STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 16, 2012
v	No. 301461 Kent Circuit Court
JEFFREY LYNN MALMBERG, Defendant-Appellant.	LC No. 10-003346-FC

Before: SAWYER, P.J., and O'CONNELL and RONAYNE KRAUSE, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317; larceny (more than $1,000 but less than $20,000), MCL 750.356(3)(a); and tampering with evidence, MCL 750.483a(6)(b). He was sentenced to 30 to 90 years' imprisonment for the second-degree murder conviction, two to five years for his larceny conviction, and five to ten years for his tampering with evidence conviction. He now appeals by right. We affirm.

Defendant's murder conviction arose out of the death of two-year-old Jozlynn Martinez. Defendant lived with the child's mother, Consuela Martinez, in Grand Rapids. While Consuela was out of the home, the child became upset and threw a tantrum. Defendant pressed his knee onto the child's chest; she stopped breathing and died a few minutes later. Defendant put the child's body in a trash bag and placed it in the garage. Consuela returned home that evening with a large amount of cash she received from her income tax return check. She assumed the child was asleep in bed, and did not check on her.

The next morning, while everyone else in the house was sleeping, defendant stole the money that Consuela had received and left for Lansing. On his way, he disposed of the child's body in a dumpster. Defendant was arrested in Lansing, and the police brought him back to Grand Rapids for questioning. Despite an extensive search, police were unable to recover the child's body.

The police and FBI agents interviewed defendant multiple times over the course of four days. During these interviews, defendant gave conflicting reports to officers, but was otherwise cooperative in answering questions. He initially denied any wrongdoing and later told officers that the child died from falling down the stairs. Eventually, he admitted that the child died after his knee went into her chest and that he disposed of her body in a dumpster. He filed a pretrial

motion to suppress these statements. The trial court denied the motion and admitted the statements into evidence.

Defendant argues that the trial court erred by allowing the statements into evidence. First, he argues that the statements were made involuntarily. "Statements of an accused made during custodial interrogation are inadmissible unless the accused voluntarily, knowingly, and intelligently waived his or her Fifth Amendment rights." *People v Gipson*, 287 Mich App 261, 264; 787 NW2d 126 (2010). A defendant's waiver of his *Miranda*[1] rights is voluntary if "it was the product of a free and deliberate choice rather than intimidation, coercion, or deception." *People v Daoud*, 462 Mich 621, 635; 614 NW2d 152 (2000) (quotation omitted). This Court uses a list of factors from *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988), in determining whether a suspect's statements were made voluntarily.

> [T]he trial court should consider, among other things, the following factors: 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.*]

While each factor is important, none is dispositive. *Id.* Instead, "[t]he voluntariness of a defendant's statements is determined by examining the totality of the circumstances surrounding the interrogation." *Gipson*, 287 Mich App at 265.

Defendant argues that his statements were involuntary because he was deprived of food and sleep during his interrogations. However, we find his arguments unavailing. The record reveals that during one interview, defendant was given a sandwich and a soft drink after he requested food. The record further indicates that defendant did not eat other food that he was given, either because he did not like it or because he chose not to eat it. Thus, defendant was not denied food, and police action did not render his statements involuntary. See *People v Sexton*, 458 Mich 43, 68-69; 580 NW2d 404 (1998) (the defendant's statements were not made involuntarily when police officers gave him food).

In addition to having food available, defendant was not deprived of sleep. Law enforcement personnel testified that he was awake and alert during interviews. Furthermore, despite the fact that defendant's first two interviews were conducted within a few hours of each other, he was given breaks of several hours between subsequent interviews, including one break of nearly 24 hours. Therefore, defendant had time to sleep, and any alleged inability to sleep was attributable to him, and not to police coercion. When a defendant's inability to sleep is not

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

attributable to police coercion, his lack of sleep does not render his statements involuntary. *Sexton*, 458 Mich at 68-69. Accordingly, defendant's statements were made voluntarily.

