# STATE OF MICHIGAN

# COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TERRY SCOTT MYLER,

Defendant-Appellant.

UNPUBLISHED
March 3, 1998

No. 194783
Calhoun Circuit Court
LC No. 95-002493

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Before: Griffin, P.J., and Holbrook and Neff, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of first-degree felony murder, MCL 750.316; MSA 28.548. The trial court sentenced defendant to life imprisonment without parole. We affirm.

I

Defendant first contends on appeal that the trial court erred in denying his motion for a directed verdict. Defendant argues that insufficient evidence was presented at trial to prove beyond a reasonable doubt the identity of defendant as the perpetrator of the murder. We disagree.

A directed verdict of acquittal is appropriate only if, considering all the evidence in the light most favorable to the prosecution, no rational trier of fact could find that the essential elements of the crime charged were proved beyond a reasonable doubt. *People v Pena*, 224 Mich App 650, 659; 569 NW2d 871 (1997). Circumstantial evidence and reasonable inferences drawn therefrom may be sufficient to prove the elements of a crime. *Id.*; *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993). The court may not determine the weight of the evidence or the credibility of the witnesses. *People v Mehall*, 454 Mich 1, 6; 557 NW2d 110 (1997). Rather, questions regarding the credibility of the witnesses are left to the trier of fact. *Pena*, *supra* at 659.

This prosecution stems from the death of Thomas Copeland, who was found dead in his wheelchair in his Battle Creek apartment on August 15, 1995. He had been strangled with a rope and his apartment had been ransacked. The victim's neighbor saw a white male with a dark ponytail, a

description fitting defendant, sitting in defendant's wheelchair in his apartment on the night of the murder. Defendant's fingerprints were found on a plastic insert from a corn flakes box which was found lying in front of the victim's refrigerator, and also on a ziplock baggy containing greeting cards which was found on the floor next to the victim. A footwear pattern found on the top side of some cards and letters that had been scattered on Copeland's floor matched the pattern on a pair of shoes found in defendant's home. The pattern on the shoes found in defendant's home also matched a footwear impression found on the plastic corn flakes insert.

Testimony was presented that the victim kept a jar of change on his dining room table and an envelope of money in a drawer. Defendant moved to a motel in the days following the homicide. When he was arrested at the motel, he was carrying $487. A friend of defendant's testified that shortly after the murder, he drove defendant and defendant's former girlfriend to a bank, where she cashed in an amount of change for bills. When she came out of the bank, she gave the money to defendant. The friend also testified that to his knowledge defendant rarely carried money on his person, and that in the past he had loaned money to defendant.

The manager of the Motel 6 testified that on the night after defendant's arrest, a girl came to the motel and went through defendant's room. The manager saw her retrieve a small bag of change from behind the dresser. A few weeks later, defendant came to the motel and asked about the bag of money and was told that the girl had already taken it. The manager indicated that defendant was upset, stating that his girlfriend told him the police had seized the money. Later that night, the manager learned that defendant had escaped from the jail while awaiting trial on these charges.

Defendant offered varying explanations to the police regarding his possession, when arrested, of the money. He also admitted that he had been in the victim's apartment twice. The first occasion was about one month before the crime and the second time was a few days before he learned of Copeland's death. Defendant told police that on the second visit he had been sitting in Mr. Copeland's wheelchair.

We conclude that this evidence, albeit circumstantial, when viewed in a light most favorable to the prosecutor, was sufficient for rational jurors to find that defendant's identity was proven beyond a reasonable doubt. *Pena*, *supra*. The neighbor's testimony, defendant's familiarity with the victim, the presence of defendant's fingerprints and matching footwear impression on items found in the ransacked apartment, defendant's questionable possession of a quantity of change and other money after the homicide, and defendant's flight to a motel and escape from jail[1] – all of these facts, viewed in combination, constitute a more than adequate basis for denying defendant's motion for a directed verdict.

