

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SCOTT ALLEN RAY,

Defendant-Appellant.

UNPUBLISHED

October 2, 1998

No. 202251

Oakland Circuit Court

LC No. 96-147536 FC

Before: Holbrook, Jr., P.J., and Markey and Whitbeck, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree premeditated murder, MCL 750.316(1)(a); MSA 28.548(1)(a), and first-degree felony murder, MCL 750.316(1)(b); MSA 28.548(1)(b). The trial court sentenced defendant to life without parole for the premeditated murder conviction and to life without parole for the felony murder conviction. The felony murder conviction was vacated, however. Defendant appeals by right his conviction. We affirm.

I

First, defendant argues that the trial court erred by admitting his involuntary confession into evidence. According to defendant, his confession was involuntary because it was taken (1) after he sustained a head injury in a car accident; (2) while he was sleep deprived; and (3) despite the fact that he failed to complete high school, had difficulty reading and writing, and suffered from attention deficit disorder.

On appeal, this Court reviews the trial court's determination regarding the voluntariness of a defendant's statement by examining the whole record and making an independent determination. *People v Gould*, 225 Mich App 79, 88; 570 NW2d 140 (1997); *People v Haywood*, 209 Mich App 217, 225-226; 530 NW2d 497 (1995). This Court must give deference to the trial court's findings unless they are clearly erroneous. *People v Cheatham*, 453 Mich 1, 30 (Boyle, J., joined by Brickley, C.J., and Riley, J.), 44 (Weaver, J., concurring in this part of Justice Boyle's lead opinion);¹ 551 NW2d 355 (1996); *Gould, supra*. Whether the defendant's statement was knowing, intelligent, and voluntary is a question of law for the court. *Cheatham, supra* at 27, 44.

Unless the accused voluntarily, knowingly and intelligently waives his Fifth Amendment rights, any statements made by the accused during custodial interrogation are inadmissible. *People v Howard*, 226 Mich App 528, 538; 575 NW2d 16 (1997) (citing *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602, 1612; 16 L Ed 2d 694 (1966)). Whether an accused voluntarily waived his *Miranda* rights and whether an otherwise voluntary waiver was knowing and intelligent are separate questions. *Howard, supra*. The voluntariness prong is determined solely by examining police conduct. *Id.* Even in the absence of police coercion, a statement made to police during questioning may be suppressed if the defendant was incapable of knowingly and intelligently waiving his constitutional rights. *Id.* To determine whether a suspect knowingly and intelligently waived his *Miranda* rights, a court must examine the totality of the circumstances, including the defendant's intelligence and capacity to understand the warnings given. *Id.* Absent evidence of police coercion or misconduct, however, the voluntariness prong cannot be resolved in defendant's favor. *Id.* Moreover, even if a suspect's confession was not voluntarily or knowingly and intelligently made, its admission at trial would be subject to a harmless error analysis. *Id.* at 542.

Considering the totality of the surrounding circumstances, the test of voluntariness is whether the confession was 'the product of an essentially free and unconstrained choice by its maker,' or whether the accused's 'will has been overborne and his capacity for self-determination critically impaired.' *People v Cipriano*, 431 Mich 315, 333-334; 429 NW2d 781 (1988). "The line of demarcation 'is that at which governing self-direction is lost and compulsion, of whatever nature or however infused, propels or helps to propel the confession.'" *Id.*

To determine whether a statement is voluntary, the trial court should consider, among other things, the following factors: (1) the age of the accused; (2) his lack of education or his intelligence level; (3) the extent of his previous experience with the police; (4) the repeated and prolonged nature of the questioning; (5) the length of the detention of the accused before he gave the statement in question; (6) the lack of any advice to the accused of his constitutional rights; (7) whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; (8) whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; (9) whether the accused was deprived of food, sleep, or medical attention; (10) whether the accused was physically abused; and (11) whether the suspect was threatened with abuse. *Cipriano, supra* at 334. The absence or existence of any one factor is not necessarily conclusive on the issue of voluntariness. *Id.* Admissibility is determined by examining the totality of the circumstances surrounding the making of the confession to inquire whether it was freely and voluntarily made. *Id.* "Use of an involuntary statement in a criminal trial violates due process." *People v Peerenboom*, 224 Mich App 195, 198; 568 NW2d 153 (1997); accord *Cipriano, supra* at 331.

