# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>June 3, 2004 |
| v | No. 246619<br>Wayne Circuit Court |
| JEFFREY CATO,<br><br>Defendant-Appellant. | LC No. 02-2504-01 |

Before: Owens, P.J., and Kelly and R. S. Gribbs*, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317, two counts of assault with intent to commit armed robbery, MCL 750.88, felon in possession of a firearm, MCL 750.224f, and felony firearm, MCL 750.227b. The trial court sentenced defendant to 300 to 500 months' imprisonment for the second-degree murder conviction, fifteen to thirty years' imprisonment for the assault convictions, one to five years' imprisonment for the felon in possession conviction, those sentences to run concurrently, and a consecutive two-year imprisonment term for felony firearm. Defendant appeals as of right, challenging the trial court's denial of his motion to suppress a statement he made to police, and asserting that his trial counsel rendered ineffective assistance by failing to request correction of the presentence report to reflect that defendant was not the shooter. We affirm, but remand to the trial court for correction of the PSIR to reflect that defendant was not the shooter.

I

The instant case arose from the shooting death of Michael Staunton, around midnight on September 10, 2001. Staunton and a colleague, Michael Pemberton, were employees of Michigan Public Telephone and repairing a pay phone on the corner of Joy and Patton Roads, when they were approached by two men on foot. Both men pulled out guns. At trial, Pemberton identified defendant as the assailant in front of Staunton. Pemberton testified that as he and Staunton moved toward Pemberton's vehicle to get away from the assailants, two to five shots were fired. Pemberton drove Staunton to Oakwood hospital, where Staunton died a short time later. An assistant medical examiner at the Wayne County Medical Examiner's Office testified at trial that Staunton suffered an entrance gunshot wound on the left lower back, and an exit gunshot wound on the left groin, and that the path of the bullet caused extensive internal

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

bleeding into the abdominal and pelvic cavity. She testified that because no projectile was recovered from the wound track, neither the type of gun or the caliber of the gun could be identified. She also testified that there was no evidence of close-range firing.

After the shooting, the two assailants ran and rejoined other men with whom they had been driving around in a Jeep. Detroit Police officers Curtis Johns and Edward Davis were on night-shift patrol at the time in Detroit's 6th Precinct and observed four to five unknown African-American males running across Fitzpatrick at the Chicago Road area. Officers Johns and Davis observed the men enter a Jeep through the same door, and observed the Jeep take off at a high rate of speed, squealing tires. The officers testified at trial that they followed the Jeep and, after a LEIN check revealed the Jeep was stolen, activated their lights and sirens. The Jeep crashed several blocks later, and its occupants left the vehicle and fled, scattering in different directions. The officers testified that one of the men that got away was wearing a red shirt, black pants, and had a large afro, and was 5'9" to 6". The officers apprehended two of the men, DeSean Butler and Rahim Jones, and found a .38 caliber handgun with live rounds and the butt stock of a long gun in the Jeep. Both were submitted for fingerprints, as well as the Jeep itself. Michael Cutts, a Detroit Police Department evidence technician, testified that he examined the butt stock and recovered no fingerprints from it.

Defendant testified at trial in his own defense. Defendant denied shooting Staunton and denied being present at the shooting, although he admitted having been with the men in the Jeep earlier that day.

A

On January 25, 2002, while defendant was in custody at Wayne County jail on an unrelated matter,[1] Detroit Police Department Detective Sergeant Felix Kurt went to the jail to question defendant about the instant offenses, but cut the questioning short after eliciting only basic information because there was commotion and no private room available. The following day, January 26, 2002, a homicide-section detective, Barbara Simon, questioned defendant for more than two hours. Simon testified at trial that she read defendant his *Miranda*[2] rights, he initialed the standard rights form, and that she then questioned him, eventually writing down defendant's answers to questions she posed. Simon testified that she had defendant review the nine-page statement she wrote, and that defendant initialed the answers to each question.

B

Defendant was charged with six counts: felony murder,[3] assault with intent to murder (Pemberton),[4] two counts of assault with intent to rob while armed,[5] felon in possession of a

[1] Defendant was waiting to be re-released on a tether on a drug case.

