STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ASBERRY DONELL DANIELS,

Defendant-Appellant.

UNPUBLISHED
July 11, 1997

No. 184692
Kent Circuit Court
LC No. 94-002834-FC

Before: Bandstra, P.J., and Hoekstra and J.M. Batzer*, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of felony murder, MCL 750.316(b); MSA 28.548(b), two counts of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), attempted armed robbery, MCL 750.92; MSA 28.287 and MCL 750.529; MSA 28.797, and conspiracy to commit armed robbery, MCL 750.157a; MSA 28.354(1) and MCL 750.529; MSA 28.797. Defendant was sentenced to life imprisonment without parole for the felony murder conviction, two to five years' imprisonment for the attempted armed robbery conviction, thirty to fifty years' imprisonment for the conspiracy to commit armed robbery conviction, and two years' imprisonment for each of the felony firearm convictions. He appeals as of right, and we affirm.

Defendant first argues that he was denied due process of law and the right to confrontation by the admission of Perry Ward's preliminary examination testimony at trial. At the preliminary examination, Ward testified that defendant shot the victim; however, at trial, Ward intended to testify that another individual committed the shooting. The prosecutor then informed the trial court that if Ward recanted his preliminary examination testimony, he would be charged with perjury. Ward was appointed counsel, and subsequently, outside the presence of the jury, invoked his Fifth Amendment privilege against self-incrimination. The trial court ruled that Ward was unavailable to testify, and allowed his preliminary examination testimony to be read into the record.

* Circuit judge, sitting on the Court of Appeals by assignment.

Defendant claims that the prosecutor disregarded Ward's admission that his preliminary examination testimony was inaccurate, and therefore permitted false testimony to stand uncorrected. We disagree. When a witness intends to recant prior testimony, it is within a prosecutor's discretion to conclude whether the witness' original account was truthful. *People v Morrow*, 214 Mich App 158, 165; 542 NW2d 324 (1995).[1] Here, we find no abuse of discretion in the prosecutor's decision to introduce Ward's preliminary examination testimony.

Defendant next contends that the prosecutor successfully intimidated Ward into invoking his Fifth Amendment privilege against self-incrimination by threatening criminal prosecution for perjury if he recanted his preliminary examination testimony. This Court, in *People v Callington*, 123 Mich App 301, 306-307; 333 NW2d 260 (1983), set forth the following procedures which a prosecutor and trial court may invoke to avoid the appearance of intimidation:

> [W]e feel it is a better practice for the prosecutor to inform the court, in the appropriate case, out of the presence of the witness, of the possible need for a witness to be informed of his or her rights under the Fifth Amendment. The prosecutor should further state the basis for such request and the trial judge shall exercise his discretion in determining whether such warnings should issue. If the trial judge determines that such warnings are appropriate under the facts presented then the court shall inform the witness of his rights under the Fifth Amendment on the record out of the presence of the jury, if that be the case.

In this instance, the prosecutor and the trial court invoked the above noted procedures. Moreover, in *Morrow, supra* at 165, this Court noted:

> While the recanting witness stated that the prosecution threatened her with criminal prosecution if she recanted her testimony and told her that the penalty for perjury was life imprisonment, this does not constitute prosecutorial misconduct, as defendant suggests. If, in fact, the recanting witness lied while under oath at the preliminary examination, she is subject to prosecution for criminal perjury and was fully and properly informed of this before placing her recanting testimony on the record. MCL 750.422 *et seq.;* MSA 28.664 *et seq*. [*Id.*, 165 n 5.]

Here, we believe that Ward was likewise properly informed that he could be subject to criminal prosecution for perjury if he had lied while under oath at the preliminary examination, and that such notification does not rise to the level of intimidation.

Defendant also contends that his Sixth Amendment right to confrontation was violated by the admission of Ward's preliminary examination testimony. We disagree. A defendant's right to confrontation can be satisfied through the reading of a witness' preliminary examination testimony into the record in lieu of actual testimony. *People v Cooper*, 168 Mich App 62, 65; 423 NW2d 597 (1988), rev'd in part on other grds, 433 Mich 862 (1989). A principal factor in determining whether a defendant's right to confrontation was violated is whether defense counsel cross-examined the witness

at the preliminary examination. *Id.* at 67. In the case at bar, Ward was cross-examined at length by defense counsel at the preliminary examination. Thus, defendant's right to confrontation was not violated.

