STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 21, 2013
v	No. 304610 Oakland Circuit Court
WILBERN WOODROW COOPER, Defendant-Appellant.	LC No. 2010-232149-FC

Before: CAVANAGH, P.J., and SAAD and RIORDAN, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of first-degree felony murder, MCL 750.316(1)(b). Defendant was sentenced to life imprisonment without parole. We affirm.

I. FACTUAL BACKGROUND

The victim was murdered in September of 1978. His body was discovered by his roommate, Paul Jenkins, who was not home during the murder. The victim was lying in a pool of blood in his bedroom with his hands tied behind his back with an electrical cord. He was shot seven times in the head, and sustained an injury to his groin. A pillow was discovered next to the victim's body and was riddled with bullet holes, residue, burns, and blood.

While the police conducted an initial investigation in 1978, they did not discover any evidence of a forced entry or ransacking. The police interviewed Jenkins, who informed them that the victim was involved in a cult and was probably murdered for having sex with married women. Jenkins allegedly owed a debt to John Anderson, defendant's roommate, although Jenkins denied this at the time of trial. The police also interviewed Billy Lolley. Lolley had encountered the victim either the day of the murder or the day before, as the victim worked at a real estate agency owned by Jenkins, and the victim had shown Lolley a house. While the detectives pursued several leads, they cleared all of their suspects without discovering who killed the victim.

In November of 2006, however, Lolley contacted the Farmington Hills Police Department about the murder, seeking to clear his conscience. Lolley told the police that someone had offered defendant $3,000 to kill a man and defendant, in turn, offered Lolley $1,500 to be the driver. Lolley refused the offer, thinking that defendant may have been joking. Yet, after the murder, defendant told Lolley that he had killed the victim. Defendant explained

that he laid the victim down on the floor, put a pillow on his head, and shot him repeatedly in the head. Defendant confessed to Lolley that they had meant to kill Jenkins but had accidently killed the victim. Anderson warned Lolley to keep quiet or they would kill Lolley or his children.

The police interviewed defendant several times, and defendant's statements were admitted at trial. Defendant was convicted of first-degree felony-murder and was sentenced to life imprisonment. Defendant now appeals on several grounds.

II. CONFESSION

A. Standard of Review

Defendant argues that his statements to the police were inadmissible because he asserted his right to remain silent and his statements were involuntary.

"A trial court's findings of fact on a motion to suppress are reviewed for clear error, while the ultimate decision on the motion is reviewed de novo." *People v Brown*, 297 Mich App 670, 674; 825 NW2d 91 (2012) (quotation marks and citation omitted). "Clear error exists if the reviewing court is left with a definite and firm conviction that a mistake has been made." *People v Miller*, 482 Mich 540, 544; 759 NW2d 850 (2008) (quotation marks and citation omitted). "We review constitutional questions de novo." *People v Sadows*, 283 Mich App 65, 67; 768 NW2d 93 (2009).

B. Invocation of Right to Remain Silent

A defendant's invocation of his right to remain silent must be unequivocal and unambiguous. *Berghuis v Thompkins*, ____ US ____; 130 S Ct 2250, 2260; 176 L Ed 2d 1098 (2010). "[I]f a person chooses silence over speech . . . the police must scrupulously honor the right to remain silent." *People v Williams*, 275 Mich App 194, 198; 737 NW2d 797 (2007). "If the police continue to interrogate the defendant after he has invoked his right to remain silent, and the defendant confesses as a result of that interrogation, the confession is inadmissible." *People v White*, 493 Mich 187, 194; 828 NW2d 329 (2013) (quotation marks omitted).

