STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JASON R. GRAVES,

Defendant-Appellant.

UNPUBLISHED
March 30, 1999

No. 191052
Oakland Circuit Court
LC No. 94-135924 FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID L. YORKS,

Defendant-Appellant.

No. 191054
Oakland Circuit Court
LC No. 94-135925 FC

Before: MacKenzie, P.J., and White and Smolenski, JJ.

PER CURIAM.

Defendants Jason Graves and David Yorks were each convicted of one count of first-degree premeditated murder, MCL 750.316(1)(a); MSA 28.548(1)(a), and one count of first-degree felony murder, MCL 750.316(1)(b); MSA 28.548(1)(b). The trial court vacated each defendant's conviction of premeditated murder and sentenced each defendant to the mandatory term of life in prison without parole for the felony murder conviction. After each defendant appealed as of right, this Court consolidated the appeals. We now affirm.

Defendants convictions arise out of the murder of a teenage boy during the course of a robbery of the boy's home.

Defendant Graves

Defendant Graves initially raises several grounds for his argument that the trial court erred in denying his motion to suppress the inculpatory statement he gave at the sheriff's department. Specifically, Graves first contends that his statement should have been suppressed because it was obtained when the police impermissibly reinitiated questioning at the sheriff's department after he had already invoked his privilege against self-incrimination at the scene of the crime.

The admissibility of statements obtained after a defendant has asserted the privilege against self-incrimination turns on whether, under the particular facts of the case, the police scrupulously honored the defendant's assertion of the right to cut off questioning. *People v Slocum (On Remand)*, 219 Mich App 695; 558 NW2d 4 (1996).

In this case, the evidence admitted at the suppression hearing reveals that when Graves invoked his privilege against self incrimination at the scene of the crime the officer who was attempting to question Graves immediately discontinued the attempted questioning. A substantial period of time (over two hours) thereafter elapsed before a different officer reinitiated questioning at the sheriff's department during which time no efforts were made by the police to wear down Graves' resistance and make him change his mind. *Id*. at 698-700, 705. Between the time that Graves invoked his right against self incrimination at the scene of the crime and the police reinitiated questioning at the sheriff's department, significant new information (an inculpatory statement by York) became available to the police. Cf. *id*. at 705, n 3. And, the second officer who reinitiated questioning gave Graves a fresh set of warnings. Cf. *id*. at 700. We thus conclude that the totality of the circumstances indicates that the police "scrupulously honored" Graves' assertion of the "right to cut off questioning." *Id*. at 705. Accordingly, the trial court did not err in refusing to suppress Graves' statement on this ground.

Next, Graves contends that his inculpatory statement should have been suppressed because he invoked his right to counsel during questioning at the sheriff's department. However, we agree with the trial court that Graves did not invoke his right to counsel during questioning. The transcript of Graves' taped statement reveals that he was then willing to talk to the officer without an attorney and that he simply wanted to make sure that he was not waiving his right to have counsel present at some future time.[1] Cf. *People v Granderson*, 212 Mich App 673, 676; 538 NW2d 471 (1995). Moreover, even if Graves' statements could be construed as an ambiguous request for an attorney, the officer was not required to refrain from questioning Graves and his subsequent inclupatory statement was properly admitted. *Id*. at 677-678.

` Finally, Graves argues that his inculpatory statement should have been suppressed because he did not knowingly and intelligently waive his rights. Specifically, Graves contends that the record shows that he did not understand that by answering the officer's questions he was waiving his right to an attorney. Graves also contends that he was too intoxicated to waive his rights.

Statements given in response to custodial interrogation are not admissible unless the defendant was first given the warnings required by *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966), and the defendant then voluntarily, knowingly and intelligently waived the privilege against self incrimination. *Id*. at 444, 468-475; *People v Howard*, 226 Mich App 528, 538; 575 NW2d 16 (1997). Whether the waiver was voluntary and whether it was knowing and intelligent are two separate questions. *Colorado v Spring*, 479 US 564, 573; 107 S Ct 851; 93 L Ed 2d 954 (1987); *Howard, supra*. A waiver will be found to be knowing and intelligent if the defendant understood both the "basic privilege guaranteed by the Fifth Amendment," i.e., that he could remain silent and consult with counsel, and the consequences of the decision to abandon the privilege and speak freely to the police, i.e., that anything he said could be used against him. See *Spring, supra* at 573-575; *People v Cheatham*, 453 Mich 1, 28-29 (Brickley, C.J., and Riley, J.), 44 (Weaver, concurring); 551 NW2d 355 (1996); *People v Garwood*, 205 Mich App 553, 558; 517 NW2d 843 (1994). The question whether a defendant validly waived his *Miranda* rights depends in each case on the totality of the circumstances surrounding the interrogation. *Cheatham, supra* at 27 (Boyle, J., with Brickley, C.J., and Riley, J.), 44 (Weaver, concurring). Although this Court engages in de novo review of the entire record, we will defer to a trial court's factual findings concerning the issue of waiver unless that ruling is clearly erroneous. *Id*. at 29-30 (Boyle, J., with Brickley, C.J., and Riley, J., concurring), 44 (Weaver, concurring).

