STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

COREY MANNING,

Defendant-Appellant.

UNPUBLISHED
October 2, 1998

No. 199646
Recorder's Court
LC No. 95-012837

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

YUSEF QUALLS,

Defendant-Appellant.

No. 201270
Recorder's Court
LC No. 95-012865

Before: Murphy, P.J., and Gribbs and Gage, JJ.

PER CURIAM.

Following a joint trial with separate juries, defendant Manning was convicted of two counts of first-degree premeditated murder, MCL 750.316(1)(a); MSA 28.548(1)(a), assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279, first-degree home invasion, MCL 750.110a(2); MSA 28.305(a)(2), and possession of a firearm during the commission of a felony, MCL 750.227b(1); MSA 28.424(2)(1), while defendant Qualls was convicted of two counts of first-degree premeditated murder, assault with intent to murder, MCL 750.83; MSA 28.278, first-degree home invasion, and felony-firearm. The trial court sentenced defendant Manning to concurrent terms of mandatory life imprisonment without parole for the first-degree murder convictions, six to ten years' imprisonment for the assault conviction, and ten to twenty years' imprisonment for the home invasion conviction, with a consecutive two-year term for the felony-firearm conviction. The court sentenced

defendant Qualls, a juvenile, as an adult to concurrent terms of mandatory life imprisonment without parole for the first-degree murder convictions, five to fifteen years' imprisonment for the assault conviction, and five to twenty years' imprisonment for the home invasion conviction, all consecutive to a two-year term for the felony-firearm conviction. Both defendants appeal as of right. We affirm.

I

Both defendants contend that the trial court erred in denying their motions to suppress their confessions. We review de novo a trial court's determination regarding whether a statement was made voluntarily, knowingly and intelligently. *People v Cheatham*, 453 Mich 1, 30, 44; 551 NW2d 355 (1996); *People v Gould*, 225 Mich App 79, 88; 570 NW2d 140 (1997). The trial court's findings of fact will not be disturbed unless they are clearly erroneous. *People v LoCicero (After Remand)*, 453 Mich 496, 500; 556 NW2d 498 (1996). The trial court's factual findings are clearly erroneous if, after a review of the record, this Court is left with a definite and firm conviction that a mistake has been made. *People v Givans*, 227 Mich App 113, 119; 575 NW2d 84 (1997). To the extent that resolution of disputed factual questions turn on the credibility of witnesses or the weight of the evidence, this Court will ordinarily defer to the trial court, which has a superior opportunity to evaluate these matters. *People v Young*, 212 Mich App 630, 634; 538 NW2d 456 (1995), remanded on other grounds 453 Mich 976 (1996), on remand 222 Mich App 498; 565 NW2d 5 (1997), reversed on other grounds 458 Mich 43; 580 NW2d 404 (1998).

A

Defendant Manning contends that his waiver of his rights against self-incrimination and subsequent statement to police were neither voluntarily nor knowingly and intelligently made. Statements made during a custodial interrogation are inadmissible unless the defendant voluntarily, knowingly and intelligently waives his Fifth Amendment rights. *People v Howard*, 226 Mich App 528, 538; 575 NW2d 16 (1997). Whether a waiver of *Miranda*[1] rights is voluntary and whether an otherwise voluntary waiver is knowing and intelligent are separate questions. *Id*. The issue of voluntariness is to be determined solely by examining police conduct, and cannot be resolved in defendant's favor absent some police coercion. *Id.*; *People v Garwood*, 205 Mich App 553, 555; 517 NW2d 843 (1994). The test of voluntariness considers whether, in light of the totality of the circumstances, the statement was the product of an essentially free and unconstrained choice or whether it was the result of an overborne will. *People v Cipriano*, 431 Mich 315, 333-334; 429 NW2d 781 (1988). Relevant factors in determining voluntariness include the defendant's age; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of time defendant was detained before providing a statement; the lack of any advice to the defendant of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he made his statement; whether the defendant was injured, intoxicated or drugged, or in ill health when he made the statement; whether the defendant was deprived of food, sleep or medical attention; and whether he was physically abused or threatened with abuse. *Id*. at 334. The absence or presence of any one of these factors is not necessarily conclusive on the issue of voluntariness. *Id*.

In determining whether the defendant knowingly and intelligently waived his *Miranda* rights, an objective standard is used. *Garwood, supra* at 557. A determination whether a waiver was knowing and intelligent depends on the totality of the circumstances, including the defendant's education, experience, conduct, intelligence and capacity to understand the warnings given, as well as the credibility of the police officers' testimony. *Howard*, *supra*; *Garwood*, *supra*.

