STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v JEFFREY MONTREAL CURRY, Defendant-Appellant.	UNPUBLISHED March 12, 2009 No. 279254 Saginaw Circuit Court LC No. 06-027797-FC

Before: Gleicher, P.J., and Kelly and Murray, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of second-degree murder, MCL 750.317, carrying a concealed weapon (CCW), MCL 750.227, resisting or obstructing a police officer, MCL 750.81d(1), and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. He was sentenced to serve concurrent prison terms of two years for the felony-firearm conviction, 40 to 60 months for the CCW conviction, and 16 to 24 months for the resisting or obstructing conviction, plus a consecutive term of 25 to 50 years for the murder conviction. We affirm defendant's convictions, but remand for correction of the judgment of sentence.

I. Facts

Defendant was convicted of fatally shooting Dedrick Jackson. A witness testified that he was at home with Jackson and others when defendant came to the door in the company of an unknown person, loudly identified himself, and demanded to know where the Jackson was located. Jackson left the house and confronted defendant on the porch. Defendant then pulled a gun out, at which point the eyewitness fled, and gunshots rang out. When the witness returned, Jackson was lying on the porch.

The police found defendant the following afternoon and a car chase ensued. Defendant ran from his vehicle and was struck by a police car moving at approximately 25 to 30 miles an hour. Defendant rolled over the hood of the car and fell to the pavement, where he struggled with the police. One officer repeatedly struck defendant on the head in order to subdue him.

When interviewed by the police shortly thereafter, defendant spoke of a desire to obtain medical attention for his injuries, but the police deferred taking him to the hospital until after the interview. Defendant stated, without having received any *Miranda*[1] warnings, that he went to a house where the victim, who was armed with a gun, confronted him. Defendant then said that a struggle ensued during which defendant seized the gun and shot it in self-defense. At this point, the police informed defendant of his *Miranda* rights and the interview continued, during which defendant elaborated upon his previous statements. After the police interview, defendant resisted going to the hospital, but the police took him regardless. Defendant then resisted treatment, but was examined even so. The medical personnel found nothing of concern in defendant's condition. Over defendant's objection, a video recording of defendant's police statement was played for the jury.

II. Standards of Review

On appeal, defendant argues that the trial court erred when it denied his motion to suppress his police interview at an evidentiary hearing and by denying his request for an instruction on manslaughter. We may not disturb a trial court's ruling at a suppression hearing unless that ruling is clearly erroneous. *People v Burrell*, 417 Mich 439, 448; 339 NW2d 403 (1983). In reviewing a trial court's determination whether a defendant knowingly and intelligently waived his or her *Miranda* rights, this Court reviews the trial court's factual findings for clear error, but reviews the legal conclusions de novo. *People v Abraham*, 234 Mich App 640, 644; 599 NW2d 736 (1999). Further, "[we] review[] jury instructions in their entirety to determine if there is error requiring reversal." *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994). Instructions must cover each element of each offense charged, along with all material issues, defenses, and theories that have evidentiary support. *Id.* Conversely, an instruction should not be given that is without evidentiary support. *People v Johnson*, 171 Mich App 801, 804; 430 NW2d 828 (1988).

III. Admissibility of Defendant's Police Statement

Defendant argues that the police extracted a confession before being given his *Miranda* warnings, which in turn tainted the elaboration of his statement that followed the warning. Defendant additionally argues that police coercion, along with his injuries, sleep deprivation, and intoxication rendered his waiver of his right to remain silent ineffective. We disagree. The admission of defendant's statements made after the being read his *Miranda* warnings did not violate defendant's Fifth Amendment right against self-incrimination.

"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). According to defendant, all of his custodial statements to the police violated his Fifth Amendment right against self-incrimination: in particular, defendant argues that because his preliminary statement was made

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[1] *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

prior to his *Miranda* warnings, both that statement and his subsequent statement made after he received the warnings are inadmissible because there was no break in time between the two statements, citing *Clewis v Texas,* 386 US 707; 87 S Ct 1338; 18 L Ed 2d 423 (1967) and *Brown v Illinois,* 422 US 590; 95 S Ct 2254; 45 L Ed 2d 416 (1975).

Contrary to defendant's argument, neither *Clewis* nor *Brown* are applicable. Rather, *Oregon v Elstad*, 470 US 298; 105 S Ct 1285; 84 L Ed2d 222 (1985), is the controlling authority. In *Elstad*, the Court held that if an unwarned first statement was voluntary, the second statement is admissible if also voluntary and provided after *Miranda* warnings. *Elstad, supra* at 318.[2] This holds true because, "[o]nce warned, the suspect is free to exercise his own volition in deciding whether or not to make a statement to the authorities." *Id.* at 308. The Supreme Court's ultimate holding was clear and concise:

> We must conclude that, absent deliberately coercive or improper tactics in obtaining the initial statement, the mere fact that a suspect has made an unwarned admission does not warrant a presumption of compulsion. A subsequent administration of *Miranda* warnings to a suspect who has given a voluntary but unwarned statement ordinarily should suffice to remove the conditions that precluded admission of the earlier statement. In such circumstances, the finder of fact may reasonably conclude that the suspect made a rational and intelligent choice whether to waive or invoke his rights. [*Id.*, at 314.]

