STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 24, 2020
v	No. 343755 Wayne Circuit Court
JOSHUA LAMAR-JAMES STEWART, Defendant-Appellant.	LC No. 16-005731-01-FC

Before: GLEICHER, P.J., and K. F. KELLY and SHAPIRO, JJ.

PER CURIAM.

On May 6, 2016, Joshua Lamar-James Stewart acted as the getaway driver in an armed robbery crime spree that left one victim dead. Although the jury acquitted Stewart of first-degree felony murder and assault with intent to commit murder, the jury convicted him of three counts of armed robbery, MCL 750.529, assault with intent to do great bodily harm less than murder, MCL 750.84, receiving or concealing stolen property valued between $1,000 and $20,000, MCL 750.535(3)(a), and possession of a firearm during the commission of a felony, MCL 750.227b. Stewart challenges the trial court's denial of his motion to suppress his statement to the police, defense counsel's failure to seek redaction of that statement, and the proportionality of his armed robbery sentences. We discern no prejudicial error and affirm.

I. FACTUAL OVERVIEW

On May 6, 2016, then-18-year-old Stewart drove a stolen Dodge Intrepid to carry Deontea White and an unidentified second man on a crime spree in the city of Detroit. In the first incident, Stewart approached Aaron Foster and Etoh Walker, who were walking in the area of Packard and Savage streets. White and the second man exited the backseat of the vehicle. The second man approached Walker, pointed a semiautomatic weapon at his face, and took $10 from him. White approached Foster, pointed an AK-47 rifle at him, and stole Foster's shoes and belt. White and the second man returned to the car. As Foster and Walker ran away, White shot Foster in the back, killing him. Stewart and his companions then drove away.

Shortly thereafter, Stewart pulled up to a home where Kyle Upshaw was outside cleaning his car. White and the second man again exited and attempted to rob Upshaw at gunpoint. Upshaw's brother, Daniel Claxton, heard the commotion and came outside with his own weapon. Claxton, White, and the second robber exchanged fire. White shot Claxton in the stomach while Claxton shot White in the torso. The injured White and the second man returned to the Intrepid, and Stewart drove away from the scene.

Fortuitously, Stewart took White to the same hospital in which Claxton received treatment for his gunshot wound. Upshaw observed Stewart in the hospital parking lot, sitting on the hood of a Dodge Intrepid covered in bullet holes. Upshaw alerted the police. The police arrested Stewart after discovering that the vehicle had been reported stolen. During a search of the vehicle, the police found Foster's stolen belongings, tying the two crimes together. During a late-night police interrogation, Stewart admitted to driving the Dodge Intrepid during both incidents. At trial, Stewart contended that he had only driven the getaway vehicle under duress and did not know in advance that White and the second man were armed and planned to commit robberies that day.

II. MOTION TO SUPPRESS

Stewart first argues that the trial court erred by denying his motion to suppress his custodial statement, and allowing the statement to be admitted at trial. We review de novo a trial court's ultimate decision regarding a motion to suppress, but review any factual findings for clear error. *People v Williams*, 240 Mich App 316, 319; 614 NW2d 647 (2000). A finding is clearly erroneous if the reviewing court "is left with a definite and firm conviction that a mistake has been made." *People v Givans*, 227 Mich App 113, 119; 575 NW2d 84 (1997). Underlying questions of law are reviewed de novo. *People v Daoud*, 462 Mich 621, 629-630; 614 NW2d 152 (2000).

Both the Michigan and the United States Constitutions guarantee the right against self-incrimination. US Const, Am V; Const 1963, art 1, § 17. "Statements of an accused made during custodial interrogation are inadmissible unless the accused voluntarily, knowingly, and intelligently waived his Fifth Amendment rights." *People v Gipson*, 287 Mich App 261, 264; 787 NW2d 126 (2010), citing *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966). The prosecution must prove by a preponderance of the evidence that the defendant's waiver was knowingly, intelligently, and voluntarily made. *Daoud*, 462 Mich at 634. Whether a statement was voluntary is determined by examining police conduct, while whether it was made knowingly and intelligently depends in part upon the defendant's capacity to understand the warnings given. *People v Howard*, 226 Mich App 528, 538; 575 NW2d 16 (1997).

Stewart contends that his waiver was invalid both because the *Miranda* warnings were inadequate and because he was unable to comprehend them. In *Miranda*, 384 US at 479, the Supreme Court held that a suspect

> must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

See also *People v Cortez (On Remand)*, 299 Mich App 679, 713; 832 NW2d 1 (2013). No precise formulation exists for conveying the *Miranda* warnings; the language used to inform the defendant of these rights is adequate if it reasonably conveys the essential information. *Florida v Powell*, 559 US 50, 60; 130 S Ct 1195; 175 L Ed 2d 1009 (2010). Consequently, a reviewing court is simply required to determine whether the warnings reasonably conveyed to a suspect his rights as required by *Miranda*. *Id.* "Only if the 'totality of the circumstances surrounding the interrogation' reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived." *Moran v Burbine*, 475 US 412, 421; 106 S Ct 1135; 89 L Ed 2d 410 (1986) (quotation marks and citation omitted). When considering the "totality of the circumstances," a court is required to evaluate an accused's "age, experience, education, background and intelligence, and into whether he has the capacity to understand the warnings given him, the nature of his [*Miranda*] rights, and the consequences of waiving them." *Dauod*, 462 Mich at 634 (quotation marks and citation omitted).

