# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>June 26, 2007 |
| v | No. 264384<br>Muskegon Circuit Court |
| WILLIE HENRY GARRETT, JR.,<br><br>Defendant-Appellant. | LC No. 04-050965-FC |

Before: Kelly, P.J. and Markey and Smolenski, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree murder under two separate theories, premeditation, MCL 750.316(1)(a), and felony murder, MCL 750.316(1)(b), and was sentenced to life imprisonment without parole. He appeals as of right. We affirm.

Defendant's conviction arises from the killing of Michael Villalpando, who was beaten, stabbed, and set on fire. Defendant conceded at trial that he killed the victim in this manner, but contended that he was only guilty of second-degree murder.

Defendant first contends that defense counsel was ineffective for failing to have him examined by an independent medical professional for the purpose of assessing the viability of an insanity defense based on involuntary intoxication. Because defendant did not raise this issue in a motion for a new trial or an evidentiary hearing, our review is limited to mistakes apparent in the record. *People v Noble*, 238 Mich App 647, 661; 608 NW2d 123 (1999).

"To establish ineffective assistance of counsel, a defendant must prove that his counsel's performance was deficient and that, under an objective standard of reasonableness, [he] was denied his Sixth Amendment right to counsel." *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005). A defendant must also prove that his counsel's deficient performance was prejudicial to the extent that, but for counsel's error, the result of the proceedings would have been different. *Id.* "Effective assistance of counsel is presumed, and the defendant bears a heavy burden to prove otherwise." *Id.*

Defendant maintains that his history of drug use and his ingestion of Prozac resulted in a form of involuntary intoxication that could be considered insanity. A defendant may have an insanity defense based on involuntary intoxication "when the chemical effects of drugs or alcohol render the defendant temporarily insane." *People v Caulley*, 197 Mich App 177, 187; 494 NW2d 853 (1992). However, defendant has not established the factual predicate for his

ineffective assistance of counsel claim. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). Beyond asserting that involuntary intoxication may support an insanity defense in theory, defendant has cited no record evidence whatsoever that he was involuntarily intoxicated at any point. Therefore, we conclude that defendant's ineffective assistance of counsel claim is without merit.

Defendant also contends that the prosecutor committed misconduct by misstating the law during voir dire. We review an unpreserved claim of prosecutorial misconduct for plain error affecting the defendant's substantial rights. *People v Abraham*, 256 Mich App 165, 274-275; 662 NW2d 836 (2003). Issues of prosecutorial misconduct are decided on a case-by-case basis by examining the record and evaluating the prosecutor's remarks in context to determine whether the defendant was denied a fair and impartial trial. *People v Rodriguez*, 251 Mich App 10, 29-30; 650 NW2d 96 (2002). The propriety of a prosecutor's remarks depends on all the facts of the case. *Id*. Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *Id*.

During voir dire, defense counsel stated that there are situations in which a "[p]erson snaps, right?" Shortly thereafter, prosecutor followed up on this comment stating, "So, for example, this 'just snapped' thing – there's no temporary insanity in Michigan. You're not going to get that defense." Defendant asserts on appeal that the prosecutor's comment was incorrect because a defendant may be considered temporarily insane if he is involuntarily intoxicated. However, defendant never filed notice of his intent to present an insanity defense, so he was not entitled to present evidence in support of it. MCL 768.20a(1); MCL 768.21(1). Furthermore, as discussed above, defendant has not demonstrated with record evidence that he was involuntarily intoxicated. Because defendant's sanity was not an issue at trial, the prosecutor's statement did not affect defendant's substantial rights.

