

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY BATES,

Defendant-Appellant.

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UNPUBLISHED

January 19, 2001

No. 214684

Wayne Circuit Court

Criminal Division

LC No. 97-003604

Before: Sawyer, P.J., and Jansen and Gage, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to commit murder, MCL 750.83; MSA 28.278, two counts of assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was subsequently sentenced to thirty-five to seventy years' imprisonment for the assault with intent to murder conviction, six to ten years each for the assault with intent to commit great bodily harm less than murder convictions, and a consecutive two-year term for the felony-firearm conviction. Defendant appeals as of right and we affirm.

Defendant first argues that the trial court improperly indicated that defendant should not have had a *Walker*<sup>1</sup> hearing. In *People v Neal*, 182 Mich App 368, 371-327; 451 NW2d 639 (1990), this Court recognized that the issue of whether a statement has been made at all is distinct from the issue of whether a statement is voluntary. *Id.* It further recognized that the issue of whether a statement was made is one for the jury. *Id.* Nevertheless, it found that where a defendant denies making a statement but alternatively raises the issue of voluntariness, the trial court should resolve the voluntariness issue before trial. *Id.* Based on the rationale set forth in *Neal*, the trial court incorrectly remarked that a *Walker* hearing was unnecessary under the circumstances. Nevertheless, this issue is inconsequential because the trial court did hold a full *Walker* hearing and decided that the statements at issue were voluntary.

Defendant next argues that the trial court erred in determining that the police statements at issue were voluntarily made. In evaluating the admissibility of a police statement, the totality

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<sup>1</sup> *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

of the circumstances surrounding the making of the statement is reviewed to determine whether it was freely and voluntarily made. *People v Sexton (After Remand)*, 461 Mich 746, 752; 609 NW2d 822 (2000). In *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988), the Supreme Court stated:

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. . . .

The absence or presence of any one of these factors is not necessarily conclusive on the issue of voluntariness. The ultimate test of admissibility is whether the totality of the circumstances surrounding the making of the confession indicates that it was freely and voluntarily made.

Viewing the factors in *Cipriano*, we conclude that defendant's statements to the officers after his polygraph test were freely and voluntarily made under the totality of the circumstances. Defendant was twenty years old at the time the statements were made. While it is unclear from the record whether he finished the eighth grade or eleventh grade and whether he obtained his G.E.D., it was undisputed that defendant could read and write. His educational level was not such that he was unable to comprehend or understand his rights. Further, the record indicates that defendant was not subjected to any repeated or prolonged questioning at any time.

The next factors, the length of the detention of the accused before giving the statement and before being arraigned, are the crucial factors at issue. In this case, there was a clear delay between the time defendant was arrested on April 8, 1997, the time he made his statements on April 11, 1997, and the time of his arraignment on April 14, 1997. Prearrest delay, however, is not grounds by itself for the exclusion of a statement or confession.

Unnecessary delay is one factor to consider in reaching this conclusion, the focus being not just on the length of delay, but rather on what occurred during the delay and its effect on the accused.

In relegating prearrest delay to its status as one of several factors to be considered in judging the voluntariness of a confession, we do not condone the failure of the police to comply with the statutes. An arrested suspect should not be subjected to prolonged, unexplained delay prior to arraignment; and such delay should be a signal to the trial court that the voluntariness of a confession obtained during this period may have been impaired. However, we hold that an otherwise

competent confession should not be excluded solely because of a delay in arraignment. [*Id.* at 334-335.]

Here, the trial court found that the delay was not used as a tool to extract the confession. Rather, it found that the delay occurred so that a proper polygraph could be obtained. On appeal, defendant contends that the police wanted to extract a statement by using the polygraph and, thus, the trial court's attempt to distinguish between delay for the purpose of extracting a statement and delay to obtain a polygraph is disingenuous.

The record indicates that, within forty-eight hours of defendant's arrest, Agent Brian Maloney contacted the polygraph unit to set up the polygraph examination. This occurred only after another police officer suggested that defendant be given a polygraph and after defendant stated that he wanted to take a polygraph. Nothing in the record reveals why a polygraph was suggested, that is, whether police officers thought it may be exculpatory or whether they thought it might lead to a confession. The polygraph examiner refused to perform the polygraph on April 10, 1997, when he was contacted. A fair polygraph could not be given at that time because defendant had not adequately rested. The polygraph was then set for Friday, April 11, 1997. The timing of the polygraph caused a delay in the securing of the warrants and in the arraignment in this case, which took place the following Monday. We find valid the trial court's reasoning that there is a difference between delay for the purpose of obtaining a statement and delay for purposes of scheduling a polygraph. A proper polygraph could have exculpated defendant. If the only purpose of the delay was to extract a confession, there was no guarantee that the polygraph would accomplish that objective. More importantly, defendant was not required to confess as part of the polygraph examination and, it appears that his decision to do so after the results of the polygraph examination were revealed to him was purely voluntary. The testimony indicates that, after defendant was told that he failed the polygraph, he made his first statement with little prompting. The warrants were thereafter secured and defendant was arraigned the following Monday, April 14, 1997. Under the circumstances, where the polygraph may have exculpated defendant and where there was no evidence to support a conclusion that the securing of a confession was the main objective of the polygraph, we find that the trial court properly ruled that the delay was not simply a tool used to extract a confession. Thus, like the trial court, we find that the delays in this case do not weigh in favor of suppressing the post-polygraph statements.

