STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 6, 2012
v	No. 301459 Washtenaw Circuit Court
MAHRAN HESHAM ABED, Defendant-Appellant.	LC No. 10-000068-FC

Before: BECKERING, P.J., and OWENS and SHAPIRO, JJ.

PER CURIAM.

Defendant Mahran Hesham Abed entered into a conditional plea of nolo contendere under MCR 6.301(C) to carjacking, MCL 750.529a, and armed robbery, MCL 750.529, after the trial court denied his motion to suppress statements that he made to the police about the gun used in the crimes. Defendant appeals his conviction. We affirm.

I. PERTINENT FACTS

On January 12, 2010, Washtenaw County Sheriff's Department Deputy Joe Crova interviewed defendant's girlfriend, Alham Abdullatif, in response to a domestic-violence dispatch. Abdullatif told Crova that defendant assaulted her several days earlier. She also told Crova that defendant carjacked a car owned by John West on January 11, 2010. Abdullatif stated that defendant drove West around in the car at gunpoint. Defendant later put West into the trunk of the car and continued to drive for about three hours. Abdullatif told Crova that defendant drove West's car between an apartment complex off Denton Road in Van Buren Township and an apartment complex on the west side of Ypsilanti Township. She also stated that she threw defendant's gun out of the car's window on a street near some trees; however, she could not provide Crova with more specific information about the gun's location. After speaking to Abdullatif, Crova located and interviewed West. West confirmed Abdullatif's account of the carjacking. In addition, West told Crova that he recalled driving with defendant on Huron River Drive. After interviewing West, Crova reported West's car as stolen and attempted to locate defendant's gun "because [he] didn't want some kid to pick it up and hurt themselves or somebody else." Crova searched the roads in the vicinity where West recalled driving with defendant: Rawsonville Road, Huron River Drive, and Textile Road. Crova, however, did not find the gun.

On January 13, 2010, Crova returned to work and learned that defendant had been arrested, so he went to interview defendant at the jail. Crova gave defendant some food and then advised defendant of his *Miranda*[1] rights. According to Crova, defendant stated that he understood his rights, waived them, and agreed to speak. Crova asked defendant about the domestic-violence incident. Defendant explained that he and Abdullatif got into an argument and that she "slipped and fell and got all the damage on her face from slipping and falling." Crova then asked, "[W]hat's going on with the car with the guy downstairs?" Defendant said, "I don't have nothing [sic] to say about the car until I talk to an attorney." "I want to talk to a lawyer about the car."

Crova ended the interview and walked defendant to his cell block as he made "small talk" with defendant. Defendant told Crova that he "seem[ed] like a nice guy" and admitted "that he'd slapped his girlfriend." Crova said "okay," "asked defendant about the gun," and their "conversation turned . . . toward the location of [the] gun." Crova told defendant that "there's kids out in this neighborhood, there's a lot of kids playing, I want to get this gun off the street; I don't want some kid [to] pick up this gun and do anything with this gun, . . . I would hate for something like that to happen." Defendant told Crova that he "memorized where the gun was" and that he would show him where it was located. Later in the conversation, defendant asked Crova whether his carjacking charge was serious. Crova responded that it was, and defendant ended the conversation by stating that there was not a gun.

II. *MIRANDA*

Defendant argues that the trial court erroneously denied his motion to suppress the statements that he made to Crova about the gun. We disagree.

When we review a trial court's factual findings with respect to a motion to suppress, we defer to the trial court unless the court's findings are clearly erroneous. *People v Herndon*, 246 Mich App 371, 395; 633 NW2d 376 (2001). A finding is clearly erroneous if this Court is "left with a definite and firm conviction that a mistake has been made." *People v Muro*, 197 Mich App 745, 747; 496 NW2d 401 (1993). We review de novo a trial court's ultimate decision on a motion to suppress. *People v Lapworth*, 273 Mich App 424, 426; 730 NW2d 258 (2006).

The right against self-incrimination is guaranteed by both the United States and the Michigan Constitutions. US Const, Am V; Const 1963, art 1, § 17. In *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966), the United States Supreme Court established "procedural safeguards . . . to secure the privilege against self-incrimination." Under *Miranda*, where a criminal defendant is subjected to a custodial interrogation, before any questioning, the defendant must be warned that he has "a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." *Miranda*, 384 US at 444. Statements of an accused made during a custodial interrogation are inadmissible unless the accused knowingly, voluntarily, and intelligently waived his Fifth Amendment rights. *People v Tierney*, 266 Mich App 687, 707; 703

