

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SCOTT IRA BUSSA,

Defendant-Appellant,

UNPUBLISHED

September 17, 1996

No. 167626

LC No. 93-48665-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEVEN TROY BUSSA,

Defendant-Appellant,

No. 167912

LC No. 93-048666-FC

Before: Gribbs, P.J., and Marilyn Kelly and White, JJ.

PER CURIAM.

Defendants Scott and Steven Bussa, who are brothers, were each charged in connection with the robbery and killing of Sylvester Stout on November 28, 1992, at Stout's home in Clio, Michigan. Following a joint trial with separate juries, both defendants (hereafter Scott and Steven) were convicted of first-degree murder, MCL 750.316; MSA 28.548, armed robbery, MCL 750.529; MSA 28.797, breaking and entering an occupied dwelling with intent to commit larceny, MCL 750.110; MSA 28.305, and unlawfully driving away an automobile, MCL 750.413; MSA 28.645. Scott was sentenced to concurrent terms of natural life without parole, forty to sixty years, ten to fifteen years, and three to five years, respectively. Steven was sentenced to concurrent terms of natural life, fifteen to thirty years, ten to fifteen years and three to five years, respectively.

On appeal, Scott challenges the trial court's denial of his motion to suppress his statement to police and argues that the prosecution impermissibly bolstered the testimony of its principal witness, Stephen Anthony "Tony" Orr (Orr). Steven argues that there was insufficient evidence to support a conviction of felony murder in that the prosecutor made no showing that he possessed the required mens rea. We affirm as to both defendants.

Defendants were friends of Stout and lived in a nearby apartment complex. At the time of the murder, Orr, who was the third alleged accomplice, was visiting his mother, who lived in the same apartment complex as defendants. The defense theory as to Scott was that he had intended to rob, but not kill, Stout, and that Orr, who was not credible, had killed Stout on his own, without Scott's planning and participation. The defense theory as to Steven was that he did not participate in the actual murder of Stout, and that he lacked the requisite intent for the underlying felony, and thus for felony murder, because he was under duress, i.e., he was forced to participate in the crimes by his brother's threats, to which he was particularly susceptible because of emotional impairment.

I

Orr, who was fourteen years old when the crimes were committed, testified at trial that he met with Steven and Scott Bussa on November 28, 1992, at approximately 9:30 p.m., in front of Orr's mother's apartment, because the brothers had said they wanted to talk to him. Orr testified:

Well, first, Steven Bussa didn't say anything, but Scott Bussa had talked about going over to Mr. Stout's house and -- and wait 'til he come home and then we were planning on jumping him and tie him up, gettin' money or whatever, we'd go out to the bank and see -- and then later kill him and then leave.

Orr testified that Steven was standing right there and agreed, but Scott did most of the talking. Scott told Orr that if he told anyone anything, Scott would kill him. Steven said "yes" twice to what Scott said. Scott told Orr, in Steven's presence, that it was Steven who came up with the idea, and that Steven was the one who knew Stout was going to the race track and may be coming back with a lot of money; Steven did not object. Orr noticed that at times Steven appeared afraid of Scott.

Orr and the Bussa brothers walked over to Stout's house and through the back gate. Scott pulled out his "Rambo" knife, which had about a four-inch blade, and broke into the back door. Once they were inside, they relocked the door and walked into the living room. They left the lights off throughout their stay in Stout's house.

Orr further testified that on Scott's suggestion, they pulled out all the telephone cords. Scott gave Orr black gloves to wear so he would not leave any fingerprints. Orr testified he thought neither brother was wearing gloves.¹ Steven and Scott went through the drawers, and Steven then acted as the lookout in Stout's front bedroom. Orr and Scott discussed where they would hide when Stout came home, and that they would attack Stout. Scott broke a broomstick in half and gave half to Orr. After they talked in the front bedroom, where Steven was, Orr and Scott waited in the living room. They got hungry and found some chips, which they all ate in the front bedroom.

Orr testified that an hour or an hour and a half later, Steven told them Stout had pulled into the driveway. Orr and Scott moved to the other side of the kitchen and waited in the den. When Stout came through the kitchen, about to enter the den, Orr grabbed his arm and he and Scott swung him around. Scott pulled out his knife and put it to Stout's throat. Scott told Stout to sit down and to go along with what they said. Stout asked them what he had done, whether there was anything he could do to prevent this, and whether they were in some kind of trouble. Scott kept telling Stout to sit down and listen. After Stout sat down, Orr and Scott tied him down to the chair with the cord. Steven was in the kitchen, but walked into the living room several times to see what was going on. Scott told Stout he wanted his ATM bank card and access code. Stout stated he had no money in his account but, eventually, Stout agreed to give Scott the ATM card and wrote down his access number. Scott took Stout's car keys, his ATM card and \$43.00 in cash from Stout's wallet and drove Stout's car to an ATM machine. Scott left his knife with Orr, who stayed at the house with Stout. Orr testified that he believed Steven went with Scott to the ATM machine this first time. The brothers returned in about ten minutes and said the ATM card was not working properly. Stout told Scott how to use the machine, and Scott left again, this time definitely with Steven. Orr still had the knife and stayed to watch Stout. Scott and Steven returned after about fifteen minutes. Scott asked Stout where the money was and Stout replied he had earlier told Scott there was no money in the account and had not lied to him.

Orr testified that he and Scott then went into the kitchen and discussed killing Stout because Scott was afraid Stout would tell the police. Orr did not know where Steven was during this discussion. Orr testified that:

. . . me and Scott was gonna walk into the living room and I was gonna walk around him like I was looking out the window and then . . .

. . . Scott would walk around the other side and pull his head back and that is when I would cut his throat.

They walked into the living room. Orr put duct tape over Stout's mouth because they thought he would scream. Scott pulled Stout's head back. Orr put the knife to Stout's neck, Scott pushed against Orr's hand, and together they cut both sides of Stout's throat, while Stout struggled. Then Scott let Stout's head back down.

