STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

MARK ALLEN PORTER,

Defendant-Appellee.

UNPUBLISHED
March 16, 1999

No. 202855
St. Clair Circuit Court
LC No. 96-000245 FC

Before: Sawyer, P.J., and Fitzgerald and Saad, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of felony-murder, MCL 750.316; MSA 28.548; first-degree home invasion, MCL 750.110; MSA 28.305; and unlawfully driving away an automobile, MCL 750.413; MSA 28.645. Defendant was also convicted of being an habitual offender, fourth offense, MCL 769.12; MSA 28.1084. He was sentenced to prison terms of life without parole for the murder convictions, life for the home invasion conviction, and ten to fifteen years for the UDAA conviction. Defendant appeals as of right. We affirm.

This case arises from the September 28, 1995, murders of George and Dorothy Wendel, a wealthy elderly couple who resided in Marysville. Their home was broken into and one of their vehicles, some cash, and jewelry, were stolen. Although no physical evidence linked any suspect to the crime, circumstantial evidence led to defendant's arrest and conviction. Defendant first became a suspect when his sister, Donna Cataldo, contacted police and indicated that she believed that defendant either committed the murders or was involved in the murders.[1] Defendant was arrested three days after the murders on an unrelated warrant for prison escape, and had in his possession at that time two rings belonging to Dorothy Wendel. Defendant subsequently made a statement to police regarding the location of the jewelry stolen from the Wendel home. In addition, three inmates with whom defendant was incarcerated at various times informed police that defendant had related to them his involvement in the murders, and at least two witnesses observed defendant with a large amount of cash in the days after the murders. A warrant for defendant's arrest for the present crimes was issued on January 4, 1996.

I

Defendant claims that he was denied a fair trial as a result of the trial judge's bias in favor of the prosecutor in its rulings on the admissibility of evidence. In support of this claim, defendant refers to a myriad of alleged errors, but fails to provide specific argument or authority regarding each allegation of error. An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998), nor may he give issues cursory treatment with little or no citation of supporting authority. *People v Kelly*, 231 Mich App 627, 640-641; ___ NW2d ___ (1998).

Defendant also argues that the trial court disparaged defense counsel by threatening in the presence of the jury to hold him in contempt of court. A review of the transcript citations referenced by defendant reveals, however, that defense counsel persistently continued to ignore an admonition of the court to avoid a line of questioning. Thus, it was not improper under these circumstances for the court to suggest to defendant that "we may have to have a discussion relative to contempt of court." See *People v Williams*, 162 Mich App 542, 547; 414 NW2d 139 (1987).

Defendant further contends that he was denied his right to present a defense by the trial judge's refusal to permit defendant to introduce exculpatory statements that he made to the police.[2] However, it is well-settled that a criminal defendant may not place his exculpatory, out-of-court statement into evidence. *People v Jensen*, 222 Mich App 575, 581; 564 NW2d 192 (1997).

Next, defendant asserts that the trial court improperly denied his several motions for a mistrial. The decision whether to grant a mistrial is left to the sound discretion of the trial court and should not be granted unless the complained of incident is so egregious that there is no other remedy. *People v Wolverton*, 227 Mich App 72, 75; 574 NW2d 703 (1997). Here, defendant refers to three incidents in support of his argument that he was entitled to a mistrial. However, defendant presents no argument or authority in support of his accusations that an irregularity occurred. Hence, we need not address this argument. *Taylor, supra; Kelly, supra.*

Defendant also claims that the trial court erred by permitting the prosecutor to admit statements made by Donna Cataldo under the excited utterance exception to the hearsay rule, MRE 803(2). The statements made by Cataldo occurred the day that Cataldo learned that the Wendels, for whom she had worked for two years, were the homicide victims. She contacted the police and suggested that defendant either committed the homicides or was involved in some manner. Cataldo indicated that she was very upset upon learning the identity of the victims and a police officer testified that she was "very excited, very upset."

