STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT M. HARRINGTON,

Defendant-Appellant.

UNPUBLISHED
May 19, 2000

No. 202467
Recorder's Court
LC No. 82-003790

Before: Hood, P.J., and Gage and Whitbeck, JJ.

PER CURIAM.

At a retrial,[1] defendant was convicted after a jury found him guilty but mentally ill, MCL 768.36; MSA 28.1059, of second-degree murder, MCL 750.317; MSA 28.549, five counts of assault with intent to murder, MCL 750.83; MSA 28.278, arson, MCL 750.73; MSA 28.268, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The trial court sentenced him to concurrent prison terms of seventy-five to one hundred years for the second-degree murder conviction,[2] fifty to ninety years for each assault conviction, five to ten years for the arson conviction, and a consecutive two-year term for the felony-firearm conviction. We affirm.

Defendant first contends that the trial court erred in denying his motion to suppress his statement to arson investigators. Statements made during a custodial interrogation are inadmissible unless the defendant voluntarily, knowingly and intelligently waives his Fifth Amendment rights. Whether a waiver of *Miranda*[3] rights is voluntary and whether an otherwise voluntary waiver is knowing and intelligent are separate questions. *People v Howard*, 226 Mich App 528, 538; 575 NW2d 16 (1997).

In reviewing the trial court's determination of a statement's voluntariness, this Court examines the entire record and makes an independent determination. *People v Gould*, 225 Mich App 79, 88; 570 NW2d 140 (1997). This court will not disturb the trial court's findings of fact unless they are clearly erroneous. *People v LoCicero (After Remand)*, 453 Mich 496, 500; 556 NW2d 498 (1996). Factual findings qualify as clearly erroneous if, after 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). Ordinarily, however, this Court will defer to the trial court's resolution of factual issues, especially when the resolution involves the credibility of witnesses whose testimony conflicts.

People v Cartwright, 454 Mich 550, 555; 563 NW2d 208 (1997); *People v Burrell*, 417 Mich 439, 448; 339 NW2d 403 (1983).

The issue of voluntariness is to be determined solely by examining police conduct and cannot be resolved in the defendant's favor absent some police coercion. *Howard, supra*; *People v Garwood*, 205 Mich App 553, 555; 517 NW2d 843 (1994). The test of voluntariness is whether, considering the totality of the circumstances, the statement represents the "'product of an essentially free and unconstrained choice'" or whether it resulted from an "'overborne'" will. *People v Cipriano*, 431 Mich 315, 333-334; 429 NW2d 781 (1988), quoting *Columbe v Connecticut*, 367 US 568, 602; 81 S Ct 1860; 6 L Ed 2d 1037 (1961). 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 prestatement detention; 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. The absence or presence of any one of these factors is not necessarily conclusive on the issue of voluntariness. The ultimate test remains whether the totality of the circumstances indicate that the statement was freely and voluntarily made. *Id*. at 334.

In determining whether the defendant knowingly and intelligently waived his *Miranda* rights, courts apply an objective standard. *Garwood, supra* at 557. Applying the objective standard likewise requires consideration of the totality of the relevant circumstances, including the defendant's education, experience, conduct, intelligence, capacity to understand the warnings given, and the credibility of the police officers' testimony. *Howard, supra*; *Garwood, supra*.

Our review of the record convinces us that the trial court correctly determined that defendant voluntarily, knowingly and intelligently waived his rights and offered the statement in question. While defendant apparently now contends that his mental illness precluded him from understanding his rights or making a voluntary and intelligent waiver, he did not produce any evidence of mental illness at the suppression hearing. The trial court cannot have erred by failing to consider unavailable evidence. Moreover, defendant failed to renew his motion to suppress so that he could present additional evidence regarding his mental illness once he had obtained experts willing to testify that he was mentally ill. We thus find no error in the denial of defendant's motion to suppress.

Defendant next asserts that the trial court should have suppressed his statement because it was not electronically recorded. Apart from the fact that defendant failed to preserve this issue for appeal, *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v Grant*, 445 Mich 535, 546, 553; 520 NW2d 123 (1994), it is without merit. *People v Fike*, 228 Mich App 178, 183-186; 577 NW2d 903 (1998).

Defendant also argues that the guilty but mentally ill statute is unconstitutional. Our Supreme Court, however, ruled otherwise in *People v Ramsey*, 422 Mich 500; 375 NW2d 297 (1985), which decision we are required to follow. *Mahaffey v Attorney General*, 222 Mich App 325, 339; 564

NW2d 104 (1997). We further note that the case that defendant urges us to follow, *People v Robles*, 288 Ill App 3d 935, 951-952; 682 NE2d 194 (1997), was reversed in *People v Lantz*, 186 Ill 2d 243, 246, 251-260; 712 NE2d 314 (1999).

Affirmed.

/s/ Harold Hood
/s/ Hilda R. Gage
/s/ William C. Whitbeck

[1] The retrial was occasioned by this Court's reversal of defendant's previous convictions (guilty but mentally ill of first-degree murder, arson, felony-firearm and five counts of assault with intent to murder) on the basis that the trial court had improperly instructed the jury with respect to the definition of legal insanity. *People v Harrington (On Remand)*, unpublished opinion per curiam of the Court of Appeals, issued December 12, 1995 (Docket No. 188839); *People v Harrington*, unpublished opinion per curiam of the Court of Appeals, issued March 13, 1995 (Docket No. 149417).

[2] The sentence for second-degree murder was later vacated and defendant was resentenced to a term of sixty-six years and eight months to one hundred years' imprisonment.

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