

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MAURICE DONELL WHITING,

Defendant-Appellant.

UNPUBLISHED

April 15, 1997

No. 192192

Recorder's Court

LC No. 95-004355

Before: Holbrook, Jr., P.J., and Fitzgerald and Smolenski, JJ.

PER CURIAM.

Defendant was charged with first-degree felony murder, MCL 750.316; MSA 28.548, first-degree premeditated murder, MCL 750.316; MSA 28.548, and armed robbery, MCL 750.529; MSA 28.797. Defendant was convicted by a jury of first-degree felony murder and armed robbery, and was sentenced to concurrent terms of life imprisonment for his convictions. He now appeals as of right. We affirm in part and vacate in part.

Defendant first argues that the trial court erred in its determination of voluntariness regarding his statement to police. We disagree. When reviewing a trial court's determination of voluntariness, this Court must examine the entire record and make an independent determination with respect to the issue of voluntariness. *People v Haywood*, 209 Mich App 217, 225-226; 530 NW2d 497 (1995). Because this Court gives ample deference to the trial court, a trial court's findings will not be reversed absent clear error. *People v Mack*, 190 Mich App 7, 17; 475 NW2d 830 (1991). A finding is clearly erroneous if, upon examination of all the evidence, this Court is left with a definite and firm conviction that a mistake has been made. *Id.*

In evaluating the admissibility of a statement, this Court reviews the totality of the circumstances surrounding the making of the statement to determine whether it was freely and voluntarily made in light of the factors articulated by our Supreme Court in *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988). *Haywood, supra* at 226. These factors include: 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.*

Here, defendant was advised of his rights. In fact, defendant, a high school graduate, read aloud from and initialed a rights notification card. Defendant never requested to speak to counsel nor refused to speak with the interrogating officer. Although defendant claimed that he was drunk and, moreover, that he was detained for some five or six hours prior to making his statement, defendant exhibited no signs of intoxication or exhaustion prior to or during the interview. Defendant also declined the interrogating officer's offers of food, drink, and use of the restroom. In light of the foregoing, and recognizing the trial court's superior ability to judge the credibility of the witnesses, *People v Etheridge*, 196 Mich App 43, 57; 492 NW2d 490 (1992), we conclude that defendant's statement was freely and voluntarily made.

Defendant also argues that his convictions and sentences for both felony murder and armed robbery violate the prohibitions against double jeopardy. We agree. Conviction of both felony murder and the underlying felony of armed robbery violates the federal and state prohibition against double jeopardy. *People v Allen*, 201 Mich App 98, 105; 505 NW2d 869 (1993). If a defendant is erroneously convicted of both felony murder and the underlying felony, the remedy is to vacate the conviction and sentence for the underlying felony. *Passeno, supra* at 96. Accordingly, we vacate defendant's conviction of and sentence for armed robbery.

Affirmed in part and vacated in part.

/s/ Donald E. Holbrook, Jr.

/s/ E. Thomas Fitzgerald

/s/ Michael R. Smolenski