STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM EDWARD ARMOUR,

Defendant-Appellant.

UNPUBLISHED
October 7, 2010

No. 288102
Wayne Circuit Court
LC No. 08-001845-FC

Before: GLEICHER, P.J., and ZAHRA and K.F. KELLY, JJ.

PER CURIAM.

A jury convicted defendant of second-degree murder, MCL 750.317, assault with a dangerous weapon, MCL 750.82, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant to serve concurrent terms of 37½ to 57 years for the murder conviction and two to four years for the assault conviction, together with a consecutive two-year term of imprisonment for his felony-firearm conviction. Defendant appeals as of right. We affirm, and decide this appeal without oral argument, as contemplated by MCR 7.214(E).

The victim in this case, Sheldon Miller, died from multiple gunshot wounds, which were inflicted in Detroit on the afternoon of October 28, 2007. The prosecutor presented evidence at trial that defendant and an accomplice confronted the victim as he left a store and was entering the passenger side of a car, and that defendant and an accomplice shot the victim five times. The victim's cousin, who had accompanied the victim to the store, testified with certainty at trial that defendant and another man ambushed, shot and killed the victim, and that defendant also aimed his handgun at the cousin. Defendant made two statements to the police in December 2007; defendant admitted that he had ridden in a car with another man who suddenly shot the victim, but defendant denied pointing or holding a weapon.

I. MOTION TO SUPPRESS STATEMENTS TO POLICE

Defendant initially challenges the trial court's denial of his motion to suppress evidence of pretrial statements he made to the police. Defendant moved for suppression on the grounds that the police ignored his request for the appointment of counsel and falsely promised him a speedy release from custody if he cooperated. The trial court held an evidentiary hearing to decide the matter. See *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965). In reviewing a trial court's ruling whether to suppress evidence following a suppression hearing,

we review for clear error the court's factual findings, but consider de novo the court's legal conclusions. *People v Daoud*, 462 Mich 621, 629-630; 614 NW2d 152 (2000).

"In *Miranda v Arizona*, 384 US 436; 86[] S Ct 1602; 16 L Ed 2d 694 (1966), the United States Supreme Court articulated the rule that the police must advise a suspect before custodial interrogation that the suspect has the right to remain silent, that anything the suspect says may be used against him, and that the suspect has a right to the presence of retained or, if indigent, appointed counsel during questioning." *People v Dennis*, 464 Mich 567, 572-573; 628 NW2d 502 (2001). Evidence obtained in violation of *Miranda* principles is subject to suppression. *People v Harris*, 261 Mich App 44, 55; 680 NW2d 17 (2004). To establish that a suspect validly waived his *Miranda* rights, the prosecutor must show by a preponderance of the evidence that, under the totality of the circumstances surrounding the interrogation, the suspect voluntarily waived his rights and the "otherwise voluntary waiver was knowingly and intelligently tendered." *People v Abraham*, 234 Mich App 640, 645, 647; 599 NW2d 736 (1999). Here, defendant disputes the voluntary nature of his statements to the police. "Whether a statement was voluntary is determined by examining police conduct . . . ." *People v Tierney*, 266 Mich App 687, 707; 703 NW2d 204 (2005). As this Court recently summarized,

> whether a waiver of *Miranda* rights is voluntary depends on the absence of police coercion. A waiver is voluntary if it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. The voluntariness of a defendant's statements is determined by examining the totality of the circumstances surrounding the interrogation. A court should consider factors such as: the duration of the defendant's detention and questioning; the age, education, intelligence, and experience of the defendant; whether there was unnecessary delay of the arraignment; the defendant's mental and physical state; whether the defendant was threatened or abused; and any promises of leniency. [*People v Gipson*, 287 Mich App 261, 264-265; ___ NW2d ___ (2010).]

At the *Walker* hearing, a police officer testified concerning his two interviews of defendant on the afternoons of December 21, 2007 and December 22, 2007. The officer described that, in connection with both interviews, defendant received *Miranda* warnings, read and placed his initials next to each right listed on a printed form, and waived his right to remain silent. The officer denied that defendant ever requested a lawyer during either interview, and elaborated, "Had he made a request for an attorney, I would have immediately stopped the interview . . . ." Defendant repeatedly testified to the contrary that early in his initial questioning by the interviewing officer, he requested a lawyer, and that the officer simply ignored the invocation of defendant's right to counsel and continued posing questions. Defendant additionally testified that the interviewing officer had advised him that if he told what he knew of the homicide, he "would be home before Christmas, which would be four days," and that the officer's promise induced him to talk. Defendant admitted that he signed a form listing his *Miranda* rights, but insisted that he did so only after the officer had asked him multiple questions about the shooting of the victim.