Defendant first contends that he invoked his right to remain silent during the initial custodial interview with the police at Bay City in the afternoon of March 2, 2010, and any statements he made in the interview were inadmissible. Defendant does not dispute that he was read his *Miranda*[1] rights before the initial interrogation began. He highlights the following statement, however, near the end of the interview when he allegedly asserted his right to remain silent: "See, that's why I don't want to talk to you guys about this because who do I have to collaborate [sic] anything I have to say?" Defendant's statement was not an unequivocal and unambiguous invocation of his right to remain silent. While defendant indicated his preference was not to speak with the police unless someone could corroborate his statements, a preference is not an unequivocal or unambiguous assertion of the right to remain silent.

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

Defendant, however, argues that he again asserted his right to remain silent in a subsequent interview and, hence, his statements in that interview also were inadmissible. After the March 2nd afternoon interview at Bay City, defendant was transported to the Farmington Hills Police Department. The police reminded him of his *Miranda* rights, but defendant continued to talk with them that evening. Approximately an hour into the interview, the officers asked if defendant and others had gone to the house to beat up someone and then one of the men accompanying defendant unexpectedly shot the victim. When asked if that is what happened, defendant stood up and stated: "No, we're done." He twice stated: "Take me back to my cell," and requested to go to the bathroom. While the police officers continued to question him and received limited responses, several minutes later defendant again indicated that he did not have anything further to say. The police continued to question defendant until he stated: "Thank you for your time, I'm not talking anymore."

During this interview, defendant unambiguously and unequivocally invoked his right to remain silent. Defendant stood up and clearly informed the police officers that he was done talking, thereby asserting his right to remain silent. *Berghuis*, 130 S Ct at 2260 (an accused invokes his right to silence when saying "that he wanted to remain silent or that he did not want to talk with the police."). Defendant did not qualify his statement or limit his refusal to speak to one topic in particular. Moreover, while there is no "blanket prohibition against further interrogation after a person cuts off questioning . . . [w]hether a custodial statement obtained after a person decides to remain silent is admissible depends on whether the right to cut off questioning was scrupulously honored by the police." *Williams*, 275 Mich App at 198. Relevant factors include whether there is a significant time lapse between the invocation of the right to remain silent and the restarting of questioning, and whether defendant was again advised of his *Miranda* rights. Here, the police officers, without pause, continued to interrogate defendant even after he repeatedly asserted that he was done talking and wished to be taken back to his cell.

However, the trial court's failure to suppress the statements from this interview was harmless beyond a reasonable doubt. This Court reviews "preserved issues of constitutional error to determine whether they are harmless beyond a reasonable doubt." *People v Dendel (On Remand)*, 289 Mich App 445, 475; 797 NW2d 645 (2010). "A constitutional error is harmless if it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *Id.* (quotation marks, brackets, and citation omitted). Of significant importance here is that defendant did not make any further admissions after invoking his right to remain silent during this interview. In fact, defendant denied knowing the victim and denied shooting him.

There also was substantial evidence at trial from which a rational jury could find defendant guilty beyond a reasonable doubt absent the error. In an earlier interview in Bay City, defendant admitted to breaking into the house where the victim resided a few days before the murder with the intent to hurt Jenkins, and that he had taken an extension cord from a lamp with the plan of tying up Jenkins. He also admitted that he was on the porch the night of the murder. At trial, Lolley testified that defendant confessed to the killing, admitting that he tied the victim up and "laid him down on the floor[,] [p]ut a pillow on his head and shot him in the back of the head. Emptied the gun out." Considering this evidence, any error in admitting evidence of defendant's limited statements after he invoked his right to remain silent was harmless beyond a reasonable doubt.

Lastly, defendant challenges the admission of his statements from the final interview he gave to police on the morning of March 3, 2010.[2] This issue has been waived. Waiver is the intentional relinquishment of a known right that extinguishes any error and precludes appellate review. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).