Orr testified that he and Scott walked out to the kitchen, and Scott asked Orr how long it would take before Stout was dead. Then Steven came into the kitchen and asked how long it would be before they could leave. Orr did not know the answer to either question. Scott and Orr went back and sat in the living room. Stout asked them if they would take him to a hospital and said that he would say it was an accident. Scott refused. Scott and Orr went back into the kitchen and Scott said, "we're gonna have to do it again, he is not dying." Orr asked Scott why he could not do it himself and Scott replied because Stout was too close to him "like an uncle or something." Orr cut Stout's throat again with the same knife, and stabbed him in the throat.

After a while Stout asked if he could be taken into the bedroom and put on his bed. Orr and Scott picked Stout up, still in the chair, and carried him into the bedroom. Stout complained about dying so slowly and asked Orr to stab him in the chest, so Orr stabbed him several times. Orr wiped the knife off on the bed and left it on the end table by the bed.

Orr testified that Steven was not around and that Orr did not know what Steven was doing. Orr left the bedroom, found Steven in the kitchen and told him they could leave soon and to get what he was going to take with him. Steven said "okay." Scott gave the knife to Orr who put it in the front pouch of his poncho. Orr checked if Stout was breathing and he was not, so Orr told Scott and Steven they could leave. Someone took a pair of binoculars. Steven took a Norelco razor, and Scott had the cash from Stout's wallet.

The three left the house, got in Stout's car and Scott drove to the Amoco station, where they bought cigarettes and pop. They drove back to the apartment complex and all went to Steven's apartment. They put the knife, Scott's shoes and some gloves with blood on them in a bag, and Scott threw it in the dumpster. Steven stayed at the apartment, and Orr and Scott drove Stout's car to the back of another apartment complex and left it there. Orr and Scott walked back to Steven's apartment and found Steven at a cousin's apartment in the same complex, playing cards. Scott joined Steven, and Orr went home to bed. The next morning Orr went to Steven's apartment and the three talked about what they would say if they were questioned. Scott said they could say they were at Steven's apartment all night partying and Steven agreed.

Orr testified that he returned to his father's house in Grand Blanc, where he was picked up by the police four days later. He was charged with first degree murder, armed robbery, breaking and entering and UDAA, and pleaded guilty to all charges in probate court. Orr testified that he was not given any plea bargain or promised anything for his testimony.

On cross-examination, Orr stated that when they were waiting for Stout to get home, Steven asked several times if they could leave and also asked just before they left. Orr further stated that during most of the time, Steven stayed in another room, away from what was going on.

Officer Terry Marshall testified he was the officer in charge of the case. He interviewed Orr on the evening of December 1, 1992, at his father's home. Orr and his parents were advised of his Miranda rights and consented to the interview. Orr admitted his involvement and was taken into custody. On cross-examination by both Scott's and Steven's counsel, officer Marshall testified that he was present when Orr tendered his plea in probate court, at Orr's preliminary examination, and that he had heard Orr's trial testimony. Scott's counsel elicited from Marshall that Orr was not intoxicated at Marshall's interview of him on December 1, was fully awake and cognizant of his rights, was very calm, and that Orr appeared to be forthright and "what he was saying appeared to match the evidence that we had obtained..." On further cross-examination by Scott's counsel, Marshall answered "yes" when asked whether at the various proceedings he had heard "some of the differences in" Orr's testimony. Marshall answered affirmatively when Steven's counsel asked whether there were "slight variations" in

Orr's testimony, and agreed that Orr at one time stated he stabbed Stout eight to ten times and at another time said once or twice.

On redirect by the prosecution, Marshall testified that Orr had told Marshall that Steven was the one who knew the victim and thought he was rich, and that Steven went along with the plan. Marshall testified that Orr told him that Scott and Steven were in agreement to rob and kill Stout. The prosecutor then asked Marshall if Orr had so testified to the probate court, district court, and the juries, to which Marshall answered yes.

On recross by Steven's counsel, Marshall testified that he had heard Orr state at trial, for the first time, that Steven had asked to leave several times.

After the jury in Scott's case was excused, Detective Sergeant Michael Dunklee testified that he took a statement from Steven after advising him of his rights, with his mother and Sergeant Richardson also present. Steven agreed to waive his rights. On cross-examination, Dunklee testified that Steven had arrived at the police station shortly after 2:00 p.m. and that at 4:05 p.m. Steven signed a consent to search form at Dunklee's request. Dunklee stated that shortly after, Steven asked that his mother be called and agreed to make a statement. On redirect, Steven's taped statement was played to Steven's jury. The prosecutor then elicited Dunklee's explanation of the time span between his having Steven come to the station and Steven's formal statement, which occurred at about 6:00 p.m. Dunklee also testified that later that evening he searched Steven's apartment and found a Norelco electric razor.

Scott's jury was reconvened. Sergeant Galvin Smith, a latent print expert with the Bridgeport Forensic Lab, testified he developed latent prints from the duct tape around the victim's mouth. The prints were Scott's. Latent prints from Scott and Steven were also discovered on the outside of the utility door leading from the kitchen of the residence.

Sergeant Dunklee was recalled and testified before both juries that the door jam from Stout's residence was seized by the crime lab because it had impressions of a tool, consistent with a knife, used to force the door open. Dunklee stated no knife had ever been recovered. The markings on Stout's bed coverings were consistent with somebody wiping off a bloody knife.

Dunklee testified that he interviewed Scott, and described the circumstances leading to the interview. The tape of Scott's statement was then played. The prosecution rested.

Steven Bussa testified he was twenty years old and had attended school to the middle of the ninth grade, in special classes for the emotionally impaired. He had been hospitalized several times for emotional and mental problems; the latest hospitalization was the summer before the murder. At the time of the murder, he had been receiving SSI benefits for four months because of mental disabilities, and his parents managed his money. He had lived in this apartment for about three or four months before the murder and Orr had lived with him for about a month, but was asked to leave. Scott moved in with him about two weeks before the murder.

