STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 16, 2004
v	No. 237788 Wayne Circuit Court
WALTER ROBERT ATKINS, Defendant-Appellant.	LC No. 00-001886

Before: Hoekstra, P.J., and Fitzgerald and White, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of felony murder, MCL 750.316.[1] The trial court sentenced defendant to mandatory life imprisonment. We affirm.

On September 1, 1999, a woman's body was discovered in a dumpster in Detroit. After conducting an autopsy, a medical examiner determined that the victim died from manual strangulation. In addition to signs of strangulation, the medical examiner observed defensive wounds and bite marks on the body. At trial, defendant was identified as the perpetrator through admissions he made to an acquaintance and to a police investigator, and through DNA evidence. Also, witnesses testified that they observed scratches and bite marks on defendant's body shortly after the incident.

On appeal, defendant first argues that the trial court erred in denying his motion to suppress his statement because his confession was involuntary. Specifically, defendant contends that his confession was induced by expectations of leniency in return for his cooperation and because defendant was not mentally capable of understanding or intelligently waiving his constitutional rights. We disagree.

With regard to the admissibility of an accused's statement to the police, in *People v Howard*, 226 Mich App 528; 575 NW2d 16 (1997), the Court explained:

[1] Defendant was charged with both felony murder and first-degree premeditated murder. The jury returned a verdict for felony-murder as charged and the lesser offense of second-degree murder. At sentencing, the trial court "merged" the second-degree murder conviction with felony-murder conviction and imposed sentence on the felony murder conviction only.

> Statements of an accused made during custodial interrogation are inadmissible unless the accused voluntarily, knowingly, and intelligently waives his Fifth Amendment rights. *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966); *People v Garwood*, 205 Mich App 553, 555-556; 517 NW2d 843 (1994). Whether a waiver of *Miranda* rights is voluntary and whether an otherwise voluntary waiver is knowing and intelligent are separate questions. *People v Cheatham*, 453 Mich 1, 27, 44; 551 NW2d 355 (1996); *Garwood*, *supra* at 555. While the voluntariness prong is determined solely by examining police conduct, a statement made pursuant to police questioning may be suppressed in the absence of police coercion if the defendant was incapable of knowingly and intelligently waiving his constitutional rights. Whether a suspect has knowingly and intelligently waived his *Miranda* rights depends in each case on the totality of the circumstances, including the defendant's intelligence and capacity to understand the warnings given. *Cheatham*, *supra* at 27, 44. [*Id.* at 538.]

We review de novo the entire record to determine whether an accused has knowingly and intelligently waived his *Miranda* rights; however, we give deference to a trial court's findings at a suppression hearing and we will not disturb a trial court's factual findings unless they are clearly erroneous. *People v Abraham*, 234 Mich App 640, 644; 599 NW2d 736 (1999), quoting *Cheatham*, *supra* at 29-30. Further, with respect to whether a statement is voluntary, in *People v Sexton (After Remand)*, 461 Mich 746, 752-753; 609 NW2d 822 (2000), our Supreme Court explained:

> [The Court of Appeals] review of the issue of voluntariness must be independent of that of the trial court. *People v Robinson*, 386 Mich 551, 558; 194 NW2d 709 (1972). However, we will affirm the trial court's decision unless we are left with a definite and firm conviction that a mistake has been made. *Id.; People v DeLisle*, 183 Mich App 713, 719; 455 NW2d 401 (1990). Further, if resolution of a disputed factual question turns on the credibility of witnesses or the weight of the evidence, we will defer to the trial court, which had a superior opportunity to evaluate these matters. See *People v Marshall*, 204 Mich App 584, 587; 517 NW2d 554 (1994).
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> 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 factors set forth by our Supreme Court in *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988):
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> > "[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.
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> "The absence or presence of any 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. [Citations omitted.]"

