STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 18, 2016
v	No. 327842 Macomb Circuit Court
DUANE LESLIE JOHNSON, Defendant-Appellant.	LC No. 2014-000459-FH

Before: FORT HOOD, P.J., and GLEICHER and O'BRIEN, JJ.

PER CURIAM.

Defendant was convicted in a jury trial of first-degree criminal sexual conduct (sexual penetration of person under 13, perpetrator 17 or over) (CSC-I), MCL 750.520b(1)(a). He was sentenced to 25 to 61 years' imprisonment for the CSC-I conviction. Defendant appeals as of right. We affirm.

This case arises out of the sexual assault of a minor child, NO. Defendant wrote and signed a statement for police, stating that he put the tip of his penis in NO. At the conclusion of a *Walker*[1] hearing, the trial court denied defendant's motion to suppress his written statement.

Defendant first argues that the trial court erred when it refused to suppress his written statement because he did not knowingly and voluntarily waive his *Miranda*[2] rights. We disagree.

"We review de novo a trial court's determination that a waiver was knowing, intelligent, and voluntary." *People v Gipson*, 287 Mich App 261, 264; 787 NW2d 126 (2010). Factual findings are reviewed for clear error and should be affirmed unless this Court is "left with a definite and firm conviction that a mistake was made." *Id*. "Deference is given to a trial court's assessment of the weight of the evidence and the credibility of the witnesses." *Id*. Finally, "[w]hen reviewing a trial court's determination of voluntariness, we examine the entire record

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

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

and make an independent determination." *Id.* "Whether a person is in custody for purposes of the *Miranda* warnings requirement is a mixed question of law and fact that must be answered independently after a review of the record de novo." *People v Cortez* (*On Remand*), 299 Mich App 679, 691; 832 NW2d 1 (2013). Further, factual findings are reviewed for clear error. *Id*.

Both the United States and Michigan Constitutions protect the right against self-incrimination. *People v Tierney*, 266 Mich App 687, 707; 703 NW2d 204 (2005), citing US Const, Am V; Const 1963, art 1, §17, and *People v Cheatham*, 453 Mich 1, 9; 551 NW2d 355 (1996). "Statements of an accused made during custodial interrogation are inadmissible unless the accused voluntarily, knowingly, and intelligently waived his or her Fifth Amendment rights." *Gipson*, 287 Mich App at 264, citing *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966), and *People v Daoud*, 462 Mich 621, 633; 614 NW2d 152 (2000). A prosecutor must show that a waiver was knowingly, intelligently, and voluntarily made by a preponderance of the evidence. *Tierney*, 266 Mich App at 707. "[T]he analysis must be bifurcated, i.e., considering (1) whether the waiver was voluntary, and (2) whether the waiver was knowing and intelligent." *Id*.

Initially, we hold that the court did not err when it concluded that defendant's June 6, 2013 interviews could not be considered custodial interrogations. "*Miranda* warnings need only be given when a person is subject to custodial interrogation." *People v Jones*, 301 Mich App 566, 580; 837 NW2d 7 (2013). To determine whether a defendant was in custody, this Court should look at the totality of the circumstances. *Id*. The ultimate question is "whether the accused reasonably could have believed that he or she was free to leave." *Id*.

Considering the totality of the circumstances and the *Walker* hearing testimony, the court's finding that defendant's interviews did not amount to custodial interrogations was proper. Defendant was asked by Detective Daniel Bozek of the Warren Police Department to participate in a forensic interview with Agent Mark O'Riordan of the Secret Service, and Janice Beseler, defendant's mother, granted permission for defendant to participate. Although Agent O'Riordan gave defendant his *Miranda* rights, he did so based on Secret Service policy. He testified, however, that he told defendant he was free to leave and did not have to answer questions. With regard to defendant's second interview with Detective Bozek, he testified that, despite giving defendant his *Miranda* rights out of cautiousness, he informed defendant he was free to leave the interview. Moreover, despite claiming that he failed to realize he could have left the police station at any time, defendant admitted that he took the bus to the police station by himself for the interviews. Based on this testimony, defendant reasonably could have believed he was free to leave the interviews with Agent O'Riordan and Detective Bozek on June 6, 2013.

