

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID JAMES WRIGHT,

Defendant-Appellant.

UNPUBLISHED

December 22, 2009

No. 286851

Macomb Circuit Court

LC No. 2007-004518-FC

Before: Fort Hood, P.J., and Sawyer and Donofrio, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of felony-murder, MCL 750.316b, kidnapping, MCL 750.349, and larceny in a building, MCL 750.360. He was sentenced to life imprisonment for the felony-murder and kidnapping convictions, and two to four years' imprisonment for the larceny conviction. We affirm.

On June 14, 2007, the victim, Marilou Johnson, resided in a home in Washington Township with her sons and her boyfriend, the homeowner. After midnight on June 15, 2007, the police were called to investigate the victim as a missing person. The victim, her purse, and her cellular telephone were missing. However, her car was at the home. Police searched the residence and found no signs of foul play. Defendant became a person of interest after the victim's cell phone records revealed that her last two phone calls were from defendant. He had borrowed \$50,000 from the victim's boyfriend, he had failed to pay the money back, and he had a gambling problem. Defendant voluntarily spoke to police, but insisted that he had only exchanged one phone call with the victim, despite the phone records. Police began surveillance on defendant when his reports of his travels did not match his cell phone records.¹

A gas station employee knew defendant from his frequent visits into the store. On June 14, 2007, defendant entered the store, but was not his usual friendly self. The clerk noticed that there was a footprint and blood on defendant's shirt. Defendant reported that a coworker cut his finger and kicked defendant. The videotape of this visit was turned over to police.

¹ Police also were investigating defendant's adult children who had conflicts with the victim in the past.

On June 22, 2007, a West Bloomfield police officer was on patrol near the UGARS facility, a community of owners of small cottages. The officer came upon a pickup truck at the side of the road. Defendant was at the back of the vehicle. The officer stopped to see if defendant was in need of assistance. Defendant showed the officer a possum in a bag and said that he was giving the animal a proper burial. The interaction was captured on the officer's video recorder. Defendant's family owned a cottage at the UGARS facility, and he was seen there on June 22, 2007.

On June 23, 2007, defendant was observed trying to visit a pawnshop, but it was closed. Later that day, he went to a car wash. Although defendant was parked in the bay area, he did not wash the exterior of his pickup truck. Instead, he cleaned the interior and removed trash bags and a shovel. After he left the car wash, police recovered the discarded items and found that the garbage bags had blood and hair in them. The officers conducting surveillance requested that a traffic stop occur because defendant had an improper plate on his vehicle. Defendant was placed under arrest for improper plates, no registration, and no proof of insurance. Defendant was handcuffed, and a pat down search revealed a vial containing diamonds. The diamonds had been removed from a necklace owned by the victim.

After his arrest, defendant initially declined to speak to police. However, he later agreed to give a statement. He had performed work at the victim's home and needed money. Defendant was speaking with the victim when he saw a knife in his bag. He grabbed the knife and told the victim to get in the trailer while he went into the house to get a check from her boyfriend. Defendant claimed that the murder was an accident. As he tried to get the victim in his trailer, they both tripped, and he fell on top of her. He poked the victim with his fishing knife.

Defendant then went into the home and took the victim's purse. When he returned there was blood dripping from the trailer onto the driveway. He moved the trailer and used the hose to remove the blood from the driveway. He originally buried the victim near his family cottage. However, defendant was concerned that cadaver dogs would locate the body and learned that a carcass could confuse the dogs. He dug up the body, weighed it down with blocks, and dropped it in the lake. Defendant placed a dead possum in the former burial site.

At trial, defendant denied any participation in the murder. Rather, he asserted that he saw the victim holding her neck when her boyfriend approached and stabbed her. Defendant was instructed to dispose of the body and helped the victim's boyfriend move the body into the trailer.² Despite defendant's trial testimony, the jury convicted him as charged.

Defendant first alleges that the trial court erred by denying his motion to suppress when police failed to scrupulously honor his right to counsel and manipulated defendant's mother into deceiving defendant to waive his rights and give a statement. We disagree.

