S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DENNIS DEMAR LINCOLN,

Defendant-Appellant.

UNPUBLISHED
March 8, 2005

No. 249838
Wayne Circuit Court
LC No. 03-000903-01

Before: Hoekstra, P.J., and Cavanagh and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right his convictions of five counts of second-degree murder, MCL 750.317, five counts of armed robbery, MCL 750.529, five counts of felony murder, MCL 750.316(1)(b), felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant as a second habitual offender, MCL 769.10, to a mandatory sentence of imprisonment for life without parole for the felony murder convictions, and 42 to 90 months for the felon in possession of a firearm conviction, and two years for the felony-firearm conviction. We affirm.

I. Facts

On the afternoon of December 21, 2002, Marco Pesce, an Italian immigrant who owned Italia Jewelry in Livonia, drove his three young children, Carlo, Sabrina, and Melissa, to visit their mother, Diane Pesce,[1] who was in a residential drug treatment facility in Ann Arbor. Marco picked up the children from their visit, then dropped them off at his home in Livonia at about 5:30 or 5:40 p.m., returning to work at approximately 6:00 or 6:15 p.m. Marco's mother, Maria Vergati, who was visiting the family from Italy, was at the Pesce home at the time, and Marco did not exit his vehicle and go inside his home when he dropped off the children. Shortly after Marco arrived back at work after dropping off the children at home, Carlo called Marco and told him to come home because Melissa had fallen and chipped her tooth. Marco left work immediately and returned home. The next day Marco, his three children, and his mother were discovered dead in the Pesce home. They had each been shot to death on December 21, 2002. The house had been ransacked and the family safe had been emptied of jewelry and cash.

[1] Marco was divorced from Diane Pesce.

The evidence showed that defendant and his codefendant, John Wolfenbarger, carefully planned and prepared to rob Marco Pesce at his home. Defendant made a written statement[2] to the police explaining his role in the crimes and describing how he and Wolfenbarger planned and prepared to commit their crimes. Defendant admitted that on December 19, 2002, he and Wolfenbarger, in separate cars, communicated by cell phone as they targeted Marco Pesce and watched Italia Jewelry. They attempted to follow Marco home, but could not tell which driveway he turned into. The next evening, on December 20, 2002, defendant and Wolfenbarger followed Marco home again. This time, they succeeded in ascertaining the location of Marco's home. According to defendant, on December 21, 2002, he and Wolfenbarger purchased a clipboard, delivery receipts, and a teddy bear to further their plan to have Wolfenbarger pose as deliverymen to gain access to the Pesce family home. They also borrowed a pick-up truck from Wolfenbarger's friend to use when they committed the robbery. According to defendant, late in the afternoon of December 21, 2002, Wolfenbarger drove the truck to the Pesce home, parked it in the driveway, and got out with the teddy bear and approached Vergati, who was in the garage. According to defendant, defendant put his hand in his coat pocket, which contained a .380 pistol, and Wolfenbarger and Vergati went inside the home.

Defendant claimed that Wolfenbarger made a gesture with his hand, so defendant left the Pesce home in the pick-up truck and drove to Italia Jewelry to watch for Marco. Defendant and Wolfenbarger communicated by cell phone during this time. According to defendant, Wolfenbarger told him that he told Carlo to call Marco at work and tell him that one of his sisters chipped her tooth to lure Marco home. Defendant claimed that he fell asleep while he was sitting in the parked truck waiting for Marco. Defendant further claimed that he awakened at 6:21 p.m. and then drove to the Pesce home and picked up Wolfenbarger. Defendant asserted that when Wolfenbarger got into the truck, he said, "five dead, Bro'." Defendant and Wolfenbarger then returned the truck to Wolfenbarger's friend and brought bags containing items from the Pesce home to Tracy Letts' home. Defendant denied being the shooter and claimed that he simply dropped off and picked up Wolfenbarger at the Pesce home. He also asserted that Wolfenbarger had determined that defendant did not need a gun because he would not go inside the Pesce home.

II. Sufficiency of the Evidence

Defendant challenges the sufficiency of the evidence for his felony murder, felony-firearm, and felon in possession of a firearm convictions. According to defendant, the evidence is not sufficient to sustain his felony murder conviction because it does not establish that he acted with malice. Defendant also contends that the evidence is insufficient to sustain his felony-firearm and felon in possession of a firearm convictions because it did not establish that he possessed a gun.