Our review of the evidence adduced at the hearing reveals that defendant voluntarily, knowingly and intelligently waived his constitutional rights and offered his statement. Although defendant was attacked and beaten by a mob as the police led him from his house, the incident was not instigated by the police. The police did all they could to protect defendant from the angry mob. The officers' testimony established that defendant emerged relatively unscathed, showing no visible signs of injury and boasting that he could have defeated three or four of his assailants. Defendant, who was eighteen and had a ninth grade education, was advised of his rights and stated that he understood them. He was only interrogated once. The fact that the session was rather lengthy owed more to defendant's recitation of his life's history than to extended badgering by the interrogating officer. Defendant was given food and water and bathroom privileges during the session, and was not physically abused or threatened with abuse. Defendant did not appear to be drunk or high on drugs, and never indicated that he was unwell or needed medical attention. Although defendant disputed much of the officers' testimony, the trial court found him incredible based on his demeanor and the court's viewing of a videotape of the mob incident. This Court will not second-guess that finding. Therefore, based on the totality of the circumstances, we conclude that defendant waived his rights and made his statement voluntarily, knowingly and intelligently. The trial court correctly denied his motion to suppress.

B

Defendant Qualls first contends that his statement was taken in violation of his right to counsel. The United States Supreme Court, in *Edwards v Arizona*, 451 US 477, 484-485; 101 S Ct 1880; 68 L Ed 2d 378 (1981), has determined that an accused who has requested an attorney is not subject to further interrogation in the absence of counsel unless the accused himself initiates further communication. *People v Kowalski*, ___ Mich App ___; ___ NW2d ___ (Docket No. 190352, released 6/26/98), slip op p 6. Defendant testified that he requested an attorney and that the interrogating officer agreed to provide one. Defendant further explained that the officer did not stop the interview, and that he proceeded to give a statement because he somehow failed to notice that an attorney had not been provided. The trial court found that defendant's testimony on this issue was not credible. Given the fact that defendant and his mother had gone to the police voluntarily and that defendant knew the police wanted to question him about the homicides, in addition to defendant's claim that he paid no attention to the absence of an attorney, the inconsistencies throughout his testimony, and the fact that neither his mother nor the interrogating officer testified that defendant had invoked his right to counsel, we conclude that the trial court's finding was not clearly erroneous.

C

Defendant Qualls next contends that the officers' promises of leniency rendered his statement involuntary and thus inadmissible. A promise of leniency is one factor to be considered

in the evaluation of the voluntariness of a defendant's statements. *Givans, supra* at 120. Unspecified promises to help are not improper promises of leniency. *People v Ewing (On Remand)*, 102 Mich App 81, 85-86; 300 NW2d 742 (1980). The interrogating officer testified that he did not promise anything to defendant, but that his partner said he would try to help defendant if he could, without specifying what help he could provide. Defendant conversely testified that the interrogating officer's partner did not say anything about helping him, but that the interrogating officer told him, again without making a specific offer of help, simply that he could help defendant if he gave a statement.

Defendant's mother testified that both officers said they would work on defendant's behalf and would (depending on how one interprets her testimony) either recommend reduced charges to the prosecutor or see that the prosecutor filed reduced charges. While a promise to work on defendant's behalf is, like a general promise to help, too vague to constitute a promise of leniency, promising to convince the prosecutor to file reduced charges is a specific promise of leniency. *People v Carigon*, 128 Mich App 802, 810-811; 341 NW2d 803 (1983). However, a promise of leniency will not render a statement inadmissible unless the defendant relied on the promise in making the statement. *People v Butler*, 193 Mich App 63, 69; 483 NW2d 430 (1992). Defendant's mother did not contend that she urged her son to cooperate because of the alleged promise, and defendant did not claim that the alleged promise was made to him or that he acted in reliance on it. In fact, defendant admitted that the officer told him it did not matter if he made a statement or not. We conclude that because nothing in the record shows that the alleged promise induced defendant to make a statement, the trial court did not clearly err in finding that defendant's statement was not induced by a promise of leniency. *Givans*, *supra*.

D

Finally, defendant Qualls contends that his statement was involuntary under the totality of the circumstances. The admissibility of a juvenile's confession depends on whether, under the totality of the circumstances, it was voluntarily made. *Id*. The relevant factors that must be considered in applying the totality of the circumstances test include (1) whether the defendant was advised of and clearly understood and waived his constitutional rights, (2) the degree of police compliance with MCL 764.27; MSA 28.886 and the juvenile court rules, (3) the presence of an adult parent, custodian or guardian, (4) the juvenile's personal background, (5) the juvenile's age, education and intelligence level, (6) the extent of his prior experience with the police, (7) the length of detention before the statement was made, (8) the repeated and prolonged nature of the questioning, 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. *Id.* at 121.

