STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 16, 2001
v	No. 217703 Van Buren Circuit Court
DANIEL AVILES, Defendant-Appellant.	LC No. 98-010954-FC

Before: Saad, P.J., and Fitzgerald and O'Connell, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of second-degree murder, MCL 750.317; MSA 28.549, felonious assault, MCL 750.82; MSA 28.277, and possession of firearm during the commission of a felony, MCL 750.227b; MSA 28.242(2). Defendant was sentenced to concurrent terms of eighteen to forty-five years' imprisonment for the murder conviction, and forty to forty-eight months for the assault conviction, to run consecutively to the mandatory two-year prison term for felony-firearm. We affirm.

Defendant first argues that the trial court clearly erred when it concluded that his statement to the police was voluntary. We disagree.

Whether a defendant's statement was knowing, intelligent, and voluntary is a question of law that we review against the totality of the circumstances. *People v Snider*, 239 Mich App 393, 417; 608 NW2d 502 (2000). Because this Court affords great deference to the trial court, we will not reverse the trial court's findings unless they are clearly erroneous. *Id.* The trial court's findings are clearly erroneous where, after an examination of the record, this Court is left with a definite and firm conviction that the trial court made a mistake. *People v Givans*, 227 Mich App 113, 119; 575 NW2d 84 (1997).

A criminal defendant's custodial statements are generally inadmissible at trial unless the prosecutor establishes that the statement was voluntary. *People v Cheatham*, 453 Mich 1, 13; 551 NW2d 355 (1996) (Boyle J.). On appeal, defendant does not contest that he was advised of

his *Miranda*[1] rights. Rather, defendant claims that his inculpatory statement was involuntary because it was the product of police coercion.

The use of an involuntary statement coerced by police conduct offends due process under the Fourteenth Amendment. *People v Wells,* 238 Mich App 383, 386; 605 NW2d 374 (1999). The following factors guide our determination whether a confession was voluntary:

> . . . the age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse. [*People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988).]

None of these factors should be given preemptive weight, rather, the controlling inquiry is whether the totality of the circumstances suggests that the statement was freely and voluntarily made. *Id.*; *People v Manning* ___ Mich App ___; ___ NW2d ___ (Docket No. 224898, issued 12/15/00), slip op p 17.

The record reveals that defendant was advised of his *Miranda* rights in Spanish at the time of his arrest before being transported to the police station for questioning. A Spanish speaking member of the Michigan State Police administered the warnings and acted as an interpreter during the following six to seven hours of questioning. Defendant did not inform the police that he was experiencing difficulties understanding their questions, therefore the record does not support defendant's assertion that he was unable to understand the *Miranda* warnings or the investigators' questions. A person speaking to the police by way of a translator is subject to the same standards as one fluent in English. *People v Truong (After Remand),* 218 Mich App 325, 335; 553 NW2d 692 (1996). Consequently, the police had no heightened obligation to take steps to ensure that defendant understood his *Miranda* rights. *Id*.

Moreover, while acknowledging that defendant had little in the way of sustenance during the police interview, this alone does not necessitate a finding of police coercion, particularly where the police interviewing defendant also did not eat. Defendant's failure to eat a meal before he was arrested at approximately 11:00 a.m. can be attributed to his own eating habits, therefore his subsequent hunger is not necessarily indicative of police coercion. See *People v Young*, 212 Mich App 630, 635; 538 NW2d 456 (1995).

Additionally, defendant's allegations that the police used coercive tactics to obtain his inculpatory statement present a credibility issue. When evaluating the voluntariness of a

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

statement, where a disputed issue turns on the credibility of witnesses, we defer to the superior vantage point of the trial court. *People v Sexton (After Remand)*, 461 Mich 746, 752; 609 NW2d 822 (2000), quoting *People v Sexton (After Remand)*, 236 Mich App 525; 601 NW2d 399 (1999) (Murphy, J., dissenting). Because we are not left with the firm and definite conviction that the trial court's findings were mistaken, we decline to disturb them on appeal.

We also reject defendant's argument that the trial court committed error warranting reversal when it informed the jury of its prior determination that defendant's statement was voluntary. In the instant case, that defendant gave the inculpatory statement was not disputed. During cross-examination defendant expressly acknowledged giving the statement. Where the making of a statement is not a contested issue at trial, the trial court's comment to the jury regarding its prior determination of voluntariness does not amount to error requiring reversal. *People v Corbett*, 97 Mich App 438, 443; 296 NW2d 64 (1980).

Defendant next asserts that he is entitled to a new trial because inadmissible hearsay evidence admitted at trial deprived him of his right to confront the witnesses against him under the United States and Michigan Constitutions. US Const Am VI; Const 1963, art 1, § 20. We disagree.

