

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

VICTOR OQUENDO,

Defendant-Appellee.

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UNPUBLISHED

May 10, 2012

No. 304329

Wayne Circuit Court

LC No. 10-013218-FC

Before: SAAD, P.J., and K.F. KELLY and M.J. KELLY, JJ.

PER CURIAM.

The prosecutor charged defendant with two counts of first-degree murder, MCL 750.316(1)(a), two counts of felony murder, MCL 750.316(1)(b), carjacking, MCL 750.529a, armed robbery, MCL 750.529, possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, and burning of personal property with a value greater than \$1,000 but less than \$20,000, MCL 750.74(1)(c)(i). After the preliminary examination, the trial court granted defendant's motion to suppress his statement to police. Specifically, the trial court ruled that the *Miranda*<sup>1</sup> warnings "were not comprehensively given" and defendant's confession "was induced by promises of leniency." The prosecutor appeals and, for the reasons set forth below, we reverse.

I. WAIVER

The prosecutor argues that defendant validly waived his *Miranda* rights. This court reviews de novo a trial court's determination that a waiver of Fifth Amendment rights was knowing, intelligent, and voluntary. *People v Gipson*, 287 Mich App 261, 264; 787 NW2d 126 (2010). "When reviewing a trial court's determination of voluntariness, we examine the entire record and make an independent determination." *Id.* However, review of the trial court's factual findings is for clear error, and this Court will not overturn the trial court's decision "unless left with a definite and firm conviction that a mistake was made." *Id.*

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<sup>1</sup> *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

The Fifth Amendment of the United States Constitution and Article 1, § 17 of the Michigan Constitution guarantee the right against self-incrimination. US Const, Am V; Const 1963, art 1, § 17; *People v Bassage*, 274 Mich App 321, 324; 733 NW2d 398 (2007). A defendant must make a voluntary, knowing, and intelligent waiver of his Fifth Amendment rights in order for a statement he makes during a custodial interrogation to be admissible. *Miranda*, 384 US at 444; *Gipson*, 287 Mich App at 264. To determine whether a defendant validly waives his rights requires an evaluation of the totality of the circumstances, including the suspect's age, education, background, intelligence, and whether he is capable of understanding the warnings, the nature of the rights as given, and the consequences of waiver. *People v Daoud*, 462 Mich 621, 634; 614 NW2d 152 (2000), citing *Fare v Michael C*, 442 US 707, 725; 99 S Ct 2560; 61 L Ed 2d 197 (1979)). "As a general rule, an effective advising of *Miranda* rights does not require an oral recitation, and presentation to a defendant of a written form which adequately lists his rights is sufficient." *People v Nantelle*, 130 Mich App 51, 52; 342 NW2d 627 (1983), citing *United States v Sledge*, 546 F2d 1120, 1122 (CA 4, 1977).

Here, during defendant's interview on November 19, 2010, Sergeant Kenneth Gardner handed defendant a constitutional rights form and asked defendant if he was familiar with his constitutional rights. Defendant nodded his head and said, "Yes." Sergeant Gardner handed defendant a pen and asked him to read the form and sign it. Without reading the form, defendant took the pen and started to sign the paper. Defendant was apparently signing in the wrong place and Sergeant Gardner said, "I'm sorry, no. Right here," pointing to another place on the paper. After defendant signed the paper, Sergeant Gardner asked defendant "Do you have any questions about it?" Defendant shook his head. Gardner then said, "Do you understand 'em?" Defendant continued to look down at the paper, making a gesture with his head that appeared ambiguous. The trial court ruled that defendant's gesture was a head shake indicating a negative response, meaning he did not understand his rights.

After reviewing the video recording of the interview several times, we hold that defendant's conduct was somewhat ambiguous. On one hand, defendant appears to have shaken his head in response to Sergeant Gardner's question about his understanding of his rights, which is a physical indication that generally is intended to mean "no." On the other hand, defendant's gesture appears to have been a mere continuation of his prior head shake indicating that he had no questions about the form. Particularly in light of defendant's prior affirmative statement that he was familiar with his constitutional rights, his gesture could be viewed as a continuing indication that he had no questions about the form, or an absentminded response to a question that he did not really heed. In other words, defendant's body language suggested that he was not thoughtfully listening to Sergeant Gardner's specific question about his understanding of the rights and he just shook his head inattentively, or, to again indicate he had no questions.

