STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 6, 2014
v	No. 311437 Oakland Circuit Court
BEINVILLE HAMILTON ALEXANDER, SR., Defendant-Appellant.	LC No. 2011-237424-FC

Before: HOEKSTRA, P.J., and MURRAY and RIORDAN, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of armed robbery, MCL 750.529; felony-firearm, MCL 750.227b(1); and possession of a loaded firearm other than a pistol in a motor vehicle, MCL 750.227c(1). Defendant appeals as of right. We affirm.

I. FACTS

The victim parked his car in a public lot during the early morning hours of June 19, 2011. As he walked out of the parking lot, defendant pressed a gun into the victim's back and robbed him. The victim thereafter flagged down a police car and pointed out defendant walking away. The officer observed defendant approach a vehicle, open a rear door, close it, and continue walking away. The vehicle was later stopped, and defendant was found in the back seat along with a pistol, identified by the victim as the same one pressed into his back, and a loaded shotgun.

At the police station, defendant admitted in writing to a detective that he robbed the victim. Defendant subsequently asked to call his attorney. Defendant was allowed to use the telephone at the booking desk in the police station, which was described as being a high traffic area, with at least two officers within earshot of the telephone. While on the telephone with his attorney's secretary, defendant once again admitted to committing the crime, and further indicated that he was not concerned with the officers standing around him because he did not want to hide anything. Defendant did not cover his mouth, whisper, or ask for privacy. During a *Walker*[1] hearing, defendant argued that this statement should be suppressed as it was protected

[1] *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

under the attorney-client privilege. The trial court admitted the confession, stating that it did not appear that the attorney-client privilege extends to a secretary and because defendant did not make a reasonable attempt to keep the conversation confidential.

At a separate pretrial hearing, defendant requested that the trial court allow him to represent himself. The trial court did not make a decision but gave defendant time to think about it until the next hearing. Approximately three weeks later, the trial court confirmed with defendant that he wanted to represent himself. After informing defendant of the dangers, requirements, and consequences of doing so, the trial court accepted defendant's waiver of counsel. The trial court appointed standby counsel as well.

II. ANALYSIS

Defendant first argues that the trial court erred in admitting his confession over the telephone to the secretary. "The decision to admit evidence is reviewed for an abuse of discretion." *People v Washington*, 468 Mich 667, 670; 664 NW2d 203 (2003). MCL 767.5a(2) states that, "[a]ny communications between attorneys and their clients . . . are hereby declared to be privileged and confidential when those communications were necessary to enable the attorneys . . . to serve as such attorney." "The scope of the attorney-client privilege is narrow, attaching only to *confidential* communications by the client to his advisor that are made for the purpose of obtaining legal advice." *Augustine v Allstate Ins Co*, 292 Mich App 408, 420; 807 NW2d 77 (2011) (quotation marks and citation omitted; emphasis added).

For purposes of resolving the issue, we assume that the conversation between defendant and the secretary could be covered under the attorney-client privilege because the secretary was an agent of the attorney, and was acting to obtain factual information to enable the attorney to provide legal advice. *Reed Dairy Farm v Consumers Power Co*, 227 Mich App 614, 618; 576 NW2d 709 (1998) (holding that the attorney-client privilege applies to agents of the attorney); see also *Grubbs v K Mart Corp*, 161 Mich App 584, 589-590; 411 NW2d 477 (1987) (holding that the attorney-client privilege exists where a non attorney third party is present during a confidential conversation, in order to record the conversation to provide an accurate factual base from which the attorney might provide legal advice). Assuming there was an attorney-client privilege, it was waived because the conversation was not confidential as required by *Augustine*, 292 Mich App at 420. The facts are undisputed that defendant confessed to the crime, over the telephone, in a room with at least two officers within ear shot, and made no attempt to lower his voice or to ask for privacy. Defendant could have requested his attorney's presence at the jail rather than describing the crime so publicly. Defendant did not attempt to keep his conversation private and even indicated that he was not concerned about hiding it. Because "defendant failed to take reasonable precautions to keep his remark[s] confidential . . . the communication was not privileged." *People v Compeau*, 244 Mich App 595, 597-598; 625 NW2d 120 (2001). Because the communication was not privileged, the trial court did not abuse its discretion in admitting defendant's verbal confession.

