STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 14, 2004
v	No. 246776 Wayne Circuit Court
DENNIS R. FARMER, Defendant-Appellant.	LC No. 01-008873-02

Before: Whitbeck, C.J., and Saad and Talbot, JJ.

PER CURIAM.

Defendant Dennis Farmer appeals as of right his jury trial convictions for felony murder,[1] armed robbery, and possession of a firearm during the commission of a felony.[2] The trial court sentenced Farmer to life in prison for the felony murder conviction and two years in prison for the felony-firearm conviction. The trial court imposed no sentence for the armed robbery conviction. We affirm.

I. Basic Facts And Procedural History

This case arises from the shooting of Christopher Ingram. Ingram died from two gunshot wounds inflicted by Farmer and Eugene Fisher during a robbery. Codefendant Erric Watkins drove the men to the robbery. Watkins was charged with felony murder,[3] armed robbery,[4] and felony-firearm.[5] Farmer and Watkins were tried together before separate juries.

Farmer moved to suppress his statement below. At a *Walker* hearing Bruce Christnagel, a Wayne County police officer, testified that he worked for Operation Second Shot, which was formed to investigate homicides that had not been solved and involved the city of Detroit police

[1] MCL 750.316.

[2] MCL 750.227b.

[3] MCL 750.316.

[4] MCL 750.529.

[5] MCL 750.227b.

force, the Wayne County Sheriff's Department, the state police, and the Federal Bureau of Investigation. Christnagel testified that he picked Farmer up from the Macomb County Jail on July 12, 2001, at 3:30 p.m. and brought him to Detroit police department headquarters. According to Christnagel, he took Farmer to the seventh floor and read him his rights using the Constitutional Rights Certificate of Notification Form. Farmer initialed each right and signed the form. Christnagel stated that Farmer never requested to speak to an attorney. Christnagel asserted that he did not threaten Farmer and did not make him any promises. Christnagel also said that Farmer did not seem to be under the influence of any drugs. According to Christnagel, he told Farmer that he was there because they wanted to ask him questions about the murder of Ingram. Christnagel testified that another officer took over the interview soon after he read Farmer his rights.

Ramon Childs, an investigator with the Detroit police department, testified that he spoke to Farmer several hours after his arrest and that he was assisting Christnagel with the interview. Childs stated that Farmer did not ask for an attorney and that he did not threaten Farmer or make him any promises of leniency. According to Childs, Farmer did not appear to be intoxicated. Childs stated that he told Farmer that he was being charged with murder. According to Childs, he based the murder charge against Farmer on information from codefendant Watkins. Childs testified that he took a statement from Farmer on July 12, 2001, at 4:45 p.m and that Farmer told him that he knew nothing about Ingram's murder. Childs said that after Farmer gave the statement, he was transported to the Fourth Precinct for the night.

Childs testified that on the next day, July 13, 2001, Farmer was held on the fifth floor of police headquarters between 9:30 a.m. and 12:40 p.m. and that he then spoke with Farmer. Childs acknowledged that Farmer was not allowed to use the telephone while he was in custody. However, according to Childs, Farmer did not tell him that he did not want to be interviewed, nor did he ask to speak with an attorney. Childs stated that he did not tell Farmer that he would keep him until he confessed and that he informed Farmer of his constitutional rights using the Notification of Constitutional Rights Form. Childs stated that Farmer put his initials next to each right on the form to show he understood each one, he signed his name at the bottom of the form, and that he dated it July 13, 2001. According to Childs, Farmer told him that he had a high school diploma, that he had been arrested three times before this incident, and that he spoke with detectives when he was arrested for breaking and entering. Childs said that did not feel that Farmer told him the truth in his first statement because Farmer stated that he barely knew codefendant Watkins while Childs had information that Farmer knew codefendant Watkins well.

Childs testified that he took a second statement from Farmer on July 13, 2001, at 2:05 p.m. and that Farmer signed the statement. According to Childs, after Farmer gave his statement, they took a break and Farmer was given something to eat. Childs stated that he informed Farmer during the second interview that he did not believe Farmer was telling the truth and that Farmer offered to take a polygraph exam. Childs testified that he and Farmer went to the Forensic Service Unit to take a polygraph exam.

Andrew Sims, a polygraph examiner with the Detroit Police Department, testified that he conducted a polygraph test on Farmer on July 13, 2001, at about 5:30 p.m. after having Farmer read the Polygraph Waiver Rights Form and his Fifth Amendment rights. According to Sims, Farmer told him that he had a high school education and could read and write. Sims said that Farmer expressed a willingness to take the polygraph and he did not appear intoxicated or under

the influence of any drugs. Sims stated that he did not threaten Farmer or promise him leniency. Sims testified that after Farmer completed the polygraph, he told Farmer that he did not believe him and that he was going to tell the detectives that he did not believe him. Sims stated that he then asked Farmer if there was anything else Farmer wanted to tell him. According to Sims, Farmer then told him what happened at the crime scene. Sims said that he gave Farmer a piece of paper and left the room. According to Sims, Farmer then wrote his statement and gave it to Sims when he came back into the room. Sims testified that he then left Farmer with police officer Andre Guyton and police investigator George Harris. According to Sims, Farmer never asked for an attorney, never complained of an injury requiring medical attention, never asked to make a telephone call, and never said he did not want to take the polygraph. Sims stated that he informed Farmer that Farmer did not have to talk to him if he did not want to. Sims emphasized that he did not tell Farmer that it would help him if he wrote out a statement and that he did not tell Farmer that he would not get out of his situation until he wrote a statement.

