STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 3, 2004
v	No. 246709 Wayne Circuit Court
MICHAEL ELLIS, Defendant-Appellant.	LC No. 01-007703-01

Before: Jansen, P.J., and Meter and Cooper, JJ.

PER CURIAM.

Defendant Michael Ellis appeals as of right his jury trial convictions for second-degree murder[1] and possession of a firearm during the commission of a felony[2] for the killing of Robert Daniels. Defendant was sentenced to eighteen to forty years' imprisonment for his murder conviction and two years' imprisonment for his felony-firearm conviction. We affirm.

I. Facts

Mr. Daniels was the ex-boyfriend of defendant's sister, Karen Ellis. Ms. Ellis left Mr. Daniels in February of 2000, following an eight-year abusive relationship. However, Ms. Ellis testified that the violence did not end with the relationship. Ms. Ellis further testified that the night before the shooting, Mr. Daniels choked her in her home. When Mr. Daniels allowed her to take the couple's children to a neighbor's house, Ms. Ellis called the police and hid in the basement while Mr. Daniels stalked her with a gun.

On June 17, 2001, Ms. Ellis took her children to her mother's home and related the events of the previous evening to her family. Mr. Daniels arrived with a friend asking for his son. Mr. Daniels returned to his car and began to leave when defendant returned home. Mr. Daniels then walked back to the house and opened the door. When he did, defendant shot him twice with a rifle, killing him.

[1] MCL 750.317.

[2] MCL 750.227b.

Defendant testified that he retrieved his rifle to frighten Mr. Daniels away. Defendant also testified that his friend, Marc Perry, indicated that Mr. Daniels had a gun, and that he believed he saw a gun in Mr. Daniels's hand. Defendant admitted that he shot Mr. Daniels twice and then shut and locked the front door. Defendant further testified that Mr. Perry had a weapon and shot at Mr. Daniels's vehicle before the two ran away.

II. Custodial Statements

Defendant asserts that the trial court improperly admitted his two custodial statements following his *Walker*[3] hearing. Specifically, defendant argues that the statements were involuntary because he was denied his right to counsel, was promised leniency, and was coerced into speaking by suggestions that he acted in self-defense. We review a trial court's factual findings on a motion to suppress for clear error.[4] "When reviewing a trial court's determination of the voluntariness of inculpatory statements, this Court must examine the entire record and make an independent determination."[5]

Compliance with *Miranda*[6] is necessary to establish that a defendant's waiver was knowing and intelligent, but is not dispositive on the issue of voluntariness.[7] The voluntariness of a confession is determined by considering the totality of the circumstances, including the duration of the defendant's detention and questioning; the age, education, intelligence and experience of the defendant; whether there was unnecessary delay of arraignment; the defendant's mental and physical state; whether the defendant was threatened or abused; and any promises of leniency.[8]

Following the shooting, defendant's family retained attorney George Garris to represent defendant. Defendant made arrangements to meet Mr. Garris in his office on the morning of June 21, 2001, and travel together to turn himself in to Detroit police. However, defendant was arrested that same morning at 4:30 a.m., while sitting in a car outside a hotel in the city of Livonia. Defendant told the arresting officer that he was wanted for a murder in the city of Detroit, and was released to Detroit police officers at 5:45 a.m. Defendant was eighteen-years old at the time of his arrest and had completed the eleventh grade.

Detroit police officer Russell Solano was the first to question defendant at 6:35 a.m., followed shortly thereafter by Officer Miguel Bruce at 8:00 a.m. Officer Solano and Officer Bruce both testified to reading defendant his *Miranda* rights and indicated that defendant signed a waiver form. Both defendant and his mother, Doris Ellis, testified that he had consumed

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[3] *People v Walker (On Reh)*, 374 Mich 331, 338; 132 NW2d 87 (1965).

[4] *People v Oliver*, 464 Mich 184, 191; 627 NW2d 297 (2001).

[5] *People v Shipley*, 256 Mich App 367, 372; 662 NW2d 856 (2003).

