# STATE OF MICHIGAN

# COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TOYA M. RUSSELL,

Defendant-Appellant.

UNPUBLISHED
January 5, 2001

No. 214593
Oakland Circuit Court
LC No. 97-154262-FC

Before: Gribbs, P.J., and Kelly and Sawyer, JJ.

PER CURIAM.

Defendant appeals by right her convictions following a jury trial of assault with intent to commit murder, MCL 750.83; MSA 28.278, and possession of a firearm in the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to eight to twenty years' imprisonment for the assault with intent to murder conviction, to be served consecutively to the two-year sentence for the felony-firearm conviction. We affirm.

Defendant first argues that it was error for the trial court not to have instructed the jury on mitigating circumstances. That instruction, as stated in CJI2d 17.4, states that the accused cannot be found guilty of the crime of assault with intent to commit murder if circumstances would have reduced the charge to manslaughter had the victim died. On appeal, the prosecution contends that the defense deliberately did not ask for the mitigating circumstances jury instruction because it was instead arguing that defendant shot the complainant in self-defense. We agree. Defendant's theory of the case, as expounded upon at length in closing arguments, was self-defense. Under the law of self-defense, if believed by the jury, defendant's actions would have been justified, warranting an acquittal. See *People v Heflin*, 434 Mich 482, 547-548; 456 NW2d 10 (1990). Requesting the instruction would have been contrary to the defense theory since the instruction, if applied by the jury, would not lead to an acquittal. Reversal may not be premised on an error caused by the aggrieved party by plan or design. *People v Griffin*, 235 Mich App 27, 46; 597 NW2d 176 (1999).

Defendant next contends that evidence that defendant smoked marijuana was improperly admitted in contravention of MRE 404(b). This issue was not properly preserved by an objection, *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994), and is reviewed only for plain error. *People v Carines*, 460 Mich 750, 761-762; 597 NW2d 130 (1999). Three requirements must be met to withstand forfeiture under the plain error rule "1) error must have

occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *Id.* at 763. Reversal is necessitated only if plain error resulted in the conviction of an actually innocent defendant, or where the error seriously affected the fairness, integrity, or reputation of judicial proceedings. *Grant, supra* at 550-551.

On cross-examination, the prosecution asked each of defendant's expert witnesses who testified that defendant suffered from Battered Woman Syndrome (BWS) about her marijuana use. MRE 703 and 705 provide that the facts underlying an expert's opinion may be disclosed on cross-examination. Defendant's marijuana use was an underlying fact behind the experts' opinions. Our Supreme Court, however, has held that considerations of unfair prejudice under MRE 403 may preclude the disclosure of the facts underlying an expert's opinion. *People v Robinson*, 417 Mich 661, 664-665; 340 NW2d 631 (1983). See also *People v Pickens*, 446 Mich 298, 334-336; 521 NW2d 797 (1994). Defendant thus contends that the probative value of her marijuana use was substantially outweighed by unfair prejudice under MRE 403. MRE 403 is not intended to prohibit prejudicial evidence, but only that which is unfairly prejudicial. *People v Crawford*, 458 Mich 376, 398; 587 NW2d 785 (1998). Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury. *Id.* at 398. Defendant used the experts' diagnosis of her depression and BWS to negate her intent to kill the complainant and to instead bolster the theory that she acted in self-defense. Evidence of defendant's marijuana use rebutted the experts' opinions that defendant's depression was related to BWS and was, therefore, relevant and not substantially outweighed by unfair prejudice.

Defendant also argues that the prosecutor improperly injected defendant's marijuana use during the questioning of her friend. The prosecution argues that the questioning was proper under MRE 404(a)(1) and MRE 405(a). We agree. Defendant put in issue whether she suffered from BWS as a "pertinent trait of character" under MRE 404(a)(1). *People v Lukity*, 460 Mich 484, 499; 596 NW2d 607 (1999). The friend, too, corroborated the defense theory that defendant was depressed and suffered from BWS. The prosecution committed no error by cross-examining the witness on whether she knew defendant smoked marijuana to rebut the theory that defendant's depression was caused by her relationship with the complainant.

Finally, defendant contends that her statements to the police should have been excluded on the basis that they were involuntarily made because she took her aunt's prescription Xanax pill before her interrogation. When reviewing a trial court's determination of the voluntariness of a defendant's statement, this Court must examine the entire record and make an independent determination, *People v Sexton*, 458 Mich 43, 68; 580 NW2d 404 (1998), and will affirm unless left with a definite and firm conviction that a mistake was made, *People v Sexton (After Remand)*, 461 Mich 746, 752; 609 NW2d 822 (2000). Deference is given, however, 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. *People v Howard*, 226 Mich App 528, 543; 575 NW2d 16 (1997). A finding is clearly erroneous if it leaves this Court with a definite and firm conviction that a mistake has been made. *People v Givens*, 227 Mich App 113, 119; 575 NW2d 84 (1997).

Statements of an accused made during custodial interrogation are rendered inadmissible unless the accused voluntarily, knowingly and intelligently waived his or her Fifth Amendment rights. *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602, 1612; 16 L Ed 2d 694 (1966); *People v Abraham*, 234 Mich App 640, 644; 599 NW2d 736 (1999). The prosecutor must establish a valid waiver by a preponderance of the evidence. *Id.* at 645.

Whether the defendant's statement was knowing, intelligent, and voluntarily made is a question of law which the court must determine under the totality of the circumstances. *People v Cheatham*, 453 Mich 1, 27 (Boyle, J.), 44 (Weaver, J.); 551 NW2d 355 (1996); *People v Snider*, 239 Mich App 393, 416; 608 NW2d 502 (2000). A voluntarily made statement is one that is the product of a free and deliberate choice rather than intimidation, coercion, or deception. *People v Daoud*, 462 Mich 621, 633; 614 NW2d 152 (2000). Whether the accused voluntarily waived his or her *Miranda* rights depends on the absence of police coercion. *Id.* at 635. Here, defendant does not argue that the police coerced her into waiving her *Miranda* rights. When asked if she was physically abused or threatened by any of the officers, she responded in the negative. In fact, defendant testified at the *Walker*[1] hearing that the investigating officer "seemed very nice to me" and that she was fed dinner and given water.

In the absence of police coercion, a defendant's mental state alone can never render a confession involuntary. *Colorado v Connelly*, 479 US 157, 164; 107 S Ct 515, 520; 93 L Ed 2d 473 (1986). Therefore, as a matter of law defendant cannot prevail on this issue.

Affirmed.

/s/ Roman S. Gribbs
/s/ David H. Sawyer

I concur in result only.

/s/ Michael J. Kelly

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