Harris testified that he first spoke to Farmer on July 12, 2001, on the seventh floor of police headquarters with Christnagel and Childs but that he did not take a statement from Farmer. According to Harris, Farmer told him that there was a plan to rob Ingram of a pound of "weed" and Farmer was the driver. Harris said that, at that point, he had codefendant Watkins' statement which indicated that Watkins, and not Farmer, was the driver. Harris stated that he informed Farmer that all the rights he went over with Sims applied to Farmer's conversation with him and that Farmer told him that he understood. Harris testified that he then took a five-page written statement from Farmer at 9:10 p.m. on July 13, 2001, that Farmer initialed the statement in twenty-seven places, and that Farmer signed it in six places. Harris stated that he did not threaten Farmer and did not promise defendant leniency. According to Harris, Farmer did not appear intoxicated and did not ask for an attorney. Harris said that after Farmer gave his statement, Farmer asked to be able to call his girlfriend and his grandmother and that he was allowed to do so.

Andre Guyton, a Detroit police officer, testified that he picked Farmer up from Macomb County Jail on July 12, 2001, at 3:30 p.m. Guyton stated that he interviewed Farmer on that date while Christnagel and Childs were in the room and that he was present when Childs took Farmer's statement. Guyton stated that Farmer did not ask for an attorney and that Farmer denied any knowledge of the homicide. Guyton also said that on July 13, 2001, he and Harris interviewed Farmer.

Farmer testified that, when he was taken out of the Macomb County Jail by the Detroit police officers, he was told that he was being taken for questioning. According to Farmer, at police headquarters, he was put in a room with Christnagel, Guyton, Harris and Childs. Farmer said that he was given some "paperwork," that he was asked if he could read and write, and that he told the officers that he could. Farmer testified that the officers read the first right to him, that he asked them why he was there, and that they told him that he was brought down for questioning. Farmer testified that he asked if he could talk to a lawyer and he asked to make a telephone call, but that he was not allowed to make a call. According to Farmer, after the officers asked him a few questions, they took him to the fourth precinct. Farmer said that the next morning, he was taken back to police headquarters and put in a room with Childs. Farmer said that Childs told him that if he did not cooperate with the police, the case could be turned over to a federal grand jury and Farmer could get the death penalty. Farmer further said that

Childs told him that he had to cooperate with Childs. Farmer said that when the polygraph examination was brought up, he stated that he asked to talk to a lawyer. Farmer also said that a Federal Bureau of Investigation agent came into the room and told him that he could possibly get the death penalty. Farmer testified that he was threatened regarding what "they" would do if he did not cooperate and that he was told that if the case were taken to federal court, he would not be able to see his children again.

Farmer testified that he signed statements written by the officers and acknowledged that he wrote out a statement after the polygraph examination. Farmer stated, however, that he wrote down what he was told to write down. According to Farmer, he wrote the statement down in his own words but it was what Childs told him to write. Farmer acknowledged that he initialed and signed his statement. According to Farmer, when he told the officers that he wanted to speak to an attorney, they told him "[he] was only down for questioning, and it wasn't nothing that an attorney can do." Farmer stated, however, that he was not physically threatened.

At the conclusion of the testimony at the *Walker* hearing, the trial court found that Farmer was not credible. The trial court stated that it did not like the tactics employed by Childs in questioning Farmer, but found that the under a totality of the circumstances, Farmer's statement was voluntarily given and that Farmer had knowingly waived his *Miranda*[6] rights.

At trial, the only evidence linking Farmer to the shooting was the statement he gave to Harris on July 13, 2001. In that statement, Farmer told Harris, "Yes, I have the gauge, but I didn't mean to shoot Chris. This was only supposed to be a robbery." Farmer went on to confess that he, "Fester" (Eugene Fisher), and Forty (a codefendant) planned to rob Ingram. Farmer stated that codefendant Watkins picked him up between 10:00 p.m. and 11:00 p.m. and then they picked up Fisher. Farmer said that there was an AK-47 in the back seat of the car and a twelve-gauge shotgun under the passenger seat. In the statement, Farmer said that codefendant Watkins dropped Fisher and Farmer off in the parking lot of the Recreation Center and left to get Ingram. Farmer said that he and Fisher, who had the AK-47, hid behind snow mounds until codefendant Watkins returned with Ingram, then Fisher went to the car and got Ingram out and told Ingram to give him "the weed."