At defense counsel's urging, the trial court viewed a video recording of a December 22, 2007 police interview with defendant conducted by a different officer in connection with an apparently unrelated armed robbery. After the review, the court observed that defendant had expressed in the recording that an officer, who must have been the officer who interviewed

defendant concerning the victim's murder on December 21, 2007, told defendant he would help him if defendant cooperated, but defendant later denied that he received any specific promises.

In denying the motion to suppress, the court reasoned, in pertinent part, as follows:

> [T]he defendant . . . claims that his *Miranda* [rights] were given after he gave his statement, and the court does not find this to be true. I don't accept that testimony.
>
> * * *
>
> The court finds as a matter of fact he was given his *Miranda* [rights] prior to giving his statement.
>
> [Defendant] says that he asked for a lawyer. Taking all of the evidence into consideration that was presented to me, based on [defendant's] prior [police interview] experience in July 2007, based upon the fact, quite strangely this is an exculpatory statement on the first interview. [Defendant] says the statement was about armed robbery. After he was read his *Miranda* rights, he gave a statement. He repeats in his statement, in exhibit 2, that this was voluntary. He was read his rights prior to giving his statement. He had no questions regarding this statement.
>
> . . . [F]urthermore, the other piece of evidence that was introduced was the [video-recorded] interview with Sergeant Eby. [Defendant] never asked Sergeant Eby for an attorney. Sergeant Eby made it absolutely clear that he was starting all over again; this had nothing to do with this interview with [Officer] Williams.
>
> He did not request a lawyer at that point. He knew enough to stop [answering questions] back in July of 2007 and not sign this statement. The court believes that [defendant] completely and thoroughly knows his *Miranda* rights and his constitutional rights to have an attorney present.
>
> The court doesn't find that testimony is convincing and that the people prevailed by a preponderance of the evidence. The promise to go home before Christmas, well, the court doesn't accept that based upon the defendant['s] . . . statements to Sergeant Eby that he wasn't promised anything.
>
> All he was told was that if you help me, we will help you. The defendant also knew that he was wanted, not just for homicide, but he was in the jail for an armed robbery.
>
> Secondly, there was no evidence, whatsoever, that he was going to get out in time for Christmas while charged with the armed robbery, as well as the homicide. . . .

Defendant characterizes as clearly erroneous the trial court's findings that he neither invoked his right to counsel nor was promised leniency during the December 21, 2007 interview. With regard to defendant's right to counsel invocation, "[w]hen a defendant invokes his right to

counsel, the police must terminate their interrogation immediately and may not resume questioning until such counsel arrives." *People v McBride*, 273 Mich App 238, 258; 729 NW2d 551 (2006) (internal quotation omitted), rev'd in part on other grounds 480 Mich 1047 (2008). The trial court expressly discredited defendant's testimony that he asked for counsel near the outset of his December 21, 2007 interview with Officer Edward Williams. "[I]f resolution of a disputed factual question turns on the credibility of witnesses or the weight of the evidence, we will defer to the trial court, which had a superior opportunity to evaluate these matters." *People v Sexton (After Remand)*, 461 Mich 746, 752; 609 NW2d 822 (2000); see MCR 2.613(C) (cautioning that review of a court's factual findings must give "regard . . . to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it"). After reviewing the *Walker* hearing record, we simply possess no definite and firm conviction that the trial court made a mistake when it deemed incredible defendant's assertion that he requested counsel, especially in light of Officer Williams's testimony to the contrary; the documentation of defendant's *Miranda* rights waivers and statements to Williams, none of which suggested that defendant had desired counsel; the video recording of defendant's December 22, 2007 interview with Sergeant Eby, in which defendant made no mention of a wish for counsel; and evidence that during a police interview earlier in 2007 concerning a weapons charge, defendant invoked his right to remain silent and refused to supply a statement after the officer apprised him of his *Miranda* rights. *People v Barclay*, 208 Mich App 670, 675; 528 NW2d 842 (1995).

