STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ARDRA YOUNG,

Defendant-Appellant.

UNPUBLISHED
March 14, 2000

No. 208788
Wayne Circuit Court
LC No. 97-001523

Before: Gribbs, P.J., and Cavanagh and Gage, JJ.

PER CURIAM.

Defendant was convicted by a jury of two counts of first-degree murder, MCL 750.316; MSA 28.548, and two counts of felony-firearm, MCL 750.227b; MSA 28.414(2), in the shooting deaths of his wife and son. He was sentenced to concurrent terms of mandatory life imprisonment, and to consecutive two-year terms for felony-firearm. On appeal, defendant raises numerous issues, both through counsel and in propria persona. We affirm.

First, there is no merit to defendant's claim that the trial court erred by denying his motion to suppress his confession. Defendant's claim that he was not given his *Miranda*[1] rights is not relevant to this issue; defendant was not in custody at the time of his first statement, *People v Honeyman*, 215 Mich App 687, 694-695; 547 NW2d 344 (1996), and he denies that he ever made the second statement. In determining whether a defendant's statement was voluntary, a court should consider (1) the age of the accused; (2) the accused's lack of education or his intelligence level; (3) the extent of the accused's previous experience with the police; (4) the repeated and prolonged nature of the questioning; (5) the length of the detention before the accused gave the statement; (6) the lack of any advice to the accused of his constitutional rights; (7) whether there was an unnecessary delay in bringing the accused before a magistrate before he gave the confession; (8) whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; (9 whether the accused was deprived of food, sleep or medical attention; (10) whether the accused was physically abused; and (11) whether the accused was threatened with abuse. *People v Sexton*, 458 Mich 43; 580 NW2d 404 (1998). Here, defendant had a high school education; he came to the police station voluntarily, at a time of his own choosing; he was at the police station less than 3-1/2 hours when he made his confession; he

denied being intoxicated or drugged and did not appear to be; he was offered food; and he does not claim to have been physically abused or threatened. Defendant's claims of error rest entirely on a finding of credibility. The trial court did not believe defendant's allegations and this Court gives great deference to the trial court's assessment of credibility. *People v Cheaham,* 453 Mich 1, 29-30; 551 NW2d 355 (1996); *People v Kowalski,* 230 Mich App 464, 471-472; 584 NW2d 613 (1998), The trial court's findings and conclusion that defendant's confession was voluntary are not clearly erroneous. *Id.*

There is no merit to defendant's claim that the trial court erred by denying defendant's motions for new trial. Defendant sought a new trial on the basis of newly discovered evidence. For a new trial to be granted on the basis of newly discovered evidence, it must be shown that: (1) the evidence itself, not merely its materiality, is newly discovered; (2) the newly discovered evidence was not cumulative; (3) including the new evidence upon retrial would probably cause a different result; and (4) the party could not, using reasonable diligence, have discovered and produced the evidence at trial. *People v Johnson,* 451 Mich 115, 118 n 6; 545 NW2d 637 (1996). The evidence raised here was not newly discovered. Defendant sought to introduce the same evidence at trial and was precluded from doing so. Defendant's allegations of *un*discovered new evidence are not supported by any evidence, old or new. The trial court did not abuse its discretion in denying defendant's motion for new trial. *Bosak v Hutchinson,* 422 Mich 712, 737; 375 NW2d 333 (1985).

There is no merit to defendant's claims of ineffective assistance of counsel. Contrary to defendant's claim on appeal, defense counsel did attempt to impeach witness Connolly with his prior statement. Counsel's decision whether to attempt to introduce the statement into evidence is a matter of trial strategy that will not be second guessed by this Court. *People v Mitchell*, 454 Mich 145; 560 NW2d 600 (1997); *People v Stewart*, 219 Mich App 38, 42; 555 NW2d 715 (1996). Defendant's claim that the prosecutor acted improperly by not revealing the statement to the jury is specious and without merit.

There is no merit to defendant's claim that the trial court abused its discretion by refusing a request from the jury to rehear testimony. The trial court did not err by refusing to send an exhibit that had not been admitted to the jury room, and, contrary to defendant's allegation, it left open the possibility that the jury could ask to hear tapes of testimony if necessary.

There is no merit to the claim that the trial court disparaged defendant's alibi witness. The trial court's comment about used car salesmen was made during voir dire in another context. Defendant's witness identified himself as a truck salesman, not a used car salesman, and, in any event, his testimony was not challenged by the prosecution. There was no clear error here, defendant was not prejudiced, and the fairness of the proceedings was not compromised. *People v Carines,* 460 Mich 750, 763-764; 597 NW2d 130 (1999).

There is no merit to defendant's claim of prosecutorial misconduct. When reviewing a claim of prosecutorial misconduct, this Court considers the conduct in context to determine whether it denied the defendant a fair and impartial trial. If the issue was not properly preserved, review is foreclosed unless no curative instruction could have removed any undue prejudice to the defendant or manifest injustice

would result from the failure to review the conduct. *People v Reid*, 233 Mich App 457, 466; 592 NW2d 767 (1999). Prosecutors are afforded wide latitude regarding their arguments and conduct. They are free to argue the evidence, to comment on the demeanor of witnesses, and to make all reasonable inferences. *People v Bahoda*, 448 Mich 261; 531 NW2d 659 (1995); *People v Bucky*, 424 Mich 1, 15; 378 NW2d 432 (1985); *People Garland*, 152 Mich App 301, 310; 393 NW2d 896 (1986). The prosecutor's remarks here, viewed as a whole, did not deny defendant a fair and impartial trial.