This Court reviews de novo a claim regarding the sufficiency of the evidence. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). The test for determining whether sufficient evidence has been presented to sustain a conviction is whether, viewing the evidence

[2] Defendant signed the statement, but Sergeant Thomas Goralski, one of the officers who interviewed defendant, actually wrote the statement for defendant. Sergeant Goralski read the statement at trial and it was admitted as evidence.

in a light most favorable to the prosecution, a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000). "The standard of review is deferential: a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *Id.* at 400. "'Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime.'" *Id.*, quoting *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999).

Defendant first argues that the evidence was insufficient regarding the intent element of felony murder. The prosecution's theory at trial was that defendant aided and abetted Wolfenbarger in committing felony murder.

> 'Aiding and abetting' describes all forms of assistance rendered to the perpetrator of a crime and comprehends all words or deeds that might support, encourage, or incite the commission of a crime. . . . To support a finding that a defendant aided and abetted a crime, the prosecutor 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. An aider and abettor's state of mind may be inferred from all the facts and circumstances. Factors that may be considered include a close association between the defendant and the principal, the defendant's participation in the planning or execution of the crime, and evidence of flight after the crime. [*Carines*, *supra* at 757-758, quoting *People v Turner*, 213 Mich App 558, 568-569; 540 NW2d 728 (1995) (citations omitted). See also MCL 767.39.]

The requisite intent for aiding and abetting is that necessary to be convicted of the crime as a principal. *People v Kelly*, 423 Mich 261, 278; 378 NW2d 365 (1985). The intent required to support a conviction of felony murder is the malicious intent required for a conviction of second-degree murder: intent to kill, intent to do great bodily harm, or intent to create a very high risk of death or great bodily harm with the knowledge that such death or harm would be the probable result. *People v Flowers*, 191 Mich App 169, 176; 477 NW2d 473 (1991). The facts and circumstances of a killing may give rise to an inference of malice. *Id.* A jury may infer malice from evidence that the defendant intentionally set in motion force likely to cause death or great bodily harm; in addition, malice may be inferred from the use of a deadly weapon. *Carines*, *supra* at 759.

Therefore, to sustain defendant's convictions of felony murder as an aider and abettor, there must have been sufficient evidence that defendant intended to kill, intended to do great bodily harm, or intended to create a very high risk of death or great bodily harm with the knowledge that such death or harm would be the probable result. *Flowers*, *supra* at 176. If defendant participated in the crime with knowledge of Wolfenbarger's intent to kill or cause great bodily harm, he acted with wanton and willful disregard sufficient to support a finding of malice. *Kelly*, *supra* at 278-279.

We find that there was sufficient evidence to convict defendant of felony murder as an aider and abettor. The evidence established that defendant and Wolfenbarger carefully planned

and prepared to commit armed robbery at the home of Marco Pesce and then executed their plan together. They watched Marco Pesce at Italia Jewelry and followed him in his car when he left work to return home to determine where he lived. They procured a different vehicle to drive on the day of their crimes and purchased a clipboard, receipts, and a teddy bear so that Wolfenbarger could pose as a deliveryman. Defendant admitted in his written statement that he knew Wolfenbarger had a gun when they went to the Pesce home on December 21, 2002. Even accepting as true defendant's contentions that he merely dropped off and picked up Wolfenbarger at the Pesce home, that he never entered the Pesce home on the night the family was killed, that he did not possess a gun, and that he was not the shooter, the evidence established that defendant and Wolfenbarger acted intentionally or recklessly in pursuit of a common plan of armed robbery and that defendant knew that Wolfenbarger had a gun when the two of them commenced their plan to commit armed robbery on December 21, 2002. In *Turner*, *supra* at 572, this Court held that the defendant's "knowledge that [his co-defendant] was armed during the commission of the armed robbery is enough for a rational trier of fact to find that [the defendant,] as an aider and abettor, participated in the crime with knowledge of [the co-defendant's] intent to cause great bodily harm." We therefore concluded that a rational trier of fact could find that the defendant in that case was acting with wanton and willful disregard sufficient to support a finding of malice. *Id.* at 572-573. Similarly, in the instant case, we conclude that because defendant knew that Wolfenbarger had a gun, there was sufficient evidence to support defendant's convictions of felony murder as an aider and abettor. By meticulously planning, preparing, and participating in the armed robbery with Wolfenbarger, defendant set in motion a force likely to cause death or great bodily harm. The evidence was sufficient to permit a rational trier of fact to conclude that defendant was guilty of aiding and abetting felony murder.

