STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 23, 2001
v JUAN CARLOS NUNEZ, Defendant-Appellant.	No. 218647 Ottawa Circuit Court LC No. 98-021745-FH

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v JUAN CARLOS NUNEZ, Defendant-Appellant.	No. 218648 Ottawa Circuit Court LC No. 97-021297-FC

Before: Doctoroff, P.J., and Holbrook, Jr. and Smolenski, JJ.

PER CURIAM.

In Docket No. 218647, defendant was convicted, following a bench trial, of armed robbery, MCL 750.529; MSA 28.797, in connection with the robbery of a Little Caesar's restaurant in Holland, Michigan, on September 5, 1997. Defendant was sentenced to a term of 96 to 240 months' imprisonment. In Docket No. 218648, defendant was convicted by a jury of first-degree felony murder, MCL 750.316(1)(b); MSA 28.548(1)(b), armed robbery, MCL 750.529; MSA 28.797, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), in connection with the robbery and homicide at Pereddies restaurant in Holland, Michigan, on September 17, 1997. He was sentenced to concurrent terms of life imprisonment without parole for the murder conviction and 20-40 years' imprisonment for the armed robbery conviction, to be served consecutively to a two-year term for the felony-firearm conviction. Defendant appeals as of right in both cases, which have been consolidated for purposes of appeal. We affirm.

On September 5, 1997, a Little Caesars Pizza restaurant in Holland, Michigan was robbed. There were two employees in the restaurant at the time. Three masked robbers entered through the front door while a fourth blocked the back exit with the getaway vehicle. Defendant was identified as one of the robbers who entered the restaurant, carrying a knife. One of the codefendants, David Alfaro, carried a BB gun covered with a bandanna and another codefendant, Antonio Villa-Cruz, carried a knife. The robbers locked the two employees in a freezer while they stole cash and a pizza.

On September 17, 1997, the Pereddies restaurant in Holland, Michigan was robbed. At the time of the robbery, the restaurant manager, the kitchen manager, a line cook and two dishwashers were in the restaurant. Two armed robbers entered through the back door. Codefendant Ramiro Zamudio, who was carrying a knife, took control of the two dishwashers and the line cook. Defendant, who was armed with a sawed-off shotgun, went to the office to rob the restaurant manager, Lisa Richardson. After Richardson gave defendant money and her purse, defendant led her to the kitchen area. When they got there, the kitchen manager, James Scott Anderson, came around a corner and called Richardson's name. Defendant turned, stepped toward Anderson and shot him in the left eye, killing him instantly. Defendant then led Richardson to where Zamudio was holding the other employees. The robbers forced the employees to remain in a bathroom while making their escape.

On September 18, 1997, the police received information that defendant was involved in the Pereddies robbery and homicide.[1] A uniformed Holland Police officer went to defendant's home and brought him to the police station around 6:00 p.m. Later, police returned to defendant's house to seek permission from his mother to speak with him, due to the fact that he was a minor, and to obtain permission to search the home. Defendant's mother gave the police permission to speak to defendant and she signed a consent form to search the home.

During a subsequent interview with police, defendant confessed to the robbery and murder at Pereddies. However, defendant denied any participation in the Little Caesars robbery. The police tried to entice defendant to confess to the Little Caesars robbery by telling him that he would not be charged with it. Defendant nevertheless refused to admit any knowledge of or participation in that crime. Defendant was arraigned on the Pereddies case and retained counsel. His counsel advised him not to talk to the police, the prosecutors, or any other jail inmates. His counsel also told him that he could be charged with other crimes if he talked about them.

On November 25, 1997, two Holland police detectives went to the jail and spoke to defendant about the Little Caesars robbery. They specifically told defendant that they did not want to discuss the Pereddies robbery and they gave defendant his *Miranda*[2] warnings. Defendant waived his *Miranda* rights, including his right to counsel, and spoke to the detectives. Defendant claims that he told them he might have information about the robbery, but did not tell

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[1] The two dishwashers, who appeared to be victims at the time of the robbery, were also implicated and charged in connection with the robbery and homicide.

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

them anything else. The police claim that defendant told them that he was involved in planning the Little Caesars robbery, but he did not admit actually participating in it.

On December 17, 1997, an Ottawa County sheriff's deputy went to the jail to speak with defendant about an attempted robbery at the Ottawa County Pharmacy. The deputy told defendant that he did not want to speak about the Pereddies robbery. Defendant was given his *Miranda* warnings and waived his *Miranda* rights. The deputy, who had spoken to Holland detectives about defendant in the past, mentioned to defendant that he had been implicated in the Little Caesars robbery. Defendant denied participating in any crime at the Ottawa Village Pharmacy but ultimately confessed, in great detail, to the Little Caesars robbery.