Even if the interviews conducted on June 6, 2013, amounted to custodial interrogations, the court did not err when it denied defendant's motion to suppress his statement. First, defendant voluntarily waived his *Miranda* rights. Again, "[w]hen reviewing a trial court's determination of voluntariness, we examine the entire record and make an independent determination." *Gipson*, 287 Mich App at 264. "[W]hether a waiver of *Miranda* rights is voluntary depends on the absence of police coercion." *Id.*, quoting *Daoud*, 462 Mich at 635. Further, "[a] waiver is voluntary if it was the product of a free and deliberate choice rather than intimidation, coercion, or deception." *Gipson*, 287 Mich App at 264-265.

To determine the voluntariness of a defendant's statement and *Miranda* waiver, a court should consider: (1) the defendant's age; (2) education or intelligence level; (3) previous experience with the police; (4) the prolonged nature of questioning; (5) length of detention; (6) lack of advice regarding constitutional rights; (7) unnecessary delay in bringing the defendant before a magistrate; (8) whether the defendant was ill, injured, intoxicated, or drugged; (9) food, sleep, or medical deprivation; (10) physical abuse; and (11) whether the defendant was threatened with abuse. *Tierney*, 266 Mich App at 708. No one factor should be considered determinative. *Id*.

On appeal, defendant argues that his "mental health issues and cognitive abilities, the lengthy interrogation, and the totality of the circumstances surrounding the custodial interrogations reveal that [he] did not make an uncoerced choice to waive his Miranda safeguards or speak with the police." He also argues that he used alcohol and marijuana the night before the June 6, 2013 interviews. However, the record supports the court's determination that defendant voluntarily waived his *Miranda* rights based on the totality of the circumstances.

Defendant did present evidence that he failed to complete high school and has a sub-average IQ. Detective Bozek testified that defendant indicated he attended school through the tenth grade, and Dr. Ronald Fenton testified that defendant has an IQ between 55 and 70, putting him in the "mild retardation" range. However, Detective Bozek also testified that, during his second interview with defendant, defendant provided rational answers to his questions. Dr. Fenton said he believed defendant had a basic understanding of criminal trial proceedings; understood, to a large extent, his legal options and consequences; and was not intellectually limited to the point that he could not distinguish between right and wrong. In addition, although defendant testified that he smoked marijuana the night before his June 6, 2013 interviews, and the morning of, both Detective Bozek and Agent O'Riordan testified that defendant did not appear to be intoxicated or under the influence of marijuana. They apprised defendant of his *Miranda* rights, and defendant initialed and signed the forms. Finally, and most importantly, the record is devoid of any police coercion or intimidation. Detective Bozek testified that he left the interview room to allow defendant to write his own statement, and did not force defendant to make the statement. Further, Dr. Fenton testified that he viewed the DVD of defendant's confession and did not witness any force or intimidation.

Finally, the court did not err when it concluded that defendant knowingly and intelligently waived his *Miranda* rights. "Whether a waiver was made knowingly and intelligently requires an inquiry into defendants [sic] level of understanding, irrespective of police conduct." *Gipson*, 287 Mich App at 265. A defendant need only have a basic understanding of his *Miranda* rights, and need not understand the consequences of waiving those rights. *Id*. "[T]he *only* inquiry with regard to a 'knowing and intelligent' waiver of *Miranda* rights is, as stated, whether the defendant understood 'that he did not have to speak, that he had the right to the presence of counsel, and that the state could use what he said in a later trial against him.' " *Daoud*, 462 Mich at 643-644, quoting *Cheatham*, 453 Mich at 29. "Intoxication from alcohol or other substances can affect the validity of a waiver, but is not dispositive." *Gipson*, 287 Mich App at 265. A court may consider a defendant's IQ, but "[l]ow mental ability in and of itself is insufficient to establish that a defendant did not understand his rights." *Cheatham*, 453 Mich at 36.

At the *Walker* hearing, defendant did present evidence that he is intellectually challenged, and may have been intoxicated or impaired while making his statement. He testified that he smoked marijuana the night before and morning of the interviews, and did not understand what was happening at the police station. Beseler said that defendant had been in special education since second grade, and had not been taking his medication for bipolar disorder at the time of the interview. Further, Dr. Fenton testified that he questioned defendant's ability to fully comprehend his *Miranda* rights because he functioned at the level of a 12-year old and has an IQ between 55 and 70.

