STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 28, 2004
v	No. 231665 Wayne Circuit Court
MICHAEL B. REED, Defendant-Appellant.	LC No. 99-011015

Before: Wilder, P.J., and Hoekstra and Owens, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of first-degree felony murder, MCL 750.316(1)(b), and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to life in prison for the murder conviction and a consecutive two-year term for the felony-firearm conviction. He appeals as of right. We affirm.

I. Effective assistance of counsel

Defendant argues that he is entitled to a new trial because his trial attorney was ineffective. We disagree.

A defendant seeking a new trial on the ground that trial counsel was ineffective bears a heavy burden. "To justify reversal under either the federal or state constitutions, a convicted defendant must satisfy the two-part test articulated" in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). First, counsel's performance must have been deficient, that is, counsel made errors so serious that the defendant was deprived of his Sixth Amendment right to counsel. *Id.* at 600. "The defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy." *Id.* Next, the defendant must show that he was prejudiced by the deficient performance by demonstrating it was reasonably probable that the result of the proceeding would have been different but for counsel's error. *Id.* Here, the court rejected defendant's claim that counsel was ineffective after conducting a three-day evidentiary hearing. A trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

Defendant first argues that trial counsel was ineffective for failing to seek to suppress his police statements on the ground that they were involuntary. We disagree.

As this Court has explained:

> A statement obtained from a defendant during a custodial interrogation is admissible only if the defendant 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 Daoud*, 462 Mich 621, 632-639; 614 NW2d 152 (2000).] A confession or waiver of constitutional rights must be made without intimidation, coercion, or deception, *id.* at 633, and must be the product of an essentially free and unconstrained choice by its maker. *People v Cipriano*, 431 Mich 315, 333-334; 429 NW2d 781 (1988). The burden is on the prosecution to prove voluntariness by a preponderance of the evidence. *Daoud, supra* at 634. In *Cipriano, supra* at 334, our Supreme Court set forth a nonexhaustive list of factors that should be considered in determining the voluntariness of a statement:
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> "[T]he 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."
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> No single factor is necessarily conclusive on the issue of voluntariness. [*People v Akins*, 259 Mich App 545, 564; 675 NW2d 863 (2003).]

A promise of leniency by the police is also a factor to be considered in the evaluation of the voluntariness of a defendant's statement. *People v Givans*, 227 Mich App 113, 120; 575 NW2d 84 (1997). The ultimate test of admissibility is whether the totality of the circumstances surrounding the making of the statement indicates that it was freely and voluntarily made. *Id*. Defendant offered evidence of his youth, learning disability, and police misconduct to support his claim that his statements were involuntary. Relying on both the trial testimony and its determination that defendant's testimony at the evidentiary hearing was not credible, the trial court concluded that defendant's statements were voluntary.

The officers who took defendant's statements testified that he read his constitutional rights out loud and indicated he understood them. They testified that defendant agreed to give the statements, and they denied that he was coerced. And counsel explained defendant admitted to him that the police had *not* made any promises. Counsel concluded there was no basis to proceed with a suppression motion. The evidence supported the court's determination that the statements were voluntarily given as well as its determination that defendant's evidentiary hearing testimony was not credible. We defer to the court's assessment of credibility. MCR 2.613(C). Accordingly, because defendant's statements were voluntary, counsel did not err by not seeking to suppress them on this basis. Counsel was not required to make a futile motion. *People v Riley* (*After Remand*), 468 Mich 135, 142; 659 NW2d 611 (2003).

Defendant also claims counsel should have tried to suppress the statements and the gun seized from his home on the ground that they were obtained after an illegal warrantless arrest. We disagree.