Steven testified that on the day of the murder, Scott had his daughter with him at the apartment. Steven told Scott he did not have enough food for everyone, so Scott should take his daughter back home to Owosso. Steven went to Sylvester Stout's and asked him if he could give them a ride to Owosso. Stout agreed and picked up Steven, Scott and Scott's daughter and drove them to Owosso. Steven did not hear Scott ask Stout about borrowing any money, but testified that Scott told him after they got back home:

... that Sylvester was going to the race track that night and that he had asked Sy if he could borrow a few dollars to get some food and Sy said that he didn't have the money at that time, but apparently Sy was going to the racetrack that night and he said if he had gotten some money from the racetrack that he would get a few items for us.

Then Scott and Steven went to Orr's mother's house and Scott told Orr he wanted to speak with him alone outside. The three of them went outside. Steven testified that he stayed off to the side while they were talking and did not hear the conversation but heard Stout's name and "money" mentioned. They all went back to Steven's apartment, and discussed going over to Stout's house and searching his apartment to see if there was anything they could pawn. Steven did "not want any part of it" because Stout "was a friend." He told them he did not want to go. Scott threatened that if he did not go, something would happen to him and his apartment. Steven was scared by this.

Steven testified that the three walked over to Stout's and that Scott used his survival knife to pop open the back door. Scott started to unplug the telephones and Steven unplugged the telephone on the desk in the dining room. Scott told Steven to watch for Stout from the window in Stout's bedroom. Steven testified that after they had been there a half hour, Steven asked to leave. Orr and Scott were pacing back and forth from the living room to the kitchen to the bedroom and going through the drawers. Orr said he was hungry. Orr and Scott went to the kitchen and came back to the bedroom with two bags of potato chips and water. They ate, drank and smoked cigarettes. Orr told them not to put the cigarette butts in the ashtray because the police could get fingerprints off of them. Scott was wearing his camouflage outfit and carrying his Rambo knife. Scott put the cigarette butts in his pocket.

Steven testified that he asked Scott several times if he could leave, and Scott told him to wait a few more minutes. Just when Scott agreed they could leave, Stout pulled into the driveway. Scott and Orr went to the area near the back door and Steven went back to Stout's bedroom. He heard what sounded like somebody hit Stout and heard Stout asking, "what's this about, what's going on." Steven heard Scott say, "cooperate and you won't get hurt; don't be scared, come in the living room and sit down so I can talk to you." Scott, Orr and Stout walked into the living room. Steven stayed in the bedroom by the door, trying not to be seen by Stout. Steven circled around the back way to the kitchen and stood there listening. When Steven walked into the living room, Scott was tying Stout's wrist to a chair. Scott asked Stout for his ATM card and account number. Stout stated he did not want to give Scott the access code aloud because he didn't want anyone to know it, so Scott untied Stout's arm, gave him a piece of paper and a pen and had Stout write down the number. Scott retied Stout's arm, took the keys to Stout's car and told Steven and Orr to wait there while he went to try the

card. Steven testified that when Scott left, Steven started to untie Stout's hands, and Orr grabbed the knife, put it up to Steven's face and said, "you'd better not do that, Scott wouldn't like it."

Steven further testified that when Scott returned, he said the card would not work and Stout explained how to make it work. Scott told Steven to go with him to Citizen's Bank. Steven testified that he wanted to get out of the situation but did not see any possible way. When Scott came back to the car from the ATM machine, he stated that Stout had only three dollars in his account. They went back to Stout's. Steven stayed in the kitchen. Scott went into the living room. Scott and Orr came and stood in the doorway in the kitchen and Steven heard Scott tell Orr, "you're gonna have to go in and kill Sy." Orr said he did not want to do it, and asked why Scott would not do it, and Scott said he could not do it because he was too close to Stout. Scott told Orr if Orr did not go in and stab Stout, Scott would go after Orr's family.

Steven testified that he was in the kitchen, leaning against the wall, shaking, hitting his head against the wall. He told Scott he was leaving. Scott said just stay here, just stay here. Steven heard Stout say, please don't. Steven looked in and saw blood on Stout's throat. Orr had the knife. Scott was holding Stout's head backwards. Steven went back into the kitchen and leaned against the wall. He heard a thud sound and walked back and saw Orr stabbing Stout in the chest. Scott came in the kitchen and Steven said let's get out of here. Scott said, no, we can't go right now. Steven was afraid to leave because he thought Scott or Orr would come after him.

Orr came back to the kitchen. Scott told Orr he was going to have to do it again because Stout was not dead. Orr said he did not want to do it any more. Scott and Orr went back into the living room. They both had gloves on, which Scott had brought. Steven did not have gloves with him. Steven walked into the living room. Scott asked Steven to help carry Stout to the bedroom. Steven refused and went back to the kitchen. Scott and Orr carried Stout in the chair to the bedroom. Steven was crying, shaking and banging his head against the wall. Either Scott or Orr came out and asked him if he was all right. Steven asked to leave and was told "in a few more minutes." He could see Stout was leaned up against the bed and Orr was still stabbing him. He saw Orr put the knife in the pocket of his poncho. Steven grabbed the Norelco razor. He had loaned the razor to Stout and felt it belonged to him. They all left together.

Scott drove the car to the Amoco station where they got out and bought cigarettes and pop. Scott let Orr drive back to the apartments on Pine Street. They went to Steven's apartment, Scott got two plastic bags and put the tennis shoes, the knife and the white cotton gloves in a bag. Scott and Orr left and when Steven saw them drive off, he went to his cousin Tina's apartment in the same complex, because he did not want to be alone. After about fifteen minutes, Scott arrived and they played cards for awhile with their relatives. When they got back to Steven's apartment, Scott told him if he said anything to anybody, Scott would have him killed. Scott said, "I have friends on the inside and I have friends on the outside and it will be taken care of."

Steven further testified that two or three days before the murder, Scott told Steven he had been on drug runs with their real father and had killed people and he could kill Steven and not think twice

about it. Because of Stout's murder, Steven testified that he had cold sweats, flashbacks and thought about suicide everyday. On cross-examination, Steven stated he had known Stout for fourteen or fifteen years and considered him a friend.