Defendant next argues that there was insufficient evidence that he possessed a gun during the commission of the crimes and that the evidence is therefore insufficient to support his felony-firearm and felon in possession of a firearm convictions.

Possession of a firearm is an element of both felony-firearm and felon in possession of a firearm. MCL 750.224f; MCL 750.227b(1). The question of possession is factual and is decided by the jury. *People v Hill*, 433 Mich 464, 469; 446 NW2d 140 (1989). Possession may be proved by circumstantial as well as direct evidence. *Id.* The firearm need not be operable to support a conviction for either felony-firearm or felon in possession of a firearm. *People v Brown*, 249 Mich App 382, 384-387; 642 NW2d 382 (2002).

In defendant's written statement to the police, defendant asserted that he did not have a gun during the offense. According to defendant's statement, Wolfenbarger decided that defendant did not need a gun because the plan did not include defendant entering the Pesce home. However, evidence introduced at trial, if viewed in a light most favorable to the prosecution, permits the inference that defendant did possess a gun. Steven Phillips testified that two or three days before the victims were robbed and killed, defendant and Wolfenbarger came to his home to obtain a .32 Beretta. Phillips further testified that on the morning of December 22, 2002, Wolfenbarger came to his house, put the .32 Beretta under a mat on the side of his house, and told Phillips to "take care of it."

In light of evidence that Wolfenbarger used a .380 pistol to commit the crimes, the jury could have inferred that when defendant and Wolfenbarger went to Steven Phillips' house to

obtain the .32 Beretta, they were obtaining it for defendant to use in furtherance of their crimes. Phillips' testimony that Wolfenbarger asked Phillips to "take care" of the gun the day after the murders also permits the inference that defendant possessed the gun. Despite defendant's claims to the contrary, a reasonable jury could infer from the evidence that defendant did possess a gun. Reasonable inferences arising from the evidence can constitute satisfactory proof of the elements of a crime. *Carines*, *supra* at 757. Moreover, "[i]t is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences." *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). Viewing the evidence in a light most favorable to the prosecution and drawing all reasonable inferences in support of the jury verdict, there was sufficient evidence that defendant possessed a gun.

III. Prosecutorial Misconduct

Defendant argues that the prosecutor made improper comments during closing argument and rebuttal closing argument and that the prosecutor's misconduct deprived him of a fair trial.

Defendant failed to preserve this issue for review because he did not object to the prosecutor's allegedly improper remarks during closing and rebuttal closing argument. Appellate review of alleged prosecutorial misconduct is precluded if the defendant fails to timely and specifically object unless an objection could not have cured the error or a failure to review the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994); *People v Kelly*, 231 Mich App 627, 638; 588 NW2d 480 (1998). Absent a timely and specific objection, this Court reviews for plain error a defendant's claim of prosecutorial misconduct. *Carines*, *supra* at 761-767; *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000), abrogated in part on other grounds by *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004). Because defendant failed to object to the prosecutor's comments, our review is for plain error.

Issues of prosecutorial misconduct are decided on a case-by-case basis. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). The reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. *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. *Schutte*, *supra* at 721. The test of prosecutorial misconduct is whether the defendant was denied a fair trial. *Noble*, *supra* at 660.

Defendant first argues that the prosecutor improperly denigrated defense counsel when he stated that defense counsel's arguments did not address the facts of the case and suggested that defense counsel's arguments were nothing more than "smoke and mirrors." Generally, prosecutors are accorded great latitude regarding their arguments and conduct. *People v Bahoda*, 448 Mich 261, 283; 531 NW2d 659 (1995). This Court has specifically rejected the argument that a prosecutor's references to "smoke and mirrors" amounts to prosecutorial misconduct. *People v Rodriguez*, 251 Mich App 10, 40; 650 NW2d 96 (2002). The prosecutor's reference to "smoke and mirrors" was a colorful way of commenting on the evidence. Reviewing the record as a whole, the prosecutor was attempting to get the jury to focus on the facts of the case; he was not attacking defense counsel. Accordingly, such comments did not constitute plain error.