In the direct examination of Detective Richard Wehby, the prosecution did not ask about the March 3rd interview. During cross-examination, however, defense counsel initiated a line of questioning regarding the detective's false representations to defendant about DNA evidence during the March 2nd interview at Bay City. The following colloquy ensued:

> *Q.* Okay. And you did that in order to try to get him to admit something that he didn't do.
>
> *A.* I was trying to get him to open up further about his involvement in the incident, yes.
>
> *Q.* He never did that, did he?
>
> *A. No, as a matter of fact he did.*
>
> *Q.* He never told you he was inside when you had this interview, did he?
>
> *A.* Did he ever tell me that he was inside?
>
> *Q.* No, I said during this interview did he tell you he was inside?
>
> *A.* No, sir not during that interview he didn't tell me. [Emphasis added.]

On redirect, the prosecution then asked if defendant ever indicated that he was inside the house, to which the detective replied: "Yes, he did." The prosecution asked if that admission occurred during the March 3rd interview, to which the detective replied in the affirmative and explained that it was in that interview that defendant changed his story, admitted to entering the house, and admitted to providing the extension cord to tie the victim up and helping to subdue the victim. Defense counsel then requested that the transcript of the March 3rd interview be provided to the jury and that all of the taped interviews be played for the jury.

Thus, it was defendant's questioning of Detective Wehby that resulted in the reference to the March 3rd interview and it was defendant who subsequently moved to admit that interview at trial. Defendant made a strategic choice when attempting to impeach Detective Wehby. Defendant then made a second strategic choice in introducing the videotape of this interview in

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[2] Defendant alleges that the interviews on March 2nd and the interview on March 3rd were really one continuous interview. Even if true, there was a significant time lapse and a reminder of defendant's *Miranda* rights before the March 3rd interview, and, thus, the police were entitled to speak with defendant again on the morning of March 3rd. *Williams*, 275 Mich App at 198.

an effort to show the jury the apparent coerciveness of the police. These strategic choices were ultimately unsuccessful, and defendant now objects to the admissibility of the March 3rd interview. Yet, "[a]ppellate review is precluded because when a party invites the error, he waives his right to seek appellate review, and any error is extinguished." *People v Jones*, 468 Mich 345, 352 n 6; 662 NW2d 376 (2003)

C. Voluntariness

Lastly, we reject defendant's argument that his statements were involuntary. "Use of an involuntary statement in a criminal trial violates due process." *People v Peerenboom*, 224 Mich App 195, 198; 568 NW2d 153 (1997). Moreover, "[t]he test of voluntariness is whether considering the totality of all the surrounding circumstances, 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.* (quotation marks and citation omitted). This Court has recognized that:

> In determining voluntariness, the court should consider all the circumstances, including: [1] the age of the accused; [2] his lack of education or his intelligence level; [3] the extent of his previous experience with the police; [4] the repeated and prolonged nature of the questioning; [5] the length of the detention of the accused before he gave the statement in question; [6] the lack of any advice to the accused of his constitutional rights; [7] whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; [8] whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; [9] whether the accused was deprived of food, sleep, or medical attention; [10] whether the accused was physically abused; and [11] whether the suspect was threatened with abuse. [*People v Tierney*, 266 Mich App 687, 708; 703 NW2d 204 (2005) (quotation marks and citation omitted).]

No single factor is determinative and the ultimate inquiry is whether, under the totality of the circumstances, the confession was freely and voluntarily made. *Id.*

Defendant's statements were voluntary. Defendant was 49 years old at the time of the police interviews, he had a criminal background and experience with the criminal justice system, he boasted to the police that he was a self-professed fan of cold case television programming, and his actions indicated he was very familiar with DNA testing. At the beginning of the custodial Bay City interview, defendant was read his *Miranda* rights and explicitly waived those rights. There is no evidence that anyone threatened or abused defendant. While the interviews were not short, defendant does not claim that he was injured, intoxicated, drugged, or denied food, sleep, or medical attention. He did not display any behavior suggesting that he failed to comprehend the questions being asked of him. Therefore, under the totality of the circumstance, we find that the confession was freely and voluntarily made.

