STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

AUBRIE BOWIE, a/k/a AUBRIE ASHLEY and AUBRIE EDWARD BOWIE, III,

Defendant-Appellant.

UNPUBLISHED
May 22, 1998

No. 194132
Recorder's Court
LC No. 95-003197

Before: Whitbeck, P.J., and MacKenzie and Murphy, JJ.

PER CURIAM.

Defendant, a juvenile offender, appeals as of right from his jury convictions of first-degree felony-murder, MCL 750.316; MSA 28.548, armed robbery, MCL 750.529; MSA 28.797, and possession of a firearm during the commission of a felony ("felony-firearm"), MCL 750.227b; MSA 28.424(2). The trial court sentenced defendant as an adult to concurrent prison terms of mandatory life for the first-degree murder conviction and ten to twenty years for the armed robbery conviction, and a consecutive two-year term for the felony-firearm conviction. We affirm the convictions and sentences for first-degree felony-murder and felony-firearm, but vacate the conviction and sentence for armed robbery on double jeopardy grounds.

I. The Voluntariness of Defendant's Statement

Defendant contends that the trial court erred in ruling that his confession was voluntarily made and thus admissible at trial. We disagree.

The admissibility of a juvenile's confession depends upon whether the statement was voluntarily made. The test of voluntariness is whether, considering the totality of the circumstances, the confession was the product of an essentially free and unconstrained choice or whether the defendant's will was overborne and the defendant's capacity for self-determination critically impaired. *People v Givans*, 227 Mich App 113, 121; ___ NW2d ___ (1997).

The factors to be considered in determining the admissibility of a juvenile's confession include (1) whether the requirements of *Miranda v Arizona,* 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966), were met and the defendant clearly understood and waived those rights, (2) the degree of police compliance with MCL 764.27; MSA 28.866 and the juvenile court rules, (3) the presence of an adult parent, custodian or guardian, (4) the defendant's personal background, (5) the defendant's age, educational and intelligence level, (6) the extent of the defendant's prior experience with the police, (7) the length of detention before the statement was made, (8) whether the questioning was repeated and prolonged, and (9) whether the defendant was injured, intoxicated, in ill health, physically abused or threatened with abuse, or deprived of food, sleep or medical attention. *Givans, supra,* slip op at 4; *People v Good,* 186 Mich App 180, 189; 463 NW2d 213 (1990).

Defendant was advised of his constitutional rights. They were read to him and he read them as well. Although defendant was a special education student, he did not testify that he did not understand his rights and the officer who questioned defendant testified that defendant stated that he understood his rights and was willing to waive them. Because this was an automatic waiver case,[1] the requirement of MCL 764.27; MSA 28.886, that a child must be taken immediately before the juvenile division of the probate court when arrested, does not apply. See MCL 600.606(1) and (2)(a); MSA 27A.606(1) and (2)(a); *People v Spearman,* 195 Mich App 434, 445; 491 NW2d 606 (1992), rev'd in part on other grounds sub nom *People v Rush,* 443 Mich 870 (1993), overruled in part on other grounds *People v Veling,* 443 Mich 23, 43; 504 NW2d 456 (1993). Defendant did not request the presence of a parent or guardian. The questioning officer unsuccessfully attempted to ascertain the whereabouts of defendant's parents and defendant rejected the officer's invitation for defendant's grandfather to accompany them. Although defendant's grandmother later came to the police station, she apparently did not arrive until the interview was completed and defendant had made his statement. Defendant was sixteen years and two months old, had a ninth grade education, could read and write, and had previously faced delinquency charges as a juvenile. Defendant was questioned only once and the entire process, from arrival at the police station until completion of the statement, took less than two hours. There was no evidence that defendant was not in good health, mentally or physically. Considering the totality of the circumstances, the trial court's factual findings underlying its determination of voluntariness were not clearly erroneous. *People v Peerenboom,* 224 Mich App 195, 198; 568 NW2d 153 (1997). In light of these factual findings, we independently conclude that defendant's confession was voluntary. *Id.*

II. Sufficiency of the Evidence of Armed Robbery

Defendant contends that the prosecutor failed to present sufficient evidence to support defendant's armed robbery conviction. We disagree.

In reviewing the sufficiency of the evidence in a criminal case, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt. *People v Hoffman,* 225 Mich App 103, 111; 570 NW2d 146 (1997). Circumstantial evidence and reasonable inferences drawn therefrom may be sufficient to prove the elements of the crime. *People v Gould,* 225 Mich App 79, 86; 570 NW2d 140 (1997).

