*STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARREN MICHAEL YOUNG,

Defendant-Appellant.

UNPUBLISHED
November 14, 2006

No. 264960
Calhoun Circuit Court
LC No. 05-000291-FH

Before: Fort Hood, P.J., and Murray and Donofrio, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of burning a dwelling house, MCL 750.72, and two counts of assault with a dangerous weapon, MCL 750.82. The trial court sentenced defendant to serve concurrent terms of imprisonment of eight to twenty years for the arson conviction, and twenty-three to forty-eight months each for the assault convictions. Defendant appeals as of right. We affirm. This appeal is being decided without oral argument in accordance with MCR 7.214(E).

This case arises from what began as a domestic altercation. The prosecutor's theory of the case was that defendant and his wife were separated, but that defendant broke into the marital home, his wife went to a neighbor's home to call 911, and police officers responded. When the police asked defendant to leave the house, the latter responded with verbal abuse, after which the police heard the sounds of defendant's attacking the household with a baseball bat. The police continued to entreat defendant to calm down and leave the house, but defendant threatened the first two officers on the scene with the bat, and set fire to the interior of the house, resulting in major smoke damage.

On appeal, defendant argues that the trial court erred in admitting evidence of his statements to the police, and in refusing to adjourn proceedings when he announced that his family had retained counsel on his behalf.

I. Statement to the Police

"Statements of an accused made during custodial interrogation are inadmissible unless the accused voluntarily, knowingly, and intelligently waives his Fifth Amendment rights." *People v Howard*, 226 Mich App 528, 538; 575 NW2d 16 (1997), citing *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966). In order to effect a valid waiver of *Miranda*

rights, the prosecution must show, by a preponderance of the evidence, that the suspect understood that he or she had the right to remain silent, the right to have counsel present for further questioning, and that the state could use whatever the suspect said in a subsequent trial. *People v Abraham*, 234 Mich App 640, 645, 647; 599 NW2d 736 (1999).

In this case, the trial court convened a *Walker*[1] hearing to determine the admissibility of defendant's statements to the police. One of the police officers who had responded to the scene testified that he talked to defendant while the latter was detained in the hospital, approximately two and one-half hours after the incident. According to the officer, he read defendant his *Miranda* rights, and defendant, now of much calmer disposition, indicated his desire to talk. The officer stated that he made defendant no promises, and imposed no coercion, but added that defendant admitted smoking some crack cocaine before the incident. The witness further reported that defendant was being treated with oxygen at the time, and had suffered two applications of pepper spray or mace that the police had administered in attempting to subdue him in the first instance.

The officer continued that defendant admitted getting into an argument with his wife, hoping the police would shoot him in the fracas, and starting the house fire with his lighter, including that the curtains did not burn quickly but the reclining chair did. The officer additionally recounted that defendant asked whether his crimes were felonies, speculated that he was facing fifteen years' imprisonment, and tearfully expressed concern how the damage he had caused the house would impact his wife and children. The witness opined that defendant spoke voluntarily, having in fact initiated the conversation.

Defendant testified that he had been smoking crack cocaine for two or three days before the incident, and that he had little memory of the confrontation with the police and no memory of his discussion with an officer while in the hospital. Defendant agreed that his remorseful statements to the interviewing officer were consistent with his personality, with or without the influence of cocaine.

The trial court ruled as follows:

> [The police witness] has testified clearly that he complied with the *Miranda* requirements and that it was a knowing, voluntary response by [defendant] that he would speak with the officer. Further [defendant] has testified that he does not remember speaking with [the officer] . . . . So there's no attack by the defendant on the accuracy of the officer's testimony.
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> Secondly, the record . . . is clear that the discussion . . . was approximately two hours after [defendant] had started receiving some kind of treatment. He was receiving oxygen. . . .
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> Most importantly . . . , [defendant] was savvy enough to say to the officer, well, I hoped that you'd forget about *Miranda*. . . . [E]qually importantly, is the

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

> recognition by [defendant] of the fact that these crimes are felonies, that he would probably get 15 years. And . . . [defendant] knew . . . a great many details of the fire, how it was started, what burned, what burned slow, what burned fast, . . . there was a great amount of specific information that [defendant] had.
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> Now, simply because someone now says I do not recall does not vitiate the legitimacy of making a knowing, voluntary statement to the officer. In addition, I note that [defendant] testified [about] being remorseful, stating that he did not want to hurt any police or fire personnel is consistent with his personality whether or not he's been smoking crack cocaine. So it's clear to me that this was a proper, knowing, voluntary statement and it will come into evidence during the trial.

In reviewing a trial court's decision following a suppression hearing, we review the trial court's factual findings for clear error, but review the legal conclusions de novo. See *Abraham, supra* at 644.