> [Ingram] got out and walked to the back of the car. [Fisher] made [Ingram] get on his knees. [Codefendant Watkins] searched [Ingram] and got the weed out of his hoody. [Codefendant Watkins] got back in the car and started to back up. Then [Fisher] shot [Ingram] with the AK-47 and I jumped because that wasn't supposed to happen. It wasn't supposed to be any shooting. Then I shot. I didn't even remember shooting.
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> Then I threw [Fisher] into the back seat and I jumped into the front seat. We left the park and drove down Navarro and went to [Fisher's] house. We split

[6] *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602, 1612; 16 L Ed 2d 694, reh den sub nom *California v Stewart*, 385 US 890; 87 S Ct 11; 17 L Ed 2d 121 (1966).

> up everything and we all got three hundred to four hundred dollars apiece and some weed. After I got my stuff I left the house.

Farmer told Harris that he got the shotgun out of the car after codefendant Watkins returned with Ingram, that he stood to Ingram's right and Fisher stood in front of Ingram, that he fired one shot, and that Fisher fired one shot. Farmer also told Harris that it was Fisher's idea to rob Ingram:

> [Fisher] said his girl was going to leave him because he lost his job. [Fisher] said he knew this guy with some pounds of weed. [Fisher] said he needed to hit a lick. [Codefendant Watkins] asked him who he was talking about. [Fisher] said [Ingram]. [Fisher] said his girl needed money for college and [Fisher] just kept bringing up the lick. Then I lost my job, and I did it.[7]

The medical examiner testified that Ingram sustained two gunshot wounds, one from a high-powered automatic weapon, like an AK-47, in the back of the neck and one from a shotgun to the upper right back. Harris testified that the casing found at the scene of the shooting was fired by an AK-47 and could not have been fired from either a nine-millimeter handgun or a twenty-two-caliber handgun.

Velma Tutt, an evidence technician with the city of Detroit Police Department, testified that she was called to a parking lot in the area of Navarre and Crusade on January 27, 2001, at about 12:10 a.m., where she saw the body of a black male lying in the parking lot. She also saw a cigarette package lying in the snow, a snow embankment that had footprints, fresh tire tracks in the snow, and a shell casing lying in the parking lot. According to Tutt, casings are found when an automatic weapon is used in a shooting. Tutt stated that there were footprints leading from the snow embankment to the body. Tutt said that she took a photograph showing the tire tracks and footprints leading up into the snow embankment, but that she was never given a shoe to compare with the footprints in the snow.

Fifteen-year-old Michael Atkins testified that on January 27, 2001, he was at his home on a street in the area of the Heilman Recreation Center, in which parking lot Ingram was found dead. Atkins testified that around eleven o'clock, he heard a car spinning its tires out in the snow at the Recreation Center. Atkins said that looked out his window and saw a four-door, white Crown Victoria pulling into the parking lot of the Recreation Center. Atkins said that he saw two people get out of the Crown Victoria, that one person shot the other person, and that the shooter got back in the Crown Victoria and the car "pulled off." According to Atkins, the two men were outside the car for a couple of minutes before the shooting, there were three people in the car before the shooting, and there were two people in the car after the shooting.

On cross-examination, Atkins testified that codefendant Watkins lived near him and Watkins had a white Crown Victoria with a blue rag top. Atkins stated that this car was not the same car that was involved in the shooting, which was all white. Atkins said that he saw the

[7] "Hit a lick" means to commit a robbery.

shooter with a "nine automatic" handgun but that he did not see an AK-47 or a shotgun and he did not hear a shotgun blast. Atkins testified that knew Ingram and that he knew codefendant Watkins, but that he did not hang out with Watkins and they were not friends. Atkins stated that if he had seen Watkins' car at the scene of the shooting he would have told the police.

Barbara Davis-Stone testified that she could see the parking lot of the Recreation Center from her home and she heard arguing coming from that lot on January 26, 2001, around 11:00 p.m. She said she saw people along the passenger side of a white Crown Victoria arguing. She stated that her husband told her not to be nosy so she lay down but that she then she heard two or three shots. According to Stone, when she looked out the window again, the car was gone and she saw a person lying in the parking lot. She said she could not describe the people she saw because it was dark and she could not see that well. Stone testified that she probably told a police officer that the driver of the car had an afro but she does not have an independent memory of doing so.

Leporian Stone, Barbara Davis-Stone's husband, testified that he looked out the window and saw three men standing next to a four-door white car on the passenger side arguing with each other. He stated that he lay down and then he heard three or four shots. He stated that his wife told him that the driver had an afro.