Defendant next argues that the prosecutor improperly asserted his personal belief in defendant's guilt when he asserted the following during closing argument: "Let me state to you at the outset that I think we have proven a case of Felony Murder against Dennis Lincoln beyond a reasonable doubt." According to defendant, this error was magnified when the prosecutor repeatedly asserted that that the case against defendant for felony murder was "solid." Defendant is correct that it is improper for a prosecutor to "express their personal opinions of a defendant's guilt." *Bahoda*, *supra* at 282-283. However, in this case, the prosecutor's statements did not constitute an improper expression of the prosecutor's personal opinion regarding defendant's guilt. Rather, the prosecutor was merely commenting on the strength of his case based on the evidence. Prosecutors are free to argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case. *Id.* at 282. Viewing the remarks in context, the prosecutor correctly articulated the burden of proof in a criminal case and asserted that, based on the evidence, the prosecutor had met that burden. The remarks were a proper comment on the evidence rather than a personal opinion regarding defendant's guilt and did not constitute plain error.

Defendant finally argues that the prosecutor made an improper civic duty argument when he urged the jury to serve "justice" by "holding . . . defendant accountable for what he's done." Defendant is correct that a prosecutor may not advocate that jurors convict a defendant as a part of their civic duty. *People v Ackerman*, 257 Mich App 434, 452; 669 NW2d 818 (2003). In this case, however, the prosecutor's comments did not constitute an improper civic duty argument. In *People v Matuszak*, 263 Mich App 42, 56; 687 NW2d 342 (2004), this Court rejected the defendant's argument that the prosecutor improperly presented a civic duty argument when the prosecutor asked the jury to hold the defendant "accountable" because the prosecutor had also argued that the crime had been established beyond a reasonable doubt. In *Matuszak*, we reasoned that because the prosecutor also argued that the crime had been established beyond a reasonable doubt, the remarks did not urge the jury to convict defendant regardless of the evidence. *Id.* Similarly, in this case, the prosecutor also argued that the evidence established that defendant was guilty of the crimes beyond a reasonable doubt. Moreover, the prosecutor's comment asking the jury to serve "justice" was also based on the evidence. The comments were not improper, and defendant has not established plain error.

In summation, the prosecutor's comments during closing argument and rebuttal closing argument were not improper and thus did not constitute plain error. Because the comments were not improper, an objection would have been meritless; therefore, defense counsel was not ineffective in failing to object. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001).

IV. Statements of Nontestifying Codefendant

Defendant argues that the admission of Detective Keith Schoen's testimony regarding testimonial statements that Wolfenbarger made to Schoen while Wolfenbarger was in police custody violated his Sixth Amendment right to confrontation and cross-examination because Wolfenbarger did not testify, and defendant was therefore unable to cross-examine him regarding the statements. According to defendant, Wolfenbarger's statements to Detective Schoen should have been suppressed under the United States Supreme Court's decision in *Crawford*, *supra*. We agree, but hold that trial court's error in failing to suppress the statements was harmless.

Crawford precludes the admission of testimonial out-of-court statements if the declarant is unavailable and the defendant did not have "a prior opportunity for cross-examination" of the declarant. *Crawford*, *supra* 541 US at ___; 124 S Ct at 1374. The Supreme Court left "for another day any effort to spell out a comprehensive definition of 'testimonial.'" *Id.* However, it observed that "[s]tatements taken by police officers in the course of interrogations are . . . testimonial under even a narrow standard." *Id.*, 541 US at ___; 124 S Ct at 1364. Wolfenbarger was in custody when he made the statements to Detective Schoen. Before obtaining Wolfenbarger's statements, Detective Schoen advised him of his rights under *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966). We hold that Wolfenbarger's statements to Schoen are clearly testimonial under *Crawford* because they were taken by Schoen in the course of an interrogation. In addition, because Wolfenbarger invoked his Fifth Amendment privilege not to testify at trial, he was an "unavailable witness." See MRE 804(a)(1). Finally, it is undisputed that defendant did not have the opportunity to cross-examine Wolfenbarger. We therefore hold that Detective Schoen's testimony regarding Wolfenbarger's statements to him should have been suppressed under *Crawford*.

