STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED August 10, 2004
v	No. 248546 Oakland Circuit Court
JAJUAN LAMAR DAVIS, Defendant-Appellee.	LC No. 2002-185313-FC

Before: Cavanagh, P.J. and Jansen and Saad, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction, following a jury trial, of first-degree murder during the perpetration or attempted perpetration of the breaking and entering of a dwelling, home invasion, or larceny in violation of MCL 750.316(1)(b) (felony murder). We affirm.

At trial, defendant testified that he broke into the home owned by Azawi Arabo in order to burglarize it. While defendant was in the house, Arabo came home, noticed defendant, and attempted to restrain defendant from leaving. During a brief scuffle, defendant grabbed a hammer that he testified belonged to Arabo and hit Arabo in the head several times. Arabo thereafter died from the wounds he sustained.

Defendant first asserts that the trial court erred by denying his motion to suppress a written statement that he gave to the police in which he admitted to having killed Arabo while burglarizing the house, contending that the statement was not given voluntarily. We disagree. When reviewing a trial court's determination that inculpatory statements were made voluntarily, this Court reviews the entire record de novo. *People v Daoud*, 462 Mich 621, 629-630; 614 NW2d 152 (2002). However, this Court reviews the trial court's factual findings for clear error and, thus, will not disturb them absent a definite and firm conviction that a mistake was made. *People v Shipley*, 256 Mich App 367, 372-373; 662 NW2d 856 (2003).

Defendant asserts that he did not make the challenged statement voluntarily because the interviewing officer promised him leniency and told him that he would not look "like an animal" if he confessed. However, the officer denied having made any promise of leniency to defendant either before or after the interview. The trial court evidently believed the officer to be more credible, and chose not to believe defendant's assertions that the officer had promised leniency or stated that defendant's confessing would make him seem less "like an animal" in the eyes of

the jury, and this Court will defer to a trial court's assessment of the credibility of a witness. *Shipley, supra* at 373.

This Court examines the conduct of the police to determine whether a statement was voluntary. *Id*. In *People v Sexton (After Remand)*, 461 Mich 746, 752-753; 609 NW2d 822 (2000), our Supreme Court stated that the totality of the circumstances surrounding the statement must be reviewed in order to determine whether it was voluntarily given, and set forth the following factors to be considered:

> "[T]he 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." [Quoting *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988) (citations omitted).]

In the present case, defendant was advised of his *Miranda*[1] rights and signed a form stating that he understood his rights, was willing to waive them, and that no promises or threats had been made to him. Defendant also testified that he understood his rights when the detectives read them to him, and that he was not threatened in any way. Moreover, defendant stipulated that he had previous experience with the police, and the trial court confirmed that he had previous experience with his rights because they had been read to him during his previous court experience. Furthermore, the officer testified that defendant was not under arrest when he made the statement, appeared to comprehend what was being said to him, did not appear to be deprived of sleep or nourishment, and did not appear to be malnourished, suffering from any mental deficiencies, or under the influence of drugs or alcohol.

Defendant, however, asserts that his confession was not voluntary under the totality of the circumstances because he was seventeen years old at the time of the interview, was not accompanied by a parent or guardian, and only had a tenth grade education. However, a seventeen-year-old is treated as an adult for the purposes of criminal procedure. MCL 764.27; *People v Perkins*, 107 Mich App 440, 444; 309 NW2d 634 (1981). Therefore, the additional factors that are taken into account when reviewing the totality of the circumstances to determine

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

whether a juvenile's confession is admissible, such as whether the police complied with the juvenile court rules and whether a parent or custodian were present, are not applicable in the present case. See *In re SLL*, 246 Mich App 204, 209; 631 NW2d 775 (2001). Moreover, in the present case, given defendant's previous experiences with the police and court system, the fact that he was living on his own at the time of the interview, and appeared to the officer to comprehend what was being said to him, defendant's only having a tenth grade education does not lead to an inference that his statement was not voluntary.

Based on review de novo, we find that the trial court committed no error requiring reversal when it denied defendant's motion to suppress.

Defendant next asserts that his trial counsel was ineffective for failing to object to the introduction of expert testimony that DNA testing conducted on a hammer and gloves found at the crime scene matched the profiles of Arabo and defendant on the ground that an appropriate foundation for the evidence was not laid. Without addressing whether defense counsel committed any error, we conclude that this issue is without merit because defendant has not shown that a different outcome reasonably would have resulted but for his counsel's error. *People v Harmon*, 248 Mich App 522, 531; 640 NW2d 314 (2001). First, during trial, defendant did not deny that he had killed Arabo with a hammer. Second, during trial, defendant was shown the hammer that was found at Arabo's house, and acknowledged that it was the hammer that he had used to kill Arabo. Moreover, a video tape was introduced at trial that showed defendant purchasing gloves that he admitted wearing when he tried to clean up the crime scene, as well as a receipt for their purchase, and defendant admitted in his written confession and at trial that he had purchased the gloves and other items. Furthermore, a crime lab specialist from the Oakland County Sheriff's Department testified that defendant's fingerprints were found on the packaging for the gloves, which was found in Arabo's home, as well as the duct tape that defendant had purchased, Arabo's telephone, and other items in Arabo's home. For the above reasons, defendant has not shown the required prejudice to prevail on an ineffective assistance of counsel claim. See *Harmon*, *supra* at 531.

Defendant's final assertion is that the trial court erred by denying his motion to exclude a jail guard from testifying that, while he was awaiting trial, defendant stated to the guard that he hates white people and that the person he killed was white. The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made, *People v Snider*, 239 Mich App 393, 419; 608 NW2d 502 (2000), or the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias, *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002). A decision on a close evidentiary question ordinarily cannot be an abuse of discretion. *People v Sabin (After Remand)*, 463 Mich 43, 67; 614 NW2d 888 (2000).

"Generally, all relevant evidence is admissible, and irrelevant evidence is not." *People v Coy*, 258 Mich App 1, 13; 669 NW2d 831 (2003) citing MRE 402 and *People v Starr*, 457 Mich 490, 497; 577 NW2d 673 (1998). Relevant evidence is that which has "any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." MRE 401. "Relevant evidence thus is

evidence that is material (related to any fact that is of consequence to the action) and has probative force (any tendency to make the existence of a fact of consequence more or less probable than it would be without the evidence)." *People v Sabin (After Remand)*, 463 Mich 43, 57; 614 NW2d 888 (2000) citing *People v Mills*, 450 Mich 61, 66-68; 537 NW2d 909 (1995).

Defendant asserts that the officer's testimony as to defendant's statement that he hates white people and that the person that he killed was white was not relevant because defendant did not dispute at trial that he had killed Arabo, instead asserting as his defense that he did not possess the requisite state of mind. However, our Supreme Court has specifically stated that a criminal defendant's entering a plea of not guilty places all of the elements of the crime charged in issue, thereby requiring the prosecution to fulfill its burden of proving every element beyond a reasonable doubt regardless of whether the defendant specifically disputes them. *Mills*, *supra* at 69-71.

Further, even if this Court were to determine that the trial court did abuse its discretion by allowing the officer to testify as to defendant's statements, any error was harmless. Our Supreme Court has held that a trial court's error on an evidentiary ruling "is not a ground for reversal unless 'after an examination of the entire cause, it shall affirmatively appear' that it is more probable than not that the error was outcome determinative." *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999) quoting MCL 769.26. As described above, defendant admitted at trial the killing and the home invasion. That testimony together with the physical evidence constituted overwhelming evidence of defendant's guilt and, thus, any error regarding the testimony of the jail guard was harmless.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Henry William Saad