MRE 803(2) defines an excited utterance as a "statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." It is the lack of capacity to fabricate, not the lack of time to fabricate, that is the focus of the excited utterance rule. *People v Smith*, 456 Mich 543, 550-551; 581 NW2d 654 (1998).

Here, we believe that there can be no question that Cataldo's learning that a couple with whom she had been close had been murdered was a startling event. The question is whether Cataldo was still under the stress of learning of this information when she called the police. The circumstances surrounding the statement convince us that Cataldo's statements were made while Cataldo was still under the overwhelming influence of learning of the murders and, therefore, were reliable and admissible.[3]

Last, defendant claims that the trial judge allowed the prosecutor to admit irrelevant evidence on three occasions. A review of the record, however, reveals that one item of evidence was never admitted.[4] With regard to the jewelry, the victim's niece clearly separated the jewelry into pieces that she could identify and pieces that she could not identify. Thus, the jury was apprised of the fact that not all of the jewelry was identified as belonging to Dorothy. With regard to the paint scraper that was removed from defendant's possession at the time of his arrest, a police forensics expert testified that the telephone wires at the Wendel residence had been cut with a straight edged instrument. The fact that defendant was carrying in his pocket a cutting instrument of the same class that cut the telephone wires tended to provide a link between defendant and the crime, thus rendering the evidence relevant. MRE 401.

II

Next, defendant maintains that defense counsel's representation of defendant was compromised as a result of a prosecution witness' testimony that defense counsel attempted to influence the witness' testimony and, therefore, the trial court erred by denying his counsel's motion to withdraw. We disagree.

Prosecution witness Darryl Martin, who was defendant's cell mate at the Oakland County jail, testified that defense counsel visited him at the jail two days before the trial began. He indicated that defense counsel had two tape recorders and that he kept "messing with them." Martin testified that defense counsel was using words like "snitch" and that, while winking at Martin, asked him if he "needed anything." Martin believed that defense counsel was trying to get him to change his testimony. Defendant asserts that this testimony placed defense counsel in a situation where the interests of counsel were adverse to his, thus necessitating disqualification of counsel. We disagree.

To demonstrate that a conflict of interest denied a defendant the Sixth Amendment right to counsel, the defendant must establish that an actual conflict of interest adversely affected counsel's performance by showing that the performance fell below an objective standard of reasonableness and that the deficient performance prejudiced the defense so as to deny a fair trial. *Smith, supra* at 555-558. There is no automatic correlation between an attorney's theoretical self-interest and an ability to loyally serve a defendant. *Id.* at 557.

Here, no evidence was cited to suggest that defense counsel actively lessened his defense as a result of Martin's testimony. To the contrary, defense counsel thoroughly cross-examined Martin regarding his accusations and established that Martin's subjective beliefs may have been mistaken.

There is no indication that counsel's performance was below an objective standard of reasonableness. Hence, defendant's argument is without merit.

III

Defendant argues that his statements to the police were involuntary and, therefore, should have been suppressed. When a defendant challenges the admissibility of his statements, the trial court must hear testimony regarding the circumstances outside the presence of the jury. *People v Walker (On Rehearing)*, 374 Mich 331, 338; 132 NW2d 87 (1965). Whether the defendant's statement was voluntary is a question of law that the court must determine under the totality of the circumstances. *People v Etheridege*, 196 Mich App 43, 57; 492 NW2d 490 (1992). Whether a statement is voluntary is determined by examining police conduct. *People v Howard*, 226 Mich App 528, 538; 575 NW2d 16 (1997. In determining voluntariness, the court should consider all the circumstances, including: the duration of the defendant's detention and questioning; the age, education, intelligence, and experience of the defendant; whether there was unnecessary delay of arraignment; the defendant's mental and physical state; whether the defendant was threatened or abused; and any promises of leniency. *People v Givens*, 227 Mich App 113, 121; 575 NW2d 84 (1997). Intoxication from alcohol or other substances can affect the validity of Fifth Amendment rights, but is not dispositive. *People v Leighty*, 161 Mich App 565, 571; 411 NW2d 778 (1987). No single factor is determinative. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998).