However, we find that the trial court's error in failing to suppress Detective Schoen's testimony was harmless and does not require reversal of defendant's convictions. When a trial court commits an error that denies a defendant his constitutional rights under the Sixth Amendment, this Court need not reverse if the error is harmless beyond a reasonable doubt. *People v McPherson*, 263 Mich App 124, 131; 687 NW2d 370 (2004). Two of the factors to consider in determining whether such an error is harmless include the importance of the witness' testimony and the strength of the prosecution's case. *Kelly*, *supra* at 645. In this case, Wolfenbarger's statements were not important to defendant's case. Significantly, the statements were not harmful to defendant because Wolfenbarger did not identify defendant in his statements to Detective Schoen and did not implicate defendant in any way. The rationale for precluding statements made by a nontestifying codefendant at a joint trial is that such statements are suspect because the declarant is attempting to shift blame. *People v Frazier (After Remand)*, 446 Mich 539, 544-545; 521 NW2d 291 (1994). In this case, however, Wolfenbarger's statements to Schoen did not implicate or incriminate defendant in any way and did not attempt to shift blame to defendant. In addition, the evidence against defendant was overwhelming. We conclude that because the statements did not implicate defendant and the prosecutor's case against defendant without his co-defendant's statement was so strong, the trial court's error in admitting Schoen's testimony regarding Wolfenbarger's statements was harmless beyond a reasonable doubt.

V. Sixth Amendment Right to Counsel

Defendant argues that the trial court erred in denying his motion to suppress statements that he made to the police following his arraignment because the statements were obtained in violation of his Sixth Amendment right to counsel. Defendant contends that the trial court violated MCR 6.005(A) and MCR 6.104(E)(3) when it arraigned him and that because he was not given the opportunity to assert his right to counsel at arraignment, the trial court should have suppressed all statements defendant made to the police after his arraignment because the statements were tainted by his improper arraignment and because the police, not defendant, initiated the post-arraignment interrogation that led to the incriminating statements. We disagree.

When considering a ruling on a motion to suppress evidence, an appellate court reviews the trial court's findings of fact for clear error. *People v Custer (On Remand)*, 248 Mich App 552, 558; 640 NW2d 576 (2001). However, the constitutional questions relevant to the suppression hearing are questions of law that are reviewed de novo. *Id.* at 559. The appellate court reviews de novo the trial court's ultimate decision on the motion to suppress. *People v Frohriep*, 247 Mich App 692, 702; 637 NW2d 562 (2001).

The Sixth Amendment[3] to the United States Constitution guarantees the accused in a criminal prosecution the right to the assistance of counsel for his defense and applies to the states through the Fourteenth Amendment. US Const, Am VI; *People v Crusoe*, 433 Mich 666, 684 n 27; 449 NW2d 641 (1989). The Sixth Amendment right to counsel attaches "at or after the initiation of adversary judicial proceedings against the accused by way of a formal charge, preliminary hearing, indictment, information, or arraignment." *People v Bladel (After Remand)*, 421 Mich 39, 52; 365 NW2d 56 (1984), aff'd sub nom *Michigan v Jackson*, 475 US 625; 106 S Ct 1404; 89 L Ed 2d 631 (1986). A defendant "is entitled to counsel not only at trial, but at all 'critical stages' of the prosecution, *i.e.*, those stages 'where counsel's absence might derogate from the accused's right to a fair trial.'" *Id.*, quoting *United States v Wade*, 388 US 218, 226-227; 87 S Ct 1926; 18 L Ed 2d 1149 (1967). The Sixth Amendment guarantee of the assistance of counsel provides the right to counsel at post-arraignment interrogations. *Jackson*, *supra* 475 US at 629.

The proper inquiry in this case can be described as follows:

> As a rule, the admissibility of an accused's confession made during a police-initiated custodial interrogation depends on the results of two distinct inquiries. First, courts must determine whether the accused actually invoked his right to counsel. Second, where the accused has invoked his right to counsel, his later statement is admissible only upon a finding that the defendant initiated further discussions with the police and knowingly and intelligently waived the right he had invoked. [*Crusoe*, *supra* at 682-683 (footnote omitted).]