However, this testimony is outweighed by evidence that defendant did knowingly and intelligently waive his *Miranda* rights. Detective Bozek and Agent O'Riordan apprised defendant of his *Miranda* rights, and defendant initialed and signed both forms. Both forms indicated that defendant was entitled to an attorney, although the form from Detective Bozek only said he was entitled to an attorney before questioning. Defendant came to the police station for the interviews on his own. According to both Detective Bozek and Agent O'Riordan, defendant did not appear to be intoxicated or under the influence during the interviews. Further, Detective Bozek testified that defendant provided rational answers to his questions. Finally, although Dr. Fenton questioned defendant's ability to understand his *Miranda* rights, he testified that he believed defendant largely understood his legal options and their consequences, as well as the difference between right and wrong. For these reasons, we conclude that the trial court did not err in refusing to suppress defendant's statement.

Defendant next argues that he was denied his right to confront the witnesses against him and present a defense when the court refused to allow him to question NO regarding past sexual abuse by NO's brother, CO, based on Michigan's rape-shield statute. We disagree.

"This Court reviews a trial court's evidentiary ruling for an abuse of discretion." *People v Benton*, 294 Mich App 191, 195; 817 NW2d 599 (2011). A court abuses its discretion when it "reaches a result that is outside the range of principled outcomes." *Id*. "[W]hether a defendant's right to present a defense was violated by the exclusion of evidence is a constitutional question that this Court reviews de novo." *People v Steanhouse*, 313 Mich App 1, 17; 880 NW2d 297 (2015), lv gtd 499 Mich 934 (2016), quoting *People v Mesik (On Reconsideration)*, 285 Mich App 535, 537-538; 775 NW2d 857 (2009). Unpreserved issues are reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Michigan's rape-shield statute, MCL 750.520j, provides:

> (1) Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct shall not be admitted under sections 520b to 520g unless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:
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> (a) Evidence of the victim's past sexual conduct with the actor.

> (b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease.
>
> (2) If the defendant proposes to offer evidence described in subsection (1)(a) or (b), the defendant within 10 days after the arraignment on the information shall file a written motion and offer of proof. The court may order an in camera hearing to determine whether the proposed evidence is admissible under subsection (1). If new information is discovered during the course of the trial that may make the evidence described in subsection (1)(a) or (b) admissible, the judge may order an in camera hearing to determine whether the proposed evidence is admissible under subsection (1).

The statute "bars, with two narrow exceptions, evidence of all sexual activity by the complainant not incident to the alleged rape." *People v Duenaz*, 306 Mich App 85, 91; 854 NW2d 531 (2014) (citations omitted). "Michigan courts have applied the rape-shield statute in cases involving child victims." *Id.* at 92.

"Because the statute excludes evidence that in most cases would be only minimally relevant, the statute's prohibitions do not deny or significantly diminish a defendant's right of confrontation." *Id*. at 92-93. However, evidence that does not fit into one of the statutory exceptions may still "be relevant and admissible to preserve a criminal defendant's Sixth Amendment right of confrontation." *Benton*, 294 Mich App at 197, citing *People v Hackett*, 421 Mich 338, 344, 348; 365 NW2d 120 (1984). This Court and the Michigan Supreme Court have recognized that "in certain limited situations, such evidence may not only be relevant, but its admission may be required to preserve a defendant's constitutional right to confrontation." *Hackett*, 421 Mich at 348. Such situations include where defendant proffers evidence to demonstrate bias; to prove ulterior motives for making a false charge; to show that a victim has a history of making false rape allegations; and to show the source of a victim's age-inappropriate sexual knowledge. *Id.* at 348-349; *People v Morse*, 231 Mich App 424, 436; 586 NW2d 555 (1998). "Our Supreme Court has directed that trial courts inform the exercise of their discretion in regard to such a constitutional claim by conducting an in camera hearing." *Duenaz*, 306 Mich App at 93. "The defendant is obligated initially to make an offer of proof regarding the proposed evidence and to demonstrate its relevance. Absent a sufficient showing of relevancy in the offer of proof, the motion for admission, whether presented at trial or in limine, must be denied." *People v Byrne*, 199 Mich App 674, 678; 502 NW2d 386 (1993).

Defendant does not seem to dispute that the evidence in question does not fit within an exception to MCL 750.520j. Defendant first argues that the evidence was admissible to demonstrate an alternative source of NO's age-inappropriate sexual knowledge. However, NO never exhibited any age-inappropriate sexual knowledge. NO testified that defendant put his "front private part" in NO's "back private part." He did not know the name for the "front private part," but said he uses the front to pee and the back to poop. Based on this testimony, we do not agree that this the evidence was relevant for this purpose.