Questions of law pertaining to a motion to suppress evidence are subject to de novo review. *People v Keller*, 479 Mich 467, 473; 739 NW2d 505 (2007). Furthermore,

² Police found DNA evidence in the trailer and blood on rocks near the home. However, the testimony at trial revealed that the victim's boyfriend was an older man in frail health.

constitutional claims and statutory construction issues also present questions of law reviewed de novo. *Id.* at 473-474. The trial court's factual findings are reviewed for clear error. *People v Gillam*, 479 Mich 253, 260; 734 NW2d 585 (2007). Although the factual findings underlying the suppression ruling are reviewed under the clearly erroneous standard, the trial court's ultimate ruling regarding a motion to suppress is reviewed de novo. *People v Reese*, 281 Mich App 290, 294; 761 NW2d 405 (2008). When reviewing a defendant's claim that his constitutional rights were violated, this Court gives deference to the trial court's superior position to evaluate the credibility of the witnesses. *People v McPherson*, 263 Mich App 124, 136; 687 NW2d 370 (2004). Similarly, we give due deference to the trial court's factual findings. *Id.* The trial court's role in determining factual issues and issues of credibility must be respected. *People v Williams*, 470 Mich 634, 641; 683 NW2d 597 (2004).

A defendant may waive his privilege against self-incrimination provided that the waiver is voluntarily, knowingly, and intelligently made. *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966). Once a defendant invokes his right to counsel at questioning, the police may not conduct further interviews until counsel has been made available, unless the accused initiates further communications with the police. *People v Anderson (After Remand)*, 446 Mich 392, 402; 521 NW2d 538 (1994). The prosecution has the burden of establishing a valid waiver by a preponderance of the evidence. *People v Daoud*, 462 Mich 621, 634; 614 NW2d 152 (2000). To determine if a valid waiver of *Miranda* rights occurred, a two-prong review occurs. First, a voluntary relinquishment of the right must occur in the sense that it was the product of a free and deliberate choice rather than based on intimidation, coercion, or deception. *Id.* at 635. Secondly, the court must determine whether the waiver was knowing and intelligent. *Id.* at 635-636. This requires inquiry into the suspect's level of understanding, irrespective of police behavior. *Id.* at 636.

When a defendant asserts that his waiver was involuntary because of coercion by police officers, the court should examine the totality of the circumstances including: the age of the accused; his education or intelligence level; his prior experience with the police; the duration and intensity of the questioning; the length of the detention before the statement; the lack of any advice of constitutional rights; the delay in bringing the defendant before a magistrate; the health of the accused; the deprivation of food, sleep, or medical attention for the accused; any abuse of the accused; and any threatened abuse of the accused. *People v Tierney*, 266 Mich App 687, 708; 703 NW2d 204 (2005) citing *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988). No single factor is conclusive. *People v Sexton (After Remand)*, 461 Mich 746, 753; 609 NW2d 822 (2000).

An appellate court reviews for clear error the trial court's factual findings regarding a defendant's voluntary, knowing, and intelligent waiver of *Miranda* rights. *Daoud, supra* at 629. However, the meaning of the phrase "knowing and intelligent" presents a question of law subject to de novo review. *Id.* at 629-630. A trial court commits an error at law when it focuses on why a defendant confessed rather than considering whether a defendant could in fact understand and waive his *Miranda* rights. *Id.* at 639. The only inquiry when addressing a "knowing and intelligent" waiver of *Miranda* rights is "whether the defendant understood 'that he did not have to speak, that he had the right to the presence of counsel, and that the state could use what he said in a later trial against him.'" *Id.* at 643-644 quoting *People v Cheatham*, 453 Mich 1, 29; 551 NW2d 355 (1996).