We similarly defer to the trial court's discounting of defendant's credibility in connection with his protestations that the police promised his prompt release from custody if he gave them information about the victim's murder. Not only did defendant's testimony to this effect fail to comport with other hearing testimony that Officer Williams made defendant no specific promises, but, given that defendant was incarcerated also in connection with an alleged armed robbery at the time of his interview with Officer Williams, he could not reasonably have believed that the police intended to or remained at liberty to discharge him from their custody in the immediate future. With respect to the video-recorded reference defendant made relating to Officer Williams's offer to help defendant if he supplied information, the nebulous nature of the offer, "without more, could [not] reasonably be considered a promise of leniency." *People v Givans*, 227 Mich App 113, 120; 575 NW2d 84 (1997). At best the statement may constitute a promise, "but not a promise of leniency." *Id*. (internal quotation omitted).

We conclude that the trial court properly denied defendant's motion to suppress at trial the statements he offered to the police.

II. MOTION TO PRECLUDE IDENTIFICATION TESTIMONY

Before trial, defendant moved to bar the admission of evidence that the victim's cousin had selected defendant from a photographic lineup, or other identification testimony by the cousin, on the ground that the cousin's identifications were tainted by faulty procedure. Defendant maintained that the police violated his constitutional rights by employing a photographic array instead of an in-person lineup, even though defendant was already in custody, that an attorney other than his trial counsel appeared on his behalf as the showup attorney, and that the police officer conducting the showup may have confirmed to the victim's cousin afterward that he had picked the "right" person. The trial court held an evidentiary hearing

before ruling on defendant's motion. See *United States v Wade*, 388 US 218; 87 S Ct 1926; 18 L Ed 2d 1149 (1967).

A "trial court's decision to admit identification evidence will not be reversed unless it is clearly erroneous." *People v Kurylczyk*, 443 Mich 289, 303 (opinion by Griffin, J.), 318 (opinion by Boyle and Riley, JJ., concurring in part and dissenting in part); 505 NW2d 528 (1993). A court must evaluate the fairness of an identification procedure in light of the total circumstances to ascertain whether the procedure qualifies as so impermissibly suggestive that it gave rise to a very substantial likelihood of irreparable misidentification. *Kurylczyk*, 443 Mich at 311-312, 318; *People v McCray*, 245 Mich App 631, 639; 630 NW2d 633 (2001); *People v Davis*, 146 Mich App 537, 548; 381 NW2d 759 (1985). If a witness has exposure to an impermissibly suggestive pretrial lineup or showup, that witness may not make an in-court identification of the defendant unless the prosecutor shows by clear and convincing evidence that the in-court identification has a sufficiently independent basis to purge the taint of the improper identification. *People v Gray*, 457 Mich 107, 115; 577 NW2d 92 (1998); *People v Kachar*, 400 Mich 78, 95-97; 252 NW2d 807 (1977). "The need to establish an independent basis for an in-court identification arises [only] where the pretrial identification is tainted by improper procedure or is unduly suggestive." *Barclay*, 208 Mich App at 675.

At the *Wade* hearing, the police sergeant in charge of the case testified that while defendant remained incarcerated on a matter unrelated to the victim's murder, the officer had arranged to present the cousin with an in-person lineup in the presence of a "show up attorney." The sergeant explained that the live lineup never occurred because defendant "refused to come out of his cell to participate in the process." The sergeant continued that he instead arranged for the cousin to view a six-person photographic lineup. The police officer who conducted that lineup testified that it took place just before defendant's preliminary examination, and that the cousin identified defendant's photograph from the six images presented. The officer confirmed that a showup attorney had appeared for the photographic lineup procedure. When asked if he advised the cousin that he had selected defendant, the officer replied, "I don't believe I told him he picked the defendant out," then added, "I don't really remember if I did tell him that was the correct one."

In setting forth its decision to deny defendant's motion to preclude identification testimony by the victim's cousin, the trial court found credible the sergeant in charge of the case, and opined that the photographic array from which the cousin had identified defendant featured subjects of similar appearance, and thus did not constitute an unfairly suggestive lineup array. With respect to defendant's complaint that the photographic lineup attorney was not defendant's retained counsel, the court viewed the complaint as neither raising constitutional concerns, nor having any bearing on the question whether the police had conducted an unduly suggestive lineup procedure.

