STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 12, 2009
v	No. 281505 Macomb Circuit Court
KENYATTA KHURU DAVIS, Defendant-Appellant.	LC No. 06-004902-FC

Before: Jansen, P.J., and Borrello and Stephens, JJ

PER CURIAM.

Defendant was convicted of first-degree premeditated murder, MCL 750.316(1)(a), and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to life in prison for his first-degree premeditated murder conviction, and two years in prison for his felony-firearm conviction. He appeals as of right. We affirm.

Defendant first argues that, under the totality of the circumstances, there were serious doubts regarding whether he voluntarily waived his *Miranda*[1] rights, and whether his statements to the police were voluntary, and thus, the trial court erred when it denied his motion to suppress his statements to the police. Defendant presents two theories in support of this argument: that defendant was sleep and food deprived when he made his statement and that the police engaged in intentional action to obviate defendant's exercise of free will. We disagree. This Court reviews a trial court's conclusions of law and application of the law to the facts regarding its decision to suppress a confession de novo, *People v McBride*, 273 Mich App 238, 249; 729 NW2d 551 (2006), reversed in part on other grounds 480 Mich 1047 (2008), while reviewing its factual findings for clear error, *id*. A finding of fact is clearly erroneous if, after a review of the entire record, we are left with a definite and firm conviction that a mistake was made. *McBride, supra* at 249. In reviewing the particular issue of whether a confession was voluntary, this Court's review must be independent of that of the trial court. *People v Sexton (After Remand)*, 461 Mich 746, 752; 609 NW2d 822 (2000). However, we must affirm the trial court's decision unless we are left with a firm and definitive conviction that a mistake has been made. *Id.* "Further, if resolution of a disputed factual question turns on the credibility of witnesses or the

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

weight of the evidence, we will defer to the trial court, which had a superior opportunity to evaluate these matters." *Id.*

In determining whether a statement is voluntarily given, this Court must review the totality of the circumstances surrounding the making of the statement to determine whether it was freely and voluntarily made or whether it was made when "the accused's 'will has been overborne and his capacity for self-determination critically impaired.'" *People v Cipriano*, 431 Mich 315, 333-334; 429 NW2d 781 (1988), quoting *Culombe v Connecticut*, 367 US 568, 602; 81 S Ct 1860; 6 L Ed 2d 1037 (1961). A 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. [*Id*. at 334.]

The absence or presence of the aforementioned factors is not necessarily conclusive on the issue of voluntariness, but rather, is only a guide in helping to determine "whether the totality of the circumstances surrounding the making of the confession indicates that it was freely and voluntarily made." *Id*. Coercive police activity is a necessary predicate to the finding that a confession is not "voluntary." *Colorado v Connelly*, 479 US 157, 164; 107 S Ct 515; 93 L Ed 2d 473 (1986).

We acknowledge that (1) sleep deprivation can be a contributing factor in finding that a statement is involuntary, *Cipriano, supra* at 334, and (2) according to defendant's testimony, the conditions of his transport (including his overnight stay in Flint) from Wisconsin to the Sterling Heights Police Department (SHPD) were not ideal for sleeping, and he allegedly did not sleep for the 48 plus hours preceding the making of his statements to the police. However, defendant never complained or indicated to the police that he was tired. Detective Spence testified that defendant appeared alert and attentive, and was able to focus on the questions asked of him. The trial court had a firsthand opportunity to assess the credibility of the testimony of both defendant and the officer on this issue and to watch a video of the questioned interrogation. The court carefully reviewed the testimony when making its findings of fact. We conclude that the trial court did not commit clear error when it found that defendant was not under duress from lack of sleep or food.

Likewise, the court did not err when it found that defendant failed to establish "that there was any intentional state action to break [him] down or that [he] was at all mistreated." *Sexton (After Remand), supra* at 752; *McBride, supra* at 249. According to the testimony of Detective Spence, defendant arrived at the station at 4:00 p.m. While defendant could have been interviewed the following day, it was the SHPD's policy to conduct interrogation as soon as a defendant is in its custody. The testimony and the video support a finding that defendant

appeared attentive and did not express to the police that he was tired. We reject defendant's argument that the "timing of the interrogation was unjustified and was intended to take advantage of [defendant's] exhausted state." Detective Spence acknowledged that he used the phrase "merely a formality" preceding the reading of defendant's *Miranda* rights. However the record reflects that both Detective Spence and Detective McMullen read defendant each of his *Miranda* rights. Defendant verbally acknowledged that he understood his rights, putting his initials by each of his rights and signing a constitutional rights notification form. Therefore, we likewise reject defendant's argument that the police "trivialized" defendant's rights in an intentional effort to deceive defendant into making a statement.

