DIVISION ONE
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PHILIP G. URRY, CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 09-0201
	)	
Appellee,	)	DEPARTMENT B
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication –
GERARDO O. MACIEL,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	

Appeal from the Superior Court of Maricopa County

Cause No. CR 2008-006720-001 DT

The Honorable John R. Ditsworth, Judge

AFFIRMED

Terry Goddard, Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
and Sarah E. Heckathorne, Assistant Attorney General
Attorneys for Appellee

James Haas, Maricopa County Public Defender — Phoenix
by Kathryn L. Petroff, Deputy Public Defender
Attorneys for Appellant

T H O M P S O N, Judge

¶1 Defendant, Gerardo O. Maciel, appeals from his conviction on one count of first-degree murder, a Class 1 dangerous felony. He argues that the trial court erred in

denying his motion to suppress his confession as well as his requested jury instruction on voluntariness and asks us to reverse his conviction. For reasons stated more fully below, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 We derive the following statement of facts from the evidence before the trial court at a voluntariness hearing on November 11, 2008, which consisted of the testimony of the state's witnesses as well as the transcripts of two interviews conducted with defendant on February 25 and 27, 2008. On February 25, 2008, Maricopa County Sheriff's Office Detective M.B. of the Jail Crimes Unit went to defendant's cell at the Lower Buckeye Jail to interview him regarding a charge of destruction of jail property.[1] Defendant was seventeen at the time, and M.B. read defendant his juvenile *Miranda*[2] rights from a form before questioning him. Defendant initialed each question and signed the form, and then agreed to speak with M.B. without a lawyer or his parents present. The interview was audio-taped.

¶3 After M.B. finished interviewing defendant about the sprinkler incident, he asked defendant if he had any questions for him. Defendant then told M.B., "off this subject," that he "ha[d] a murder" that no one knew about and that he "want[ed] to

[1] Defendant had "popped" an industrial fire sprinkler head in his cell because he was "bored and had nothing better to do."

[2] *Miranda v. Arizona*, 384 U.S. 436 (1966).

confess to it." He told M.B. that he was confessing because he did not want the murder to go unsolved and because he wanted "to get something else for it . . . I want to visit with my family." Defendant also said that he "want[ed] to talk to somebody that knows like a cop or an attorney" so that he could tell them what he did and when he did it and with whom.

¶4 M.B. stopped defendant and advised him that he might wish to consult with his attorney before he did so. He also told defendant that he was "not prepared to handle or deal with that," that he had "legal parameters" that he needed to follow, but that he would talk to his supervisor and contact the prosecutor and get back to defendant.

¶5 On February 27, M.B. again contacted defendant and informed defendant that he was there to speak with him "about the other issue that you wanted to talk about." He transported defendant to the general interview room of the investigation unit at Durango where the interview could be videotaped and again read defendant his juvenile *Miranda* rights from a form prior to questioning him. This time defendant initialed each question, but did not sign the bottom of the form. According to M.B., the purpose of re-interviewing defendant was to obtain sufficient information about the alleged murder so that M.B. could determine the proper agency that should be involved.

¶6 Defendant again told M.B. that he would confess to the murder, although he would not "get nobody else in trouble," as long as M.B. could promise him that he would get a visit with his family. Defendant explained that he wanted to see his family because he knew that, once he went to prison for his "couple of armed robberies," he would not see his family members again because they would not visit him as they were "not legal."

¶7 M.B. informed defendant that, in order for him to even ask "the county attorney" to try and arrange for a family visit, he needed more information from defendant than "Hey, I committed a murder;" he needed to know "where it happened, who, who got killed, when it happened." M.B. explained that he could not force defendant's family members to come visit defendant if they chose not to. He also explained that he had no authority to change jail rules or ensure that a visit could happen because "the decision for something like that to happen has to happen several levels above mine." To even begin the process, however, M.B. stated that he needed some "basic information" to take to the appropriate homicide division. Defendant then told M.B. that the murder occurred "about a year ago" at a Dollar Store at Central and Hatcher and that the victim was the owner of the store. Defendant also told M.B. that the story "was on the news."

