STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 20, 2011
V	No. 296647 Oakland Circuit Court
JEFFREY PAUL REIHER, Defendant-Appellant.	LC No. 2009-226577-FH

Before: SAWYER, P.J., and JANSEN and DONOFRIO, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of receiving or concealing a stolen motor vehicle, MCL 750.535(7), and breaking and entering a vehicle causing damage, MCL 750.356a(3). He was sentenced as a habitual offender, fourth offense, MCL 769.12, to concurrent terms of 2 to 30 years' imprisonment. Defendant appeals as of right, and we affirm.

Defendant's convictions arise from the theft of a vehicle and breaking into a vehicle to steal property. The victim, a Southfield business owner, learned that his employee's truck had been stolen. He was on his way to a tow yard in Detroit where his stolen van had been taken a week earlier. At a gas station, the victim encountered defendant who tried to sell the victim his stolen tools from the back of his employee's stolen truck. After exchanging words, defendant fled on foot, but was stopped by two to three bystanders who wrestled defendant to the ground and assaulted him. The victim removed defendant from the assault and locked defendant in the back of his van. On the way back to Southfield, defendant admitted the theft of the victim's van and the property. Although defendant expressed fear, the victim stated that he did not intend on harming defendant, but would turn defendant over to the Southfield police. When Southfield police arrived at the scene, defendant waived his *Miranda*[1] warnings and gave additional incriminating statements.

After convicted, defendant testified at a *Ginther*[2] hearing that he did not recall making any statements to the victim or police. He further asserted that he was actually beaten by the

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

[2] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

victim and the victim's accomplice. However, the trial court rejected defendant's testimony and rejected his claim of ineffective assistance of counsel. Defendant now appeals.

Defendant first alleges that the trial court erred in denying his motion to suppress. We disagree. Questions of law pertaining to a motion to suppress evidence are subject to de novo review. *People v Keller*, 479 Mich 467, 473; 739 NW2d 505 (2007). Constitutional claims also present questions of law reviewed de novo. *Id*. at 473-474. The trial court's factual findings are reviewed for clear error. *People v Gillam*, 479 Mich 253, 260; 734 NW2d 585 (2007). Although the factual findings underlying the suppression ruling are reviewed under the clearly erroneous standard, the trial court's ultimate ruling addressing a motion to suppress is reviewed de novo. *People v Reese*, 281 Mich App 290, 294; 761 NW2d 405 (2008). When reviewing a defendant's claim that his constitutional rights were violated, this Court gives deference to the trial court's superior position to evaluate the credibility of the witnesses. *People v McPherson*, 263 Mich App 124, 136; 687 NW2d 370 (2004). Similarly, we give due deference to the trial court's factual findings. *Id*. The trial court's role in determining factual issues and issues of credibility must be respected. *People v Williams*, 470 Mich 634, 641; 683 NW2d 597 (2004). That is, the reviewing court may not substitute its judgment for that of the trial court. *Id*.

A defendant may waive his privilege against self-incrimination provided that the waiver is voluntarily, knowingly, and intelligently made. *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966). Once a defendant invokes his right to counsel at questioning, the police may not conduct further interviews until counsel has been made available, unless the accused initiates further communications with the police. *People v Anderson (After Remand)*, 446 Mich 392, 402; 521 NW2d 538 (1994). The prosecution has the burden of establishing a valid waiver by a preponderance of the evidence. *People v Daoud*, 462 Mich 621, 634; 614 NW2d 152 (2000). To determine if a valid waiver of *Miranda* rights occurred, a two-prong review occurs. First, a voluntary relinquishment of the right must occur in the sense that it was the product of a free and deliberate choice rather than based on intimidation, coercion, or deception. *Id*. at 635. Secondly, the court must determine whether the waiver was knowing and intelligent. *Id*. at 635-636. This requires inquiry into the suspect's level of understanding, irrespective of police behavior. *Id*. at 636.

When a defendant asserts that his waiver is involuntary because of infirmity such as intoxication and coercion by police officers, the court should examine the totality of the circumstances including: the age of the accused; his education or intelligence level; his prior experience with the police; the duration and intensity of the questioning; the length of the detention before the statement; the lack of any advice of constitutional rights; the delay in bringing the defendant before a magistrate; the health of the accused; the deprivation of food, sleep, or medical attention for the accused; any abuse of the accused; and any threatened abuse of the accused. *People v Tierney*, 266 Mich App 687, 708; 703 NW2d 204 (2005) citing *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988). No single factor is conclusive. *People v Sexton (After Remand)*, 467 Mich 746, 753; 609 NW2d 822 (2000).

An appellate court reviews for clear error the trial court's factual findings regarding a defendant's voluntary, knowing, and intelligent waiver of *Miranda* rights. *Daoud*, 462 Mich at 629. The meaning of the phrase "knowing and intelligent" presents a question of law subject to de novo review. *Id*. at 629-630. A trial court commits an error at law when it focuses on why a

defendant confessed rather than considering whether a defendant could in fact understand and waive his *Miranda* rights. *Id*. at 639. The only inquiry when addressing a "knowing and intelligent" waiver of *Miranda* rights is "whether the defendant understood 'that he did not have to speak, that he had the right to the presence of counsel, and that the state could use what he said in a later trial against him.'" *Id*. at 643-644 quoting *People v Cheatham*, 453 Mich 1, 29; 551 NW2d 355 (1996).