Defendant contends that he effectively invoked his right to counsel at arraignment because the arraigning judge failed to advise him at arraignment that he had the right to a court appointed lawyer if he could not afford one, failed to inquire regarding defendant's financial status, and failed to ask defendant if he wanted an attorney appointed for him in violation of MCR 6.005(A) and MCR 6.104(E)(3). According to defendant, his arraignment should be treated as an invocation of his right to counsel because he would have invoked his right to counsel at that time if the trial court had properly complied with MCR 6.005(A) and MCR 6.104(E)(3). We reject this argument. "[T]he [Sixth Amendment right to counsel] is invoked *only* by requesting counsel, usually at postcharge questioning or at arraignment." *People v*

[3] Defendant's argument on appeal is only that his Sixth Amendment right to counsel was violated. The Fifth Amendment protection against compelled self-incrimination also provides for the right to counsel at custodial interrogations. *Michigan v Jackson*, 475 US 625, 629; 106 S Ct 1404; 89 L Ed 2d 631 (1986). Defendant does not argue on appeal that his Fifth Amendment right to counsel was violated. Therefore, our analysis will focus solely on the Sixth Amendment right to counsel.

Anderson (After Remand), 446 Mich 392, 402; 521 NW2d 538 (1994) (emphasis added). At his arraignment, defendant did not assert or invoke his right to counsel.

Our review of the record supports defendant's contention that the arraigning judge did not strictly adhere to MCR 6.005(A) and MCR 6.104(E)(3) in advising defendant of his rights. However, the trial court's conduct does not require reversal of defendant's convictions because it was harmless for two reasons. *McPherson*, *supra* at 131; MCL 769.26; MCR 2.613(A). First, the arraignment was not a critical stage of the proceedings in this case because defendant was not questioned, did not plead guilty, and did not waive any defenses. See *People v Green*, 260 Mich App 392, 400; 677 NW2d 363 (2004). The arraigning judge simply read the charges against defendant, then stated that he was accepting defendant's not guilty plea without even asking defendant on the record about his plea. Under these circumstances, defendant's arraignment, unlike a trial, was not a proceeding at which defendant required a great deal of aid in coping with legal problems or assistance in meeting his adversary. *Patterson v Illinois*, 487 US 285, 298; 108 S Ct 2389; 101 L Ed 2d 261 (1988); *id*.

Second, defendant's Sixth Amendment rights were adequately protected post-interrogation. The police had advised defendant of his *Miranda* rights when they first interviewed or questioned him on December 25, 2002, before he was arraigned. At that time, defendant placed his initials next to each of the five rights to indicate that he understood the rights. While the police did not again read defendant his *Miranda* rights when they interviewed him after he was arraigned, they informed him that the rights they had advised him of the previous day were still in place and asked him if he understood his rights. Defendant indicated that he understood his rights and that he wished to speak to the police. Moreover, defendant was again advised of his *Miranda* rights before he signed his written statement and again waived his right to have counsel present. An accused who is advised of his *Miranda* rights "has been sufficiently apprised of the nature of his Sixth Amendment rights, and of the consequences of abandoning those rights, so that his waiver on this basis will be considered a knowing and intelligent one." *Patterson*, *supra* 487 US at 296. Therefore, because defendant affirmed that he understood his *Miranda* rights and that he wanted to continue talking to the police, his waiver of his Sixth Amendment rights at the post-arraignment interrogation was both knowingly and intelligently made.

Furthermore, we reject defendant's contention that the police were prohibited from initiating an interrogation of defendant after his arraignment. Defendant is correct that the police cannot initiate interrogation of the defendant if a defendant asserts his Sixth Amendment right to counsel at his arraignment. *Anderson*, *supra* at 402-403. However, because defendant did not invoke his Sixth Amendment right to counsel at his arraignment, the police were not prohibited from initiating an interrogation of defendant after defendant's arraignment provided that they obtained a valid waiver of defendant's Fifth and Sixth Amendment rights to counsel before the post-arraignment interrogation. *Id.*

The fact that the trial court may have appointed counsel for defendant or that defendant's mother may have retained counsel for defendant before the police interrogation does not render improper the conduct of the police in initiating the interrogation with defendant after his arraignment for two reasons. [4] First, the arraigning judge did not indicate on the record that he