¶8 Upon learning that defendant had viewed a news story about the murder on television, M.B. pressed defendant for more details so that a prosecutor would not think that defendant was merely confessing to some story he had heard on television in order to get his family visit. Defendant then drew M.B. a map of the location of the Dollar Store. He also provided M.B. with additional details, including the age of the male owner, the fact that he had shot the victim in the chest four times "with a nine Smith and Wesson," and the information that he had gone there specifically to rob and kill the victim because the victim had "kicked [him] out of his store" at some time in the past.

¶9 Based on this information, the Sheriff's Department that same day contacted Phoenix Police Homicide Bureau Detective J.B., who had initially investigated the unsolved murder at the Dollar Store. J.B. immediately went to the general interview room at Durango where defendant was being held and questioned him about the murder. That interview lasted approximately forty-five minutes and was also videotaped.

¶10 J.B. did not re-*Mirandize* defendant because she was informed that defendant had already received his *Miranda* warnings and that he had waived his rights and agreed to talk. Defendant then provided J.B. with information concerning the Dollar Store murder. According to J.B., defendant also asked her for a visit with his family, however, she neither initiated

the request nor promised defendant that a visit would occur during the course of their interview. At the conclusion of the interview, defendant was transported to Phoenix Police Headquarters at 620 W. Washington, where a visit with his family eventually took place.

¶11 In his motion for a voluntariness hearing, defendant conceded that it was "undisputed" that he had "proposed the deal that he would confess to a homicide in exchange for a visit with his family." Defendant nevertheless argued that the confession to the murder was involuntary because it was the result of M.B.'s "express promise" that defendant would be rewarded with a visit from his family if defendant would "play ball" and reveal the specifics of the offense. Thus, according to defendant, M.B. had "baited" him into thinking that the more information he gave, the more likely it was that defendant would get to see his family. He maintained that, because M.B. had obtained the confession improperly, any statements to M.B., as well as any statements to law enforcement following the interrogation with M.B., must be suppressed.

¶12 At the conclusion of the testimony at the voluntariness hearing, the state argued that defendant had been properly advised of his rights several times and had waived them each time, that defendant was the one who had initiated the murder confession, and that there was no evidence that the

confession was the result of any threats or promises. Defendant reiterated the argument that M.B. had "baited" defendant into giving him incriminating statements "under the guise of being able to coordinate the Phoenix department or whatever entity could connect [him] to his family." He drew the trial court's attention to the transcript of Detective M.B.'s February 27 interview with defendant and asked the court to review it in making its decision.

¶13 The trial court did not rule on defendant's motion to suppress immediately but took the matter under advisement. On December 5, 2008, the court issued its ruling finding that defendant "was advised of his *Miranda* warnings and properly waived them" and that defendant's statements were therefore voluntary.

DISCUSSION

A. Motion to Suppress

1. Standard of Review

¶14 When reviewing a motion to suppress, we look only to the evidence presented to the trial court at the suppression hearing. *State v. Newell*, 212 Ariz. 389, 396, ¶ 22, 132 P.3d 833, 840 (2006) (citation omitted). We view that evidence in the light most favorable to sustaining the trial court's ruling regarding the motion to suppress. *State v. Hyde*, 186 Ariz. 252, 265, 921 P.2d 655, 668 (1996). We review the factual findings

underlying the court's determination for an abuse of discretion but review its legal conclusions de novo. *Newell*, 212 Ariz. at 397, ¶ 27, 132 P.3d at 841.

¶15 On appeal, defendant maintains that the trial court erred in denying his motion to suppress his statements to M.B. He argues that his confession was involuntary because he was "rushed through" his *Miranda* rights; because he was advised that his attorney would be contacted; and because he was, in essence, promised that the police would arrange for a visit with his family in exchange for his incriminating statements.