Defendant next argues that the trial court erred in accepting his waiver of the right to counsel. Defendant did not challenge his waiver at trial, and this issue is unpreserved for review. *People v Metamora Water Service, Inc*, 276 Mich App 376, 382; 741 NW2d 61 (2007). We review unpreserved issues for plain error, which requires a showing that: "1) error [] occurred, 2)

the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Before granting an individual's request to waive counsel, the trial court must determine (1) whether defendant made an unequivocal request to waive counsel, (2) whether defendant asserted the right to waive counsel knowingly, voluntarily, and intelligently, and (3) whether "defendant's acting as his own counsel would not disrupt, unduly inconvenience and burden the court and the administration of the court's business." *People v Anderson*, 398 Mich 361, 367-368; 247 NW2d 857 (1976). MCR 6.005(D) provides that the trial court, before granting waiver of counsel, must "advis[e] the defendant of the charge, the maximum possible prison sentence for the offense, any mandatory minimum sentence required by law, and the risk involved in self-representation," and must also "offer[] the defendant the opportunity to consult with . . . an appointed lawyer." Substantial compliance with these requirements is enough for a waiver to be upheld. *People v Willing*, 267 Mich App 208, 220; 704 NW2d 472 (2005). In other words, "[a] waiver is sufficient if the defendant knows what he is doing and his choice is made with eyes open." *People v Williams*, 470 Mich 634, 642; 683 NW2d 597 (2004) (internal citations and quotations omitted).

The trial court clearly complied with the "unequivocal" requirement in *Anderson*, 398 Mich at 367-368, because the trial court asked defendant if he was sure that he wished to represent himself and defendant affirmatively responded without any qualifications. The trial court assured that defendant made a knowing and voluntary waiver by informing defendant that he would be held to the same standard as all attorneys, be required to know the rules of evidence, cross-examine and examine his own witnesses, and make his own opening and closing arguments, and defendant indicated quite clearly that he understood and still wished to continue representing himself. *Id*. The trial court fulfilled the third requirement by informing defendant that he was required to know the rules of evidence and would be treated like any other attorney. Further, the trial court knew that defendant was proficient in the legal field where defendant filed many of his own pretrial motions and a brief, and, therefore, would likely not unduly inconvenience the court. *Id*.

With regard to MCR 6.005(D)(2), defendant was allowed to consult with an attorney before the trial court allowed the waiver, and he had an appointed attorney in the weeks between his first request for waiver and the pretrial hearing at which his request to proceed *in propria persona* was granted. Defendant was also warned of "the risk involved in self-representation," MCR 6.005(D)(1), when the trial court informed defendant that he would be held to the same standard as any other attorney, and would be given no advantages for representing himself.

We also conclude that the trial court substantially complied with the requirement in MCR 6.005(D)(1), which states that the trial court must "advis[e] the defendant of the charge, the maximum possible prison sentence for the offense, [and] any mandatory minimum sentence required by law . . . ." The trial court advised defendant of the charges by stating the first two charges explicitly on the record, and defendant indicated his knowledge of the third by stating "[i]t's a misdemeanor possession for transporting firearm of up to two years." The trial court also advised defendant of the maximum possible, and minimum mandatory, sentences by stating that the sentencing guidelines were 108 to 360 months' imprisonment, informing defendant that

he could face life for the armed robbery conviction, and that the felony-firearm conviction carried a minimum two-year prison sentence.

Defendant's argument that the trial court erred by not informing defendant that his felony-firearm conviction would actually be five years' imprisonment instead of two does not change our conclusion. The trial court was not aware until sentencing that defendant had a prior felony-firearm conviction that raised the sentence to five years' imprisonment pursuant to MCL 750.227b(1). The trial court also did not reversibly err in not advising defendant that one of the charges carried a 15-year maximum, as defendant was informed that his sentencing guidelines had a 30-year maximum, which necessarily included the 15-year maximum, and defendant was informed that he faced life in prison for the armed robbery charge, which was the longest of the potential sentences. The trial court also did not have to inform defendant that there was a two-year minimum sentence for armed robbery if aggravated assault or serious injury occurred, because there was no allegation of aggravated assault or serious injury. We have previously held that even where a "judge did not specifically address the charged offense and the range of possible punishment" a finding of substantial compliance with the waiver procedures may be found. *People v Adkins (After Remand)*, 452 Mich 702, 731; 551 NW2d 108 (1996), rev'd on other grounds *Williams*, 470 Mich 634 (2004). Despite defendant's arguments, there was substantial compliance here.

We also disagree with defendant that the trial court failed to make an express finding that defendant made a valid waiver on the record. *People v Russell*, 471 Mich 182, 187; 684 NW2d 745 (2004). The trial court required defendant to affirmatively acknowledge on the record his understanding of everything that the trial court stated related to self-representation before accepting the waiver. *Id*. at 191. There was no plain error related to defendant's waiver of the right to counsel. *Carines*, 460 Mich at 763.

