STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 20, 2004
v	No. 247042 Wayne Circuit Court
TIMOTHY CLIFFORD, Defendant-Appellant.	LC No. 01-013634-01

Before: Murphy, P.J., and Griffin and White, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree felony murder, MCL 750.316(1)(b), armed robbery, MCL 750.529, possession of a firearm during the commission of a felony, MCL 750.227b, and felonious assault, MCL 750.82. Defendant was sentenced to life imprisonment without parole for the felony-murder conviction, fifteen to twenty-five years' imprisonment for the armed robbery conviction, two years' imprisonment for the felony-firearm conviction, and one to four years' imprisonment for the assault conviction. We affirm in part, but remand for entry of an amended judgment of sentence vacating defendant's conviction and sentence for armed robbery.

Defendant first argues that he was denied his Sixth Amendment right of confrontation after the prosecutor, in his opening statement, made a remark suggesting that information was obtained from Andre Dwyane Butler, the codefendant. Because defendant's argument implicates his Sixth Amendment right to confront his accuser, this Court reviews the issue, as it reviews all constitutional issues, de novo. *In re Hawley*, 238 Mich App 509, 511; 606 NW2d 50 (1999).

Defendant has a constitutional right to confront witnesses against him as set forth in the Sixth Amendment of the United States Constitution and § 20 of article 1 of the Michigan Constitution of 1963. *People v Bean*, 457 Mich 677, 682; 580 NW2d 390 (1998). The United States Supreme Court recently addressed the parameters of the Confrontation Clause in *Crawford v Washington*, 541 US __; 124 S Ct 1354; 158 L Ed 2d 177 (2004). The Court held that an out-of-court statement by a witness that is testimonial in nature is barred from admission under the Confrontation Clause unless the witness is unavailable and the defendant had the prior opportunity to cross-examine the witness, regardless whether the statement is found reliable and falls within firmly-rooted hearsay exceptions.

Defendant argues that codefendant's statement against him was placed into evidence by the following remarks made by the prosecutor during opening statements:

> [Codefendant] is arrested and then the investigation turns towards [defendant]. So after [codefendant] is arrested, and then the investigation turns towards [defendant] . . . .

Due to this statement by the prosecutor, defendant moved for a mistrial. The trial court denied the motion, stating:

> I'm going to deny the motion for mistrial. I think it was a general statement that was made. There are many ways to interpret it rather than the sole way that is claimed by the defense and so I'll deny the motion for mistrial.

We conclude that the remarks simply noted the chronological order of events in the case. There was no out-of-court statement admitted into "evidence," as the prosecutor's opening statement is not evidence, which principle was conveyed by the court to the jury in the jury instructions, and jurors are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Had the prosecutor directly stated during his opening remarks that the codefendant made a statement specifically implicating defendant in the murder, it is certainly arguable that it would offend the Confrontation Clause, even if no supportable evidence was introduced. We need not reach that issue, however, because no such assertion was made by the prosecutor, nor did the prosecutor claim that any statement whatsoever was made by the codefendant; the remarks merely referenced the investigation and how it proceeded. We concede the possibility that a juror may have inferred that the codefendant informed the police of information that incriminated defendant, which caused the investigation to focus on defendant. But considering the trial court's instructions concerning statements made by counsel as they relate to the actual evidence presented, if a juror reached this inference, and assuming a Confrontation Clause issue can arise out of an opening statement, it is likely that the failure to subsequently present any evidence in support of the remarks would be damaging to the prosecution; the juror would naturally question the prosecutor's truthfulness on the point and possibly question the whole case. In other words, any error, assuming error, was harmless beyond a reasonable doubt. *People v Spinks*, 206 Mich App 488, 493; 522 NW2d 875 (1994)(Confrontation Clause violation is harmless if the appellate court can confidently conclude, beyond a reasonable doubt, that the error did not affect the jury's verdict.). This is true, considering, in addition, the admission of defendant's own statement to police that he was involved and assisted in the crime and the testimony of the injured victim. The brief, vague reference made by the prosecutor, when considered in the context of the evidence presented at trial and the court's instructions, did not affect the jury's verdict, and we are confident of that conclusion.

Defendant next argues that he was denied his due process right to a fair trial because his statement to police was involuntary and was used against him at trial. We disagree. In regard to a suppression issue, we review a trial court's factual findings for clear error. *People v Attebury*, 463 Mich 662, 668; 624 NW2d 912 (2001). To the extent that a trial court's ruling on a motion to suppress involves an interpretation of the law or the application of a constitutional standard to uncontested facts, our review is de novo. *Id.*

With respect to a custodial interrogation, a statement of an accused is inadmissible unless the accused voluntarily, knowingly, and intelligently waived his Fifth Amendment rights. *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966); *People v Abraham*, 234 Mich App 640, 644; 599 NW2d 736 (1999). The burden is on the prosecutor to establish a valid waiver by a preponderance of the evidence. *Id.* at 645.