Reviewing these factors in the instant case, defendant was advised of his constitutional rights. Hearing testimony revealed that the interrogating officer read defendant his rights, and that defendant himself read one of the rights. The interrogating officer testified that defendant stated that he understood his rights and agreed to make a statement, and defendant never alleged that he failed to comprehend the reading of his rights. The police were not required to take defendant before the probate court pursuant to § 27 because he had voluntarily come to the station and was not under arrest at the time he offered his statement. Defendant was accompanied by his mother, was sixteen and-a-half years old, had a tenth

grade education, could read and write and had previously faced charges. He was questioned only once within a short time after arriving at the station. Although the duration of the interview session was never specified, neither defendant nor his mother indicated that it took very long. No evidence indicated that defendant was in other than good physical health. Regarding defendant's mental well-being during the interview, although defendant's mother testified that she was under an emotional strain due to her mother's recent death, defendant did not say the same for himself. Furthermore, while defendant and his mother indicated that the victims' relatives' threats of harm caused defendant to turn himself in, no evidence established that this concern overcame defendant's will in a manner that caused him to waive his rights and offer a statement. Based on our review of the totality of the circumstances, we conclude that the trial court did not err in finding that defendant's statement was voluntarily made.

II

Next, defendant Manning argues that the prosecutor's reference to the Bible during closing argument deprived him of his right to a fair trial. Claims of prosecutorial misconduct are decided on a case by case basis. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995). This Court examines the record and evaluates the allegedly improper remarks in context to determine whether the defendant was denied a fair and impartial trial. *Id*. Remarks by the prosecutor should not be held prejudicial if they are made in good faith and, when fairly construed, they do not appear to have prejudiced the jury against the defendant. *People v Wilson*, 163 Mich App 63, 65; 414 NW2d 150 (1987). Even an otherwise improper remark may not rise to an error requiring reversal when the prosecutor is responding to the defense counsel's argument. *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996). While a prosecutor may not appeal to the jury's religious convictions in calling for a defendant's conviction and thus inflame the jury's passions and fears, *People v Rohn*, 98 Mich App 593, 597-598; 296 NW2d 315 (1980), references, by way of illustration, to principles of divine law or biblical teachings are not per se improper. *People v Mischley*, 164 Mich App 478, 483; 417 NW2d 537 (1987).

The prosecutor's statement that the Bible "says whatsoever you shall do to these, the least of my [brethren] you do unto me" did not constitute an appeal to the jury's passions or prejudices to help secure a conviction on religious grounds. Defense counsel had suggested during his closing argument that one of the surviving victims who testified at trial had lied about taking illegal drugs. Viewing the prosecutor's remark in context, he used the passage in responding to defense counsel's statement to illustrate his position that while the victims may not have been model citizens, that fact did not give defendant the right to kill them. We conclude that the prosecutor's reference to this principle of biblical teachings in responding to defense counsel's prior argument did not deprive defendant of a fair trial.

III

Defendant Manning finally contends that his attorney's failure to object to evidence that he had twice assaulted one of the victims, his former girlfriend, during the week before the killing deprived him of the effective assistance of counsel. Because defendant failed to request an evidentiary hearing regarding this allegation of error, our review is limited to errors apparent on the record. *People v Moseler*, 202 Mich App 296, 299; 508 NW2d 192 (1993). To establish that his right to effective

assistance of counsel was so undermined that it justifies reversal of an otherwise valid conviction, the defendant must show that counsel's representation fell below an objective standard of reasonableness and that the representation so prejudiced him as to deprive him of a fair trial. *People v Price*, 214 Mich App 538, 547; 543 NW2d 49 (1995). The defendant must overcome a strong presumption that counsel's assistance constituted sound trial strategy and show that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994).

