STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEFFREY STAWARZ,

Defendant-Appellant.

UNPUBLISHED
October 11. 1996

No. 179010
LC No. 93-013006

Before: Jansen, P. J., and Reilly, and M.E. Kobza,* JJ.

PER CURIAM.

A jury convicted defendant of second-degree murder, MCL 750.317; MSA 28.549, voluntary manslaughter, MCL 750.321; MSA 28.553, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to ten to twenty years of imprisonment for the murder conviction, eight to fifteen years of imprisonment for the manslaughter conviction, and two years of imprisonment for the felony-firearm conviction. Defendant's murder and manslaughter sentences are to run concurrently with each other and consecutively to the felony-firearm sentence. Defendant appeals as of right. We reverse and remand.

Defendant argues that the trial court erred in failing to suppress two statements made to the police. With respect to the statement given to Officer Harvel on November 5, 1993, we agree. Officer Lofton's testimony establishes that defendant previously invoked the right to remain silent, and that his assertion of that right was not "scrupulously honored." *Michigan v Mosley*, 423 US 96; 96 S Ct 321; 46 L Ed 2d 313 (1975); *People v Catey*, 135 Mich App 714; 356 NW2d 241 (1984).

Officer Lofton advised defendant of his rights and questioned him at the club where the shooting occurred after he was arrested. At the *Walker*[1] hearing, Lofton provided the following testimony:

> [Lofton]: I asked him what happened and he stated that he had to shoot two guys. And when I asked him why, he stated because they tried to rob me. I asked him what

* Circuit judge, sitting on the Court of Appeals by assignment.

type of weapon did they have and he told me he didn't know. He said one of them came at him with something in his hands and he didn't know what it was. After that statement, he refused to answer any more questions.

[Prosecutor]: So before he refused to answer any more questions, did he say anything else to you in any fashion?

[Lofton]. Well, he became irritated and he simply stated, "I'm not answering any more questions."

[Prosecutor]: Did he say anything else at that point?

[Lofton]; No, he didn't.

[Prosecutor]: Did you say anything else at that point?

[Lofton]: I don't recollect exactly what I said to him, but I remember saying something to the effect, well, you don't have to answer any more questions now but you'll have to answer some later.

The following colloquy occurred on cross-examination by defense counsel:

[Defense counsel]: Did you ask him a question and he said I don't want to answer any more questions, or did he just on his own say I don't want to answer any more questions?

[Lofton]: As I recall, it was on his own.

[Defense counsel]: In other words, he had finished an answer and then said to you, I refuse to answer any more questions?

[Lofton]: He stated he didn't want to answer any more questions, yes.

[Defense counsel]: And he didn't say I don't want to answer any more of your questions, Officer Lofton, he just said I don't want to answer any more questions; is that a fair statement?

[Lofton]: As I recall, yes.

The trial court, acknowledging that the issue was "very troubling", found the case analogous to *Catey*, *supra* and denied the motion to suppress. The court explained its ruling, in part, as follows:

I think the most compelling facts are the testimony of Mr. Lewis [a friend of defendant's] that indicates that Defendant wanted to make this statement. He wanted

to get his story out; his spontaneous response to Officer Morgan to get his story out. The fact that he was Mirandized each time certainly protects his rights and reiterates his rights to him in that he can remain silent, and that he can get an attorney.

Finally, the fact that the statement that was made after this delay, after indicating that he didn't want to make a statement or want to answer questions, was self-serving. It wasn't an incriminating statement. It was a lengthy statement getting out his story, again that he wanted to get out. I think the testimony was 17 written pages of statement that were self-serving. And the lack of response that he didn't want to make any statement at all, I mean to anyone other than just Officer Lofton.

So, I think in its totality, especially in light of Catey and the reasoning in Catey, I am inclined to deny the motion and allow this statement to be introduced.

We must first address whether defendant unequivocally invoked the right to remain silent. In *Catey*, the defendant told a police officer, Sergeant Burns, that defendant no longer wished to speak with him. This Court held that the defendant did not unequivocally invoke the right to remain silent because he "did not indicate that he would not talk to any police officer but only that he would not speak to Sergeant Burns." *Catey, supra* at 724. Assertions of the right to remain silent were also found to be equivocal in *People v Jackson*, 158 Mich App 544; 405 NW2d 192 (1987) (the defendant said he "didn't want to say anything about the gun,"); *People v Todd*, 186 Mich App 625; 465 NW2d 380 (1990) (the defendant "indicated that he did not wish to speak to Officer Smith at that time"); and *People v Spencer*, 154 Mich App 6; 397 NW2d 525 (1986) (the defendant said, "'The less I say, the better I think I'll be.'"). None of these statements are as clear as defendant's statement in this case.

