STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEFFERY LABELL SEAY,

Defendant-Appellant.

UNPUBLISHED
August 25, 2000

No. 210929
Eaton Circuit Court
LC No. 97-020162-FC

Before: Meter, P.J., and Griffin and Talbot, JJ.

PER CURIAM.

Defendant appeals by right from his conviction by a jury of first-degree, premeditated murder, MCL 750.316(1)(a); MSA 28.548(1)(a), and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The trial court sentenced defendant to life imprisonment for the murder conviction and to two years' imprisonment for the felony-firearm conviction. We affirm.

Defendant first argues that the trial court should have suppressed an oral statement he made to the police because the totality of the circumstances, including a pre-arraignment delay, rendered it involuntary. "When reviewing a trial court's determination of voluntariness, this Court must examine the entire record and make an independent determination." *People v Howard*, 226 Mich App 528, 543; 575 NW2d 16 (1997). We must give deference, however, to the trial court's assessment of the credibility of the witnesses and the weight of the evidence, and we can reject the court's findings only for clear error. *Id*. The decision of the trial court will not be disturbed unless it is clearly erroneous. *Id.* A finding is clearly erroneous if 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).

In *People v Cipriano*, 431 Mich 315, 333-334; 429 NW2d 781 (1988), the Supreme Court stated the following regarding determinations of voluntariness:

> In accordance with the approach taken by the federal courts and a majority of the states, we believe "unnecessary delay" in arraignment is only one of the factors that should be considered in evaluating the voluntariness of a confession. The test of voluntariness should be 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. . . ." [*Culombe v Connecticut*, 367 US 568, 602; 81 S Ct 1860; 6 L Ed 2d 1037 (1961).] 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*.
>
> 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. See *Culombe*, *supra*[, 367 US at 602]; *United States ex rel Mattox v Scott*, 372 F Supp 304, 309-310 (ND Ill, 1974), aff'd in part and rev'd in part 507 F2d 919 (CA 7, 1974). See also *Schneckloth v Bustamonte*, 412 US 218, 93 S Ct 2041, 36 L Ed 2d 854 (1973).

Based on an analysis of these factors from *Cipriano*, we do not have a definite and firm conviction that the trial court erred in finding that defendant voluntarily made the statement at issue. At the suppression hearing, one of the interviewing officers testified that defendant (1) told the officers that he was seventeen years old, attended high school, and could read and write; (2) did not appear to be ill or under the influence of alcohol or a controlled substance; and (3) was advised of his rights, which he said he understood and agreed to waive in a signed writing. The officer further testified that he and his colleague offered defendant a recess, as well as water and the use of a restroom, during the interview, that no threats or force were employed, and that the officers detained defendant for only three hours before transporting him to the sheriff's department for arraignment. Defendant did not present any evidence at the suppression hearing to rebut this testimony.

Moreover, and contrary to defendant's contention, the partial transcript of the interview that defendant provides on appeal reveals no improper interrogation techniques. The officers made no *promises* of leniency, see *People v Carigon*, 128 Mich App 802, 810-811; 341 NW2d 803 (1983), and they did not coerce defendant into saying that he shot the victim but merely asked whether he did so. Finally, there was no evidence that defendant was unable to understand his rights or the officers' questions or that the interviewing officers took advantage of defendant's intelligence level. See *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998). The trial court did not err in denying defendant's motion to suppress defendant's statement.

Next, defendant argues that the trial court erred by admitting the preliminary examination testimony of a prosecution witness because (1) the prosecutor failed to exercise due diligence, under MRE 804(a)(5), in locating the witness and ensuring his presence at trial; and (2) the admission of the

preliminary examination testimony failed to protect defendant's right to confront the witnesses against him. See US Const, Am VI; Const 1963, art 1, § 20.

This Court reviews a trial court's decision whether to admit evidence for an abuse of discretion. *People v Briseno*, 211 Mich App 11, 14; 535 NW2d 559 (1995). An abuse of discretion will be found only if an unprejudiced person, considering the facts on which the trial court relied in making its decision, would conclude that there was no justification for the ruling. *Id.* This Court reviews a trial court's finding of due diligence for clear error. *Id.* A trial court's findings are clearly erroneous if this Court is left with a definite and firm conviction that a mistake has been made. *Givans*, *supra* at 119.

Under MRE 804(b)(1), the former testimony of a witness is admissible in a later proceeding if the witness is unavailable to testify and if the party against whom the testimony is being admitted had an opportunity to cross-examine the witness at the earlier proceeding. The witness is "unavailable" when he is absent from the proceeding and the proponent of his statement has used due diligence to procure his attendance. MRE 804(a)(5); *Briseno*, *supra* at 14.

Here, we are not left with a definite and firm conviction that the trial court made a mistake in ruling that the prosecution exercised due diligence in attempting to procure the witness' testimony at trial. The witness was served with a subpoena to appear in court. When he expressed his reluctance to testify to a police officer, the officer told him that he had been ordered by the court to testify and that he was required to appear. When the witness did not appear on the first day of trial, the officer contacted his residence and spoke with his family members, who informed the officer that the witness was on his way back from Chicago. The officer again tried to locate the witness at his residence the following day (the second day of trial), after the court issued a bench warrant against him for failing to appear, but the witness was not home and no one at the residence knew his whereabouts. The officer informed an occupant of the resident that a bench warrant had been issued for the witness' failure to appear in court.