Generally, when an unlawful detention has been used to directly obtain any type of evidence from a detainee, the evidence should be excluded as fruit of the poisonous tree. *People v Spinks*, 206 Mich App 488, 496; 522 NW2d 875 (1994). A confession resulting from an illegal arrest is not admissible. *People v Richardson*, 204 Mich App 71, 78; 514 NW2d 503 (1994). However, "[a] police officer may arrest an individual without a warrant if a felony has been committed and the officer has probable cause to believe that the individual committed the felony." *People v Kelly*, 231 Mich App 627, 631; 588 NW2d 480 (1998), citing MCL 764.15(c). To determine whether there is probable cause, a court must determine whether the facts known by the arresting officer at the time of arrest would cause a fair-minded person of average intelligence to believe that the suspect had committed the felony. *Id.*

In this case, evidentiary hearing testimony established that a codefendant informed police that a person named "Michael Murray" was the shooter, but the codefendant admitted that he was not certain of this other person's last name. Still, the codefendant gave a physical description of the person, knew where he lived, and led police to the person's house. There, the police found defendant, whose first name is Michael, and arrested him. While defendant did not exactly match the description given by the codefendant, he was of the approximate age, he had the same first name, and he was present at the home identified by the codefendant. This was sufficient to provide probable cause for defendant's arrest. Therefore, trial counsel was not ineffective for failing to challenge the evidence on this ground.

Defendant also contends that trial counsel was ineffective for not seeking to suppress the statements on the basis that there was a due process violation because the statements were not videotaped or audiotaped. We disagree. As this Court explained in *People v Fike*, 228 Mich App 178, 183-186; 577 NW2d 903 (1998), due process does not require such a practice. Therefore, counsel did not err by failing to seek suppression on this basis.

Lastly, defendant contends that counsel erred by failing to cross-examine one of the interrogating officers. Counsel explained that he intentionally declined to question the officer because he was not challenging the statement she obtained. He wanted it to appear to the jury that the defense had no problem with the statement because it supported an argument that defendant was either guilty of a lesser offense or not guilty because he acted in self-defense. Counsel made a valid strategical decision to use the statement to benefit defendant. Not questioning the officer about it was part of this strategy. That the strategy ultimately failed does not indicate that counsel was ineffective. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996).

II. Sufficiency and Great Weight of the Evidence

Defendant next contends that his felony murder conviction was not supported by sufficient evidence or, alternatively, was against the great weight of the evidence. We disagree.

A claim of insufficient evidence is reviewed de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). When determining if sufficient evidence was presented to

sustain a conviction, this Court views the evidence in a light most favorable to the prosecution and determines whether a rational trier of fact could have found the elements of the crime proven beyond a reasonable doubt. *People v Jaffray*, 445 Mich 287, 296; 519 NW2d 108 (1994). Where a defendant seeks a new trial because the verdict was against the great weight of the evidence, this Court reviews a trial court's decision on the motion for an abuse of discretion. *People v Gonzalez*, 178 Mich App 526, 532; 444 NW2d 228 (1989). An abuse of discretion occurs if the evidence preponderates so heavily against the verdict that allowing the verdict to stand would result in a miscarriage of justice. *People v McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001).

> "The elements of felony murder are: (1) the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result [i.e., malice], (3) while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in [the statute.]" [*People v Carines*, 460 Mich 750, 758-759; 597 NW2d 130 (1999), quoting *People v Turner*, *supra*, 213 Mich 558, 566; 540 NW2d 728 (1995), overruled in part on other grounds, *People v Mass*, 464 Mich 615, 627-628; 628 NW2d 540 (2001).]

The felony alleged in this case was larceny,[1] which is "the taking and carrying away of the property of another, done with felonious intent, and without the owner's consent." *People v Malach*, 202 Mich App 266, 270; 507 NW2d 834 (1993). In this case, defendant's statement that he shot the victim and medical evidence that the victim was shot in the head and neck, viewed most favorably to the prosecution, was sufficient to prove that defendant killed the victim while possessing the requisite malice.

Moreover, there was sufficient evidence that the killing was committed during the commission of a larceny. Defendant's statements indicated that there was a plan to rob the victim and that the two men took money and cigarettes from the victim. An eyewitness' description of the arm movements of the two men supported an inference that they were rummaging through the victim's clothing to find something to take. Additionally, the victim was found with one of his pants' pockets turned out. Accordingly, there was sufficient evidence to support defendant's conviction of first-degree felony murder. Finally, in light of all of the evidence presented, we cannot conclude that the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow it to stand. The trial court did not abuse its discretion in denying defendant's motion for a new trial.

Affirmed.

/s/ Kurt T. Wilder
/s/ Joel P. Hoekstra
/s/ Donald S. Owens

[1] Larceny is specifically enumerated in the statute. MCL 750.316(1)(b).