Dr. Harold Sommerschild, a psychologist, testified that he examined Steven on four occasions, administered intelligence, personality and academic functioning tests, and prepared a report. He examined him for competency to stand trial and diminished capacity, and concluded that Steven was competent and that no mental illness was present that would have reduced criminal responsibility. Sommerschild testified that Steven functions in the borderline retarded range of intelligence, with IQ equivalents of about 71 to 75. His report stated that Steven is very capable of intellectually anticipating and recognizing the consequences of his actions but a poor judge of other people's behavior, and impaired in his judgment and ability to relate appropriately to people. Sommerschild gave as an example Steven's "lack of concern of robbing a person who had befriended him." He testified that Scott's numerous threats to kill Steven influenced Steven and made him fearful.

As to whether Steven manifested the intent to murder, Sommerschild opined that Steven constantly made decisions during the murder. Steven indicated he had been threatened and that he felt intimidated and that he had to go along. He knew it was wrong to rob his friend and to kill somebody and he knew the consequences of those actions, but he did not know how to handle the situation effectively or how to get out of it. Sommerschild opined that during the crime, Steven was primarily motivated to protect himself and was not concerned or able to make appropriate decisions as to the victim. Sommerschild read from his report:

[H]e presents himself as a person who did not have the intent to murder and did not participate in the murder. He also presents himself as a person who was unable to make good judgments in leaving the scene where the murder eventually occurred. He also realized he did not attempt to get help, to get any type of help, for the victim or for himself. Impaired judgment in coping with situations would be quite consistent with his impaired judgment and his intellectual tests.

On cross-examination, the prosecutor elicited the following:

Q [the prosecutor]: And also I was really struck, Doctor, and I wanna, no one is trying to trick you here, I want you to understand that, but you wrote -- you testified that he was able to say no his brother [sic]?

A That's what I said.

Q Okay. On an issue he felt strongly about he'd be able to say no to his brother, is that correct?

A That's correct.

Q All right. For example, when he was asked to carry the body into the bedroom he felt strongly about that so he was able to say no?

A That is what I would believe, yes.

Q All right. And, yet, he has described this fear time and time and time and time again, being scared of his brother, but, in fact, he told you there were times when he was able to say no I'm not gonna do that, it that correct?

A That's correct.

Q On more than one occasion?

A Correct.

Dr. Sommerschild further testified that Steven was indifferent at his first interview:

I ask [sic] him about his lack of concern for a friend of his who is going be [sic] robbed by them and then he stated that it did not bother him.

* * *

He stated that it did not bother him. He stated that he had been robbed at knife point by a boy friend of a girl friend he knew, stated that he had been into robberies and theft, and I concluded it was clear that he had no anxiety or empathy or sense of commitment to the man who had befriended him who was later murdered.

Dr. Sommerschild opined that Steven was both competent and capable of forming the intent to engage in a crime.

Dr. Gail Farley, a clinical psychologist with the Forensic Center, testified as a rebuttal witness that she examined and tested Steven pursuant to court order, and concluded he was both competent and capable of forming criminal intent at the time of the murder. She found Steven had a realistic assessment of his situation and acknowledged that it was a "bummer." Steven stated Stout had helped him when he was down and out and had been "pretty generous." He stated that he had not wanted to be involved in the situation, and emphasized several times that he was not involved in the killing itself.

Following her interviews and testing, Farley concluded that at the time of the offense, Steven was not suffering from a mental illness, not showing serious substantial disruption in his thinking and had good contact with reality. There was no evidence of mood disorder, he was not seriously depressed or suicidal, and was sleeping and eating adequately. There was no evidence of a mental illness as the law defines it. As to whether defendant had the ability to form the requisite intent to rob and murder, Farley stated:

There was no evidence of any clinical condition or other circumstance that would have, in my opinion, rendered him unable to form the intent. He was quite aware of his surroundings, had a good understanding of the implications of his behavior and that of others, had an accurate assessment of the potential consequences. He was not confused or disoriented and he was acting in [sic] organized manner throughout that evening.

Farley testified that IQ scores of between seventy and eighty pertain to borderline intellectual functioning and not mental retardation. No further rebuttal was presented.

As to Scott's case, defense counsel presented no proofs. The juries convicted both defendants of first-degree murder, armed robbery, breaking and entering an occupied dwelling and UDAA.

II

A

Defendant Scott Bussa argues that the trial court reversibly erred in refusing to suppress his statement to the police. He asserts that what may arguably have been a voluntary appearance at the station turned into an arrest before the police had probable cause, and that his statement must thus be suppressed as the fruit of what became an illegal detention. Scott asserts, and we accept, that the police did not have probable cause to arrest Scott until Steven made the statement implicating Scott.

At a *Walker*² hearing to determine the voluntariness of Scott's confession, Detective Dunklee testified that he was informed by other officers that Otis Stout had mentioned that Scott and Steven Bussa were acquainted with the victim, borrowed money from him and that Stout took them places. Scott Bussa was located at around 3:30-4:00 p.m. on December 1, 1992, and was brought down to the station in an unmarked police vehicle. He was not under arrest. Dunklee testified that Scott was placed in an office used by patrolmen until Dunklee could interview Steven. Dunklee was not sure whether the office had windows but knew it had one doorway leading to a long hallway. Dunklee spoke to Scott for the first time at about 4:10 p.m., approximately one half hour after Scott arrived at the station. Dunklee asked Scott his name, age and other preliminaries, and then asked how long he had known Stout, when he last saw Stout, who Stout's friends were, whether he owned any large knives, where he had been the last three or four days, and what clothing he had been wearing. Dunklee testified that Scott was not advised of his Miranda rights at that time because he was not a suspect and was not in custody and would have been free to go if he had asked.

After the initial interview with Scott, Dunklee was informed by Sergeant Richardson that Steven wanted to talk with his mother, Charlene Lee. Contact was made with Lee around 5:00 p.m., and she arrived at the station around 6:00 p.m. Scott remained alone in the office during this time, but there were officers in and out. After Lee spoke with Steven, she stated that Steven wished to speak to Dunklee and Richardson. At that time Steven was given his rights and a statement was taken. That took approximately 40-45 minutes. Scott continued waiting in the office.