[2] *Miranda v Arizona,* 384 US 436, 475; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

[3] MCL 750.316(1)(b).

[4] MCL 750.83.

firearm,[6] and felony firearm.[7] Defendant moved to suppress the statement he made to Detective Simon. After a *Walker*[8] hearing, the court concluded that under the totality of the circumstances, defendant's statement was voluntary, and denied defendant's motion to suppress. The jury convicted defendant of second-degree murder, two counts of assault with intent to rob armed, felon in possession of a firearm, and felony firearm. This appeal ensued.

II

Defendant asserts that the trial court reversibly erred in concluding that the prosecution had shown a valid waiver of his right to counsel during custodial interrogation, and in denying his motion to suppress the statement he made to Detective Simon. We disagree.

This Court reviews for clear error the trial court's factual findings regarding a defendant's knowing and intelligent waiver of *Miranda* rights, with deference to the court's credibility determinations. *People v Daoud,* 462 Mich 621, 629-630; 614 NW2d 152 (2000). This Court engages in de novo review of the entire record. *Id.* "The prosecution has the burden of establishing a valid waiver by a preponderance of the evidence." *Daoud, supra* at 634, citing *Colorado v Connelly*, 479 US 157, 168; 107 S Ct 515; 93 L Ed 2d 473 (1986).

Statements of a defendant during a custodial interrogation are inadmissible unless the defendant voluntarily, knowingly and intelligently waived his right to silence and his right to counsel. *Miranda v Arizona,* 384 US 436, 475; 86 S Ct 1602; 16 L Ed 2d 694 (1966); *Daoud, supra* at 632-634. This Court must determine 1) whether the waiver was 'voluntary' and 2) whether the waiver was 'knowing' and 'intelligent.' *Daoud, supra* at 639.

> First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the "totality of the circumstances surrounding the interrogation" reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived. [*Daoud, supra* at 633, quoting *Moran v Burbine*, 475 US 412, 421; 106 S Ct 1135; 89 L Ed 2d 410 (1986).]

The *Daoud* Court further noted:

> The 'totality of the circumstances' approach referred to in *Moran* requires an inquiry into all the circumstances surrounding the interrogation. This includes evaluation of the suspect's

(…continued)

[5] MCL 750.88.

[6] MCL 750.224f.

[7] MCL 750.227b.

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

> age, experience, education, background, and intelligence, and into whether he has the capacity to understand the warnings given him, the nature of his [*Miranda*] rights, and the consequences of waiving those rights. [*Fare v Michael C*, 442 US 707, 725; 99 S Ct 2560; 61 L Ed 2d 197 (1979); see also *Cheatham*,[9] *supra* at 27.]

When a suspect invokes his right to have counsel present during a custodial interrogation, the police must immediately cease all questioning, and cannot reinitiate questioning without counsel present, unless the defendant initiates further questioning. *Edwards v Arizona*, 451 US 477, 484-485; 101 S Ct 1880; 68 L Ed 2d 389 (1981); *People v Paintman*, 412 Mich 518, 525; 315 NW2d 418 (1982); *People v Adams*, 245 Mich App 226, 237; 627 NW2d 623 (2001).

**Testimony at the *Walker* hearing**

Sergeant Kurt testified at the *Walker* hearing that on January 25, 2002, he went to Wayne County Jail, where defendant was being held on an unrelated matter, to obtain a statement from defendant about the instant case. Kurt testified that defendant was brought from the cell he was in, he introduced himself to defendant, and told defendant he was there to try to get a statement from him in regard to the instant shooting. Kurt testified that he and defendant talked in a common hallway, but that he left after talking for only a few minutes because the area was too noisy and there was too much foot-traffic. Kurt testified that he obtained only general information from defendant on an interrogation sheet (name, address, age, height, weight, phone number, parents' names, siblings' names), and that he and defendant talked a bit about defendant's father, whom Kurt had known years before. Kurt testified that he did not question defendant about the instant case, and that he therefore did not advise defendant of his *Miranda* rights. Kurt testified he told defendant that someone else would talk to him later. He also testified that he did not mention any of the co-defendants, denied that defendant declined to speak with him, denied that defendant asked for an attorney, and denied that defendant asked for his mother.

