STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 21, 2004
v	No. 243475 Wayne Circuit Court
GWINN B. GIBSON, JR., Defendant-Appellant.	LC No. 02-001444-01

Before: Cavanagh, P.J., and Smolenski and Owens, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for first-degree felony murder, MCL 750.316, armed robbery, MCL 750.529, possession of a firearm by a person convicted of a felony, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to life in prison for the felony murder conviction, thirty to fifty months' imprisonment for the armed robbery conviction, forty to sixty months' imprisonment for the firearm possession by a felon conviction, and two years' imprisonment for the felony-firearm conviction. We affirm.

Defendant first argues that the trial court erred by denying his motion to suppress evidence confiscated from his residence on December 5, 2001. When considering a motion to suppress evidence, this Court reviews for clear error a trial court's factual findings and reviews de novo a trial court's conclusions of law. MCR 2.613(C); *People v Farrow*, 461 Mich 202, 209; 600 NW2d 634 (1999);

Both the United States and Michigan Constitutions guarantee the right against unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, § 11; *People v Kazmierczak*, 461 Mich 411, 417; 605 NW2d 667 (2000). A search conducted without a warrant is unreasonable unless it falls within one of the delineated exceptions to the warrant requirement. *Kazmierczak, supra* at 418. The burden of establishing that a search was justified by a recognized exception falls on the prosecutor. *People v Mayes (After Remand)*, 202 Mich App 181, 184; 508 NW2d 161 (1993).

Defendant argues that the consent to search his residence given by his mother, Francis Pratt, was not valid because it was not voluntarily and knowingly given and further, even if the consent was valid, the consent "cannot cure the Fourth Amendment violations that were committed prior to" Pratt's arrival at her home. It is undisputed that defendant was residing with

Pratt at the time of the search and that she was not at home on December 5, 2001, at the time the search of her house began. Darlene Gibson, defendant's sister-in-law and resident of the house, had given Officer Steven Dolunt permission to enter the house.[1] Gibson directed Officer Dolunt to a second-floor computer room, which was a common room of the house, where defendant was found hiding in the closet. After removing defendant from the closet and placing him against the adjacent wall, Officer Dolunt searched the closet for a weapon that might be within defendant's reach. Before finding a weapon, Pratt arrived at the home. After she signed a consent form to search the house, the police recovered a gun from the closet defendant had been hiding in, a cigar box which contained phone cards, and several packs of Newport cigarettes. The phone cards and cigarettes had been reported missing from the gas station that had been robbed.

The consent exception to the warrant requirement allows search and seizure when consent is unequivocal and specific, and freely and intelligently given. *People v Galloway*, 259 Mich App 634, 648; 675 NW2d 883 (2003). Whether a consent is valid depends on the totality of the circumstances. *Id*. Although consent to a search must ordinarily be given by the person affected, a third party may consent to the search when the consenting person has equal right of possession or control of the premises. *People v Goforth*, 222 Mich App 306, 311-312; 564 NW2d 526 (1997). Police may approach a person at his residence and ask for consent to a search of the premises in the absence of coercive factors. *People v Frohriep*, 247 Mich App 692, 698; 637 NW2d 562 (2001). And a person does not have to be advised of his right to refuse consent for consent to be valid. *People v Borchard-Ruhland*, 460 Mich 278, 294; 597 NW2d 1 (1999).

We find that Gibson's consent to enter the house to look for defendant was valid. It is not disputed that the police merely asked for permission and Gibson acquiesced. Gibson was permitted to give this consent because, as a resident of the house, she had an equal right to possession or control of the common areas. *Goforth, supra* at 311.

After police found defendant hiding in a closet, they placed him up against the wall to check for weapons while placing him under arrest. The search-incident-to-a-lawful-arrest exception to the warrant requirement permits an arresting officer to search the person arrested to remove any weapons the latter may use to escape or resist arrest. The officer is also allowed to search the area within the arrestee's immediate control for weapons or evidence, including closed containers. *People v Champion*, 452 Mich 92, 115; 549 NW2d 849 (1996). And police may, without probable cause or reasonable suspicion, look in closets and additional spaces directly adjoining the place of arrest from which an attack could be immediately launched. *People v Shaw*, 188 Mich App 520, 524; 470 NW2d 90 (1991). Also, a search incident to an arrest may occur immediately prior to the arrest, at the place of arrest, or at the place of detention. *Champion, supra* at 115-116. For these reasons, the search of the closet, in which the murder weapon was discovered, was valid.

[1] During the evidentiary hearing, Officer Dolunt testified that he could not be sure of the last name of "Darlene." The PCR stated that "Darlene Rucker" allowed the police officers access to the house. Officer Dolunt also incorrectly indicated on the PCR that Francis Pratt had allowed the police initial access into the house rather than Darlene Gibson.

Further, Officer Dolunt's testimony at the evidentiary hearing indicated that Francis Pratt signed the consent to search form willingly and accompanied Officer Dolunt upstairs. Deference is given to a trial judge's resolution of a factual issue, especially where it involves the credibility of witnesses whose testimony is in conflict. *Farrow, supra* at 209. Based on the testimony given by Pratt and Officer Dolunt regarding the circumstances surrounding Pratt's signing of the consent form, we cannot say that the trial court's finding that Pratt's consent was valid was clearly erroneous. Because the police had Pratt's consent to search the home, the evidence found subsequently was lawfully obtained. *Galloway, supra* at 648. Therefore, we hold that the trial court did not err in refusing to suppress the evidence found in the search.

