STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant, v MANTREASE DATRELL SMART, Defendant-Appellee.	FOR PUBLICATION February 11, 2014 9:05 a.m. No. 314980 Genesee Circuit Court LC No. 11-029652-FC

Before: SERVITTO, P.J., and CAVANAGH and WILDER, JJ.

SERVITTO, P.J.

The prosecution appeals by leave granted[1] the trial court's order suppressing statements made by defendant on March 15, 2011, and June 8, 2011. We affirm the order suppressing both statements.

"This Court reviews de novo the trial court's ultimate ruling on the defendant's motion to suppress." *People v Brown*, 279 Mich App 116, 127; 755 NW2d 664 (2008). If this Court's "inquiry requires interpretation of the Michigan Rules of Evidence, an issue of law is presented, which this Court reviews de novo." *People v Dobek*, 274 Mich App 58, 93; 732 NW2d 546 (2007). The trial court's findings of fact at a suppression hearing are reviewed for clear error. *People v Chowdhury*, 285 Mich App 509, 514; 775 NW2d 845 (2009).

Defendant was charged with one count of felony murder, MCL 750.316; two counts of armed robbery, MCL 750.529; one count of assault with intent to murder, MCL 750.83; and one count of felony firearm, MCL 750.227b, in connection with the robbery and shooting death of Megan Kreuzer on May 31, 2010. Defendant supplied a gun to two other men who planned the robbery. Defendant also witnessed the robbery, during which one of the other men shot and killed Kreuzer.

Defendant's involvement was unknown until he was charged in another incident and advised his attorney in that case that he had information concerning a homicide. Hoping to work

[1]See *People v Smart*, unpublished order of the Court of Appeals, entered March 27, 2013 (Docket No. 314980).

out a favorable plea bargain in the pending case against him, defendant's attorney spoke with Assistant Prosecuting Attorney Richmond Riggs of the Genesee County Prosecutor's Office and thereafter arranged a meeting with Sergeant Mitch Brown, the officer in charge of the homicide case, to discuss the instant matter. Defendant's attorney, believing that defendant may have been a witness to the murder, elicited an agreement from Riggs that the information defendant provided at the meeting would not be used against him. At the March 15, 2011, meeting attended by Sergeant Brown, defendant, and defense attorney Lazzio, defendant (to Lazzio's surprise) admitted to providing a weapon to the individuals who planned the robbery of Kreuzer and then witnessing the shooting. Thereafter, defendant entered into a written plea agreement in the case pending against him. Defendant subsequently desired to schedule another meeting with Sergeant Brown because defendant questioned whether his attorney had secured the best possible plea agreement. Sergeant Brown and Lazzio both believed the plea agreement would not change and Lazzio asked Sergeant Brown to tell defendant that the plea agreement would not improve. Nevertheless, the prosecutor's office urged Sergeant Brown to meet with defendant again to see if he could obtain more information from defendant about the homicide.

As a result, a second interview between defendant, Lazzio, and Sergeant Brown took place on June 8, 2011. At that meeting, Sergeant Brown told defendant that he did not think that the plea agreement was going to get any better and that it was the prosecutor's office that decided what plea deals to offer. Defendant and Sergeant Brown still continued to converse and defendant ultimately revealed further information about the robbery and homicide that implicated him more than he had originally admitted. Defendant was thereafter charged in the instant case.

Prior to trial, defendant orally moved to suppress the statements he made at both the March 15, 2011, and June 8, 2011, meetings pursuant to MRE 410. The trial court conducted an evidentiary hearing to take testimony from those who participated in the interviews and, at the conclusion of the hearing, the trial court suppressed both statements.

The prosecution conceded (and still concedes) that defendant's March 15, 2011, statement was inadmissible under MRE 410(4), as a statement made during plea discussions, but argues that MRE 410(4) does not apply to defendant's June 8, 2011, statement. We disagree.