Steven's statement implicated Scott. Dunklee went back and told Scott:

that his brother had made a confession and that we needed to talk, if he wished to talk, he was allowed to talk to his mother at his request in the same room that Steven had talked to his mother.

Scott and his mother spoke alone for a few minutes. Then Dunklee and Richardson advised Scott of his Miranda rights with his mother present. All four signed the rights form at 7:25 p.m. Dunklee testified that Scott had no difficulty communicating, did not appear to be under the influence of drugs or alcohol, and that they did not use any force, threats, coercion or trickery, or make any promises of a deal. Scott agreed to waive his rights and make a statement, which was taped. The judge listened to part of the tape.

On cross-examination, Dunklee stated he believed that Scott was initially placed in a patrol officers' office, then was moved to a sergeant's office where the pre-interview took place, then was moved to a conference room where he spoke with his mother. He did not know if the doors of the rooms were open or closed. Dunklee did not recall telling Scott that he was free to leave prior to giving Scott his Miranda rights. He testified that he did not recall whether Scott asked to speak to Steven. When asked "what point in time would you say was it that Scott would have not been free to leave the police department," Dunklee responded that he "would think after the [taped] interview with [Steven]." Dunklee denied questioning Scott at that point, i.e., before advising Scott of his rights. The initial interview after Scott's arrival was at around 4:00 p.m., and the Miranda statement started at 7:25 p.m. When asked whether Scott was offered food or drink, Dunklee responded that he "did not think any of us had anything to eat or drink."

Sergeant Richardson testified that he talked with Otis Stout, who gave him the names of Scott and Steven Bussa as possible witnesses. He testified that when Scott arrived at the station he was in an office used by patrol officers to write their reports. He also testified that Scott's mother was allowed to speak to him alone, in a conference room. On cross-examination, Richardson stated that although he never went into the officers' office where Scott was, he could see him from the hallway and that the door to that room remained open. Richardson testified that there were officers milling about, but he did not believe any were "posted" outside the room.

Scott Bussa testified that on December 1, 1992, he was alone in his brother's apartment at about 3:30-4:00 p.m. with the door open when a plainclothes officer came by, asked him if he was Scott Bussa, and asked him to accompany him to the station because Steven was there. The officer exhibited no weapon, and they drove in an unmarked vehicle, with Scott in the front passenger seat. Scott testified that he felt he could have declined to go and there was no conversation during the two minute ride to the station. He was led through the front door and taken to an office. After a minute, Officer Dunklee came in and asked him questions. Scott testified that Dunklee's questions were as Dunklee had testified. Before Dunklee asked the questions, Scott asked to talk to his brother and was told he could not. No Miranda warnings were given. Dunklee left the office and closed the door.

Scott further testified that after a few minutes, he had to use the rest room, got up and, when he opened the door and stepped into the hallway, three officers, including Dunklee, approached him. He asked them if he could use the rest room and they said yes and showed him where it was. They followed him to the rest room, waited outside and followed him back. When he was back in the office, the door was shut by one of the officers. At that point he did not feel free to leave because they had followed him to the rest room. After about forty-five minutes, he was escorted by Dunklee and a second officer to another office. He asked to talk to his brother, and was told no. He was told to sit and wait. The door was not shut, but there were officers in the hall.

After about thirty to forty-five minutes, Dunklee came in and told Scott that Steven had asked to speak with their mother and was going to make a statement. Scott testified:

A At first he [Dunklee] came in by himself and he just -- he asked me, he says, are you ready to make a statement now, I said, I told him no, and he indicated to me that if he wanted to he was -- he could -- he was able to make me talk.

Q What did he say -- what did he -- what do you recall his exact words being?

A He asked me if I was ready to make a statement and I told him no. He said, if I wanted to I could make you talk 'cause we have big officers on our force. That --

Q Okay. What was your response to that?

A I didn't -- I just -- nothing really, I just sat there.

Scott testified that Dunklee left the office and shut the door, and about fifteen minutes later, returned with Richardson. Dunklee again asked Scott if he was ready to make a statement, and when Scott said no, Dunklee indicated again that if he wanted to, he could make him talk. The two officers left the room. Scott testified that Dunklee returned after a few minutes, looked at Scott and said

[a] Rambo knife, and I just gave him a -- like a blank look and he says your brother -- he said I just got through interviewing your brother and he said you stuck him and I told him I says well, can I speak with him and he said no. He says are you ready to make a statement and I said no.

Scott testified that Dunklee told Scott his mother was there, and that when Scott asked to talk to her and stepped to the door, Dunklee stood in front of him. Scott stated he did not get to speak with his mother alone either before or after the taped interview. Dunklee left and returned after about ten to fifteen minutes. He asked Scott if he was ready to give a statement and Scott agreed because he was scared of Dunklee's threats or "some sort of brutality maybe, I don't know." They went to another office where the statement was taken. He was given his Miranda warnings. His mother was present during the interview.

On cross-examination, Scott stated it "never occurred" to him that he was being asked to go to the station in connection with the murder of Sylvester Stout. Scott admitted lying to Dunklee in the initial interview when he was asked about Stout. Scott testified that he never asked to leave the station and was not accompanied into the bathroom. Scott stated that he finally agreed to give a statement because he felt threatened and was "emotional at that point in time" because "he lost a friend too."

Officer Carlton testified that he transported Scott to the station, and that it was standard procedure to keep witnesses apart once at the station.

Charlene Lee, Scott's mother, testified that, after she spoke with Steven and he gave his statement, she spoke to Scott privately for about three to five minutes, in the room where Scott gave his statement, just before the taped statement was taken. She also testified that when she first arrived at the station she saw Scott to say "hi" and let him know she was there.