When reviewing a trial court's determination of voluntariness, this Court must examine the entire record and make an independent determination. *People v Sexton*,458 Mich 43, 67-68; 580 NW2d 404 (1998). However, deference is given to the trial court's assessment of the weight of the evidence and credibility of the witnesses, and the trial court's findings will not be reversed unless they are clearly erroneous. *Howard, supra* at 543.

With regard to the relevant factors, defendant asserts only that he was intoxicated and that he was given promises of leniency. At the *Walker* hearing, Marysville Assistant Chief of Police Steve Tiszai testified that defendant was under the influence of "something" when he was arrested but that he did not know if defendant was "completely under the influence." Tiszai did not recall a strong odor of alcohol about defendant. St. Clair County Prosecutor Elwood Brown testified that although defendant appeared to have been drinking, defendant was in control of his faculties and made sense when he spoke. Brown also testified that defendant indicated that he was interested in getting an escape charge "to go away," and that Brown informed defendant that he did not have any authority with regard to Oakland County proceedings. Defendant's girlfriend, Barbra Hofer, testified that defendant's speech was slurred when she talked with him between noon and 1:00 p.m. on the day of his arrest and that he was excited. Defendant testified that he consumed 1-1/2 fifths of run on the day he was arrested and that he also used marijuana that day. He testified that he did not remember signing the Miranda form or waiving his rights. Defendant also indicated that Prosecutor Brown told him that he "had a lot of influence in Oakland County" and that if defendant could give him some direction on the murder investigation that he would get the escape charge dismissed and would "dump" the marijuana found on defendant when he was arrested.

Clearly, the testimony of the officers was diametrically opposed to defendant's testimony on the two factors involved here. In light of the fact that we give deference to the trial court's assessment of the credibility of witnesses, we are convinced, upon an examination of the entire record, that defendant's statement was voluntary. *Howard, supra*. The trial court did not err in ruling that defendant's statements were admissible.

IV

Next, defendant maintains that he was denied a fair trial as a result of several instances of prosecutorial misconduct. Prosecutorial misconduct issues are decided on a case-by-case basis, and the reviewing court must examine the pertinent part of the record and evaluate a prosecutor's remarks in context. *People v LeGrone*, 205 Mich App 77, 82; 517 NW2d 270 (1994). After reviewing the record, we conclude that defendant was not denied a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1997).

A

Defendant first argues that the prosecutor improperly announced to the jury that the trial court had made a ruling on the admissibility of defendant's statements. However, a review of the prosecutor's comment in context, however, reveals that the prosecutor objected to defense counsel's questioning of a police officer wherein he intimated that defendant's rights had been violated on the ground that "we've already had a discussion about rights. He's already indicated he waived those rights." Unlike the situation presented in *People v Skowronski*, 61 Mich App 71; 232 NW2d 306 (1975) on which defendant relies, the jury here was not instructed that the court had found defendant's confession to be voluntarily given and that its ruling was binding on the jury. We find that the prosecutor's objection did not deny defendant a fair and impartial trial.

B

Defendant also contends that the prosecutor made an improper civic duty argument in her rebuttal closing argument. Defendant did not object to the allegedly improper argument, and therefore appellate review is precluded unless an objection could not have cured the error or a failure to review the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 421 NW2d 557 (1994). Because any prejudicial effect of the prosecutor's comments could have been cured by an appropriate instruction, *People v Turner*, 213 Mich App 558, 575; 540 NW2d 728 (1995), and because the argument was in response to issues raised by defense counsel, *People v Simon*, 174 Mich App 649, 655; 436 NW2d 695 (1989), we decline to review this issue.

C

Defendant asserts that the prosecutor disparaged defense counsel by arguing to the jury that counsel tried to get a witness to change his story. However, a review of the pertinent portion of the transcript reveals that the comments to which defense objects occurred during a bench conference. Hence, defendant's assertion is without merit.