III. JURISDICTION

A. Standard of Review

In defendants' Standard 4 brief, he presents several challenges to the trial court's exercise of jurisdiction. Defendant challenges the trial court's exercise of personal jurisdiction over him, and we review unpreserved claims for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). He also challenges the trial court's exercise of subject-matter jurisdiction, which we review de novo. *People v Gonzalez*, 256 Mich App 212, 234; 663 NW2d 499 (2003).

B. Subject-Matter Jurisdiction

Defendant first alleges that the trial court lacked subject-matter jurisdiction over the case. However, defendant was charged with a felony, and "Michigan circuit courts are courts of general jurisdiction and unquestionably have jurisdiction over felony cases." *People v Lown*, 488 Mich 242, 268; 794 NW2d 9 (2011). Thus, the circuit court properly exercised its subject-matter jurisdiction over the case.

C. Arrest Warrant & Felony Complaint

Defendant next challenges that the felony complaint and warrant were improper because they were signed by an assistant prosecutor rather than the prosecutor. Contrary to defendant's suggestion, an assistant prosecutor has the authority to sign the felony complaint and warrant. MCL 49.42 provides, in relevant part, that an "assistant prosecuting attorney shall . . . perform any and all duties pertaining to the office of prosecuting attorney at such time or times as he may be required so to do by the prosecuting attorney and during the absence or disability from any cause of the prosecuting attorney[.]" There was no error in the assistant prosecutor's actions.

Defendant also contends that the felony complaint and warrant were defective because they did not contain sufficient information to support an independent judgment that probable cause existed. Yet, the complaint alleged that defendant killed the victim on September 29 or September 30, 1978. Moreover, even if we agree that the felony complaint and warrant were defective, this would not justify setting aside defendant's conviction for lack of jurisdiction. "[A]n illegal arrest or arrest warrant issued on defective procedure will not divest a court of jurisdiction when the court has jurisdiction over the charged offense and the defendant appears before the court." *Porter v Porter*, 285 Mich App 450, 462; 776 NW2d 377 (2009); see also *People v Rice*, 192 Mich App 240, 244; 481 NW2d 10 (1991) ("[t]he invalidity of an arrest does not deprive a court of jurisdiction to try a defendant."). Thus, defendant has failed to establish that any defect in the felony complaint or warrant deprived the trial court of jurisdiction.

D. Return from District Court

Moreover, contrary to defendant's assertions, the circuit court properly obtained personal jurisdiction over him. A circuit court obtains personal jurisdiction over a defendant once the district court files a return to circuit court. *People v Goecke*, 457 Mich 442, 458; 579 NW2d 868 (1998). The district court filed a return to circuit court after it found probable cause to bind

defendant over to the circuit court on the charge of open murder. Thus, the trial court properly exercised personal jurisdiction over defendant.

Furthermore, the late filing of the felony information did not deprive the circuit court of jurisdiction. While the prosecution concedes that the felony information was untimely filed, defendant acknowledged at the arraignment that he had received a copy and waived the formal reading. Moreover, "[h]aving once vested in the circuit court, personal jurisdiction is not lost even when a void or improper information is filed." *Goecke*, 457 Mich at 458-459. MCR 6.112(G) specifically states that, "[a]bsent a timely objection and a showing of prejudice, a court may not dismiss an information or reverse a conviction because of an untimely filing[.]" Because defendant did not offer a timely objection or show prejudice, he is not entitled to relief.

E. Amendment to Information

Finally, defendant contends that the trial court erred in allowing the prosecution to add a second charge to the information. Defendant has mischaracterized this issue. In the general information, count 1 was listed as homicide, open murder, MCL 750.316. On the verdict form, two counts were listed, but they were merely a separation of the different types of first-degree murder, namely, premeditation or felony-murder. Thus, contrary to defendant's argument, there was no new felony charge added at any point in the proceedings. Defendant's judgment of sentence properly reflects that he was guilty of only one felony, first-degree felony-murder, MCL 750.316. We find no error requiring reversal.

