STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 15, 2006
v	No. 259193 Washtenaw Circuit Court
ERIC JOHN BOLDISZAR, Defendant-Appellant.	LC No. 02-001366-FC

Before: Whitbeck, C.J., and Zahra and Donofrio, JJ.

PER CURIAM.

Defendant Eric Boldiszar appeals as of right from his jury trial conviction of first-degree felony murder.[1] This case stems from the murder of Lee Ann Anderton, a manager at the Blockbuster Video store on Jackson Road in Ann Arbor. Anderton was killed as she opened the store for business on the morning of August 12, 2002. Following Boldiszar's jury conviction, the trial court sentenced him to life imprisonment without parole. We affirm.

I. Boldiszar's Confession

A. Standard Of Review

Boldiszar argues that his confession was involuntary and that the trial court erred when it refused to suppress that confession. "When reviewing a trial court's determination of voluntariness, this Court examines the entire record and makes an independent determination."[2] "However, deference is given to the trial court's assessment of the weight of the evidence and credibility of the witnesses, and the trial court's findings will not be reversed unless they are clearly erroneous."[3]

[1] MCL 750.316(1)(b).

[2] *People v Howard*, 226 Mich App 528, 543; 575 NW2d 16 (1997).

[3] *Id.*

B. Legal Standards

"The federal and state constitutions provide that no person can be compelled to be a witness against himself in a criminal trial."[4] Use of an involuntary confession against a defendant is a violation of this right.[5] In determining whether a confession was freely and voluntarily made, we review the totality of circumstances surrounding the making of the statement including: (1) the age of the defendant; (2) the defendant's lack of education or his intelligence level; (3) the extent of the defendant's previous experience with the police; (4) the repeated and prolonged nature of the detention of the defendant before he gave the statement in question; (5) the lack of any advice to the defendant of his constitutional rights; (6) whether there was any unnecessary delay in bringing the defendant before a magistrate before he confessed; (7) whether the defendant was injured, intoxicated or drugged or in ill health when he confessed; (8) whether the defendant was deprived of food, sleep or medical attention; and (9) whether the defendant was physically abused or threatened with abuse.[6] "'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.'"[7]

C. Applying The Standards

After reviewing the evidence produced at the *Walker*[8] hearing, we conclude that the trial court did not err when it concluded that Boldiszar's confession was voluntary, considering the totality of the circumstances. At the time of the confession, Boldiszar was a 19-year-old man entering his second year of college at Eastern Michigan University. There is no evidence that he was physically abused, or threatened with abuse. He was not deprived of food, sleep, or medical attention, and there is no evidence that he was injured, intoxicated, drugged, or in ill health when he confessed.

In addition, Boldiszar's prior experience with the police in the same interview setting indicates that his confession was voluntary. Two days prior to his allegedly involuntary confession he was interviewed for the first time in relation to the murder. The first interview took place in an interview room located in the basement of the Ann Arbor City Police Station. He was told that he was not under arrest and that he was free to leave. At the conclusion of the first interview, he told officers that he would be more than happy to come back and answer more questions. At the request of the police, he returned to the police station for a second interview two days later. The second interview, like the first, took place in an interview room located in the basement of the Ann Arbor City Police Station. He was again told that he was not under

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[4] *People v Mendez*, 225 Mich App 381, 382; 571 NW2d 528 (1997).

[5] *People v Ray*, 431 Mich 260, 269-270; 430 NW2d 626 (1988).

[6] *People v Sexton* (*After Remand*), 461 Mich 746, 753; 609 NW2d 822 (2000).

[7] *Id*., quoting *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988).

[8] *People v Walker* (*On Rehearing*), 374 Mich 331; 132 NW2d 87 (1965).

arrest and that he was free to leave "the same way he'd come in and in the same way he had left . . . 2 days prior." In addition, early during the second interview, the interviewing officers asked him for permission to search his car and honored his denial of such permission. These prior interactions with law enforcement indicate that he was comfortable asserting his rights with the police and was voluntarily talking with the police during the second interview.

The length of the interview in this case, over five hours in a small windowless basement room, is relevant to the issue of voluntariness. However, in the absence of other circumstances suggesting that Boldiszar's confession was involuntary, this factor is not determinative. The officer's interview techniques, suggesting a theory on how the crime happened and telling Boldiszar that he could relieve himself of the guilt by confession, strike this Court as sound police work, rather then overbearing psychological coercion.