Defendant next argues that the trial court erred in denying his *Batson*[1] challenge. As our Supreme Court recently summarized:

> In *Batson*, the United States Supreme Court held that a peremptory challenge to strike a juror may not be exercised on the basis of race. The Court set forth a three-step process for determining whether a challenger has improperly exercised peremptory challenges. First, the opponent of the challenge must make a prima facie showing of discrimination based on race. Next, once the prima facie showing is made, the burden then shifts to the challenging party to come forward with a neutral explanation for the challenge. Finally, the trial court must decide whether the opponent of the challenge has proven purposeful discrimination. [*People v Bell*, 473 Mich 275, 278-279; 702 NW2d 128, opn corrected on reh 474 Mich 1201 (2005) (citations omitted).]

We review de novo whether the prosecutor articulated a race-neutral explanation. *People v Knight*, 473 Mich 324, 345; 701 NW2d 715 (2005). We review for clear error the trial court's

[1] *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986).

determination whether the race-neutral explanation was a pretext and whether defendant proved purposeful discrimination. *Id.*

The prosecutor explained that the first juror was excused because she headed an organization whose goals were often at odds with the prosecutor's office. The second juror was excused because he "looks very young," was unemployed, has three kids, and is unmarried. The third juror was excused because she first stated she did not know anyone who was introduced and then said that she might have gone to school with defendant. The prosecutor stated that because she equivocated, he did not want to take the risk of having her on the jury. The prosecutor's reasons for dismissing the potential jurors were race-neutral, had a relation to his trial strategy, and were not patently pretextual. The trial court found that there was no discriminatory intent associated with the use of the peremptory challenges. On this record, and considering that the trial court was in a better position to evaluate the prosecutor's credibility, *Knight*, *supra* at 344, we conclude that the trial court did not err in its determination that the prosecutor articulated a race-neutral reason that was not a pretext.

Defendant also argues that the prosecutor's failure to provide a complete transcript of a witness's taped interview with the police was a discovery violation. Because defendant did not include this claim in his statement of questions presented, it is not properly before this Court. MCR 7.212(C)(5); *English v Blue Cross Blue Shield of Michigan*, 263 Mich App 449, 459; 688 NW2d 523 (2004). In any event, there was no violation because the prosecutor gave defendant the actual tape of the interview and the partial transcript in his possession. MCR 6.201(A)(2). We also reject defendant's assertion that defense counsel was ineffective for failing to review the tape before cross-examining the witness because there is no factual support for this claim in the record.

Defendant also raises several evidentiary issues. Defendant first takes issue with the admission of autopsy photographs of the victim. Because defense counsel specifically agreed to their admission, this evidentiary claim is waived. *People v Carter*, 462 Mich 206, 214-216; 612 NW2d 144 (2000). Nonetheless, defendant also contends that defense counsel was constitutionally ineffective for agreeing to the admission of the photographs. We disagree.

"Admission of photographs solely to arouse the sympathies or prejudices of the jury may be error requiring reversal." *People v Ho*, 231 Mich App 178, 188; 585 NW2d 357 (1998). "However, a photograph that is otherwise admissible for some proper purpose is not rendered inadmissible because of its gruesome details or the shocking nature of the crime." *Id.*; *People v Mills*, 450 Mich 61, 77, 79; 537 NW2d 909 (1995), mod 450 Mich 1212 (1995). Here, while the photographs were indeed gruesome, they were also relevant to the case, as defendant was attempting to argue that he did not intend to kill the victim. While testimony alone could have described the injuries, the photographs were helpful to corroborate the testimony and show the full extent of the victim's injuries. "Photographs are not excludable simply because a witness can orally testify about the information contained in the photographs." *Id.* at 76. The probative value of the photographs was not substantially outweighed by the danger of unfair prejudice. *People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001). Although the photographs of the victim were certainly damaging or prejudicial to defendant, the probative value of them was not substantially outweighed by the danger of unfair prejudice. *Mills*, *supra* at 75; MRE 403. Defendant has not shown that defense counsel was constitutionally deficient for not objecting to the admission of these photographs. Further, defendant admits on appeal that the testimony was

sufficient to prove there was intent to kill; therefore, defendant cannot demonstrate that admission of the photographs was outcome determinative.

