STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TRACY ALEXANDER MARTIN,

Defendant-Appellant.

UNPUBLISHED
July 9, 1996

No. 163040
LC No. 92-003857-FC

Before: Hoekstra, P.J., and Saad and S.J. Latreille,* JJ.

PER CURIAM.

The jury convicted defendant of three counts of first-degree murder, under premeditated and felony murder theories, MCL 750.316; MSA 28.548. The court sentenced defendant to a single term of mandatory life imprisonment without parole for all counts, to be served consecutive to an unrelated sentence for assault. Defendant now appeals his convictions and sentence, and we vacate defendant's two felony murder convictions and affirm both the first-degree premeditated murder conviction and the mandatory life sentence.

I.

Because he claims that he gave his statement in violation of *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 694 (1966), defendant argues that the trial court erred in denying his motion to suppress. The police arrested defendant a week after the murder; advised him of his *Miranda* rights, and took him to the police station about 4:00 p.m. He declined to speak with detectives until his mother arrived at 6:22 p.m. He first confessed to the murder, and then at about 8:00 p.m., he gave a tape recorded statement in which he again confessed.

At the beginning of the interrogation at the police station, defendant stated to detectives, "Man, it is – it is the rest of my life. I can't. It would be the rest of my life." Although the detective interpreted this statement as an admission, defendant asserts on appeal that this was an unequivocal invocation of

* Circuit judge, sitting on the Court of Appeals by assignment.

his right to remain silent. Alternatively, defendant argues that, if the detectives were not sure if defendant exercised his right to silence, then they were only permitted to clarify whether defendant had indeed invoked his right of silence. Defendant also asserts that he made an ambiguous request to see an attorney, and that the officers failed to clarify his repeated requests to speak with a judge. Defendant further asserts that his statements were psychologically coerced (while he was under the effects of drug withdrawal), and that the officers made him say what they wanted to hear. According to defendant, admission of the statements was not harmless error.

Statements of an accused made during custodial interrogation are inadmissible unless the accused voluntarily, knowingly and intelligently waived his Fifth Amendment rights. *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602, 1612; 16 L Ed 694 (1966); *People v Garwood*, 205 Mich App 553, 555-556; 517 NW2d 843 (1994). In reviewing the lower court's determination of the voluntariness of a confession, this Court must examine the entire record and make an independent determination of the voluntariness. *People v Haywood*, 209 Mich App 217, 225-226; 530 NW2d 497 (1995). However, we are to defer to the trial court's superior ability to view the evidence and the witnesses and we will not disturb the court's findings unless they are clearly erroneous. *People v Marshall*, 204 Mich App 584, 587; 517 NW2d 554 (1994).

If an accused requests counsel at any time during the interrogation, questioning must cease until an attorney is present. *Edwards v Arizona*, 451 US 477, 484-485; 101 S Ct 1880; 68 L Ed 2d 378 (1981). However, the Supreme Court has recently held that, after a knowing and voluntary waiver of rights under *Miranda*, law enforcement officers may continue questioning until and unless a suspect *clearly* requests an attorney. *Davis v United States*, 512 US ___; 114 S Ct 2350; 129 L Ed 2d 362, 373 (1994). An ambiguous or equivocal statement regarding counsel does not require the police to cease questioning or to clarify whether the accused wants counsel. *Id.*, 129 L Ed 2d at 371, 373; *People v Granderson*, 212 Mich App 673, 677-678; 538 NW2d 471 (1995).

The Michigan constitutional provision regarding the right against self-incrimination, Const 1963, art 1, § 17, is construed no more liberally than the federal guarantee, US Const, Am V. *Phillips v Deihm*, 213 Mich App 389, 400; 541 NW2d 566 (1995). Prior to *Davis*, this Court determined that where a suspect makes an equivocal exercise of his right to remain silent, the police were then only permitted to ask clarifying questions. *People v Catey*, 135 Mich App 714, 726; 356 NW2d 241 (1984) (relying on *Thompson v Wainwright*, 601 F2d 768 (CA 5, 1979)). However, following *Davis*, federal courts extended the rule in *Davis* (that if a suspect's statement is an ambiguous or equivocal request for counsel, officers have no duty to clarify the suspect's intent and may proceed with the interrogation) to cases where the suspect makes ambiguous or equivocal invocations of the right to remain silent. *See Coleman v Singletary*, 30 F3d 1420, 1424-1426 (CA 11, 1994); *United States v Sanchez*, 866 F Supp 1542, 1558-1559 (D Kan, 1994). We reach a similar conclusion here. Defendant never clearly invoked his right to remain silent, nor did he clearly request counsel. Because the challenged remarks were, at best, ambiguous, the officers were under no duty to cease questioning, or to ask clarifying questions, and therefore, defendant's inculpatory statements were properly admitted.

Defendant next argues that his confession was psychologically coerced while he was under the effects of drug withdrawal. After a thorough review of the record, we find no merit to this claim. Indeed, the only evidence of possible drug withdrawal was Detective Uebler's testimony that it was his "impression" that the day after the interrogation, defendant was taken to Saint Joseph Berrien County Jail because of drug withdrawal. This does not establish that defendant was under the effects of drug withdrawal at the time he was interviewed by police. Even beyond this, however, our independent examination of the record does not reveal any evidence that defendant's will was overborne or that his capacity for self-determination was critically impaired. *People v Cipriano,* 431 Mich 315, 334; 429 NW2d 781 (1988).