Following counsels' arguments, the court observed that the prosecutor had the burden of proving the statement's admissibility, that voluntariness should be evaluated based on the totality of the circumstances, and that while Scott asserted he should have been given *Miranda* warnings before the first interview, the prosecutor only sought to admit the second, taped statement. The court continued:

So the issue then becomes . . . whether or not the second statement was given after the proper advice of rights, and after waiver of the rights to which the defendant is entitled under *Miranda* versus *Arizona*.

The testimony is [sic] this case is undisputed that the defendant was initially picked up by Detective Carlton and brought to the Clio-Vienna Police Department in the late afternoon of December 1st at the request of, I believe, Detective Dunklee. The other brother in this case, Steven, had previously been brought to the police department for investigative purposes, and that was the purpose enunciated at the outset in this particular matter because information had been given to the police by the deceased's brother, Otis Stout, that these two individuals might have additional information regarding what happened to his brother.

At the time the defendant was picked up and brought to the station he was certainly not under arrest by any stretch of the imagination nor in custody. He was not told he was under arrest, there was no indicia of arrest such as cuffing, he was not advised he was under arrest, he was not treated by place -- being placed in a cage as if he were under arrest, and he did have an interview with Sergeant Dunklee at the police department in an office -- a patrol officer's office, about 10 by 10. The evidence shows there was no *Miranda* given and the Court certainly cannot find any requirement that the *Miranda* warnings [sic] have been given at the pre-interview. There is certainly no evidence of custody.

However, it is clear from the record now before the Court that after Steven spoke to the police as I believe Sergeant Dunklee put it, the complexion of the case

changed and Dunklee then told the defendant, Scott Bussa, that he had been implicated and they did need to talk.

Also, the Court notes in this particular case that the mother of the defendant was present in the police department and her own testimony establishes that she first was taken in to say hi and let the defendant . . . know that she was there. She also was gonna speak to her other son who was there at the police department and, again, the evidence shows there was never any cuffing, he was never placed in a cage, he was not held with an officer present at gun point. There was never any physical touching or violence perpetrated upon the defendant whatsoever. And, indeed, after he was told that the complexion of this case changed he was allowed to speak, prior to giving his formal statement, to his mother for what she estimates [sic] three to five minutes prior to a taped statement being taken from this defendant.

Clearly, at this time, the Court would have to conclude the defendant was in custody, and accordingly, he was advised of his Miranda warnings. The Court has heard the testimony played today of the advisal of rights and the waiver of rights. The Court has also had the opportunity to view People's Exhibit Number 1 which is the document used by Sergeant Dunklee to advise the defendant of his rights, and his signature appears here as well as the witnesses, Brad Richardson, and the mother, Charlene Lee.

The Court cannot find any defect in the advisal of the rights, so the focus of this Court's inquiry now also switches over to the voluntariness of the waiver of rights.

Now, the testimony is clear that the defendant was at the station for some three hours prior to giving this particular formal taped statement. There is, however, no indication as I have indicated previously, that he was under arrest, he had not been told he was under arrest, he was not cuffed, he had not been booked or printed, or photographed, and he was treated, according to the police, in a standard procedure up to this point as witnesses would be, separated from each other so that their stories would not be affected by each other's statements, intermingled or cross-fertilized with other person's information. And the officer has indicated that at no time did he make any physical threat to this defendant or any type of implied threat. He never drew his gun, and there was absolutely no evidence of any physical violence.

The evidence with respect to voluntariness to a large extent in these cases and these motions comes from the defendant . . . of any coercion and it is the defendant who is saying he felt coerced because when he tried to go to the bathroom several officers asked if they could be of assistance in what he wanted to do. As Mr. Riggs has pointed out, the defendant does not appear to have ever been in this particular police department and certainly would have to be advised as to the location of the men's room

if he wished to use the bathroom, and certainly that is a credible explanation as to why they would approach and ask if they could be of assistance.

There is also, and I think it's important to note, no evidence on the record from the defendant or the officers, that he requested at any time to leave. He has enunciated on the stand that he requested several times to speak to his brother. His purported reasoning for this request was to see if his brother was all right, . . . not to satisfy himself of anything for his own purposes.

The Court notes in this particular case . . . that the mother was on the premises around 6 p.m. according to all testimony, and he was made aware of her presence. And after the . . . brother [] had spoken to the mother he also was allowed to speak to his mother.

Under the totality of the circumstances, the Court is unable to conclude that there was any force, threat or coercion invoked by the police that would affect the defendant's ability to knowingly and intelligently waive his rights under the Miranda decision. Indeed, the presence of the mother and her opportunity to speak to him seems to me to remove any possible taint if there was a taint because of his isolation from his brother. And once we reach this point, as I said, the Miranda warnings were given, indeed, and waived, and the statement was then taken and it is available now for use . . .

I think a very important point in this all is that credibility is essential for a judge to make this determination, and the defendant himself has substantially impaired his own credibility in the court's eyes by stating that he never got to talk to his mother and yet his mother, Mrs. Lee, has come into the court this morning and indicated she did talk to him prior to the statement being taken.

So, perhaps, it is, as Mr. Riggs has pointed out, that his memory is not as good of these events because he was emotional, maybe that is true, but the Court does not find that emotion impaired his ability to freely, voluntarily and intelligently waive his Miranda warnings, and accordingly, the Court will decline to grant the motion . . .

B

The Fourth Amendment's protection against unreasonable seizures includes seizure of the person. *California v Hodari*, 499 US 621, 624; 113 L Ed 2d 690; 111 S Ct 1547 (1991). A seizure effected through a show of authority occurs only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. *Id.* at 627-628, citing *Michigan v Chesternut*, 486 US 567, 573; 108 S Ct 1975; 100 L Ed 2d 565 (1988). Scott argues that *Dunaway v New York*, 442 US 200, 210-212; 99 S Ct 2248; 60 L Ed2d 824, 834-835 (1979), controls here. In *Dunaway*, the proprietor of a pizza parlor was killed during an attempted robbery. Nearly four months later an incarcerated informant supplied a possible lead implicating the defendant. A

police detective questioned the informant but learned nothing that supplied enough information to get a warrant for the defendant's arrest. 442 US at 202-203. Nonetheless, the detective ordered that the defendant be picked up and brought in. The police located the defendant at a neighbor's house and involuntarily took him into custody. 442 US at 207. Although he was not told he was under arrest, he would have been physically restrained if he had attempted to leave. The defendant was driven to police headquarters in a police car, placed in an interrogation room, and questioned by police officers after being given *Miranda* warnings. The defendant waived counsel and eventually made statements and drew sketches that incriminated him in the crime. *Id.* at 203.