Next, defendant argues that his statements should have been suppressed because he made an unequivocal request for an attorney, and police continued to elicit incriminating statements from him after that request. After defendant was advised of his rights at one interview, he stated that "[t]hey were supposed to get me a lawyer and I still haven't seen him. I don't even know who the hell he is." He also acknowledged that if he had an attorney, the attorney would advise him to stop talking to the police. However, despite defendant's intimation that he was supposed to have an attorney at the time he made his statement, the record does not support that he requested an attorney at a previous interview.

In order to invoke the right to an attorney during custodial interrogation, a suspect must unequivocally demonstrate his present desire to have counsel. *People v Granderson*, 212 Mich App 673, 676-677; 538 NW2d 471 (1995). "If the accused makes a reference to an attorney and the reference is ambiguous or equivocal in that a reasonable police officer in light of the circumstances would have understood only that the accused might be invoking the right to counsel, the cessation of questioning is not required." *People v Adams*, 245 Mich App 226, 237-238; 627 NW2d 623 (2001).

We do not find that defendant's statements were an unambiguous request for an attorney. First, neither statement even indicates a present desire to speak with an attorney, much less have one present during interrogation. See *Granderson*, 212 Mich App at 676-677 (a suspect must make a present request for an attorney). Furthermore, even if defendant made such a request, it was far from an unambiguous one. A request for an attorney must be unambiguous. See *id.* at 678. In *People v McKinney*, 488 Mich 1054; 794 NW2d 614 (2011), the Michigan Supreme Court entered an order reversing this Court and held: "The defendant's statement that he would 'just as soon wait' until he had an attorney before talking to the police, followed immediately by his statement that he was willing to discuss the 'circumstances,' was not an unequivocal assertion of the right to counsel or a statement declaring an intention to remain silent." *Id*. Here, defendant's statement contained even less clarity than did the defendant's statements in *McKinney*, as defendant never gave a present indication that he wanted to speak to his assigned attorney. As such, the trial court did not err in admitting defendant's statements.

Next, defendant argues that the prosecution did not satisfy the *corpus delicti* rule before admitting his confession. As noted above, the child's body was never recovered. "We review a lower court's decision regarding *corpus delicti* for an abuse of discretion." *People v King*, 271 Mich App 235, 239; 721 NW2d 271 (2006). **"**[T]he [*corpus delicti*] rule provides that a defendant's confession may not be admitted unless there is direct or circumstantial evidence independent of the confession establishing (1) the occurrence of the specific injury . . . and (2) some criminal agency as the source of the injury." *People v Konrad*, 449 Mich 263, 269-270; 536 NW2d 517 (1995). "[T]he *corpus delicti* of murder requires proof both of a death and of some criminal agency that caused that death." *People v McMahan*, 451 Mich 543, 549; 548 NW2d 199 (1996). The prosecution can establish the *corpus delicti* without the victim's body, as long as it establishes specific injury, i.e., that the victim died, and that the defendant's criminal agency was the source of the victim's death. *Id.* at 551 n 13, 553. The level of proof necessary

for establishing the *corpus delicti* is a preponderance of the evidence. *People v Burns*, 250 Mich App 436, 438; 647 NW2d 515 (2002).

We reject defendant's contention that the trial court abused its discretion in finding that the *corpus delicti* was established. First, the record reveals that the prosecution presented evidence of the child's death before it introduced evidence of his confession. When the prosecution proves that the victim suddenly disappeared and is neither heard from nor seen again, it has established the victim's death for purposes of the *corpus delicti* rule. *People v Brasic*, 171 Mich App 222, 228; 429 NW2d 860 (1988); *People v Modelski*, 164 Mich App 337, 342; 416 NW2d 708 (1987). In this case, the prosecution established that the child suddenly disappeared during the middle of winter, and despite an exhaustive search, was not found. Both *Brasic* and *Modelski* involved adult victims who presumably were capable of taking care of themselves. Here, however, a young child who was completely dependent on adult care disappeared and could not be found. Thus, the prosecution proved, for purposes of the *corpus delicti* rule, that a specific injury, i.e., the child's death, occurred. See *id.*; *Brasic*, 171 Mich App at 228.