On appeal, defendant argues that the November 25 and December 17 police questioning violated his Sixth Amendment right to counsel. We disagree. The Sixth Amendment right to counsel is offense-specific and cannot be invoked once for all future prosecutions. *People v Smielewski*, 214 Mich App 55, 60-61; 542 NW2d 293 (1995). The right "attaches only at or after adversarial judicial proceedings have been initiated" for an offense. *Id.*

> [O]nce the Sixth Amendment right to counsel has been invoked, any subsequent waiver during a police-initiated custodial interview is ineffective with respect to the formal charges filed against the defendant. "'Incriminating statements pertaining to other crimes, as to which the Sixth Amendment right has not yet attached, are, of course, admissible at a trial of those offenses.'" . . . Thus, when a defendant is interrogated after being arraigned *and the interrogation involves charges unrelated to the arraigned charges, the defendant's Sixth Amendment right* invoked at arraignment – the initiation of the criminal prosecution – *is inapplicable to the interrogation*. [*Id.* at 62 (citations omitted) (emphasis added).]

In *Smielewski,* this Court explained what "related" charges constitute:

> Before we can conduct a factual determination to resolve the issue of relatedness between the charged and uncharged offenses in this case, we must define the term "related." Black's Law Dictionary (6th ed), p 1288, defines "related" as "[s]tanding in relation; connected; allied; akin." It also defines "related claim" as a "claim resting on substantially identical facts." . . . The *Random House Webster's College Dictionary* (1995), p 1136, defines "related" as "associated; connected" and "relation" as "a significant association between or among things; connection; relationship; *the relation between cause and effect."* Also, "it is the factual similarity between the crimes and not the charges filed which determines whether the crimes are 'related'." [*Id.* (citations omitted) (emphasis in original).]

In *Smielewski, supra* at 57, the defendant had been arraigned on charges of carrying a concealed weapon in a motor vehicle (CCW). While he was incarcerated with regard to that CCW charge, a state trooper twice interviewed him about an armed robbery. *Id.* At the first interview, the defendant denied any knowledge about or involvement in the robbery even though a jacket, gun and ski mask were all found in his car at the time of the CCW arrest. *Id.* At the

second interview, three days later, the defendant admitted that he planned the armed robbery, supplied the gun, drove the getaway car and split the money with the holdup man. *Id.* at 57-58. This Court found that the CCW case and the armed robbery cases were not related or connected such that the trooper's questioning of the defendant on the armed robbery case violated the defendant's Sixth Amendment right to counsel:

> [W]e believe that the October 1992 CCW charge and the January 1993 armed robbery and felony-firearm charges (stemming from the October 1992 robbery) are not related or connected and *do not rest on substantially identical facts*. The CCW arrest arose out of an apparent automobile accident involving defendant's vehicle; the police found alcohol and defendant's gun in the vehicle, which led to defendant's arrest for CCW. The armed robbery and felony-firearm felony complaint arose out of a robbery that took place ten days before the CCW arrest. An eyewitness identified a vehicle matching the description of defendant's vehicle, and his description of the perpetrator's clothing matched items of clothing found in defendant's car. Although both charges involve the same vehicle and both involve the possession or use of *a* gun, these charges were *neither connected nor part of the same criminal episode or transaction; in short, they share no factual nexus.* . . . Notably, the record reveals no evidence that the gun seized as a result of the CCW charge matched or was identified as the gun used in the armed robbery. Consequently, we are not persuaded that the gun provided any factual connection between the two cases.
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> Accordingly, we believe that the armed robbery charge was unrelated to the CCW charge, so the Sixth Amendment right to counsel, an offense-specific right, that defendant invoked with respect to the CCW charge did not extend to the armed robbery and felony-firearm charges. [*Id.* at 62-64 (emphasis added).]