In this case, the trial court found that Graves was not intoxicated at the time he waived his *Miranda* rights. After reviewing the record, including the testimony of all the police officers who came into contact with Graves both at the scene of the crime and at the sheriff's department, we conclude that the trial court's finding in this regard is not clearly erroneous. The transcript of Graves' taped statement indicates that Harvey did not have any trouble communicating with Graves and that Graves provided appropriate responses to Harvey's questions. The transcript shows that the officer read the advice-of-rights form to Graves and then had Graves himself read the form. Although he refused to sign the form, Graves expressly indicated that he understood the form, that he was willing to then talk to the officer without an attorney and that he just did not want to waive his right to have an attorney present during questioning at some future time. As noted by the trial court, "at no time did [Graves] demonstrate any lack of understanding . . . ." Accordingly, on this record, we conclude that the trial court correctly determined that Graves knowingly and intelligently waived his *Miranda* rights.

In summary, we conclude that the trial court correctly refused to suppress Graves' inculpatory statement.

Next, Graves argues that the trial court's refusal to allow defense counsel to conduct voir dire prevented sufficient facts from being elicited during voir dire upon which to challenge the prospective jurors ability to serve impartially in this high profile case. In making this argument, Graves relies on the plurality opinions of Justice Mallett and Justice Levin in *People v Tyburski*, 445 Mich 606; 518 NW2d 441 (1994). However, even Justice Mallett's plurality opinion in *Tyburski* recognizes that the scope and conduct of voir dire is within the trial court's discretion and that a defendant does not have a right to have counsel conduct voir dire. *Id*. at 619 (Mallett, J., with Cavanagh, C.J., and Levin, J.). Our review of the record in this case reveals that during voir dire the trial court asked questions propounded by

counsel and conducted individual and sequestered voir dire. The trial court allowed counsel to ask questions during sequestered voir dire. The trial court's questions concerning pretrial publicity were sufficiently probing to reveal a factual basis to challenge the potential jurors. The trial court did not rely on the potential jurors' own assessment of whether they could be fair and impartial. Rather, the trial court questioned the potential jurors at length to allow the court to reach its own conclusions concerning bias resulting from pretrial publicity. Accordingly, we conclude that the trial court did not abuse its discretion in the manner in which it conducted voir dire. See, generally, *Tyburski, supra*. We likewise find no merit to Graves' suggestion that the venire was tainted by certain prejudicial answers relating to the pretrial publicity in this case. *People v Bell*, 209 Mich App 273, 277-278; 530 NW2d 167 (1995).

Next, Graves argues that the trial court erred in refusing to give CJI2d 7.2 (Murder: Defense of Accident [Not Knowing Consequences of Act]). A trial court is required to give a requested instruction except when the theory is not supported by the evidence. *People v Mills*, 450 Mich 61, 81; 537 NW2d 909, modified and remanded 450 Mich 1212 (1995). Graves contends that there was evidence admitted at trial that supported his requested instruction on the theory of accident. However, in support of this argument, Graves provides this Court with only three citations to record evidence. Specifically, Graves cites to the evidence of his statement in which he admitted giving Yorks a straight, white-handled, sharp object that was "like a knife." Graves also cites to the testimony of a witness that at some point during the incident he heard a voice, allegedly Graves' voice, say "If you don't stop you're going to kill him." However, rather than finding that this evidence supports the defense of accident, we agree with the prosecution that this evidence indicates that there was nothing accidental about the boy's death and that Graves was aware that the boy would probably die or suffer great bodily harm. See CJI2d 7.2. Graves also cites to the testimony of the same witness that at some point during the incident it sounded like there were a lot of people in the boy's home because there was a lot of running around upstairs and downstairs. However, we fail to understand how this testimony provides evidence for the defense of accident. Accordingly, we conclude that the trial court correctly denied Graves' requested instruction on the defense of accident.

