STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NATHAN BELL,

Defendant-Appellant.

UNPUBLISHED
August 10, 1999

No. 207548
Genesee Circuit Court
LC No. 97-000553 FC

Before: Smolenski, P.J., and Gribbs and O'Connell, JJ.

PER CURIAM.

Defendant was convicted following a jury trial of eight counts related to the murders of Sheila Jones and her two children, seven-year-old Darquelle Ray and four-year-old Shawanna Ray as follows: count I, first-degree murder of Sheila Jones, MCL 750.316(1)(a); MSA 28.548(1)(a); count II, first-degree murder of Darquelle Ray, MCL 750.316(1)(a); MSA 28.548(1)(a); count III, first-degree felony murder of Darquelle Ray, MCL 750.316(1)(b); MSA 28.548(1)(b); count IV, first-degree murder of Shawanna Ray, MCL 750.316(1)(a); MSA 28.548(1)(a); count V, first-degree felony murder of Shawanna Ray, MCL 750.316(1)(b); MSA 28.548(1)(b); count VI, first-degree home invasion of a dwelling, MCL 750.110a(2); MSA 28.305(a)(2); count VII, disinterment and mutilation of Sheila Jones' dead body, MCL 750.160; MSA 28.357; and, count VIII, unlawful driving away of a motor vehicle belonging to another, MCL 750.413; MSA 28.645. We affirm, but remand for resentencing.

The evidence presented at trial established that on or about September 26, 1996 defendant and Dante Davis participated in the stabbing and beating death of Sheila Jones at Davis' residence on Dartmouth Street in Flint. Then, defendant and Davis went to Jones' house on 2923 Winona Street, where defendant participated in the stabbing deaths of her two children. Defendant subsequently stole a van in which he and Davis transported Jones' body to a park, where they attempted to burn the body. After defendant was arrested, he gave the authorities two incriminating statements on October 2, 1996 and a third incriminating statement on October 5. Defendant subsequently moved to suppress his statements. The trial court denied defendant's motion after a *Walker*[1] hearing in which it determined

that defendant made the statements voluntarily. The prosecutor presented defendant's October 5 statement as evidence at trial, but did not present either of defendant's October 2 statements. The jury convicted defendant on all counts.[2] After a juvenile sentencing hearing, the trial court determined to sentence defendant as an adult to life imprisonment as to each of counts I-V, 13 to 20 years' imprisonment as to count VI, 6 to 10 years' imprisonment as to count VII, and 3 to 5 years' imprisonment as to count VIII. Defendant appeals as of right.

I

In his first issue on appeal, defendant contends that his October 5 confession, although initiated by him, was the "poisonous fruit" of an earlier violation of his right to remain silent as established in *Edwards v Arizona*, 451 US 477; 101 S Ct 1880; 68 L Ed 2d 378 (1981). We disagree. This Court reviews the record of an appeal from a ruling on a motion to suppress evidence of a confession de novo, but will not disturb the trial court's factual findings unless the findings are clearly erroneous. *People v Kowalski*, 230 Mich App 464, 471-472; 584 NW2d 613 (1998).

Defendant's contention is based upon three suppositions: (1) the October 2 interrogation which occurred after defendant asserted his right to speak with an attorney violated his constitutional rights recognized in *Edwards*; (2) his subsequent confession on October 5 should have been suppressed as the "poisonous fruit" of the October 2 *Edwards* violation; and (3) he is entitled to a new trial because the admission of his confession was not harmless. Defendant's first supposition presents the threshold issue in this case of whether the police activity on October 2 constituted an interrogation in violation of defendant's Fifth Amendment privilege against compulsory self-incrimination and his Sixth Amendment right to counsel in violation of *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966) and *Edwards*. Under the *Miranda* decision, if a suspect under interrogation states that he wants an attorney, the interrogation must cease until an attorney is present. *Miranda, supra* at 474. "If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." *Id.* at 475. In *Edwards*, the Supreme Court further restricted the government's ability to interrogate a suspect, holding that an accused who "expresse[s] his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." *Edwards, supra* at 484-485. However, the *Edwards* decision does not prohibit all communication between the police and a suspect who has requested an attorney. *Kowalski, supra* at 478.[3] Rather, the *Edwards* decision prohibits further police-initiated custodial interrogation of the suspect. *Id.* The critical determination for this Court is determining whether the defendant initiated the questioning or whether the defendant's statement was made in response to further interrogation by the police officer. *People v McCuaig*, 126 Mich App 754, 760; 338 NW2d 4 (1983).

