

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEROME WALKER,

Defendant-Appellant.

UNPUBLISHED

April 6, 2001

No. 217346

Wayne Circuit Court

Criminal Division

LC No. 98-006537

Before: Markey, P.J., and McDonald and K.F. Kelly, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree felony murder, MCL 750.316; MSA 28.548, second-degree murder, MCL 750.317; MSA 28.549, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to life imprisonment for the felony murder conviction and a consecutive two-year term for the felony-firearm convictions. He appeals as of right. We affirm.

First, defendant contends that the trial court erred in refusing to suppress some written statements that he allegedly made while in police custody on the basis that they were not voluntarily made. We disagree. Whether a defendant's statement was knowing, intelligent and voluntary is a question of law that a court must determine considering the totality of the circumstances. *People v Snider*, 239 Mich App 393, 417; 608 NW2d 502 (2000). We give deference to the trial court's factual findings and will not reverse those findings unless they are clearly erroneous. *Id.* The trial court's decision should be affirmed unless we are left with a definite and firm conviction that a mistake has been made. *People v Sexton (After Remand)*, 461 Mich 746, 752; 609 NW2d 822 (2000).

In evaluating the admissibility of a particular statement, we review the totality of the circumstances surrounding the making of the statement to determine whether it was freely and voluntarily made in light of the following factors set forth in *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988):

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.

The absence or presence of any one of these factors is not necessarily conclusive on the issue of voluntariness. The ultimate test of admissibility is whether the totality of the circumstances surrounding the making of the confession indicates that it was freely and voluntarily made.

Although the police officers testified that defendant voluntarily agreed to give a written statement after being advised of his rights, defendant claimed that he was presented with some written statements, which were prepared outside his presence, and he was forced to sign them under the threat of physical abuse. Under the circumstances, resolution of the question of voluntariness was essentially a credibility determination. The trial court determined that defendant was not credible. Because of the trial court's superior opportunity to evaluate these matters, we defer to its conclusion on matters of credibility. *Sexton, supra* at 752. Although defendant presented pictures which he claimed depicted bruises received as a result of being physically abused by the police, the pictures were taken about two months after defendant made his confession and, therefore, the trial court did not clearly err in finding that they did not reflect what occurred during the interrogation. Further, the evidence indicated that the police obtained a search warrant for defendant's mother's house based on information provided by defendant in his first statement. The search warrant affidavit indicates that defendant claimed that he robbed the victim of money and drugs and hid the items in his mother's basement. Upon execution of the search warrant, the police found this property in the location described. This evidence militates against defendant's claim that the police fabricated the first statement. The trial court also observed that the various statements were very detailed, thereby further suggesting that they were not fabricated by the police, and that the advice of rights forms were signed by defendant using pens with different ink colors, thereby negating defendant's claim that the statements were signed all at the same time.

Moreover, the evidence indicated that defendant had a tenth grade education and was able to read and write, and there was no suggestion that he was deprived of food, sleep or medical attention. While defendant was detained for a period before his statements were obtained, and there was some delay before he was brought before a magistrate, this is because the police were continuing to investigate the matter throughout the time that defendant was being held.

Considering the totality of the circumstances and the trial court's superior opportunity to evaluate the credibility of the witnesses, we find no clear error in the trial court's determination that defendant voluntarily made the statements in question.

Next, defendant argues that reversal is required because of the trial court's rulings denying his motions for a continuance, a mistrial, and to admit the victim's grand jury testimony, which was given shortly before the victim was killed. Defendant also complains that the trial court curtailed defense counsel's questioning of various witnesses, thereby depriving him of his

constitutional right of confrontation. We review each of these matters for an abuse of discretion. *People v Dowell*, 199 Mich App 554; 502 NW2d 757 (1993) (continuance); *People v Griffin*, 235 Mich App 27, 36; 597 NW2d 176 (1999) (mistrial); *People v Taylor*, 195 Mich App 57, 60; 489 NW2d 99 (1992) (admission of evidence); *People v Crawford*, 232 Mich App 608, 620; 591 NW2d 669 (1998) (limits on scope of cross-examination).

In determining whether a trial court has abused its discretion in denying a defendant's request for a continuance, we consider the following factors: (1) whether the defendant was asserting a constitutional right; (2) whether the defendant had a legitimate reason for asserting that right; (3) whether the defendant was not negligent in asserting it; (4) whether prior adjournments of trial were not at his request; and (5) on appeal, whether the defendant has demonstrated prejudice resulting from the trial court's abuse of discretion. *People v Sinistaj*, 184 Mich App 191, 201; 457 NW2d 36 (1990).

Here, the trial court denied defendant's request for a continuance because defendant would have several more days before the trial resumed to locate an alleged informant. The court indicated that it was open to reconsidering the matter later. However, when trial resumed, defendant never renewed his request for a continuance and, instead, asked for a mistrial. Under the circumstances, we find no abuse of discretion in the trial court's decision to deny defendant's request for a continuance. Moreover, because there is no indication that the informant actually existed, or could have been located had defendant been given more time, defendant has not demonstrated that he was prejudiced by the denial of the continuance. Accordingly, this issue does not warrant reversal.

Further, the trial court did not abuse its discretion in denying defendant's request for a mistrial. A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to receive a fair trial. *Griffin, supra* at 36. Here, even if there was an irregularity in the proceeding, defendant was not prejudiced or deprived of a fair trial as a result of it. Accordingly, no error has been shown.

Nor did the trial court abuse its discretion in refusing to admit the victim's grand jury testimony. The court found that the evidence was not relevant or reliable and was also hearsay. Evidence is relevant if it tends to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. MRE 401. Generally, all relevant evidence is admissible, while irrelevant evidence is not. MRE 402. However, even relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. MRE 403.

Here, we agree that the challenged evidence was hearsay, not subject to any of the exceptions cited by defendant. Moreover, it is apparent that the trial court felt that the evidence would confuse or mislead the jury, or was unduly prejudicial, and, therefore, should be excluded under MRE 403. A review of the record reveals that the court did not abuse its discretion in this regard.

Lastly, the court did not abuse its discretion in limiting the scope of cross-examination of various witnesses. The scope of cross-examination is a matter left to the trial court's discretion, which must be exercised with due regard for a defendant's constitutional rights. *People v Jensen*, 162 Mich App 171, 180; 412 NW2d 681 (1987). If cross-examination of a prosecution witness has been unreasonably limited, amounting to an abuse of discretion and a denial of the right to confrontation, a conviction based on that witness' testimony should not be sustained. *Id.* Reversal is not required, however, where the error is harmless or no prejudice results. *Id.*

Here, the court did not unreasonably limit the cross-examination of Officer Vintovoghel. Defendant does not dispute that the questioning called for inadmissible hearsay, as the court determined. As far as the questioning of officer Bivens, no prejudice has been shown from the court's refusal to allow a hypothetical question because the witness denied the allegation that he shot the victim because the victim had testified against him. Finally, because it was unclear whether Officer Quick knew about Officer Upshaw's suspension, defendant has failed to demonstrate that he was prejudiced by the court's decision to sustain a relevancy objection to this question.

Finally, the trial court did not err in allowing defendant's confession to be used to establish the corpus delicti for the underlying felony where there was independent evidence that the victim's death occurred as a result of some criminal agency. *People v Hughey*, 186 Mich App 585; 464 NW2d 914 (1990).

Affirmed.

/s/ Jane E. Markey

/s/ Gary R. McDonald

/s/ Kirsten Frank Kelly