Defendant further asserts that the prosecutor disparaged defense counsel during rebuttal closing argument by accusing counsel of misleading the jury and distorting the evidence. A review of the allegedly improper comments in context, however, reveals that the prosecutor was responding to comments made by defense counsel during closing argument and, under the circumstances presented, were not improper. *Simon, supra* at 655.

D

Defendant also argues that the prosecutor improperly speculated during the testimony of a police officer about the reasons why another witness paused before answering one of defense counsel's questions. However, a review of the record reveals that it was defense counsel who questioned the officer regarding another witness' pause in answering a question. The prosecutor merely objected to the form of the question and stated that the "pause" was merely a result of confusion. Defendant was not denied a fair trial as a result of the prosecutor's objection. Defendant further contends that the prosecutor improperly argued facts not in evidence by asserting in a question to a defense witness who testified that he sold two rings to defendant that the witness had never reported this claim to anyone else. However, defendant's objection to the prosecutor's assertion was sustained, and the facts were subsequently placed into evidence when the witness testified that he never reported the claim. Last, defendant contends that the prosecutor improperly argued during closing arguments that George Wendel was in a hospital bed because this information had not been released to the public. Again, defendant's objection to the prosecutor's comment was sustained, and the jury was instructed to disregard the comment if, in fact, the jury's collective recollection did not recall any such evidence being presented. Defendant was not denied a fair and impartial trial as a result of the prosecutor's comment.

E

Defendant next contends that the burden of proof was improperly shifted to defendant when a prosecution witness testified that a blue duffel bag that defendant was seen carrying the day after the murders was never found. Although not entirely clear, it appears that defendant is suggesting that the prosecution's presentation of potentially damaging evidence in some way shifted the burden of proof to defendant to disprove the evidence. We disagree. The burden of proof is shifted when the prosecutor suggests that the defendant must prove something or present a reasonable explanation for damaging evidence. See, e.g., *People v* Green, 131 Mich App 232, 237; 345 NW2d 676 (1983). The prosecutor did neither in this case.

F

Defendant also maintains that the prosecutor improperly vouched for defendant's guilt. However, statements that a defendant is guilty, without more, do not constitute improper vouching. *People v Swartz*, 171 Mich App 364, 370-371; 429 NW2d 905 (1988). Further, in response to defense counsel's suggestion on cross-examination of a police officer that the police work was "crummy" in this case, the prosecutor asked the officer if he would characterize the police work as "crummy." The witness responded:

> I think we did everything that we could during the course of the investigation, and while the evidence, and presented the evidence to the [sic] your office, you know, at which time the decision was made to issue a warrant. A warrant would not have been issued had there not been enough evidence there to feel that we could get a conviction of, of the crime.

The witness' comment regarding the warrant was an unsolicited remark to a question regarding the quality of the police work and, therefore, is not grounds for a mistrial. *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995). Further, the comments were induced by and made in response to statements made by defense counsel and, therefore, do not require reversal. *Simon, supra*.[5]

V

Defendant argues that he was denied due process of law by the failure of the police to preserve possibly exculpatory evidence in the form of a blood smear on the wall of the hallway in the Wendel home and George Wendel's hospital bed. However, defendant's argument fails to recognize the fact that the police serologist at the scene determined that the amount and quality of the blood on the wall was not sufficient to allow any meaningful analysis,[6] and that the bed was thoroughly examined for trace evidence. The facts of the crime in this case were unlikely to have resulted in a smear of the assailant's blood on the wall in the hall,[7] or in hair or fingerprint evidence on the bed.[8] Defendant's exculpatory theory about the evidence is thus highly speculative, and reversal is not required on this basis.

Defendant also asserts that he was denied due process as a result of prearrest delay. The threshold test of whether a delay between the offense and the arrest denied due process is whether the defendant was prejudiced. *People v Reddish*, 181 Mich App 625, 627; 450 NW2d 16 (1989). The defendant bears the burden of coming forward with evidence of actual and substantial prejudice to his right to a fair trial. *People v Adams*, 232 Mich App 128; ___ NW2d ___ (1998).