In *People v Rowen*, 111 Mich App 76, 80-81; 314 NW2d 526 (1981), we quoted the following definition of interrogation as set forth in *Rhode Island v Innis*, 446 US 291, 300-302; 100 S Ct 1682; 64 L Ed 2d 297 (1980):

> We conclude that the *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police. This focus reflects the fact that the *Miranda* safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police. A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation. But, since the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response. [Emphasis in original; footnotes omitted.]

Furthermore, an interrogation as conceptualized in *Miranda* must reflect a measure of compulsion above and beyond that inherent in the custody itself. *Innis, supra* at 300; *People v Anderson*, 209 Mich App 527, 532-533; 531 NW2d 780 (1995).

In order to determine whether defendant's October 2 statement arose from an improper interrogation, we must review the evidence presented at defendant's *Walker* hearing. While defendant did not testify at the hearing, Flint police officers Gary Elford and Thomas Korabik testified and gave consistent accounts of the events which surrounded defendant's statements. Defendant was arrested in Detroit and transported to Flint, where he met with officers Elford, Korabik and Jawanne Coney on October 2, 1996. Defendant was originally identified as seventeen-year-old Gregory Deshawn Lynch; however, the authorities determined defendant's true identity of sixteen-year-old Nathan Bell and contacted his parents.[4] After the officers read defendant his *Miranda* warnings, defendant requested an attorney and the officers ceased their questioning. However, while in defendant's presence, Elford and Korabik held a brief conversation regarding a statement which Davis gave them earlier in the day implicating defendant as the sole murderer of Jones and her two children. Elford stated that although the conversation was not inadvertent, he directed his remarks to Korabik, not defendant.[5] During the officers' conversation, defendant said that he wanted to talk to them and tell his side of the story. Elford and Korabik told him that they could not ask him any questions unless he waived his right to an attorney, to which defendant responded that he wanted to talk and did not want an attorney. Then, Korabik asked defendant if he wanted to waive his right to an attorney and discuss the matter, to which defendant responded affirmatively.

Defendant proceeded to give a statement for over an hour during which he appeared very calm. After giving his statement, defendant was allowed to read the handwritten report of the so-called "informal interview" prepared by Korabik.[6] After defendant gave his informal interview, Korabik took defendant's formal statement in the presence of two other officers and a stenographer. Although

Korabik did not give defendant new *Miranda* warnings, he asked defendant if he remembered the *Miranda* warnings from the earlier informal interview, to which defendant responded affirmatively and indicated that he wanted to speak with the officers. The formal interview lasted ten to fifteen minutes. Defendant gave his final statement three days later. Elford testified that on October 5, he received a telephone call at home from officer Coney to advise him that defendant wanted to talk to Coney.[7] During the October 5 interview, defendant stated that he initiated the interview by asking the Genesee County deputies to speak with Coney "about some facts that had not come out earlier in the original interview." Elford gave defendant his *Miranda* warnings before the interview and defendant waived his right to have an attorney present. During the October 5 interview, defendant admitted his involvement in the murders and other crimes with which he was convicted.

We conclude that the police did not violate defendant's right to counsel under *Edwards* because their remarks did not constitute an interrogation as defined in *Innis*. The conversation between Elford and Korabik did not contain a measure of compulsion above and beyond that inherent in defendant's custody and neither called-for nor elicited an incriminating response. While Elford and Korabik may have expected defendant to contemplate their October 2 conversation, or discuss the conversation with his attorney at a later date, the officers had no reasonable expectation that defendant would make an instantaneous response to their conversation by waiving his right to counsel and confessing to the murders and other crimes. Given defendant's calm demeanor and his use of an alias, it would not be unreasonable for the police to consider defendant as someone experienced with the criminal justice system who would not make a spontaneous confession.