Detective Barbara Simon testified at the *Walker* hearing that she took a statement from defendant on January 26, 2002. She advised defendant of his constitutional rights, using the Detroit Police form, asked him each question on the rights form, had defendant read each right out loud to her, and had defendant write his initials by each one. Simon testified she also had defendant sign a waiver of his rights on that form. Simon testified there was nothing about defendant's demeanor to indicate that he was under the influence of alcohol or controlled substances, that defendant was responsive to her questions, and that he agreed to make a statement. She testified that she made no promises to defendant, did not represent that he would receive a lesser charge if he made a statement, and did not threaten defendant in any way. Simon testified that defendant told her he had completed 12th grade at Farmington Adult Education in 2001.

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[9] *People v Cheatham*, 453 Mich 1; 551 NW2d 355 (1996).

Detective Simon testified that before she took defendant's statement, she was familiar with the investigation in the instant case and believed defendant to be one of the shooters. Simon testified that the first few pages of the statement were defendant's narrative version, and that later she took down defendant's responses to her questions, she had him read the answers she had written, make any corrections needed, and sign each page. Simon testified that defendant signed the statement twenty-six times. She denied that defendant ever said the statement was inaccurate. Detective Simon denied that defendant had asked to speak to an attorney or to his mother. Simon denied that she showed defendant the statement of Nelson Page, and denied telling defendant that the other men involved in the incident had turned state's evidence against him. She denied telling defendant that he should understand that he risked facing life imprisonment. She testified that she and defendant were alone in the office where the interrogation occurred, and that defendant told her he wanted to tell her his side of the story because he did not shoot anybody. Simon also testified that defendant in his statement claimed someone other than he fired the shot that killed Staunton.

Defendant testified at the *Walker* hearing that he declined to talk to Detective Kurt when he saw him at the Wayne County Jail in January 2002, that he told Kurt he wanted to talk to his lawyer and to his mother, and that Kurt told him he would be back the next day to pick him up. The next day, defendant was taken to the homicide section of the DPD, where Detective Simon talked to him in a room, alone.

Defendant testified that he was 18 years old when arrested, and had graduated from Farmington Adult Education. He testified that he had never been interrogated by a police officer before the instant case, and that the only reason he repeatedly signed the statement Detective Simon prepared was that she told him that three people were saying he committed the murder, that she had a witness that could identify defendant "to a T," and that if defendant wanted to help himself and go home, he had to tell her what happened and sign the statement. Defendant testified that Simon told him that if he were found guilty he could get life imprisonment, and that if he did not talk to her, she would tell her partner to call the prosecutor and they would type a warrant for his arrest and put him through a lineup. Defendant testified that absent these threats and promises, he would not have made or signed the statement.

Defendant testified that the statement Simon took stated that he admitted getting out of the Jeep with a gun, and that Nelson Page did the shooting. Defendant testified that he was not under the influence of alcohol or controlled substances during Simon's interview, and that he signed his name repeatedly on the statement and on the constitutional rights form. Defendant testified that before January 2002, he did not know what felony murder was or that he would be charged with it, and that he only signed the documents because he wanted to go home.

Defendant's mother, Catherine Cato, was called by the court for questioning at the *Walker* hearing. Mrs. Cato testified that she talked to defendant by phone on January 25, 2002, when he called her collect from the jail, and that defendant told her someone came to talk to him, that they were coming to get him the next day, that he did not want to talk to them without a lawyer or his mother, and that she told defendant, "Well, don't." She testified she talked to defendant the next day, while he was in Simon's office, and that she also talked to Simon. Simon told Mrs. Cato that she (Simon) was trying to help defendant and had just finished questioning him.