In the present case, defendant argues that the murder, armed robbery and felony-firearm charges stemming from the September 17, 1997, Pereddies incident are related to the armed robbery charge stemming from the September 5, 1997, Little Caesars incident. We disagree. Both the district court and the circuit court recognized that neither case was factually similar to the other such that defendant's Sixth Amendment rights were violated when police questioned defendant about the Little Caesars case after he was arraigned on the Pereddies case. First, the participants in each crime differed. Second, defendant used different weapons to commit the two crimes; defendant carried a knife during the Little Ceasars robbery and carried a sawed-off shotgun during the Pereddies robbery. Third, the robberies occurred twelve days apart. The charges at issue did not rest on substantially identical facts and were not connected as part of the same episode or criminal transaction. Apart from the fact that both crimes involved armed robberies of restaurants in which defendant participated, there was no factual nexus. Thus, the offense-specific Sixth Amendment right to counsel was not implicated when the police questioned defendant about the Little Caesars robbery after he had been arraigned for the Pereddies robbery.

Defendant next argues that the questioning by police on December 17, 1997, violated his Fifth Amendment right to counsel. Defendant claims that between November 25, 1997, and

December 17, 1997, his counsel in the Pereddies case spoke to police and effectively invoked defendant's right to counsel at all future custodial interrogations. Unfortunately for defendant, the record does not factually support his claim that his counsel for the Pereddies case spoke to the police before December 17, 1997, and invoked defendant's Fifth Amendment right to counsel at a custodial interrogation. In fact, at the suppression hearing in the trial court, defendant's counsel testified that it was probably after December 17th that he spoke with the detective. Thus, because defendant's counsel did not invoke defendant's Fifth Amendment right to counsel before defendant confessed on December 17, 1997, his Fifth Amendment rights were not violated.

Defendant next argues that the trial court improperly denied his motion to change venue due to pretrial publicity. Our review of the record reveals that defendant never moved to change venue on this ground. Therefore, this issue is not preserved and we review it only for plain error. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130. The record does not indicate that extensive inflammatory pretrial publicity saturated the community to the extent that the entire jury pool was tainted or that a high percentage of the venire admitted to disqualifying prejudices. *People v Jendrzejewski*, 455 Mich 495, 500-501; 566 NW2d 530 (1997). Most of the newspaper articles were factual accounts of major events in the case, and many of the articles concerned codefendants. The articles were not sensational and they did not slander defendant's reputation. Moreover, several potential jurors were not familiar with the case at all. Therefore, we find no plain error.

Defendant also argues that the trial court failed to insure a fair and impartial jury. Again, this issue is not preserved and we review it only for plain error. Our review of the jury voir dire transcript convinces us that the trial court took great measures to insure that defendant obtained a jury that was free from taint. In *Jendrzejewski, supra* at 509, our Supreme Court suggested three possible approaches to avoid the danger of prejudice from pretrial publicity:

> 1) questionnaires prepared by the parties and approved by the court, 2) participation of the attorneys in the voir dire, and 3) sequestered questioning of each potential juror.

In this case, the trial court allowed the prosecution and defense to thoroughly question potential jurors about pretrial publicity, the extent that such publicity may have influenced them, and whether they understood the presumption of innocence and could be fair and impartial. The trial court did not limit or interfere with defense counsel's ability to question potential jurors in that respect. The trial court even allowed sequestered voir dire of several jurors upon the request of counsel. The parties were allowed unlimited access to ascertain juror bias and the trial court received ample information to determine whether the jurors were impartial. The trial court dismissed several potential jurors for cause. Because there was no impediment to the discovery of possible bias and prejudice, we cannot find plain error in the trial court's handling of the voir dire.

We also disagree with defendant's claim that the trial court improperly forced him to use three peremptory challenges to excuse jurors who should have been excused for cause.

> A four-part test is used to determine whether an error in refusing a challenge for cause merits reversal. There must be a clear and independent

> showing on the record that (1) the court improperly denied a challenge for cause, (2) the aggrieved party exhausted all peremptory challenges, (3) the party demonstrated the desire to excuse another subsequently summoned juror, and (4) the juror whom the party wished later to excuse was objectionable. [*People v Lee*, 212 Mich App 228, 248-249; 537 NW2d 233 (1995).

Defendant has failed to meet this test. Nothing in the record supports defendant's claim that he wanted to use a peremptory challenge for any specific juror after he utilized the twelve that he had been given. In addition, there has been no showing whatsoever that any specific juror who counsel would have liked to excuse was objectionable. Thus, no error occurred.

Defendant next argues that his September 18, 1997, confession to police about the Pereddies robbery and homicide should have been suppressed because he was a minor and his mother was not present during the custodial interrogation. In *People v Snider*, 239 Mich App 393, 417; 608 NW2d 502 (2000), this Court stated:

> Whether a defendant's statement was knowing, intelligent and voluntary is a question of law that a court must determine under the totality of the circumstances. Because this Court gives ample deference to the trial court, it will not reverse the trial court's findings unless they are clearly erroneous. [Citations omitted.]

