STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SEAN P. SWORD,

Defendant-Appellant.

UNPUBLISHED
July 28, 1998

No. 191049
Oakland Circuit Court
LC No. 94-132902 FC

Before: Griffin, P.J., and Gribbs and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree felony murder, MCL 750.316; MSA 28.548, conspiracy to commit armed robbery, MCL 750.157A; MSA 28.354(1) and MCL 750.529; MSA 28.796, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The trial court sentenced defendant to life in prison for the first-degree murder conviction, fifteen to thirty years in prison for the conspiracy to commit armed robbery conviction, and to two years in prison for the felony-firearm conviction. We affirm.

On appeal, defendant first contends that the trial court erred in denying his motion to suppress his statement to the police. We disagree. Specifically, defendant argues that his statement was inadmissible because it was made involuntarily and taken in violation of his right to counsel under the Fifth and Sixth amendments. This Court reviews for clear error a trial court's findings of fact in deciding a motion to suppress evidence. *People v Darwich*, 226 Mich App 635, 637; 575 NW2d 44 (1997). Particular 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); *People v Crowell*, 186 Mich App 505, 507-508; 465 NW2d 10 (1990). However, the trial court's ultimate decision regarding a motion to suppress evidence, which is a mixed question of fact and law, is reviewed de novo. *Darwich*, *supra* at 637, citing *People v Goforth*, 222 Mich App 306, 310 n 4; 564 NW2d 526 (1997).

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). Considering the totality of the circumstances evidenced by the record, in particular Sergeant William Harvey's statement to defendant that defendant would be moved out of the DTU cell even if he did not talk, we agree with the trial court's conclusion that defendant's confession was the product of an essentially free and unconstrained choice by its maker. *Culombe*, *supra* at 602.

Both the Sixth Amendment, US Const, Am VI, and Const 1963, art 1, § 20 guarantee a defendant the right to counsel. Generally, these two provisions have been construed identically. *People v Richert (After Remand)*, 216 Mich App 186, 194; 548 NW2d 924 (1996). However, the Sixth Amendment does not confer a right to counsel before the initiation of adversary judicial criminal proceedings. *Davis v United States*, 512 US 452, 456; 114 S Ct 2350; 129 L Ed 2d 362 (1994). Here, when defendant made his confession to the police, he had only been arrested and arraigned on an unrelated charge of carrying a concealed weapon. Incriminating statements pertaining to other crimes, to which the Sixth Amendment right has not yet attached, are admissible at a trial of those offenses. *People v Smielewski*, 214 Mich App 55, 61; 542 NW2d 293 (1995). Therefore, defendant's statement was not taken in violation of his Sixth Amendment right to counsel.

The Fifth Amendment "right to counsel" refers only to a defendant's right to have an attorney present during a custodial interrogation. *Id.* A defendant may waive this right by voluntarily waiving his *Miranda* rights. *Id.* When an accused specifically requests counsel prior to making a confession, additional safeguards are necessary to ensure that the defendant's subsequent waiver of his *Miranda* rights is knowing and voluntary. See *People v Paintman*, 412 Mich 518, 525-526; 315 NW2d 418 (1982). Accordingly, in a custodial interrogation, where the accused requests counsel, interrogation must cease when counsel is requested, and police officials may not reinitiate interrogation without counsel present, regardless of whether the accused has consulted with counsel. *Minnick v Mississippi*, 498 US 146; 111 S Ct 486; 112 L Ed 2d 489 (1990). However, the police may engage in further interrogation if the accused himself initiates further communication. See *Paintman*, *supra* at 525, quoting *Edwards v Arizona*, 451 US 477, 484; 101 S Ct 1880; 68 L Ed 2d 378 (1981). Here, the trial court found that it was defendant who initiated the subsequent police interrogation. Giving deference to the trial court's superior ability to assess the credibility of witnesses, we conclude that this finding was not clearly erroneous. Moreover, we are not persuaded by defendant's claim that Detective Harvey "manipulated" him into volunteering a statement. Cf. *People v McCuaig*, 126 Mich App 754, 760; 338 NW2d 4 (1983). Accordingly, we conclude that the trial court was not in error when it rejected defendant's claim that the statement was obtained in violation of his Fifth Amendment "right to counsel." For the reasons stated above, we hold that the trial court did not err when it denied defendant's motion to suppress his police statement.