When a defendant challenges the admissibility of his statements on the basis that they were involuntary, the trial court, outside the presence of a jury, must hear testimony regarding the circumstances of the defendant's statement. *People v Walker (On Remand)*, 374 Mich 331, 338; 132 NW2d 87 (1965); *People v Manning*, 243 Mich App 615, 624-625; 624 NW2d 746 (2000). Whether defendant's statement was knowing, intelligent, and voluntary is a question of law, which the court must examine under the totality of the circumstances. *People v Snider*, 239 Mich App 393, 417; 608 NW2d 502 (2000). Whether a statement was voluntary is determined by examining police conduct. *People v Howard*, 226 Mich App 528, 538; 575 NW2d 16 (1997). Voluntariness is determined by examining the totality of the circumstances surrounding a statement to establish if it was the product of an essentially free and unconstrained decision by its maker, or whether the accused's will had been overborne and his capacity for self-determination critically impaired. *People v Cipriano*, 431 Mich 315, 333-334; 429 NW2d 781 (1988). The list of factors to be considered includes:

> 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. [*Id*. at 334 (citations omitted).]

Any promises of leniency should also be considered. *People v Shipley*, 256 Mich App 367, 373; 662 NW2d 856 (2003). On the issue of voluntariness, the absence or presence of any one factor is not necessarily conclusive. *Cipriano, supra* at 334.

The trial court examined the admissibility of defendant's confession at a *Walker* hearing held on May 31, 2002, at which it found that the confession was made after a knowing, intelligent, and voluntary waiver of *Miranda* rights. The trial court determined that defendant's testimony at the *Walker* hearing was inherently contradictory. The court denied defendant's motion to suppress his statement.

According to the police version of events, during the course of the interviews, police treated defendant fairly and did not engage in any coercive behavior. Defendant only had one previous encounter with the police, and, at twenty-one years of age, he had completed high school and over one year of college. The police asserted that defendant was not hungry and that they gave him food and beverages. The police claimed that defendant was not ill and did not appear intoxicated or drugged. There was evidence that defendant had the ability to put his head down if he was tired. Although defendant was held for 10 ½ hours before giving a statement,

there were breaks in the interrogation according to police. There was further evidence that defendant was advised of his constitutional rights and that he was not physically abused, nor threatened with abuse. The facts, as testified to by the police, when viewed in their entirety, do not show police coercion that would negate the voluntary nature of defendant's confession.

Although defendant's version of the story was very different, as here, when the resolution of a disputed factual question turns on the credibility of witnesses, we will defer to the trial court, which had a superior opportunity to evaluate these matters. *People v Daoud*, 462 Mich 621, 629; 614 NW2d 152 (2000); *People v Sexton (After Remand)*, 461 Mich 746, 752; 609 NW2d 822 (2000). The trial court believed the testimony of the police officers over the testimony of defendant, thus finding that defendant voluntarily waived his *Miranda* rights. The evidence is sufficient to find that the lower court did not err in denying defendant's motion to suppress his confession.

Defendant finally argues, and the prosecution agrees, that his conviction and sentence for both felony murder and the underlying offense of armed robbery violates double jeopardy. We add our agreement. A double jeopardy issue constitutes a question of constitutional law that is reviewed de novo on appeal. *People v Hill*, 257 Mich App 126, 149-150; 667 NW2d 78 (2003).

Two convictions, of felony murder and armed robbery, when armed robbery is the predicate felony of the murder charge, violate the constitutional prohibition against double jeopardy found in both the federal and state constitutions, US Const, Am V; Const 1963, art 1, § 15. *People v Harding*, 443 Mich 693, 712; 506 NW2d 482 (1993); *People v Wilder*, 411 Mich 328, 352; 308 NW2d 112 (1981). Here, the judgment of sentence reflects convictions and sentences for both first-degree felony murder and armed robbery. Defendant was sentenced to life in prison on the felony-murder conviction and fifteen to twenty-five years in prison on the armed robbery conviction. The appropriate remedy for such a violation is to affirm the conviction of the higher charge and vacate the lower conviction. *People v Herron*, 464 Mich 593, 609; 628 NW2d 528 (2001). We therefore vacate defendant's armed robbery conviction and sentence and remand for modification of the judgment of sentence.

Affirmed, but remanded for entry of an amended judgment of sentence. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Richard Allen Griffin
/s/ Helene N. White