First, with regard to the statements made to the victim, constitutional protections do not apply to private citizens. "Constitutional protections apply to governmental action only; thus, it generally has been held that a 'person not a police officer, or not acting in concert with or at the request of police authority, is not required to extend constitutional warnings prior to the eliciting of an incriminating statement'." *Grand Rapids v Impens*, 414 Mich 667, 673; 327 NW2d 278 (1982). "Statements made to private individuals need not be preceded by *Miranda* warnings." *Id*. at 674. Merely asking questions is not illegal, and statements obtained without physical or psychological coercion generally are deemed voluntary even though the defendant never knew or waived his rights to silence and counsel. *Id*. at 675-676.

In the present case, the victim was not a state actor. Additionally, even if one could conclude that procedural safeguards should be put in place with regard to private citizens because of physical abuse or coercion, the lower court found that there was no evidence of physical abuse or coercion by the victim. Rather, the trial court found that defendant was abused by third parties at the scene, and the victim intervened to remove defendant from the abuse. Although the victim admitted to locking defendant in his van, the trial court found that this act saved defendant from further abuse by the bystanders, and the victim expressly told defendant that he was merely transporting defendant to the police. We cannot conclude that these factual findings are clearly erroneous particularly where defendant waived his right to testify at the *Walker* hearing. *Gillam*, 479 Mich at 260. We acknowledge that, at the *Ginther* hearing, defendant introduced his version of events of abuse by the victim. However, the trial court did not make a finding that this testimony was credible, but rather, continued to abide by the earlier suppression ruling. We defer to the trial court's assessment of the credibility of the witnesses. *McPherson*, 263 Mich App at 136. Accordingly, defendant's challenge to the introduction of his statements to the victim does not provide him with appellate relief.

With regard to the statement made to police, Officer Simerly testified that he came upon defendant and asked what happened. Defendant said he was trying to sell some tools and the buyer beat him up. This statement was elicited before defendant received his *Miranda* warnings. However, there is nothing incriminating about the statement. After making this initial statement, Officer Simerly gave defendant his *Miranda* warnings. Then, defendant reportedly waived his rights and said he had stolen tools and a truck from the Hilltop location in Southfield. Officer Simerly testified that, although injured, defendant did not appear to suffer from any other type of infirmity. He made eye contact with the officer and responded to questions coherently. He did not appear confused by the questions. Additionally, Officer Schneider did not interview defendant, but she accompanied defendant to the hospital until she was relieved of duty. There, defendant did not appear to have any difficulty understanding what was transpiring. Although defendant's arm at the hospital was x-rayed, it was not broken.

The trial court denied the motion to suppress by acknowledging that defendant suffered an injury, but concluded that the injury did not overcome defendant's will or was used to exploit defendant. That is, medical treatment was not delayed or deprived from defendant to elicit a statement. The trial court found, when assessing the credibility of the witnesses, that defendant's waiver was knowing and voluntary. On this record, it cannot be concluded that the trial court clearly erred. *Williams*, 470 Mich at 641.

Next, defendant contends that he was deprived of the effective assistance of counsel. We disagree. To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate: (1) that the performance of his attorney was objectively unreasonable in light of prevailing professional norms, and (2) that, but for the errors of counsel, a different outcome reasonably would have resulted. *People v McCauley*, 287 Mich App 158, 162; 782 NW2d 520 (2010). "[A] defendant must overcome the strong presumption that his counsel's action constituted sound trial strategy under the circumstances." *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). When the record does not contain sufficient detail to support defendant's claim of ineffective assistance, the issue is effectively waived. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). "Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. *Id*. Ineffective assistance of counsel premised on the failure to call witnesses is established only if the defendant is deprived of a substantial defense. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). It is the responsibility of trial counsel to present all substantial defenses, and a defense is substantial if it might have made a difference in the outcome of the trial. *People v Chapo*, 283 Mich App 360, 371; 770 NW2d 68 (2009). The defendant bears the heavy burden of proving the factual predicate for his claim of ineffective assistance. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). The trial court's factual findings regarding effective assistance are reviewed for clear error. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

The trial court found that defendant failed to meet his burden of proof, *McCauley*, 287 Mich App at 162, and we cannot conclude that the trial court clearly erred in light of the factual findings. *LeBlanc*, 465 Mich at 579. Defendant failed to provide specific information regarding witnesses to the event such that they could be located. The trial court found that trial counsel acted properly regarding the admission of evidence, and that the decision to exclude the medical records was a matter of trial strategy. *Toma*, 462 Mich at 302. Although appellate counsel contends that trial counsel was ineffective for failing to file a motion for speedy trial because any delay was not attributable to the defense, appellate counsel failed to support the factual predicate of the claim. *Hoag*, 460 Mich at 6. A review of the record reveals that trial counsel filed a motion to suppress after the preliminary examination transcripts were filed in the trial court. Additionally, docket congestion accounts for any additional delay. Accordingly, defendant failed to meet his burden in establishing ineffective assistance of counsel. *McCauley*, 287 Mich App at 162.

Affirmed.

/s/ David H. Sawyer
/s/ Kathleen Jansen
/s/ Pat M. Donofrio