STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEVIN BOYD,

Defendant-Appellant.

UNPUBLISHED
June 5, 1998

No. 197876
Oakland Circuit Court
LC No. 95-137251 FC

Before: Kelly, P.J., and Cavanagh and N. J. Lambros*, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree murder, MCL 750.316; MSA 28.548, and conspiracy to commit first-degree murder, MCL 750.157(a); MSA 28.354(1). He was sentenced to life imprisonment without parole on both counts. Defendant now appeals as of right. We affirm defendant's conviction but remand for resentencing.

Defendant first argues that the trial court erred by admitting his confession because it was taken in violation of his right against self-incrimination. Specifically, defendant argues that the confession was obtained in violation of his Fifth Amendment right to counsel and that it was involuntary. We disagree.

The confession was not obtained in violation of defendant's right to counsel during custodial interrogation under *Miranda*[1]. Defendant's retained attorney sent a letter to the sheriff's department indicating that he represented defendant and his mother and requesting that all communication between the department and his clients be directed to him. Defendant contends that the police violated his right to counsel when they engaged in the functional equivalent of express questioning by showing defendant a gun taken from the victim's home. We agree with the prosecution that defendant did not invoke his right to counsel by the letter because *Miranda* rights can not be invoked anticipatorily. See *McNeil v Wisconsin*, 501 US 171, 182 n 3; 111 S Ct 2204; 115 L Ed2 2d 158 (1991). We need not address whether presenting the gun would have been improper had the right to counsel been invoked.

We next address defendant's claim that the statement was involuntary. This Court reviews a trial court's determination of voluntariness and the decision to admit a defendant's confession by

* Circuit judge, sitting on the Court of Appeals by assignment.

examining the entire *Walker*[2] hearing record and making an independent determination as to the admissibility of the evidence. However, this Court should not disturb the lower court's factual findings regarding the validity of the waiver of *Miranda* rights unless that ruling is found to be clearly erroneous. *People v Cheatham*, 453 Mich 1, 29-30; 551 NW2d 355 (1996).

Where a defendant challenges the admissibility of a confession on the grounds that his *Miranda* rights had not been validly waived, the court must consider the totality of circumstances surrounding the interrogation. *Cheatham, supra* at 27. A voluntary relinquishment of his rights means that the decision must be the "'product of a free and deliberate choice rather than intimidation, coercion, or deception.'" *People v Garwood*, 205 Mich App 553, 556; 517 NW2d 843 (1994), quoting *Colorado v Spring*, 479 US 564; 107 S Ct 851; 93 L Ed 2d 954 (1987). When evaluating the admissibility of a juvenile's confession, appropriate considerations 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 28.866 and the juvenile court rules, (3) the presence of an adult parent, custodian or guardian, and (4) the juvenile defendant's personal background.
>
> In addition, the court must consider (1) the accused's age, educational and intelligence level, and the extent of the accused's prior experience with the police, (2) the length of detention before the statement was made, (3) the repeated and prolonged nature of the questioning, and (4) 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 Good*, 186 Mich App 180, 189; 463 NW2d 213 (1990). Citations omitted.]

Although defendant complains that the *Miranda* rights were read together, we are nevertheless satisfied that the requirements of *Miranda* were met and that defendant understood and waived those rights. Although he was seventeen at the time he gave the statement, he had one prior contact with the juvenile court when he was thirteen and had been interviewed by the police on other occasions before he gave the statement. Furthermore, because he chose not to testify at the *Walker* hearing, the accounts of the police officers were uncontested. These accounts do not suggest that the confession was the product of police coercion, which is a prerequisite to a finding that the waiver of rights was involuntary. *Garwood, supra* at 555.

Defendant next argues that he was denied a fair trial because the trial court refused to instruct the jury on the offense of accessory after the fact. Accessory after the fact is not a cognate lesser offense of murder. *People v Perry*, 218 Mich App 520, 532; 554 NW2d 362 (1996). It is a separate and distinct offense that can occur only after the substantive crime has been committed. *People v Bargy*, 71 Mich App 609, 614-615 n 5, 61-617; 248 NW2d 636 (1976). Therefore, the court did not err by refusing to give the requested instruction.

Defendant contends that the trial court abused its discretion by excluding evidence about his mother contacting the police in November about "some difficulties" with a third person. The court

sustained the prosecutor's hearsay objection. Defense counsel did not make an offer of proof nor was the substance of the evidence apparent from the context of the question. MRE 103(a)(2). Accordingly, defendant is not entitled to relief on this basis.

Defendant also argues that it was error for the court to exclude Lynn Boyd's testimony that her trial strategy was to blame her son for the murder. However, it was defense counsel that objected to the prosecutor's question about her trial strategy. Defendant cannot request a certain action in the trial court and then, after the court grants the request, argue on appeal that the action was error. *People v Murry*, 106 Mich App 257, 262; 307 NW2d 464 (1981). Therefore, defendant may not now contend that the court erred when it sustained defense counsel's objection at trial.

Defendant next contends that the trial court abused its discretion by admitting the opinion testimony of a police officer concerning blood spatter evidence. At trial, defendant objected to the court's qualifying the witness as an expert because he had not been previously qualified as an expert in the field in any circuit court. Inasmuch as the officer had been trained in the field by attending several seminars and had experience as shown by the fact that he had previously testified as an expert in district court, the trial court did not abuse its discretion in qualifying the officer as an expert witness in blood spatter evidence. MRE 702; *People v Whitfield*, 425 Mich 116; 388 NW2d 206 (1986).

Finally, defendant argues that the trial court abused its discretion in sentencing him as an adult. We agree.

A trial court's findings of fact at a juvenile sentencing hearing are reviewed for clear error, while the ultimate decision whether to sentence a minor as an juvenile or as an adult is reviewed for an abuse of discretion, using the principle of proportionality. *People v Brown*, 205 Mich App 503; 517 NW2d 806 (1994); *People v Lyons (On Remand)*, 203 Mich App 465, 468; 513 NW2d 170 (1994).

We believe the trial court abused its discretion in sentencing defendant as an adult. Although defendant committed a very serious offense, experts testified at the sentencing hearing that defendant was a model prisoner, an excellent student, amenable to treatment, unlikely to disrupt the rehabilitation of other juveniles, not a danger to the public and remorseful for his actions. Under these circumstances, it was an abuse of discretion for the trial court to sentence defendant as an adult. *Brown, supra; Lyons, supra.*

Defendant's convictions are affirmed but this matter is remanded to the trial court for resentencing in conformity with the dictates of this opinion. We do not retain jurisdiction.

/s/ Michael J. Kelly
/s/ Mark J. Cavanagh
/s/ Nicholas J. Lambros

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

[2] *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).