STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 23, 2002
v	No. 231223 Lenawee Circuit Court
RAFAEL CIBRIAN EGUIA, Defendant-Appellant.	LC No. 00-008856-FH

Before: Cooper, P.J., and Hood and Kelly, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of possession of less than twenty-five grams of cocaine, MCL 333.7403(2)(a)(v). He was sentenced to five years' probation and appeals as of right. We affirm.

Defendant first alleges that the trial court was required to sua sponte hold an evidentiary hearing to determine the voluntariness of his confession. We disagree. In *People v Ray*, 431 Mich 260, 269; 430 NW2d 626 (1988), our Supreme Court held that there was no automatic requirement that a voluntariness hearing be held in the absence of some contemporaneous challenge to the use of the confession. An exception to this "raise or waive" rule arises where the factual situation itself raises a substantial question of voluntariness. *Id*. Circumstances that may alert a trial court to the need for an evidentiary hearing include the defendant's mental, emotional or physical condition, evidence of police threats, or other obvious forms of physical and mental duress. *Id*. Our Supreme Court acknowledged the immense burden that would be placed on trial courts to recognize the need for and conduct sua sponte evidentiary hearings regarding voluntariness of confessions. *Id*. at 271. Consequently, the Supreme Court held that the exception to the raise or waive rule was to be narrowly construed and reserved for extreme facts where the evidence clearly and substantially reflected a question regarding the voluntary nature of a confession. *Id*. Defendant testified that, when interviewed by police, he was a "little bit drunk" and "tired." Defendant testified that he finally admitted that the cocaine was his after "two, three" hours of questioning. However, on cross-examination, when asked to confirm that duration of time, defendant responded, "Something like that because I can't remember." When the prosecutor questioned whether the admission was "beaten" out of him or "coerced" by police, defendant merely testified that he was tired. Defendant did not raise his mental capacity or comprehension ability. The evidence available did not constitute alerting circumstances that would cause a trial court to sua sponte conduct an evidentiary hearing. Accordingly, defendant's claim of error is without merit.

Defendant next alleges that the trial court erred by admitting his confession. We disagree. Whether a defendant's statement was knowing, intelligent, and voluntary is a question of law that a court must determine under the totality of the circumstances. *People v Snider*, 239 Mich App 393, 417; 608 NW2d 502 (2000). In *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988), our Supreme Court stated:

> In determining whether a statement is voluntary, the trial court should consider, among other things, the following factors: 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 ultimate test of admissibility is premised on the totality of the circumstances, not the presence or absence of any specific factors. *Id*. Defendant testified that he may have been a "little drunk" and was tired. Police testified that while defendant may have had an odor of alcohol, he appeared to be "clearly coherent." Based on the totality of the circumstances addressed in the record, we cannot conclude that the trial court erred by admitting defendant's statement.[1]

Lastly, defendant alleges that he was denied the effective assistance of counsel. We disagree. Where a *Ginther*[2] hearing has not been held below, this Court's review is limited to mistakes apparent on the record. *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994). Effective assistance of counsel is presumed, and the defendant bears a heavy burden to prove otherwise. *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001). The decision regarding what evidence to present is presumed to be trial strategy, and we will not substitute our judgment for that of counsel regarding matters of trial strategy. *Id*. Review of the closing argument by defense counsel indicates that the failure to challenge the admission of the confession was trial strategy. Specifically, defense counsel noted that the statement was nonsensical and defendant admitted that he lied throughout the statement. Defense counsel

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[1] We note that many of the factors alleged by defendant on appeal are not supported by the record or are not an accurate reflection of the record. There is no indication that defendant was awake for twenty hours at the time of his contact with police. Additionally, there is no testimony to support the assertion that he had been smoking crack since late afternoon. In fact, during his testimony, defendant denied cocaine use. Finally, the time frame provided in defendant's brief on appeal to support the contention that the interview lasted for two to three hours is based on documentation not preserved in the record below and speculation as to the document's significance. It is equally as plausible that police officers were interviewing the other occupants of the vehicle during that time period, as alleged in the prosecutor's opening statement.

[2] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

further argued that another passenger in the vehicle with defendant was charged with possession of the cocaine because it was retrieved from her sock. It was argued that these facts constituted reasonable doubt, resulting in acquittal. Based on the record available, defendant has failed to meet his burden regarding effective assistance. *Garza, supra*.

Affirmed.

/s/ Jessica R. Cooper
/s/ Harold Hood
/s/ Kirsten Frank Kelly