After closing arguments, the trial court asked counsel whether defendant's statement would be admissible if defendant had asked Detective Kurt for an attorney, an attorney was not provided, and defendant waived his *Miranda* rights the next day when questioned by Simon. Defense counsel told the court that defendant's statement would not be admissible. The trial court then indicated it thought there was law that allowed the police to reinitiate interrogation after a suspect asked for an attorney if they waited some sufficient period of time before reinitiating questioning. Defense counsel and the prosecutor both indicated on the record that the court's understanding was not correct. The trial court then stated:

> I heard the testimony that Ms. Simon said that she didn't offer him anything and that that's what he wanted to do. I heard his mother say she called him and they talked the night before. She told him to ask for a lawyer. I heard him say that he asked for a lawyer.
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> And again, in terms of is it inconsistent, I don't think that somebody's going to promise somebody something in exchange for some information that will make them culpable. That they would only make promises to people that are less culpable.
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> I think also the other way, that you're more likely to offer somebody something if they're more culpable to try to get them and elicit a statement to them [sic].
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> There's so many things in all of these arguments that show this, and then at the same time, show something that's totally inconsistent. I agree. It's inconsistent to say that you want a lawyer and then sign a statement that says you don't. That you have a right to a lawyer and you don't want the lawyer. Yes, there's a little inconsistence [sic].
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> It's inconsistent to say that you don't want to talk to somebody that you've received some advise that said, don't talk. Ask for a lawyer. Then you turn around and you sign your name and your initials a zillion times. I mean it's all inconsistent.
>
> What does it show.
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> Well, it can show that a person changed their mind. It can show that the person didn't say that by virtue of it being so inconsistent.
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> I don't think that Mr. Cato didn't tell him that, but at the same time, you know, is it inconceivable, is it inconsistent after being told what to do a person decides not to do that and to proceed with another course of action. I don't think that's necessarily inconsistent. People do and say whatever they want to and try to determine some consistency out of it, it's really difficult. People who are a diet [sic] and eat pizza. To me that's inconsistent.
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> * * *

You know inconsistency I think is so interwoven into that in these arguments there's nothing that is so consistent as to make one point or another. And that's why I think that the test that was incorporated was the totality. I mean how many times in my mind does mean something. It does show something. The absence of things being done tends to prove circumstantial [sic?]. Because there's a lot of circumstantial inferences that have to be made.

Well, if you ask for a lawyer, then why did you go ahead and talk. Oh, well you thought that if this- that that – is that reasonable? Was that person that was telling you that so convincing, was her charm so alluring that even though you didn't think that made since [sic], you were willing to trust them as to that point? I mean, you know, that's inconsistent that people that think that the police are out to get them, can get lowered into believing that the police is [sic] going to act in their best interest. That they'll tell you that the statement will help you. But the statement right on there says anything that you say will be used against you, not for you, but against you.

You hearing one thing and you're reading this. Isn't it inconsistent for somebody to say, well that really doesn't mean what it says. It really means this. No, that isn't inconsistent at all. All of that is reasonable.

People will be asked, oh, you can just sign here, it's all right. Just sign here. I mean, I've gone to house closures and seen people just sign whatever was put in front of them. Initial here, sign here. Here's the X, sign here. You sell all of this long-play stuff, and after while [sic] you just start signing.

Now, is a commitment to a $125,000 house loan, 30-year mortgage any different? I would suggest yes and no.

Do a [sic] person of Mr. Cato's age, is he more likely to be trusting of people in authority positions. I would say maybe if I had to guess as a presumption, perhaps. Perhaps. But then you can't say that's true either for all. But I know usually, you know with figures in authorities, he had some expectation because he had freed [sic] and reput back in custody and really was expecting to be released.

I'm not sure about Mr. Kurt. Mr. Kurt for all of these years, he knew what the conditions would be like when he went over there. I don't think he was surprised to see the commotion, because the physical layout of that place suggested exactly that he found what he found, that there was – commotion. There's no interview rooms over there. It's going to be commotion.

Now, did he stop because there was too much commotion? That's just as likely as, you know, being told I'm not going to tell you anything. But they seem to have some conversation. Maybe he was just over there to soften Mr. Cato up.

