STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 20, 2010
v	No. 282185 Wayne Circuit Court
DEVONNE DERNARD DAVIS, Defendant-Appellant.	LC No. 07-011604-FC

Before: M.J. KELLY, P.J., and TALBOT and WILDER, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of first-degree felony murder, MCL 750.316(1)(b), and possession of a firearm during the commission of a felony, MCL 750.227b(1). Defendant was sentenced to life imprisonment for the murder conviction and a consecutive two-year term of imprisonment for the felony-firearm conviction. We affirm.

Defendant's convictions arise from the shooting death of Bernard Cranford during a failed robbery attempt outside a liquor store. Witnesses observed defendant enter and then leave the liquor store. According to one witness, when the victim left the store, defendant produced a gun and demanded that the victim "run your shit." The victim told defendant to "take whatever you want," but defendant shot him. The victim received two gunshot wounds. Defendant gave a statement to the police, in which he admitted shooting the victim once, but denied intending to rob him and claimed that the shooting was an accident.

I. ADMISSILITY OF DEFENDANT'S STATEMENT

Defendant argues that the trial court erred in denying his motion to suppress his police statement. Defendant argues that the statement should have been suppressed because it was the product of an illegal arrest, and because it was unlawfully obtained after the police continued to interrogate him after he asserted his right to remain silent and after he requested an attorney.

"This Court reviews a trial court's factual findings in a suppression hearing for clear error." *People v Jenkins*, 472 Mich 26, 31; 691 NW2d 759 (2005); *People v Murphy (On Remand)*, 282 Mich App 571, 584; 766 NW2d 303 (2009). "However, this Court reviews de novo a trial court's conclusions of law and ultimate decision regarding a motion to suppress evidence." *Id.*; see also *People v Keller*, 479 Mich 467, 473; 739 NW2d 505 (2007). This Court will defer to a trial court's findings regarding credibility because "the trial judge is in the best

position to make this assessment." *People v Daoud*, 462 Mich 621, 629; 614 NW2d 152 (2000) (citation omitted).

A. PROBABLE CAUSE TO ARREST

Defendant first argues that the police did not have probable cause to arrest him and, therefore, his statement should have been suppressed as the fruit of an unlawful arrest. We disagree.

A defendant may be arrested without a warrant when an officer has probable cause to believe that a felony has been committed, and that the defendant committed it. *People v Tierney*, 266 Mich App 687, 705; 703 NW2d 204 (2005). "Probable cause is found when the facts and circumstances within an officer's knowledge are sufficient to warrant a reasonable person to believe that an offense had been or is being committed." *People v Chapo*, 283 Mich App 360, 367; 770 NW2d 68 (2009) (citation omitted). "The standard is an objective one, applied without regard to the intent or motive of the police officer." *Id*.

The testimony at the suppression hearing indicated that an anonymous caller provided information linking defendant and another person to the victim's shooting death, and that the police verified some of that information.[1] In an initial interview, conducted before defendant gave the statement that was the subject of his motion to suppress, defendant initially denied being at the party store on the night of the shooting or knowing anything about the incident. Defendant also denied knowing the other person named by the tipster. Later, however, defendant admitted knowing the other man, and then admitted, "that he was at the party store with him that night." Defendant then seemed to break down, put his face in his hands, and refused to answer any more questions.

The information linking defendant to the shooting that was provided to the arresting officer, and the officer's verification of some of that information, together with the information the officer obtained during his initial interview with defendant, during which defendant initially lied about being present and then admitted that he was present and dropped a bag of unopened chips that was found near the victim, along with his denial and subsequent acknowledgement of familiarity of another individual believed to be involved in the crime and his admitted presence with him at the scene, was sufficient to warrant a reasonable person to believe that defendant was involved in the shooting. Therefore, the officer had probable cause to arrest defendant.

[1] We note that the trial court relied on the prohibition against hearsay, MRE 801(c) and MRE 802, to preclude the parties from introducing the information provided by the anonymous informant, and what the police did to verify that information before contacting defendant. That was error. Except for rules concerning privileges, the rules of evidence do not apply to preliminary questions of admissibility, including hearings to determine the admissibility of a defendant's confession. See MRE 104(a) and (c).

B. RIGHT TO REMAIN SILENT

Defendant also argues that his second statement should have been suppressed because the police unlawfully resumed questioning him after he terminated the first interview.

There is no blanket "proscription of indefinite duration" on resuming police questioning, "after a person in custody asserts the privilege against compelled self-incrimination." *People v Slocum (On Remand)*, 219 Mich App 695, 699; 558 NW2d 4 (1996). Rather, "the admissibility of statements obtained after the person in custody has decided to remain silent depends . . . on whether his right to cut off questioning was scrupulously honored," or whether the police were "persisting in repeated efforts to wear down [the person's] resistance and make him change his mind." *Id*. at 699-700 (internal quotations and citation omitted). Relevant factors include (1) "the passage of a significant period of time," (2) "the provision of a fresh set of warnings," and (3) whether "the subsequent interrogation relates to a crime that was not the subject of the first interrogation." *Id*. at 699-702. These factors are not mandatory, exclusive, or dispositive. *Id*. at 701, 704. Thus, the absence of a substantial passage of time, or of a fresh set of warnings, does not mandate the conclusion that subsequent questioning was unconstitutional. *Id*. at 701-702. The same is true whether the subsequent questioning relates to the same or a different crime. *Id*. at 702. "[T]he ultimate inquiry is whether the police have scrupulously honored a defendant's assertion of the right to cut off questioning." *Id*. at 704 (internal quotations and citation omitted).