Childs testified that Farmer was held from July 12, 2001, until July 13, 2001. According to Childs, he spoke with Farmer on July 12, 2001, when Farmer denied knowing Ingram and denied any involvement in the shooting. Childs acknowledged that there was no physical evidence linking Farmer to the shooting and no eyewitness testimony placing him at the scene of the shooting. Harris testified that he reviewed three statements by Farmer before Farmer gave him the incriminating statement on the evening of July 13, 2001. According to Childs, when Harris spoke with Farmer on July 13, 2001, at 2:05 p.m., Harris informed Farmer of his constitutional rights. Childs said that Farmer told him that he wore his hair in an afro in January, 2001. According to Childs, Farmer also told him that he only used long guns, shotguns or rifles. Childs also stated that Farmer said that he was aware of a plan to rob Ingram.

Childs testified that he was aware that two men, named Marvis Daniels and Mitchell Randolph, were arrested the night of Ingram's shooting and that these men were driving a white Crown Victoria, which was impounded. Childs stated that Mitchell Randolph was related to a city of Detroit police officer. According to Childs, Daniels and Randolph were investigated, cleared and released. Childs testified that the gunshot wound which killed Ingram did not match the handgun that was found with Randolph and Daniels. Harris and Guyon also testified in conformance with their testimony at the Walker hearing.

Michael Mizer, a special agent with the Federal Bureau of Investigation, testified that he told Farmer that the case "might go federal." Mizer also testified that he advised Farmer that in the federal system, he could get the death penalty.

Codefendant Watkins' sister, Kenyatta Watkins, testified on his behalf that on January 26, 2001, she was at the C-Note Lounge from 8:30 p.m. until 2:30 a.m. with Tawana

Warren and Bridgette Lavaty. She testified that she knew this because a picture of her was taken at the lounge and she had written the date on the picture. Kenyatta Watkins stated that she drove her brother's white Grand Marquis[8] to the lounge that night, and that to her knowledge, the car was not moved from when she parked it at 8:30 p.m. until she left at 2:30 a.m. Robin Carethers, codefendant Watkins' mother, testified that she received a telephone call from Watkins in mid-July of 2001 at 3:00 a.m. and that he sounded like he was crying.

Codefendant Watkins testified in his own defense and stated that he was taken to the Detroit Police Department on July 10, 2001, at twelve in the afternoon. Watkins stated that he spoke to Harris until five or six o'clock in the evening. According to Watkins, Harris asked him if he knew anything about Ingram's shooting and Watkins told Harris that he did not. Watkins stated that Harris left the room for an hour and, upon his return, took Watkins to talk to Childs. Watkins stated that he talked to Childs until eleven o'clock at night, that Childs left him alone in the room for an hour, and that Childs then took him to talk to Sims. According to Watkins, he told Sims that he did not know anything about the shooting. Watkins said that Sims had him read a form and initial it if he understood it, which he did. According to Watkins, after he told Sims that he did not "give up his rights," Sims turned him over to Childs. Watkins stated that Childs slid him a piece of paper with a written statement on it and told him that if he signed the statement, he could go home. Watkins stated that Childs never informed him of his constitutional rights and that Childs told him that either he could sign the paper or he would get charged with the murder. Watkins stated that Childs then copied down what was written on the piece of paper and told Watkins to sign it. Watkins said that he then signed the statement. Watkins testified that he asked to speak to an attorney every time the police asked him a question and he stated that the police never stopped questioning him. According to Watkins, the day after he gave his statement, Christnagel spoke to him and asked him about the constitutional rights form. Watkins said that he understood the form and so he initialed it. Watkins said he then asked Christnagel for an attorney and Christnagel stopped questioning him.

Watkins testified that his sister had his car on the night of January 26, 2001. He stated that on that night he was babysitting his child and his girlfriend's child from 7:30 or 8:00 p.m. "all the way to the next day." Watkins stated that he did not see Eugene Fisher or anybody else that night and that he had nothing to do with Ingram's murder. On cross-examination, Watkins admitted that he knew Eugene Fisher and Farmer and that he owned a white four-door Grand Marquis in January 2001.

II. Prosecutorial Misconduct

A. Standard Of Review

Farmer argues that the prosecutor's comments that it was uncontroverted at trial that Farmer gave a statement to the police was an impermissible comment on his right not to testify

[8] According to the Insurance Institute for Highway Safety, a Crown Victoria and a Grand Marquis are "identical except for minor styling and trim differences." See http://www.iihs.org/vehicle_ratings/ce/html/10313_04.htm, visited December 3, 2004.

and constituted prosecutorial misconduct. Generally, a claim of prosecutorial misconduct is a constitutional issue which de novo, but we review the trial court's factual findings for clear error.[9]

B. Legal Standards

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial.[10] Prosecutorial misconduct issues are decided on a case-by-case basis, and the reviewing court must examine the record and evaluate a prosecutor's remarks in context.[11] The propriety of a prosecutor's remarks depends on all the facts of the case.[12] Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial.[13] A prosecutor may not comment on a defendant's failure to testify, or failure to present evidence, but may argue that certain evidence is uncontradicted, and may contest evidence presented by the defendant.[14] With respect to a defendant's federal constitutional rights, the Sixth Circuit Court of Appeals used a balancing test to determine whether comments regarding uncontroverted evidence violated a defendant's right to testify.[15] The balancing test considers the number of comments and the nature of the comments as viewed in context of all the evidence and argument at trial.[16]