There is no merit to defendant's claim in propria persona that the police lacked probable cause to conduct a custodial interrogation. An arrest must be made upon probable cause at the time of the arrest. *People v Lyon*, 227 Mich App 599, 611; 577 NW2d 124 (1998). Probable cause is established by showing the probability or substantial chance of criminal activity. *Id.* Even if a suspect is detained illegally, his subsequent confession need not be suppressed unless the unlawful detention was used to directly procure evidence from the detainee. *People v Kelly*, 231 Mich App 627, 634; 588 NW2d 480 (1998). Intervening circumstances, such as new information learned by the police, can break the causal connection between an unlawful arrest and an inculpatory statement, so that the statement is sufficiently an act of free will to purge the primary taint of unlawful arrest. *Id.* Here, there was ample evidence of defendant's involvement in the shootings to justify his custodial interrogation prior to his making a confession. There was no plain error in admission of his statement, *Carines*, *supra*, and defendant's claim of ineffective assistance on this basis is also without merit.

There is no merit to defendant's claim in propria persona that counsel was ineffective for not challenging police failure to have defendant examined by a physician after making his confession, as provided by a police department policy. Counsel did in fact raise the issue of the department policy requiring examination by a physician, and the question whether counsel pursued the claim vigorously enough involves a matter of trial strategy. *People v Mitchell*, 454 Mich 145; 560 NW2d 600 (1997); *People v Stewart*, 219 Mich App 38, 42; 555 NW2d 715 (1996). Further, defendant does not present, and we do not find, any authority for the contention that suppression of defendant's confession is required because the police did not follow their department policy. The sole purpose of the policy is to determine whether there is evidence of physical abuse. Defendant makes no allegation of physical abuse here and was not prejudiced.

There is no merit to defendant's issue in propria persona that the prosecutor improperly raised the issue of defendant's and witnesses' religious practices. Defendant first raised the issue, during cross-examination of defendant's brother-in-law, regarding defendant's involvement with Jehovah's Witnesses. Part of the defense in this case was that defendant removed his son so quickly from life support because of the family's involvement with Jehovah's Witnesses. The decision concerning defendant's defense strategy and which of the prosecutor's questions to challenge are matters of trial strategy that this Court will not second-guess. *Id.*

There is no merit to defendant's issue in propria persona that the prosecutor deliberately injected bad acts evidence, that the trial court erred by failing to sua sponte give a cautionary instruction, and that counsel was ineffective for failing to object. Defendant challenges admission of testimony that he spoke to his wife "as if she were a child," that his disassociation from Jehovah's Witnesses led to a

breakdown in his marriage because he "no longer wanted to follow [Bible] principles," and that he took money from his wife that would otherwise have been used for their son's education. Evidence of marital discord is admissible to show motive. *People v Fisher*, 449 Mich 441, 453; 537 NW2d 577 (1995). The testimony was properly allowed and neither the prosecutor, the trial court nor defense counsel were in error.

There is no merit to defendant's claim in propria persona that reversal is required because the prosecutor introduced and defense counsel failed to object to "third-party hearsay" concerning marital discord. The decision about what testimony to object to is a matter of trial strategy that will not be second-guessed by this Court. *Stewart, supra*. In any event, in light of the other admissible evidence against defendant, we are not convinced that any error here could have been decisive to the outcome. *People v Nimeth*, 236 Mich App 616, 625; 601 NW2d 393 (1999).

There is no merit to defendant's claim in propria persona that defendant was denied a fair trial because the prosecutor asked improper questions of defense witness Floride Brown, and because defense counsel failed to object. Although Brown had never met defendant, she wrote him letters in jail and defendant sent her an extremely negative response. Under the circumstances, it was not improper for the prosecutor to delve into Brown's motive for volunteering an alibi for defendant a month before trial, and counsel was not ineffective for failing to object.

There is no merit to defendant's claim in propria persona that he was denied a fair trial because of prosecutorial misconduct during closing argument. When reviewing alleged instances of prosecutorial misconduct, a court must examine the pertinent portion of the record and evaluate the prosecutor's remarks in context. The test is whether the defendant was denied a fair and impartial trial *People v Green*, 228 Mich App 684, 693; 580 NW2d 444 (1998). Defendant raises a number of challenges, most of which were not preserved below. Absent an objection at trial to a prosecutor's closing argument, appellate review is precluded unless any prejudicial effect could not have been cured by a cautionary instruction and failure to consider the issue would result in a miscarriage of justice. *People v Warren*, 200 Mich App 586, 589; 504 NW2d 907 (1993). We have reviewed the record and conclude that defendant was not denied a fair and impartial trial.

There is no merit to defendant's claim in propria persona that reversal is required because the trial court failed to comply with MCL 767.27A; MSA 28.966(11). The statute was repealed in 1974 and so does not apply in this matter. A defendant is presumed competent to stand trial, *People v Newton (Aft Rem)*, 179 Mich App 484, 487; 446 NW2d 487 (1989), and there was no allegation either at trial or on appeal that defendant was incompetent to stand trial. Further, a determination of competency may rest solely on the psychiatric report if neither the state nor defendant chooses to offer testimony. Here, defense counsel stipulated to defendant's competency and two psychiatric examiners found him competent to stand trial. Even if it was error for the trial court to fail to hold a hearing, defendant has not demonstrated prejudice in this matter. *Carines, supra*.

Because we have found each of defendant's issues to be without merit, there is also no merit to his contention that reversal is required because of their cumulative affect.

Affirmed.

/s/ Roman S. Gribbs
/s/ Mark J. Cavanagh
/s/ Hilda R. Gage

[1] *Miranda v Arizona,* 384 US 436, 467; 86 S Ct 1602; 16 L Ed 2d 694 (1966).