A finding is clearly erroneous "if this Court is left with the definite and firm conviction that a mistake has been made." *People v Brooks*, 184 Mich App 793, 795; 459 NW2d 313 (1990). In addition, this Court reviews de novo the ultimate decision regarding a motion to suppress. *People v Garvin*, 235 Mich App 90, 96; 597 NW2d 194 (1999).

"The admissibility of a juvenile's confession depends upon whether, under the totality of the circumstances, the statement was voluntarily made." *People v Givans*, 227 Mich App 113, 120; 575 NW2d 84 (1997) (citations omitted).

> 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.
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> The factors that must be considered in applying the totality of the circumstances test to determine the admissibility of a juvenile's confession included (1) whether the requirements of *Miranda* . . . 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. [*Givans, supra* at 121 (citations omitted).]

In *Givans*, this Court agreed that the juvenile defendant's statement was voluntarily and knowingly made even though his parent was not present at the custodial interrogation:

> In the instant case, the *Miranda* requirements were met. Defendant does not claim that there was any violation of the juvenile court rules. Defendant's mother was not present at the interview, but he did not request her presence. At the time of the interview, defendant was sixteen years and ten months old. Defendant had a ninth-grade education and could read and write. Defendant had pending charges of armed robbery, assault, escape, and assault with intent to commit a felony. The entire interview took less than three hours; defendant admitting his involvement in the attempted robbery after approximately one hour. Except for a slight cold, defendant was in good health and was not on any medication. Considering the factors. . . , we cannot conclude that the trial court's finding that defendant's statement was voluntarily made is clearly erroneous. [*Id*. at 121-122 (citation omitted).]

In this case, the totality of the circumstances reveal that defendant's September 18, 1997, confession was voluntary and knowingly made. First, defendant concedes that he was informed of his *Miranda* rights and that he waived them. Second, the police were not required to comply with MCL 764.27; MSA 28.886, because those provisions do not apply when a defendant is charged and processed under the automatic waiver provisions of MCL 600.606; MSA 27A.606. *Brooks*, *supra* at 797-798. Third, although defendant's mother was not present at the questioning, testimony indicated that she voluntarily allowed police to speak to defendant without her. The trial court heard testimony that a Spanish speaking officer explained defendant's rights, in Spanish, to defendant's mother. She signed the form after a lengthy discussion and gave officers permission to speak to defendant.[3]

More importantly, like the defendant in *Givans*, defendant never requested the presence of a parent during questioning. He never even asked to telephone one of his parents. In addition, defendant's mother testified that, as soon as she arrived at the police station, she was allowed to see and talk to defendant. Defendant lived in a two parent home with his sister, had an eighth grade education, and could read and write. He was sixteen years and eleven months old at the time of questioning. He was also familiar with the police and had contacts with them before the statements at issue were taken. Nothing about defendant's background indicates that he was unable to understand the process. Also, there was no extensive delay from the time defendant was brought to the police station, shortly after 6:00 p.m., until the time he was questioned, at approximately 8:10 p.m. Further, there was no repeated or prolonged questioning. Rather, the police detectives testified, and defendant does not dispute, that defendant admitted his involvement approximately twenty minutes after the interview started and that the entire

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[3] Apparently, the trial court did not find defendant's mother credible when she claimed that no explanation was given to her and that she did not give permission to the police.

interview lasted between forty-five minutes and one hour. Finally, defendant was not injured, ill or intoxicated when he was taken to the police station, and there was no evidence that he was mistreated while there. Thus, the trial court's findings that defendant's statements were knowingly, intelligently and voluntarily made are not clearly erroneous and the motion to suppress was properly denied.

Finally, defendant argues that MCL 769.1; MSA 28.1072 violates the separation of powers doctrine of the Michigan constitution because it allows the prosecutor to eliminate any sentencing discretion on the part of the trial court. Because this issue was not raised below, it is not preserved for our review. We note, that this precise issue was addressed in *People v Conat*, 238 Mich App 134, 147-153; 605 NW2d 49 (1999), where this Court found that the statute did not violate the separation of powers doctrine. We are bound to follow the decision in *Conat*, MCR 7.215(H)(1). Further, we are not persuaded by defendant's argument that the issue was wrongly decided or that this panel should express disagreement with it.

Affirmed.

/s/ Martin M. Doctoroff
/s/ Donald E. Holbrook, Jr.
/s/ Michael R. Smolenski