A prosecutor's argument that inculpatory evidence is undisputed does not constitute improper comment.[17] In *Perry*, the defendant was accused of setting a deadly fire by throwing firebombs into a house. The prosecutor stated during closing argument that expert testimony regarding the purpose of the Molotov cocktail was uncontradicted. The defendant moved for a mistrial on the ground that this comment improperly referenced the defendant's failure to testify.[18] The prosecutor responded that she limited her use of the word 'uncontradicted' to specific testimony that defendant could have contradicted by calling a witness other than defendant.[19] This Court upheld the trial court and found that there was no prosecutorial

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[9] *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003); *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001).

[10] *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

[11] *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004).

[12] *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002).

[13] *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000), overruled on other grds *Crawford v Washington*, 541 US 36; 124 S Ct 1354, 1371; 158 L Ed 2d 177 (2004).

[14] *People v Callon*, 256 Mich App 312, 331; 662 NW2d 501 (2003); *Abraham*, *supra* at 273.

[15] *People v Guenther*, 188 Mich App 174, 179; 469 NW2d 59 (1991), citing *Butler v Rose*, 686 F2d 1163, 1170 (CA 6, 1982).

[16] *Id.*

[17] *People v Perry*, 218 Mich App 520, 538; 554 NW2d 362 (1996), aff'd 460 Mich 55 (1999).

[18] *Id.* at 537-538.

[19] *Id.* at 538.

misconduct where the prosecutor limited his comment regarding unrelated testimony to specific instances that were subject to contradiction by witnesses other than defendant.[20] In *People v Godbold*,[21], this Court has also found that such comment is acceptable even though defendant was the only person who could have provided contradictory testimony.

C. Applying The Legal Standards

Here, defense counsel argued during closing that Farmer was intimidated by the police who forced him to sign a statement that was not true. Defense counsel urged the jury to use their common sense to conclude that Farmer was not cooperating with the police and so they kept him in custody and kept questioning him until he told them what they wanted to hear. Defense counsel stated that the evidence raised a question as to whether Farmer's statement could be considered as true. The prosecutor's remarks—that the evidence was undisputed, that the statement was made by Farmer, and that there was no evidence of coercion—although restated more times than might have been prudent, were a proper response to Farmer's argument and were an appropriate comment on the weight of the evidence. Further, because there were a number of officers who witnessed the taking of Farmer's statement and who could have offered testimony supporting his theory if it were true, the prosecutor's comments did not constitute prosecutorial misconduct.[22] Finally, the trial court instructed the jury that Farmer had an absolute right not to testify and that his decision not to testify must not affect the verdict in any way. Under these circumstances, we conclude that the prosecutor's comments did not violate Farmer's right not to testify.

III. Codefendant Watkins' Statement

A. Standard Of Review

Farmer argues that the trial court erred in reopening the proofs and admitting codefendant Watkins' statement. Because Farmer failed to object to the admission of Watkins' statement at trial on the same ground as asserted on appeal, this issue is unpreserved and will be reviewed for plain error which affected Farmer's substantial rights.[23] We review for an abuse of discretion a trial court's decision to permit the reopening of proofs.[24] Relevant considerations include whether the moving party would take any undue advantage and whether the nonmoving party can show surprise or prejudice.[25]

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[20] *Id.* at 539.

[21] *People v Godbold*, 230 Mich App 508, 521; 585 NW2d 13 (1998).

[22] *Perry*, *supra* at 520.

[23] *People v Jones*, 468 Mich 345, 355-356; 662 NW2d 376 (2003).

[24] *People v Herndon*, 246 Mich App 371, 419; 633 NW2d 376 (2001).

[25] *Id.*

B. Reopening The Proofs

We conclude that the trial court did not abuse its discretion in reopening the proofs to admit Watkins' statement. Farmer argues that the reopening of proofs for the admission of the statement constituted error because it was a surprise to him. However, there is no statement by defense counsel in the record below or in the brief on appeal that Farmer was unaware of the existence of Watkins' statement. Defendant testified at the *Walker* hearing that the police officers showed him a statement allegedly made by Watkins that incriminated Farmer. Farmer was therefore on notice of the existence of a statement by Watkins to the police and, when Watkins chose to testify at trial, must be charged with the knowledge that the prosecution could seek to admit the statement, even if only for impeachment purposes. There was no error in the trial court's decision to reopen the proofs on the basis of surprise to Farmer.