In the instant case, there is no evidence on the record to suggest any type of police coercion or misconduct. The police officers obtained immediate medical treatment for defendant upon his arrival at the jail. The officers were told that defendant's injuries were superficial. Defendant was given the opportunity to sleep, was provided with a pillow, blanket, and food. There was no indication that defendant was under the influence of alcohol or any controlled substance. Furthermore, defendant was not threatened into giving his confession. At the *Walker* hearing, defendant testified that Officer Kinney

treated him with respect. While Kinney did relate to defendant that things would go easier if he told the truth, such a statement standing alone could not have impaired defendant's capacity for self determination. The police never made any promises to defendant in return for his confession.

Before every conversation with defendant, the police officers read him his *Miranda* rights. On three different occasions, defendant was read his rights. Defendant received a written copy of his rights and initialed each paragraph. At no time did defendant ask that questioning cease. Defendant never indicated that he had difficulty understanding his rights. In fact, two days after giving his statement, defendant read over and corrected his transcribed statement and initialed each page of the statement as he did so. The entire interrogation process lasted approximately one hour. Certainly, this was not a prolonged interrogation. While defendant was detained for approximately 12 hours before the interrogation began, the delay was not due to any police misconduct. Defendant was suspected of a crime in another state and the exchange of information between the two police departments took some time.

While defendant claims that his lack of education, his attention deficit disorder, and the fact that the majority of his education was through special education classes prohibited him from giving a voluntary statement, there was no evidence that the police officers were either aware of defendant's limitations when they began questioning or that they took advantage of defendant's situation. The interrogating officer testified that defendant never indicated that he was in pain. Defendant failed to tell the officer that he did not understand his rights. Instead, defendant indicated that he could read and write. His responses to the officer's questions and his vocabulary were not only appropriate but also evidenced his understanding of his rights. Therefore, after a review of the totality of the circumstances, we believe that the trial court did not err by finding that defendant's confession was voluntary, intelligent and knowing.

II

Next, defendant asserts that the trial court erred by failing to suppress his confession because the police failed to make an audio or video recording of the entire interrogation. We disagree. Because defendant failed to move to suppress his confession based on the failure of the police to record his entire statement, the issue is unpreserved. Regardless, the police are under no constitutional duty to electronically record their conversations with a defendant. *People v Fike*, 228 Mich App 178, 183-186; 577 NW2d 903 (1998).

III

Finally, defendant contends that he was denied his due process right to a fair trial based on the trial court's decision to admit gruesome crime scene and autopsy photos into evidence. According to defendant, the photographs were not relevant and any probative value was outweighed by unfair prejudice. "The decision to admit or exclude photographs is within the sole discretion of the trial court." *People v Mills*, 450 Mich 61, 76; 537 NW2d 909, modified 450 Mich 1212 (1995); *People v Ho*, ___ Mich App ___, ___ NW2d ___ (Docket No. 188274, issued August 14, 1998), slip op at 5.

Generally, all relevant evidence is admissible. MRE 402. Evidence is relevant if it has any tendency to make the existence of a fact which is of consequence to the action more probable or less probable than it would be without the evidence. MRE 401. Even if evidence is relevant, it may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, waste of time, or needless presentation of cumulative facts. MRE 403. However, “unfair prejudice” does not mean “damaging.” *Mills, supra* at 75. Any relevant evidence will be damaging to some extent. *Id.* Unfair prejudice exists when there is a probability that the evidence will be given undue preemptive weight by the jury, or when it would be inequitable to allow the use of the evidence. *Id.* at 75-76.

