STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 11, 2012
v	No. 308482 Genesee Circuit Court
MARK ANTHONY JONES, JR., Defendant-Appellant.	LC No. 11-028887-FC

Before: GLEICHER, P.J., and OWENS and BOONSTRA, JJ.

PER CURIAM.

Defendant appeals, by leave granted, an order denying his motion to suppress a confession he made to police. Defendant has been charged with open murder, MCL 750.316, felony murder, MCL 750.316(1)(b), armed robbery, MCL 750.529, first-degree home invasion, MCL 750.110a(2), carjacking, MCL 750.529a, carrying a concealed weapon, MCL 750.227, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Because we find that the trial court correctly determined that defendant's confession was voluntary, we affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

Defendant was arrested at his home in Flint, Michigan, in connection with the alleged robbery and homicide of Merlyne Wray. Defendant was 14 years old and in seventh grade at the time of his arrest. Flint Police Sergeant Shawn Ellis began an interview with defendant at the police station at around 2:30 a.m. on November 18, 2010. Ellis later introduced defendant to Sergeant Brett Small when Small joined the interview. Ellis read defendant his *Miranda* rights prior to the interrogation, although defendant testified that he did not remember being read his rights. Defendant waived his rights and stated that he did not need an attorney present to speak with Ellis and Small. The first part of the interrogation lasted approximately one hour and thirty minutes. According to Ellis, defendant responded to the questioning but was cold, defiant, uncooperative, and lying during this part of the interview. At about 3:50 a.m. Ellis gave up on the interview because he felt that defendant was not cooperating or telling the truth. Ellis ended the interview and informed defendant that he was going to jail for carjacking and homicide. Ellis, Small, and defendant exited the interview room, and Ellis turned defendant over to police officer Harlan Green and then proceeded to his office.

Green then talked to defendant in the hallway. According to defendant, Green told defendant that if he did not "let them know what happened, whatever, you know, send my dad back to prison, send my mom to jail." Defendant testified that he believed Green. However, according to Green, Green told defendant that he needed to cooperate, be truthful, and tell the whole story. He told defendant that he knew defendant's mother and father. He told defendant that he had arrested defendant's father and sent him to prison. Green told defendant that defendant may not have a relationship with his father because of the crime his father had committed, and that one day defendant would want to be a man and have a family and not be locked up for the rest of his life. Green did not yell at defendant; he talked to defendant as if he were talking to his own child. Green saw defendant's demeanor change. Defendant started being remorseful and began to cry. Green then asked defendant if he wanted to speak to Ellis. Defendant nodded and indicated that he did want to talk to Ellis. Green had talked with defendant for approximately 5 to 10 minutes. Green then walked over to Ellis's office without defendant and informed Ellis that defendant wanted to now talk. Ellis went over to talk to defendant; defendant was crying. Ellis asked defendant if he wanted to talk to him now and if he was going to tell the truth, which defendant answered affirmatively. Ellis, Small, and defendant then proceeded back into the interview room, where defendant confessed to shooting Wray and stealing her money and car.

Before trial, defendant filed an amended motion to suppress statements and request for a *Walker* hearing and a brief in support of the motion. Defendant argued that his confession to police could not be considered voluntary given "his age, educational background, learning disability, his inability to speak with his parents, as well as the conduct of the police . . . ." The trial court held an extensive *Walker* hearing regarding defendant's interrogation and confession and concluded that defendant's confession was voluntary under the totality of the circumstances. This Court granted leave to appeal.

II. STANDARD OF REVIEW

"This Court reviews de novo a trial court's ruling on a motion to suppress. Although this Court engages in a de novo review of the entire record, it will not disturb a trial court's factual findings unless those findings are clearly erroneous." *People v Steele*, 292 Mich App 308, 313; 806 NW2d 753 (2011) (citation omitted). Deference is given to the trial court's factual findings. *People v Harris*, 261 Mich App 44, 53; 680 NW2d 17 (2004). A factual finding is clearly erroneous if it leaves the Court with a definite and firm conviction that the trial court made a mistake. *Steele*, 292 Mich App at 313.

III. ANALYSIS

Defendant argues that the trial court committed clear error by denying his motion to suppress the confession, because of defendant's youth, mental capacity, psychological impairments, and the fact that no parent or attorney was present during his interrogation. We disagree.

"The test of voluntariness is whether, considering the totality of all the surrounding circumstances, 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 Givans*, 227 Mich App 113, 121; 575 NW2d 84 (1997). The pertinent factors for our consideration are as follows:

> The factors that must be considered in applying the totality of the circumstances test to determine the admissibility of a juvenile's confession include (1) whether the requirements of *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966), have been met and the defendant clearly understands and waives those rights, (2) the degree of police compliance with MCL 764.27; MSA 28.886 and the juvenile court rules, (3) the presence of an adult parent, custodian, or guardian, (4) the juvenile defendant's personal background, (5) the accused's age, education, and intelligence level, (6) the extent of the defendant's prior experience with the police, (7) the length of detention before the statement was made, (8) the repeated and prolonged nature of the questioning, and (9) whether the accused was injured, intoxicated, in ill health, physically abused or threatened with abuse, or deprived of food, sleep, or medical attention. [*People v Hall*, 249 Mich App 262, 268; 643 NW2d 253 (2002).]