In so ruling, we note that during most of the delay between the arrest and confession, defendant was in a detention area and was not with officers. He was not threatened or questioned excessively or deprived of food or sleep. Thus, it cannot be said that the delay impacted defendant's decision to make the statements. In addition, there was testimony that after defendant was returned to police headquarters from the polygraph testing facility, he had no contacts with police before his arraignment. Although he disputed this and claimed that there was one more contact on April 11, 1997, defendant admitted that he had no further police contacts until the arraignment. Thus, as with the delay before the confession, the several-day delay between the arrest and the arraignment had no detrimental effect on defendant.

With regard to the remaining factors, there were no irregularities that would weigh in favor of suppression. It is undisputed that defendant was properly advised of his constitutional

rights before the polygraph and again before he made further statements to investigating officers after the polygraph. It is also undisputed that defendant was not injured, intoxicated, drugged, in ill health, deprived of food, deprived of sleep, or deprived of medical attention before giving the statements at issue. The statements all occurred within a short period of time immediately after the polygraph examination. In addition, there was no evidence whatsoever that defendant was physically abused or threatened with abuse when he made the statements. While defendant claimed that, on the evening of April 9, 1997, and continuing into the early morning hours of April 10, 1997, he was threatened, this fact, if believed, does not support finding that the statements made on the morning of April 11, 1997, were the product of any threat.

Consequently, the totality of the circumstances supports the trial court's determination that the statements were freely and voluntarily made.

Defendant also argues that his Fourth Amendment rights were violated and that the error is not harmless.<sup>2</sup> The Fourth Amendment requires that a judicial determination of probable cause be made within forty-eight hours of a warrantless arrest unless there is a bona fide emergency or other extraordinary circumstance. *People v Whitehead*, 238 Mich App 1, 2; 604 NW2d 737 (1999), citing *Riverside Co v McLaughlin*, 500 US 44, 56; 111 S Ct 1661; 114 L Ed 2d 49 (1991).

In *Whitehead*, *supra* at 6, this Court held:

“Judicial expediency allows courts to address issues according to their ease of resolution.” *People v Graves*, 458 Mich 476, 479-480, n 2; 581 NW2d 229 (1998). Of the two questions presented by defendant's argument—whether the statement should have been suppressed and, if so, whether admission of the statement was harmless error—we find the second to be easier to resolve. Accordingly, assuming without deciding that it was error for the trial court to allow the confession to be used against defendant at trial, we consider whether that constituted harmless error. If any error that might have occurred was harmless, we need not consider whether, in fact, there was error in admitting the confession.

This Court further held that the erroneous admission of a confession into evidence is a nonstructural, constitutional defect. *Id.* at 7. Constitutional errors that do not constitute structural defects do not require automatic reversal. *People v Anderson*, 446 Mich 392, 405; 521 NW2d 538 (1994). Rather, those errors are subject to review to determine if the beneficiary of the error can prove that the error is harmless beyond a reasonable doubt. *Id.* at 405-406. In order to demonstrate that an error is harmless beyond a reasonable doubt, it must be proved that there was no reasonable possibility that the error contributed to the conviction. *Id.* The error must be assessed in the context of the other evidence presented at trial. *Id.*

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<sup>2</sup> Although defense counsel did not specifically raise the issue of a Fourth Amendment violation in the trial court, the issue is preserved because a *Walker* hearing was held and the issue of delay was raised at that hearing. *People v Whitehead*, 238 Mich App 1, 7, n 5; 604 NW2d 737 (1999).

In *Whitehead*, *supra* at 9-10, this Court stated:

[T]he question before us is whether, absent the confession, “honest, fair-minded jurors might very well have brought in not-guilty verdicts.” . . . The properly admitted evidence must be “quantitatively assessed” to determine whether, had the improperly admitted evidence not been presented at trial, there is any “reasonable possibility” that a factfinder would have acquitted. . . . As recently explained by the United States Supreme Court in *Neder* [*v United States*, 527 US 1; 119 S Ct 1827, 1838; 144 L Ed 2d 35 (1999)]: “[A] reviewing court [must] conduct a thorough examination of the record. If, at the end of that examination, the court cannot conclude beyond a reasonable doubt that the jury verdict would have been the same *absent the error*[,] . . . it should not find the error harmless.”

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If the proof against defendant was so overwhelming that all reasonable jurors would have found guilt even without the confession being brought into evidence, the conviction must stand.