Defendant emphasizes evidence that, at the time of the interview, he was being treated with oxygen, was recovering from both his cocaine consumption and two applications of pepper spray or mace, and had no memory of the interview, and argues that under those conditions defendant's waiver of his *Miranda* rights cannot be considered a knowing and intelligent one. The trial court found the testifying police officer credible, and we defer to that determination. See *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998) ("it is well settled that this Court may not attempt to resolve credibility questions anew"). Defendant points to no evidence or authority that stands for the proposition that receiving supplemental oxygen treatments impedes a suspect's ability to effect a knowing waiver of his rights; on the contrary, as the trial court pointed out, defendant's receipt of such treatment in this instance was part of a course of medical treatment that should have improved defendant's awareness of his situation. Concerning the evidence of defendant's recent cocaine consumption, "[W]hile advanced intoxication from drugs or alcohol may preclude an effective waiver of *Miranda* rights, the fact that a person was narcotized or under the influence of drugs is not dispositive of the issue of voluntariness." *People v Leighty*, 161 Mich App 565, 571; 411 NW2d 778 (1987) (citations omitted).

Finally, even assuming the truth of defendant's protestations of lack of memory of the interview, we agree with the trial court that this is not dispositive of his competence to waive his rights at the time he did so. A valid waiver of *Miranda* rights requires proof that the accused understood that he was not required to speak, that he had the right to have counsel present during questioning, and that the state could use his statements against him. Remembering the confession afterward is not among the requirements, and bears but little on the question whether defendant was competent to waive his rights when interviewed by the police. Because we find no error in the trial court's conclusion that defendant knowingly and intelligently waived his *Miranda* rights, we affirm the trial court's decision to admit the evidence that resulted at trial.

II. Retained Counsel

The *Walker* hearing in this case took place the day before trial. At the beginning of that hearing, appointed defense counsel informed the court that defendant "is bringing to my attention now he has retained counsel." Asked to name this new attorney, defendant replied that he did

not know, but that his parents had made some arrangement, but had misapprehended the date of the hearing. The trial court declared that the hearing would proceed with appointed counsel.

Then, at the start of trial, appointed counsel informed the court as follows:

> [Defendant's] family was attempting to retain counsel, specifically I believe it was James Sauber. I waited around to hear, frankly, as I instructed [defendant] to have somebody in his family contact me about 3:00 o'clock yesterday regarding what was happening in that. . . . I never did hear from anybody from his family. Mr. Sauber contacted me sometime after 4:00 o'clock advising me that with this case being scheduled for trial for today that he was not getting involved in it.
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> . . . This morning when I shared that with him [defendant] advised me that he was told last night by his father that Mr. Sauber was coming down here this morning. Although it's now after 9:00 o'clock, I haven't seen him here. At this point just to make the record the conversation between us degenerated . . . .

Counsel asked to withdraw from the representation. When the court inquired of the state of relations between defendant and appointed counsel, the latter replied, "I don't know what his intentions are through the course of the trial. . . . He never verbalized that. . . . He seems to at least listen to what I say in that regard." Appointed counsel added, "He doesn't like the message, so he has a problem with the messenger." The trial court pointed out that jurors were waiting to try the case, that defendant was bound over to the circuit court three months earlier, and that it was not clear that substitute counsel was indeed prepared to take over, and concluded that under these circumstances there was not a sufficient breakdown in the attorney-client relationship to allow counsel to withdraw.

Defendant argues that the trial court erred in declining to adjourn the proceedings so that substitute counsel could take over his representation. We first note that there was no specific motion to adjourn below. However, defense counsel asked to withdraw, and granting that motion would obviously have necessitated an adjournment, which the trial court recognized by expressing concerns for the waiting jurors. "[A] trial judge has wide discretion and power in matters of trial conduct." *People v Ramano*, 181 Mich App 204, 220; 448 NW2d 795 (1989) (internal quotation marks and citation omitted). Accordingly, "[We] review for an abuse of discretion a trial court's exercise of discretion affecting a defendant's right to counsel of choice." *People v Akins*, 259 Mich App 545, 556; 675 NW2d 863 (2003) (internal quotation marks and citation omitted).

The United States and Michigan Constitutions guarantee a criminal defendant the right to the assistance of counsel. US Const, Ams VI and XIV; Const 1963, art 1, § 20. Accordingly, a criminal defendant "has a constitutional right to defend an action through the attorney of his choice." *People v Portillo*, 241 Mich App 540, 543; 616 NW2d 707 (2000). But this right is not absolute, and is subject to being balanced against the effective administration of justice. *Akins*, *supra* at 557. This Court has held that a criminal defendant was not entitled to postponement of trial where the defendant had had three months in which to engage counsel of his choice but failed to avail himself of that opportunity. *People v Stinson*, 6 Mich App 648, 654; 150 NW2d 171 (1967). This is precisely the situation that this case presents. Moreover, defendant was

unable to inform the trial court of any of the particulars of the putative substitute counsel, while appointed counsel had explained that the attorney in question had indicated that he would not become involved. The trial court reasonably ascertained that the relationship between defendant and appointed counsel, who was present and prepared for trial, was sufficient for adequate representation. We hold that the trial court did not err in declining to sacrifice judicial economy to unsubstantiated innuendoes about a new attorney's potential involvement.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Christopher M. Murray
/s/ Pat M. Donofrio