# STATE OF MICHIGAN

# COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TORIANO JACOE TISDALE,

Defendant-Appellant.

UNPUBLISHED
December 2, 1997

No. 193962
Recorder's Court
LC No. 94-011239

Before: Fitzgerald, P.J., and Markey and J.B. Sullivan,* J.J.

PER CURIAM.

Defendant appeals as of right from his bench trial convictions of second-degree murder, MCL 750.317; MSA 28.549, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b; MSA 28.424(2). Defendant was sentenced to serve twenty-five to sixty years in prison for his second-degree murder conviction and two years for his felon-firearm conviction. We affirm.

Defendant first argues that, because the trial court erred in denying his motion to suppress his statement to the police, the evidence was insufficient to support his conviction of second-degree murder. We disagree. Although defendant frames the issue as one of sufficiency, he concedes that his sufficiency argument is dependent upon a determination that the trial court erred when it found defendant's statement to have been made voluntarily.

The issue of the voluntariness of a confession is a question of law for the court's determination. *People v Etheridge*, 196 Mich App 43, 57; 492 NW2d 490 (1992). In reviewing the trial court's findings, this Court examines the entire record and makes an independent determination of voluntariness. However, recognizing the trial court's superior ability to view the evidence, this Court gives deference to the trial court's findings unless they are clearly erroneous. *Id.* A finding is clearly erroneous if, although there is evidence to support it, this Court is left with a definite and firm conviction that a mistake has been made. *People v Jobson*, 205 Mich App 708, 710; 518 NW2d 526 (1994). Particular

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

deference should be given where the demeanor and credibility of witnesses are important to the trial court's determination. See, *People v Mack*, 190 Mich App 7, 18; 475 NW2d 830 (1991).

When evaluating the voluntariness of a confession, a court must determine whether, "considering the totality of all the surrounding circumstances, the confession [was] 'the product of an essentially free and unconstrained choice by its maker,' or whether the defendant's 'will [was ] overborne and his capacity for self-determination critically impaired.'" *People v Cipriano*, 431 Mich 315, 333-334; 429 NW2d 781 (1988), quoting *Culombe v Connecticut*, 367 US 568, 602; 81 S Ct 1860; 6 L Ed 2d 1037 (1961). When applying the "totality of the circumstances" test to determine whether a statement was voluntarily made, a court should consider, among other things, 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 unnecessary delay in bringing him before a magistrate before he gave the statement, whether the accused was injured, intoxicated or in ill health when he gave the statement, whether the accused was deprived of food, sleep, or medical attention, and whether the accused was physically abused or threatened with abuse. *Cipriano, supra*, 334.

The record in the instant case indicates that when defendant made his statement to Detroit Police Investigator Dale Collins, he appeared to be in good physical health and was not under the influence of narcotic drugs or alcohol. Defendant, who had attended school through the eleventh grade and earned his GED, was twice advised of his *Miranda*[1] rights. There was no evidence of prolonged or repeated questioning, and defendant admitted that he was not treated roughly by the police. Moreover, Collins testified that he made no threats or promises to defendant, that defendant never requested that the questioning stop, that defendant never requested an attorney, that defendant never requested any food, and that defendant checked the written version of his statement for errors and made and initialed five or six corrections. Although Collins' testimony was disputed by defendant, we defer to the trial court's finding that Collins' testimony was more credible than defendant's testimony. *Etheridge, supra,* 57. Finally, upon the trial court's questioning at defendant's *Walker*[2] hearing, defendant indicated that food had been provided to him. Accordingly, we hold that the trial court did not clearly err when it determined, based on the totality of the circumstances, that defendant's statement was made voluntarily. *Cipriano, supra*, 333-334.

Defendant next argues that the trial court imposed a sentence that was disproportionately severe, given defendant's lack of a serious prior criminal record. We disagree. A sentence within the sentencing guidelines' range can be disproportionate if unusual circumstances exist. *People v Milbourn*, 435 Mich 630, 661; 461 NW2d 1 (1990). However, if a defendant believes that unusual circumstances exist so that a sentence within the guidelines' range would not be proportionate, those circumstances should be presented to the sentencing judge in open court before sentencing so that the judge may consider them. *People v Sharp*, 192 Mich App 501, 505-506; 481 NW2d 773 (1992). If this is not done, the issue may not be raised on appeal. *Id.*, 506.

In the instant case, defendant failed to cite his lack of a serious prior criminal record as an unusual circumstance meriting deviation from the sentencing guidelines' recommended minimum

sentence range. Accordingly, this issue is not preserved for appeal. *Sharp*, *supra*. In any event, the lack of a prior criminal history is not an unusual circumstance that can overcome the presumption that a minimum sentence within guidelines' range is proportionate. *People v Daniel*, 207 Mich App 47, 54; 523 NW2d 830 (1994).

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey
/s/ Joseph B. Sullivan

[1] See, *Miranda v Arizona*, 84 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

[2] See, *People v Walker (On Rehearing)*, 374 Mich 331, 338; 132 NW2d 87 (1965).