The Court also rejected any suggestion that defendant's lack of knowledge that the initial statement would not be used against him would cause his second, warned statement to not be knowing or voluntary. *Id.,* at 316-317. And, just as importantly, the Court concluded that it would not impute any "'taint' to subsequent statements obtained pursuant to a voluntary and knowing waiver." *Id.,* at 318.

In order to determine voluntariness, we look to such factors as defendant's age, education, prior police interactions with the police, whether *Miranda* warnings were given, and whether defendant suffered physical punishment. *United States v Craft,* 495 F3d 259, 263 (CA 6, 2007). Here the video tape and transcript reveal that defendant had an 11th grade education, was familiar with the police, and was fully cognizant of his rights and the consequences of waiving those rights. The interviewing police officer testified that defendant was coherent and showed no signs of serious injury, and that the interview took place with no force, coercion, trickery, deceit, or promises. Nothing in the first six pages of the transcript reveals any of the "earmarks of coercion." *Oregon, supra* at 316. By the second page of the interview transcript defendant was informed that he needed to have his rights read to him, by the fourth page he was being read his rights, and by the sixth page he waived those rights. Neither before nor after

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[2] *Missouri v Seibert,* 542 US 600; 124 S Ct 2601; 159 L Ed 2d 643 (2004), a plurality opinion, does not impact this case because there is no suggestion that the police deliberately obtained statements from defendant prior to giving him *Miranda* warnings. See *United States v Stewart,* 536 F3d 714, 718-719 (CA 7, 2008).

defendant received his *Miranda* warnings did he appear ill, confused or unsure of what his rights were. Because these facts indicate that defendant was not under duress when he spoke to the police, the trial court properly allowed the interview into evidence. Consequently, the first statement was voluntary, and the second Mirandized statements (which in fact contained much more detail that the pre-Mirandized statements) were also voluntary, and therefore admissible in defendant's prosecution. See *Elstad, supra* at 314 ("A subsequent administration of *Miranda* warnings to a suspect who has given a voluntary but unwarned statement ordinarily should suffice to remove the conditions that precluded admission of the earlier statement."). Thus, even accepting defendant's argument that the statements made in the first five pages of the transcript were not admissible, the remaining ones made on the next 76 were. The trial court properly allowed the interview into evidence.

IV. Manslaughter Instruction

The trial court instructed the jury on second-degree murder as a lesser offense to first-degree murder, but denied defendant's request for an instruction on manslaughter. Defendant argues that this was error requiring reversal. We disagree.

"[A] requested instruction on a necessarily included lesser offense is proper if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it." *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002). Manslaughter is a lesser included offense of murder. *People v Mendoza*, 468 Mich 527, 533; 664 NW2d 685 (2003). A homicide constitutes voluntary manslaughter instead of murder when the killing was accomplished without malice. *Id.* at 534. "Thus, to show voluntary manslaughter, one must show that the defendant killed in the heat of passion, the passion was caused by adequate provocation, and there was not a lapse of time during which a reasonable person could control his passions." *Id.* at 535. Further, where a person kills in self-defense, but he initiated non-lethal aggression that escalated to lethal aggression as the result of the victim's reaction, the defense is downgraded to imperfect self-defense and the homicide may be mitigated from murder to manslaughter. *People v Butler*, 193 Mich App 63, 67; 483 NW2d 430 (1992).

In this case, the jury had before it the witness's account depicting defendant as the aggressor, with apparent homicidal intentions from the start, and defendant's account that he acted in self-defense. Defendant attempts to discredit the witness's account of defendant's arrival at the premises with a gun and his expression of aggressive intentions for the victim and, citing his own account as presented in his police interview, argues that the deceased's sudden aggression against him satisfied the heat-of-passion element for manslaughter. However, lethal violence offered in reasonable response to sudden and severe aggression invokes the privilege of self-defense, not mitigation from murder to manslaughter. See *James, supra* at 677. Further, no witness provided an account showing that defendant initiated nonlethal aggression, to which the deceased reacted in a sufficiently life threatening manner as to cause defendant to resort to lethal force. Had such evidence been presented, then a theory of imperfect self-defense would have justified a manslaughter instruction. Because the manslaughter theory comported with neither account actually presented to the jury, the trial court did not err in refusing to give a manslaughter instruction. *Johnson, supra* at 804. The trial court duly instructed the jury on perfect self-defense, which well covered defendant's theory of the case. *Daniel, supra* at 53. No alternative theory of the case suggested the possibility of manslaughter.

IV. Consecutive Sentencing

Although not raised below or presented on appeal, we take this opportunity to correct a sentencing error. The judgment of sentence indicates that defendant's sentences for CCW and second-degree murder are to be served consecutively. "[C]oncurrent sentencing is the norm." *People v Brown*, 220 Mich App 680, 682; 560 NW2d 80 (1996). Consecutive sentences may be imposed only when statutorily authorized. *Id*. No statutory authority supports consecutive sentencing for defendant's second-degree murder and CCW sentences. Accordingly, pursuant to MCR 7.216(A)(7), we remand this case to the trial court for the purpose of correcting the judgment of sentence to provide that defendant's sentences for CCW and second-degree murder are to be served concurrently.

Affirmed and remanded for correction of the judgment of sentence. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ Christopher M. Murray