STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEKOVEN LERAY KERR,

Defendant-Appellant.

UNPUBLISHED
November 9, 2010

No. 293384
Genesee Circuit Court
LC No. 08-023202-FC

Before: SERVITTO, P.J., and ZAHRA and DONOFRIO, JJ.

PER CURIAM.

A jury convicted defendant of second-degree murder, MCL 750.317, carrying a concealed weapon, MCL 750.227, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced him to life imprisonment for the second-degree murder conviction, two to five years' imprisonment for the carrying a concealed weapon conviction, and two years' imprisonment for the felony-firearm conviction. We affirm.

Defendant first argues on appeal that his statement to police was involuntary. We disagree. A trial court's determination that a waiver was knowing, intelligent, and voluntary is reviewed de novo. *People v Gipson*, 287 Mich App 261, 264; 787 NW2d 126 (2010). 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. *People v Shipley*, 256 Mich App 367, 372-373; 662 NW2d 856 (2003). A finding is clearly erroneous if it leaves this Court with a definite and firm conviction that a mistake was made. *Id.*

Statements of an accused made during custodial interrogation are inadmissible unless the accused voluntarily, knowingly, and intelligently waived his Fifth Amendment rights. *Miranda v Ariz*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966); *People v Daoud*, 462 Mich 621, 633; 614 NW2d 152 (2000). A waiver is voluntary if it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. *Shipley*, 256 Mich App at 373-374. The voluntariness of a defendant's statements is determined by examining the totality of the circumstances surrounding the interrogation. *Daoud*, 462 Mich at 633-634. In looking at the totality of circumstances surrounding the voluntariness of a confession, the trial court may consider the following factors:

> [1] the age of the accused; [2] his lack of education or his intelligence level; [3] the extent of his previous experience with the police; [4] the repeated and

> prolonged nature of the questioning; [5] the length of the detention of the accused before he gave the statement in question; [6] the lack of any advice to the accused of his constitutional rights; [7] whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; [8] whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; [9] whether the accused was deprived of food, sleep, or medical attention; [10] whether the accused was physically abused; and [11] whether the suspect was threatened with abuse. [*People v Tierney*, 266 Mich App 687, 708; 703 NW2d 204 (2005), quoting *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988).]

No single factor is determinative in this inquiry. *Tierney*, 266 Mich App at 708. Rather, "[t]he 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." *Cipriano*, 431 Mich at 334. Generally, a false statement by an officer that induces a defendant to respond is not alone sufficient to make the statement involuntary. *People v Hicks*, 185 Mich App 107, 113; 460 NW2d 569 (1990).

In reviewing the totality of the circumstances and giving deference to the trial court's assessment of the weight of the evidence and the credibility of the witnesses, we conclude that defendant's statements to Sergeant Mike Angus and Sergeant Leann Gaspar were voluntary. At the time of his statement, defendant was in his early twenties and had graduated from high school. Defendant was not deprived of food, sleep, or medical attention, and he was not injured, intoxicated, or drugged when he gave his statement. Defendant was not physically abused, or threatened with abuse. The interview was about an hour and a half long, and defendant was advised and waived his *Miranda* rights before speaking with the police officers. The trial court specifically noted that in watching the video of defendant's statement, it was clear that defendant did not adversely react to the officers' comments nor were his statements the product of his fear for his grandmother. The trial court did not err in determining that defendant's statements were voluntarily made, and it properly denied defendant's motion to suppress.

Defendant argues that the trial court erred in refusing to provide the voluntary manslaughter instruction to the jury. We disagree. Whether the trial court properly determined that a particular jury instruction is applicable to the facts of the matter is reviewed for an abuse of discretion. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). The trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *People v Carnicom*, 272 Mich App 614, 617; 727 NW2d 399 (2006).

Jury instructions must fairly present the issues to be tried and sufficiently protect a defendant's rights. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). The instructions must include all elements of the charged offenses, and must not exclude relevant issues, defenses, and theories if supported by the evidence. *People v McGhee*, 268 Mich App 600, 606; 709 NW2d 595 (2005). Even if the jury instructions are not perfect, they do not create error if they fairly presented the issues to be tried and sufficiently protected the defendant's rights. *People v Clark*, 274 Mich App 248, 255-256; 732 NW2d 605 (2007).

Voluntary manslaughter is a necessarily included lesser offense of murder and the trial court must instruct the jury regarding voluntary manslaughter if it is supported by a rational view

of the evidence. *People v Mendoza*, 468 Mich 527, 541; 664 NW2d 685 (2003). "[T]o show voluntary manslaughter, one must show that the defendant killed in the heat of passion, the passion was caused by adequate provocation, and there was not a lapse of time during which a reasonable person could control his passions." *Id*. at 535. While provocation is not an element of voluntary manslaughter, it is the circumstance that negates the presence of malice, which is a requisite element of murder. *Id.* at 540. The degree of provocation required must cause a reasonable person to lose control and act out of the heat of passion rather than reason. *Tierney*, 266 Mich App at 714-715. Although whether the provocation needed to cause the defendant to act out of the heat of passion was adequate is usually a question of fact for the jury, the trial court may decline to instruct the jury on voluntary manslaughter where no reasonable jury could conclude that the provocation was adequate to cause the defendant to act out of the heat of passion. *People v Pouncey*, 437 Mich 382, 391-392; 471 NW2d 346 (1991); *Tierney*, 266 Mich App at 715.

A rational view of the evidence presented at trial does not support the voluntary manslaughter instruction. As noted by the trial court, the evidence in this case did not support that defendant acted in the "heat of passion." While there was testimony suggesting defendant was upset with the victim for telephoning Katrice Stewart, defendant's ex-girlfriend, Deshawn Ferguson's testimony indicated that this occurred before 11:00 a.m. on June 2, 2008, the day of the murder, and the victim was not present at that time. The murder did not occur until later in the morning when defendant arrived at the Sussex apartment. Therefore, there was a significant lapse of time for defendant to take control of his passions, and thus, the killing was not a result of an irrational impulse. The trial court did not abuse its discretion in declining to read the voluntary manslaughter instruction.

Finally, defendant submitted an improper standard-4 brief that failed to present a statement of questions presented or an argument section. Rather, defendant's standard 4 brief consists entirely of a statement of facts 15 conclusory statements. We find that each of defendant's points are abandoned, *People v Albers*, 258 Mich App 578, 584; 672 NW2d 336 (2003); *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001). An appellant's failure to properly address the merits of his assertion of error constitutes abandonment of the issue. *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004). Moreover, our review of 15 statements did not reveal merit in any of defendant's claims.

Affirmed.

/s/ Deborah A. Servitto
/s/ Brian K. Zahra
/s/ Pat M. Donofrio