Defendant also argues that the admission of codefendant's statement violated his state and federal rights to confrontation and relies on *Crawford*, *supra.* The admission of a declarant's out of court statement does not violate the Confrontation Clause if the declarant testifies at trial and is subject to cross-examination.[26] *Crawford* bars the admission of testimonial, out-of-court statements where the witness is unavailable and the defendant did not have "a prior opportunity for cross-examination of the declarant." Watkins, who was tried with Farmer, testified at trial and was available to him for cross-examination. Therefore, there was no violation of Farmer's state and federal right to confrontation.

IV. Farmer's Statement

A. Standard Of Review

Farmer argues that the trial court erred in denying his motion to suppress his statement. Whether the defendant's statement was knowing, intelligent, and voluntary is a question of law that we must determine under the totality of the circumstances.[27] It is the prosecutor's burden to show that the defendant knowingly, intelligently, and voluntarily waived his Fifth Amendment rights by a preponderance of the evidence.[28] When reviewing a trial court's determination of voluntariness, we must examine the entire record and make an independent determination.[29] We will affirm unless we are left with a definite and firm conviction that a mistake was made.[30] However, deference is given to the trial court's assessment of the weight of the evidence and

[26] *California v Green*, 399 US 149; 90 S Ct 1930; 26 L Ed 2d 489, 497-499 (1970); *People v Malone*, 445 Mich 369, 382-383; 518 NW2d 418 (1994).

[27] *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).

[28] *People v Daoud*, 462 Mich 621, 634; 614 NW2d 152 (2000); *Cheatham*, *supra* at 44.

[29] *People v Sexton*, 458 Mich 43, 68; 580 NW2d 404, on rem 236 Mich App 525; 601 NW2d 399 (1999), rev'd 461 Mich 746; 609 NW2d 822 (2000); *People v Shipley*, 256 Mich App 367, 372; 662 NW2d 856 (2003).

[30] *People v Sexton (After Remand)*, 461 Mich 746, 752; 609 NW2d 822 (2000).

credibility of the witnesses, and the trial court's findings will not be reversed unless they are clearly erroneous.[31] A finding is clearly erroneous if it leaves this Court with a definite and firm conviction that a mistake was made.[32]

B. Legal Standards

Statements of an accused made during custodial interrogation are inadmissible unless the accused voluntarily, knowingly and intelligently waived his Fifth Amendment rights.[33] The prosecutor must establish a valid waiver by a preponderance of the evidence.[34] Generally, the prosecutor may not use custodial statements as evidence unless he demonstrates that, prior to any questioning, the accused was warned that he had a right to remain silent, that his statements could be used against him, and that he had the right to retained or appointed counsel.[35] When determining whether a waiver of the right to silence was knowing and intelligent, an objective standard must be applied through an inspection of the circumstances involved, including the education, experience and conduct of the defendant and the credibility of the police.[36] The necessary awareness of the defendant is that of his available options; he need not comprehend the ramifications of exercising or waiving his rights.[37] In determining voluntariness, the court should consider all 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.[38] A delay between a defendant's arrest and arraignment will not render a confession made during the period of delay inadmissible.[39] It is only one of the factors to be considered in evaluating the voluntariness of a confession.[40] In considering the delay in arraignment, consideration should be given as to what occurred during the delay and the effects of the delay on the accused.[41]

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[31] *Sexton (After Remand)*, *supra* at 752; *Sexton*, *supra* at 68; *Shipley*, *supra* at 372-373.

[32] *People v Hall*, 249 Mich App 262, 267-268; 643 NW2d 253, rem'd 467 Mich 888 (2002), on rem 256 Mich App 674; 671 NW2d 545 (2003).

[33] *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602, 1612; 16 L Ed 2d 694 (1966); *People v Harris*, 261 Mich App 44, 55; 680 NW2d 17 (2004).

[34] *Id.*

[35] *Dickerson v US*, 530 US 428; 120 S Ct 2326, 2331; 147 L Ed 2d 405, 414 (2000); *Miranda*, *supra* at 444; *Daoud*, *supra* at 633.

[36] *Daoud*, *supra* at 633-634; *People v Garwood*, 205 Mich App 553, 557; 517 NW2d 843 (1994).

[37] *Daoud*, *supra* at 636-637; *Cheatham*, *supra* at 44.

[38] *Sexton*, *supra* at 66; *People v Akins*, 259 Mich App 545, 564; 675 NW2d 863 (2003); *Shipley*, *supra* at 373-374.

[39] *People v Cipriano*, 431 Mich 315, 333; 429 NW2d 781 (1988).

[40] *Id.*

[41] *Id.* at 334-335.

