STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM MARTIN,

Defendant-Appellant.

UNPUBLISHED
November 19, 2002

No. 226314
Wayne Circuit Court
LC No. 99-006375

Before: Talbot, P.J., and Neff and Fitzgerald, JJ.

PER CURIAM.

Defendant was charged with first-degree murder, MCL 750.316, assault with intent to commit murder, MCL 750.83, and possession of a firearm during the commission of a felony, MCL 750.227b. After a jury trial, he was convicted as charged of assault with intent to commit murder and felony-firearm, and of the lesser offense of second-degree murder, MCL 750.317. Defendant was sentenced to concurrent prison terms of thirty to sixty years each for the murder and assault convictions, and a consecutive two-year term for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant's convictions arise from his involvement in the drive-by shooting of LaWranza Robertson. Defendant shot from the rear side window of a passing car. Codefendant Mario Peterson was the driver, and codefendant Shawn Lundy was a front-seat passenger.

The proofs against defendant consisted primarily of the testimony of Steven Brown and defendant's statement to the police. Brown testified that he was walking Robertson home from a barbecue shortly after midnight on June 6, 1999, when a station wagon approached and slowed down at the intersection of Holmur and Chalfonte in Detroit. Although he did not recognize the car, Brown recognized its occupants as the three defendants. As the car slowed down, defendant leaned out the back window and started shooting with a black handgun. Robertson was struck in the chest and died.

In a statement to police, defendant said that he and Peterson were driving around with Peterson's brother earlier in the day, when they heard twenty to twenty-two shots being fired at them by "either Patrick or Dwayne." They dropped off Peterson's brother, procured a car from a "crack head," and picked up Lundy to look "for a guy who knew about it," an apparent reference to the earlier shooting.

While driving with Lundy, the three saw Steven Brown "with a pistol." Defendant claimed that Brown "fired at us, and I fired back." Brown had a revolver, or "it could have been an automatic."[1] Lundy also fired, using a "street sweeper," which was later described as a pistol-grip shotgun. Defendant denied intending to kill anyone, and said he did not see anyone with Brown.

The parties stipulated that a neighbor heard two sets of shots, one like a shotgun, and the other like automatic gunfire, and saw a single flash from the station wagon.

I. VOLUNTARINESS OF CUSTODIAL STATEMENT TO POLICE

Defendant first argues that the circuit court erred when it found that he voluntarily gave a statement to police while in custody. This claim was preserved by a motion to suppress pursuant to *People v Walker (On Rehearing)*, 374 Mich 331, 338; 132 NW2d 87 (1965).

Statements made during custodial interrogation are inadmissible unless the accused voluntarily, knowingly and intelligently waived his rights under the Fifth Amendment. *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 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.

This Court examines the entire record and makes an independent determination of voluntariness. *People v Sexton*, 458 Mich 43, 68; 580 NW2d 404 (1998). We will not reverse unless we are left with a definite and firm conviction that a mistake was made—in other words, the "clearly erroneous" standard applies. *Id*.; *People v Sexton (After Remand)*, 461 Mich 746, 752; 609 NW2d 822 (2000). Deference is given to the trial court's assessment of the weight of the evidence and credibility of the witnesses, and the court's findings will not be reversed unless they are clearly erroneous. *Id.*; *People v Howard*, 226 Mich App 528, 543; 575 NW2d 16 (1997). Conversely, the trial court's application of constitutional standards is an issue of law reviewed de novo. *People v Daoud*, 462 Mich 621, 629-630; 614 NW2d 152 (2000).

The prosecutor argued below, and we agree, that the *Walker* hearing was a credibility contest between defendant and the police officer who took his statement. The officer testified that he read defendant his constitutional rights several hours after defendant turned himself into the police, after a lineup was conducted, but before interrogation. He let defendant read the advice of rights form, and defendant appeared to read it and signed it. *Id.* The officer admitted that he did not have defendant initial each right as he read them. According to the officer, defendant did not appear sleepy, he denied being under the influence of alcohol or drugs, and he did not complain of hunger or thirst. Defendant did not ask for a lawyer and never asked to stop.

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[1] All the shell casings recovered at the scene admittedly matched defendant's gun, which was recovered from a person, but not from any of the defendants. Defendant said he threw his gun in the Detroit River. The defendants sought to prove that Steven Brown had a revolver because a revolver does not automatically eject its spent shells (thus explaining why only one set of shells was found at the scene of the shooting).

Defendant was shown the statements of his codefendants and was told that a witness had identified him in the lineup. Defendant gave an oral statement that was reduced to writing, and defendant signed the statement.