In the present case, approximately seven hours elapsed between the time defendant terminated his initial interview with the arresting officer, and the time a second officer resumed questioning. Defendant was not given a fresh set of warnings, but the second officer showed defendant his original signed and initialed advice of rights form. Between the two interviews, the police did not attempt to question defendant. The second interview with defendant was prompted by the results of two lineups, in which one witness stated that defendant looked familiar but made no identification, and the second witness stated that defendant was definitely present but she was not certain whether he was the shooter. The officer told defendant that the police had sufficient information to convict him, and asked him if he wanted to explain what happened. Defendant immediately admitted shooting the victim, but claimed that the victim startled him and that the shooting was an accident. The statement, which was comprised of defendant's own handwritten answers to questions posed by police, further supports its voluntary nature.

The facts indicate that the police scrupulously honored defendant's assertion of his right to remain silent. There is no evidence that the police were persisting in repeated efforts to wear down defendant's resistance and make him change his mind. They merely informed him of the lineup results and asked him if he wanted to explain what happened, whereupon defendant immediately agreed to give another statement. Thus, the trial court did not err in denying defendant's motion to suppress on this basis.

C. RIGHT TO COUNSEL

Defendant also argues that his statement should have been suppressed because he invoked his right to counsel, but the police refused to provide him with an attorney and unlawfully continued to question him.

When a person clearly and unequivocally invokes his right to counsel during a custodial interrogation, questioning must cease. *People v Adams*, 245 Mich App 226, 237-238; 627 NW2d 623 (2001). This comprises an "objective inquiry." *Id*. at 237. Questioning may not resume until an attorney is made available, unless the accused initiates further communication with the police. *Id*.

Defendant claims that he asked Detective Hines for a lawyer, and that Detective Hines refused his request. On appeal, defendant claims that this occurred while he was being transported to the interrogation room after the lineups, and implies that no other officers were present. At the evidentiary hearing, however, defendant testified that "[a]fter the lineup they sent me back in the waiting area and had me change into some [jail] greens, and Detectives Hines and Bemis escorted me upstairs on the elevator to the interrogation room." Defendant testified he made the request for counsel after the group "went to the interrogation room." Thus, defendant's testimony at the evidentiary hearing indicated that Detective Bemis was present when defendant made his alleged request for counsel. Detective Bemis testified that defendant never requested an attorney.

The trial court implicitly found that defendant's claim that he requested an attorney was not credible. The trial court was in the best position to make that determination. Further, although the prosecutor indicated that Detective Hines was present and available to testify, defendant specifically waived Detective Hines' testimony. Because defendant's testimony at the evidentiary hearing indicated that his alleged request for counsel was made in the presence of Detective Bemis, who denied that any request was ever made, and deferring to the trial court's superior opportunity to assess credibility, the trial court did not clearly err in denying defendant's motion to suppress on this basis.

II. JURY INSTRUCTIONS

Finally, defendant contends that a new trial is required because the trial court failed to define great bodily harm as part of the definition of malice for both first-degree felony murder and the lesser offense of second-degree murder. Because defendant did not object to the trial court's instructions on this basis, or request an instruction defining great bodily harm, this issue is not preserved. Therefore, we review this issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 766-767, 772-773; 597 NW2d 130 (1999); *People v Aldrich*, 246 Mich App 101, 124-125; 631 NW2d 67 (2001).

"[I]nstructions must include all elements of the charged offense and any material issues, defenses, and theories if supported by the evidence." *People v McGhee*, 268 Mich App 600, 606; 709 NW2d 595 (2005). Even if somewhat imperfect, instructions are not grounds for reversal if "they fairly present to the jury the issues to be tried and sufficiently protect the rights of the defendant." *People v Gaydosh*, 203 Mich App 235, 237; 512 NW2d 65 (1994).

"When a word is not defined by statute, this Court presumes that the word is subject to ordinary comprehension and there will be no error warranting reversal as a result of a trial court's failure to define a term that is generally familiar to lay persons and is susceptible of ordinary comprehension." *People v Martin*, 271 Mich App 280, 352; 721 NW2d 815 (2006).

The phrase "great bodily harm" is generally familiar to laypersons and it is one of common understanding. Thus, the failure to define great bodily harm was not plain error.

Affirmed.

/s/ Michael J. Kelly
/s/ Michael J. Talbot
/s/ Kurtis T. Wilder