Defendant also argues that he wanted to question NO about CO's sexual abuse to show that NO might have mistakenly identified defendant as the perpetrator. Defendant cites no case that includes misidentification as an exception to the rape-shield statute.[3] Regardless, the proposed evidence is not admissible because it is not relevant. See *id*. " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. The fact that CO has been convicted of sexually abusing NO does not make it any more or less likely that defendant also abused NO. Although defendant argues that, as a result of CO's abuse, NO may have mistakenly identified defendant, there is no indication in the record that NO was confused regarding defendant's identity. NO testified that he was alone in the house with defendant at the time of the assault, and that CO was out with their parents. Although NO did not provide an exact date for the assault, he described, in detail, defendant's actions. Accordingly, the trial court did not abuse its discretion in excluding the evidence.

Next, defendant argues that he was denied his right to present a defense when the court prohibited him from introducing testimony from his sister that CO told her that he sexually assaulted NO, not defendant. Defendant asserts that the statement should be admitted under the statement against interest hearsay exception, MRE 804. We disagree. We review a trial court's evidentiary decision for an abuse of discretion and findings of facts for clear error. *Steanhouse*, 313 Mich App at 22. "However, whether a statement was against a declarant's penal interest is a question of law that this Court reviews de novo." *Id*.

Hearsay is inadmissible at trial unless one of the hearsay exceptions applies. MRE 802. MRE 804(b)(3) provides an exception to the hearsay rule for statements against interest made by an unavailable declarant.[4] A statement against interest is defined as, "A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true." MRE 804(b)(3). Further, "[a] statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement." MRE 804(b)(3).

"Whether to admit or exclude a statement against a witness's penal interest offered under MRE 804(b)(3) is determined by considering '(1) whether the declarant was unavailable, (2) whether the statement was against penal interest, (3) whether a reasonable person in the declarant's position would have believed the statement to be true, and (4) whether corroborating

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[3] In *Byrne*, 199 Mich App at 678, this Court acknowledged, as a potential exception to the prohibition of evidence under the rape-shield statute, a "figment of imagination" theory of defense. Specifically, this Court stated, "The 'figment of the imagination' theory of the defense might just possibly be sufficiently intertwined with defendant's Sixth Amendment right of confrontation so as to overcome the exclusionary effect of the rape-shield statute . . . ." *Id*.

[4] At trial, the prosecutor indicated that the parties stipulated CO was unavailable to testify.

circumstances clearly indicated the trustworthiness of the statement.' " *Steanhouse*, 313 Mich App at 23, quoting *People v Barrera*, 451 Mich 261, 268; 547 NW2d 280 (1996). Further, "[i]n exercising its discretion, the trial court must conscientiously consider the relationship between MRE 804(b)(3) and a defendant's constitutional due process right to present exculpatory evidence." *Barrera*, 451 Mich at 269.

CO's alleged statement that defendant did not assault NO cannot be considered a statement against CO's penal interest. Here, there were no corroborating circumstances indicating the trustworthiness of the statement. While the prosecutor admitted that it charged CO for committing criminal sexual conduct against NO, there was no corroborating evidence to show that CO stated that defendant did not assault NO. Indeed, NO testified that he was alone in the house with defendant at the time of the assault, and that CO was out with their parents. NO's testimony regarding defendant's identity and actions was clear and direct. As discussed previously, the fact that CO has been convicted of sexually abusing NO does not make it any more or less likely that defendant also assaulted NO. Thus, the court did not abuse its discretion by excluding the testimony from defendant's sister.

Finally, defendant argues that the 25-year mandatory minimum sentence under MCL 750.520b(2)(b) amounts to cruel or unusual punishment. This Court reviews constitutional questions de novo. *Benton*, 294 Mich App at 203. Defendant acknowledges that this issue is controlled by *Benton*, where this Court upheld the 25-year mandatory minimum sentence imposed by MCL 750.520b(2)(b) in response to the defendant's claim that the statutorily mandated sentence amounted to cruel or unusual punishment. *Id*. at 203-207. Accordingly, defendant's claim fails.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Elizabeth L. Gleicher
/s/ Colleen A. O'Brien