Defendant testified that he was advised of his rights only after giving his statement. He clarified that the officer never read the rights to him, but he was presented with a stack of papers to sign and the advice of rights form was concealed by other papers, but he signed the bottom of it. He testified that he was intimidated into giving a statement because the officer told him that he would never see his mother again and the only way that he would leave prison would be "in a pine box." Defendant testified that he asked for food, but the officer brought him soda pop that he did not want.[2]

Defendant testified that he was asthmatic, and his inhaler was taken from him. He was told that the inhaler could not be retrieved from the property room; defendant testified that he was wheezing from the heat of the interrogation room and was later taken to the hospital during the night because of his asthma. Defendant testified that he wrote out a statement, but claimed the officer said he was unable to read it and tore it up, and the officer wrote out a new statement in his own handwriting. Nonetheless, the statement that defendant said he wrote was consistent with the statement used in evidence—namely, defendant maintained that he was riding with the codefendants when they came upon Steven Brown, and Brown started shooting at their car. Defendant stated that he shot back at Brown.

The court found the officer's testimony credible, noting, "I do not credit the testimony of the defendant." The court found that defendant was advised of his rights orally, and then was permitted to read the rights to himself. Defendant appeared to read the rights and signed the acknowledgment. He was told that a witness identified him in the lineup, and he was permitted to read his codefendants' statements before giving his own statement. The court stated that the contents of the statement did not support defendant's contention that he was threatened or coerced into making the statement because the statement was "self-serving" and not the product of a coercive environment.

On appeal, defendant argues that the court erred by relying on the content of the statement and its "self-serving" nature. Defendant argues that the proper focus is the conduct of the police and the method used to extract the statement, rather than its truthfulness.

When examining the voluntariness of a confession, we focus on the conduct of the police. *Daoud*, *supra* at 635; *Howard*, *supra* at 540.[3] A determination of voluntariness is "uninfluenced by the truth or falsity of the confession." *Jackson v Denno*, 378 US 368, 377; 84 S Ct 1774; 12 L

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[2] The officer agreed that he brought defendant a can of pop.

[3] This is different from an inquiry into the knowing and intelligent waiver of defendant's rights. *Daoud*, *supra* at 635-636, 639; *Howard*, *supra* at 538, 540. There, we examine the defendant's mental state and his capacity to understand the *Miranda* warnings—what the rights encompass and minimally what waiver entails. *Daoud*, *supra* at 637, 640.

Ed 2d 908 (1964) (holding that admissibility of a confession is not a jury issue). See also *Lego v Twomey*, 404 US 477, 485; 92 S Ct 619; 30 L Ed 2d 618 (1972) ("[t]he use of coerced confessions, whether true or false, is forbidden because the method used to extract them offends constitutional principles"). Therefore, the truth or falsity of a defendant's custodial statement to police is not a factor in determining the propriety of police conduct.

Testimony relating to voluntariness must be measured against the backdrop of the witnesses' credibility, however. *Sexton (After Remand)*, *supra* at 752; *Howard*, *supra* at 543. Credibility includes not only the outward appearances of witnesses, but a comparison of their testimony with other testimony or a known body of evidence. *People v Miller (After Remand)*, 211 Mich App 30, 48; 535 NW2d 518 (1995). While the statement's text is not indicative of the conduct of the police, we agree with the circuit court that its nature affects the credibility of defendant's testimony that he was intimidated into making the statement. The substance of the statement may be used to determine defendant's credibility.

The court here did not examine whether defendant's statement was true or false and did not weigh the statement's contents against the conduct of the police. Rather, the court determined as one small part of its findings that the statement was inconsistent with defendant's claim that he was coerced. Ultimately, the court found that defendant's version of events was not credible and that the police officer's version was credible. After careful review of the entire record, we find no error in that determination.

II. UNPRESERVED CLAIMS OF ERROR

Defendant argues that the court erred by (1) allowing a police officer to testify at trial that defendant's custodial statement was taken after defendant was permitted to read two witness statements, (2) allowing a police officer to testify that defendant was "familiar" to the police, and (3) permitting the prosecutor to state during closing argument that there was "no evidence of self defense."

We note at the outset that trial counsel did not object to any of these matters. Accordingly, these three issues are not preserved for appellate review. MRE 103(a)(1) (evidentiary issues); *People v Carines*, 460 Mich 750; 597 NW2d 130 (1999) (unpreserved constitutional error); *People v Grant*, 445 Mich 535; 520 NW2d 123 (1994) (unpreserved non-constitutional error). We further note that defendant does not argue that the *Carines* rule applies to these unpreserved issues, although defendant argues that the first claim should be reviewed under comparable federal authority interpreting the "plain error" rule found in the Federal Rules of Criminal Procedure. See *United States v Olano*, 507 US 725; 113 S Ct 1770; 123 L Ed 2d 508 (1993); *United States v Causey*, 834 F2d 1277, 1281 (CA 6, 1987).