MRE 410 provides:

> Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:
>
> * * *
>
> (4) Any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

Citing *People v Dunn*, 446 Mich 409, 415; 521 NW2d 255 (1994), the prosecution first contends that defendant's expectation that the June 8, 2011, meeting would lead to a better plea agreement was unreasonable. In *Dunn*, our Supreme Court held that MRE 410 applies when: (1)

the defendant has "an actual subjective expectation to negotiate a plea at the time of the discussion," and (2) that expectation is reasonable "given the totality of the objective circumstances." *Dunn*, 446 Mich at 415, citing *United States v Robertson*, 582 F2d 1356, 1366 (CA 5, 1978).

We note that when *Dunn* was decided, MRE 410 read as follows:

> Inadmissibility of Pleas, Offers of Pleas, and Related Statements.
>
> Except as otherwise provided in this rule, evidence of a plea of guilty, later withdrawn, or a plea of nolo contendere, or of an offer to plead guilty or nolo contendere to the crime charged or any other crime, or of statements made in connection with any of the foregoing pleas or offers, is not admissible in any civil or criminal proceeding against the person who made the plea or offer. However, evidence of a statement made in connection with, and relevant to, a plea of guilty, later withdrawn, a plea of nolo contendere, or an offer to plead guilty or nolo contendere to the crime charged or any other crime, is admissible in a criminal proceeding for perjury or false statement.
> *People v Stevens*, 461 Mich 655, 661 n 4; 610 NW2d 881 (2000).

Thus, the amendment to MRE 410 added a required element that the statement subject to exclusion must be made in the course of plea discussions with an attorney for the prosecuting authority. In arguing that MRE 410 does not apply to the June 8, 2011, statement, the prosecution states that "[s]ince there was no attorney for the prosecuting attorney present and since defendant had no reasonable basis to expect a second statement to result in further plea negotiation, the trial court erroneously applied MRE 410." However, the prosecution focuses its argument *exclusively* on whether defendant's subjective expectations of obtaining further plea negotiations was reasonable, given Sergeant Brown's and defendant's own attorney's statements to him that no better plea agreement would be obtained. The prosecution does not elaborate on its claim that there was no attorney present and did not even cite to the prior language of MRE 410. "An appellant may not . . . give issues cursory treatment with little or no citation of supporting authority." *Houghton v Keller*, 256 Mich App 336, 339; 662 NW2d 854 (2003) (citations omitted). An appellant may also not merely announce its position and leave it to this Court to rationalize the basis for its claim, or elaborate its argument. *Blackburne & Brown Mortg Co v Ziomek*, 264 Mich App 615, 619; 692 NW2d 388 (2004). "An appellant's failure to properly address the merits of his assertion of error constitutes abandonment of the issue." *Houghton*, 256 Mich App at 339–340. We thus decline to address whether or not there was an attorney for the prosecuting attorney "present" during the June 8, 2011, meeting and whether that fact has any bearing on the admissibility of the challenged statement made during that meeting.

We specifically decline to address this issue not only because the prosecution abandoned the issue, but for additional reasons. First, although it has been established that no prosecuting attorney was physically present during the March 15, 2011, meeting between Sergeant Brown and defendant, the prosecutor nevertheless conceded that the March 15, 2011, statements were inadmissible under MRE 410. Clearly, then, the prosecutor believed that the statements by defendant at the March 15, 2011, meeting were given "in the course of plea discussions with an attorney for the prosecuting authority" despite the absence of the physical presence of a

prosecuting attorney during that meeting. For our purposes, and, we emphasize, *in this particular case*, then, the prosecutor has conceded that a prosecuting attorney need not be physically present for statements to be deemed inadmissible under MRE 410. The prosecutor has foreclosed review of this specific issue in this case by its concession.