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The question before us requires consideration of the kind of case and argument the prosecutor would have had without defendant’s confession. Putting defendant’s confession aside, we must consider whether the other evidence adduced by the prosecutor was such that no reasonable juror would have accepted defendant’s trial testimony or otherwise acquitted him.

In this case, as in *Whitehead*, an assessment of the evidence against defendant, apart from his confession, demonstrates that any error in the admission of the confession was harmless beyond a reasonable doubt. Defendant’s defense was to attack the numerous identifications of him as the shooter and to argue that the facts of the case did not make sense.

Ronald Lanning testified that he saw defendant at the party and later saw defendant shoot the victims with a gun. Around the time of the shootings, Lanning described the shooter to police as being five feet, ten inches tall and weighing approximately 180 pounds with short hair. At trial, there was testimony that defendant was five feet, ten inches tall and heavy set at 190 pounds. Lanning later picked defendant out of some photographs and, subsequently, identified defendant at a corporeal line-up. Lanning’s description of defendant to police was accurate and his identification of defendant was consistent. Similarly, Franklin Ash testified that he saw defendant shoot the victims and would never forget defendant’s face. Ash recognized defendant in a photographic line-up, but he waited to positively identify defendant until he viewed defendant in a corporeal line-up. Ash testified that he was one hundred percent sure that defendant was the shooter. John Stickney, one of the victims, described the shooter to police as a black male, approximately age twenty, who was about five feet, nine inches tall, weighed about 150 pounds, and had light facial hair. Although Stickney’s description was inaccurate with regard to weight, Stickney tentatively picked defendant out of a photographic line-up several

months later and, subsequently, positively selected defendant as the shooter at a corporeal line-up. Stickney testified at trial that the shooter was only ten to fifteen feet away when he shot at Stickney. Stickney testified that there was no doubt in his mind that defendant was the shooter. Chad Curtis, another victim, also testified at trial that there was no doubt in his mind that defendant was the shooter. Curtis described the shooter to police as being a black male, approximately age twenty, between five feet, seven inches tall to five feet, nine inches tall and heavy set. Although Curtis failed to pick defendant out of a photographic line-up and was somewhat inaccurate about defendant's height, his trial testimony positively identified defendant. Accordingly, the above testimony, considered as a whole, demonstrates that, though there were some discrepancies in the description of the shooter at the time of the incident, several witnesses positively identified defendant as the shooter before and during trial.

These identifications constituted overwhelming evidence against defendant. Viewing the evidence in this case, without the confession, there is no possibility that a reasonable fact finder would have acquitted defendant. Thus, we find that even if there was error, it was harmless beyond a reasonable doubt.

Defendant next argues that a remand is necessary because the trial court failed to rule on his argument that his alleged statements were made in violation of his Fifth Amendment right to counsel. The trial court made a specific finding of fact that defendant never requested counsel. At the end of the *Walker* hearing, the trial court stated:

[A]nd, finally, I do not find that there was any credible testimony on this record that, in fact, a lawyer was requested especially in light of everything I have before me.

The trial court's specific finding of fact, that defendant did not ask for counsel, disposed of the Fifth Amendment issue. Defendant's statements could not have been made in violation of his right to counsel if he never requested counsel. The Fifth Amendment right to counsel only attaches where a defendant specifically requests counsel for subsequent custodial interrogations. *People v McElhaney*, 215 Mich App 269, 277; 545 NW2d 18 (1996). Remand for further rulings by the trial court on this issue is, therefore, unnecessary.

Lastly, defendant argues that his sentence for the conviction of assault with intent to commit murder is disproportionate. Here, the sentencing guidelines range was ten to twenty-five years or life. Sentencing courts are not required to adhere to the guidelines range, and the key test of proportionality is whether the sentence reflects the seriousness of the matter. *People v Houston*, 448 Mich 312, 320; 532 NW2d 508 (1995).

Defendant had one prior felony and was on probation at the time of the shootings. Further, the trial court stated on the record and on the SIR departure form its reasons for departure from the guidelines range. The trial court properly took into account the full factual circumstances of the shootings. Moreover, contrary to defendant's argument, the trial court properly took into account that one victim died even though defendant was acquitted of the charge with respect to that victim. *People v Parr*, 197 Mich App 41, 46; 494 NW2d 768 (1992) (a sentencing court may consider the facts underlying uncharged offenses, pending charges, and acquittals). The trial court also properly considered the seriousness of the injuries inflicted, the

boldness of the assault, *People v Castillo*, 230 Mich App 442, 448; 584 NW2d 606 (1998), and defendant's total disregard for public safety, *People v Watkins*, 209 Mich App 1, 6; 530 NW2d 111 (1995), as legitimate factors when departing from the sentencing guidelines.

Accordingly, the trial court did not abuse its discretion in sentencing defendant because the sentence is proportionate to the seriousness of the offense and the background of the offender.

Affirmed.

/s/ David H. Sawyer

/s/ Kathleen Jansen

/s/ Hilda R. Gage