Although the United States Supreme Court has suggested that the court may properly consider "events preceding the response or nuances inherent in the response itself", a defendant's response to interrogation after invoking the right to remain silent may not be used to argue that his invocation of the right to remain silent was equivocal. *Medina v Singletary*¸ 59 F 3d 1095 (CA 11, 1995), quoting *Smith v Illinois*, 469 US 91, 100; 105 S Ct 490; 83 L Ed 2d 488 (1984). Therefore, the fact that defendant provided a statement in response to interrogation after he said he did not want to answer any more questions should not have been considered by the trial court when determining whether the right to remain silent was unequivocally invoked.

In summary, defendant did not need to declare, "I am invoking my constitutional right to remain silent." In our view, "I don't want to answer any more questions," was an unequivocal assertion of defendant's right to remain silent, and the trial court's holding to the contrary was clearly erroneous.

Having determined that defendant unequivocally invoked the right to remain silent, we next consider whether his "'right to cut off questioning' was 'scrupulously honored.'" *Catey*, *supra* at 725, quoting *Mosley*, *supra* at 104.

> "Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has once been invoked."
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> * * *
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> A reasonable and faithful interpretation of the Miranda opinion must rest on the intention of the Court in that case to adopt "fully effective means . . . to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored . . . ." [*Mosley*, at 100-101, 103 quoting *Miranda v Arizona*, 384 US 436, 473-474, 479; 86 S Ct 1602; 16 L Ed 2d 694.]

Factors found to be relevant in *Mosley* were the immediate cessation of interrogation when the right to remain silent was invoked, the length of time before interrogation was resumed (two hours), repetition of Miranda warnings before the second interrogation and restriction of the second interrogation to a crime that had not been the subject of the earlier interrogation. *Mosley*, *supra* at 106.

In this case, Lofton's testimony indicates that after defendant refused to answer any more questions, Lofton told defendant that he would have to answer questions later, which essentially notified defendant that his right to remain silent would not be honored. Within an hour of invoking the right to remain silent, after defendant was transported to headquarters, the interrogation concerning the present offense resumed. Although a fresh set of Miranda warnings was given, the circumstances as a whole indicate that defendant's right to cut off questioning was not scrupulously honored. Accordingly, the trial court erred in denying defendant's motion to suppress defendant's statement given on November 5, 1993.

Defendant also challenges the admission of a statement given to Officer Myles on November 6, 1993. Defendant contends that the statement should be suppressed on the basis that it was involuntarily made. One of the issues argued by defendant was the delay in his arraignment. In its ruling, the trial court referred to the length of delay between arrest and arraignment, defendant's age, education, and intelligence, physical and mental abuse, and his prior experience with police. These are some of the factors identified in *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988). Then, the court concluded:

> So in its totality I don't believe that the questioning was for – of the delay was for the purpose of extracting a statement.

Although the court's findings on the factors it identified from *Cipriano* indicate that the court was not favorably impressed with defendant's argument that the statement was involuntary, the court did not expressly make a finding that the statement was voluntary. The test the court should have applied was "whether the totality of the circumstances surrounding the making of the confession indicates that it was freely and voluntarily made." *Id.* The issue of whether there is a causal nexus between a delay in arraignment and a confession, which the court appears to have been referring to in its ruling, is no longer

the test for admissibility of a confession under *Cipriano*. *Id.* at 329-335. Therefore, on remand, the court shall reconsider its ruling denying defendant's motion to suppress, consider the totality of the circumstances and make a finding as to whether, under the totality of circumstances, the November 6, 1993, statement, was voluntary.

Defendant's claim that his statements should be suppressed because his Sixth Amendment right to counsel was violated is essentially an issue of credibility, which the trial court resolved against defendant. This Court defers to the trial court's findings when there is conflicting evidence and the determination depends on the credibility of witnesses. *Catey*, *supra* at 721.

Because our conclusion as to the statement given to Officer Harvel on November 5, 1993, necessitates a new trial, we need not address defendant's arguments that the trial court erred by permitting the prosecutor to re-open proofs, that the court's handling of the jury's request for additional instructions was in error, that defendant was denied effective assistance of counsel at trial, and that the prosecutor improperly expressed personal beliefs regarding defendant's guilt. However, because the issue is likely to occur at defendant's retrial, we note that we disagree with defendant's contention that the reading of CJI 2d 16.21(3) and (4) had the effect of shifting the burden of proof.

Reversed and remanded. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Maureen Pulte Reilly
/s/ Michael E. Kobza

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