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

NW2d 204 (2005). "[T]he Fifth Amendment right to counsel is a corollary to the amendment's stated right against self-incrimination and to due process." *People v Marsack*, 231 Mich App 364, 372-373; 586 NW2d 234 (1998). "In *Edwards v Arizona*, 451 US 477, 484; 101 S Ct 1880; 68 L Ed 2d 378 (1981), the United States Supreme Court established the bright-line rule that an accused, having expressed a desire to deal with the police only through counsel, may not be subject to further interrogation by the authorities until counsel has been made available unless the accused initiates further communication." *People v McRae*, 469 Mich 704, 715; 678 NW2d 425 (2004). "The *Edwards* rule, moreover, is *not* offense specific: Once a suspect invokes the *Miranda* right to counsel for interrogation regarding one offense, he may not be reapproached regarding *any* offense unless counsel is present." *McNeil v Wisconsin*, 501 US 171, 177; 111 S Ct 2204; 115 L Ed 2d 158 (1991).

Notwithstanding the bright-line rule of *Edwards*, the Supreme Court explained in *Connecticut v Barrett*, 479 US 523, 525-530; 107 S Ct 828; 93 L Ed 2d 920 (1987), that a person may partially invoke the rights to remain silent and to counsel. In *Barrett*, the defendant (Barrett) acknowledged that he understood his *Miranda* rights, told interrogators that he would not make a written statement unless his attorney was present, but stated that he had "no problem" speaking with the interrogators. *Barrett*, 479 US at 525-526. The defendant then gave oral statements admitting his involvement in a sexual assault. *Id.* On appeal to the United States Supreme Court, the Court addressed whether the defendant's invocation of his right to counsel fell within the bright-line rule of *Edwards*; the Court concluded that it did not. *Id.* at 527-530. The Court opined:

> It is undisputed that Barrett desired the presence of counsel before making a written statement. Had the police obtained such a statement without meeting the waiver standards of *Edwards*, it would clearly be inadmissible. Barrett's limited requests for counsel, however, were accompanied by affirmative announcements of his willingness to speak with the authorities. The fact that officials took the opportunity provided by Barrett to obtain an oral confession is quite consistent with the Fifth Amendment. *Miranda* gives the defendant a right to choose between speech and silence, and Barrett chose to speak.
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> Barrett made clear his intentions, and they were honored by police. To conclude that respondent invoked his right to counsel for all purposes requires . . . a disregard of the ordinary meaning of respondent's statement. [*Id.* at 529-530.]

Thus, consistent with *Barrett*, this Court has recognized that "a limited invocation of the right to counsel does not preclude the admissibility of statements made by a defendant that fall outside that limited invocation." *People v Adams*, 245 Mich App 226, 231; 627 NW2d 623 (2001). Indeed, we concluded in *Adams* that, where a defendant only declined to answer some questions regarding a few limited topics and only asserted a need for counsel with respect to questions regarding motive, a police detective was permitted to continue interviewing the defendant about other matters concerning a murder. *Id.* at 234-235. Accordingly, by exercising *Miranda* rights, a person can control the time at which the interrogation occurs, the subject matter discussed, and

the duration of the interrogation. *Id.* at 230-231, citing *Michigan v Mosley*, 423 US 96, 103-104; 96 S Ct 321; 46 L Ed 2d 313 (1975).

There are, of course, well-established narrow exceptions to the *Miranda* rule where unwarned custodial interrogation does not violate *Miranda*. *Chavez v Martinez*, 538 US 760, 790; 123 S Ct 1994; 155 L Ed 2d 984 (2003) (Kennedy, J., concurring and dissenting in part). One exception is the "public safety exception." See *New York v Quarles*, 467 US 649, 655-656; 104 S Ct 2626; 81 L Ed 2d 550 (1984). The exception applies where there is an immediate concern for the safety of the general public or police officers. *People v Attebury*, 463 Mich 662, 670-671; 624 NW2d 912 (2001). Moreover, the public safety exception only applies to questions that are objectively necessary to secure the public safety; it does not apply to investigatory questions, i.e., questions designed solely to elicit testimonial evidence from a suspect and that fail to relate in any way to an objectively reasonable need to protect the public or the police from an immediate danger. *Id.* at 671; see also *Quarles*, 467 US at 659 & n 8.

