STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BODIE J. DAVIS,

Defendant-Appellant.

UNPUBLISHED
December 19, 1997

No. 198578
Recorder's Court
LC No. 96-000735

Before: Griffin, P.J., and Sawyer and O'Connell, JJ.

PER CURIAM.

Defendant was convicted of first-degree premeditated murder, MCL 750.316; MSA 28.548, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to life imprisonment for the first-degree premeditated murder conviction and two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right, and we affirm.

Both issues raised on appeal involve the lower court's refusal to suppress a statement given by defendant to the police. First defendant contends that the statement was inadmissible because police lacked probable cause to arrest him and, therefore, the statement was the fruit of an illegal arrest without a warrant. We disagree.

Appellate review of a lower court's grant or denial of a motion to suppress evidence is made under the clearly erroneous standard. *People v Malach*, 202 Mich App 266, 276; 507 NW2d 834 (1993); *People v O'Neal*, 167 Mich App 274, 279: 421 NW2d 662 (1988). A lower court's finding will be found to be clearly erroneous only where, although there is evidence to support the ruling, the reviewing court is left with a definite and firm conviction that a mistake has been made. *Id.*

In *People v Lewis*, 160 Mich App 20, 24; 408 NW2d 94 (1987), this Court recognized that "when a defendant is detained or taken into custody by the police acting without a warrant, the detention is illegal unless the police have probable cause to arrest that defendant." Further, "when an unlawful detention has been employed as a tool to directly procure any type of evidence from a detainee such evidence shall be excluded as the fruit of the poisonous tree." *Malach, supra* at 274. Thus,

whether the trial court's denial of the motion to suppress was proper turns upon whether there existed probable cause to arrest defendant. We hold that the trial court properly determined that the police had probable cause to arrest defendant.

In reviewing a claim that a police officer lacked probable cause to arrest, the reviewing court must determine whether facts available to the officer at the moment of arrest would justify a fair-minded person of average intelligence in believing that the suspected person had committed a felony. *People v Oliver*, 111 Mich App 734, 747; 314 NW2d 740 (1981). There must be an actual belief in the mind of the arresting officer; mere suspicion is insufficient. *People v O'Neal*, 167 Mich App 274, 281; 421 NW2d 662 (1988). Each case must be analyzed in light of the particular facts confronting the arresting officer. *Oliver, supra*. The prosecution has the burden of establishing that an arrest without a warrant is supported by probable cause. *O'Neal, supra.*

In this case, the facts available to the police pointed to defendant as the perpetrator of the offense. Officer Kirk testified that Carla, the victim's girl friend, told him that in the fifteen minutes preceding the shooting, the victim was traveling to defendant's house to discuss why defendant was angry with him. At 12:45 a.m. the victim was on his way to defendant's; the shooting was at approximately 1:00 a.m. It was also known that some sort of "feud" was ongoing between the victim and defendant. Witness Hughes gave a statement to the police that there was a disturbance in front of defendant's house near the time of the shooting. The shooting occurred near defendant's home and the area of the disturbance. After reviewing the foregoing information, Kirk believed that defendant was involved in the fatal shooting.

We conclude that the foregoing facts were sufficient to create an honest belief that defendant had committed the felony. Therefore, the trial court did not clearly err in its finding that there was probable cause to arrest defendant for the murder.

Defendant also challenges the trial court's finding that the statement was voluntary and admissible. An appellate court must give deference to the trial court's findings in a suppression hearing. *People v Cheatham*, 453 Mich 1, 29-30; 551 NW2d 355 (1996). "Although engaging in a de novo review of the entire record . . . , this Court will not disturb a trial court's factual findings regarding a knowing and intelligent waiver of *Miranda* [*v Arizona*, 384 US 436; 86 S Ct 1602, 16 L Ed 2d 694 (1966)] rights 'unless that ruling is found to be clearly erroneous.'" *Id.*

Whether a suspect has validly waived his *Miranda* rights depends in each case on the totality of the circumstances surrounding the interrogation. *Cheatham, supra* at 27. In *Cheatham*, the Supreme Court stated that the totality of the circumstances approach

> permits—indeed, it mandates—inquiry into all the circumstances surrounding the interrogation. This includes evaluation of the [suspect's] age, experience, education, background, and intelligence, and into whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights. [*Id.* at 27.]

The burden is on the state to prove by a preponderance of the evidence that the suspect properly waived his rights. *Id.* To establish a valid waiver, the state must present sufficient evidence to demonstrate that the defendant knew he had the right not to speak, that he had the right to an attorney and that the state could use what he said in a later trial against him. *Id.* at 29. In *Cheatham*, the Supreme Court recognized that

> [t]he test is not whether [the defendant] made an intelligent decision in the sense that it was wise or smart to admit his participation in the crime, but whether his decision was made with the full understanding that he need say nothing at all and that he might then consult with a lawyer if he so desired. [*Id.*]

With respect to the testimony that was presented at the *Walker*[1] hearing, the testimony of the two witnesses, Police Officer Quick and defendant, was diametrically opposed. Quick's testimony established that defendant understood his rights and that he thereafter voluntarily gave a statement. Defendant's testimony to the contrary was inherently incredible in all respects. The question of voluntariness ultimately boiled down to credibility. The trial court rejected defendant's version of the events in its entirety. The trial court's assessment of defendant's credibility was sound and, therefore, should be left undisturbed. *People v Oliver*, 111 Mich App 734, 750-751; 314 NW2d 740 (1981). The trial court's denial of defendant's motion to suppress was not clearly erroneous.

Finally, in his supplemental brief, defendant raises a hearsay issue. In light of the admission of his inculpatory statement, we conclude that even if the statement is hearsay, it is harmless.

Affirmed.

/s/ Richard Allen Griffin
/s/ David H. Sawyer
/s/ Peter D. O'Connell

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