Defendant also raises additional arguments in a Standard 4 brief. First, defendant argues that the trial court should have suppressed defendant's statements made during the interrogation with the detective. With respect to defendant's statements made during the interrogation, defendant argues that he was promised leniency for his son and this rendered the confession involuntary. "[W]e review de novo the trial court's ultimate ruling on [a] motion to suppress." *People v Williams*, 472 Mich 308, 313; 696 NW2d 636 (2005). The trial court's factual findings, however, are reviewed for clear error. *People v Harris*, 261 Mich App 44, 53; 680 NW2d 17 (2004). "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made." *People v Lanzo Const Co*, 272 Mich App 470, 473; 726 NW2d 746 (2006). When a defendant gives a statement during a custodial interrogation, that statement is only admissible if the defendant voluntarily, knowingly, and intelligently waived his Fifth Amendment rights. *People v Akins*, 259 Mich App 545, 564; 675 NW2d 863 (2003). See also *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966). "The test of voluntariness should be 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." *People v Cipriano*, 431 Mich 315, 333-334; 429 NW2d 781 (1988) (quotation marks and citation omitted). The Court in *Cipriano*, 431 Mich at 334, provided the following factors to consider:

> [T]he 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.

"[A] defendant's inculpatory statement is not inadmissible per se if induced by a promise of leniency. Rather, a promise of leniency is merely one factor to be considered in the evaluation of the voluntariness of a defendant's statements." *People v Givans*, 227 Mich App 113, 120; 575 NW2d 84 (1997).

While defendant claims that the police induced his statement by promising leniency for his son (who was tangentially involved in the armed robbery), a detective testified that no such offer of leniency was made. The trial court found that defendant's testimony regarding the interrogation was not credible, but that the detective's testimony was. When an issue of fact, such as the one now presented, relies solely on the credibility of witnesses, we must defer to the trial court's finding because the trial court is in a better position to evaluate these matters. *People v Sexton (After Remand)*, 461 Mich 746, 752; 609 NW2d 822 (2000). Further, the trial court considered all of the *Cipriano* factors and found the statement admissible. The trial court's findings of fact were all supported by relevant evidence and testimony—defendant was 47 years old, he was of moderate intelligence and education level, he had previously been arrested, the detective testified that defendant had not been interrogated before the time in question, the interrogation was not overly long, defendant was not in jail for an unusually long time before giving the statement, defendant admitted to having his *Miranda* rights read to him before making the statement, there was no evidence of a delay in proceedings against defendant, testimony by the detective indicated that defendant was not drugged, intoxicated, injured, ill, abused, threatened with abuse, or deprived of food, sleep, or medical attention. Those findings of fact were not clearly erroneous. *Lanzo Const Co*, 272 Mich App at 473. Because the *Cipriano* factors supported the admissibility of the statement, we hold that the trial court properly denied defendant's motion to suppress his statements made during the interrogation. *Givans*, 227 Mich App at 120.

Defendant also argues that the trial court should not have admitted a recording of his telephone conversation because the recording of the conversation violated state and federal eavesdropping statutes. This argument is unpreserved and reviewed for plain error affecting substantial rights. *Carines*, 460 Mich at 764. Defendant asserts that his conversation was recorded in violation of both MCL 750.539 *et seq*. and 18 USC 2510 *et seq*.[2] Defendant is

[2] Defendant also alleged violation of 47 USC 605. However, this Court has already held that 47 USC 605 is inapplicable to facts such as those presented here. *People v Tebo*, 37 Mich App 141, 147; 194 NW2d 517 (1971).

correct that violation of either statute results in the suppression of evidence obtained via that violation. 18 USC 2515; *People v Warner*, 401 Mich 186, 202; 258 NW2d 385 (1977) (opinion by WILLIAMS, J.). However, there was no violation of either eavesdropping statute. Both the federal and Michigan statutes require that a conversation be "private" in order to be protected. MCL 750.539c refers to a "private conversation." This Court has defined a private conversation as one that is "intended for or restricted to the use of a particular person or group or class of persons . . . [and is] intended only for the persons involved." *People v Stone*, 234 Mich App 117, 123-124; 593 NW2d 680 (1999) (quotation marks and citation omitted). Further, 18 USC 2510(2) defines an "oral communication" as "any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation . . . ." For the reasons already discussed, defendant's conversation was not private. Defendant admitted as much during the conversation when he announced that he did not care who was listening and acknowledged officers standing nearby. Because the conversation was not private, as required under both statutory schemes, the eavesdropping statutes were not violated. MCL 750.539c; 18 USC 2510(2). As such, defendant has failed to show plain error. *Carines*, 460 Mich at 763-764.

