STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 22, 2010
v	No. 286580 Kalamazoo Circuit Court
ANDREW JOHN MILLER, Defendant-Appellant.	LC No. 2007-000606-FC

Before: OWENS, P.J., and SAWYER and O'CONNELL, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of three counts of felony murder, MCL 750.316(1)(b); perjury, MCL 767A.9(1)(b); and first-degree home invasion, MCL 750.110a(2). Defendant was sentenced as an habitual offender, third offense, MCL 769.11, to life imprisonment for the felony murder convictions, 127 months to 40 years' imprisonment for the perjury conviction, and 210 months to 40 years' imprisonment for the home invasion conviction. We affirm.

During the preliminary examination codefendant Angela McConnell testified pursuant to a plea agreement and implicated defendant in the August 2000 home invasion and murders of Marinus and Sary Polderman and their daughter Anna Lewis. Before trial, McConnell withdrew from her plea agreement and sent a letter to the trial court recanting her preliminary examination testimony. McConnell invoked her Fifth Amendment right and refused to testify at defendant's trial. At trial, the trial court allowed the prosecutor to introduce McConnell's preliminary examination testimony. On appeal, defendant first argues that the trial court violated his rights under the Confrontation Clause when it admitted McConnell's preliminary examination testimony. Whether admission of evidence constitutes a violation of a defendant's Confrontation Clause rights involves a question of constitutional law that we review de novo. *People v Beasley*, 239 Mich App 548, 557; 609 NW2d 581 (2000).

Pursuant to the Confrontation Clause of the Sixth Amendment of the United States Constitution, an accused in a criminal prosecution is guaranteed the right to be confronted with witnesses against him. US Const Am, VI; *Crawford v Washington*, 541 US 36, 42; 124 S Ct 1354; 158 L Ed 2d 177 (2004). This right applies in both state and federal prosecutions. *Id*. The Confrontation Clause excludes "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross-examination." *Id*. at 53-54. "[T]he Confrontation Clause guarantees an *opportunity* for

effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware v Fensterer*, 474 US 15, 20; 106 S Ct 292; 88 L Ed 2d 15 (1985).

In this case, the crux of defendant's argument involves whether he had an adequate opportunity to cross-examine McConnell at the preliminary examination. Defendant asserts that his defense counsel did not have a proper opportunity to cross-examine McConnell because, after the preliminary examination, she recanted her testimony and wrote a letter wherein she stated that her prior testimony was fabricated. Defendant contends that he was not afforded the opportunity to cross-examine McConnell regarding the contents of her later letter. A review of the record indicates that defense counsel effectively cross-examined McConnell on all of the relevant aspects of the case and attacked McConnell's credibility at the preliminary examination. Then, at trial, defense counsel impeached McConnell by introducing her letter. No further questioning regarding the contents of the letter was necessary to impeach McConnell. Defendant fails to show how any cross-examination concerning the letter would not have been duplicative of the contents of the letter itself. Because defendant had a prior opportunity to effectively cross-examine McConnell, the trial court did not violate defendant's Confrontation Clause rights when it admitted her preliminary examination testimony. *Crawford*, 541 US at 53-54; *Fensterer*, 474 US at 20.

Next, defendant argues that the trial court violated his constitutional rights when it admitted statements he made to police. Specifically, defendant argues that the police violated his due process rights when they waited two days after a warrant was issued on an unrelated weapons charge to arrest him. Before and after the warrant was issued, defendant voluntarily appeared at the police department and made incriminating statements. Defendant argues that the statements were involuntary and obtained in violation of his due process rights.

In reviewing a trial court's decision whether to suppress a confession, we review de novo the trial court's conclusions of law and application of law to the facts. *People v Akins*, 259 Mich App 545, 563; 675 NW2d 863 (2003). A trial court's factual findings are reviewed for clear error. *Id*. A factual finding is clearly erroneous where, after a review of the entire record, we are left with a definite and firm conviction that a mistake has been made. *Id*. at 564. Review of a trial court's decision whether a statement was involuntary requires this Court to conduct an independent analysis of the record to determine whether the trial court's ruling was clearly erroneous. *People v Cipriano*, 431 Mich 315, 339; 429 NW2d 781 (1988). We give "deference to the trial court's findings, especially where the demeanor of the witnesses is important, as where credibility is a major factor." *Id*. (quotations omitted). And, we will reverse a trial court's finding on the voluntary nature of a defendant's statements only if it we are left with a "definite and firm conviction that a mistake has been made." *People v Sexton (After Remand)*, 461 Mich 746, 752; 609 NW2d 822 (2000).

