STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEMELL STONE,

Defendant-Appellant.

UNPUBLISHED
September 29, 1998

No. 193258
Recorder's Court
LC No. 95-002072

Before: Bandstra, P.J., and Griffin and Young, Jr., JJ.

PER CURIAM.

Defendant was convicted by a jury of armed robbery, MCL 750.529; MSA 28.797, carjacking, MCL 750.529a; MSA 28.797(a), assault with intent to do great bodily harm, MCL 750.84; MSA 28.279, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to concurrent prison terms of fourteen to thirty years for the armed robbery conviction, fourteen to thirty years for the carjacking conviction, and five to ten years for the assault with intent to do great bodily harm conviction. Those sentences were further ordered to be served consecutive to a two-year term for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant first claims that the trial court erred in admitting his confession at trial because defendant did not knowingly and intelligently waive his *Miranda*[1] rights. We note that defendant does not claim that his statement was involuntary. It is the prosecutor's burden to show that the defendant properly waived his Fifth Amendment rights by a preponderance of the evidence. *People v Cheatham*, 453 Mich 1, 27; 551 NW2d 355 (1996). "Whether a suspect has knowingly and intelligently waived his *Miranda* rights depends in each case on the totality of the circumstances, including the defendant's intelligence and capacity to understand the warnings given." *People v Howard*, 226 Mich App 528, 538; 575 NW2d 16 (1997). When reviewing a trial court's findings regarding a knowing and intelligent waiver of *Miranda* rights, this Court must undertake a thorough and

independent review of the entire record below. *Cheatham*, *supra* at 30. We give deference to the trial court's assessment of the weight of the evidence and credibility of the witnesses, and the trial court's findings will not be reversed unless they are clearly erroneous. *Id*.

Detroit Police Officer Steven Myles testified at the *Walker*[2] hearing that he took defendant's statement. Using the Detroit Police Department's standard advice of rights form, Myles advised defendant of his *Miranda* rights. According to Myles, defendant read all of the rights aloud, explained to Myles what each one meant, and then initialed that he understood each right. Myles testified that defendant only had difficulty with one or two words, which Myles explained to defendant, who then indicated that he understood. Finally, defendant signed and printed his name on the advice of rights form. Defendant told Myles that he completed the tenth grade and never indicated to Myles that he did not understand his rights. Convinced that defendant understood his rights, Myles proceeded to take defendant's statement. After the interrogation, defendant reviewed the statement and signed it.

The court-employed psychiatrist, Dr. Dexter Lee Fields, testified that, based on his examination of defendant, defendant was not capable of knowingly and intelligently waiving his *Miranda* rights. Fields based his conclusion on several factors, including defendant's low IQ, which indicated mild retardation, and his below-average reading capability. Fields was particularly concerned that, when he read defendant each *Miranda* right and asked defendant to explain its meaning, defendant simply restated the particular right almost verbatim. According to Fields, this exchange did not allow him to assess the true nature of defendant's understanding.

After an independent and thorough review of the record, we conclude that the trial court properly determined that defendant knowingly and intelligently waived his *Miranda* rights. The testimony presented at the *Walker* hearing supports the trial court's finding that, although defendant apparently had some difficulties understanding a few words, once those words were explained to him, he seemed to comprehend their meaning. Moreover, defendant's responses to Dr. Fields' questions concerning the meanings of each of the *Miranda* rights indicate that defendant understood those rights.[3] Although defendant apparently had a below-average IQ, this is only one factor in the "totality of circumstances" inquiry, *Cheatham*, *supra* at 43, and there is no indication in the record that defendant was incapable of validly waiving his rights.[4] We find no clear error in the trial court's determination that defendant made a knowing and intelligent waiver.

Defendant next argues that his statement made to police should have been suppressed as the fruit of an illegal arrest. This Court reviews a trial court's ruling at a suppression hearing under the clearly erroneous standard. A decision is clearly erroneous where this Court is left with a definite and firm conviction that a mistake has been made. *People v Burrell*, 417 Mich 439, 448-449; 339 NW2d 403 (1983). However, although deference is given to the trial court's resolution of factual disputes, "[a]pplication of constitutional standards by the trial court is not entitled to the same deference." *People v Nelson*, 443 Mich 626, 631 n 7; 505 NW2d 266 (1993); *People v Bordeau*, 206 Mich App 89, 92; 520 NW2d 374 (1994).

The Fourth Amendment and the parallel provision in the Michigan Constitution guarantee the right to be free from unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, § 11; *People v Champion*, 452 Mich 92, 97; 549 NW2d 849 (1996). At the moment a police officer stops someone and detains him, and the person is not free to leave, the officer has "seized" that person under the Fourth Amendment. *People v Chambers*, 195 Mich App 118, 121; 489 NW2d 168 (1992). However, not all seizures are forbidden, only unreasonable ones. Accordingly, "[a] brief stop of a suspicious individual, in order to maintain the status quo momentarily while more information is obtained, may be reasonable." *Id.* Under certain circumstances, the police may detain an individual for more than the brief time involved in *Terry v Ohio*, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968), in order to investigate possible criminal activity. *Chambers*, *supra*. However, an investigatory stop must be founded on the officer's "reasonable suspicion" that crime is afoot. *Champion*, *supra* at 98. "Reasonable suspicion entails something more than an inchoate or unparticularized suspicion or 'hunch,' but less than the level of suspicion required for probable cause." *Id.* Justification of a valid investigatory stop "must be based on an objective manifestation that the person stopped was or was about to be engaged in criminal activity as judged by those versed in the field of law enforcement when viewed under the totality of the circumstances." *Id*.