The mere fact that defendant possesses a "mental age" below the age of maturity is not enough, by itself, to render the defendant's confession involuntary. *People v Inman*, 54 Mich App 5, 9; 220 NW2d 165 (1974). Also, "[t]he absence of a parent, guardian, attorney, or other adult advisor does not necessarily mean that defendant's confession should have been excluded." *Id*. Rather, these are factors to be considered in our review of the totality of the circumstances. *Id.* at 8-9. However, "threats to arrest members of a suspect's family may cause a confession to be involuntary." *United States v Finch*, 998 F2d 349, 356 (CA 6, 1993). Even still, there is no specific guide to the decision whether a juvenile confession was voluntary, except the totality of the circumstances involved in each particular case. See *Gallegos v Colorado*, 370 US 49, 54-55; 82 S Ct 1209; 8 L Ed 2d 325 (1962); see also *Inman*, 54 Mich App at 9.

Here, factors one, two, six, seven, eight, and nine weigh in favor of the prosecution, and the trial court did not clearly err in its findings of fact regarding these factors. The videotape of defendant's interrogation shows that defendant was read his *Miranda* warnings before being interrogated and defendant acknowledged and waived his rights before answering police questions. It appears that the police did comply with MCL 764.27,[1] and the juvenile court rules,[2]

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[1] "[I]f a child less than 17 years of age is arrested, with or without a warrant, the child shall be taken immediately before the family division of circuit court of the county where the offense is alleged to have been committed, and the officer making the arrest shall immediately make and file, or cause to be made and filed, a petition against the child . . . ." MCL 764.27.

[2] During defendant's preliminary hearing before the juvenile court the prosecution properly requested a special adjournment and that defendant remain detained pursuant to MCR 3.935(3)(a), which the juvenile court granted:

because on November 18, 2010, a preliminary hearing was held pursuant to MCL 764.27, with defendant and his parents present. Defendant has extensive previous experience with the police. Additionally, defendant has received *Miranda* warnings on one previous occasion. The trial court acknowledged that defendant had been arrested on eight prior occasions and had been interrogated by the police on multiple previous occasions. Defendant was on probation at the time of the alleged offense. Also, defendant's length of detention before being interrogated was approximately six hours. Thus, defendant's detention before being interrogated was not unreasonably lengthy. Additionally, the police questioning of defendant appeared to be appropriate; Sergeants Ellis and Small did not threaten or coerce defendant. Defendant was asked if he needed to go to the bathroom or needed some water. The record does not indicate that defendant was deprived of food, sleep, or medical attention. Defendant did indicate that he had smoked marijuana before being arrested. However, the trial court concluded that defendant was not intoxicated. Defendant did not appear to be exhibiting abnormal behavior during his interrogation.

Factors three, four, and five weigh in favor of defendant and the trial court did not err in its findings of fact regarding these factors. Neither defendant's parents nor an attorney was present during defendant's interrogation. Additionally, defendant's personal background appears to be very disadvantaged. Defendant had been arrested on eight previous occasions in connection with serious offenses, and defendant's father had been in prison during defendant's formative years. Also, at the time of defendant's confession, he was only 14 years old and in the 7th grade. Additionally, defendant was evaluated by a doctor to be of low average intelligence.

Defendant did not make his confession until after he had a 5 to 10 minute conversation

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> (3) *Special Adjournment; Specified Juvenile Violation.* This subrule applies to a juvenile accused of an offense that allegedly was committed between the juvenile's 14th and 17th birthdays and that would constitute a specified juvenile violation listed in MCL 712A.2(a)(1).
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> (a) On a request of a prosecuting attorney who has approved the submission of a petition with the court, conditioned on the opportunity to withdraw it within 5 days if the prosecuting attorney authorizes the filing of a complaint and warrant with a magistrate, the court shall comply with subrules (i) through (iii).
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> (i) The court shall adjourn the preliminary hearing for up to 5 days to give the prosecuting attorney the opportunity to determine whether to authorize the filing of a criminal complaint and warrant charging the juvenile with an offense as though an adult pursuant to MCL 764.1f, instead of unconditionally approving the filing of a petition with the court.
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> (ii) The court, during the special adjournment under subrule 3(a), must defer a decision regarding whether to authorize the filing of the petition.
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> (iii) The court, during the special adjournment under subrule (3)(a), must release the juvenile pursuant to MCR 3.935(E) or detain the juvenile pursuant to MCR 3.935(D). [MCR 3.935(3)(a).]

with Officer Green. This conversation, which took place in the hallway during a break between defendant's first and second interrogations, appears to have been impactful with respect to defendant's making of that confession.