Defendant insists that because the police had him in custody at the time of the lineup, the use of a photographic lineup instead of an in-person lineup invalidated the resulting identification. "Identification by photograph should not be used when a suspect is in custody or when he can be compelled by the state to appear at a corporeal lineup." *People v Strand*, 213 Mich App 100, 104; 539 NW2d 739 (1995) (internal quotation omitted). Accordingly, police may resort to a photographic lineup when the suspect is in custody only if a "legitimate reason" exists. *Kurylczyk*, 443 Mich at 298. In this case, the sergeant in charge of the case, whose

testimony the trial court expressly credited, recalled at the evidentiary hearing that defendant had refused to participate in a live lineup, thereby setting forth a legitimate reason for holding the photographic lineup. *Davis*, 146 Mich App at 546-547 (holding that the police properly resorted to a photographic lineup in lieu of a live one because "police made a substantial effort to conduct a proper lineup but their efforts were thwarted by the defendant"). Again, we defer to the trial court's credibility determinations, and conclude that the police in this case properly conducted the photographic lineup necessitated by defendant's refusal to participate in a live lineup. *Sexton*, 461 Mich at 752.

Defendant also argues that the equivocal testimony of the officer who conducted the photographic lineup, concerning whether he told the victim's cousin that he had identified the person of interest from the array, gives rise to an inference that the police improperly suggested defendant to that witness, thus tainting the cousin's subsequent in-court identification at defendant's preliminary examination. However, the officer equivocated only after unconditionally denying that he had said anything to indicate that the cousin had chosen the person whose preliminary examination was about to begin. Even resolving the officer's equivocation in the light most damaging to the prosecutor, the evidence establishes that any police confirmation of the cousin's photograph selection occurred *after* the cousin had made his selection. Because our review of the totality of the circumstances surrounding the photographic lineup reveals only minimal potential, postidentification suggestiveness, we discern no basis for characterizing the photographic lineup procedure in this case as unduly suggestive or otherwise constitutionally unsound. *Kurylczyk*, 443 Mich at 311-312, 318.

Defendant lastly submits that the police deprived him of his right to the defense counsel of his choice by proceeding with the photographic lineup in the presence of a showup attorney, instead of the counsel defendant had retained.[1] See *United States v Gonzalez-Lopez*, 548 US 140, 144; 126 S Ct 2557; 165 L Ed 2d 409 (2006). But defendant neglects to explain precisely how the actions of the police prejudiced him in any respect.[2] For example, defendant offers no criticism of any actions taken, or not taken, by the showup counsel who observed the photographic lineup, or any suggestion of how defendant's retained counsel might have done anything differently. Because defendant has failed to substantiate that the presence of the showup counsel on defendant's behalf at the photographic lineup adversely affected his right to have representation by counsel,[3] we conclude that the trial court correctly ascertained no constitutional violation arising from defendant's representation by showup counsel. Even assuming that an infringement of defendant's right to counsel occurred and that the trial court should have excluded trial testimony by the victim's cousin identifying defendant, the trial court properly admitted defendant's statements to the police, which, although primarily exculpatory,

[1] In a Standard 4 brief on appeal filed by defendant, Michigan Supreme Court Administrative Order 2004-6, Standard 4, he joins in and supplements his appellate counsel's argument concerning this issue.

[2] Nor does defendant address the conflict that arises when trial counsel has served as a witness to an identification procedure that the defense might wish to challenge in later judicial proceedings. The prosecutor brought this potential problem to the trial court's attention at the hearing.

[3] See US Const, Am VI; Const 1963, art 1, § 20.

did contain defendant's concession that he was at the scene of the crime in the company of a man who shot the victim. Given that defendant's own statements placed him at the shooting, and given the absence of any evidence of record that individuals other than defendant accompanied the shooter described in defendant's statements, the victim's cousin's identification testimony qualifies as primarily cumulative evidence. *People v McRunels*, 237 Mich App 168, 185; 603 NW2d 95 (1999) (noting that the allegedly unconstitutional admission of evidence amounts to harmless error where the challenged evidence is cumulative of other, properly admitted evidence).

In summary, defendant's challenges to the pretrial identification procedures warrant no appellate relief.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Brian K. Zahra
/s/ Kirsten F. Kelly