The *Miranda* warnings given in this case were sufficient. Stewart read the advice of rights form aloud. Stewart complains that the officer did not read the rights to him, but *Miranda* does not require this form of advice. Through his own clear recitation, Stewart was unequivocally informed that he had the right to remain silent, that any statements made could be used in a court of law, that he had the right to consult with an attorney and to the presence of an attorney, that if he could not afford an attorney one would be appointed, and that he could ask for an attorney and invoke his right to remain silent at any time. The form read aloud by Stewart covered all the rights enumerated in *Miranda*. Stewart urges this Court to find the warnings inadequate because the interrogating officer used a "minimization technique": "Let's go through some paperwork real quick, Man." Stewart further notes that the entire waiver process took only five minutes. However, Stewart has provided no legal support for his contentions that *Miranda* requires a particular amount of time to execute or that the "paperwork" must be presented in a particular tone or fashion.

Stewart's waiver was also understanding. To establish his understanding, the interrogating officer asked Stewart to initial next to each individual right on the form. Contrary to Stewart's contentions, the officer was not required to stop Stewart after each statement to more thoroughly question his understanding.

Further, relying on several articles, Stewart argues that his waiver was not voluntary, knowing, and intelligent because his youth, limited intellect, and limited education made him vulnerable to coercive police tactics. At the time of his interrogation, Stewart was not a minor, he was 18 years old, although he was still in high school. He attended an "alternative school . . . designed to meet the needs of children and adolescents who cannot learn effectively in a traditional school environment . . . due to learning disabilities, certain medical conditions, psychological and behavioral issues, or advanced skills." Stewart also noted that he was only recently in remission after undergoing cancer treatment.

Stewart was no longer a "juvenile" and therefore could not benefit from the legal recognition that juveniles have a diminished decision-making capacity. Moreover, the record establishes that Stewart had sufficient capacity to understand his rights. Stewart read the rights himself, and there is no record evidence that he suffered from any mental condition that would have prevented him from understanding the warnings.

Alternatively, Stewart contends that the statement he made after waiving his rights was not voluntary because the interrogating officer employed overly coercive tactics. Coercive police activity is a necessary predicate to finding that a confession is not voluntary. *Colorado v Connelly*, 479 US 157, 164; 107 S Ct 515; 93 L Ed 2d 473 (1986). "The test of voluntariness is whether, considering the totality of all the surrounding circumstances, the confession is the product of an essentially free and unconstrained choice by its maker, or whether the accused's will has been overborne and his capacity for self-determination critically impaired." *Givans*, 227 Mich App at 121. The following factors should be considered when determining the voluntariness of a statement:

> [T]he 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. [*People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988).]

Any promises of leniency should also be considered. *People v Shipley*, 256 Mich App 367, 373; 662 NW2d 856 (2003). A promise of leniency does not render a statement per se involuntary and inadmissible; it is but "one factor to be considered" in determining whether a defendant freely and voluntarily made a statement. *Id*. "If, after considering all relevant factors, the court concludes that the inducements offered did not overcome the defendant's ability to make a voluntary decision to make a statement, that statement will be admissible." *People v Conte*, 421 Mich 704, 754, 365 NW2d 648 (1984).

Stewart relies on various statements made by his interrogators, which he contends amounted to promises of leniency. It is apparent on this record that the officers strongly encouraged Stewart to disclose his role in the crimes and suggested that his punishment would be greater if he did not tell the truth, but would be lesser if did. This interview technique did not impermissibly alter Stewart's psychological state such that he could not operate of his own free will. The fact that the 18-year-old Stewart initially denied any involvement, then admitted to only limited involvement, and still denied knowing of any plans to commit a robbery supports that Stewart was still operating under his own free will. Even if the officers went too far in implying that the prosecutor would be lenient on Stewart, this is only factor to consider. Stewart was otherwise old enough and intellectually capable of understanding what he was doing. This was not Stewart's first encounter with the police. Although the officers interrogated Stewart in the middle of the night, there is no evidence that he was deprived of sleep, food, or drink.

Considering the totality of the circumstances, the trial court did not err by finding Stewart's *Miranda* waiver and statement to be voluntary, knowing, and understanding.

III. SENTENCE PROPORTIONALITY

The trial court sentenced Stewart to concurrent prison terms of 23 to 46 years for each robbery conviction, 5 to 10 years for the assault conviction, and one to five years for the receiving or concealing conviction, to be served consecutive to a two-year term of imprisonment for the felony-firearm conviction. Stewart contends that his 23-year minimum sentences for his three armed-robbery convictions are disproportionate and unreasonable.