In any case, defendant's conduct on the tape was not such that a viewer would readily conclude that defendant was signaling to Sergeant Gardner that he did not understand his rights and that they should be explained to him. Sergeant Gardner appears to have interpreted defendant's response as a general affirmation of his understanding because Sergeant Gardner immediately said, "Okay . . . alright," took back the pen and form, and continued with the process. In our view, Sergeant Gardner did not simply ignore defendant's lack of understanding and push forward, nor did Sergeant Gardner pause or look at defendant in a way to suggest he did not comprehend defendant's response, but decide to push forward anyway. Further,

defendant did not stop Sergeant Gardner and clarify that he needed to be reminded of his rights before continuing. Rather, there was simply an air of understanding between the participants, who knew each other from a prior police interview and defendant's other contacts with police.

While we disagree with the trial court's interpretation of defendant's gesture as a head shake meaning "no," the gesture was admittedly ambiguous enough so that we are not "left with a definite and firm conviction that a mistake was made" with regard to that factual issue. However, the critical inquiry is not whether defendant moved his head with any particular intent, it is whether the totality of the circumstances surrounding the interrogation reflects that defendant knowingly, intelligently, and voluntarily waived his *Miranda* rights. *Moran v Burbine*, 475 US 412; 106 S Ct 1135; 89 L Ed 2d 410 (1986). Defendant had been orally advised of his *Miranda* rights on prior occasions and admitted to having other contacts with police. At the hearing on defendant's motion to suppress, defendant acknowledged that police had given him his *Miranda* rights before and he testified that he understood that anything he said to Sergeant Gardner could be used against him. Despite his prior assertions and claims of understanding, defendant stated at the hearing that he only understood his right to remain silent. This assertion is questionable because, at the time of his interview with Sergeant Gardner, defendant was in jail for another crime—a case for which he was represented by counsel. Indeed, during this interview, Sergeant Gardner actually stopped defendant from talking about facts related to the other case and reminded defendant that he was represented by counsel in that case and could not talk to him about it.<sup>2</sup> The following exchange at the motion hearing also highlights defendant's understanding of his rights:

*Prosecutor.* And you knew what those rights were because you already had them read to you two other times for sure, correct?

*Defendant.* Yes, ma'am.

*Prosecutor.* And you knew what you were waiving; is that true?

*Defendant.* I guess, yes.

*Prosecutor.* I don't want you to guess. Is it a yes or no, sir?

*Defendant.* Yes, ma'am.

Thus, defendant admitted that he knew the *Miranda* rights, his rights were read to him on at least two prior occasions while in custody, defendant received and had the opportunity to read his rights during this interview, he told Sergeant Gardner he had no questions about them, he signed

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<sup>2</sup> Because the issue was not raised by the parties, and because we are deciding the case on other grounds, we do not address the potential application of the United States Supreme Court's recent opinion in *Howes v Fields*, \_\_\_ US \_\_\_; 132 S Ct 1181; \_\_\_ L Ed 2d \_\_\_ (2012) with regard to whether the nature of this interview even amounted to a custodial interrogation that would require *Miranda* warnings.

the form indicating his understanding of those rights, and defendant testified that he knew he was waiving those rights by signing the form. Accordingly, we hold that the trial court clearly erred when it found that defendant did not knowingly waive his rights. At a minimum, the totality of the circumstances, along with defendant's testimony, show that defendant knowingly waived his *Miranda* rights. See *People v McBride*, 480 Mich 1047 (2008), reversing *People v McBride*, 273 Mich App 238; 729 NW2d 551 (2006).

## II. VOLUNTARINESS

We also agree with the prosecutor that defendant's statement was not involuntary. The determination whether a statement is voluntary involves considering the totality of all the surrounding circumstances, and a determination whether the confession is "the product of an essentially free and unconstrained choice by its maker" or whether the accused's "will has been overborne and his capacity for self determination critically impaired." *People v Cipriano*, 431 Mich 315, 333-334; 429 NW2d 781 (1988), quoting *Culombe v Connecticut*, 367 US 568, 602; 81 S Ct 1860; 6 L Ed 2d 1037 (1961). In making this determination, a trial court should consider factors including:

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. [*Cipriano*, 431 Mich at 334.]

An incriminating statement induced by a promise of leniency may render the statement involuntary and inadmissible. *People v Conte*, 421 Mich 704, 751, 753; 365 NW2d 648 (1984). A promise of leniency is but one factor, though, to be considered in determining whether a defendant freely and voluntarily made a statement. *Id.* at 751, 755. "If, after considering all relevant factors, the court concludes that the inducements offered did not overcome the defendant's ability to make a voluntary decision to make a statement, that statement(s) will be admissible." *Id.* at 754.