In the present case, three Detroit police homicide officers testified at a suppression hearing that on four separate occasions during the investigation defendant was advised of his *Miranda* rights. Two officers testified that that they advised defendant of his *Miranda* rights on September 2, 1999, and a third officer testified that he advised defendant of his *Miranda* rights on September 5, 1999, and again on January 21, 2000.[2] Each officer acknowledged to some extent that defendant had limited literacy skills and little education, but that in their opinion defendant understood his *Miranda* rights and defendant waived those rights and agreed to speak to the officers. Defendant signed and/or initialed by the statements of his rights printed on a standard form.

Defendant's testimony at the hearing varied significantly from that of the police officers. Although he identified his signature and initials on the advice of rights and statement forms introduced at the hearing, defendant maintained that because he essentially could not read he did not know what was written on them and only signed or initialed them because the officers told him that he needed to so that he could be released.

In ruling on defendant's motion to suppress, the trial court stated that "what this ends up being is a credibility contest." The trial court found that in fact the officers had informed defendant of his *Miranda* rights and that defendant understood those rights. On appeal, defendant challenges, in essence, this finding by the trial court on the basis of defendant's lack of sophistication, repeated contacts with homicide investigators, and his inability to read. However, after reviewing the record, and giving deference to the trial court's findings, we find no clear error and agree with the trial court that defendant knowingly and intelligently waived his *Miranda* rights.

With respect to the voluntariness of his statements to police, defendant claims that he was intimidated by the presence of numerous police officers, received rough treatment from the police, and received promises of leniency that induced him to confess on January 21, 2000. The trial court's ruling did not address these claims. The record from the evidentiary hearing reveals that defendant never claimed in his testimony that he was treated roughly by the police or that he was intimidated by the number of police present. As to leniency, defendant never asserted that he confessed because the police promised him that if he did that he would be released. Rather,

[2] Both statements given by defendant on September 2, 1999 were exculpatory, but he confessed to the killing in his statement of January 21, 2000. The record does not reveal whether defendant made a statement on September 5, 1999.

he maintained, in essence, that on January 21, 2000, he was duped into signing a confession that he did not make on the pretext that his signatures and initials were necessary requirements for his release. Thus, defendant's testimony at the hearing is distinctly different than that which defendant now asserts on appeal. Because the record does not support defendant's assertions that police promises of leniency induced him to confess, we find defendant's claims made on appeal regarding whether his statements were voluntary are without merit. In sum, the trial court did not err in denying defendant's motion to suppress his statement.

Next, defendant claims that the trial court erred in denying his request to have the jury instructed on "the cognate lesser offense of manslaughter"[3] because a rational view of the evidence supported giving the instruction. Specifically, defendant argues that a voluntary manslaughter instruction was appropriate because a rational view of the evidence would support a finding that defendant was provoked into strangling the victim to death because she attempted to ward off his attempt to rob her by brandishing a box-cutter and, consequently, he was frightened "to the point where his emotions became so intense that they distorted the very process of choosing what course of action to follow." Additionally, defendant contends that these same circumstances give rise to a claim that defendant could only be guilty of voluntary manslaughter based on the imperfect self-defense doctrine. We disagree.

"An inferior-offense instruction is appropriate only when a rational view of the evidence supports a conviction for the lesser offense." *People v Mendoza*, __ Mich __; __ NW2d __ (2003) [Docket No. 120630, rel'd 6/20/03]. Murder is reduced to voluntary manslaughter if the defendant kills in the heat of passion that is adequately provoked and before a lapse of time during which a reasonable person could control their passion. *People v Pouncey*, 437 Mich 382, 388; 471 NW2d 346 (1991). For the passion to be adequate it must be that which would cause a reasonable person to lose control. *Id.* at 389. When the evidence does not support a finding of voluntary manslaughter, the trial court may exclude a requested instruction. *Id.* at 392. Here, we find defendant's claim in this regard without merit. Like the trial court, we find that the evidence does not support a finding that defendant was adequately provoked. Adequate provocation does not arise out of a victim's attempts to defend herself from a robbery.