II

Defendant next argues that the trial court erred in denying his motion to suppress his statements to police. Defendant claims that his decision to waive his *Miranda*[2] rights was involuntary, resulting from his lack of sleep and food, his isolation from family or counsel, the inherently coercive atmosphere of the interrogation session, and his increased susceptibility to suggestion. Defendant further contends that the police failed to honor his request for counsel.

Whether a defendant's statements were knowing, intelligent, and voluntary is a question of law for the trial court's determination. *People v Etheridge*, 196 Mich App 43, 57; 492 NW2d 490 (1992). In determining whether a statement is voluntary, the trial court should consider, among other things, whether the defendant was intoxicated or drugged, and whether he was deprived of sleep or food. *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988). The ultimate test of admissibility is whether the totality of the circumstances surrounding the making of the statement indicates that it was freely and voluntarily made. *Id*. On appeal, this Court examines the entire record and makes an independent determination of voluntariness, deferring to the trial court's superior ability to view the evidence and the demeanor of the witnesses. *People v Johnson*, 202 Mich App 281, 287-288; 508 NW2d 509 (1993). We will not disturb the trial court's findings unless they are clearly erroneous. *Id*.

Defendant was interviewed by detective Robert Drewry on August 18, 1995, and again on August 19, 1995. Before Drewry interviewed defendant on August 18, detective Timothy Hurtt advised defendant of his *Miranda* rights, and defendant waived such rights. These sessions were videotaped.

At the *Walker*[3] hearing, defendant testified that he finished drinking a fifth of whiskey just two hours before he was arrested, and that he had been smoking "a little weed" and "a little crack" the previous night. Defendant also stated that he had eaten only "two bites of a submarine sandwich" the night before he was arrested and had not eaten again before his interview at 7:00 p.m. Defendant claimed that he had not slept for one week before his arrest.

Our examination of the entire record, including the videotaped interviews of defendant, reveals that defendant's statements to the police were voluntarily made and that defendant was not so tired and fatigued as to render his statements involuntary. The videotape reveals that although defendant appears to be tired during the interview on August 18, he had no difficulty in answering Detective Drewry's questions and, in fact, regularly asked Drewry questions. Further, defendant's demeanor on August 19, after defendant had the opportunity to sleep during the night, was very similar to his demeanor on August 18. Defendant stated at the hearing that he was unable to sleep well on the night of August 18 because of the noise at the county jail. However, again on August 19 defendant clearly answered Drewry's questions and again asked questions of Drewry. We find no clear error in the trial court's ruling that defendant's statements were voluntarily made.

Next, defendant argues that his statements to police should have been suppressed because of the alleged failure of the police to "scrupulously honor" his requests to consult with an attorney. Defendant does not deny his initial waiver of the *Miranda* rights before questioning began on August 18, but claims that he requested an attorney during the August 18 interview, and again during the rereading of his Miranda rights on August 19.

If an accused validly waives his Fifth Amendment rights, the police may continue questioning him until and unless he clearly requests an attorney. *People v Granderson*, 212 Mich App 673, 677-678; 538 NW2d 471 (1995). An ambiguous statement regarding counsel does not require the police to cease questioning or to clarify whether the accused wants counsel. *Id*. Once an accused invokes his

Fifth Amendment rights, the police must discontinue interrogation and cannot resume interrogation without counsel present unless the accused initiates further communication with the police. *People v Myers*, 158 Mich App 1, 8; 404 NW2d 677 (1987).

We agree with the trial court's assessment that defendant did not unequivocally request counsel until Detective Drewry informed him that he believed that defendant had murdered Mr. Copeland. At that point, the questioning ceased. A review of the videotape reveals that even after defendant indicated that "maybe" he wanted a lawyer, defendant stated that he wanted to cooperate and continued asking questions of Drewry. Defendant showed no intention or desire to terminate the interrogation. Although during both the August 18 and 19 interviews, defendant inquired about his need for an attorney, Detective Drewry asked defendant if he wished to continue talking and defendant responded affirmatively. At no point during the interview did defendant clearly request counsel and, in fact, continued to engage Drewry in conversation. We therefore discern no clear error in the trial court's ruling.