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

[7] *People v Godboldo*, 158 Mich App 603, 605-606; 405 NW2d 114 (1986).

[8] *People v Sexton (After Remand)*, 461 Mich 746, 752-753; 609 NW2d 822 (2000); *Shipley*, *supra* at 373-374.

alcohol that night. Defendant asserted that he was intoxicated, however, the officers testified that defendant did not appear to be intoxicated or otherwise under the influence of any drug at the time. Officer Solano testified that defendant denied being tired, but defendant testified that he had not slept that night and kept falling asleep while waiting to be questioned. Defendant testified that he asked Officer Solano to allow him to call his attorney, but his request was denied. The officers testified that defendant agreed to speak to them and never requested an attorney. Defendant also asserts that, before the second interview, Officer Bruce told defendant that the police knew that Mr. Daniels was causing problems with the family and that it appeared that defendant acted in self defense. However, both officers denied having such knowledge about the case prior to questioning defendant.

In denying defendant's motion to suppress the statements, the trial court specifically stated that "the Court is free to observe the demeanor of the witness, and the Court finds the defendant was not very credible."[9] The trial court found defendant's acts of waiving his rights and admittedly voluntarily giving a statement inconsistent with his contention that his request for his attorney was denied. Both officers testified that defendant's statements were voluntarily made after defendant received and waived his *Miranda* rights, and the trial court considered their testimony more credible than that of defendant. As we defer to the trial court regarding witness credibility,[10] we conclude that this finding was not clearly erroneous. Therefore, the trial court properly denied defendant's motion to suppress.

III. Sufficiency of the Evidence

Defendant argues that the prosecution presented insufficient evidence to support his second-degree murder conviction. Again, we disagree. In sufficiency of the evidence claims, this Court reviews the evidence in the light most favorable to the prosecution and determines whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt.[11] "[C]ircumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime."[12] Determinations of witness credibility and the weight of the evidence, however, are the sole province of the jury.[13]

Second-degree murder is defined by statute as "all other kinds of murder" that are not first-degree murder.[14] To sustain a conviction, the prosecution must prove a death caused by defendant's act with malice and without justification or excuse.[15] "Malice is defined as the intent

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[9] Evidentiary Hearing Transcript, May 15, 2002, p 51.

[10] *Shipley, supra* at 372-373.

[11] *People v Hunter*, 466 Mich 1, 6; 643 NW2d 218 (2002).

[12] *People v Lee*, 243 Mich App 163, 167-168; 622 NW2d 71 (2000).

[13] *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748, amended 441 Mich 1201 (1992).

[14] MCL 750.317.

[15] *People v Mendoza*, 468 Mich 527, 534; 664 NW2d 685 (2003), citing *People v Goecke*, 457 Mich 442, 463-464; 579 NW2d 868 (1998).

to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and willful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm."[16] The intent to kill may be inferred where the type of weapon used was "naturally adapted to produce death."[17]

The jury heard testimony concerning Mr. Daniels's abusive relationship with Ms. Ellis. However, defendant admitted on the stand that he shot Mr. Daniels twice with a rifle and intended to kill him. Defendant also contradicted his assertion that he shot in self defense by admitting that Mr. Daniels did not have a gun and that he could have locked the door before Mr. Daniels approached. Furthermore, several defense witnesses had altered their testimony from their original statements given to police, which may have damaged their credibility with the jury. Therefore, considering the evidence presented in a light most favorable to the prosecution, we find that sufficient evidence was presented during trial for a reasonable jury to find that defendant shot and killed Mr. Daniels with malice and without justification or excuse.