Next, Graves contends that he was denied his right to a fair trial where the media was allowed to videotape the trial proceedings for television broadcast over the objections of defendants, their families and the jury. However, whether the media shall be allowed in the courtroom does not depend on the lack of an objection by defendants, their families or the jury. Rather, media coverage in the courtroom is controlled by AO 1989-1, which provides that film or electronic media coverage shall be allowed upon request in all court proceedings unless the trial court finds in the exercise of discretion that the fair administration of justice requires otherwise. See 432 Mich cxii. On review, a defendant must show that his right to a fair trial was prejudiced by the presence of the media. *Chandler v Florida*, 449 US 560, 581-581; 101 S Ct 802; 66 L Ed 2d 740 (1981). For instance, a defendant could establish prejudice by showing "that the presence of cameras impaired the ability of the jurors to decide the case on only the evidence before them or that the[] trial was affected adversely by the impact on any of the participants of the presence of cameras and the prospect of broadcast." *Id*. at 581.

In this case, defendant contends that he was prejudiced because the jury was so focused on the cameras that it was unable to focus on the trial and the presentation of the evidence. However, in support of this contention, defendant notes only that on the second day of trial, a juror expressed a concern about cameras in the courtroom. The trial court responded to this concern by stating that the cameras "are not to take pictures of any jurors, they are to be focused solely on the witness stand, and they would be inconspicuous to the jury . . . ." The court also instructed the jury to be careful concerning the news programs they watched and to allow family members to peruse the newspaper first. Defendant also notes that on the third day of trial, another juror interrupted defense counsel's opening statement to inquire whether the camera was focusing on the jury. The court again explained that the cameras were not, and would not, be focused on the jury. Although the interruption of counsel's opening statement was somewhat unusual, the incidents relied on by defendant to establish prejudice were isolated, minor, brief and appropriately handled by the trial court. Moreover, defendant has failed to show that the cameras posed a problem once the actual evidentiary portion of the trial commenced. Accordingly we conclude that defendant has failed to establish that the presence of cameras in the courtroom denied him a fair trial.

Next, Graves contends that he was denied a fair trial where the court allowed members of the media to remove exhibits (photographs of each defendant) from the prosecution table, tape these exhibits to the swinging door of the jury box, and film these exhibits for television broadcast. However, the jury was not present in courtroom when this occurred. Although it appears that Yorks' photograph was broadcast, there is no indication that Graves' photograph was actually broadcast. Finally, defendant does not allege that any juror violated the court's instructions and saw any such broadcast. Accordingly, we find no abuse of discretion by the trial court, *In re People v Atkins*, 444 Mich 737, 739; 514 NW2d 148 (1994), or denial of the right to a fair trial on this ground.

Next, Graves contends that the trial court abused its discretion in allowing the jury to have a copy of the transcript of the audio tape of Graves' statement while it listened to this tape where the accuracy of the transcript was never established to any degree of certainty. We make clear that under the circumstances of this case we do not necessarily disapprove of the manner in which the trial court handled defense counsel's objection to the accuracy of the transcript, made as it was on the eleventh day of trial. Rather, we assume for purposes of analysis only that the trial court's handling of this issue did not comply with the procedures set forth in *People v Lester*, 172 Mich App 769, 776; 432 NW2d 433 (1988) (requiring a trial court to independently ensure the accuracy of a transcript of a tape recording in the absence of a stipulation). However, even assuming such preserved nonconstitutional error, we note that defense counsel conceded below that he had studied the tape for a great period of time and that except for the nine or ten inaccuracies in the transcript that he identified and that were corrected before the transcript was given to the jury he could not specifically identify any other inaccuracies in the transcript. Even on appeal, defendant fails to specify any further inaccuracies in the transcript that were not corrected below. Most significantly, the jury listened to the actual tape while it followed along with the transcript. Thus, on this record, we are satisfied that it is highly probable that any preserved nonconstitutional error by the court did not affect the verdict. *People v Graves*, 458 Mich 476, 487; 581 NW2d 229 (1998).