Defendant relies on *Edwards*, *People v Paintman*, 412 Mich 518; 315 NW2d 418 (1982) and *Kowalski* to support his contention that he was interrogated because Elford and Korabik confronted him with Davis' confession. However, all of these cases are distinguishable. In *Paintman*, a consolidated appeal, the police elicited incriminating statements from the two defendants, Paintman and Conklin, several days after they asserted their right to counsel. *Paintman, supra* at 526-528. Both Paintman and Conklin had intense pressure placed upon them before they gave statements. *Id.* at 526-528. Paintman was an admitted heroin addict who suffered from withdrawal symptoms in the days preceding his statement, which he made three days after he twice asserted his right to counsel. *Id.* at 527. Furthermore, the police played him the taped statements made by his accomplices before he confessed. *Id.* at 526-527. Conklin made his statement nine days after his arrest and initial request for counsel. *Id.* at 526. In addition, the officers knew that Conklin was represented by an attorney when he confessed, but did not contact his attorney. *Id.* Furthermore, the police placed Conklin in a room with his younger alleged accomplice to "clear things up" just prior to making his statement. *Id.* at 527. Unlike the defendants in *Paintman*, defendant in the present case was not confronted by either his codefendant or a tape recorded statement given by his codefendant after being incarcerated for a number a days. Furthermore, there is no evidence that defendant had symptoms of drug withdrawal like Paintman.

In *Edwards, supra* at 479, the defendant (Edwards) invoked his right to counsel following some police questioning and the interrogation ceased. The next morning, two detectives went to the county jail and asked to see Edwards, but he refused to speak with them. *Id.* However, the guard told

Edwards that "he had" to talk and took him to meet with the detectives. *Id.* The detectives informed Edwards of his *Miranda* rights and he subsequently gave a statement implicating himself in the crime after listening to the taped statement of his alleged accomplice who had implicated him. *Id. Edwards* is distinguishable from the present case because Elford and Korabik did not visit defendant the day after he requested counsel or advise defendant that he "had to" talk to them. On the contrary, Elford and Korabik initially refused to speak with defendant after he asserted his right to counsel. Furthermore, Elford and Korabik did not confront defendant with a taped statement made by Davis.

Finally, our holding and observations made in *Kowalski* do not apply to the facts in this case. In *Kowalski, supra* at 482, this Court stated that the detective's remark informing the defendant that a codefendant had given a statement was not an interrogation, because the remark did not involve any express questioning but merely described an event that transpired since the detective had last seen the defendant. While we determined that the detective's remark was not likely to elicit an incriminating response, we found it significant that the detective did not attempt to discuss with the defendant either the codefendant's statement or the effect that the codefendant's statement might have on the defendant's case, which suggests that we may have reached a different result if the detective had held such discussions. *Id.* However, our observations made in *Kowalski* do not apply to the present case because Elford and Korabik did not discuss Davis' statement with defendant; rather, they discussed the statement among themselves. A conversation between police officers which does not invite a response from the defendant does not constitute an interrogation. *Innis, supra* at 302. See also *Rowen, supra* at 79-82 and *People v Benjamin*, 101 Mich App 637, 649; 300 NW2d 661 (1980), in which we held that a police officer's action of placing evidence within defendant's view was not the functional equivalent of an interrogation under *Innis*.

Under the facts in this case, we conclude that defendant was not interrogated after he invoked his right to have counsel present and that no *Edwards* violation occurred. Accordingly, the trial court did not err when it denied defendant's motion to suppress his statements. Because no interrogation occurred, we find it unnecessary to address defendant's contention that his October 5 confession was the fruit of an earlier violation of his rights under *Edwards*.

II

Next, defendant contends that the trial court erred when it sentenced him on two counts of felony murder in addition to the underlying felony of home invasion. We agree. A double jeopardy issue presents a question of law which this Court reviews de novo. *People v Lugo*, 214 Mich App 699, 705; 542 NW2d 921 (1995). We will review this unpreserved issue because it involves a significant constitutional question. *Id*. In the present case, the jury convicted defendant of two counts of felony murder, Counts III and V, with the underlying felony for both counts being first-degree home invasion. In addition, the jury convicted defendant of first-degree home invasion as a separate crime in Count VI. The trial court subsequently sentenced defendant on both felony murder counts and the first-degree home invasion count.