IV. Prosecutorial Misconduct

Defendant contends that he was denied a fair trial as the prosecutor asked several witnesses about their failure to come forward to authorities earlier. Prosecutorial misconduct claims are reviewed on a case by case basis, examining any remarks in context, to determine if the defendant received a fair and impartial trial.[18] Because defendant failed to object to the alleged instance of prosecutorial misconduct, our review is limited to plain error affecting substantial rights.[19] "No error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction."[20]

The prosecution is not required to lay a special foundation before impeaching *alibi* witnesses regarding their failure to come forward to the authorities before trial.[21] However, it is well-established that the prosecution must lay a foundation that a *non-alibi* witness would have a "natural tendency" to come forward with exculpatory evidence before eliciting testimony regarding their failure to do so.[22] The People ask us to extend the Supreme Court's ruling in *People v Gray* to this situation involving non-alibi witnesses. However, there is a valid

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[16] *People v Fletcher*, 260 Mich App 531, 559; 679 NW2d 127 (2004), quoting *Goecke, supra* at 464.

[17] *People v Taylor*, 422 Mich 554, 567-568; 375 NW2d 1 (1985), quoting *Roberts v People*, 19 Mich 401, 415-416 (1870).

[18] *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001).

[19] *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

[20] *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000).

[21] See *People v Gray*, 466 Mich 44; 642 NW2d 660 (2002).

[22] See *People v Emery*, 150 Mich App 657, 666; 389 NW2d 472 (1986); *People v Perkins*, 141 Mich App 186, 195-196; 366 NW2d 94 (1985); *People v Grisham*, 125 Mich App 280, 287-288; 335 NW2d 680 (1983).

distinction between alibi and non-alibi witnesses. While an alibi witness knows his information is essential to the defense, a non-alibi witness possessing relevant exculpatory information is not necessarily aware of its import.[23]

Accordingly, we find that the prosecution erred in questioning defense witnesses regarding their failure to come forward before trial without first demonstrating their "natural tendency" to do so. However, in light of defendant's confession and admissions on the stand, the prosecution's error does not rise to the level of reversible error.

V. Sentencing

Defendant finally contends that he is entitled to resentencing as the trial court improperly scored OV 6 at twenty-five instead of ten points. Defendant claims that the trial court was required, pursuant to MCL 777.36(2)(b), to score only ten points because the death occurred during a combative situation and as a result of Mr. Daniels's victimization of defendant. We disagree. The sentencing court has discretion in determining the number of points to be scored provided that there is evidence on the record that adequately supports a particular score.[24]

Pursuant to statute, the sentencing court must score OV 6 "consistent with a jury verdict unless the judge has information that was not presented to the jury."[25] There is no indication in the record that the trial court had any information before it other than that presented to the jury. Based on the evidence presented, the jury declined to find that defendant had a justification or excuse for killing Mr. Daniels. Furthermore, while Ms. Ellis testified that Mr. Daniels had previously abused *her,* no evidence was presented at trial that he had ever victimized *defendant.* Defendant testified that he was afraid Mr. Daniels had a weapon and had come to his mother's home with violent intentions. However, defendant admitted that he did not see Mr. Daniels with

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[23] See *Grisham, supra* at 287-288.

[24] *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

[25] MCL 777.36(2)(a). We note that MCL 777.36(2)(a) appears on its face to be in opposition to the recent United States Supreme Court decision of *Blakely v Washington*, ___ US ___; ___ S Ct ___; ___ L Ed 2d ___ ; 72 USLW 4546 (June 24, 2004), as the statute explicitly allows a sentencing court to consider factors not before the jury. However, a majority of the Michigan Supreme Court recently decided that *Blakely* does not apply to Michigan's indeterminate sentencing guidelines in which the maximum sentence is set by law. *People v Claypool*, ___ Mich ___; ___ NW2d ___ (Docket No. 122696, decided July 22, 2004), slip op at 17, n 14 (Justices Cavanagh, Weaver and Young concurred with Justices Taylor and Markman, writing for the Court, that *Blakely* is inapplicable in Michigan).

a gun. As there was evidence to support this score, the trial court did not abuse its discretion in scoring OV 6 at twenty-five points rather than ten points. As defendant's score is within the appropriate sentencing guidelines range and we find no error in scoring, we must affirm.[26]

Affirmed.

/s/ Kathleen Jansen
/s/ Jessica R. Cooper

[26] MCL 769.34(10).