Next, defendant argues that his *Miranda* waiver was not knowing, intelligent, and voluntary because he had requested counsel before the waiver and was extremely intoxicated at the time of the waiver. "We review de novo a trial court's determination that a waiver was knowing, intelligent, and voluntary." *People v Gipson*, 287 Mich App 261, 264; 787 NW2d 126 (2010). Further, "we review a trial court's factual findings for clear error and will affirm the trial court's findings unless left with a definite and firm conviction that a mistake was made." *Id.* "Statements of an accused made during custodial interrogation are inadmissible unless the accused voluntarily, knowingly, and intelligently waived his or her Fifth Amendment rights." *Id.* "An 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." *People v Paintman*, 412 Mich 518, 525; 315 NW2d 418 (1982) (quotation marks and citation omitted; emphasis omitted). "Advanced intoxication, whether the product of drugs or alcohol, may preclude the effective waiver of *Miranda* rights." *People v Davis*, 102 Mich App 403, 410; 301 NW2d 871 (1980).

Defendant insists that he asked for counsel before waiving his rights under *Miranda*. Two officers, however, testified that defendant made no such request, and the trial court found the officers' testimony credible and defendant's version of the events not credible. Based on the officers' testimony, we are not "left with a definite and firm conviction that a mistake was made" with respect to that finding. *Gipson*, 287 Mich App at 264. Because the record does not support defendant's allegation that he asked for counsel, his argument regarding the voluntariness of his statement is without merit. See *Paintman*, 412 Mich at 525-526.

Defendant also argues that his waiver was not knowing or intelligent because of his extreme intoxication. The record indicates otherwise. Defendant himself stated during the interrogation that he was not intoxicated. Further, the detective the trial court found credible indicated that, in his opinion, defendant did not appear intoxicated during the interview. Considering the detective's testimony and experience in the field, we are not convinced that a mistake has been made and conclude that the trial court's factual finding was not clearly

erroneous. *Gipson*, 287 Mich App at 264. Because the record does not support defendant's allegation of extreme intoxication, the trial court properly determined that defendant's waiver was knowing and intelligent and not the product of intoxication such that effective waiver was precluded. *Davis*, 102 Mich App at 410. In sum, defendant's waiver was made knowingly, intelligently, and voluntarily. *Gipson*, 287 Mich App at 264.

Defendant next raises several allegations against his standby counsel, whom defendant asserts provided him with the ineffective assistance of counsel. As already discussed, however, defendant waived his right to counsel and represented himself. "A defendant who asserts his right to self-representation has no absolute entitlement to standby counsel." *People v Kevorkian*, 248 Mich App 373, 422; 639 NW2d 291 (2001). "With no constitutional right to an attorney, a defendant proceeding in propria persona has no basis to claim that the attorney must abide by constitutional standards." *Id*. at 424. Only in the event of standby counsel acting as standby counsel in name only, and actually operating as defendant's attorney, will this Court subject any standby defense counsel to constitutional standards of effectiveness. *Id*. at 425. We are satisfied that defense counsel acted only as standby counsel. Defendant examined and cross-examined almost all of his own witnesses and made an opening statement. Defendant cannot now attempt to hold defense counsel to constitutional standards of effectiveness when defendant chose to represent himself. As such, any alleged error is without merit. *Id*. at 424.

Finally, defendant alleges prosecutorial misconduct. This issue is unpreserved because defendant failed to make "a timely, contemporaneous objection and request for a curative instruction" when the alleged misconduct took place. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). Therefore, we review for plain error affecting substantial rights. *Carines*, 460 Mich at 763-764. Generally, however, the test for prosecutorial misconduct is whether defendant was denied a fair and impartial trial. *People v Dobek*, 274 Mich App 58, 66; 732 NW2d 546 (2007). "A prosecutor may not make a factual statement to the jury that is not supported by the evidence, but he or she is free to argue the evidence and all reasonable inferences arising from it as they relate to his or her theory of the case." *Id*. (internal citation omitted).

Defendant first argues that the prosecutor committed misconduct by playing the audio exhibit of defendant's recorded telephone conversation during the prosecutor's opening statement. "Opening statement is the appropriate time to state the facts that will be proved at trial." *People v Ericksen*, 288 Mich App 192, 200; 793 NW2d 120 (2010). The prosecutor played the audio recording during opening statement, and the trial court later admitted that recording during trial. Therefore, because the prosecutor was simply "stat[ing] the facts that [would] be proved at trial," he did not engage in any misconduct. *Id*.

Lastly, defendant alleges that the prosecutor violated *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963), by playing the recording of defendant's interrogation during trial and failing to inform defendant that he intended to do so. The *Brady* rule requires "the prosecution to disclose evidence in its possession that is exculpatory and material, regardless of whether the defendant requests the disclosure." *People v Schumacher*, 276 Mich App 165, 176; 740 NW2d 534 (2007). We have no doubt that the interrogation recording was not exculpatory in any manner, as the recording contained defendant's confession. As such, there was no *Brady* violation, and defendant has failed to show plain error affecting substantial rights. *Carines*, 460 Mich at 763-764.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Christopher M. Murray
/s/ Michael J. Riordan