First, we conclude that law enforcement did not deprive defendant of his due process rights when defendant was arrested on the unrelated weapons charge two days after the warrant was issued. "Michigan applies a balancing test to determine if a prearrest delay requires reversing a defendant's conviction because the state may have an interest in delaying a prosecution that conflicts with a defendant's interest in a prompt adjudication of the case." *People v Cain*, 238 Mich App 95, 108-109; 605 NW2d 28 (1999). A defendant must first show that the prearrest delay resulted in prejudice. *Id*. Defendant must show "actual and substantial"

prejudice that "meaningfully impaired his ability to defend the charge and, as a result, the disposition of the criminal proceeding was likely affected." *Id*. at 110 (quotations omitted). Here, defendant has failed to show that any delay in relation to his arrest on the unrelated weapons charge amounted to "actual and substantial" prejudice in this proceeding. *Cain*, 238 Mich App at 110. Defendant's statements to the contrary are self-serving and speculative.

Second, we conclude that the trial court did not clearly err in ruling that defendant's statements to the police were voluntary. *Cipriano*, 431 Mich at 339. An involuntary statement made by a defendant introduced in a criminal trial for any purpose violates that defendant's due process rights. *Id*. at 331. The determination whether a statement was voluntary involves considering the totality of all the surrounding circumstances, and determining whether the confession is "the product of an essentially free and unconstrained choice by its maker" or whether the accused's "will has been overborne and his capacity for self determination critically impaired." *Id*. at 333-334, quoting *Culombe v Connecticut*, 367 US 568, 602; 81 S Ct 1860; 6 L Ed 2d 1037 (1961). In making this determination a trial court should consider factors including:

> the age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse. [*Cipriano*, 431 Mich at 334.]

The presence or absence of one of these factors is not dispositive. *Id*. Instead, whether a statement is voluntary depends on the totality of the circumstances surrounding the statement. *Id*. Applying the relevant factors set forth by the Court in *Cipriano*, 431 Mich at 334, and reviewing the totality of the circumstances in the instant case, we conclude that the trial court properly found that defendant's statements to the police were voluntary.

The record indicates that at the time defendant made the incriminating statements he was 31 years old, had a high-school diploma, and had prior encounters with police. The police interviews took place over a three-day period and the longest interview session lasted nine hours. Defendant voluntarily appeared at all three interviews before he was arrested. In fact, he initiated two of the interviews. He was not in custody, he was permitted to take breaks and leave whenever he wanted. Police provided defendant with food, drinks, cigarettes, access to a restroom, and anything else he wanted. Defendant was not threatened or promised anything and no force was used against him. Defendant was not under the influence of drugs, alcohol, or any other intoxicants, and he was not sick or in need of medical attention. Although defendant stated that his hands were shaking because he recently quit drinking alcohol, defendant also stated that the symptom was not severe, and the interviewing officers testified that the symptom did not affect defendant's ability to make decisions. In sum, the trial court did not violate defendant's constitutional rights when it admitted statements he made to police. *Cipriano*, 431 Mich at 339.

Next, defendant argues that there was insufficient evidence to convict him of the charged offenses. We review a challenge to the sufficiency of the evidence de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). In determining whether the prosecution has presented sufficient evidence to sustain a conviction, this Court must construe the evidence in a light most favorable to the prosecution and consider whether there was sufficient evidence to justify a rational trier of fact in finding all of the elements of the crime beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 722-723; 597 NW2d 73 (1999). "Circumstantial evidence and reasonable inferences arising therefrom may be sufficient to prove all the elements of an offense beyond a reasonable doubt." *People v Harrison*, 283 Mich App 374, 378; 768 NW2d 98 (2009). On review, we will not interfere with the trier of fact's determination with respect to the credibility of the witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

With respect to Count 1, Count 2 and Count 3, defendant was charged and convicted of felony murder with the predicate felony being first-degree home invasion (Count 5). The elements of felony murder with the applicable predicate felony of first-degree home invasion are:

> (1) the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result, (3) while committing, attempting to commit, or assisting in the commission of [first-degree home invasion]. [*People v Gayheart*, 285 Mich App 202, 210; 776 NW2d 330 (2009), citing MCL 750.316(1)(b).]