Defendant next argues that his statements to the police were involuntary. Specifically, he contends that his statements were psychologically coerced while he was under the effects of medication. We disagree. In reviewing the voluntariness of a confession, this Court examines the entire record and makes an independent determination regarding voluntariness. *People v Marshall*, 204 Mich App 584, 587; 517 NW2d 554 (1994). "Nonetheless, we defer to the trial court's superior ability to view the evidence and the witnesses and will not disturb the court's findings unless they are clearly erroneous." *Id.* A finding is clearly erroneous if this Court is left with a definite and firm conviction that a mistake has been made. *People v DeLisle*, 183 Mich App 713, 719; 455 NW2d 401 (1990). The ultimate test of admissibility of a confession is whether the totality of the circumstances surrounding its making demonstrate that it was freely and voluntarily given. *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988).

In this instance, an extensive *Walker*[2] hearing was conducted, and the trial court engaged in an in-depth analysis of all the testimony presented. Despite defendant's prolonged use of phenobarbital and Dilantin, the court found that defendant did not appear to suffer from a serious impairment. The trial court was impressed with defendant's ability to recall in great detail information relating to the two separate interviews that were conducted. While we agree that defendant may have been given misleading information pertaining to the accuracy of a polygraph examination, we are not persuaded that this renders defendant's statements involuntary. This Court, in *People v Hicks*, 185 Mich App 107, 113; 460 NW2d 569 (1990), held that misrepresentations to a defendant do not render an otherwise voluntary statement involuntary. Furthermore, despite defendant's contentions that he felt pressured to make the statements, the record fails to reveal any coercive conduct. Accordingly, we are not left with a definite and firm conviction that the trial court's ruling that defendant statements were voluntary was erroneous.

Finally, defendant argues that the trial court erroneously admitted rebuttal testimony. Because defendant failed to object to the admission of this evidence, this Court will review the issue only for manifest injustice. *People v King*, 210 Mich App 425, 433; 534 NW2d 534 (1995). Even assuming that the rebuttal testimony was improper, admission of this evidence could not result in manifest injustice because the rebuttal evidence that defendant claims on appeal was improperly admitted was previously introduced through cross-examination by defense counsel during the prosecution's case in chief. *King, supra* at 434.

Affirmed.

/s/ Joel P. Hoekstra
/s/ James M. Batzer

[1] The concurring opinion contends that *People v Morrow*, 214 Mich App 158; 542 NW2d 324 (1995), involved a separation of powers question and, therefore, reliance on it here is misplaced. The Court in *Morrow, supra* at 165, appositely states:

> Defendant argues, however, that once the alleged victim recanted her first story, the prosecutor would have to rely on testimony that was known to be false if it decided to proceed against defendant; this would, therefore, constitute an abuse of power. To the contrary, the prosecutor could reasonably conclude that the victim's original account was the truth and argue to the jury that it was corroborated by evidence other than the victim's statement. It is the province of the jury to determine which of the victim's accounts is the truth, and there is no abuse of power in the prosecutor relying upon and arguing for the victim's earlier sworn testimony in support of the criminal charges against defendant. We find no reason to conclude that the prosecutor's decision to proceed with the case even after the sole complaining witness recanted her testimony was unconstitutional, illegal, or ultra vires. That decision, that exercise of discretion is, therefore exempt from judicial review. (citation omitted).

Moreover, the Court also stated:

> While the recanting witness stated that the prosecution threatened her with criminal prosecution if she recanted her testimony and told her that the penalty for perjury was life imprisonment, this does not constitute prosecutorial misconduct, as defendant suggests. If, in fact, the recanting witness lied while under oath at the preliminary examination, she is subject to prosecution for criminal perjury and was fully and properly informed of this before placing her recanting testimony on the record. MCL 750.422 *et seq*.; MSA 28.664 *et seq*. [*Id*. at 165, n 5.]

Thus, *Morrow* casts the very proposition for which it is cited—i.e. that it is within the prosecutor's discretion on which statement of a recanting witness it chooses to rely in its prosecutorial decision to pursue a case—in separation of powers language.

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