They talked about things that both of them were familiar with. You know, all and all it boils down in my opinion as to the totality seriously of the situation, because nothing in and of itself directly proves anything in and of itself except what's

contained in black and white. Other than that, it's just a series of, I said this. No, I didn't say that. How old are you? Why would this make more sense that you would do something like this or something inconsistent.

Whew, these are just so difficult when so much we know is unwritten or what is said. Even the things that are agreed upon by both sizes [sic] that aren't contained or memorialized.

I think in this particular case the totality and circumstances, I think the People have sustained their burden and I'm going to allow the statement to be used.

We conclude that although the trial court's colloquy was at times less than a model of clarity, in the final analysis, it is clear that the court weighed the testimony, determined it found Kurt and Simon credible and, having had the opportunity to observe all the witnesses, unlike this Court, then concluded that under the totality of the circumstances defendant's waiver of his *Miranda* rights was voluntary, knowing and intelligent. We find no error in the court's determination that the prosecution established a valid waiver by a preponderance of the evidence.

III

Defendant next asserts that this Court should remand for correction of the presentence report to reflect that defendant was not Staunton's shooter. Under the circumstances presented, we agree.

Defendant's PSIR states under "Agent's Description of the Offense":

Per the Detroit Police Department Investigator's report, on 09/10/01 at approximately 11:45 p.m., at Joy Road and Patton in the City of Detroit, MI., Scout Car 06-13 manned by Police Officers Shaun Pawlis and Daniel Linares responded to Oakwood Hospital regarding a man shot. Upon their arrival the officers met with a Mr. Michael Pemberton and Dr. Owens, Emergency Room Attending Physician. Mr. Pemberton advised the officers that while at the corner of Joy Road and Patton at approximately 11:45 p.m., he and the deceased complainant, Michael Staunton were repairing a privately owned pay telephone when they were approached by the defendant, Jeffrey Darnell Cato. The defendant was armed with a rifle and demanded money. Mr. Pemberton then stated that he and the deceased complainant backed away from the defendant and the defendant threatened they would be shot if they didn't halt. Mr. Pemberton and Mr. Staunton then started running to the vehicle and that's when Defendant Cato began shooting at them, hitting Complainant Staunton in the back. Mr. Pemberton conveyed Mr. Staunton to the hospital where he was listed in critical condition. Mr. Staunton expired on 09/11/01 at 5:40 a.m.

The defendant was apprehended by Police Officers Curtis Johns and Edward Davis of the 6th Precinct. Jeffrey Darnell Cato was in his get-away vehicle, the officers followed the vehicle and attempted to stop the vehicle. Mr. Cato accelerated to escape and hit another car. His vehicle was forced to stop and then

defendant began running from the stolen vehicle. He was subsequently arrested and detained.

At sentencing, defense counsel requested leniency for defendant, in light of co-defendant Nelson Page's guilty plea, entered just before the start of the instant trial, in which Page admitted being Staunton's shooter.

The trial court stated that Page had admitted at a plea-taking just before the instant trial that he was the one who shot Staunton. The trial court also stated "I do believe that [defendant Cato] didn't shoot anybody, but I know he was there based on the testimony as I believe it to be."

Defendant acknowledges that he did not request the trial court to correct or delete the challenged information from the presentence report, but argues that the continued inclusion of information in the presentence report that the trial court found inaccurate is plain error affecting defendant's rights, because there is a real and substantial likelihood that the inaccurate information will affect his chances for parole.

The trial court clearly did not rely on the erroneous information in the PSIR in sentencing defendant. Defendant's concern is for the effect the erroneous information could have on his parole eligibility; a legitimate concern, to be sure. Given the gravity of the offense the PSIR assumes defendant committed, shooting Staunton, and the likelihood that the now-erroneous information in the PSIR will affect defendant's parole eligibility, we remand for correction of the PSIR to reflect that defendant was not the shooter.[10] We do not retain jurisdiction. In all other respects, we affirm.

/s/ Donald S. Owens
/s/ Kirsten Frank Kelly
/s/ Roman S. Gribbs

[10] In light of our disposition we need not address defendant's alternative argument that his trial counsel was ineffective in failing to request correction of the presentence report after the trial court stated it did not believe defendant was the shooter.