The *Dunaway* Court concluded that the defendant's custodial interrogation was indistinguishable from an arrest, and declined to extend to such circumstances the narrow exception to the probable cause requirement carved out in *Terry v Ohio*, 392 US 1; 20 L Ed 2d 889, 88 S Ct 1868 (1968):

In contrast to the brief and narrowly circumscribed intrusions involved in those cases [applying *Terry, supra*] the detention of petitioner was in important respects indistinguishable from a traditional arrest. Petitioner was not questioned briefly where he was found. Instead, he was taken from a neighbor's home to a police car, transported to a police station, and placed in an interrogation room. He was never informed that he was "free to go"; indeed, he would have been physically restrained if he had refused to accompany the officers or had tried to escape their custody. The application of the Fourth Amendment's requirement of probable cause does not depend on whether an intrusion of this magnitude is termed an "arrest" under state law. The mere facts that petitioner was not told he was under arrest, was not "booked," and would not have an arrest record if the interrogation would prove fruitless, while not insignificant for all purposes, obviously do not make petitioner's seizure even roughly analogous to the narrowly defined intrusions involved in *Terry* and its progeny. Indeed, any exception that could cover a seizure as intrusive as that in this case would threaten to swallow the general rule that Fourth Amendment seizures are "reasonable" only if based on probable cause. [Dunaway, 442 US at 212-213.]

* * *

. . . [D]etention for custodial interrogation—regardless of its label—intrudes so severely on interests protected by the Fourth Amendment as necessarily to trigger the traditional safeguards against illegal arrest. We accordingly hold that the Rochester police violated the Fourth and Fourteenth Amendments when, without probable cause, they seized the petitioner and transported him to the police station for interrogation. [*Id.* at 216.]

Scott argues that *Dunaway* prohibits arrests absent probable cause, and argues that numerous factors support that he was under arrest before there was probable cause to hold him. He concedes that he agreed to accompany Carlton but argues that "it is obviously coercive to be picked up at home by the police and driven to the station." He asserts that he was kept for several hours in a police room

as opposed to the lobby, was interrogated for an hour, was never told that he could leave, was accompanied by three officers when he went to the rest room, and was escorted by at least two persons when he was moved to a different office. He argues that under these circumstances a reasonable person would not have felt free to leave. We conclude, however, that the trial court did not err in impliedly finding that Scott was not under arrest for Fourth Amendment purposes.

At the *Walker* hearing, Scott testified he was at Steven's apartment, with the door open, when officer Carlton, who was alone and in plain clothes, came by and asked him if he was Scott Bussa, to which he responded affirmatively. He testified that he agreed to go to the police station with Carlton because "they had my brother down there." There is no dispute that Carlton and defendant drove to the station in an unmarked car and that during the drive, which defendant testified took about two minutes, there was no conversation. Scott testified he believed during this time that he could have declined to go. Dunklee testified that defendant was not under arrest and not in custody.

Dunklee testified that when he first interviewed Steven at about 2:00 p.m., Steven provided no incriminating evidence as to Scott, and that when Scott was questioned he was just a witness, no different than anyone else. Once at the station, Scott was placed in an office, not in an interrogation room. Scott testified, in accord with Sergeant Dunklee, that soon after he arrived at the station he was questioned by Dunklee about preliminaries and about his acquaintance with the victim. This interview took about an hour. Dunklee testified that after he initially interviewed Scott, Sgt. Richardson told him that Steven indicated he wanted to speak to his mother, and that beginning around 5:00 p.m. they started calling Charlene Lee, who arrived at about 6:00 p.m. Dunklee testified that Scott remained in the office and that he spoke with him as quickly as he could after taking Steven's formal statement.

It is unclear at what time defendant asked to use the rest room, but we gather from his testimony that it was some time after 5:10 p.m. when the initial interview concluded. Defendant's mother testified that when she arrived at the police station around 6:00 p.m., she said hello to Scott to let him know she was there and also spoke to Steven. Dunklee then questioned Steven, who confessed to being involved in the victim's murder and implicated Scott in the homicide. Scott asked to speak with his mother and was permitted to do so alone, in a conference room. Dunklee denied ever coercing Scott or making any reference to officers who could make him talk. There is no dispute that defendant was never told he was under arrest, never told he could not leave the station, and never handcuffed. There is also no dispute that defendant never asked to leave.

Although mindful of the passage of some three hours between the time defendant was initially interviewed and his formal statement, we conclude under the circumstances presented here that in light of defendant's indisputably voluntary agreement to go to the police station, as well as the absence of record support for any show of police coercion, physical or otherwise, the police conduct did not constitute or evolve into an arrest prior to Scott's being apprised of his *Miranda* rights. The record supports the trial court's conclusion that Scott was not under arrest or in custody until that time. The record further supports that Scott would have been free to leave until that time. Unlike in *Dunaway*, the purpose of defendant's being at the station was not custodial interrogation; the investigation was not focused on Scott nor had it reached the accusatory stage. At the time Scott was subjected to custodial

interrogation, police had probable cause to detain him derived from Steven's statement implicating him. Scott was then properly apprised of his *Miranda* rights, which he waived. We thus reject defendant's argument that he was under arrest prior to this time and that his statement must be suppressed as the fruit of an illegal detention. See *People v Marbury*, 151 Mich App 159, 162; 390 NW2d 659 (1986), and *People v Myers*, 158 Mich App 1; 404 NW2d 677 (1987).

C

Defendant next argues that his statement must be suppressed for the independent reason that the prosecutor did not establish that he voluntarily waived his *Miranda* rights. We disagree.

