

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TIMOTHY LEE KISSINGER,

Defendant-Appellant.

UNPUBLISHED

September 24, 2002

No. 225193

St. Joseph Circuit Court

LC No. 97-008746-FC

Before: Neff, P.J., and White and Owens, JJ.

PER CURIAM.

Defendant appeals as of right his conviction by a jury of armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced as an habitual offender, fourth offense, MCL 769.12, to twenty-seven to fifty years' imprisonment for the armed robbery conviction and a consecutive two-year term for the felony-firearm conviction. We affirm.

I

Defendant was convicted of armed robbery following a hold-up at gunpoint of an elderly woman, who lived with her husband in a mobile home park in St. Joseph County. The woman was awakened at approximately 4:20 a.m. on September 25, 1997, to find an intruder standing in her bedroom doorway. Her husband was sleeping. The intruder had a gun and demanded money. After the woman gave the intruder more than \$150 from her purse, the man ordered the couple to remain in bed, covered up, while he escaped or he would shoot them.

Defendant was subsequently arrested and confessed to the robbery. Before trial, he moved to have his confession suppressed on the ground that it was involuntary. Following a *Walker*¹ hearing, the trial court denied defendant's motion. Defendant was convicted as charged.

¹ *People v Walker (On Rehearing)*, 374 Mich 331, 338; 132 NW2d 87 (1965).

II

Defendant first argues that the court erred in denying his motion to suppress his confession because the confession was involuntary. Further, any error is not harmless because the confession was the only evidence linking defendant to the crime.

We review a trial court's findings of fact following a suppression hearing for clear error. *People v Givans*, 227 Mich App 113, 119; 575 NW2d 84 (1997). We review de novo a trial court's conclusions of law. *People v Snider*, 239 Mich App 393, 406; 608 NW2d 502 (2000).

When reviewing a trial court's determination of voluntariness, this Court must examine the entire record and make an independent determination of the issue. *People v Sexton (After Remand)*, 461 Mich 746, 752; 609 NW2d 822 (2000). However, this Court will affirm the trial court's determination unless left with a definite and firm conviction that a mistake was made. *Id.* If resolution of a factual question hinges on the credibility of the witnesses or the weight of the evidence, we will defer to the trial court, which is in a superior position to evaluate these matters. *Id.*

Whether a statement is voluntary is determined by the totality of the circumstances. *People v Manning*, 243 Mich App 615, 635; 624 NW2d 746 (2000); *Snider, supra* at 417. The test is whether the confession was the product of an essentially free and unconstrained choice, or whether the accused individual's will was overborne and the capacity for self-determination critically impaired. *Manning, supra* at 635. In *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988), the Court set out various factors for determining whether a statement was voluntary: the age of the accused; the lack of education or intelligence level; the extent of 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 the 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. *Manning, supra* at 635.

Defendant claims that his confession was involuntary because it was the product of an alleged threat by the interrogating officer, Deputy Kennedy, and because of defendant's unstable physical and mental state. Defendant contends that Kennedy threatened to arrest defendant's wife in connection with the crimes if defendant did not cooperate, and that, at the time, defendant was suffering from depression, post traumatic stress syndrome, alcohol and drug abuse, and alcohol and nicotine withdrawal.

With respect to the alleged threat, the trial court determined as a matter of fact that defendant did not confess because of the alleged threat. The court found Kennedy's testimony credible, finding that Kennedy did not improperly threaten to arrest defendant's wife. Even had defendant perceived such a threat, the court found defendant's assertions of coercion implausible and unlikely to be true. After an extensive analysis, the court determined that defendant's actions following his confession were inconsistent with his claims, but that his actions were not inconsistent with the ability to exercise free will. Giving deference to the court's findings of

fact, which are not clearly erroneous, we conclude that defendant's confession was not the result of a coercive threat sufficient to render the confession involuntary.

We likewise find no clear error in the court's conclusion that defendant's physical and psychiatric state did not render him incapable of acting voluntarily. While a defendant's physical and mental state is a factor to be considered, no one factor is determinative. *People v Fike*, 228 Mich App 178, 181-182; 577 NW2d 903 (1998). This Court has previously ruled that the fact that a person is under the influence of drugs is not dispositive of the issue of voluntariness. See *People v Feldmann*, 181 Mich App 523, 530-531; 449 NW2d 692 (1989). "[A] deficiency in the defendant that is not exploited by the police cannot annul the voluntariness of a confession unless there is evidence of police coercion." *Fike, supra* at 182. Further, credibility is appropriately determined by the trial court; a trial court is not required to believe a defendant's assertion that he was suffering from drug-related distress at the time of a confession. *People v Smith*, 80 Mich App 106, 109, 112; 263 NW2d 306 (1977).

In this case, the record does not support that defendant exhibited, or that Kennedy observed, signs of distress as the result of substance withdrawal or psychiatric ailments. The record also does not support that Kennedy took advantage of any alleged physical or mental deficiency. Defendant was on his proper medication and was not under the influence of any intoxicants. The record supports that he was able to understand the conversation and coherently participate. The trial court did not clearly err in finding that this factor did not render defendant unable to exercise his free will.