Moreover, the prosecutor spoke with the witness on the telephone on the second day of trial. She told him that he was required to testify, and she agreed to call other witnesses beforehand so that he would not look like the only person incriminating defendant. The witness agreed to testify, but then did not appear for trial.

The prosecutor and the police made reasonable, good faith efforts to locate the witness and obtain his testimony. See *Briseno*, *supra* at 14. They visited and telephoned his residence, spoke with his family members regarding his whereabouts, see *People v Conner*, 182 Mich App 674, 681; 452 NW2d 877 (1990), procured a bench warrant for his arrest, and made reasonable arrangements with the witness after making telephone contact with him. The trial court did not clearly err in ruling that the MRE 804(a)(5) due diligence standard had been fulfilled.

Additionally, defendant's claim that the admission of the witness' preliminary examination testimony violated his right of confrontation is without merit. Defendant had sufficient opportunity and incentive to cross-examine the witness at the preliminary examination, see *People v Adams*, 233 Mich App 652, 659; 592 NW2d 794 (1999), and the former testimony was admitted under a firmly rooted

exception to the hearsay rule, thereby satisfying the requirements of the Confrontation Clause. See *People v Meredith*, 459 Mich 62, 67-71; 586 NW2d 538 (1998), and *Adams, supra* at 657-659. We find no merit in defendant's claim that the cross-examination at the preliminary examination was inadequate and failed to protect defendant's right of confrontation. The trial court did not abuse its discretion by admitting the testimony.

Finally, defendant contends that the trial court abused its discretion in sentencing him as an adult rather than as a juvenile. When defendant committed the instant offenses, in 1995, he was sixteen years old. At that time, sentencing judges were given discretion to determine if juveniles convicted as adults of first-degree murder should be sentenced as juveniles or as adults. See former MCL 769.1(3); MSA 28.1072(3). Subsequently, but before defendant was charged, convicted, and sentenced, the law was changed to provide that a juvenile convicted as an adult of first-degree murder must automatically receive the adult sentence of life imprisonment. See MCL 769.1(1)(g); MSA 28.1072(1)(g); MCL 750.316(1)(a); MSA 28.548(1)(a). The trial court in the instant case followed the former sentencing scheme. We need not decide which sentencing scheme was actually applicable, since under either scheme, defendant's sentence was proper.[1]

Under the current law, the trial court had no choice but to sentence defendant to life imprisonment. See MCL 769.1(1)(g); MSA 28.1072(1)(g); MCL 750.316(1)(a); MSA 28.548(1)(a). Under the former law (the one actually applied by the trial court), the court had more latitude; the court was to consider the following circumstances in deciding whether defendant should be sentenced as an adult:

> (a) The prior record and character of the juvenile, his or her physical and mental maturity, and his or her pattern of living.
>
> (b) The seriousness and the circumstances of the offense.
>
> (c) Whether the offense is part of a repetitive pattern of offenses which would lead to 1 of the following determinations:
>
> (i) The juvenile is not amenable to treatment.
>
> (ii) That despite the juvenile's potential for treatment, the nature of the juvenile's delinquent behavior is likely to disrupt the rehabilitation of the other juveniles in the treatment program.
>
> (d) Whether, despite the juvenile's potential for treatment, the nature of the juvenile's behavior is likely to render the juvenile dangerous to the public if released at the age of 21.

[1] Neither party argues that the updated version of the statute should apply to this case; they focus solely on the earlier version.

(e) Whether the juvenile is more likely to be rehabilitated by the services and facilities available in adult programs and procedures than in juvenile programs and procedures.

(f) What is in the best interests of the public welfare and the protection of the public security. [See former MCL 769.1(3); MSA 28.1072(3).]

The trial court's factual findings regarding the above statutory factors were not clearly erroneous, and the trial court's ultimate decision to sentence defendant as an adult did not constitute an abuse of discretion. See *People v Thenghkam*, 240 Mich App 29, 41-42; 610 NW2d 571 (2000), and *People v Launsburry*, 217 Mich App 358, 362; 551 NW2d 460 (1996). The offense in this case was very serious. Defendant went to his friend's house with the intent to steal drugs and money, shot the victim once, and then stood over the victim and shot him again. In addition, three persons concluded that due to defendant's failure to be honest, admit his mistakes, and show any remorse, his potential for rehabilitation in the juvenile system was low in light of the fact that defendant would reach the age of twenty-one approximately eighteen months after his sentencing. This Court has previously held that where a juvenile would not be subject to juvenile rehabilitation for a sufficient period of time to fully rehabilitate the juvenile, and thus protect the public safety and welfare, the trial court did not abuse its discretion in sentencing the juvenile as an adult. See *People v Black*, 203 Mich App 428, 430-431; 513 NW2d 152 (1994). See also *People v Cheeks*, 216 Mich App 470, 478-479; 549 NW2d 584 (1996), and *People v Perry*, 218 Mich App 520, 543-545; 554 NW2d 362 (1996). No error occurred.

Affirmed.

/s/ Patrick M. Meter
/s/ Richard Allen Griffin
/s/ Michael J. Talbot