Here, the trial court listed various statements Sergeant Gardner made to defendant that appeared, in the judge's opinion, to constitute promises of leniency. However, the court failed to analyze the *Cipriano* factors and clearly applied the incorrect legal standard when it reasoned as follows:

But in any event, [*Conte*] talks about, certainly, that an involuntary statement – I'm sorry. That a statement that is made by the defendant that has been found to be induced by either promises of leniency, deception or coercion in and of itself is an involuntarily statement, and as a result is inadmissible for any purposes.

There's a lot of discussion about whether or not the test itself – whether or not evaluating the voluntarily nature of the statement, whether or not if you find it's involuntarily, it should just, you know, standing alone it should be suppressed or whether you have to apply the totality of the circumstances analysis. And Conte concluded that you really – it's a combination of both. In Michigan for the purposes of evaluating whether or not a statement is voluntarily, you take a little bit of the per se rule and you take a little bit of the totality of the circumstances. So that's what this Court did.

Quite simply, it was legally incorrect for the trial court to “take a little bit of the per se rule and . . . a little bit of the totality of the circumstances” to decide whether defendant's statements was voluntary. Again, promises of leniency do not render a statement per se involuntary and inadmissible. *People v Givens*, 227 Mich App 113, 119-120; 575 NW2d 84 (1997). The court was required to consider the totality of all of the surrounding circumstances and the *Cipriano* factors listed above to determine whether any “inducements offered” overcame defendant's ability to make a voluntary decision to make a statement to police.

However, we need not remand the case for reconsideration because, using the correct legal standards, defendant's statement was voluntary and his will was not overcome by a promise of leniency by Sergeant Gardner. At the time of the interview, defendant was five days away from his twentieth birthday. Defendant attended school through the tenth grade, and answered Sergeant Gardner's questions intelligently and articulately. Defendant admittedly has had other police contacts, including a serious case for which he was in jail when Sergeant Gardner questioned him on these charges. Sergeant Gardner questioned defendant for approximately 50 minutes before defendant made his incriminating statement, which is not an unduly prolonged period of time. Defendant was advised of his constitutional rights, he said he understood them, and that he specifically understood that any statements could be used against him. Defendant was not injured, abused, or threatened. He also was not intoxicated, ill, or deprived of food, sleep or medical attention.

Sergeant Gardner did encourage defendant to disclose his role in the crimes and told him that other witnesses implicated him in the shootings. Indeed, Sergeant Gardner read from a statement made by codefendant, Jonathon Lopez-Briones, in which he claimed that defendant had committed both murders. He also named other witnesses who stated that defendant participated in the crimes. Sergeant Gardner suggested that defendant tell the truth because he did not believe he committed both murders and he did not want defendant to “go down by [him]self.” Sergeant Gardner did suggest that defendant's punishment would be greater if he did not tell the truth about his participation in the crimes and Briones's participation. He also stated that, if he had a lesser role in the crimes, he might not receive a sentence of life in prison. Sergeant Gardner also did appeal to defendant about his eventual ability to see his kids.

However, we do not view Sergeant Gardner's statements as promises of leniency. Rather, he appeared to be predicting how things might unfold if defendant simply allowed Briones to blame both murders on him. And, again, this was not a pretext or fabrication by Sergeant Gardner, who read directly from Briones's statement that defendant shot both of the victims. Sergeant Gardner also clearly explained to defendant that other witnesses and other evidence placed him at the scene of the crime and showed he had a role in the shootings. We

simply do not view Sergeant Gardner's interview techniques as unfair or deceptive, particularly in light of defendant's experience with the criminal justice system. Moreover, one of the first incriminating statements defendant made was that Briones did the shooting, so his interest in clearing himself of shooting both victims appears to have been a primary motivation for making his statement to Sergeant Gardner. In any case, at no point did it appear that defendant was overcome by any inducement offered by Sergeant Gardner.

Again, and importantly, were we to find that Sergeant Gardner suggested some leniency in exchange for defendant's statement, which we do not, it is but one factor to consider. The totality of the circumstances and the *Cipriano* factors clearly favor the prosecutor's position. On the basis of this record, defendant's statement was knowing, intelligent, and voluntary, and the trial court incorrectly granted defendant's motion to suppress.

Reversed.

/s/ Henry William Saad  
/s/ Kirsten Frank Kelly