Defendant's challenge to the admission of his statement is not premised on the totality of the individual factors, but rather, relies upon the contact between the police and his mother. Defendant contends that the police convinced his mother that there was evidence that the death was accidental, but defendant needed to tell police about the accident before his arraignment and his appearance with counsel. Defendant contends that case law does not address third-party coercion for purposes of determining a voluntary waiver of *Miranda* rights. However, we need not address defendant's theory of third-party coercion. Review of the trial court's factual findings reveals that it did not find any evidence of trickery, deception, or coercion, and expressly held that there was no improper police conduct. Therefore, the trial court did not give credence to the testimony presented by defendant and his mother. When the key issue involves a question of the credibility of the witnesses, the test of credibility lies with the trier of fact. *People v Lemmon*, 456 Mich 625, 646-647; 576 NW2d 129 (1998). In light of this record, we cannot conclude that the trial court erred in denying the motion to suppress the statement. *Keller, supra*. The ultimate ruling was premised on the trial court's factual findings, and the factual findings were not clearly erroneous. *Gillam, supra*.

Defendant next asserts that the trial court erred when it refused to conduct an evidentiary hearing regarding defendant's competency to waive his *Miranda* rights. We disagree. The trial court's decision to conduct an evidentiary hearing is reviewed for an abuse of discretion. *People v Unger*, 278 Mich App 210, 216-217; 749 NW2d 272 (2008). An abuse of discretion occurs when the trial court selects an outcome that falls outside the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

After jury selection was complete, defendant filed a motion for a renewed *Walker*³ hearing. Successor trial counsel had obtained an evaluation of defendant by Dr. Gerald Sheiner. In the evaluation, defendant reported to the doctor that he had suffered a head injury in his early teens, had an aneurysm, and was unconscious for three to four days. As a result of the brain injury or brain damage, Dr. Sheiner opined that defendant was vulnerable to coercion. The trial court denied the motion for a renewed hearing. The court held that it had the opportunity to review the statement and the testimony of defendant. It found that defendant was aware of the right to counsel and that any statement could be used in a later proceeding.

The trial court's denial of the request for a renewed *Walker* hearing did not constitute an abuse of discretion. *Unger, supra*. Defendant, for the first time, raised the issue of his cognitive ability with regard to voluntariness. However, the question of voluntariness is a multi-faceted inquiry, based on the totality of the circumstances, and one particular factor is not dispositive. *Sexton, supra*; *Tierney, supra*. The trial court was able to evaluate and assess defendant's intelligence level and level of functioning when defendant testified at the prior hearing. During that hearing, defendant did not report suffering from a brain injury or from any long or short-term memory difficulties. He also had five prior contacts with police and three convictions. There is no indication that defendant ever raised his cognitive level as a basis for excusing his criminal responsibility. Moreover, vulnerability to coercion explains why defendant confessed,

³ *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

not whether he understood his *Miranda* rights. *Daoud, supra* at 639. In light of the above, the trial court's decision did not constitute an abuse of discretion. *Unger, supra*.

Next, defendant alleges that the trial court violated his due process rights when it excluded evidence of a financial settlement between the victim's children and her boyfriend because it provided an alternate explanation for the murder. We disagree.

A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). When a ruling excludes evidence, it is incumbent upon the party seeking admission to make an offer of proof, and error may not be predicated on the exclusion of evidence unless a substantial right of the party is affected. MRE 103(a)(2); *People v Witherspoon*, 257 Mich App 329, 331; 670 NW2d 434 (2003). Without evidentiary support, any alleged error in excluding evidence is harmless. *Witherspoon, supra* at 331-332.

Review of the record reveals that the parties initially stipulated to admission of the settlement agreement, but the prosecutor later retracted his consent prior to admission. When the victim's son was unable to testify regarding specific details of the settlement agreement, it was suggested that admission be attempted through the attorney who drafted the agreement. The next day, the boyfriend's attorney testified that the settlement agreement "wound up the affairs as they stood at the time of [the victim's] death." The settlement agreement addressed cars, jewelry, and money. In addition to an insurance policy obtained for the victim, the children were given a monetary settlement from the victim's boyfriend. No party attempted to elicit the monetary settlement amount or the amount of the insurance policy. There is no evidence on the record that defense counsel attempted to admit the settlement agreement itself into evidence during or after the attorney's testimony. Furthermore, a separate offer of proof was not preserved on the record. In light of the fact that the crux of the settlement agreement was introduced orally at trial through the testimony of the attorney, we cannot conclude that this issue has any merit.