Stewart's sentence falls within the advisory minimum sentence range, although near the top of the range. And Stewart does not allege any error in scoring the sentencing guidelines, only that the trial court should have imposed a lower sentence based on various mitigating factors like his young age and relatively minor prior record. We may not review Stewart's sentence for reasonableness. *People v Anderson*, 322 Mich App 622, 636-637; 912 NW2d 607 (2018). A within-guidelines sentence based on accurately scored guidelines is deemed proportionate and must be affirmed. *People v Jackson*, 320 Mich App 514, 527; 907 NW2d 865 (2017), rev'd in part on other grounds 504 Mich 929 (2019).

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

Finally, Stewart contends that he is entitled to a new trial because his trial counsel was ineffective for failing to request redaction of his recorded police interrogation, which was played for the jury, to prevent the jury from hearing repeated irrelevant and prejudicial references to his possible gang affiliation and that he possessed a weapon two years earlier. Stewart did not file a motion for a new trial and has not sought remand to do so. In any event, we can adequately review Stewart's challenge on the existing record. See *People v Heft*, 299 Mich App 69, 80; 829 NW2d 266 (2012).

A claim of ineffective assistance of counsel includes two components: "First, the defendant must show that counsel's performance was deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense." *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). To establish that counsel's performance was deficient, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). To establish prejudice, the defendant must demonstrate a reasonable probability that, but for counsel's errors, the result of the proceedings would have differed. *Id*. at 663-664.

"Decisions regarding what evidence to present . . . are presumed to be matters of trial strategy." *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Generally, all relevant evidence is admissible unless otherwise prohibited by the rules of evidence or the state or federal constitutions. MRE 402; *People v Yost*, 278 Mich App 341, 355; 749 NW2d 753 (2008). Evidence is relevant if it has "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. However, even if evidence is relevant, it "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." MRE 403.

Stewart's trial counsel should have sought redaction of the interrogation video to prevent the jury from hearing irrelevant information about Stewart's possible affiliation with the "Bang Bang Pooy Gang." Not only was there no evidence supporting Stewart's gang affiliation, there was no evidence that the charged offenses were gang related.[1] Accordingly, the information was possibly untrue and was completely irrelevant. By failing to seek redaction of the interrogation video, defense counsel unnecessarily exposed Stewart to the risk that the jury could conclude that he committed the charged crimes because he was acting in conformity with typical gang activity. See *People v Bynum*, 496 Mich 610, 630; 852 NW2d 570 (2014) (evidence of a defendant's gang membership risks causing a jury to conclude that the defendant "acted in conformity with the character traits commonly associated with gang members on a particular occasion"). Counsel could have no strategic reason for permitting the video to be played before the jury as is. Indeed, the references to Stewart's possible gang membership went against the crux of the defense—that Stewart was an innocent driver taken by surprise when his friends decided to engage in armed robbery.

Counsel was also ineffective in failing to request redaction of the officers' references to Stewart's prior act of possessing a weapon. Other-acts evidence is admissible under MRE 404(b)(1) if: it is (1) offered for a proper purpose, i.e., one other than to prove the defendant's character or propensity to commit the crime, (2) relevant to an issue or fact of consequence at trial under MRE 401, and (3) sufficiently probative to outweigh the danger of unfair prejudice under MRE 403. *People v Starr*, 457 Mich 490, 496-497; 577 NW2d 673 (1998); *People v VanderVliet*, 444 Mich 52, 55, 63-64, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). "MRE 404(b) permits the admission of evidence" of a defendant's other acts for any relevant purpose that "does not risk impermissible inferences of character to conduct." *People v Watson*, 245 Mich App 572, 576; 629 NW2d 411 (2001) (quotation marks and citation omitted). While using his prior gun possession may have been an allowable police tool to interrogate Stewart, there was no argument that this prior act was relevant to this case. Again, this information was contrary to the theory of the defense and counsel should have sought redaction.

However, neither of these errors prejudiced Stewart or required a new trial. Multiple eyewitnesses placed Stewart as the driver of a stolen getaway car in a crime spree that resulted in the death of one victim, the shooting of a second victim, and the shooting of Stewart's codefendant. While Stewart claimed ignorance of his companions' plans or even their possession of weapons, he did not leave his companions after the first incident. Ultimately, the jury credited Stewart to some extent as it acquitted Stewart of first-degree murder and convicted Stewart of a lesser assault offense rather than the charged assault with intent to murder. Given the record evidence, however,

[1] The Supreme Court has held that "[t]he introduction of evidence regarding a defendant's gang membership is relevant and can 'assist the trier of fact to understand the evidence' when there is *fact evidence that the crime at issue is gang-related*." *People v Bynum*, 496 Mich 610, 625-626; 852 NW2d 570 (2014) (emphasis added).

we cannot conclude that the jury would have been more lenient absent the problematic information in his recorded police interrogation.

We affirm.

/s/ Elizabeth L. Gleicher
/s/ Kirsten Frank Kelly