¶16 In general, confessions are presumed to be involuntary; and the state bears the burden of proving by a preponderance of the evidence that a confession was voluntary and not the product of physical or psychological coercion. *State v. Amaya-Ruiz*, 166 Ariz. 152, 164, 800 P.2d 1260, 1272 (1990). "In making this determination, the totality of the circumstances surrounding the confession must be considered." *Id*. (citation omitted). A confession may be rendered involuntary by any of the following factors, including impermissible police conduct, coercive pressures that are not dispelled, or because it was derived directly from a prior involuntary statement. *Id*. This court will not disturb a trial court's denial of a motion to suppress absent clear and manifest error. *Id*.

2. *Miranda* Warnings

¶17 The record shows that M.B. *Mirandized* defendant twice, once before each interview, and that defendant indicated that he understood his rights and did not want an attorney or his parents present. On February 25, defendant initialed each question and signed the *Miranda* form, indicating that he understood his rights; on February 27, defendant again initialed each question on the form although he did not separately sign it.

¶18 On appeal, defendant maintains that M.B. was "insincere" at the voluntariness hearing when he testified that defendant initialed each question as M.B. asked it, because the transcript of each interview shows that defendant initialed the individual questions at the end of each entire set of *Miranda* warnings. From this discrepancy, defendant concludes that this delayed initialing was a tactic on M.B.'s part that coerced defendant into signing away his rights by suggesting that those rights were unimportant and defendant was "uncool" if he thought otherwise. He suggests that M.B.'s use of the phrase "real quick" before reviewing the *Miranda* warnings also establishes that M.B. "rushed" defendant through the warnings to prevent him from asking any questions about them.

¶19 The record belies defendant's arguments. The transcripts show that, prior to each interview, M.B. read each

and every question in the *Miranda* warnings to defendant and established with each question that defendant understood that particular right before moving on to the next. At the end of each recitation, defendant indicated that he understood "each of these rights." He also indicated that he understood that he could stop answering questions at any time during the interviews to talk to a lawyer. We do not find any indication that M.B. "rushed" defendant through the *Miranda* warnings to prevent defendant from raising any questions.

¶20 We also do not perceive any coercive intent underlying M.B.'s use of the phrase "real quick" before M.B. initiated his reading of the *Miranda* warnings. It appears instead to be simply a figure of speech that M.B. incorporated into his prologues to the warnings. It is unlikely that this comment forced defendant into the untenable position of thinking that it would be "uncool" for him to raise any questions or objections had he had any. This is especially so in light of the evidence of defendant's other exchanges with M.B. in the transcripts and the fact that defendant, even though a juvenile at the time, was not new to the criminal justice system.

3. Request for Defense Counsel

¶21 At his first interview, when defendant told M.B. that he wanted to confess, M.B. advised defendant that he might want to speak to his lawyer and be "legally protected" before making

any statements. Defendant eventually told M.B. that he did not want a lawyer, however, and had never talked to his attorney, but indicated that he was interested instead in talking to a district attorney or a prosecutor. Before M.B. left, defendant gave him the name of his defense attorney and told M.B. that he had her "extension number" in his room and could get it for M.B., if M.B. wanted it. M.B. stated that it was "no biggie" and that he could get the phone number from the prosecutor and left.

¶22 On appeal, defendant argues that this exchange constituted M.B.'s "promise" to defendant that he would contact his defense counsel on defendant's behalf. We find no such promise. Furthermore, we do not find that defendant requested the presence of defense counsel.

¶23 In order to have counsel present even during a custodial interrogation a defendant must articulate his desire to have counsel present sufficiently clearly so that a reasonable police officer would understand that it was a request to have an attorney present. *Newell*, 212 Ariz. at 397, ¶ 25, 132 P.3d at 841 (citing *Davis v. United States*, 512 U.S. 452, 459 (1994)). If a reasonable officer understood only that a defendant "might" want an attorney present then questioning need not cease. *Id*.