Normally, the facts and circumstances surrounding the commission of a crime are properly admissible as part of the res gestae, the complete story of the offense, *People v Bostic*, 110 Mich App 747, 749; 313 NW2d 98 (1981); *People v Shannon*, 88 Mich App 138, 146; 276 NW2d 546 (1979), even when these antecedent events include other criminal acts. *People v Delgado*, 404 Mich 76, 83; 273 NW2d 395 (1978). If relevant, evidence of other crimes or acts is also admissible to prove something other than that the defendant acted in conformity with his bad character, such as the defendant's motive or intent. MRE 404(b)(1). Testimony that defendant assaulted his girlfriend approximately a week before the crime was relevant to place in context his subsequent threat to kill her, which was itself relevant to prove intent. That evidence and the evidence that defendant again assaulted the victim a day or two before the crime were also relevant to show the events leading up to the offense, to prove motive and to disprove defendant's denial that the killing was premeditated. None of this highly probative evidence was outweighed by the danger of unfair prejudice. MRE 403. Therefore, because the evidence was admissible, defense counsel's failure to object to it did not constitute ineffective assistance. *People v Torres (On Remand)*, 222 Mich App 411, 425; 564 NW2d 149 (1997).

IV

Lastly, defendant Qualls contends that the trial court erroneously sentenced him as an adult. This Court engages in a bifurcated review of the trial court's decision to sentence a minor as a juvenile or as an adult: first, the trial court's factual findings supporting its determination regarding each factor are reviewed under the clearly erroneous standard; second, the ultimate decision whether to sentence the minor as a juvenile or as an adult is reviewed for an abuse of discretion. *People v Launsburry*, 217 Mich App 358, 362; 551 NW2d 460 (1996).

The prosecutor bears the burden of proving by a preponderance of the evidence that the best interests of the juvenile and the public would be served by sentencing the juvenile as an adult. MCR 6.931(E)(2). At the time defendant was sentenced, both MCL 769.1(3); MSA 28.1072(3) and MCR 6.931(E)(3) required the trial court to consider six criteria in determining whether to sentence him as a juvenile or as an adult:

> (a) The prior record and character of the juvenile, his or her physical and mental maturity, and his or her pattern of living.
>
> (b) The seriousness and the circumstances of the offense.

(c) Whether the offense is part of a repetitive pattern of offenses which would lead to 1 of the following determinations:

(i) The juvenile is not amenable to treatment.

(ii) That despite the juvenile's potential for treatment, the nature of the juvenile's delinquent behavior is likely to disrupt the rehabilitation of the other juveniles in the treatment program.

(d) Whether, despite the juvenile's potential for treatment, the nature of the juvenile's delinquent behavior is likely to render the juvenile dangerous to the public if released at the age of 21.

(e) Whether the juvenile is more likely to be rehabilitated by the services and facilities available in adult programs and procedures than in juvenile programs and procedures.

(f) What is in the best interests of the public welfare and the protection of the public security. [*People v Perry*, 218 Mich App 520, 541-542; 554 NW2d 362 (1996).]

In making that determination, the trial court must make complete, detailed findings with respect to each of the requisite factors cited in the statute and court rule. *People v Hazzard*, 206 Mich App 658, 660-661; 522 NW2d 910 (1994). The court must attempt to weigh the relevant factors in a meaningful way; no single criterion, such as the seriousness of the offense, may be given preeminence over the others. *Perry*, *supra* at 542.

The trial court properly sentenced defendant as an adult. The court did not err in finding that defendant was physically and mentally mature, given that he was seventeen years and four months old, five foot eight and 180 pounds, and had been earning good grades and otherwise doing well in the juvenile facility. Nor did the court improperly conclude that defendant's pattern of living was that of an adult because he had left his mother's home and had gone to live with an aunt who provided little supervision. The court recognized that the instant offenses were "most heinous," in light of defendant's participation in a "killing spree" despite having no motive to murder the victims. Testimony at the hearing supported the court's determination that the offenses appeared to be part of a repetitive pattern, but that defendant was amenable to juvenile treatment and not likely to be disruptive to others. However, testimony also supported the court's finding that his prior juvenile offenses were serious and had involved assaultive behavior, that rehabilitation could not begin until defendant admitted his participation in the killings, something he had recently denied, and that therefore defendant was likely to remain dangerous if released from juvenile detention at age twenty-one. While the court observed that the adult and juvenile programs in some respects paralleled each other, defendant's continued hesitation to accept responsibility for his actions, a prerequisite to rehabilitation, would result in less time to utilize the juvenile programs, thus making long-term treatment in the adult system more appropriate. Finally, we do not possess a firm conviction that the court erred in finding that the best interests of the public

mandated sentencing as an adult, based on the court's observation that "anybody who would go in and commit a murder and another shooting on business that he had no interest in is a menace to society." Given that all these proper findings but one indicated that defendant should be sentenced as an adult, the trial court did not abuse its discretion in so sentencing defendant.

Affirmed.

/s/ William B. Murphy
/s/ Roman S. Gribbs
/s/ Hilda R. Gage

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