STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 12, 2010
v	No. 286545 Kent Circuit Court
STEVEN WILLIS SCARBOROUGH, Defendant-Appellant.	LC No. 07-009422-FC

Before: Markey, P.J., and Bandstra and Murray, JJ.

PER CURIAM.

I. Introduction

Following a jury trial, defendant was convicted of voluntary manslaughter, MCL 750.321, in the killing of Victor Manious, and sentenced as a habitual offender, fourth offense, MCL 769.12, to 19 to 60 years' imprisonment. Defendant appeals as of right, arguing that statements he made to agents of the Federal Bureau of Investigation and Grand Rapids police officers, in which he admitted to the killing, should have been suppressed. Additionally, defendant argues that the trial court made several scoring errors. We affirm.

II. Analysis

A. Suppression Issues

Defendant argues that his statements made during four post-arrest interviews with FBI agents and Grand Rapids police on August 2 and 3, 2007, were improperly admitted, because those statements were not voluntary and because the police improperly questioned him after he invoked his right to remain silent. The United States and Michigan Constitutions guarantee the right against self-incrimination. US Const, Am V; Const 1963, art 1, § 17. To admit into evidence a statement obtained from defendant during a custodial interrogation, the defendant must have voluntarily, knowingly, and intelligently waived his Fifth Amendment rights. *People v Akins*, 259 Mich App 545, 564; 675 NW2d 863 (2003). "Whether a defendant's statement was knowing, intelligent, and voluntary is a question of law that the court must determine under the totality of the circumstances." *People v Snider*, 239 Mich App 393, 417; 608 NW2d 502 (2000). We review de novo a trial court's determination that a statement was voluntary, but will not

disturb the trial court's findings of fact absent clear error. *People v Daoud*, 462 Mich 621, 629-630; 614 NW2d 152 (2000).

We consider the following factors in determining whether a statement is voluntary:

> [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.
>
> The absence or presence of any one of these factors is not necessarily conclusive on the issue of voluntariness. The ultimate test of admissibility is whether the totality of the circumstances surrounding the making of the confession indicates that it was freely and voluntarily made. [*People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988) (citations omitted).]

Defendant's challenge is to the four factors relating to (1) whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; (2) whether the accused was deprived of food, sleep, or medical attention; (3) whether the accused was physically abused; and (4) whether the suspect was threatened with abuse. After a close review of the record, we hold that the trial court's factual findings were not clearly erroneous, and that defendant's statements were knowing, intelligent, and voluntary. *Snider*, 239 Mich App 417.

With respect to the first two factors noted above, defendant asserts on appeal that he "was in no physical or mental condition to withstand the coercive atmosphere created by the police . . . due to the length and frequency of the interrogations, the denial of sleep, the overcrowded nature of the detention cells, the denial of epilepsy medication and [defendant's] constant concern over seizures, implied promises made by the police, and the abusive conduct of one of the officers involved." Contrary to this argument, and consistent with the trial court's findings, is that (1) defendant indicated that he felt fine before the initial August 3, 2007, interview commenced, (2) although defendant mentioned his medication during the interviews, he did not indicate that the lack of medication was affecting him physically, and there is no indication that the police withheld defendant's medication to coerce him into making any statements, and (3) defendant admitted that he never had any epileptic seizures during his incarceration in Texas. The recorded interviews also reveal that defendant was in no means pressured or coerced by police, or that he was under any stress or ill health. For these reasons, we conclude the record refutes defendant's argument that he could not mentally or physically withstand the questioning by police. *Cipriano*, 431 Mich 334.

With respect to the latter two factors, defendant argues that Detective Gregory Griffin's abusive conduct during the August 3, 2007, interviews rendered defendant's statements involuntary. Regarding this argument, the trial court found that "[w]hile Detective Griffin's interview style could be deemed argumentative and confrontational at times, Detective Griffin

never engaged in physical abuse or threats of abuse." We agree, as there is nothing in the record to suggest that defendant was physically abused or that the police threatened him with physical abuse during any of the interviews. *Id.*

Defendant also argues that the Grand Rapids police improperly coerced defendant's statements by promises of leniency. Though a promise of leniency may impact the voluntariness of a statement, *People v Givans*, 227 Mich App 113, 120; 575 NW2d 84 (1997), there is again no evidence in the record to support that such a promise was made. Instead, Detective Griffin told defendant that he needed to grab a "lifeline," and while defendant now interprets that assertion as an offer of leniency in exchange for a confession, by the time of that statement he had already admitted to the operative facts in this case, i.e., that defendant hit the victim with a baseball bat after some kind of altercation, stuffed the victim's body in a trunk, and then abandoned the car with the victim's body still inside. We conclude that the trial court correctly observed that in context, there was no promise of leniency by the police. *Id.*

Defendant's final argument on this issue is that he invoked his right to remain silent, and that the Grand Rapids police failed to honor that request on various occasions at the August 3, 2007, interviews. "[A] suspect is free at any time to exercise his right to remain silent, and all interrogation must cease if such right is asserted." *People v Catey*, 135 Mich App 714, 722; 356 NW2d 241 (1984). The police, however, are permitted to continue an interview where defendant does not unequivocally invoke his right to remain silent. *People v Adams*, 245 Mich App 226, 234-235; 627 NW2d 623 (2001). We have reviewed the specific portions of the record cited by defendant, and while defendant made several assertions that he no longer wished to speak to the police, these assertions were equivocal. Defendant's right to remain silent was not violated by the continuation of the interviews. *Id.*

B. Scoring

As noted, defendant also challenges the trial court's scoring of offense variables (OVs) 5, 7, and 13. A trial court's scoring decision will be upheld if there is any evidence in the record to support it. *People v Kegler*, 268 Mich App 187, 190; 706 NW2d 744 (2005).