Defendant also challenges the admission of two inculpatory statements made to police officers, which were admitted without objection by defense counsel. He argues that they were inadmissible because he was in custody and was not given *Miranda*[2] warnings before the statements were made. The trial court's decision to admit evidence is reviewed for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). However, where the admission of evidence involves a preliminary question of law, such as whether a rule or statute bars admission, this Court reviews the question de novo. *Id.* Whether a waiver was knowing, intelligent and voluntarily is reviewed de novo. *People v Tierney*, 266 Mich App 687, 707-708; 703 NW2d 204 (2005).

With regard to defendant's recorded statements made before Detectives Cliff Johnson and Calvin Davis, Detective Davis testified that the interrogation was preceded by *Miranda* warnings. Therefore, defendant's assertion that his statements were not preceded by *Miranda* warnings is not supported by the record.

Following this recorded interview, Officer Regina Winston was asked to transport defendant to the county jail and allow him to telephone his mother. During the telephone conversation, defendant was upset and made inculpatory statements. Shortly thereafter, defendant's mother pulled up in a car and defendant cried and made more inculpatory statements to her. Defendant's statements were not the result of police interrogation and defendant made no attempt to hide them from Officer Winston. During the time Officer Winston was transporting defendant, defendant continued "sobbing real hard" and initiated a conversation with her asking how much time he would get. After defendant asked this question, Officer Winston asked him what happened, and defendant made additional inculpatory statements.

The record clearly demonstrates that defendant initially made inculpatory statements to other people and Officer Winston voluntarily, and not as a result of any police questioning. Because "[s]tatements made voluntarily by persons in custody do not fall within the purview of *Miranda*," these statements were admissible. *People v Raper*, 222 Mich App 475, 479; 563 NW2d 709 (1997). With regard to the questions Officer Winston asked after defendant's initial statements, "the police are not required to read *Miranda* rights every time a defendant is questioned." *People v Littlejohn*, 197 Mich App 220, 223; 495 NW2d 171 (1992) (footnote omitted). "[T]he failure to reread a defendant's *Miranda* rights prior to each interrogation does not render his subsequent statements inadmissible as evidence against him. Rather, a factual question is raised as to whether the statements were voluntary." *People v Godboldo*, 158 Mich App 603, 607; 405 NW2d 114 (1986). Here, considering that defendant, after being recently *Mirandized*, provided a taped confession, voluntarily made inculpatory statements to other people in Officer Winston's presence and then initiated a conversation with her, we conclude that he knowingly, intelligently, and voluntarily relinquished his right to remain silent when he answered her questions. *People v McBride*, 273 Mich App 238, 252; 729 NW2d 551 (2006).

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

For these reasons, the statements defendant challenges on appeal were admissible at trial.

Defendant also contends that the trial court erred in admitting DNA evidence without a proper foundation. State police DNA specialist, Ann Hunt, testified that she used generally accepted laboratory principles in analyzing the DNA samples, specifically the polymerase chain reaction (PCR) method, which Michigan courts "firmly accept." *People v Coy (After Remand)*, 258 Mich App 1, 11; 669 NW2d 831 (2003). Hunt also testified about the controls used to ensure that the samples and equipment were not contaminated and to ensure that the chemicals, reagents, and instruments were working properly from start to finish. Although defendant also asserts that there was a lack of foundation regarding the statistical analysis of the DNA evidence, Hunt testified that she used generally accepted scientific principles in creating the population statistics, the basis of which was a national database program. This sort of statistical evidence is generally admissible, *People v Herndon*, 246 Mich App 371, 406; 633 NW2d 376 (2001), and challenges to the statistical analysis of DNA evidence are relevant to its weight, not its admissibility, *Coy*, *supra* at 11. Therefore, defendant has not established that the trial court abused its discretion in admitting this evidence.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Jane E. Markey
/s/ Michael R. Smolenski