We briefly address Graves' remaining issues. In deciding to admit certain photographs, the trial court conducted the appropriate evidentiary analysis. We find no error. See, generally, *Mills, supra*. At the preliminary examination, Graves stipulated that his statement supplied enough factual detail to support a finding of probable cause with respect to the charge of felony murder. The subsequent suppression hearing focused only on the admissibility of this statement. Thus, we conclude that the trial court did not err in denying Graves' motion to quash. *People v Northey*, 231 Mich App 568, 574; ___ NW2d ___ (1998). Finally, viewing the evidence in the record at the time Graves moved for a directed verdict in a light most favorable to the prosecution, we conclude that there was sufficient evidence from which a rational trier of fact could have found that Graves, either as a principal or as an aider and abettor, was guilty beyond a reasonable doubt of the crimes of first-degree premeditated murder and first-degree felony murder. *People v Marsack*, 231 Mich App 364, 370-371; 586 NW2d 234 (1998); *People v Turner*, 213 Mich App 558, 566-568; 540 NW2d 728 (1995). Thus, the trial court did not err in denying Graves' motion for a directed verdict. *People v Lemmon*, 456 Mich 625, 633-634; 576 NW2d 129 (1998).

In summary, in docket number 191052, we affirm.

Defendant Yorks

Yorks first argues that the trial court erred in failing to suppress statements he made at the scene of the crime and the sheriff's department. Yorks contends that these statements should have been suppressed because he was too intoxicated at the time he made these statements to have voluntarily, knowingly and intelligently waived his *Miranda* rights.

We have previously stated the law in this opinion concerning the issue whether a defendant knowingly and intelligently waived his *Miranda* rights. The determination whether a defendant's waiver was voluntary in the *Miranda* context is the same as the determination whether a defendant's statement itself was voluntary in the Fourteenth Amendment confession context. *Colorado v Connelly*, 479 US 157, 169-170; 107 S Ct 515; 93 L Ed 2d 473 (1986). Whether a defendant's statement was involuntary in the Fourteenth Amendment confession context depends on the totality of the circumstances. *Culombe v Connecticut*, 367 US 568, 602; 81 S Ct 1860; 6 L Ed 2d 1037 (1961); see also *People v Sexton*, 458 Mich 43, 67-68; 580 NW2d 404 (1998) (citing *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 [1988]). In *Cipriano, supra*, our Supreme Court, citing *Culombe*, enumerated a number of factors that may be considered in determining whether a defendant's statement was involuntary:

> In determining whether a statement is voluntary, the trial court should consider, among other things, the following factors: the age of the accused; 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 the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused

was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse.

However, above all else, "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment." *Connelly, supra* at 167. The fact that a defendant has a deficiency will not render a statement involuntary within the meaning of due process unless the deficiency is exploited by the police with coercive tactics. *Id*. at 165-167; see also *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998).

The voluntariness of a statement is a question for the trial court. *Sexton, supra* at 68. An appellate court must give deference to a trial court's factual findings at a suppression hearing and will not reverse such findings unless they are clearly erroneous. *Arizona v Fulminante*, 499 US 279, 287; 111 S Ct 1246; 113 L Ed 2d 302 (1991); *Cheatham, supra* at 30 (Boyle, J., with Brickley, C.J., and Riley, J., concurring), 44 (Weaver, concurring); *Howard, supra* at 543. However, because the ultimate issue of voluntariness is a legal question, an appellate court must nevertheless examine the entire record and make an independent determination of voluntariness. *Fulminante, supra*; *Sexton, supra*; *Howard, supra*.

In this case, the trial court found that Yorks was not intoxicated. After reviewing the record, including the testimony of all the police officers who observed Yorks that morning, whom the trial court found credible, we conclude that the trial court's finding in this regard was not clearly erroneous. Where there was no intoxication for the police to exploit and where Yorks does not allege any other coercive conduct by the police, we conclude that the trial court correctly determined that Yorks voluntarily waived his *Miranda* rights. We note also that Yorks was given his *Miranda* rights several times and indicated several times that he understood his rights. There is likewise no indication that Yorks had any trouble communicating with any of the officers. We thus conclude that the trial court did not err in determining that Yorks knowingly and intelligently waived his *Miranda* rights. Accordingly, the trial court did not err in denying Yorks' motion to suppress.

Next, Yorks argues that his statements to the police should have been suppressed because the police failed to electronically record these statements, thereby denying him due process of law under the Michigan Constitution. However, this Court recently rejected this precise argument in *Fike, supra* at 183-186.

Finally, Yorks raises the same challenge to the manner in which the trial court conducted voir dire as that raised by Graves. For the reasons stated in our previous discussion of this issue, we reject Yorks' challenge in this regard.

In summary, in docket number 191054, we affirm.