In this case, it is clear that defendant was "seized" when Officer Felix Kirk left Deborah Jarrell's house at 4129 Magnolia to interview Jarrell's neighbor, Calvin Pearson, who had called 911 and reported the shooting, and instructed the remaining officers not to permit anyone to leave the house. However, given the totality of the circumstances, we believe that Officer Kirk had a particularized suspicion that at least some of the individuals there may have been involved in the shooting, vicious assault, robbery, and carjacking that took place in the alley behind the home the night before. When he arrived at the scene, Officer Kirk knew from the 911 call that Pearson had seen three to four men assaulting the victim shortly after the shooting, and that the men then ran into 4129 Magnolia. Moreover, a police dog had tracked a scent leading from the scene of the shooting to that residence. Finally, again based upon Pearson's 911 call, Officer Kirk had reason to believe that Jarrell was lying when she told Officer Kirk that no one was home on the night of the shooting. We conclude that this particularized knowledge meets the requisite threshold for reasonable suspicion.

Moreover, we are not convinced that the brief detention of forty-five minutes to one hour transformed the investigatory stop into an illegal arrest. Investigative techniques such as those employed by the police in this case "are not inherently objectionable provided the period of detention is not unduly long or does not involve moving the suspect to another locale." *People v Marland*, 135 Mich App 297, 305; 355 NW2d 378 (1984). "The question that must be asked in assessing whether a detention is too long in duration to be justified as an investigatory stop is whether the police were diligently pursuing a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain those stopped." *Chambers*, *supra* at 123. Here, Officer Kirk went directly around the corner to Calvin Pearson's home to determine whether Pearson could provide information that would either confirm or dispel Officer Kirk's suspicions that one or more of the males

being detained at 4129 Magnolia were involved in the crimes. Because Officer Kirk was diligently pursuing his investigation, the approximate forty-five minute to one-hour detainment was not improper. Cf. *People v Yeoman*, 218 Mich App 406, 413; 554 NW2d 577 (1996).

The remaining question is whether the police had probable cause to arrest defendant. We conclude that they did. Under MCL 764.15; MSA 28.874, "a police officer may arrest without a warrant if he has reasonable (or probable) cause to believe that a felony has been committed and that the suspect committed the felony." *People v Thomas*, 191 Mich App 576, 579; 478 NW2d 712 (1991). An officer has probable cause to arrest "if the facts available [to him] at the moment of arrest would justify a fair-minded person of average intelligence to believe that the suspected person has committed a felony." *Id.*

In this case, Pearson informed Officer Kirk that he saw the victim lying in the alley with at least three black males standing over him; one of the men was kicking the victim and another was holding a chain or similar type of object. Pearson further described one of the men as about 5'8" and about 165 pounds and another as stockier than the other two. Pearson confirmed to Officer Kirk that he had seen two of the men run into 4129 Magnolia. When Officer Kirk returned to that address, he observed that two of the men there fit the description provided by Pearson, one of whom was defendant. We conclude that, at this point, there was sufficient probable cause to arrest defendant. Accordingly, the trial court's decision to admit defendant's subsequent statement made to police was not clearly erroneous.

Defendant next argues that the trial court erred in allowing Harry Berry to give testimony that was not based on his personal knowledge. This claim is without merit. A review of the testimony at issue establishes that although witness Harry Berry may have on a few occasions testified concerning events not within his personal knowledge in violation of MRE 602, the trial court immediately instructed the witness not to testify about events that he did not observe himself or of which he had no personal knowledge. The trial court's comments made it clear to the jurors that they were to disregard any statement made by Berry about what others heard or observed. The court also struck testimony by Berry that was not within his personal knowledge. We conclude that the trial court properly responded to defendant's objections. In any event, we believe that any perceived error was harmless in light of the simply overwhelming evidence of defendant's guilt. See *People v Gearns*, 457 Mich 170; 577 NW2d 422 (1998) (reversal not required if there is a "high probability" that nonconstitutional error did not affect the judgment). To the extent defendant also takes issue with the prosecutor's use of a police report either to refresh Berry's recollection or to impeach him, we decline to address the issue because defendant cites no authority to support his claim that the prosecutor's actions were improper. See *People v Piotrowski*, 211 Mich App 527, 530; 536 NW2d 293 (1995). Even if this issue had been preserved, we would have found no error.

Lastly, we reject as unfounded defendant's argument that the trial court denied defendant his Sixth Amendment right to present exculpatory evidence in his defense when the court refused to hold a

hearing into Danetta Olive's claim on the second day of trial that the victim threatened her during a recess. Defendant maintains that a hearing was necessary to determine whether Olive or possibly other witnesses had been improperly influenced. We disagree. Defendant had the opportunity to inquire into this matter during his cross-examination of Olive and the remaining prosecution witnesses but failed to do so. Simply put, no decision by the trial court precluded defendant from presenting favorable testimony or evidence or otherwise establishing a defense. Accordingly, defendant's claim must fail.

Affirmed.

/s/ Richard A. Bandstra
/s/ Richard Allen Griffin
/s/ Robert P. Young, Jr.

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

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

[3] For example, when Dr. Fields asked defendant to explain the statement, "I have a right to remain silent and I do not have to answer any questions put to me or make any statements," defendant responded, "You don't got ta answer any questions."

[4] "Low mental ability in and of itself is insufficient to establish that a defendant did not understand his rights." *Cheatham*, *supra* at 36.