Second, the prosecution established that defendant's criminal agency was responsible for the child's disappearance. In *Modelski*, 164 Mich App at 344-346, we concluded that the defendant's suspicious actions after the victim's disappearance demonstrated that his criminal agency was responsible for the victim's death. Likewise, in this case, the prosecution presented proof of defendant's criminal agency because it demonstrated that he acted in a suspicious manner. Defendant stole nearly $2,800 from Consuela and left town. He purchased new clothes on his way out of town. Further, after he left Grand Rapids, he told an acquaintance that he might move to Florida. A defendant's flight can provide circumstantial evidence of his guilt. *People v Unger*, 278 Mich App 210, 226; 749 NW2d 272 (2008). Accordingly, defendant's flight and suspicious activities following the disappearance of the child demonstrated that his criminal agency was responsible for the child's death. *Modelski*, 164 Mich App at 344-346.

Lastly, defendant challenges his sentence and argues that the trial court impermissibly increased his sentence because he refused to admit his guilt. "[A] sentencing court, cannot, in whole, or in part, base its sentence on a defendant's refusal to admit guilt." *People v Wesley*, 428 Mich 708, 711; 411 NW2d 159 (1987). We consider three factors in deciding whether the trial court improperly sentenced the defendant based on his refusal to admit guilt: "(1) the defendant's maintenance of innocence after conviction, (2) the judge's attempt to get the defendant to admit guilt, and (3) the appearance that had the defendant affirmatively admitted guilt, his sentence would not have been so severe." *Id.* at 713. Defendant failed to challenge his sentence on these grounds at sentencing, so our review is for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Defendant does not argue that the trial court acted improperly at sentencing. Rather, he argues that the trial court's comments from a pretrial status conference several months before trial demonstrate it would consider his refusal to admit his guilt. During that conference, the trial court stated:

> As I note it from the status conference, the only offer is to plea as charged. The only thing I can say by way of a supplement to that is that . . . defendants who

> plead guilty as charged [and] that acknowledge their guilt, saving the State the cost of a trial, are given a specific benefit in reduced guidelines under the federal system.
>
> They are not, under the state system, but . . . there's a tendency to sentence people other than at the high end of the guidelines, and in my practice, it's been generally at the middle or lower half of the guidelines in cases where people plead guilty as charged. *So, I try to recognize that in situations where people are guilty and are willing to acknowledge their guilt.*
>
> People who are not guilty or people who have good defenses certainly should go ahead and conduct their business as they best see fit. [Emphasis added.]

However, at his sentencing hearing, defendant did not maintain his innocence or dispute his conviction. Moreover, the trial court did not offer defendant a more lenient sentence if he admitted his guilt, nor did it inquire as to whether defendant would admit his guilt. Under the factors articulated in *Wesley*, there is no indication that defendant either maintained his innocence or that the trial court attempted to force him to admit his guilt. Thus, because neither occurred at sentencing, we cannot conclude that the trial court erroneously considered defendant's refusal to admit his guilt, or attempted to make him admit his guilt.

Furthermore, at sentencing, the trial court did not offer defendant a lighter sentence in exchange for an admission of guilt. In *People v Spanke*, 254 Mich App 642, 650; 658 NW2d 504 (2003), we held that "[r]esentencing is required only if it is apparent that the court erroneously considered the defendant's failure to admit guilt, as indicated by action such as asking the defendant to admit his guilt or offering him a lesser sentence if he did." In this case, it is not apparent that the trial court offered defendant a more lenient sentence if he agreed to admit his guilt. While the trial court's comments at the status conference show that it might have considered defendant's decision to plead guilty in sentencing him pursuant to a guilty plea, the record does not demonstrate that the trial court actually considered any of this at sentencing. If the trial court indicates that it might impose a different sentence if the defendant continues to maintain his innocence, but actually cites legitimate reasons for imposing the defendant's sentence, then the trial court does not impermissibly consider the defendant's refusal to admit guilt. *People v Dobek*, 274 Mich App 58, 106; 732 NW2d 546 (2007). In this case, despite its comments at the pretrial status conference, the trial court cited legitimate reasons for imposing defendant's sentence. Accordingly, the trial court did not impermissibly offer defendant a more lenient sentence in exchange for his admission of guilt. See *Dobek*, 274 Mich App at 106.

Affirmed.

/s/ David H. Sawyer
/s/ Peter D. O'Connell
/s/ Amy Ronayne Krause