When determining whether photographs should be excluded due to gruesomeness, the proper inquiry is always whether the photographs’ probative value is substantially outweighed by unfair prejudice. *Id.* at 76. The trial court is not required to exclude the photographs from evidence simply because a witness can orally testify about the information contained in the photographs. *Id.*; cf. *People v Eddington*, 387 Mich 551, 561-563; 198 NW2d 297 (1972). In addition, photographs may be used to corroborate a witness’ testimony. *Mills, supra* at 76. “Gruesomeness alone need not cause exclusion.” *Id.* In *Eddington, supra* at 562-563, quoting 29 Am Jur 2d, Evidence, § 787, pp 860-861, the Supreme Court stated:

Photographs that are merely calculated to arouse the sympathies or prejudices of the jury are properly excluded, particularly if they are not substantially necessary or instructive to show material facts or conditions. If photographs which disclose the gruesome aspects of an accident or a crime are not pertinent, relevant, competent, or material on any issue in the case and serve the purpose solely of inflaming the minds of the jurors and prejudicing them against the accused, they should not be admitted in evidence. However, if photographs are otherwise admissible for a proper purpose, they are not rendered inadmissible merely because they bring vividly to the jurors the details of a gruesome or shocking accident or crime, even though they may tend to arouse the passion or prejudice of the jurors. Generally, also, the fact that a photograph is more effective than an oral description, and to that extent calculated to excite passion and prejudice, does not render it inadmissible in evidence.

In the instant case, the prosecution offered the photographs to corroborate defendant’s confession, to corroborate the testimony of the medical examiner, to prove the requisite element of intent to murder, and to demonstrate the corpus delicti of the crime. While defense counsel offered to stipulate to certain factual events, the jury was not required to accept those stipulations. Therefore, any of defendant’s stipulations did not relieve the prosecutor of his burden to prove each element of the crime beyond a reasonable doubt.

Moreover, the contested photographs were relevant. Two of the photos were taken at the crime scene and exhibit the nature of the crime and the crime scene. The autopsy photos showed the nature of the victim’s multiple injuries and the vulnerability of the victim. Through the use of the photographs, the jury had a greater comprehension of the medical examiner’s testimony regarding the

various injuries and which was the ultimate cause of death. The medical examiner described a series of injuries that were not immediately fatal to the victim. This testimony pertained to the issue of premeditation because the examiner opined that after inflicting each injury, defendant had time for reflection, and that with each additional attack the victim's injuries became more severe.

Additionally, the prosecution offered the photographs to corroborate defendant's confession and to prove certain elements of the crime; i.e. the intent to murder and premeditation. Simply because other witnesses at trial testified about the information contained in the photographs did not require the trial court to exclude the photographs from evidence. Furthermore, the jury could have chosen to disregard defendant's confession and the testimony of any of the witnesses. The photographs served to corroborate the testimony of various witnesses.

Because the photographs were relevant, the trial court was required to determine whether their probative value was substantially outweighed by the danger of unfair prejudice. Generally, a photograph is more effective than oral testimony. As long as photographs are admitted for a proper purpose, "they are not rendered inadmissible merely because they bring vividly to the jurors the details of a gruesome or shocking accident or crime, even though they may tend to arouse the passion or prejudice of the jurors." *Eddington, supra* at 562-563, quoting 24 Am Jur 2d, Evidence, 787, pp 860-861. Thus, the fact that the photographs depicted the victim as he appeared after his death does not render them inadmissible. *Ho, supra*.

While defendant asserts that the trial court erred by admitting all of the photographs, he specifically points to only two pictures he believes to be virtually identical. Because the photographs focused on different injuries to the victim and were offered for a legitimate purpose other than to excite the jury, the trial court did not abuse its discretion by admitting both photographs.

Even if we determined that defendant's confession or the contested photographs were erroneously admitted into evidence, any error was harmless. *People v Doyle*, 129 Mich App 145, 157; 342 NW2d 560 (1983). In the case at bar, there was overwhelming evidence of defendant's guilt. Defendant was arrested while driving the victim's car. Defendant's fingerprints were located throughout the victim's home. His clothing was covered with the victim's blood type. Defendant was found in possession of some of the victim's personal property. Even the extent and type of the victim's wounds evidence that defendant intended to kill the victim despite several chances to reconsider his actions. The victim had been beaten, strangled, repeatedly stabbed, and his throat was slashed. Clearly, the facts support a first-degree murder conviction.

Affirmed.

/s/ Donald E. Holbrook, Jr.

/s/ Jane E. Markey

/s/ William C. Whitbeck

¹ All citations to *Cheatham* in this opinion are to parts of Justice Boyle's lead opinion that constituted a majority opinion of the Michigan Supreme Court.