C. Applying The Legal Standards

We conclude that the preponderance of the evidence at the *Walker* hearing established that Farmer knowingly and intelligently waived his Fifth Amendment rights. Farmer testified that he had a high school education and that he could read and write. He had three prior arrests and had been questioned by the police on one prior occasion. Farmer also testified that the police officers gave him some paperwork and told him to read through his rights and, if he understood them, to sign his initials by them. When the three constitutional rights forms used by Sims, Christnagel, and Childs to inform Farmer of his rights were given to Farmer at the preliminary examination, he acknowledged that his initials and signature were on each one. In addition, Christnagel, Childs, and Sims all testified that they informed Farmer of his constitutional rights, Christnagel on July 12, 2001, and Childs and Sims on July 13, 2001. These officers all testified that Farmer indicated that he understood his rights by initialing the rights forms. In his testimony, Farmer did not deny that he was informed of his rights or that he understood them before he gave his statement. Therefore, based on Farmer's age, education, experience, and the consistency in his testimony and that of the interrogating police officers, we conclude that the trial court did not err in finding that Farmer knowingly and intelligently waived his Fifth Amendment rights.

The evidence adduced at the *Walker* hearing also supported the trial court's finding that Farmer gave his statement voluntarily. As noted above, Farmer was an adult, had a high school education, was literate, and had prior experience with police investigation. Farmer testified that he was given something to drink and Childs testified that Farmer was given something to eat. Further, Sims, Childs, and Harris all testified that Farmer was not promised leniency, was not threatened in any way, did not appear to be under the influence of drugs or alcohol, and did not request an attorney. All of these factors weigh in favor of a finding of voluntariness. Farmer calls our attention to the amount of time he was held in custody before he gave his inculpatory statement on the night of July 13, 2001. The testimony at the *Walker* hearing was that Farmer was held from July 12, 2001, at 3:30 p.m., when he was picked up from the Macomb County Jail, until he gave the last statement on July 13, 2001, at about 10:00 p.m., which is approximately thirty hours. Farmer was questioned for a total of approximately seven hours; from 3:30 p.m. to 4:40 p.m. on July 12, 2001, from 12:40 p.m. to 2:05 p.m. on July 13, 2001, and from 5:30 p.m. to 10:00 p.m. on July 13, 2001.

This case is similar to the facts in *People v Harrison*,[42] a companion case to *Cipriano*. In *Harrison*, the defendant was held for ninety-six hours between his arrest and arraignment, due to the attempts of the police to verify "the defendant's progression through four different explanations as to how he came to possess the decedent's automobile."[43] Notwithstanding the delay in arraigning the defendant, the Court found that the defendant's confession was the

[42] *People v Harrison*, 431 Mich 315; 429 NW2d 781 (1988).

[43] *Id*. at 344-345.

product of a voluntary decision based on his knowledge of his constitutional rights and his failure of a polygraph examination.[44]

Here, Farmer was held some thirty hours before giving the inculpatory statement to Harris. But, this delay was occasioned by Child's suspicion that Farmer was not telling the truth when he said that he did not know codefendant Watkins when Childs had information that Farmer knew Watkins well, and the delay was furthered upon Farmer's request for a polygraph examination. After Farmer failed the polygraph examination, he gave his final statement. Because the amount of time that Farmer was held in custody was attributable, at least in part, to his desire to take a polygraph examination, because Farmer was not subject to continuous interrogation but was only questioned for some seven hours in total, because the amount of time Farmer was held was not excessive, and because there was no evidence of coercion that overrode Farmer's free will, the delay before his arraignment does not prevent a finding that his statement was voluntarily given.

Farmer asserts that the evidence at the *Walker* hearing established that he was threatened with the loss of his children if he did not cooperate, that he was promised leniency if he cooperated, that the police threatened to expose him as a murderer to the public, and threatened him with the death penalty if he did not cooperate. However, this evidence consisted of Farmer's own testimony, and the trial court specifically found that Farmer was not credible. We defer to this finding on appeal. As stated above, the testimony of Christnagel, Childs, Sims, and Harris was that they made no promises of leniency, that they did not threaten Farmer, that Farmer never requested to speak to an attorney, and that Farmer did not appear to be under the influence of drugs or alcohol. Therefore, giving due deference to the trial court's determination that Farmer was not credible, the trial court's finding that Farmer's statement was voluntarily made was not clearly erroneous. We conclude that the trial court did not err in denying Farmer's motion to suppress.

V. Ineffective Assistance Of Counsel

A. Standard Of Review

Farmer argues that his trial counsel was ineffective for failing to call alibi witnesses, failure to investigate footprint evidence, and failure to object to the prosecutor's remarks which impermissibly shifted the burden of proof to him. Whether a defendant was denied effective assistance of counsel presents a question of constitutional law that we review de novo.[45]

B. Legal Standards

Generally, to establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms; (2) that there is a reasonable probability that, but for counsel's error, the

[44] *Id*. at 345.

[45] *In re CR*, 250 Mich App 185, 197; 646 NW2d 506 (2001).

result of the proceedings would have been different;[46] and (3) that the resultant proceedings were fundamentally unfair or unreliable.[47] Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise.[48] A defendant can overcome the presumption by showing that counsel failed to perform an essential duty and that the failure was prejudicial to the defendant[49] or by showing a failure to meet a minimum level of competence.[50]

C. Applying The Legal Standards

Farmer claims that he was deprived of effective assistance of counsel where his attorney failed to call two alibi witnesses at trial. With his brief on appeal, Farmer submits affidavits by both potential witnesses. Because the affidavits were not part of the lower court record, this Court cannot consider them.[51] Our review of the lower court record reveals no support for Farmer's claim that he was denied a substantial alibi defense when his counsel failed to call alibi witnesses on his behalf. Therefore, we conclude that Farmer has failed to establish that he was denied effective assistance of counsel.