Finally, the fact that Boldiszar was not advised of his rights until almost four hours had passed is also relevant to the issue of voluntariness, but not determinative. Although Boldiszar's brief on appeal refers to the interview as a "custodial interrogation," he does not argue on appeal that his confession violated *Miranda v Arizona*.[9] Nonetheless, we conclude that a *Miranda* warning was unnecessary before Boldiszar's initial confession because he was not in custody prior to being told that he was under arrest. *Miranda* warnings are only required when a person is subject to a custodial interrogation.[10] Custody is determined by the totality of the circumstances, with the key question being whether a defendant reasonably could have believed that he was not free to leave.[11] Moreover, *Miranda* warnings are not required by the mere fact that an interview takes place at a police station and the police are questioning the person they suspect of committing the crime.[12]

Here, Boldiszar voluntarily drove himself to the interview. The interviewing officer testified that he specifically told Boldiszar that he was not under arrest and was free to leave at any time. In addition, when Boldiszar asked the officer if he could leave, the officer testified that he replied, "Yes, absolutely you can leave but . . .we need some answers to some of these questions . . . if you don't mind talking to me, I'd like to talk to you about it." Based on the evidence available at the *Walker* hearing, a reasonable person in Boldiszar's position would have felt free to leave. Where the interview is noncustodial, the failure to advise a defendant of his rights does not alone indicate that the confession was involuntary.[13]

The United States Supreme Court has recognized "that noncustodial interrogation might possibly in some situations, by virtue of some special circumstances, be characterized as one where 'the behavior of . . . law enforcement officials was such as to overbear petitioner's will to

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

[10] *People v Hill*, 429 Mich 382, 387; 415 NW2d 193 (1987).

[11] *People v Roark*, 214 Mich App 421, 423; 543 NW2d 23 (1995).

[12] *Mendez*, *supra* at 383-384.

[13] *Beckwith v United States*, 425 US 341, 347-348; 96 S Ct 1612; 48 L Ed 2d 1 (1976).

resist and bring about confessions not freely self-determined . . . .'"[14] When a defendant claims that a confession was involuntarily made as the result of noncustodial interrogation, a court must "'examine the entire record and make an independent determination of the ultimate issue of voluntariness.'"[15] "Proof that some kind of warnings were given or that none were given would be relevant evidence only on the issue of whether the questioning was in fact coercive."[16] We conclude that, as with the length of the interview, the failure to advise Boldiszar of his constitutional rights does not indicate that his will was overborne.

We also conclude that Boldiszar's reliance on *Missouri v Seibert*[17] is misplaced. In *Seibert*, a plurality held that law enforcement officers violate a suspect's Fifth Amendment rights under certain circumstances where they interrogate a suspect while in custody; elicit a confession; inform the suspect of his *Miranda* rights; and then elicit the same confession.[18] The determining factor in that case was that the police deliberately violated *Miranda* when eliciting the first confession, knowing this confession would be inadmissible, and then read the defendant her rights and almost immediately continued the interview, asking the defendant to repeat her confession.[19] Here, there was no deliberate violation of *Miranda* during the first phase of the interview because Boldiszar was not in custody.

II. Ineffective Assistance Of Counsel

A. Standard Of Review

Boldiszar argues that defense counsel was ineffective for failing to call him as a witness during the *Walker* hearing. Boldiszar has not fully preserved this issue because he did not move for a new trial or seek an evidentiary hearing.[20] Therefore, we must review this issue based on the existing record only.[21] Boldiszar bears the burden of overcoming the presumption that counsel was effective and must meet a two-pronged test to establish ineffective assistance of counsel.[22] First, Boldiszar must show that his attorney's performance fell below an objective standard of reasonableness under the circumstances and according to professional norms.[23]

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[14] *Id.*, quoting *Rogers v Richmond*, 365 US 534, 544; 81 S Ct 735; 5 L Ed 2d 760 (1961).

[15] *Id.* at 348, quoting *Davis v North Carolina*, 384 US 737, 741-742; 86 S Ct 1761; 16 L Ed 2d 895 (1966).

[16] *Id.*

[17] *Missouri v Seibert*, 542 US 600; 124 S Ct 2601; 159 L Ed 2d 643 (2004).

[18] *Id.* at 614-617 (Souter, J., joined by Stevens, Ginsberg and Breyer, JJ.).

[19] *Id.* at 616-617 (Souter, J., joined by Stevens, Ginsburg and Beyer, JJ.), 622 (Kennedy, J., concurring).

[20] *People v Thomas*, 260 Mich App 450, 456; 678 NW2d 631 (2004).

[21] *Id.*

[22] *Strickland v Washington*, 466 US 668, 689; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

[23] *Id.* at 687-688; *People v Pickens*, 446 Mich 298, 312-313; 521 NW2d 797 (1994).

Second, Boldiszar must show that this performance so prejudiced him that he was deprived of a fair trial.[24]

B. Legal Standards

Decisions regarding whether to call or question witnesses are presumed to be matters of trial strategy.[25] Here, we conclude that Boldiszar has not overcome the presumption that trial counsel had sound strategic reasons for not calling him to testify at the *Walker* hearing. For example, trial counsel may reasonably have feared that the prosecution would elicit damaging information on cross-examination of Boldiszar that could have undermined his theory for seeking to suppress the confession. Thus, Boldiszar has not established a claim of ineffective assistance of counsel.

Affirmed.

/s/ William C. Whitbeck
/s/ Brian K. Zahra
/s/ Pat M. Donofrio

[24] *Strickland, supra* at 687-688; *Pickens, supra* at 309.

[25] *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004).