We also reject defendant's argument that the previously discussed circumstances (sleep deprivation, timing and trivialization) raise serious doubts regarding whether defendant's waiver of his rights was voluntary, knowing and intelligent. In order for a defendant to validly waive his *Miranda* rights, the totality of the circumstances must establish that the defendant's waiver was (1) the product of a free and deliberate choice rather than intimidation, coercion, or deception, and (2) was made with a full awareness of both the nature of the rights being abandoned and the consequences of the decision to abandon them. *Moran v Burbine*, 475 US 412, 421; 106 S Ct 1135; 89 L Ed 2d 410 (1986). Here, as previously discussed, the trial court did not commit clear error when it found that there was no evidence that the police used intimidation, coercion or deception in obtaining defendant's statement. Furthermore, the record establishes that defendant, who could read and write, indicated that he understood that he had a right to counsel and a right to remain silent (through both verbal and written acknowledgment that he understood his rights). We therefore conclude that defendant made a voluntary, knowing and intelligent waiver of his *Miranda* rights. *Id*. Given our aforementioned conclusions, the trial court did not err when it denied defendant's motion to suppress his statements to the police. *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966). Accordingly, under the totality of the circumstances, we are not left with a definite and firm conviction that the trial court erred when it found that defendant's statements to the police were voluntary. *Connelly, supra* at 164; *Cipriano, supra* at 333-334; *Sexton (After Remand), supra* at 752.

Defendant next argues that, pursuant to the best evidence rule, the trial court abused its discretion when it admitted "replica" videotapes into evidence. We disagree. We review a trial court's decision to admit evidence for an abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). An abuse of discretion exists if an unprejudiced person would find no justification for the ruling made. *People v Geno*, 261 Mich App 624, 631-632; 683 NW2d 687 (2004).

MRE 1002 provides that, "[t]o prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute." An "original" is "the recording itself" or "any counterpart intended to have the same effect by a person executing or issuing it," including "any printout or other output readable by site, shown to reflect the data accurately" if the data is "stored in a computer or similar device." MRE 1001(3).

Defendant contends that the admitted "replica" videos could not be considered originals under the best evidence rule because they did not contain time stamps, and thus, did not "reflect the data accurately." There were two separate hearings on this issue. At the hearing on the pre-trial motion the court determined that the proffered video was an accurate refection of the events

on the day in question but declined to admit any of the proposed enhanced or altered recordings. During the trial the court heard additional testimony on the time-stamp issue and made a fact finding that the admitted video was admissible. The Court accepted Detective Kovalcik's testimony, which indicated that the time stamps were only a part of the "7-Eleven" computer system, and thus, only appeared when watching the video on "7-Eleven's" computer. Giving deference to the trial court's first hand opportunity to evaluate the credibility of Kovalcik's testimony, *Sexton (After Remand), supra* at 752, we conclude that the trial court did not abuse its discretion when it admitted the replica videos, finding that the videos accurately reflected the data of the original store recording, and thus, were "originals" for purposes of the best evidence rule. MRE 1001(3); MRE 1002.

Defendant's final argument on appeal is that, pursuant to the best evidence rule, the trial court committed reversible error when it permitted Detective McMullen to testify regarding the content of the admitted videos (i.e., the timing of the depicted events). Once again, we disagree. A review of the record reveals that defendant objected to the admission of the video and never objected to Detective McMullen's testimony. Therefore, defendant failed to properly preserve this issue for appeal. *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004). Thus, we review the merits of this argument for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Reversal is merited only if the plain error caused the conviction of an innocent defendant or seriously affected the fairness, integrity, or public reputation of the judicial proceedings regardless of the defendant's innocence. *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004).

The prosecution notes that, in relevant part, MRE 1004 provides that other evidence of an original recording is admissible to establish the contents of that recording if the original has been lost or destroyed, "unless the proponent lost or destroyed [the original] in bad faith." However, as noted by defendant, the trial court found that the admitted videos were considered "originals" for purposes of the best evidence rule. Given that the "original" videos were admitted into evidence, it logically follows that the videos were not "lost or destroyed," and thus, pursuant to the best evidence rule, only the videos themselves could be used to prove the content of the videos. MRE 1002; MRE 1004. Detective McMullen should therefore have not been allowed to testify regarding the content of the videos (i.e., the timing of the events depicted in the videos). However, we conclude that the trial court's failure to sua sponte suppress Detective McMullen's testimony regarding the timing of events on the video did not constitute plain error affecting defendant's substantial rights. *Thomas, supra* at 453-454.

This case was presented to the jurors solely on the issue of intent. The prosecution argued that the killing was premeditated while the defense argued that it was a second-degree murder. The prosecution's theory of premeditation was based upon both the length of time defendant had to reflect on his actions and what he did during that time. As the prosecution acknowledged, Detective McMullen's testimony was crucial in determining the length of time defendant had to reflect prior to acting. However, the prosecution also sought to establish intent by demonstrating that after the initial confrontation in the store, defendant moved his vehicle before grabbing the weapon, returning to the store and firing multiple fatal shots. This theory of intent was supported by the testimony of Moeen Ghans and Michael Robinson. Their testimony, when coupled with the properly admitted confession, was sufficient to support the finding that

the act was premeditated and that defendant had adequate time for reflection before shooting the victim.

Affirmed.

/s/ Kathleen Jansen
/s/ Stephen L. Borrello
/s/ Cynthia Diane Stephens