STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID WAYNE SMITH,

Defendant-Appellant.

UNPUBLISHED
July 11, 1997

No. 191388
Allegan Circuit Court
LC No. 95-009676 FC

Before: Cavanagh, P.J., and Doctoroff and D.A. Teeple*, JJ.

MEMORANDUM.

Defendant appeals by right his jury conviction of first degree murder and felony firearm. This case is being decided without oral argument pursuant to MCR 7.214(E).

Defendant first contends that the trial court erred in finding his confession to Detective Kapenga voluntary. The voluntariness of a confession is a mixed question of law and fact which is reviewed *de novo* on appeal. *Thompson v Keohane*, 516 US ___; 116 S Ct 457; 133 L Ed 2d 383 (1995); *People v Robinson*, 386 Mich 551, 558; 194 NW2d 709 (1972). However, to the extent the resolution of the disputed factual questions turns on the credibility of witnesses, this Court properly defers to the trial court which had a superior opportunity to evaluate such matters. *People v Marshall*, 204 Mich App 584; 517 NW2d 554 (1994).

Here, defendant claims that he was drunk and under the influence of drugs and had tried to commit suicide earlier on the day in question. On the other hand, Detective Kapenga testified that when defendant appeared voluntarily at the police station, unsummoned, he did not seem to be intoxicated but at most a bit tired. The trial court found Detective Kapenga's testimony credible, and found as historical fact that defendant not only appeared at the police station of his own volition, but after being advised that he was under no obligation to say anything and was free to leave, he elected to confess. Under the totality of the circumstances, the trial court did not err in finding defendant's confession voluntary. *People v Young*, 212 Mich App 630, 634; 538 NW2d 456 (1995).

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

Defendant next contends that his confession was inadmissible because he had not been given *Miranda* warnings. Defendant was entitled to such advice of rights only if he was in custody at the time of his confession. *People v Hill*, 429 Mich 382; 450 NW2d 193 (1987). Here, historical findings of fact made by the trial court are reviewed for clear error; mixed findings of law and fact are subject to *de novo* review. *Thompson v Keohane, supra*; *People v Burrell*, 417 Mich 439, 448-449; 339 NW2d 403 (1983).

In this respect, the trial court found that defendant was not only actually not in custody, but that he had been advised he was not in custody, and had opted to come to the police station of his own volition or at the urging of his father. While there was contrary evidence, the trial court did not find it credible, and the record provides no basis for a finding that the trial court's credibility determination was clearly erroneous. Accordingly, defendant was not in custody as a matter of historical fact and therefore the failure to provide him with *Miranda* warnings did not render his confession inadmissible.

By supplemental brief, defendant contends that trial counsel was ineffective at the first *Walker* hearing concerning admissibility of his confession for failing to call defense witnesses. Assuming arguendo that this was ineffective assistance of counsel, a second *Walker* hearing was held (actually, a continuation of the first), at which these witnesses did testify for the defense, although their testimony failed to persuade the trial judge, as trier of fact, that different factual conclusions were appropriate. As the ruling reviewed by this Court is based on the testimony of these additional witnesses for the defense, defendant has failed to establish any prerequisite prejudice from this ostensible dereliction of his original trial counsel. *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994).

In a similar vein, defendant contends that counsel was ineffective at the second *Walker* hearing in failing to call defendant as a witness. This concerns a strategic decision, since although defendant's testimony at such a hearing could not be used against him substantively, it would be available for impeachment purposes under the doctrine of *Harris v New York*, 401 US 222; 91 S Ct 643; 28 L Ed 2d 1 (1971). *People v Bender*, 452 Mich 594, 627-628; 551 NW2d 71 (1996). Defendant has not even made an offer of proof in this Court, let alone of record, to establish that minimally competent defense counsel could not possibly have pursued such a strategy, and the issue is without merit. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995).

Defense counsel's concession during trial that defendant was guilty of manslaughter and that defendant had been present at the scene of the crime at the time of the crime was an admission only of the undeniable. That does not represent ineffective assistance of counsel, where the concession is limited to a lesser included offense. *People v Krysztopaniec*, 170 Mich App 588, 596; 429 NW2d 828 (1988). Similarly, acknowledging in closing argument that the defense had been unable to conclusively identify the actual perpetrator of the homicide, where the defense could rely on the trial judge instructing the jury that the defense was under no obligation to prove anything while the prosecution had to prove defendant's guilt beyond a reasonable doubt, was not ineffective assistance of counsel, since a contrary argument would have deprived defense counsel of all credibility with the jury.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Martin M. Doctoroff
/s/ Donald A. Teeple