Second, looking at MRE 410(4), the rule does not explicitly state that an attorney for the prosecuting authority must be physically present when the statement is made—and that is what the prosecutor's single statement on this issue provides: that an attorney was not physically present. Rather, under MRE 410(4) statements must be made only "in the course of plea discussions with an attorney for the prosecuting authority." "In the course of" means "in the progress or process of; during." See, *People v Williams*, 288 Mich App 67, 97; 792 NW2d 384 (2010), citing *Webster's New World Dictionary* (2d college ed., 1970). It is conceivable that a defendant may speak to persons other than an attorney for the prosecuting authority in the course of plea discussions. Indeed, a defendant may speak to persons, such as police officers, *at the direction* of an attorney for the prosecuting authority in the course of plea discussions, as it could be argued occurred here. Again, however, the precise meaning and application of this phrase (i.e., because pleas and plea offers can be withdrawn, whether plea negotiations are ever deemed concluded; whether a statement made to an agent of an attorney for the prosecuting authority is subject to suppression so long as it is made "in the course of" a defendant's plea negotiations; who may act as an agent for an attorney for the prosecuting authority, etc.) for purposes of suppression under MRE 410, was not raised by the prosecutor. More importantly, this raises a multitude of issues far too significant to be decided without proper briefing by both parties. While this Court *may* review issues not properly raised or addressed by a party "if a miscarriage of justice will result from a failure to pass on them, or if the question is one of law and all the facts necessary for its resolution have been presented, or where necessary for a proper determination of the case," *Heydon v MediaOne*, 275 Mich App 267, 278-279; 739 NW2d 373 (2007)(citation omitted), to do so here would be to disregard the primary principle of our adversarial system by denying each party a full and fair opportunity to be heard. We therefore leave the comprehensive interpretation of MRE 410(4) for an appropriate case that includes briefs addressing the issue, prepared by both parties.

Returning to the prosecutor's argument that defendant had no reasonable expectation to believe that he would be negotiating a plea at the June 8, 2011, meeting and both parties' reliance on *Dunn*, we would note that the version of MRE 410 in effect at the time *Dunn* was decided has no bearing on our Supreme Court's analysis of when MRE 410 applies. Keeping in mind that the amended version of MRE 410 now requires that the statement sought to be excluded be made in the course of plea negotiations with an attorney for the prosecuting authority, it would stand to reason that the defendant must still have an actual subjective expectation to negotiate a plea at the time of the discussion and that such expectation be reasonable under the totality of the circumstances. *Dunn*, 446 Mich at 415. Not every requested or held discussion concerning plea negotiations will necessarily result in a plea deal. And, simply because a defendant seeks to engage in a plea negotiation does not mean that the person to whom he is speaking (a prosecuting attorney or another person) would or must view any discussion with a defendant as a plea negotiation. There is thus no reason to stray from the guidelines imposed by *Dunn*, despite the amendment to MRE 410. As a result, our analysis establishes no new rule of law, nor does it modify an existing rule of law.

The prosecution claims that the trial court essentially made a finding of fact that defendant's belief that plea negotiations would take place at the June 8, 2011, meeting was not reasonable when it said, "[t]here was very little discussion about whether a plea agreement was going to be altered and it was pretty apparent that it wasn't." We disagree and conclude that the trial court implicitly found that defendant's expectation was reasonable.

In its closing statement to the trial court, the prosecution clearly cited the two-prong test from *Dunn*, 446 Mich at 415, and argued that defendant's expectation was not reasonable. The trial court heard this argument and granted defendant's motion to suppress, nonetheless. Furthermore, the trial court said it did not see a difference between the initiation of the March 15, 2011, meeting and the initiation of the June 8, 2011, meeting. Both were requested by defendant in his attempts to get a better plea agreement. We conclude that this finding was not clearly erroneous. See *Chowdhury*, 285 Mich App at 514. In *Dunn*, 446 Mich at 415-416, our Supreme Court found that the defendant's expectation was reasonable, stating:

> Shortly after his arrest, Dunn initiated communication with the detectives for the express purpose of negotiating a plea bargain with the prosecutor. The detectives encouraged him to talk so they could discuss the possibility of a plea with the prosecutor. With the information supplied by Dunn, the detectives went to the prosecutor and obtained a warrant for the second phone call.