IV. JURY INSTRUCTIONS

A. Standard of Review

Next, defendant argues in his Standard 4 brief that the trial court erred in failing to give complete preliminary and final jury instructions. We review unpreserved claims of instructional error for plain error affecting substantial rights. *People v Aldrich*, 246 Mich App 101, 124-125; 631 NW2d 67 (2001).

B.

Contrary to defendant's assertions, the trial court gave complete preliminary instructions consistent with MCR 2.516(B)(1), the court rule in effect at the time of trial. The court explained about the presumption of innocence, reasonable doubt, trial procedures, relevant rules of evidence, and appropriate juror conduct. Furthermore, because defendant's trial occurred after the pilot program for Administrative Order 2008-2 and before the adoption of MCR 2.513(A), the trial court was not required to state the elements of the charged crimes during the preliminary jury instructions. Also, since the jury was properly instructed on the elements of the charged crime before final deliberations, we find no plain error affecting defendant's substantial rights.

In regard to the final jury instructions, defendant has waived this issue. Defendant affirmatively approved the instructions as well as the verdict form after they were read and given to the jury. Therefore, he has waived any challenges to the final jury instructions. See *People v*

Kowalski, 489 Mich 488, 504-505; 803 NW2d 200 (2011) (defendant waives jury instructional error when defense counsel expresses satisfaction with the jury instructions).

V. PROSECUTORIAL MISCONDUCT

Next, defendant argues in his Standard 4 brief that the prosecution committed misconduct when it created jurisdictional defects in the proceedings, failed to correct the incomplete jury instructions, and allowed the jury to convict defendant of a second charge that the prosecution did not bring. However, as discussed above, none of these claimed defects were errors. Thus, defendant has failed to establish any instances of prosecutorial misconduct.

Defendant also claims that the prosecution committed misconduct when it failed to inform him that he had the right to have counsel present at a polygraph exam. Defendant, however, has failed to explain how this denied him a fair trial or affected his substantial rights. Because defendant failed to explain his conclusory arguments, we decline to address them. See *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004) ("[a]n appellant's failure to properly address the merits of his assertion of error constitutes abandonment of the issue.").

VI. JUDICIAL CONDUCT

A. Standard of Review

Next, defendant argues in his Standard 4 brief that the trial judge improperly allowed the prosecutor to control the trial. "We review unpreserved claims for plain error affecting a defendant's substantial rights." *People v Jackson*, 292 Mich App 583, 592; 808 NW2d 541 (2011).

B. Analysis

Defendant asserts that the trial court failed to control the proceedings and acquiesced control to the prosecution regarding the jurisdictional defects, omission of complete jury instructions, and the addition of a new felony charge. However, as discussed above, none of these claimed defects are errors.

Defendant also contends that he was denied a fair trial because the court used his trial as a platform for reelection. During the preliminary jury instructions, the trial court instructed the jurors that they were allowed to tell others that they were on a jury and "[i]f you want you can say you're before Judge Wendy Potts because I have to run for office in a couple years and so getting my name out wouldn't be bad." While defendant concludes that this comment created an impartial jury, he fails to explain how a singular, isolated comment about reelection rendered the jury impartial. The trial court also instructed the jury that its comments, rulings, questions, and instructions were not evidence. "[T]he jury is presumed to have followed its instructions." *People v Mahone*, 294 Mich App 208, 218; 816 NW2d 436 (2011). Thus, defendant has failed to show that the jury's impartiality was in reasonable doubt. *People v Miller*, 482 Mich 540, 550; 759 NW2d 850 (2008).

VII. INEFFECTIVE ASSISTANCE OF COUNSEL

A. Standard of Review

Finally, defendant argues in his Standard 4 brief that he was denied the effective assistance of counsel. Whether a defendant received effective assistance of counsel is a mixed question of fact and law, as a "trial court must first find the facts and then decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). A trial court's factual findings are reviewed for clear error, and questions of constitutional law are reviewed de novo. *People v Unger*, 278 Mich App 210, 242; 749 NW2d 272 (2008). When reviewing a claim of ineffective assistance of counsel that has not been preserved for appellate review, a reviewing court is limited to mistakes apparent on the record. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002).

