

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

THOMAS HOWARD WENDT,

Defendant-Appellee.

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UNPUBLISHED

April 13, 2004

No. 246342

Isabella Circuit Court

LC No. 02-000442-FC

Before: O’Connell, P.J., and Jansen and Murray, JJ.

PER CURIAM.

Defendant was found guilty by a jury on three counts of first-degree murder, MCL 750.316, and three counts of possessing a firearm during the commission of a felony, MCL 750.227b. Defendant appeals as of right. We affirm.

Defendant argues that his confession should have been suppressed, as involuntary, because the pain in his shoulder, resulting from his handcuffing, at the time of his arrest made it impossible for him to voluntarily waive his *Miranda*<sup>1</sup> rights. Because we hold that any putative error on this issue would clearly have been harmless, it is unnecessary to decide whether the trial court correctly found that the confession was voluntary.<sup>2</sup>

A trial court’s findings of fact following a suppression hearing can be reversed on appeal only if they are clearly erroneous. *People v LoCicero (After Remand)*, 453 Mich 496, 500; 556 NW2d 498 (1996). If the trial court’s findings are clearly erroneous, we must then consider whether the error was harmless beyond a reasonable doubt, and whether fair-minded jurors might have found defendant not guilty had the evidence not been admitted. *People v Whitehead*, 238 Mich App 1, 7-9; 212 NW2d 953 (1999).

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<sup>1</sup> *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

<sup>2</sup> Although it is unnecessary to address whether defendant’s confession was voluntary, we note that based upon the totality of the circumstances, *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988), the reasons stated by the trial court, in finding that defendant’s confession was voluntary, were not clearly erroneous. See *People v Cheatham*, 453 Mich 1, 29-30; 551 NW2d 355 (1996).

Even if the trial court's findings were erroneous, it was harmless beyond a reasonable doubt, and fair-minded jurors would not have found defendant not guilty on any of the counts even absent evidence of the confession. The other evidence against defendant was overwhelming. Defendant had made previous death threats against two of the victims on numerous occasions, to several people. Some of the people who heard the threats made by defendant and who knew defendant well, considered them to be credible. Defendant's van was witnessed at or near the murder scene by a number of witnesses around the time of the crime. One witness saw defendant's van parked, with its motor running, at the murder scene a few minutes before the fatal shots were fired. A loaded shotgun matching the gauge of the spent shells and the casings found in the back of defendant's van and at the murder scene was found in defendant's home and near him when he was arrested. Defendant, before making his confession to police, directly stated to two friends that he had committed the murders, and strongly implied it to a third friend. Defendant also left a letter to a friend admitting guilt and asking forgiveness. And, defendant implied, in his discussions with the police negotiator before his arrest, that he was guilty of the murders. Blood was found on defendant's van with DNA matching one of the victim's DNA, with the odds against it belonging to any other individual being at least 379.2 quadrillion to one.

Given all this evidence, if there was any error in the admission of defendant's confession, it was harmless beyond a reasonable doubt. There is no possibility that fair-minded jurors would have voted to acquit defendant in the absence of the confession. *Whitehead, supra* at 7-9. Therefore, there is no basis for reversing defendant's convictions.

Defendant also argues that the trial court erred in admitting into evidence a tape of a call to a 911 operator by one of the murder victims regarding an earlier incident with defendant. We disagree.

We review a trial court's rulings on admissibility of evidence for an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). An abuse of discretion exists when an unprejudiced person, considering the facts on which the trial court acted, would conclude that there was no justification or excuse for the ruling made. *People v Tate*, 244 Mich App 553, 559; 624 NW2d 524 (2001). Here, there was no abuse of discretion by the trial court.

First, we note that the claim which defendant now asserts is different from the one he raised at trial. Although defendant did object to the tape's admission at trial, he did not raise issue with the authentication of the victim's voice. On appeal, defendant argues that the voice of the victim was not properly authenticated. Because this is a forfeited nonconstitutional issue, the trial court's ruling is subject to reversal only if defendant can show that he was actually innocent or that the proceedings were seriously tainted. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). Our discussion of the foregoing issue makes clear that defendant cannot show that he was actually innocent. Nor is there any showing that the proceedings were seriously tainted.

In any event, there was a sufficient basis for authenticating the tape. A 911 officer testified that the tape came from the department. The voice on the tape identifies herself as Vicki Keller and states that defendant is violating a protective order prohibiting him from having

contact with her and identifies defendant as the voice in the background shouting obscenities. There is sufficient evidence that this exhibit is what it purported to be, and, hence, it was admissible. *People v Berkey*, 437 Mich 40, 50; 467 NW2d 6 (1991).

Affirmed.

/s/ Peter D. O'Connell

/s/ Kathleen Jansen

/s/ Christopher M. Murray