

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TONY ORLANDO BAY,

Defendant-Appellant.

UNPUBLISHED

May 1, 1998

No. 199635

Recorder's Court

LC No. 94-011927

Before: Sawyer, P.J., and Bandstra and J. B. Sullivan*, JJ.

PER CURIAM.

Defendant appeals as of right from his bench trial convictions for 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).¹ Defendant was sentenced to life in prison for the first-degree murder conviction and two years in prison for his felony-firearm conviction. We affirm.

Defendant and three companions picked up the victim, a thirty-two-year-old woman, at a gas station. They drove to a set of railroad tracks near the freeway. The victim then performed fellatio on defendant's three companions. Defendant did not ask for her sexual services. After the victim had finished her services, one of defendant's companions paid her ten dollars. Defendant then took out a handgun and demanded that the victim drop the money. Defendant fired five to six shots at the victim. Immediately thereafter, defendant grabbed a shotgun out of the car and fired two or three more times. The victim died of a shotgun blast and two gunshot wounds. While in custody, defendant confessed, after having been read his rights, to having shot the victim numerous times with a handgun and a shotgun.

Defendant's first claim on appeal is that the trial court's decision to not suppress defendant's confession while finding that defendant's waiver of his *Miranda* rights was not knowing and intelligent was clearly erroneous. We disagree. This Court reviews a trial court's decision regarding a motion to suppress evidence under the clearly erroneous standard. *People v Massey*, 215 Mich App 639, 641; 546 NW2d 711 (1996). Clear error exists when the reviewing court is left with the definite and firm conviction that a mistake has been made. *Id.*

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

A finding that an otherwise voluntary waiver of one's *Miranda* rights was not knowingly and intelligently made may still warrant the suppression of the statement. *People v Garwood*, 205 Mich App 553, 555; 517 NW2d 843 (1994). "Only if the 'totality of the circumstances surrounding the interrogation' reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived." *Id.* at 556, quoting *Colorado v Spring*, 479 US 564; 107 S Ct 851; 93 L Ed 2d 954 (1987). The prosecution needs to prove a valid waiver only by a preponderance of the evidence. *Garwood*, *supra* at 557, citing *Colorado v Connelly*, 479 US 157, 168; 107 S Ct 515; 93 L Ed 2d 473 (1986).

This Court in *Garwood*, *supra* at 558, concluded that the awareness contemplated by the knowing and intelligent *Miranda* waiver requirement involved "simply being cognizant at all times of 'the State's intention to use [one's] statements to secure a conviction' and of the fact that one can 'stand mute and request a lawyer.'" [Citation omitted.] This Court in *Garwood*, *supra* at 558, held that the knowing and intelligent *Miranda* waiver requirement, by contrast, did *not* contemplate the type of awareness involving "'know[ing] and understand[ing] every possible consequence of a waiver of the Fifth Amendment privilege,' being 'totally rational and properly motivated' when confessing, or having all information that might be 'useful' or that might '. . . affec[t one's] decision to confess.'" See also *People v Cheatham*, 453 Mich 1, 28; 551 NW2d 355 (1996) ("[t]o knowingly waive *Miranda* rights, a suspect need not understand the ramifications and consequences of choosing to waive or exercise the rights that the police have properly explained to him").

The record shows clearly that the trial court was not aware of this Court's decision in *Garwood*, *supra*, when it stated on the record that it had found, on the basis of the evidentiary hearing, that defendant had not *fully and completely understood or appreciated* his *Miranda* rights. Subsequently, upon being briefed as to this Court's holding in *Garwood*, *supra*, the trial court denied defendant's motion to suppress. Because the *Garwood* decision specifically stated that a full appreciation of one's *Miranda* waiver was not required to effectuate a valid waiver thereof, we find that the trial court's earlier statement on the record was reconcilable with its subsequent ruling.

Moreover, we hold that the trial court did not clearly err in finding that the evidence showed that defendant knowingly and intelligently waived his *Miranda* rights. At the evidentiary hearing, Vernon Humes, the interrogating officer, testified that he had informed defendant of his *Miranda* rights and requested that defendant read them. Although defendant read his rights slowly, he got through them and then initialed each one of the rights, showing that he had understood them. Humes believed that defendant had understood his rights and the words contained within the *Miranda* warnings. According to Humes, defendant had not appeared intoxicated. Furthermore, clinical psychologist Dr. Sandra Paige opined that defendant possessed an adequate layman's understanding of his *Miranda* rights. While stating that she had not found defendant to be mentally retarded, she admitted that he may suffer from mild retardation.

Therefore, because the prosecution showed by the preponderance of the evidence that defendant knowingly and intelligently waived his *Miranda* rights, we hold that the trial court did not clearly err in denying defendant's motion to suppress his confession.

Defendant's last claim on appeal is that the trial court's failure to quash the felony murder charge because of the prosecution's failure to establish the corpus delicti was an abuse of discretion. We disagree. A circuit court reviews a district court's decision to bind over a defendant based on the factual sufficiency of the evidence for an abuse of discretion. Similarly, this Court reviews the district court's decision de novo to determine whether the court abused its discretion. *People v Orzame*, 224 Mich App 551, 557; 570 NW2d 118 (1997).

Even if the trial court had erred in denying defendant's motion to quash the information as to his felony-murder charge, the error would be harmless as sufficient evidence was presented to convict defendant of the offense of felony murder. See *People v Johnson*, 427 Mich 98, 114-116; 398 NW2d 219 (1986).

Felony murder is (1) the killing of a human being; (2) with the intent to kill, to do great bodily harm, or to create a high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result; (3) while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in MCL 750.316; MSA 28.548. *People v Hutner*, 209 Mich App 280, 282-283; 530 NW2d 174 (1995). The elements of armed robbery are: (1) an assault, (2) a felonious taking of property from the victim's person or presence, and (3) the defendant must be armed with a weapon described in the statute. *People v Johnson*, 206 Mich App 122, 123; 520 NW2d 672 (1994).

Here, a rational trier of fact could reasonably infer that defendant intended to kill the victim or create a high risk of death from the number of shots fired at the victim. The findings of the forensic pathologist indicated that the victim had died of a shotgun blast and two other gunshot wounds. Furthermore, defendant's act in demanding, at gunpoint, that the victim give him the ten dollars, constituted armed robbery. Therefore, even if the trial court had erred in denying defendant's motion to quash the information, the error would be harmless because sufficient evidence was presented to convict defendant of the offense of felony murder.

Affirmed.

/s/ David H. Sawyer
/s/ Richard A. Bandstra
/s/ Joseph B. Sullivan

¹ Although also convicted of felony murder, the trial court, at sentencing, set the conviction aside for double jeopardy reasons. Defendant was initially charged with first-degree premeditated murder, MCL 750.316; MSA 28.548, felony murder, MCL 750.316; MSA 28.548, armed robbery, MCL 750.529; MSA 28.797, and felony-firearm, MCL 750.227b; MSA 28.424(2).