Defendant contends that he was deprived of a defense when the trial court disallowed expert psychological evidence to explain defendant's behavior and statements. We disagree. "[T]he determination regarding the qualification of an expert and the admissibility of expert testimony is within the trial court's discretion." *People v Murray*, 234 Mich App 46, 52; 593 NW2d 690 (1999). The facts and circumstances upon which an expert bases his opinion are essential to determine if the opinions expressed by the witness are correct. *People v Dobben*, 440 Mich 679, 697; 488 NW2d 726 (1992). "[W]ithout examination of the foundation of the opinion, the factfinders' evaluation of the relative value of the opinions offered is necessarily circumscribed and the reliability of its ultimate determination correspondingly compromised." *Id.*

Expert testimony is of limited value when foundational deficiencies exist or where the dispute involves a question of law. In *Daoud, supra* at 625, the defendant flagged down two police officers and reported that he confessed to a 911 operator to killing his mother. Nine years earlier, the defendant's mother was found in a dumpster in Ohio. In response, the officers read the defendant his *Miranda* rights. He proceeded to waive them and explained how he killed his mother. Defendant was given his *Miranda* rights on three more occasions, waived them, and again detailed the killing of his mother. *Id.* at 625-627. The trial court determined that the

defendant was incompetent to waive his *Miranda* rights and to stand trial. The trial court relied on expert testimony to conclude that the defendant was delusional at the time of the police contact because he believed that he had no need for protective rights because God would release him from jail for confessing. *Id.* at 628.

The Supreme Court reversed the trial court's ruling and held that the determination regarding a voluntary, knowing, and intelligent waiver presented a question of law. *Id.* at 629. To be voluntary, the waiver must be the product of a free and deliberate choice, *id.* at 635, while the issue of a knowing and intelligent waiver requires an inquiry into the suspect's level of understanding, *id.* at 636. The appropriate inquiry does not focus on why a defendant confessed, but rather on whether a defendant could understand his *Miranda* rights. *Id.* at 639.

In the present case, the trial court did not abuse its discretion in excluding the testimony of Dr. Sheiner. *Murray, supra.* As an initial matter, there were foundational deficiencies with regard to admission of the opinion evidence. Dr. Sheiner failed to delineate any background in neurology such that he could review the current state of defendant's brain injury without any recent neurological tests, particularly where defendant did not complain any of lingering effects of his injury. *Dobben, supra.* Additionally, Dr. Sheiner opined that defendant could not voluntarily, knowingly, and intelligently waive his *Miranda* rights because of coercion syndrome. However, that inquiry presents a question of law. *Daoud, supra.* Further, the focus is not on why a defendant confessed, but rather, on whether a defendant could understand his *Miranda* rights. *Id.* Assuming the validity of the presence of coercion syndrome, its presence explained why defendant confessed, but it had no bearing on the trial court's legal determination regarding defendant's understanding and waiver of his *Miranda* rights.

The next challenge protests the sufficiency of the evidence to support the kidnapping and felony-murder convictions. Specifically, defendant relies on case law from another jurisdiction for the premise that the prosecutor had to prove that the victim was alive at the time of asportation. However, there is no indication that defendant raised this issue in the trial court, and defendant fails to cite any Michigan precedent in support. Therefore, this issue is abandoned. *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001).⁴

Lastly, defendant's challenge to the life sentence for the kidnapping conviction is without merit. When multiple concurrent convictions are at issue, a presentence investigation report (PSIR) need only be prepared for the highest crime class felony conviction. MCL 771.14; *People v Mack*, 265 Mich App 122, 127-128; 695 NW2d 342 (2005).

Affirmed.

/s/ Karen M. Fort Hood
/s/ David H. Sawyer
/s/ Pat M. Donofrio

⁴ The kidnapping statute, MCL 750.349, does not contain any distinction regarding viability at the time of asportation.