Defendant challenges the sentencing court's scoring of 15 points for OV 5, reflecting that "[s]erious psychological injury requiring professional treatment occurred to a victim's family." MCL 777.35(1)(a). "Offense variables are properly scored by reference only to the sentencing offense except when the language of a particular offense variable specifically provides otherwise." *People v McGraw*, 484 Mich 120, 135; 771 NW2d 655 (2009). Defendant specifically argues that there was no evidence of "serious psychological injury" as required by OV 5. We disagree, as the evidence showed that the victim's wife was present when his body was found in the trunk of the car, and that fact establishes serious psychological injury sufficient to score 15 points for OV 5.[1]

[1] Neither party has raised application of *McGraw* to the scoring of OV 5, and so that issue is not properly before us. Nonetheless, we point out that scoring OV 5 at 15 points for discovering the victim's body in the trunk of the car was not a scoring related to defendant's conduct after the
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Defendant next challenges the sentencing court's scoring OV 7 at 50 points, reflecting that "[a] victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." MCL 777.37(1)(a). The trial court found that defendant acted with excessive brutality, where defendant bragged about hitting the victim "Babe Ruth" style. Although defendant's friends testified that defendant made these statements, additional facts support this score. Specifically, defendant admitted that he hit the victim in the head with a baseball bat and rendered him unconscious, dragged the victim's body down a flight of stairs, placed the victim into the trunk of the victim's car, and then drove the victim's car to downtown Grand Rapids, leaving the car downtown with the victim inside. The record reflects that victim was inside the trunk from the late evening hours of July 28, 2007, to July 30, 2007. "Brutality" is not defined in the statute, but Random House Webster's College Dictionary (1997) defines it as "the quality or state of being brutal," and "brutal" as "savage; cruel; inhuman" or "harsh; severe." The aforementioned facts certainly demonstrate that defendant acted with excessive brutality. Thus, the record supports a score of 50 points for OV 7. *Id.*

Defendant finally challenges the trial court's OV 13 score of 25 points for a continuing pattern of criminal behavior. MCL 777.43. MCL 777.43(2)(a) provides that "[f]or determining the appropriate points under this variable, all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction." At sentencing, the prosecution argued that defendant had been convicted of aggravated burglary and two counts of theft in Tennessee, and the trial court accepted those convictions as sufficient to support an OV 13 score of 25 points. However, defendant correctly observes on appeal that his convictions for theft and aggravated burglary are not crimes against a person.[2]

Nevertheless, there is record support for the OV 13 score of 25 points. First, defendant was convicted of the instant offense. Second, defendant's presentence investigation report (PSIR), indicated that he was arrested and charged with aggravated assault in Tennessee on May 7, 2007, and that such charge was pending. Such an offense is a class C or D felony depending on the circumstances, and it is part of the chapter of crimes against a person. Tenn Code Ann § 39-13-102(d). A defendant's PSIR is presumed to be accurate, unless challenged by the defendant; and a trial court is entitled to rely on the factual information within the PSIR. *People v Grant*, 455 Mich 221, 233-234; 565 NW2d 389 (1997). And, pending charges may be used for OV 13 purposes. *People v Wilkens*, 267 Mich App 728, 743-744; 705 NW2d 728 (2005). Third, there was testimony at trial that defendant attacked and robbed Carlos Barbaran before the

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offense was committed. Instead, finding the body in the trunk result from defendant's commission of the crime, i.e., defendant hitting the victim in the head and leaving him to die in the trunk. Thus, our case is unlike the hypothetical utilized by Justice Corrigan in *McGraw*, 484 Mich 137, where the hypothetical defendant *sent* photos of the victim *after* the murder.

[2] On November 17, 2006, defendant was convicted of two counts of theft, a class D felony, and one count of aggravated burglary, a class C felony. According to Chapter 14 of the Tennessee Code Annotated, theft of property or services worth $1,000 to $10,000, Tenn Code Ann § 39-14-105(3), and aggravated burglary, Tenn Code Ann § 39-14-403, are crimes against property. MCL 777.43(1)(b) provides that 25 points will be scored if "[t]he offense was part of a pattern of felonious criminal activity involving 3 or more *crimes against a person*." (Emphasis supplied.)

instant offense took place, and defendant could have been charged with the felony of unarmed robbery, MCL 750.530, which is a crime against a person, MCL 777.16y. Defendant concedes on appeal that the uncharged offense against Barbaran constituted a suitable crime against a person for OV 13 scoring purposes. See MCL 777.43(2)(a).

Affirmed.

/s/ Jane E. Markey
/s/ Richard A. Bandstra
/s/ Christopher M. Murray