/s/ Barbara B. MacKenzie
/s/ Helene N. White
/s/ Michael R. Smolenski

[1] Specifically, the relevant portion of this transcript is as follows:

> *Officer Harvey*: Time is 8:40 a.m. Date is October 16, 1994. Present are myself, detective sergeant Harvey, officer Spadafore of the Oxford Police Department and Jason Graves.
>
> Jason, we've sat down and we've talked for a couple minutes and I've just explained to you what I do for a living and I told you I was going to set some parameters down, okay. One of those parameters being, that whatever I say here, whatever dealings I have with you, are going to be the truth. They will be nothing but the truth. They'll be no misleading. I'm not going to color, I'm not going to gloss things over. I'm not going to trick you, okay. Um . . . it's just fair that way because whatever . . . whatever we do here, we answer for later on. We have to explain later on, and I explained to you about facts and about why. The element of why. Why something occurs. How could this have occurred? Okay. Um . . . I want to ask specific questions, I don't know. Some of the questions I already know the answers to, I'm going to ask them to see if you're telling me the truth, okay?
>
> *Defendant Graves*: Alright.
>
> *Officer Harvey*: Some of them I'm not going to know. You are going to have to tell me. I can't say what went on inside of Jason's mind, only Jason can do that. Is that fair enough?
>
> *Defendant Graves*: Yes.
>
> *Officer Harvey*: Alright, do you feel more comfortable now that we have this on tape and . . .
>
> *Defendant Graves*: It doesn't matter.
>
> *Officer Harvey*: Yeah, it does . . . Yeah, it does.
>
> *Defendant Graves*: I can write it, and I can . . . (Inaudible)
>
> *Officer Harvey*: No, but we may do that later on. Before we ask specific questions, Jason, I have to do this and I believe it's already been done once before tonight. Okay, but I want to do it one more time. This is an advice of rights. This is the same thing I got to tell anybody whenever I speak to them and ask them specific questions about an incident.
>
> *Defendant Graves*: Alright.

Officer Harvey: Okay. Before we may ask you any questions you must understand your rights. You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to talk to a lawyer for advise [sic] before we ask you any questions and to have him with you during questioning. If you cannot afford a lawyer one will be appointed for you for any questioning if you wish. If you decide to answer questions now, without a lawyer present, you still have the right to stop answering at anytime. You also have the right to stop answering anytime until you talk to a lawyer. Those are your rights.

Below here is a paragraph waiver of rights. I have read this statement of my rights and I understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me.

That pretty well straight forward English? No problems?

Defendant Graves: No problems.

Officer Harvey: Do you know what coercion is ? What is it?

Defendant Graves: Coercion? Say the word again.

Officer Harvey: Coercion.

Defendant Graves: What?

Officer Harvey: Okay. I think you do but just don't know how to put it. You know what it is, but you can't explain it.

Defendant Graves: I can't explain it.

Officer Harvey: What coercion is is, me forcing you to do something, not through physical violence.

Defendant Graves: In any form.

Officer Harvey: Right. It's another form, it's a, it's a psychological form. It's a manipulation, okay. I'm not here playing games. I'm not here . . . There are no threats done, what so ever. Um . . . and I'm not forcing you to do anything psychologic [sic]. I'm not playing games in your head. Is that fair enough . . .

Defendant Grave: Yes.

Officer Harvey: Uh . . . definition? Okay, why don't you read this over.

Defendant Graves: Just like, right here?

Officer Harvey: Yup, just like right there. This is probably a little bit clearer form. Okay?

Defendant Graves: Uh-huh.

Officer Harvey: Alright, did you have any problems with any of that?

Defendant Graves: No.

Officer Harvey: Okay. At this time, when we go into the why's, are you willing to talk to me? You can stop me at any time that you feel uncomfortable.

Defendant Graves: I'm willing to talk, but I don't want to sign this paper cause I'd like to have a lawyer, but I will answer any questions, but . . .

Officer Harvey: You don't want to sign that right now.

Defendant Graves: I want . . .

Officer Harvey: That's fine, you don't have to sign it.

Defendant Graves: I want to, I have the right to still have a lawyer?

Officer Harvey: Sure, sure. The question is, Jason, are you willing to talk to me now and then talk to a lawyer later?

Defendant Graves: Yes.

Officer Harvey: Okay. You don't need to sign that, I just need to know that you understand all that.

Defendant Graves: Right. I understand it.

Officer Harvey: Okay.

Defendant Graves: I just don't want to waive my right to not have a lawyer at any particular time during questioning.

Officer Harvey: That's fine, and at any time that you feel uncomfortable with me or uncomfortable with the situation, you can always stop me. Is that fair enough?

Defendant Graves: I don't feel uncomfortable.

Officer Harvey: Okay, that's fine.