Defendant next argues that the jury should have been instructed on involuntary and statutory manslaughter and careless or reckless use of a firearm. We disagree. The trial court is required to give an instruction on a cognate lesser included offense if (1) the principal offense and the lesser offense are of the same class or category, and (2) the evidence adduced at trial would support a conviction of the

lesser offense. *People v Cheeks*, 216 Mich App 470, 479; 549 NW2d 584 (1996). Involuntary manslaughter encompasses every unintentional killing of a human being that is neither murder nor voluntary manslaughter nor within the scope of some recognized justification or excuse. See *People v Datema*, 448 Mich 585, 594-595; 533 NW2d 272 (1995), citing Perkins & Boyce, Criminal Law (3d ed), p 105. Here defendant admitted in his police statement and on cross-examination that he intentionally fired his gun at the victim.[1] Therefore, the trial court did not err in its determination that the evidence did not support the requested instructions. See *People v Heard*, 103 Mich App 571, 576; 303 NW2d 240 (1981). Furthermore, the jury was instructed with regard to both first-degree murder and second-degree murder, as required by *People v Jenkins*, 395 Mich 440; 236 NW2d 503 (1975), and found defendant guilty of first-degree murder. The jury's rejection of second-degree murder in favor of first-degree murder reflected an unwillingness to convict defendant of the lesser included offense. See *People v Raper*, 222 Mich App 475, 483; 563 NW2d 709 (1997). Consequently, even if we had held that the trial court's decision not to give the requested instructions was erroneous, such error would have been deemed harmless.

Finally, defendant argues that he was acquitted on the charges of conspiracy to commit armed robbery and felony-firearm when the jury initially returned without any verdict on those charges. Defendant further contends that when the trial court instructed the jury to "return to the jury room and continue [its] deliberations as to the other charges on the verdict form" it improperly coerced a guilty verdict and violated both the court rules and defendant's double jeopardy protections. We disagree with all of defendant's contentions pertaining to this issue.

The jury's pronouncement of defendant's guilt on Count II did not constitute a complete "verdict," because it was not accepted by the trial court as a finding on *all* of the matters duly submitted to the jury for consideration. See Black's Law Dictionary (6th ed), p 1559, citing *Ralston v Stump*, 75 Ohio App 375, 62 NE2d 293 (1944); cf. *Alvarado v Scutt*, 81 Mich App 421, 423-425; 265 NW2d 357 (1978). Instead, the jury's initial pronouncement included no findings whatsoever on Counts I and III. Moreover, there was no implied acquittal on those counts because, unlike the cases relied on by defendant, the jury did not find defendant guilty of lesser included offenses. Cf. *People v Torres*, 452 Mich 43, 47-48; 549 NW2d 540 (1996). Furthermore, because defendant was not acquitted on those charges, and the jury was not discharged in the interim, the trial court's instruction to the jury to resume its deliberations did not violate defendant's double jeopardy protections. Cf. *People v Nix*, 453 Mich 619, 624-626; 556 NW2d 866 (1996) (explaining that retrial after an *acquittal* is impermissible); *People v Rushin*, 37 Mich App 391, 399; 194 NW2d 718 (1971) (explaining that to allow a jury to be recalled *after being discharged* would offend the policies underlying the double jeopardy clause); *People v Rollins*, 108 Ill App 3d 480; 438 NE2d 1322, 1326; 64 Ill Dec 3 (1982). Finally, because the trial court merely instructed the jury to complete its deliberations, we hold that its action in response to the jury's initial pronouncement was not improperly coercive. Cf. *People v Booker (After Remand)*, 208 Mich App 163, 169; 527 NW2d 42 (1994); *Alvarado*, *supra* at 424-425; *Rollins*, *supra* at 1327.

Affirmed.

Richard Allen Griffin

Roman S. Gribbs
Michael J. Talbot

[1] Defendant's claim of voluntary intoxication, if believed by the jury, could not have mitigated his actions to involuntary manslaughter. See *People v Langworthy*, 416 Mich 630, 652; 331 NW2d 171 (1982) (holding that voluntary intoxication is not a defense to second-degree murder).