Further, as the court noted, defendant's own expert testified that if there was no threat against defendant's wife, his confession may have been voluntary. The court found no credible evidence of a threat. Any physical or mental distress suffered by defendant was insufficient, by itself, to support that his confession was involuntary.

Reviewing the totality of the circumstances and giving deference to the trial court's findings of fact, we affirm the determination that defendant's confession was voluntary and admissible, given the factors in *Cipriano, supra*. Defendant was nearly thirty-eight years old at the time of the crimes. He had a GED and could read and write. He had extensive prior experience in dealing with the police and with respect to the criminal system. The questioning by Kennedy took place for a short time in the back of a police car on September 26, 1997, and for approximately one hour and five minutes on the evening of the confession at issue. Thus, there was no repeated or prolonged questioning. Defendant was being detained on matters in Kalamazoo at the time of his confession. Thus, he was not being detained pending questioning or a confession on the St. Joseph County matters. Defendant acknowledged that he was advised of his *Miranda*² rights and signed a waiver card. He was not injured at the time of the questioning that led to his confession and there was no evidence that he was deprived of food, sleep or medical attention. In fact, defendant was receiving his Prozac on a regular schedule unlike before his arrest. Further, there was no evidence of physical abuse or a threat of physical abuse.

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

III

Defendant next argues that his statements to the police should have been suppressed because at the time of the interrogation he was illegally detained and should have been free on bond. We disagree.

When reviewing the denial of a request to suppress a confession, this Court reviews the record de novo, but the trial court's factual findings are reviewed under the clearly erroneous standard. *People v Adams*, 245 Mich App 226, 230; 627 NW2d 623 (2001). The trial court's finding that there was no causal nexus between defendant's delayed release on bond and his confession was not clearly erroneous.

Our courts have consistently recognized that where there is an illegal detention, whether resulting from a statutory or constitutional violation, the exclusionary rule operates to suppress evidence only if there is a nexus between the unlawful detention and the procurement of the evidence. See *People v Mallory*, 421 Mich 229, 239-243; 365 NW2d 673 (1984) (statutory right to prompt arraignment);³ *People v Kelly*, 231 Mich App 627, 633-634; 588 NW2d 480 (1998) (illegal arrest); *People v Feldmann*, 181 Mich App 523, 528-531; 449 NW2d 692 (1989) (violation of the right against self-incrimination and the prompt arraignment statute); *People v Jordan*, 149 Mich App 568, 577-578; 386 NW2d 594 (1986) (unlawful detention of a juvenile). Whether the connection between an unlawful detention and a confession is sufficiently attenuated to purge the primary taint depends on: 1) the temporal proximity between arrest and confession, 2) the flagrancy of the official misconduct, 3) any intervening circumstances occurring after arrest, and 4) any circumstances antecedent to arrest. *Feldmann*, *supra* at 529.

The trial court, applying the above exclusionary rule considerations, concluded that there was no causal nexus between the detention and the confession. This finding is not clearly erroneous. Defendant's statements to Kennedy were made more than twenty-four hours after his bond was posted and the Kalamazoo authorities determined that defendant would not be released. That defendant's confession was not close in time to the decision to hold defendant supports the conclusion that the unlawful detention was not the result of a desire to allow Kennedy to question defendant.

Moreover, the conduct of the Kalamazoo authorities was not flagrant misconduct. The Sheriff believed, albeit incorrectly, that the bond requirements had not been met. His actions in contacting the tether agent support this conclusion. The record does not indicate that Kennedy or any authority from St. Joseph County participated in the decision to detain defendant after bond was posted.

Defendant argues that, but for the unlawful detention, Kennedy would not have obtained the confession. However, there was no evidence that anyone, including defendant, understood that he was being unlawfully detained at the time of Kennedy's interview. It cannot be said that defendant's confession was obtained by exploiting the illegal detention, about which no one was

³ The *Mallory* Court noted that an identical result is reached when the starting point is a constitutionally unlawful detention. *Mallory*, *supra* at 243, n 8.

aware at the time. The trial court was not required to suppress the statement on the ground that it was the product of an unlawful detention.

IV

Defendant next argues that he was denied his constitutional right to present a defense where the trial court excluded evidence of the circumstances surrounding the voluntariness of his statement. We disagree.

The decision whether to admit evidence is within the discretion of the trial court. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). This Court will not disturb a trial court's decision with respect to the admission of evidence absent a clear abuse of discretion. *Id.*

Defendant sought to introduce evidence refuting Kennedy's testimony that on September 29, 1997, he visited defendant at the Kalamazoo County jail and advised him of his rights and defendant signed a *Miranda* card. The trial court ruled that the proffered, extrinsic evidence was inadmissible. Further, defendant could inquire into the veracity of Kennedy's testimony with respect to the September 29, 1997, *Miranda* card and jail visit, but would not be allowed to refute or disprove those answers with any extrinsic evidence to impeach Kennedy's credibility because the matters concerning September 29 were collateral.