Similarly, defendant initiated the June 8, 2011, meeting by telling his attorney that he thought he should get a better plea deal. In response, Lazzio arranged the meeting with Sergeant Brown. Lazzio did ask Sergeant Brown to tell defendant that the deal was not going to get better. But, importantly, Sergeant Brown did not simply call defendant and tell him that the plea agreement was not going to improve or that he needed to talk to the prosecuting authority. Instead, Sergeant Brown spoke to the prosecuting authority and, with the prosecution's urging, did, indeed, schedule another meeting with defendant as requested. The prosecuting authority was involved in the process of scheduling the June 8, 2011, meeting, just as it was with the March 15, 2011, meeting, and directed Sergeant Brown to see what information he could obtain from defendant about the homicide, just as it had with the March 15, 2011, meeting. This was not a situation where the prosecutor took a hands-off approach after the March 15, 2011, meeting was held. Furthermore, all parties were well aware that defendant was specifically requesting the second meeting to see if he could negotiate a better plea agreement. In holding the meeting with the knowledge that defendant requested and would appear at the meeting in an attempt to negotiate a better plea deal, Sergeant Brown, at the prosecutor's direction, gave defendant a reasonable belief that plea negotiations would take place at the June 8, 2011, meeting--just as they had when defendant requested the March 15, 2011, meeting for purposes of negotiating a plea agreement.

At the meeting, Sergeant Brown did communicate to defendant that he did not believe the deal would get any better. Sergeant Brown also, however, told defendant that the decision was not his to make, but rather, a decision made by the prosecutor's office. In addition, Sergeant Brown told defendant that he would "give this information to the Prosecutor and they would be very interested in hearing what you just told me." This statement could also serve to bolster defendant's belief that a potentially more promising plea agreement could be forthcoming.

Like the police officers in *Dunn*, 446 Mich at 415-416, Sergeant Brown encouraged defendant to talk by asking him questions about Megan Kreuzer's homicide. In addition, Sergeant Brown implied that defendant could benefit from the additional information he was providing. By saying that the prosecution would be "very interested" in what defendant said, Sergeant Brown indicated that the prosecution might view defendant as a more valuable witness given the additional information, which could result in a better plea deal for him. Furthermore, from defendant's perspective, the June 8, 2011, meeting was very similar to the March 15, 2011, meeting, which led to defendant's initial plea agreement. Both were initiated by defendant. Both were attended by the same individuals – defendant, Lazzio, and Sergeant Brown. During both meetings, Sergeant Brown took notes, which defendant then reviewed and signed. Thus, it was reasonable for defendant to believe that his second meeting with Sergeant Brown would have a similar outcome as the first, and possibly benefit him in terms of a plea deal.

The "totality of the objective circumstances" further support the trial court's finding that defendant's expectation was reasonable. See *Dunn*, 446 Mich at 415. Defendant did not actually enter his plea on the record until June 9, 2011, the day after his June 8, 2011, meeting with Sergeant Brown. Before defendant entered his plea, defense attorney Lazzio told the judge in that case that there were two "tweaks" to the plea agreement. One of the "tweaks" was that defendant would not be charged in the Kreuzer case if he cooperated and testified truthfully and consistently with the statements he made to Sergeant Brown. The prosecutor agreed that was part of the agreement. Thus, Lazzio and the prosecutor made adjustments to the plea agreement even after defendant's June 8, 2011, meeting with Sergeant Brown and defendant heard that "tweaks" were being made to the agreement such that he could have had a reasonable belief that the plea discussions were still ongoing at that time.

Because we conclude that defendant's June 8, 2011, statement was inadmissible under MRE 410(4), we need not consider whether the statement was also inadmissible because defendant was not advised of his *Miranda*[2] rights.

Affirmed.

/s/ Deborah A. Servitto
/s/ Mark J. Cavanagh

[2] *Miranda v Arizona*, 384 US 436, 444-445; 86 S Ct 1602; 16 L Ed 2d 694 (1966).