The voluntariness of a confession is a question of law for the trial court's determination, which we review by examining the entire record and by making an independent determination guided by the factors articulated in *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988). *People v Johnson*, 202 Mich App 281, 287-288; 508 NW2d 509 (1993). We defer to the trial court's superior ability to view the evidence and witnesses and will not disturb the court's findings unless they are clearly erroneous. *Id.* at 288; *People v Marshall*, 204 Mich App 584, 587; 517 NW2d 554 (1994). The *Cipriano* factors include:

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. [431 Mich at 334.]

We conclude after examination of the entire record and the factors set forth in *Cipriano* that the trial court's findings were not clearly erroneous. The court's findings showed careful analysis of all the testimony presented. The court noted that defendant had testified that he felt coercion when he was accompanied to the restroom, but the court stated that it considered defendant's credibility suspect after his mother contradicted his testimony that he was not permitted to speak with her alone. The court determined that there was no evidence that defendant was under arrest or in custody at the time he was initially questioned by Sergeant Dunklee or thereafter, until Steven implicated defendant, and that at that time he was properly given *Miranda* rights and properly waived them. We are persuaded that the evidence supports the trial court's determination and will thus not disturb its denial of defendant's motion to suppress.

III

Scott Bussa next argues the prosecutor impermissibly bolstered Orr's testimony by eliciting testimony from Detective Marshall that Orr had consistently stated that defendants were in agreement in their plan to rob and kill Stout. Defendant acknowledges his failure to preserve this issue, but argues that the comments denied him a fair trial. We disagree. We conclude that a timely objection would have permitted the trial court to carefully confine Detective Marshall's testimony to that permitted under MRE 801(d)(1), and that Marshall's testimony added no new substantive evidence and did not result in manifest injustice.

IV

Defendant Steven Bussa argues there was insufficient evidence to find him guilty of felony murder because there was no showing that he possessed the required mens rea for first degree murder. We disagree.

We review a claim of insufficient evidence by viewing the evidence in a light most favorable to the prosecution and determining whether a rational trier of fact could have found the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 513-514; 489 NW2d 748, modified on other grounds 441 Mich 1201-1202 (1992).

The elements of first-degree felony murder are:

(1) The killing of a human being (2) with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result (3) while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in MCL 750.316; MSA 28.548. [*People v Brannon*, 194 Mich App 121, 124-125; 486 NW2d 83 (1992).

A jury can properly infer malice from evidence that a defendant intentionally set in motion a force likely to cause death or great bodily harm. Thus, when a killing occurs in the perpetration or attempted perpetration of an inherently dangerous felony, the jury may consider the nature of the underlying felony and the circumstances surrounding its commission. If the jury concludes that malice existed, it can find murder, and, if it determines that the murder occurred in the perpetration or attempted perpetration of one of the enumerated felonies, the murder would become first-degree murder. *Aaron*, 729-730. But, the jury may not find malice from the intent to commit the underlying felony alone. *Id.* And, in situations involving the vicarious liability of co-felons, the individual liability of each felon must be shown. *Id.* at 731. The *Aaron* Court concluded:

We hold that in order to convict a defendant of murder, as that term is defined by Michigan case law, it must be shown that he acted with intent to kill or to inflict great bodily harm or with a wanton and willful disregard of the likelihood that the natural tendency of his behavior is to cause death or great bodily harm. We further hold that the issue of malice must always be submitted to the jury. [*Id.* at 733.]

Steven was convicted under an aiding and abetting theory. To prove that a defendant aided and abetted, the prosecutor is required to establish that 1) a crime was committed either by the defendant or another, 2) the defendant performed acts or gave encouragement that aided or assisted in the commission of the crime, and 3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave the aid or encouragement. *People v Spearman*, 195 Mich App 434, 441; 491 NW2d 206 (1992). The intent of the aider and abettor is satisfied by proof that he knew the principal's intent when he gave the aid or assistance. *People v McCray*, 210 Mich App 9, 14; 533 NW2d 359 (1995).

Mindful of the requirements of *Aaron, supra*, we conclude that there was sufficient evidence to enable a rational trier of fact to find that Steven aided and abetted the commission of first-degree murder. Viewed in the light most favorable to the prosecution, the evidence showed that he and Scott planned to break into Stout's house and rob him, while threatening him with a knife. In his statement to police, Steven stated that prior to going to Stout's house he and Scott discussed tying Stout up and putting the knife to Stout's throat if Stout did not give Scott the access code to his ATM card. After this discussion, Scott had Steven go get Orr, then Scott told Orr the plan and Orr said he would go too. Orr testified that Scott mentioned killing Stout while Steven was standing with him. The evidence tended to show that Steven not only knew of the plan, but also acted as an aider and abettor. In his statement, Steven stated that he, Scott and Orr broke into and entered Stout's home around 9:30 or 10:00 p.m., that they had all the lights turned out, and that Stout arrived home at around 12:30 or 1:00 a.m. Steven stated that he unplugged one of Stout's phones, and that he served as the lookout for Stout. He also stated "we did get \$45.00 off of Sy" and that "Scott was flashing the knife all around, in front of Sy's face." He went with Scott to the ATM machine and then returned to the house. While Steven did not participate in the actual killing, he was aware of it taking place. When the three left Stout's house, Steven took the electric razor, and drove away in Stout's car with the others. We reject Steven's argument that there was insufficient evidence to establish malice. At the least, the evidence showed that Steven acted with a wanton and willful disregard of the likelihood that the natural tendency of his behavior was to cause death or great bodily harm when he accompanied Scott and Orr to Stout's house knowing of the plan and acted as the lookout, accompanied Scott to the bank, and remained at the scene at Scott's behest as the events unfolded. Further, the expert witnesses testified that Steven had the capacity to form the requisite intent and to say no to Scott.

We affirm as to both defendants.

/s/ Roman S. Gribbs

/s/ Marilyn Kelly

/s/ Helene N. White

¹ On cross-examination, Orr testified Scott had had white cotton work gloves.

² *People v Walker (On Rehearing)*, 374 Mich 331; 131 NW2d 87 (1965).