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 is armed with a weapon described in the statute. *People v Johnson*, 206 Mich App 122, 123; 520 NW2d 672 (1994). The first and third elements are not in dispute because defendant admittedly assaulted the victim with a gun. The only question is whether defendant took any property from the victim's person or presence.

The evidence showed that the victim routinely carried a wallet containing approximately $100, a set of keys, and a gold retirement pin or badge. He had the wallet and keys on his person at approximately 11:00 a.m. on the day that he was killed. There was evidence that the victim was still alive at 11:55 a.m., because he called his granddaughter at that time. It was reasonable to infer that he at least had his keys with him, because he was in the house and his car was in the driveway. The evidence revealed that the victim was killed shortly thereafter, because defendant was seen coming out of the house around noon and he admittedly shot the victim before he left. Defendant returned to the house ten to fifteen minutes later, because a witness saw him on the front steps of the victim's house. At that time, the front door was still wide open, but it was almost closed when a relative arrived three hours later. The victim was dressed for a planned outing, but neither his relatives nor the authorities could find his wallet, keys and badge. Defendant was the only person known to have been in the house during the narrow time frame when the victim's belongings disappeared. From this, one could reasonably infer that defendant took these items. Viewed in a light most favorable to the prosecution, the evidence was sufficient to enable a rational trier of fact to conclude beyond a reasonable doubt that defendant committed armed robbery.

III. Juvenile Sentencing

Defendant contends that the juvenile sentencing procedure mandated by MCR 6.931 is unconstitutional because it requires the trial court to consider both the type of placement and the duration of placement and to speculate about defendant's future behavior. Defendant argues that a trial court should not determine whether a juvenile should be incarcerated in an adult or juvenile facility, a determination that necessitates predictions about the juvenile's future behavior and amenability for rehabilitation by the time he attains the age of twenty-one. Rather, defendant argues, a trial court should automatically sentence a juvenile to a juvenile facility until age twenty-one, at which time his progress towards rehabilitation and thus his potential threat to the public can be assessed more accurately. Defendant's argument overlooks the fact that he does not have a constitutional right to have his crimes dealt with by the juvenile justice system. *People v Hana*, 443 Mich 202, 220; 504 NW2d 166 (1993). Thus, defendant has established no constitutional violation based on being sentenced as an adult.

Defendant further argues that sentencing a juvenile to life imprisonment without possibility of parole violates the prohibition of Const 1963, art 1, § 16 against cruel or unusual punishment. Defendant fails to acknowledge this Court's previous determination in *People v Launsburry*, 217 Mich App 358, 364; 551 NW2d 460 (1996) that "it is not cruel or unusual punishment to sentence a juvenile to life imprisonment without the possibility of parole. The crime of first-degree murder is the most serious offense possible to commit and should be dealt with harshly." Thus, we reject defendant's

position that it was unconstitutional to sentence him to life imprisonment without the possibility of parole for his first-degree felony-murder conviction.

IV. Double Jeopardy

Defendant asserts that his duel convictions for felony-murder and the underlying felony of armed robbery violates the constitutional prohibition against double jeopardy. We agree and, accordingly, vacate defendant's conviction and sentence for armed robbery. *People v Gimotty*, 216 Mich App 254, 259-260; 549 NW2d 39 (1996).

V. Right of Allocution

Defendant contends that he was denied his right of allocution when the court denied him an opportunity to speak before ruling on whether he should be sentenced as a juvenile or as an adult. We disagree. The trial court observed defendant's right of allocution under MCR 6.425(D)(2)(c) when it allowed both defendant and his attorney to address the trial court before it passed sentence. Defendant did not seek to testify or otherwise address the trial court at the dispositional hearing, despite the opportunity to do so. Although the trial court permitted relatives of the victim and the defendant to give statements at the dispositional hearing, rather than testify, it did so with the consent of counsel for both parties. Defendant has established no error regarding this issue.

We vacate defendant's armed robbery conviction and sentence. However, we affirm his first-degree murder and felony firearm convictions and sentences.

/s/ William C. Whitbeck
/s/ Barbara B. MacKenzie
/s/ William B. Murphy

[1] Under MCL 600.606; MSA 27A.606 as in force at the time of defendant's charged crimes, the circuit court automatically had jurisdiction to try a juvenile aged fifteen or sixteen for first-degree murder or armed robbery. Section 600.606, as currently in force, extends this jurisdiction to juveniles aged fourteen. This is commonly termed "automatic waiver" in contrast to the general requirement that the probate court waive jurisdiction over a juvenile before the juvenile may be tried as an adult in circuit court. See MCL 712A.4; MSA 27.3178(598.4).