B. Analysis

In order to establish a claim for ineffective assistance of counsel, a defendant must first demonstrate that "counsel's representation fell below an objective standard of reasonableness," which requires a showing "that counsel's performance was deficient." *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). A defendant must then demonstrate that "the deficient performance prejudiced the defense," which "requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial . . . ." *Id.* at 687. The Court has held that this second prong is asking whether "there was a reasonable probability that the outcome of the trial would have been different had defense counsel" adequately performed. *People v Grant*, 470 Mich 477, 496; 684 NW2d 686 (2004).

Defendant alleges that he was denied the effective assistance of counsel when his counsel failed to object to the multiple jurisdictional defects, the prosecutor's misconduct, the incomplete jury instructions, and the trial court's acquiescence of control. However, as repeatedly stated at this point, the trial court properly exercised jurisdiction in this case, the prosecutor did not commit misconduct, the jury instructions were full and complete, and the trial judge behaved properly. Thus, any objections based on these grounds would have been futile. "Failing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel." *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

We also reject defendant's argument that this is a case where defense counsel was so defective that we should presume prejudice. While generally counsel is presumed effective, there are "three rare situations in which the attorney's performance is so deficient that prejudice is presumed." *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007).[3] This presumption

[3] These three situations are: (1) a "complete denial of counsel, such as where the accused is denied counsel at a critical stage of the proceedings[;]" (2) "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing;" and (3) "where counsel is called upon to render assistance under circumstances where competent counsel very likely could not." *Frazier*,

of prejudice, however, does not apply when a defendant is merely challenging "specific attorney errors." *Bell v Cone*, 535 US 685, 697; 122 S Ct 1843, 1852; 152 L Ed 2d 914 (2002). Instead, the unique situation where we presume prejudice only occurs when a defendant is challenging counsel's performance as a whole. *Id.* Here, because defendant is challenging specific attorney errors, this is not an exceptional circumstance where prejudice is presumed.

Defendant also argues that he was denied the effective assistance of counsel because his attorney failed to present a defense or generate a trial strategy, failed to investigate, and failed to consult with him regularly. "Defense counsel is given wide discretion in matters of trial strategy because many calculated risks may be necessary in order to win difficult cases." *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). When dealing with issues of trial strategy, there is "a strong presumption of effective counsel . . . and [w]e will not second-guess matters of strategy or use the benefit of hindsight when assessing counsel's competence." *Id.*

In the instant case, defense counsel moved to suppress defendant's statements before trial. Defense counsel also was present throughout the trial and vigorously cross-examined the prosecution's witnesses, attempting to undermine their credibility. Defendant also acknowledges that his counsel met with him on seven occasions. While defendant now attacks defense counsel's decisions, this Court will not second-guess trial strategy or use the benefit of hindsight to evaluate the defense counsel's performance. *Odom*, 276 Mich App at 415. Defendant has failed to demonstrate that his counsel's performance was objectively unreasonable. Further, defendant has failed to demonstrate that the result of the proceedings would have been different. Thus, defendant was not denied the effective assistance of counsel.

VIII. CONCLUSION

Defendant has failed to establish any errors requiring reversal in the admission of his statements derived from his interviews with the police. He also has failed to demonstrate any jurisdictional defects, jury instruction error, prosecutorial misconduct, judicial misconduct, or ineffective assistance of counsel. We affirm.

/s/ Mark J. Cavanagh
/s/ Henry William Saad
/s/ Michael J. Riordan

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478 Mich at 243, 243 n 10 (quotation marks, footnote, and citation omitted). Defendant offers no argument to justify his conclusion that his counsel fell within one of these three exceptions.