¶24 Here, despite M.B.'s cautions, defendant decidedly told M.B. in the first interview that he did *not* wish to speak to an attorney. M.B. informed defendant again at the start of the second interview of his right to have an attorney present and that, even if he initially waived that right, he had the right to stop the interview at any point and request to have an attorney present. Despite the exchange cited above, during his second interview with M.B. defendant never requested an attorney or asked whether M.B. had been in touch with his former defense attorney. The mere fact that defendant told M.B. that he did not know how to use the telephone to make calls where he was being held also does not in and of itself indicate that defendant was necessarily trying to call his former defense attorney.

¶25 The record further supports a finding that defendant did not view his exchange with M.B. as a "promise" that M.B. would contact his former attorney with regard to his making a confession. Specifically, it is reasonable to conclude that had defendant believed he asked for an attorney he would have asked M.B. about the request at the start of the second interview. Therefore, we find no merit in defendant's argument that, because he thought M.B. was contacting his attorney, defendant did not bother to ask for one "via the apparently silly *Mirandas*."

4. Promise of Family Visit

¶26 Next, defendant maintains that he was coerced into confessing the details of the murder because of M.B.'s promise that, if he did so, M.B. would make his family visit happen. We find *State v. McVay*, 127 Ariz. 18, 617 P.2d 1134 (1980), dispositive of defendant's arguments.

¶27 In *McVay*, our supreme court found two factors that undermined the defendant's argument in that case that his confession was coerced by the investigating officers' promise of his removal from an isolation cell. 127 Ariz. at 20, 617 P.2d at 1136. First, the court held that, when an alleged promise is couched in terms of a "mere possibility or an opinion," it cannot be deemed a sufficient "promise" so as to render a confession involuntary. *Id*. Second, the court concluded that when the *defendant* initiates the "deal" or "promise" that was solicited in exchange for the confession, that "promise" cannot be viewed as interfering with the defendant's "exercise of a free volition in giving the confession." *Id*. at 20-21, 617 P.2d at 1136-37. Those factors apply to undermine defendant's arguments in the present case as well.

¶28 Here, the evidence shows that defendant initiated the "deal" when he, unprompted, informed M.B. that he wanted to confess to a murder in exchange for a family visit. Defendant did not dispute that he initiated the deal in his motion to

suppress. Having chosen to initiate a deal, "freely and voluntarily," defendant cannot now maintain that in accepting the deal he was the victim of coercive influences. *Id*. at 21, 617 P.2d at 1137(citation omitted).

¶29 Furthermore, the interview transcripts show that M.B. never "promised" defendant that he would either personally guarantee that defendant could visit with his family or that "he would arrange for the proper authorities to grant his request" if defendant confessed. The evidence shows that M.B. repeatedly told defendant that he could not "extend anything" because he was a mere "middleman" and had no authority to arrange a visit. He needed certain basic information to know which agency had jurisdiction over the crime. He elicited the additional details regarding the murder because, as he told defendant, to compel a prosecutor to "consider making this happen" the prosecutor needed to be convinced that defendant was not prevaricating simply to obtain his goal.

¶30 Both the record and the law support the trial court's conclusion that defendant's statements were voluntary. We therefore decide that the trial court did not commit clear and manifest error in ruling that defendant's confession was voluntary and therefore admissible. *See Amaya-Ruiz*, 166 Ariz. at 164, 800 P.2d at 1272.

B. Requested Jury Instruction

¶31 Prior to trial, the state submitted suggested jury instructions. These included a voluntariness instruction that read:

> You must not consider any statements made by the defendant to a law enforcement officer unless you determine beyond a reasonable doubt that the defendant made the statement voluntarily.
>
> A defendant's statement was not voluntary if it resulted from the defendant's will being overcome by a law enforcement officer's use of any sort of violence, coercion or threats or by any direct or implied promise, however slight. However, a defendant's statement is not involuntary if the defendant solicited the promise or initiated bargaining with the authorities.
>
> You must give such weight to the defendant's statement as you feel it deserves under all the circumstances.