Here, defendant asserts that he was prejudiced by the loss of the blood smear evidence and the hospital bed. We have already concluded, however, that defendant's theory that the evidence would have demonstrated that another person had been in the Wendel home was mere speculation. Further, even assuming that defendant was able to establish the presence of another person, the existence of another party would not prove that defendant did not commit the crimes. Hence, we conclude that defendant suffered no prejudice as a result of the failure of the police to preserve the blood smear and the bed. In the absence of any evidence of substantial prejudice or police bad faith, this argument is without merit.

VI

Defendant argues that he was denied a fair trial by the late endorsement of an expert witness who opined that the rings found in defendant's possession belonged to Dorothy Wendel. We disagree. Any error in the late endorsement of the witness was harmless because the witness' testimony was cumulative to the testimony of two other witnesses who clearly and definitively identified the rings as

belonging to Dorothy Wendel and did not prejudice defendant. *People v Rodriguez (On Remand)*, 216 Mich App 329, 332; 549 NW2d 359 (1996).

VII

Lastly, defendant contends that he was denied a fair trial as a result of the prosecutor's failure to correct testimony by police officers that was not consistent with testimony previously given by the officers at either a preliminary examination or *Walker* hearing. We disagree. Although due process is offended when a prosecutor allows false testimony to stand uncorrected when it appears, there is no evidence that the prosecution adduced false or perjured evidence. Rather, defendant merely cites to alleged inconsistencies in witnesses' testimony. If a witness presents testimony that is inconsistent with prior recorded testimony, the witness is subject to impeachment.[9] It is the province of the jury to determine which of the witness' accounts is true. See, e.g., *People v Morrow*, 214 Mich App 158, 165; 542 NW2d 324 (1995).

Affirmed.

/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald
/s/ Henry William Saad

[1] The day before the murders, defendant, who was on escape status from the Department of Corrections, visited Cataldo's home for the first time in three years. He questioned her about elderly people for whom she used to work, inquiring whether they would pay cash for odd jobs. The Wendels' names were mentioned in the conversation.

[2] Defendant suggests that the prosecutor was permitted to introduce portions of the police report containing inculpatory statements made by defendant. However, the police report was not admitted into evidence. Rather, officers were properly permitted to testify regarding statements made by defendant pursuant to MRE 801(d)(2). Thus, defendant's reliance on the doctrine of completeness, see MRE 106, is misplaced because the prosecutor did not introduce either a written or recorded statement.

[3] Statements made by Cataldo after her initial statement regarding defendant's involvement, although preceded by a comment from the officer to "tell me more," were made while Cataldo was "visibly upset and wanting to get something off her chest," and were not the result of questioning by officers. Hence, Cataldo's statements regarding her brother's visit to her house and the way that he acted also have sufficient indicia of reliability to fall within the excited utterance exception.

[4] The photograph was of defendant with his girlfriend.

[5] Defendant also cursorily argues that defense counsel was ineffective by failing to object to the each instance of alleged prosecutorial misconduct. Because there is not a reasonable probability that the

outcome of the proceedings would have been different had counsel objected, defendant's argument is without merit. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

[6] Defendant contends that the amount of blood in the smear on the wall was sufficient for testing because the smear contained more than one cell. Defendant's contention ignores the expert testimony that one blood cell is sufficient for DNA testing if the cell is contained in a whole blood sample that has not hemolyzed. Here, the sample was not whole blood, but rather was a minute amount of dried blood on a wall that left only antigens on the surface of the cell that were not in an amount sufficient for blood typing.

[7] Witnesses testified that Dorothy's Wendel's bedroom, where the physical assault of Dorothy clearly occurred, was strewn with a large amount of blood. However, all of the blood tested matched Dorothy's Wendel's blood.

[8] Michigan State Police crime lab experts testified that the assailant must have worn gloves and a hat because no hair, fingerprint, or trace evidence inconsistent with that of the victims was found.

[9] If, in fact, a witness lies under oath, he is subject to prosecution for criminal perjury. MCL 750.422; MSA 28.664.