MRE 608(b) provides:

Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of a crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness

"Extrinsic evidence may be used to impeach a witness [only] on a material, as opposed to collateral, matter." *People v Sutherland*, 149 Mich App 161, 164; 385 NW2d 637 (1985). In other words, while a party may contradict answers elicited from a witness on cross-examination, he may only do so regarding matters germane to the issue and not with respect to collateral, irrelevant or immaterial matters. *People v Vasher*, 449 Mich 494, 504; 537 NW2d 168 (1995). "The purpose of the rule that a witness cannot be impeached on a collateral matter by use of extrinsic evidence is to avoid the waste of time and confusion of issues that would result from shifting the trial's inquiry to an event unrelated to the offense charged." *People v Guy*, 121 Mich App 592, 604; 329 NW2d 435 (1982).

Whether Kennedy visited defendant and obtained defendant's signature on the *Miranda* card on September 29, 1997, was a collateral matter although it was related to Kennedy's general credibility. MRE 608(b); *Guy, supra* at 604-605. The matter did not fit within any of the categories of noncollateral facts. *Id.* Here, the entire jury trial, excluding jury selection, occurred over a period of less than two full days. The trial court correctly recognized that the testimony defendant sought to admit, including complicated, expert handwriting testimony, would have taken at least another day or day and a half of trial time, elevating its importance far beyond the mere impeachment on a matter that related only to credibility and not to the

substantive issue in the case. Defendant was not prohibited from presenting a defense, but only from injecting the truth or falseness of a collateral issue into the trial.

V

Defendant next argues that the trial court erred in denying defendant's motion for rehearing on the motions to suppress his statement and quash the information, and for a new trial. We disagree.

A trial court's ruling on a motion for new trial is reviewed for an abuse of discretion. *People v Johnson*, 245 Mich App 243, 250; 631 NW2d 1 (2001). Further, whether a statement should be suppressed on grounds that it was involuntary presents a question of law that is determined by the totality of the circumstances. *Snider, supra* at 417. We will not reverse a trial court's findings on voluntariness unless clearly erroneous. *Id.*

The trial court properly denied defendant's motion for new trial and the attendant, renewed motion to suppress the October 1, 1997, statement.

To merit a new trial on the basis of newly discovered evidence, a defendant must show that the evidence (1) is newly discovered, (2) is not merely cumulative, (3) would probably have caused a different result, and (4) was not discoverable and producible at trial with reasonable diligence. Newly discovered evidence is not ground for a new trial where it would merely be used for impeachment purposes. [*People v Davis*, 199 Mich App 502, 515-516; 503 NW2d 457 (1993) (citations omitted).]

The handwriting evidence presented post-trial by defendant was not newly discovered evidence, but rather evidence that merely assisted in the understanding of the previously known evidence. Thus, the evidence at issue was cumulative to information previously received by the trial court. Further, while evidence of a polygraph may be considered in deciding a motion for new trial, *People v Mechura*, 205 Mich App 481, 484; 517 NW2d 797 (1994), the subject on which defendant took his polygraph was known before trial and a polygraph could have been obtained before trial in an attempt to convince the trial court that Kennedy was not worthy of belief. Thus, the polygraph evidence was also not newly discovered.

The essential purpose of this evidence was to impeach Kennedy's credibility. Given the trial court's analysis, defendant has failed to show that the evidence would likely have resulted in a different outcome. The trial court did not abuse its discretion in denying a new trial or evidentiary hearing based on the "newly presented" evidence.

VI

Finally, defendant argues that his conviction must be reversed where he was denied his state and federal constitutional right to a speedy trial when he was not brought to trial until approximately fourteen months after his arrest. We disagree.

This constitutional issue is reviewed de novo. *People v Cain*, 238 Mich App 95, 111; 605 NW2d 28 (1999). Four factors are considered in determining if a pretrial delay violated a

defendant's right to a speedy trial: (1) the length of the delay, (2) the reasons for the delay, (3) the defendant's assertion of the right, and (4) prejudice to the defendant. *Id.* at 111-112. A delay that is under eighteen months requires a defendant to prove that the defendant suffered prejudice. *Id.* at 112.

In this case, the factors do not support defendant's speedy trial claim. Much of the delay occurred because of defendant's actions, particularly defendant's vigorous pretrial tactics. *People v Williams*, 163 Mich App 744, 755-756; 415 NW2d 301 (1987). Defendant waited almost a full year before asserting his speedy trial right, only a few weeks before trial. *Cain, supra* at 113-114. Defendant has failed to show prejudice, either "(1) prejudice to his person in the form of oppressive pretrial incarceration and excessive anxiety and concern," or "(2) prejudice to his defense caused by loss of evidence or unavailability of key witnesses." *People v Missouri*, 100 Mich App 310, 323; 299 NW2d 346 (1980). Defendant's mere assertion that the delay caused anxiety is insufficient to establish a violation of the right to a speedy trial. *People v Jackson*, 171 Mich App 191, 201; 429 NW2d 849 (1988). Moreover, a portion of defendant's incarceration was apparently related to his sentence on the Kalamazoo crimes and not because of any oppressive *pretrial* incarceration in this case.

Affirmed.

/s/ Janet T. Neff
/s/ Helene N. White
/s/ Donald S. Owens