The classic example of a case necessitating the application of the public safety exception is *New York v Quarles*. In *Quarles*, a young woman approached two police officers and told them that she had just been raped by a man with a gun: the defendant. *Quarles*, 467 US at 651. The woman told the officers that the defendant entered a nearby A & P supermarket, so the officers went into the market. *Id.* at 651-652. One of the officers located the defendant, frisked him, and discovered that he was wearing an empty shoulder holster. *Id.* at 652. The officer handcuffed the defendant and asked him where his gun was. *Id.* The defendant nodded in the direction of some empty cartons and said "the gun is over there." *Id.* The officers located and seized a .38-caliber revolver from the cartons. *Id.* Although the officer did not advise the defendant of his *Miranda* rights before asking where the gun was located, the United States Supreme Court held that the defendant's answer regarding the location of the gun was admissible at trial under the public safety exception. *Id.* at 655, 659-660. The Court explained that the officers "were confronted with the immediate necessity of ascertaining the whereabouts of a gun which they had every reason to believe the [defendant] had just removed from his empty holster and discarded in the supermarket." *Id.* at 657. The Court stated that "so long as the gun was concealed somewhere in the supermarket, with its actual whereabouts unknown, it obviously posed more than one danger to the public safety: an accomplice might make use of it, a customer or employee might later come upon it." *Id.* The officer "needed an answer to his question not simply to make his case against [the defendant] but to insure that further danger to the public did not result from the concealment of the gun in a public area." *Id.*

The *Quarles* Court distinguished *Quarles* from *Orozco v Texas*, 394 US 324, 325; 89 S Ct 1095; 22 L Ed 2d 311 (1969), where officers asked a defendant investigatory questions. See *id.* at 659 n 8. In *Orozco*, four police officers entered a boardinghouse occupied by the defendant, who they suspected was responsible for a fatal shooting at the El Farleto Cafe in Dallas, Texas. *Orozco*, 394 US at 325. It was 4:00 a.m., and the defendant was asleep. *Id.* While the defendant was in his bed, the officers asked him if he had been to the cafe on the night of the shooting. *Id.* at 325-326. The defendant said "yes," and the officers asked him if he owned a pistol. *Id.* at 325. The defendant admitted to owning a pistol, and the officers twice asked him where it was located. *Id.* The defendant admitted to the officers that the pistol was in a washing machine in the back room of the boardinghouse. *Id.* The *Quarles* Court explained that the police officers' questions about the gun were "clearly investigatory." *Quarles*, 467 US

at 659 n 8. The Court stated that "there was no exigency requiring immediate action by the officers beyond the normal need expeditiously to solve a serious crime." *Id.* Thus, the officers' questions "did not in any way relate to an objectively reasonable need to protect the police or the public from any immediate danger associated with the weapon." *Id.*

In contrast, the Michigan Supreme Court determined in *People v Attebury* that police officers' questions of a defendant in the defendant's home were distinguishable from the questions in *Orozco* and, thus, that the public safety exception applied. *Attebury*, 463 Mich at 672-674. The defendant in *Attebury* confronted his estranged wife in a parking lot, displayed a handgun, threatened to kill her, and ordered her into the backseat of her car. *Id.* at 664. The wife fled on foot to a nearby video store and called the police. *Id.* Two days later, three police officers went to the defendant's apartment to execute a warrant for his arrest. *Id.* The officers entered the defendant's apartment with a key provided by the defendant's landlord and discovered that the defendant was showering. *Id.* at 664-665. With the officers' permission, the defendant finished his shower and began to get dressed, going in and out of his dresser. *Id.* at 665. Without advising the defendant of his *Miranda* rights, the officers asked him if there were weapons in the home. *Id.* at 665-666. The defendant said no. *Id.* at 665. Because the officers knew that the defendant was homicidal and their warrant indicated that the defendant had a weapon, they asked him where it was. *Id.* at 664-665. The defendant said that he took the weapon to his brother's home; the police later found and seized the weapon from the brother's home. *Id.* at 665. Our Supreme Court held that the defendant's statements to the police were admissible at trial under the public safety exception. *Id.* at 672-674. The Court stated that, when viewed objectively, a reasonable person in the officers' position would have been concerned for his own immediate safety as the defendant was getting dressed and rummaging through his dresser; the officers knew that the incident with the defendant and his wife involved a gun and that the defendant was suicidal. *Id.* at 672-673. Thus, an exigency existed. *Id.* at 673. The Court stated that the case was distinguishable from *Orozco* because the officers' attempt to ascertain the location of the gun was "directly related to an objectively reasonable need to secure protection from the possibility of immediate danger associated with the gun"; in contrast, there was not an immediate danger associated with a weapon in *Orozco*. *Id.* at 673-674.

In the present case, Crova advised defendant of his *Miranda* rights and then questioned defendant about the domestic-violence incident involving Abdullatif. Defendant provided Crova with an explanation for Abdullatif's injuries. Crova then asked defendant about the car. Defendant responded, "I don't have nothing to say about the car until I talk to an attorney." "I want to talk to a lawyer about the car." Crova ended the interview and walked defendant back to his jail cell. While walking, defendant told Crova that he slapped Abdullatif. Crova then asked defendant about the gun, and their conversation shifted to the gun's location. Defendant responded that he would show Crova where it was.