Defendant next argues that the trial court erred in denying his motion to suppress his statement made to police because it was not given voluntarily. We disagree. A statement of an accused taken during a custodial interrogation is 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 Abraham*, 234 Mich App 640, 644; 599 NW2d 736 (1999). The burden is on the prosecutor to establish a valid waiver by a preponderance of the evidence. *Abraham, supra* at 645.

Whether a statement was voluntary is determined by examining the totality of the circumstances surrounding a statement to establish if it was the product of an essentially free and unconstrained decision by its maker. *People v Cipriano,* 431 Mich 315, 333-334; 429 NW2d 781 (1988). The list of factors to be considered includes:

> 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. [*Id*. at 334 (citations omitted).]

The absence or presence of any one factor is not conclusive in determining the voluntariness of a confession. *Id*. at 334.

The court examined the admissibility of defendant's statements in a *Walker* hearing held March 22, 2002. Officer Henry Ellis testified that he placed defendant in his police car after defendant was arrested, and began to read defendant his rights from a constitutional rights form. Defendant told Ellis that he was aware of his rights because he had been through the system before. Ellis advised defendant that if he understood his rights, he should initial each one listed on the form, which defendant did and then signed the form at 1:45 p.m.

Officer Ellis told defendant that the police were investigating a homicide, and questioned defendant on the way to and at the police station. Ellis claimed that there were no threats, force, or coercion used against defendant, and that there were no promises made to defendant. Defendant was not denied the use of the restroom or denied food. And he appeared lucid.

Defendant gave Officer Ellis three different stories that he did not write down because he was not comfortable with defendant's version of events.

Defendant had been sleeping in the interrogation room when Officer Dolunt arrived. He gave defendant food and a beverage, allowed defendant to use the rest room, and that about one-half hour after waking defendant, Officer Dolunt also advised defendant of his constitutional rights. Officer Dolunt established that defendant graduated from high school and attended Mississippi State University for three and one-half years. Defendant read each of his rights out loud before initialing next to them and then signed the document at 7:15 p.m. Officer Dolunt further testified that defendant did not appear to be under the influence of any intoxicants or narcotics, that no force or coercion was used against defendant and that no promises were made to him. Defendant agreed to speak to Officer Dolunt voluntarily without the presence of an attorney. Officer Dolunt asked defendant questions and wrote down defendant's answers verbatim.

Based on the totality of the circumstances surrounding defendant's confession, we find that the trial court did not err in concluding that it was freely and voluntarily made. According to the testimony of Officers Ellis and Dolunt, defendant had a college education and had been through the system before. Defendant was not questioned extensively, was twice advised of his constitutional rights, and was not injured, intoxicated, drugged, or in ill health when he gave his statement. Additionally, defendant was given food and drink, he slept, and he was allowed to use the rest room. There was no indication that defendant was threatened, coerced, or promised leniency. We find no basis for disturbing the trial court's ruling.

Defendant also asserts that the trial court erred in admitting into evidence the spent shell casing because there was a break in the chain of custody and the proper foundation was not laid. Because defendant did not object to the admission of the shell casing, the issue is not preserved for appeal. Thus, defendant must demonstrate plain error affecting his substantial rights, and that he was actually innocent or that the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings independent of his innocence. *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004).

Defendant argues that the evidence technician who recovered the shell casing from the scene on December 2, 2001, marked the casing as a 1GFI 7.65 nine-millimeter casing on evidence tag number 693506. Defendant points out that the shell casing with evidence tag number 693056 that was admitted into evidence at trial was a .32 caliber casing, indicating that there may have been a gap in the chain of custody. While in order to lay a proper foundation for some evidence it is necessary to trace its chain of custody, admission of evidence does not require a perfect chain of custody. *People v White*, 208 Mich App 126, 130; 527 NW2d 34 (1994). Rather, the evidence is admissible where it has been established with a reasonable degree of certainty that the proffered evidence was not mistakenly exchanged, contaminated, or tampered with. *Id*. at 133. In this case, we find that the testimony established with a reasonable degree of certainty that the shell casing was not mistakenly exchanged, contaminated, or tampered with, and thus, its admission was proper. With this requirement being satisfied, any gaps in the chain of custody of the evidence go to the weight of the evidence, not its admissibility. *Id.* Accordingly, defendant has not demonstrated plain error.

Finally, defendant argues that there was insufficient scientific evidence to sustain his felony murder conviction because there was a lack of forensic evidence and evidence establishing premeditation and deliberation. In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Nowak*, 462 Mich 392, 399-400; 614 NW2d 78 (2000).

We first note that there is no need to have forensic evidence in a trial. Circumstantial evidence and reasonable inferences that arise from the evidence can constitute sufficient proof of the elements of the crime. *Id.* at 400. In this case, the murder weapon was recovered from the closet floor of the computer room in defendant's house, the same closet in which defendant was found hiding by the police. The computer room also contained phone cards and cigarettes that were missing from the gas station. And a videotape of the robbery and shooting was placed into evidence. Defendant gave a statement to police in which he described the robbery and killing, and stated that he discarded both the gloves and the coat he was wearing as he ran down Strathmoor Street immediately after committing the crimes. Any attempt to dust for fingerprints would have been futile because defendant admitted, and the videotape showed, that he was wearing gloves at the time of the crime.

Defendant's argument that there is insufficient evidence to find that he shot the victim with premeditation and deliberation is without merit because they are not factors necessary to prove felony murder. *Id.* at 401. Viewing the evidence in a light most favorable to the prosecution, we find that a rational trier of fact could conclude that sufficient evidence existed to support defendant's conviction of first-degree felony murder.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Michael R. Smolenski
/s/ Donald S. Owens