The prosecutor was required to prove the following elements to convict defendant of first-degree home invasion: 1) defendant entered a dwelling without permission with intent to commit larceny in the dwelling, 2) that at some time while defendant was entering, present in, or exiting the dwelling, committed larceny, 3) at some time while defendant was entering, present in, or exiting the dwelling another person was lawfully present in the dwelling. MCL 750.110a(2).

The jury was given an instruction on the elements necessary to convict defendant under a direct theory or alternatively as an aider and abettor. "A person who aids or abets the commission of a crime may be convicted and punished as if he directly committed the offense." *People v Izarraras-Placante*, 246 Mich App 490, 495; 633 NW2d 18 (2001).

> To support a finding that a defendant aided and abetted a crime, the prosecution must show that (1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement. [*Id*. (quotation omitted).]

The jury was also given an instruction on attempt for purposes of home invasion. An "attempt" consists of "(1) an attempt to commit an offense prohibited by law, and (2) any act towards the commission of the intended offense." *People v Thousand*, 465 Mich 149, 164; 631 NW2d 694 (2001).

We find that there was sufficient evidence to convict defendant of three counts of felony murder and the predicate felony first-degree home invasion. A codefendant, Brandy Miller, testified that she, defendant and three other codefendants planned to gain access to the Polderman home to take money. Brandy testified that defendant and the other men beat one of the victims and that defendant slashed a second victim's throat. McConnell testified at the preliminary examination that defendant stabbed a third victim in the chest and dragged her away. Brandy testified that defendant brought items out of the home and placed them into a vehicle and that defendant was covered in blood when he came out of the home. Evidence showed that defendant burned the bloody clothing, the seat cover to his pickup truck, and the floor mats from the pickup truck to conceal his involvement in the murders. Defendant admitted to Detective Jim Mallery that he helped clean up after the murders and acknowledged that he entered the Polderman home that day. Defendant explained certain details of the crime to Mallery that would allow a rational juror to conclude that he participated in the home invasion and murders. Nathan McDaniel testified that he was in jail with defendant and defendant told him he was ashamed of why he was in jail. Defendant told McDaniel that he and the four codefendants went to the Polderman home with intent to burglarize it and that during the burglary he and the others beat, stabbed, and killed all three elderly persons at the home. The prosecutor introduced a recorded telephone call between defendant and a codefendant wherein the two men discuss a third codefendant telling "secrets that shouldn't be told." Defendant also told McDaniel that he took a .22-caliber rifle from the Polderman home and eventually threw it into a river behind his father's duplex in Galesburg. Evidence showed that a .22-caliber rifle was missing from the home, and Mallery testified that, near the time of the murders, defendant's father owned a riverfront duplex in Galesburg. In sum, on this record we conclude that a rational jury could convict defendant of three counts of felony murder and one count of first-degree home invasion beyond a reasonable doubt. *Johnson*, 460 Mich at 722-723.

Similarly, we conclude that there was sufficient evidence to allow a rational juror to conclude beyond a reasonable doubt that defendant was guilty of perjury. *Id*. MCL 767A.9 governs, in part, a prosecuting attorney's issuance of an investigative subpoena and provides in relevant part as follows:

> (1) A person who makes a false statement under oath in an examination conducted under this chapter knowing the statement is false is guilty of perjury punishable as follows:
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> * * *
>
> (b) If the false statement was made during the investigation of a crime punishable by imprisonment for life, by imprisonment for life or for any term of years.

In this case, a detective testified that defendant was summoned for two investigative subpoena hearings during the investigation of the Polderman-Lewis murders and that during the hearings defendant denied all involvement in the murders. He later admitted involvement, and the evidence overwhelmingly confirmed his involvement. In addition, during the second hearing defendant acknowledged that he lied about his pickup truck at the first hearing. This evidence was sufficient to support the jury finding defendant guilty of perjury beyond a reasonable doubt.

Next, defendant argues that the trial court erred in excluding evidence that McConnell withdrew from her plea agreement. The trial court excluded evidence of the withdrawn plea agreement on relevance grounds and because it found the evidence was more prejudicial than probative and because it would confuse the jury. We review a trial court's decision whether to admit evidence for an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). However, preliminary questions of law such as whether a rule of evidence precludes admission of evidence are reviewed de novo. *Id*. With respect to a preserved evidentiary error, "the effect of the error is evaluated by assessing it in the context of the untainted evidence to determine whether it is more probable than not that a different outcome would have resulted without the error." *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999).