According to defendant, Green told defendant that if he did not "let them know what happened, whatever, you know, send my dad back to prison, send my mom to jail." Green had arrested and incarcerated defendant's father previously and defendant's mother had been to jail in the past. Defendant testified that he believed Green. However, according to Green, Green told defendant that he needed to cooperate, be truthful, and tell the whole story. He told defendant that he knew defendant's mother and father. He told defendant that he had arrested defendant's father and sent him to prison. Green told defendant that he may not have a relationship with his father because of the crime his father committed, and that one day defendant would want to be a man and have a family and not be locked up for the rest of his life. Green did not yell at defendant; he talked to defendant as if he were talking to his own child. Green saw defendant's demeanor change. Defendant started being remorseful and began to cry.

With respect to Green's contact with defendant, the trial court ruled as follows:

> [W]hen you look at the things that [Green] may or may not have said to Mr. Jones it is somewhat troubling. Mr. Jones has testified that Harlon Green basically threatened him by indicating to him that if he did not comply with and cooperate with the police that his father would be arrested, I think even his mother also and could face incarceration. The court would find that that would be in this court's opinion coercive. And I do think that it would have a tendency to--to affect the juvenile's decision whether to--to cooperate with the police, however, I don't think given the testimony of Mr. Green and even the testimony of the defendant that that statement alone would be such that it would render the juvenile's decision to cooperate with the police. And I guess I should use the language that's here, it would not have a tendency to affect his unconstrained choice to give a statement. Still I would find that given the evidence that his statement was given under his own freewill and his unconstrained choice because even though he was crying and emotional the Court would conclude that it was because Mr. Green had hit a nerve with the juvenile with respect to his testimony concerning the juvenile's ability to--to grow up, to have a family, to be able to go on with some kind of life. I think that that had more to do with the juvenile's decision to cooperate and then when he cooperated, of course, he--he gave a confession that is consistent with the evidence in this case. Which again, in this Court's opinion, would show that what he said to the police was not something that was necessarily made up in order to assure that his parents would not be incarcerated but in fact that he had made a choice at that point to cooperate with the police given what Mr. Green had said. And I do think what Mr. Green said to him, just for the record, did affect his decision to cooperate with the police. I don't think there's any question about that. Because prior to this discussion with Harlon [sic] Green, the defendant showed no desire whatsovever [sic] to cooperate with the police. But once that discussion had occurred, he made the -- the choice, the free choice, the unconstrained choice to confess and to admit what his involvement was in this particular incident. And so I think when I look at this factor overall, I

> would find that it -- that the prosecution has proven by the preponderance of the evidence that the confession was made by the juvenile's free and unconstrained choice. And even though I would agree from the testimony Mr. Green's statements were threatening. I don't think anyone could see his statements as being other than threatening towards the juvenile when you look at it in the context it was made. But it was not threatening to the point that it affected his free and unconstrained choice to come in and cooperate with the police and to give what appears to be factually a consistent statement with the evidence that's in this in this case.

The trial court did not explicitly state whether it found defendant's or Green's version of the conversation to be credible. We do not read the trial court's characterization of Green's statement as "threatening" to indicate that the trial court accepted defendant's allegation that Green explicitly threatened to arrest his mother and father unless he confessed, especially because the trial court found that the statement did not affect defendant's choice to make a voluntary and unconstrained confession and was threatening in "context." See *Finch*, 998 F 2d at 356 (evaluating the context in which threatening statements were made).

Additionally, the trial court concluded that defendant's "statement was given under his own free will and his unconstrained choice because even though he was crying and emotional the [c]ourt would conclude that it was because Mr. Green had hit a nerve with the juvenile with respect to his testimony concerning the juvenile's ability to--to grow up, to have a family, to be able to go on with some kind of life." We agree with the trial court. Green's statements, when evaluated in the totality of the circumstances, and did not cause defendant's will to be overborne, or critically impair his capacity for self-determination. Defendant's confession remained the product of his essentially free and unconstrained choice. *Givans*, 227 Mich App at 121.

Because factors one, two, six, seven, eight, and nine weigh in favor of the prosecution, and because we find that the trial court correctly evaluated the totality of the circumstances, the prosecution has established by a preponderance of the evidence that defendant's confession was voluntarily given.

Lastly, this Court notes that the trial court's reference to defendant's confession being consistent with the facts in this case was erroneous, given that voluntariness of a confession does not turn on the truth or falsity of the confession, and given that there have been no facts established in this case yet. See *People v Richter*, 54 Mich App 598, 604; 221 NW2d 429 (1974) ("[Q]uestions of voluntariness do not turn on the truth or falsity of the confession."). We do not consider the truth or falsity of defendant's statements in making our determination that his confession was voluntary.

Affirmed.

/s/ Donald S. Owens
/s/ Mark T. Boonstra