[4] The parties both assert that the trial court appointed attorney Susan Reed to represent defendant

intended to appoint counsel for defendant, so the police were not on notice that counsel had been appointed. There is absolutely no indication from the record that the police deliberately set out to obtain information from defendant by intentionally violating his constitutional rights. To the contrary, the record reveals that the police, at every step of their interrogation of defendant, scrupulously honored his rights. Second, and more importantly, the police did not improperly initiate the interrogation because the rationale for the rule prohibiting the police from initiating a post-arraignment interrogation of a defendant who has requested counsel is to protect a defendant who has expressed a desire to deal with the police only through counsel. *Id.*, 487 US at 291. The record does not indicate that defendant was aware that his mother had retained counsel for him or that he was aware of and had accepted appointed counsel. Most importantly, defendant himself was completely willing to speak to the police and had not previously "'asked for the help of a lawyer' in dealing with the police." *Id.*, quoting *Jackson*, *supra* 475 US at 631, 633-635. "[O]nce 'an accused . . . ha[s] expressed his desire to deal with the police only through counsel' he should 'not [be] subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication.'" *Id.*, quoting *Edward v Arizona*, 451 US 477, 484-485; 101 S Ct 1880; 68 L Ed 2d 378 (1981). In this case, defendant did not invoke his right to counsel at arraignment and he never expressed his desire to deal with the police only through counsel. Defendant clearly willingly spoke to the police post-arraignment after being advised that his rights were in place. Because defendant knowingly and intelligently waived his rights prior to and during all his conversations with the police, all of his statements were admissible.

VI. Voluntariness of Defendant's Statements to Police

Defendant argues that the trial court erred in refusing to suppress statements he made to the police both before and after he was arraigned because his statements were involuntary because the police engaged in coercive behavior to obtain the statements. Therefore, according to defendant, the police violated his rights under the Fifth and Fourteenth Amendments, and the statements should have been suppressed.

The Fifth Amendment of the United States Constitution guarantees that the government cannot compel a defendant in a criminal case to testify against himself. US Const, Am V. This protection has been applied to the states through the Due Process Clause of the Fourteenth Amendment. *People v Cheatham*, 453 Mich 1, 9; 551 NW2d 355 (1996). Whether a statement is deemed voluntary under the Fourteenth Amendment is to be determined using a totality of the circumstances analysis. *People v Cipriano*, 431 Mich 315, 333-334; 429 NW2d 781 (1988). The question is 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 334, quoting *Culombe v Connecticut*, 367 US 568, 602; 81 S Ct 1860; 6 L Ed 2d 1037 (1961). The trial court should consider the following non-exclusive factors in determining whether a statement is voluntary:

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after he was arraigned even without a request for counsel from defendant. However, there is no indication from the arraignment transcript that the trial court intended to appoint counsel. Moreover, the lower court file does not contain any orders or documentation regarding the appointment of counsel or defendant's acceptance of appointed counsel. In addition, after his arraignment, defendant's mother retained attorney Alford Harris, defendant's cousin, to represent him without defendant's knowledge.

> 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. [*Id*.]

The voluntariness of a confession is a question for the trial court; an appellate court must examine the entire record and make an independent determination of voluntariness. *People v Robinson*, 386 Mich 551, 558; 194 NW2d 709 (1972). An appellate court will not reverse a trial court's findings unless they were clearly erroneous. *People v DeLisle*, 183 Mich App 713, 719; 455 NW2d 401 (1990). A finding is clearly erroneous if this Court is left with a definite and firm conviction that a mistake has been made. *Id.*

Coercive police activity is a necessary predicate to finding that a confession is not voluntary under the Fourteenth Amendment Due Process Clause. *Colorado v Connelly*, 479 US 157, 164-165; 107 S Ct 515; 93 L Ed 2d 473 (1986); *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998). The same standard applies to the Fifth Amendment privilege against self-incrimination. *Cheatham*, *supra* at 14. After thoroughly examining the entire record, we are not left with a definite and firm conviction that the trial court made a mistake in finding defendant's statements to be voluntary and not coerced. The record simply does not support defendant's contention that the police engaged in coercive conduct that overcame defendant's will and rendered his statements involuntary.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Mark J. Cavanagh
/s/ Stephen L. Borrello