Under *Carines*, *supra*, an unpreserved claim of constitutional error may lead to reversal only if three requirements are met:

> 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. [*Carines*, *supra* at 763 (citations omitted).]

After a defendant establishes these three requirements, this Court must exercise discretion whether to reverse the conviction:

> Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error "'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence." [*Id.* (citation omitted).]

The identical rule applies to unpreserved claims of non-constitutional error. *Grant*, *supra*.

A. Statement of Accomplices

Defendant argues that the court erred by allowing a police officer's testimony that defendant gave his statement after reading the statements of two other "witnesses," and that he wanted defendant to see "what your boys have said about" the shooting. Contrary to defendant's argument, the quoted testimony is not equivalent to the introduction of inculpatory statements by accomplices. See *Cruz v New York*, 481 US 186; 107 S Ct 1714; 95 L Ed 2d 162 (1987). The second statement was elicited by defense counsel, who knew that the same answer had also been given at a prior hearing in response to essentially the same question (the *Walker* hearing). Defendant cannot complain of error he occasioned. *People v Griffin*, 235 Mich App 27, 46; 597 NW2d 176 (1999).

We disagree with defendant's argument that the jury was "effectively" told that the codefendants had made statements refuting defendant's claim of self-defense. The officer's testimony was too vague to convey that meaning. Accordingly, defendant has not demonstrated "plain error."

B. Defendant "Familiar" to Police

Defendant also argues that the police officer improperly testified that defendant was "familiar" to the police. Defendant asserts that this was equivalent to testifying that he had committed other crimes because, he argues, "most of us are not known to our local police force unless we have been in some kind of trouble."

We disagree with defendant's assumption in general and particularly within the confines of this case. Witness Steven Brown had testified that the police knew him (Brown), but he had no criminal record. Officer Michael Jackson testified that he had seen Brown in the neighborhood before but did not know his name. Defendant has not shown that he was any different than Brown. Thus, considered in this context, it would not have been unreasonable for the jury to infer that defendant, like Brown, would be familiar on sight to police officers who patrol that area. We will not assume that a potentially neutral statement had a negative effect. Again, defendant has not shown that plain error exists or that he was prejudiced.

C. Prosecutor's Closing Argument

In his third allegation of unpreserved error, defendant urges that the prosecutor engaged in misconduct by arguing that "there is simply no evidence before you of self-defense" and

"[t]here simply is no evidence of that." By this, defendant argues, the prosecutor improperly shifted the burden of proof and commented on defendant's silence.

We find no "plain error." The prosecutor's remarks were a proper comment on the evidence and did not suggest to the jury that defendant had to prove anything. *People v Sanders*, 163 Mich App 606, 610-611; 415 NW2d 218 (1987). The prosecutor also argued to the jury that the prosecution bore the burden of proving guilt beyond a reasonable doubt and "the burden never shifts," and the court so instructed the jury.

III. SENTENCING

Finally, defendant argues that his sentences are disproportionate because he was a twenty-two-year-old single male with no juvenile or felony record, was employed for five years as a mechanic, and had the positive support of his immediate family. Defendant also argues that the court may have based the sentence on inaccurate information because the prosecutor argued at sentencing that the shooting occurred on a crowded street. Defendant's sentence was within the guidelines' recommended range of 270 to 450 months.

Defendant's criminal record—which was free of juvenile adjudications and felony convictions—included three misdemeanors. Nonetheless, criminal history is already adequately considered in the calculation of the guidelines. *People v Babcock*, 244 Mich App 64, 79; 624 NW2d 479 (2000). His employment for five years is laudable, as is the support of his family, but they do not make the sentence disproportionate. Accordingly, defendant's sentence, within the guidelines' recommended range, must be affirmed. MCL 769.34(10); *People v Leversee*, 243 Mich App 337, 348; 622 NW2d 325 (2000).

We disagree that the court may have mistakenly believed that the shooting occurred on a crowded street. The judge presided over a seven-day trial in which the proofs established that the shooting occurred shortly after midnight and there was no evidence of a crowd. The court did not indicate that it was relying in any way on the prosecutor's misstatement. We cannot conclude that the sentencing court was misled.

Affirmed.

/s/ Michael J. Talbot
/s/ Janet T. Neff
/s/ E. Thomas Fitzgerald