Because the inculpatory statements were properly admitted, we need not address defendant's claim that the admission of the statements was not harmless error.

II.

Defendant next asserts that the jury instructions containing the elements of the murder offenses (based upon CJI2d 16.1, 16.4, 16.5) improperly removed the issue of causation from the jury's consideration, because the jury was instructed that it could find defendant guilty if the victim died by stabbing. Defendant argues that if the jury could convict him merely because the victim died in this manner, then the jury need not have found that defendant caused the death. However, because defense counsel did not object below to the instructions now challenged, this issue has been waived on appeal. *People v Pollick,* 448 Mich 376, 386-388; 531 NW2d 159 (1995).

Even if the issue were preserved, we would find no error, because the instructions, read as a whole, did require the jury to find that defendant *caused* the murder. Because the instructions were proper, defense counsel was not ineffective for failing to object to the challenged instructions. See, e.g., *People v Rodriguez,* 212 Mich App 351, 355-356; 538 NW2d 42 (1995).

III.

Defendant next alleges that the trial court erred by precluding defense counsel from pursuing two unrelated lines of questioning. Yet, counsel failed to make an offer of proof regarding what former neighbors of the victim heard on the night of her murder, and accordingly, this issue is not preserved. MRE 103(a)(2).

Defense counsel did make an offer of proof on the other issue now challenged: that Guy Pollock attempted a sexual relationship with the victim a few months prior to her murder. However, we have thoroughly reviewed the record and agree with the trial court that, had the incident occurred shortly before the victim's death, it might have been relevant. Given that the alleged incident occurred at least three months prior to the murder, it was not material to any issue in this case. *People v Mills,* 450 Mich 61, 66-68; 537 NW2d 909; modified and remanded on other grounds, 450 Mich 1212; 539 NW2d 504 (1995). We find no abuse of discretion.

IV.

Defendant next asserts that the trial court permitted the prosecutor to conduct improper rebuttal of two witnesses -- Detective Uebler and hair analysis expert, Glen Moore. We decline to review the claim that Moore's rebuttal testimony was improper, because Moore testified "in rebuttal" pursuant to an agreement between counsel, as part of the prosecutor's case-in-chief. To be reversible error, the error must be that of the trial court and not error to which the aggrieved party agreed or contributed by plan or negligence. *People v McCray*, 210 Mich App 9, 14; 533 NW2d 359 (1995).

Rebuttal evidence is admissible to contradict, repel, explain or disprove evidence provided by the other party and tending directly to weaken or impeach the same. *People v Figgures*, 451 Mich 390-399; 547 NW2d 673 (1996). When the rebuttal testimony is a simple contradiction of the defendant's testimony that tends to disprove the exact testimony given by the witness, it is proper rebuttal testimony. *People v Vasher*, 449 Mich 494, 505-506; 537 NW2d 168 (1995). Here, Detective Uebler's rebuttal testimony was properly limited to contradicting defendant's testimony on direct examination that the detectives told him what to say in his confession. The trial court did not abuse its discretion in permitting Uebler's rebuttal testimony.

V.

Defendant next asserts prosecutorial misconduct: he claims that the prosecutor improperly forced defendant to comment on the credibility of key prosecution witnesses, and that, in closing argument, the prosecutor mischaracterized the evidence. We find no merit to either challenge.

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. *People v Lawton*, 196 Mich App 341, 353; 492 NW2d 810 (1992). It is improper for a prosecutor to ask a defendant to comment or provide an opinion on the credibility of prosecution witnesses. *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985); *People v Austin*, 209 Mich App 564, 570; 531 NW2d 811 (1995). Here, a review of the prosecutor's remarks in context reveals that the prosecutor was vigorously cross-examining defendant, and in response, defendant asserted that the case against him (including his own tape-recorded statement) was all a big lie. Defendant apparently did not need an invitation from the prosecutor to brand the prosecution witnesses as liars – it was his principal theory of defense at trial. During his direct examination, defendant denied that he had a conversation with Yeager about the victim on the night of the murder, implying that Yeager was lying. Defendant did not suffer any unfair prejudice by the prosecutor's remarks on cross-examination.

Defendant also challenges the prosecutor's statement, during closing argument, about the knife. However, the prosecutor's statement that there "was possible presence of blood on there" was not a mischaracterization of the evidence. Defendant was not denied a fair trial by improper remarks of the prosecutor.

VI.

Finally, defendant asserts that his convictions for three counts of murder for one killing violate prohibitions against double jeopardy. We agree. *People v Passeno,* 195 Mich App 91, 95; 489 NW2d 152 (1992). We therefore affirm the first-degree pre-meditated murder conviction and life sentence without parole, and we vacate the two felony murder convictions.

Affirmed in part, reversed in part, and remanded to the trial court for further proceedings in accordance with this opinion. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ Henry William Saad
/s/ Stanley J. Latreille