Defendant asserts one final ground for suppressing his statements. He maintains that Detective Drewry mislead him into believing that the purpose of the interrogation was to question defendant about the outstanding child support warrant for which he had been initially arrested at the motel. However, a review of the videotaped statements does not support defendant's claim. Detective Drewry never asked defendant any questions about the outstanding warrant. Drewry informed defendant that he was not charged with anything other than the outstanding warrant, but clearly stated that defendant needed to account for the money found in his possession in order to rule out the possibility that it came from Copeland. Defendant's argument is therefore without merit.

III

Defendant next asserts that he was denied his right to a fair trial because the prosecutor elicited testimony regarding defendant's general poverty. We find no error requiring reversal.

Defense counsel moved to exclude any evidence of defendant's substance abuse and poverty as evidence of defendant's motive or intent. The trial court ruled that although testimony of defendant's "financial embarrassment" was not probative of any fact in issue and therefore not admissible, evidence that defendant may have needed money for drugs was admissible under MRE 404(b). On appeal, defendant does not challenge the trial court's ruling. However, defendant complains that the prosecutor did not abide by the ruling.

Evidence of poverty, dependence on public welfare, unemployment, underemployment, low paying or marginal employment is not admissible to show motive. *People v Henderson*, 408 Mich 56, 66; 289 NW2d 376 (1980). Other evidence of financial condition may, however, be admissible in the circumstances of a particular case. *Id*.

Our review of the prosecutor's questions and remarks in context, *People v LeGrone*, 205 Mich App 77, 82; 517 NW2d 270 (1995), reveals that such remarks were proper and within the bounds of the ruling made by the trial court. The prosecutor elicited testimony that defendant needed

money because of his girlfriend's drug habit. The prosecutor also adduced evidence that defendant had spent money on crack cocaine on the night before the murder. This testimony was offered to point out inconsistencies in defendant's testimony as to how and where he had obtained the $487 that he was carrying when arrested. The prosecutor did not introduce evidence of defendant's general state of poverty to show motive, contrary to *Henderson, supra*. We therefore find no error requiring reversal.

IV

Finally, defendant complains that the trial court abused its discretion in granting the late endorsement of Gene Adkins as a witness on the fifth day of trial. Pursuant to MCL 767.40a(4); MSA 28.980(1)(4), the prosecutor must attach to the information a list of all witnesses known to the prosecutor who might be called at trial. The prosecutor must send this list to the defendant not less than thirty days before the trial. MCL 767.40a(3); MSA 28.980(1)(3).

In this case, the prosecutor claimed that until the fourth day of trial, she was unaware of a report from the state police crime lab. The report indicated that four latent fingerprints that did not belong to defendant or Copeland were found on several items in the victim's apartment. The prosecutor sought to introduce the testimony of Adkins, an officer with the Emmett Township Department of Public Safety, that he had previously obtained the known fingerprints of defendant's girlfriend. Adkins' testimony, a foundation for the admission of these fingerprints, was relevant to the theory raised by defendant that his girlfriend could have been the perpetrator of the crime. The trial court found good cause for the endorsement, stating that although the report had been provided to the Battle Creek police department before trial, the court would not consider notice of the report to the police to be notice to the prosecutor's office.

A prosecutor's late endorsement of a witness is permitted at any time by leave of the court and for good cause shown. MCL 767.40a(4); MSA 28.980(1); *People v Canter*, 197 Mich App 550, 563; 496 NW2d 336 (1992). Defendant admitted that he received the report of the latent prints on February 21, 1996, twelve days before the beginning of trial. He therefore had access to the evidence well in advance of trial and has failed to show that he was prejudiced by the late endorsement. We conclude that the trial court did not abuse its discretion in ruling that the prosecutor showed good cause for the late endorsement of witness Adkins.

Affirmed.

/s/ Richard Allen Griffin
/s/ Donald E. Holbrook, Jr.
/s/ Janet T. Neff

[1] Although evidence of flight is not sufficient by itself to sustain a conviction, such evidence may indicate consciousness of guilt. *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995).

[2] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

[3] People v Walker (On Rehearing), 374 Mich 331; 132 NW2d 87 (1965).