Defendant also relies on the imperfect self-defense doctrine in support of his argument that the trial court should have given a voluntary manslaughter instruction. We find this defense unavailing because it is applicable only if "the defendant would have been entitled to self-defense had he not been the initial aggressor." *People v Butler*, 193 Mich App 63, 67; 483 NW2d 430 (1992). Because defendant manually strangled the victim with his hands, a mechanism for inflicting death that requires choking the victim into unconsciousness and then maintaining the choking for an additional period of time until the victim dies, we find that defendant would not be entitled to claim self-defense. *People v Kemp*, 202 Mich App 318, 325 and n 2; 508 NW2d 184 (1993).

[3] Although defendant refers to voluntary manslaughter as a cognate lesser offense, the Supreme Court recently held that it is an inferior, not cognate, offense to murder because it is a necessarily included lesser offense. *People v Mendoza*, __ Mich __; __ NW2d __ (2003).

Moreover, even if the evidence did support a voluntary manslaughter instruction, any error for not giving a voluntary manslaughter instruction would be harmless because the jury had the choice of the intermediate offense of second-degree murder, but convicted defendant of the greater offense of felony-murder. *People v Zak*, 184 Mich App 1, 16; 457 NW2d 59 (1990).

Next, defendant claims that his felony-murder conviction must be reversed because there was no evidence of the alleged predicate felony of larceny. We disagree. In his statement of January 21, 2000, defendant admitted that he confronted the victim with a weapon, demanded that she give him her money, and then choked her to death when she refused and attempted to resist. Further, he said that afterward he took $120 from the victim's purse, then put her clothes and purse in a garbage bag and put them in a dumpster. From this evidence, a rationale trier of fact could have found the elements of the predicate felony of larceny[4] were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992); *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001); *People v Cain*, 238 Mich App 95, 120; 605 NW2d 28 (1999) (elements of larceny). Defendant predicates his argument on the fact that the victim's purse was not recovered; however, this argument goes to the weight to be given to defendant's admission, not to whether the evidence taken in a light most favorable to the prosecution is sufficient to establish a larceny.

Finally, defendant challenges the trial court's admission of DNA evidence. Defendant contends that the prosecutor failed to establish that generally accepted laboratory procedures were utilized, failed to establish that the method of statistical analysis used has general acceptance in the scientific community, and failed to lay an adequate foundation for the admission of defendant's blood sample. In general, we review a trial court's decision to admit or exclude evidence for an abuse of discretion. *People v Spanke*, 254 Mich App 642, 644; 658 NW2d 504 (2003). However, because defendant failed to object to the admission of DNA evidence on the same basis as he argues on appeal, this issue is unpreserved.[5] MRE 103(a); *People v Aguwa*, 245 Mich App 1, 6; 626 NW2d 176 (2001). Accordingly, we review this unpreserved claim for plain error affecting defendant's substantial rights, i.e., affecting the outcome of the proceedings. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Having reviewed the record in light of defendant's argument, we conclude that defendant has failed to establish outcome-determinative plain error.

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[4] In pertinent part, MCL 750.316(1)(b) (felony murder), provides that a defendant is guilty of first degree murder if the killing is "*committed in the perpetration of, or attempt to perpetrate*, arson, criminal sexual conduct in the first, second, or third degree, child abuse in the first degree, a major controlled substance offense, robbery, carjacking, breaking and entering of a dwelling, home invasion in the first or second degree, *larceny of any kind*, extortion, or kidnapping." [Emphasis supplied.]

[5] At trial, defendant objected to the prosecutor's proposed expert in DNA testing on the basis that there is no agency that certifies people with regard to DNA testing.

Affirmed.

/s/ Joel P. Hoekstra
/s/ E. Thomas Fitzgerald
/s/ Helene N. White