Whether defendant's right of confrontation was violated is a constitutional issue we review de novo. *People v Cain*, 238 Mich App 95, 108; 605 NW2d 28 (2000). MRE 801(c) defines "hearsay" as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Where a witness testifies that a statement was made, rather than about the truth of the statement itself, the statement is not hearsay. *People v Harris*, 201 Mich App 147, 150-151; 505 NW2d 889 (1993).

Here, the disputed statements by the testifying police officer was made in the context of the prosecutor's direct-examination and defense counsel's cross-examination. During direct examination, after testifying that defendant initially denied being involved in the murder, the witness indicated that he continued to question defendant because "I had affirmation that [defendant] was in possession of a pistol." Later, in response to defense counsel's allegations that the witness coerced defendant into giving a statement, the witness testified, "the story I gave [defendant] was a story I obtained from [the codefendant], and I wanted [defendant] to understand."

Viewed in context, the record is clear that rather than to prove the truth of the matter asserted, these statements were offered to illustrate why the witness pursued his questioning of defendant after he denied involvement in the offense, and to refute defense allegations that the witness coerced defendant into giving a statement. Because the statements were not offered to prove the truth of the matter asserted, they were not hearsay within the meaning of MRE 801(c).

Consequently, defendant's argument that the Confrontation Clause was violated by the admission of this testimony is without merit. The primary purpose of the Confrontation Clause is to ensure the reliability of substantive evidence against the defendant by subjecting it to rigorous cross-examination before the trier of fact. *People v Sammons*, 191 Mich App 351, 356; 478 NW2d 901 (1991). Here, defendant's failure to show that the disputed statements are hearsay is fatal to his claim that he was denied the right of confrontation. Statements that are not offered to

prove the truth of the matter asserted do not implicate constitutional concerns under the Confrontation Clause. *Cargill v Turpin*, 120 F3d 1366, 1375 (CA 11, 1997). See also *Dutton v Evans*, 400 US 74, 88; 91 S Ct 210; 27 L Ed 2d 213 (1970).

Finally, defendant challenges the trial court's instruction to the jury on the law of aiding and abetting. This issue is not properly before this Court because defendant did not raise a timely objection at trial. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). Therefore we review this unpreserved claim of error relating to jury instructions for plain error. *People v McCrady*, ___ Mich App ___; ___ NW2d ___ (Docket No. 215180, issued 12/19/00), slip op p 2; *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). To avoid forfeiture of this claim, defendant must demonstrate plain error that affected his substantial rights. *Id.*

We review jury instructions in their entirety to determine whether the trial court committed error requiring reversal. *People v Canales*, ___ Mich App ___; ___ NW2d ___ (Docket No. 221452, issued 12/12/00), slip op, 2. A trial court must instruct the jury concerning the law applicable to the case in an understandable manner. *People v Henry*, 239 Mich App 140, 151; 607 NW2d 767 (1999). Even where the trial court's instructions are somewhat imperfect, there is no error if the instructions, taken as a whole, fairly presented the issues to be tried and sufficiently protected the defendant's rights. *Id.*

A jury may be instructed on aiding and abetting where there is evidence that (1) one or more persons were involved in committing the crime, and (2) the defendant's role in the crime may have been less than direct participation in the wrongdoing. *People v Bartlett*, 231 Mich App 139, 157; 585 NW2d 341 (1998). To prove guilt on an aiding and abetting theory, the prosecution must show that (1) defendant or some other person committed the underlying crime, (2) the defendant performed acts or gave encouragement that aided and assisted the commission of a crime, and (3) the defendant intended the commission of the crime, or had knowledge that the principal intended its commission at the time of giving aid or encouragement. *People v Smielewski*, 235 Mich App 196, 207; 596 NW2d 636 (1999); *People v King*, 210 Mich App 425, 431; 534 NW2d 534 (1995).

After reviewing the jury instructions, we are satisfied that the trial court properly instructed the jury with regard to the law of aiding and abetting.[2] Because defendant has not

[2] Defendant also argues that defense counsel was ineffective for failing to object to the trial court's instructions. This issue is not properly before this Court because defendant did not include this issue in his statement of the issues in his brief on appeal. *People v Yarbrough*, 183 Mich App 163, 165; 454 NW2d 419 (1990). Nonetheless, in light of our conclusion that the trial court properly instructed the jury, defendant's claim of ineffective assistance of counsel is without merit. See *People v Kulpinski*, 243 Mich App 8, 27; 620 NW2d 537 (2000).

demonstrated plain error, he has forfeited this issue on appeal.

Affirmed.

/s/ Henry William Saad
/s/ E. Thomas Fitzgerald
/s/ Peter D. O'Connell