STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID ALLEN WALKER,

Defendant-Appellee.

UNPUBLISHED
March 7, 2000

Nos. 208097, 216240
Jackson Circuit Court
LC No. 97-081140-FC

Before: Whitbeck, P.J., and Hoekstra and Owens, JJ.

PER CURIAM.

Defendant was convicted by jury of felonious assault, MCL 750.82; MSA 28.277. The trial court sentenced defendant to five years' probation, of which the first six months were ordered spent in jail. Defendant was later charged with violating his probation. After a hearing, the trial court found that defendant violated his probation because he failed to comply with the requirements of court-mandated counseling, and the court sentenced him to two to four years' imprisonment. Defendant appeals as of right from his underlying conviction and the trial court's order revoking his probation and imposing imprisonment. We affirm.

Defendant argues that his conviction must be reversed because the prosecution lost a videotape which, he claims, constitutes suppression of exculpatory evidence and the presentation of such to the jury would have resulted in an acquittal. We disagree. Where favorable evidence has been disclosed to counsel, but the evidence has been lost or destroyed, the defendant's due process rights are violated only if it is shown that the police or prosecutor acted in bad faith. *Arizona v Youngblood*, 488 US 51, 58; 109 S Ct 333; 102 L Ed 2d 281 (1988); *People v Hunter*, 201 Mich App 671, 677; 506 NW2d 611 (1993). We review a trial court's findings of fact for clear error. MCR 2.613(C).

Here, defendant concedes that he received "full discovery," but that a police officer's oversight in misplacing the videotape of defendant's presence in the store outside of which the victim was accosted constitutes the type of bad faith that was contemplated in *Arizona v Youngblood*. Defendant suggests that the misplacement of the videotape was grossly negligent, but *Youngblood* does not include gross negligence in the definition of bad faith. After a hearing, the trial court did not find bad faith, but found that the videotape was misplaced inadvertently, by mere negligence; there was no conspiracy to

suppress the evidence and deprive defendant a fair trial; photographs from the videotape were still available; and defendant's father's testimony could substitute for the missing videotape. These findings are supported by the record and are not clearly erroneous. In addition, it is not clear that the tapes included exculpatory evidence. Although defendant's father testified that one of the shots on the videotape showed defendant in the store at 2:17 p.m., approximately when the assault occurred, no other testimony or evidence supports this conclusion. A police officer testified that he did not recall times or dates on the photos. To the extent the videotape was exculpatory, defendant's father was able to offer testimony on this issue. No error is shown.

Defendant next contends that the trial court erred in allowing testimony about the statement he made to police because his statement was involuntary. We disagree. In determining whether a confession is voluntary, both the trial court and this Court use a totality of the circumstances analysis. *People v Sexton*, 458 Mich 43, 67-68; 580 NW2d 404 (1998). This analysis applies to confessions made by juveniles as well. *Fare v Michael C*, 442 US 707, 724-725; 99 S Ct 2560; 61 L Ed 2d 197 (1979). "The test of voluntariness is whether, considering the totality of all the surrounding circumstances, the confession is 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 Givans*, 227 Mich App 113, 121; 575 NW2d 84 (1997). The *Givans* Court went on to discuss the factors to be considered in determining the voluntariness of a confession:

> The factors that must be considered in applying the totality of the circumstances test to determine the admissibility of a juvenile's confession include (1) whether the requirements of *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966), have been met and the defendant clearly understands and waives those 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 defendant's personal background, (5) the accused's age, education, and intelligence level, (6) the extent of the defendant's 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 accused was injured, intoxicated, in ill health, physically abused or threatened with abuse, or deprived of food, sleep, or medical attention. *People v Good*, 186 Mich App 180, 189; 463 NW2d 213 (1990). [*Id.*]

This Court reviews the record de novo on reviewing a motion to suppress, but will not disturb the trial court's factual findings unless they are clearly erroneous. *People v Kowalski*, 230 Mich App 464, 471-472; 584 NW2d 613 (1998).

In the present case, police officer Schuette read defendant his *Miranda* rights after defendant and his father appeared at the police station. When Schuette mentioned appointment of counsel, defendant's father asked how counsel was appointed. After explaining the procedure, Schuette asked if they wanted counsel appointed; defendant's father said no, that Schuette could interview defendant. Under these circumstances, we decline to find defendant's father's question to be a request for counsel, as defendant asserts on appeal.

The interview lasted approximately two hours. Schuette asked defendant about his level of education, whether he was under the influence of "anything," and tried to ascertain defendant's mental condition. Defendant was told several times that he would not be arrested that day. They stopped twice during the interview when defendant and his father requested breaks. Nothing in the record supports defendant's claim that he was "bludgeon[ed]" by Schuette.

Defendant argues that his statements were coerced because they were outside his father's presence and in the "coercive atmosphere of the police station" with other officers present. The absence of a parent does not necessarily render a confession involuntary. See *Fare, supra* at 712. Defendant's statements when his father was absent could just as easily be seen as an attempt to avoid letting his father know what he had done. In addition, any interrogation in a police station has coercive aspects to it. *Oregon v Mathiason*, 429 US 492, 495; 97 S Ct 711; 50 L Ed 2d 714 (1977). The coercive atmosphere in this case was not such that it would render a confession involuntary.