The Double Jeopardy Clause, US Const Amend V, protects a defendant from being sentenced on both felony murder and the underlying felony because the underlying felony is a necessary element of

felony murder. *People v Wilder*, 411 Mich 328, 342-347; 308 NW2d 112 (1981). In the factually similar case of *People v Warren*, 228 Mich App 336, 354-355; 578 NW2d 692 (1998), lv gtd 460 Mich 851; ___ NW2d ___ (1999) in which the defendant was convicted of both felony murder and home invasion, this Court noted that convictions of both felony murder and the underlying felony offend double jeopardy protections and that "[w]hen a defendant is erroneously convicted of both felony murder and the underlying felony, the proper remedy is to vacate the conviction and sentence for the underlying felony." In the present case, the trial court violated defendant's constitutional right to avoid multiple punishments as provided under the Double Jeopardy Clause when it sentenced defendant on both the felony murder counts and the underlying felony count. *Id.* Accordingly, we direct the trial court to vacate defendant's conviction for home invasion.

III

Finally, defendant raises another double jeopardy issue when he contends that he cannot be convicted and punished for both the felony murder and the premeditated murder of each of the two children in this case. We agree. While no objection is required to preserve a double jeopardy claim for appeal, *Lugo, supra* at 705, we note that defendant objected at both his trial and his sentencing to his conviction on the duplicative murder counts for the deaths of the two children.

This Court recently resolved this issue in *People v Bigelow*, 229 Mich App 218; 581 NW2d 744 (1998) ("*Bigelow II*"), in which a conflict panel was convened pursuant to MCR 7.215(H)(3) to resolve inconsistent results reached by this Court's vacated opinion in *People v Bigelow*, 225 Mich App 806; 571 NW2d 520 (1997) ("*Bigelow I*") and our earlier decision in *People v Passeno*, 195 Mich App 91; 489 NW2d 152 (1992), overruled in *Bigelow II, supra*. In *Bigelow I*, this Court held that such dual convictions arising from the death of a single victim violate double jeopardy pursuant to *Passeno*, and as a result affirmed defendant's conviction of first-degree premeditated murder and vacated defendant's conviction of felony murder. *Bigelow II, supra*, 229 Mich App 220. However, in *Bigelow I* we also noted that, if permitted, we would have followed *People v Zeitler*, 183 Mich App 68; 454 NW2d 192 (1990) and held that the appropriate remedy for double jeopardy was to modify the defendant's judgment of conviction and sentence to specify that defendant's conviction was for one count and one sentence of first-degree murder supported by two theories, premeditated murder and felony murder. *Id.* The conflict panel in *Bigelow II* resolved the issue in favor of *Bigelow I*, overruled *Passeno*, and directed the trial court to modify the defendant's judgment of sentence to specify that defendant's conviction and single sentence was of one count of first-degree murder supported by two theories: premeditated murder and felony murder. *Id.* at 221-222.

The conflict panel's decision in *Bigelow II, supra*, controls the outcome in the present case. Because defendant was convicted and sentenced twice for the murders of Darquelle Jones and Shawanna Jones, his judgment of sentence should be modified to specify that defendant's conviction was for one count and one sentence of first degree murder supported by two theories. Accordingly, we direct the trial court to modify defendant's judgment of sentence for the murder of Darquelle Ray in Counts II and III to specify that defendant's conviction is for one count and one sentence of first-degree murder supported by two theories: premeditated murder and felony murder. Likewise, we direct the trial court to modify defendant's judgment of sentence for the murder of Shawanna Ray in Counts IV

and V to specify that defendant's conviction is for one count and one sentence of first-degree murder supported by two theories: premeditated murder and felony murder.

Affirmed but remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael R. Smolenski
/s/ Roman S. Gribbs
/s/ Peter D. O'Connell

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

[2] Defendant and his co-defendant, Dante Davis, had their trials before the same judge but with separate juries.

[3] While our opinion in *Kowalski* involved events which occurred years before the Supreme Court's opinion in *Edwards*, we nonetheless performed an analysis under the law as it existed after *Edwards* due to the retroactive application of the *Edwards* decision to cases that were pending on "direct appeal" when *Edwards* was decided in 1981. See *Kowalski, supra* at 477, n 5.

[4] Elford testified that they waited four hours for defendant's parents to arrive.

[5] We note that a discrepancy existed between the testimony and Korabik's written report. Korabik testified that the conversation with Elford was to apprise defendant of the statements made against him. While Korabik's written report stated that the officers "explained to [defendant] the statement in which another suspect in this incident made against him," both Elford and Korabik testified that they did not talk to defendant. Officer Coney corroborated Elford's and Korabik's testimony when she testified that the conversation was between the officers.

[6] Elford testified that he believed that defendant corrected part of the statement, and then signed and dated each page.

[7] Defendant had been held at the Genesee County jail since October 2.