When defendant told Crova "I don't have nothing to say about the car until I talk to an attorney" and "I want to talk to a lawyer about the car," defendant partially invoked his Fifth Amendment rights to remain silent and to counsel. See *Barrett*, 479 US at 525-530; see also *Adams*, 245 Mich App at 231, 233-234. Defendant unequivocally invoked these rights with respect to the subject matter of the car. However, he did not make a blanket assertion of his Fifth Amendment rights. Thus, Crova could continue to question defendant on subjects that fell outside the limited invocation, i.e., outside the scope of the incident involving the car. See

Adams, 245 Mich App at 231. Crova's subsequent inquiry about the gun fell within defendant's limited invocation of his Fifth Amendment rights as the car incident involved the gun. Defendant did not initiate further communication with Crova about the car. See *Edwards*, 451 US at 484-485 ("[A]n accused . . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police."); *Barrett*, 479 US at 529 ("It is undisputed that Barrett desired the presence of counsel before making a written statement. Had the police obtained such a statement without meeting the waiver standards of *Edwards*, it would clearly be inadmissible."). Thus, in the absence of an exception to the *Miranda* rule, Crova's question to defendant about the gun was custodial interrogation in violation of *Miranda*.

Under the unique facts of this case, we conclude that the public safety exception applies to Crova's inquiry about the gun. Like the police officers in *Quarles*, Crova had information that defendant had discarded his weapon in a specific public place, making it readily accessible to others; Abdullatif told Crova that she threw defendant's gun out of the window of West's car on a road near some trees. Although Crova did not know the exact location of the gun, he knew of its general location and surroundings. More specifically, Abdullatif told him that defendant drove West's car between an apartment complex off Denton Road in Van Buren Township and an apartment complex on the west side of Ypsilanti Township. Additionally, West told Crova that he recalled driving with defendant on Huron River Drive. Crova testified that he searched for the gun on Huron River Drive and Textile and Rawsonville Roads on the same day he received the information from Abdullatif and West because he "didn't want some kid to pick it up and hurt themselves or somebody else." Thus, as in *Quarles*, and unlike the average case in which a weapon is used, defendant's discarding of the gun in a public place created an exigency of circumstances. See *Quarles*, 467 US at 657. The presence of the unattended gun near a street for anyone to obtain, including children, presented an immediate concern for the safety of the general public. See *Attebury*, 463 Mich at 670-671. Therefore, Crova's question to defendant about the location of the gun was objectively necessary to secure the public's safety. See *id.* at 671. The present case did not involve investigatory questioning as in *Orozco*. Unlike the officers in *Orozco*, Crova had specific information that a weapon posed an immediate threat to the public safety, and Crova's inquiry into the gun was focused on the gun's location.

Accordingly, the trial court did not err when it denied defendant's motion to suppress the statements that he made to Crova about the gun.

III. RESTITUTION

Defendant also challenges the trial court's $1,940.42 restitution award to West. Defendant contends that the trial court erroneously awarded West $1,419.42 in restitution for damage to West's car. We disagree.

We review an order of restitution for an abuse of discretion and a trial court's factual findings for clear error. *People v Dimoski*, 286 Mich App 474, 476; 780 NW2d 896 (2009); *People v Gubachy*, 272 Mich App 706, 708; 728 NW2d 891 (2006).

"Crime victims retain both statutory and constitutional rights to restitution." *People v Cross*, 281 Mich App 737, 739; 760 NW2d 314 (2008), citing Const 1963, art 1, § 24; MCL 780.766. "[T]he Crime Victim's Rights Act, MCL 780.766(2), mandates that a defendant 'make *full restitution* to any victim of the defendant's course of conduct.'" *Id.* "A restitution amount, if contested, must be proven by a preponderance of the evidence." *People v Byard*, 265 Mich App 510, 513; 696 NW2d 783 (2005), citing MCL 780.767(4). The prosecuting attorney bears the burden of demonstrating the amount of loss sustained by a victim as a result of the offense. MCL 780.767(4). "Restitution should only compensate for 'losses that are (1) easily ascertained and measured and (2) a direct result of the defendant's criminal acts.'" *Byard*, 265 Mich App at 513, quoting *People v White*, 212 Mich App 298, 316; 536 NW2d 876 (1995).

In the present case, the prosecution demonstrated by a preponderance of the evidence that West incurred damage to his vehicle that was both easily ascertainable and measurable and a direct result of defendant's criminal acts. See *id.* West testified that the front end of his car was damaged. While West testified that he did not know precisely when this damage occurred, he stated that the front end of his car was not damaged when he drove it shortly before the carjacking. Moreover, West presented a receipt for the car's repairs in the amount of $1,619.42 and testified that $200 of the repairs was for preexisting damage. Accordingly, the trial court did not abuse its discretion when it awarded West $1,419.42 in restitution for damage to the car.

Affirmed.

/s/ Jane M. Beckering
/s/ Donald S. Owens
/s/ Douglas B. Shapiro