Defendant also argues that Schuette made promises to elicit a confession. Schuette had offered to talk with the prosecutor about having defendant sentenced as a juvenile if he cooperated. He also testified, however, that he cautioned defendant and his father that he could not make any promises. In addition, when Schuette made this offer, defendant again denied committing the offense. We decline to find the trial court's findings erroneous on this basis. In summary, defendant's statement was voluntary.

Defendant next argues that the trial court erred by sentencing defendant as an adult, rather than as a juvenile. We disagree. We review a trial court's fact findings for clear error, while the ultimate decision whether to sentence a minor as a juvenile or as an adult is reviewed for abuse of discretion, using the principle of proportionality. *People v Perry*, 218 Mich App 520, 540; 554 NW2d 362 (1996), aff'd on other grounds 460 Mich 55 (1999).

MCL 769.1(3); MSA 28.1072(3) lists a total of six factors that must be considered by a court in deciding whether to sentence a juvenile as an adult. As required by statute, the court made the appropriate findings, including: (1) the offense was a "serious matter" because there seemed to be "some sexual content" to the offense because defendant approached a total stranger of the opposite sex, threatened her with a knife, and told her to move over in her car; (2) he appeared to linger in the store watching the victim, indicating some planning to assault her; (3) he had no prior juvenile record; (4) there were programs available for defendant in both the juvenile and adult systems; (5) defendant could be placed on probation for five years as an adult, but supervised in the juvenile system for only twenty-two months; (6) twenty-two months was not a sufficient time to adequately assess or supervise defendant; and (7) defendant could be in a limited form of supervision whether sentenced as a juvenile or an adult. It then concluded that defendant should be sentenced as an adult.

Defendant challenges most of these findings. Defendant argues that the court erred in considering the assault a serious matter. We disagree. Defendant brandished a sharp object at the victim and attempted to force his way into her car, in what seemed to be a random attack. The court's finding was not clearly erroneous. As for defendant's culpability, the court concluded that defendant had engaged in some sort of planning. Given the victim's testimony that she had seen defendant in the store before the assault, staring at her, we cannot conclude that this finding was clearly erroneous.

Defendant points to his lack of a juvenile record; while this is to be given greater weight in the court's determination, the seriousness of the offense is also to be given greater weight. MCL 769.1(3); MSA 28.1072(3).

Defendant argues that the court clearly erred in concluding that twenty-two months was not a long enough time to supervise him. We disagree. Even the caseworker who testified about the availability of counseling in the juvenile system characterized defendant's prospects as guarded.[1] Given that that caseworker had reservations about defendant's possibilities for rehabilitation in the twenty-two months available, we cannot conclude that the trial court's finding was clearly erroneous.

Defendant contends that because he was amenable to treatment as a juvenile, he should have been sentenced as a juvenile. However, the court actually found that defendant was not amenable to sentencing as a juvenile, because of the short time he would be in the juvenile system. We find no clear error. In summary, upon review of the record, we conclude that none of the challenged findings were clearly erroneous, and that the trial court did not abuse its discretion in sentencing defendant as an adult.

Finally, defendant argues that his sentence of two to four years' imprisonment was disproportionate. We review a defendant's sentence for an abuse of discretion. *People v Cervantes*, 448 Mich 620, 626; 532 NW2d 831 (1995); *People v Fetterley*, 229 Mich App 511, 525; 583 NW2d 199 (1998). A sentence constitutes an abuse of discretion if the sentence violates the principle of proportionality by being disproportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 635-636, 654; 461 NW2d 1 (1990); *People v Paquette*, 214 Mich App 336, 344-345; 543 NW2d 342 (1995). "[T]he sentencing guidelines do not apply to sentencing for probation violations." *People v Williams*, 223 Mich App 409, 411; 566 NW2d 649 (1997). The record reveals that defendant assaulted a female while brandishing a knife-like weapon in a situation that suggested a sexual motive, and thereafter he refused to comply with the requirements of the counseling program that was a condition of his probation. Under these circumstances, the sentence imposed for the conviction of probation violation regarding the underlying offense of felonious assault is proportionate.

Affirmed.

/s/ William C. Whitbeck
/s/ Joel P. Hoekstra
/s/ Donald S. Owens

[1] We are aware that our Supreme Court found in *People v Dunbar*, 423 Mich 380, 397; 377 NW2d 262 (1985), that a probate court erred in waiving jurisdiction over a juvenile for trial on a nonparolable capital offense because the juvenile system would not be able to rehabilitate him in the time it would have jurisdiction over the juvenile. However, the present case shows an individual who could be supervised for five years in the adult system, as opposed to only twenty-two months in the juvenile system. As such, the facts of this case more resemble those of *People v Dilling*, 222 Mich App 44, 52-53; 564 NW2d 56 (1997), in which this Court found no abuse of discretion in sentencing the defendant as an adult.