Farmer also argues that defense counsel's performance was deficient because she failed to investigate the footprints that were left in the snow at the scene of the crime. This argument is utterly without merit. As Farmer notes in his brief on appeal, the evidence technician provided no testimony regarding the character of the footprints. The evidence technician testified that photographs were taken of the footprints, but there was no indication that the photographs were sufficient to determine the character of the footprints to the extent that they could be compared with Farmer's shoes. Obviously, the footprints themselves had long since vanished by the time Farmer was charged with the murder in July 2001. Without evidence regarding the character of the footprints found at the scene of the shooting, there is no way to determine whether an investigation would have resulted in exculpatory evidence for Farmer. The failure to pursue an investigation into the footprint evidence under these circumstances does not fall below a reasonable level of competence and so does not constitute ineffective assistance of counsel.

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[46] *Bell v Cone*, 535 US 685, 695; 122 S Ct 1843; 152 L Ed 2d 914, 927 (2002); *United States v Cronic*, 466 US 648, 655; 104 S Ct 2039; 80 L Ed 2d 657 (1984), on rem 839 F2d 1401 (CA 10, 1988), after rem 900 F2d 1511 (CA 10, 1990); *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674, on rem 737 F2d 894 (CA 11, 1984); *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000).

[47] *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

[48] *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002); *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

[49] *People v Reinhardt*, 167 Mich App 584, 591; 423 NW2d 275 (1988), rem'd on other grds 436 Mich 866 (1990), on rem 188 Mich App 80; 469 NW2d 22 (1991).

[50] *People v Jenkins*, 99 Mich App 518, 519; 297 NW2d 706 (1980).

[51] *People v Warren*, 228 Mich App 336, 356; 578 NW2d 692 (1998), reversed in part on other grds, 462 Mich 415; 615 NW2d 691 (2000).

Farmer also argues that prosecutor's comments regarding the fact that the fifteen-year-old witness was most likely not telling the truth with regard to what he saw and heard of the shooting constituted prosecutorial misconduct and that his attorney's failure to object constituted ineffective assistance of counsel. The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial.[52] Prosecutorial misconduct issues are decided on a case-by-case basis and the reviewing court must examine the record and evaluate a prosecutor's remarks in context.[53] The propriety of a prosecutor's remarks depends on all the facts of the case.[54] Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial.[55] A prosecutor is free to argue the evidence and all reasonable inferences from the evidence as they relate to the prosecution's theory of the case.[56]

The prosecution's theory of the case was that Farmer, using a shotgun, and Watkins, using an AK-47, shot and killed Ingram after stealing his money and marijuana. This theory was supported by Farmer's statement and by the physical evidence of the bullets found in Ingram's body. The fifteen-year-old witness' testimony did not support the prosecution's theory. To explain this discrepancy, the prosecutor properly argued the reasonable inference that the witness may not have told the truth because he may have been scared of Farmer and Watkins after witnessing the brutal shooting. Such argument was supported by the testimony that he knew Watkins and that he witnessed the shooting. The prosecutor's argument was not improper, and hence, any failure to object by defendant's counsel cannot constitute ineffective assistance of counsel.

Farmer also complains of the prosecutor's comments regarding the fact that there was no evidence introduced at trial that Farmer was coerced into making a statement or that the statement was not Farmer's. Where a defendant advances, either explicitly or implicitly, an alternate theory of the case that, if true, would exonerate the defendant, comment on the validity of the alternate theory cannot be said to shift the burden of proving innocence to the defendant.[57]

Here, Farmer's attorney advanced the theory during closing argument that Farmer was coerced and intimidated into signing his statement and suggested to the jury that they could not trust that his incriminating statement was true. The prosecutor, by pointing out that there was no evidence that the statement was coerced and no evidence that it was not Farmer's statement, was commenting on the theory of the defense. Such comment on a defendant's theory does not shift the burden of proof when that defendant's argument made the issue legally relevant.[58] Because

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[52] *Watson, supra* at 586.

[53] *Thomas, supra* at 454.

[54] *Rodriguez, supra* at 10.

[55] *Schutte, supra* at 721.

[56] *People v Knowles*, 256 Mich App 53, 60; 662 NW2d 824 (2003).

[57] *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995).

[58] *Id*.

the prosecutor's comment was appropriate in response to Farmer's theory of the case, any failure to object by his counsel cannot constitute ineffective assistance of counsel.

Affirmed.

/s/ William C. Whitbeck
/s/ Henry William Saad
/s/ Michael J. Talbot