements to the 911 operator were consistent with her statements to police, a Kids Talk interviewer, and her trial testimony. Additionally, the recording showed that the witness, although clearly upset, was able to

understand and articulate what was happening to the 911 operator. The recording enhanced the witness's credibility, so it was relevant to the proceedings. *King*, slip op at 5.

The recording of the 911 call, although emotional, was not unfairly prejudicial because the probative value of the recording was not substantially outweighed by the danger of unfair prejudice. See MRE 403. There was trial testimony regarding the same information conveyed on the 911 call, and the recording corroborated the testimony. Therefore, the trial court did not abuse its discretion in admitting the recording of the 911 call.

Affirmed.

/s/ Kathleen Jansen  
/s/ Cynthia Diane Stephens  
/s/ Michael J. Riordan