¶32 Prior to reading preliminary instructions to the jury, the trial court asked if either counsel had any issues with the instructions. The prosecutor stated that she wanted the court to read the version of the voluntariness instruction she had submitted, which was modified to include the language that indicated that statements were not deemed involuntary if a defendant "solicited a promise or initiated bargaining." Although defense counsel admitted that "*State vs. McVay* . . . is good and current law," in his opinion he thought the case should be overturned and asked that the trial court simply read the

standard RAJI.[3] The trial court read the state's version of the voluntariness instruction in both the preliminary and final instructions to the jury.

¶33 On appeal, defendant argues that the trial court erred in instructing the jury using the state's version of the voluntariness instruction because the issue of the voluntariness of his statements was a crucial issue at trial and because "solicitation of a promise by a defendant is not *invariably* an indication of voluntariness."

1. Standard of Review

¶34 We review a trial court's denial of a proposed jury instruction for a clear abuse of discretion. *State v. Anderson*, 210 Ariz. 327, 343, ¶ 60, 111 P.3d 369, 385 (2005). We review de novo whether the instruction correctly states the law. *State v. Cox*, 217 Ariz. 353, 356, ¶ 15, 174 P.3d 265, 268 (2007).

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[3] This provides:

> You must not consider any statements made by the defendant to a law enforcement officer unless you determine beyond a reasonable doubt that the defendant made the statements voluntarily.
>
> A defendant's statement was not voluntary if it resulted from the defendant's will being overcome by a law enforcement officer's use of any sort of violence, coercion, or threat, or by any direct or implied promise, however slight.
>
> You must give such weight to the defendant's statement as you feel it deserves under all the circumstances.

Standard Criminal Instruction 6- Voluntariness of Defendant's Statements, 2008, State Bar of Arizona.

¶35 We consider all the instructions in their entirety to determine whether they correctly state the law. *Id*. If a jury would be misled by the instructions viewed as a whole, the court committed reversible error; if, as a whole, the instructions are free from error, we will affirm a conviction. *Id*. We do not discern error in the court's refusal to delete the language to which defendant objected.

2. Voluntariness of Defendant's Confession

¶36 As defendant conceded, *McVay* is good law, and it stands for the proposition that a defendant's confession is not involuntary if the defendant solicited the promise or deal from which it derived. 127 Ariz. at 20-21, 617 P.2d 1136-37. Therefore, the voluntariness instruction given did not misstate the law. It was also appropriate in light of the facts of this case.

¶37 Furthermore, taken as a whole, the instructions did not misinform or mislead the jurors. The jurors were not told that solicitation of a promise by defendant was "invariably" an indication of voluntariness, as defendant contends. They were instructed that statements were involuntary if they resulted from "any direct or implied promise, however slight," by a law enforcement officer but not involuntary if the defendant solicited a promise or initiated a bargain. They were further instructed that they had to determine *if* the state had proven

the voluntariness of defendant's statements beyond a reasonable doubt. They were also instructed that, as jurors, they had to consider all these instructions when making their determinations and not "pick out one instruction or part of one . . . and ignore the others." Finding no indications to the contrary, we presume that the jury followed these instructions. *State v. LeBlanc*, 186 Ariz. 437, 439, 924 P.2d 441, 443 (1996). The trial court did not abuse its discretion by refusing to give defendant's version of the instruction.

CONCLUSION

¶38 For the foregoing reasons, we affirm defendant's conviction and sentence in this case.

/s/
_____
JON W. THOMPSON, Presiding Judge

CONCURRING:

/s/
_____
ANN A. SCOTT TIMMER, Judge

/s/
_____
PATRICIA K. NORRIS, Judge