After reviewing the record, we conclude that, regardless of whether the trial court erroneously excluded evidence of the plea agreement, defendant cannot show that any error in this respect affected the outcome of the lower court proceedings. *Lukity*, 460 Mich at 495. The jury could have easily surmised that when McConnell failed to appear and testify at trial she had withdrawn from her plea agreement. Additionally, there was significant other evidence introduced against defendant.

Finally, defendant argues that the trial court erred in allowing the prosecutor to introduce a recorded telephone conversation that took place four years after the murders between defendant and a codefendant. During the telephone conversation, defendant threatened to kill a third codefendant, Benjamin Platt, for telling "secrets that shouldn't be told." The trial court admitted the recording under MRE 801(d)(2) as a party admission. On appeal, defendant contends that the recording was not an "admission" because he never explicitly referred to the Polderman murders during the telephone call. Defendant also argues that the recording was inadmissible other-acts evidence under MRE 404(b) because he made threats and referred to "marijuana and murder" during the telephone call. Finally, defendant contends that the probative value of the recording was substantially outweighed by the danger of unfair prejudice. We review a trial court's decision whether to admit evidence for an abuse of discretion. *Katt*, 468 Mich at 278.

First, the recorded conversation was admissible under MRE 801(d). Pursuant to MRE 801(d)(2) an "admission by a party-opponent" is not hearsay and is admissible at trial if "[t]he statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity…." Under this rule, "[a] party's own statement when offered against him is not hearsay." *People v Bracey*, 124 Mich App 401, 403; 335 NW2d 49 (1983). However, the statement must also be relevant. *Id*. In this case, defendant made statements during the telephone conversation and those statements were offered against him at trial. Therefore, the statements were not hearsay pursuant to MRE 801(d)(2). *Id*. The statements were also relevant. Evidence is "relevant" if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. Here, a rational juror could infer that defendant was referencing the Polderman-Lewis murders when he told the codefendant that "Ben" was "telling secrets that shouldn't be told," indicated his anger about that fact, and referenced a television show called "Marijuana and Murder" and then laughed. Brandy testified at trial that she initially lied to police when she told them that she brought her boyfriend near the Polderman's residence on the day of the murders to look for marijuana in the fields. Evidence at trial implicated defendant, the codefendant, and Ben Platt in the home invasion and triple homicide. In addition,

Brandy and McConnell testified that the five codefendants conspired to keep secret their involvement in the crime and to try to frame Brandy's boyfriend for the murders. A reasonable juror could infer that defendant's statements related to the group's effort to conceal their involvement in the murders and were therefore relevant to show consciousness of guilt. See *People v Cutchall*, 200 Mich App 396, 400-401, 404-405; 504 NW2d 666 (1993) (conduct or statements by a defendant to conceal the commission of a crime are relevant to show consciousness of guilt).

Second, the recorded conversation was not inadmissible other-acts evidence under MRE 404(b). Defendant's threats and other statements during the telephone call did not amount to other-acts evidence because they were statements and not acts. See *People v Goddard*, 429 Mich 505, 518; 418 NW2d 881 (1988) ("MRE 404(b) does not apply to a defendant's prior statements of intent" because a statement is not a prior act); *People v Rushlow*, 179 Mich App 172, 176; 445 NW2d 222 (1989) ("a prior statement does not constitute a prior bad act coming under MRE 404(b) because it is just that, a prior statement and not a prior bad act").

Third, and finally, the probative value of the recording was not "substantially outweighed by the danger of unfair prejudice," and thus, it was not inadmissible under MRE 403. MRE 403 provides in relevant part, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice…." Evidence is not unfairly prejudicial simply because it is damaging to a defendant's case. *People v Vasher*, 449 Mich 494, 501; 537 NW2d 168 (1995). Instead, "[e]vidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998). In this case the recording was not only "marginally probative" because it showed that defendant and other people involved in the crime were engaged in a deliberate effort to conceal their participation in the murders. Additionally, there was little danger that the jury gave the recording undue or preemptive weight. *Crawford*, 458 Mich at 398. As discussed, *supra*, there was a significant amount of other evidence introduced by the prosecution including the testimonies of Brandy, McConnell, McDaniel and Mallery.

In sum, the trial court did not abuse its discretion in ruling that the audio recording was admissible at trial. *Katt*, 468 Mich at 278.

Affirmed.

/s/ Donald S. Owens
/s/ David H. Sawyer
/s/ Peter D. O'Connell