STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LAMONT ROBINSON,

Defendant-Appellant.

UNPUBLISHED
January 17, 1997

No. 175929
Recorder's Court
LC No. 92-007312-01

Before: Wahls, P.J., and Murphy and C.D. Corwin,* JJ.

PER CURIAM.

Defendant was convicted by a jury of involuntary manslaughter, MCL 750.321; MSA 28.553. Defendant then pleaded guilty as an habitual offender, fourth offense, MCL 769.12; MSA 28.1084. Defendant was sentenced to life imprisonment as an habitual offender, and appeals as of right. We affirm.

Defendant first argues that the trial court erred in finding that he voluntarily waived his *Miranda*[1] rights. We disagree. In evaluating the voluntariness of a confession, this Court examines the entire record and makes an independent determination. *People v Krause*, 206 Mich App 421, 423; 522 NW2d 667 (1994). In doing so, this Court defers to the trial court's superior ability to view the evidence and the witnesses, and we will not disturb the court's findings unless they are clearly erroneous. *Id.*

Defendant specifically argues that he was not competent to voluntarily waive his *Miranda* rights because he has low intelligence, he was suffering from extreme grief from the death of the child, the police detained and interrogated him for nine hours, and the police engaged in trickery and deceit to manipulate him into making a confession. To be admissible, a confession must be voluntary, knowing, and intelligent. *People v Garwood*, 205 Mich App 553, 555; 517 NW2d 843 (1994). The prosecution need prove waiver only by a preponderance of the evidence. *Id.*, 557.

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

Upon review of the record in this case, we conclude that defendant was competent to voluntarily waive his constitutional rights and that defendant did voluntarily waive his rights. Defendant was not physically harmed in any way at the time he made his confession. Defendant was not deprived of food or water. Defendant was not under the influence of drugs or alcohol at the time he made his confession. Although defendant was detained for nine hours, it was from 1:00 p.m. until 10:00 p.m. Although there was testimony that defendant had low intelligence, there was also testimony that defendant tried to manipulate his test scores to give the appearance that he functioned at a much lower intelligence level than he actually did. The trial court's finding that defendant was competent to voluntarily waive his *Miranda* rights was not clearly erroneous. We conclude that defendant voluntarily waived his *Miranda* rights.

Defendant also argues that the police officers' admitted failure to stop questioning defendant after he demanded to see an attorney violated the rule of *Arizona v Roberson*, 486 US 675; 108 S Ct 2093; 100 L Ed 2d 704 (1988). We disagree. In determining the admissibility of an accused's confession made during police-initiated custodial interrogation, courts must determine whether the accused actually invoked his right to counsel. *People v Crusoe*, 433 Mich 666, 670; 449 NW2d 641 (1989). The record indicates the following conversation between Officer Daniel Herrera and defendant:

> HERRERA: You have the right to have an attorney present before and during the time you answer or making any statement.
>
> DEFENDANT: Can I get a lawyer in here right now?
>
> HERRERA: If you want.
>
> DEFENDANT: And I have to wait for him to come here, right here, or we'll have to presume [sic] this tomorrow?
>
> HERRERA: No. If you want to make the statement, and you want a lawyer present, no questions will be asked of you. You have to afford your attorney. If you cannot afford your own attorney, one will be appointed for you without cost by the Court prior to any questioning. Do you understand that?
>
> DEFENDANT: Yes.
>
> HERRERA: Okay. Do you understand the other part about having an attorney present?
>
> DEFENDANT: Yes. Okay.
>
> HERRERA: Okay. Do you want an attorney present, or do you want to go ahead and make a statement?

DEFENDANT: I will make a statement.

HERRERA: Now you also understand that any given time you can exercise your right not to answer any questions or make any statement. You understand that?

DEFENDANT: Yes.

When read in context, defendant's question, "Can I get a lawyer in here right now?" was asked in order to clarify his understanding of his constitutional rights. Herrera's affirmative response did not violate defendant's constitutional rights. Defendant then asked if a lawyer would come in then or the next day. After reiterating defendant's rights, Herrera asked defendant if he wanted an attorney present, or whether he wanted to make a statement. Defendant answered, "I will make a statement." Under these circumstances, defendant never made an unequivocal invocation of his right to counsel. *People v Granderson*, 212 Mich App 673, 678; 538 NW2d 471 (1995).

Next, defendant claims the trial court erred by restricting cross-examination of police officers regarding their motivation for interrogating defendant for nine hours. In making his offer of proof, defense counsel argued to the trial court that Sergeant Herrera "was merely in there for Ellerbrake [the interviewer] to get something from [defendant]. Then he took this something Ellerbrake got from [defendant], went back to River Rouge and used it against [defendant] to get the [taped] statement. That's my point. That would be my argument to the jury."

Although the trial court had previously ruled, out of the presence of the jury, that defendant's statement was voluntary, the jury was entitled to evaluate the weight and credibility to be given to testimony regarding the taped confession. *People v Walker*, 374 Mich 331, 337-338; 132 NW2d 87 (1965). However, even assuming that the trial court erred by restricting the scope of cross-examination, any error was harmless.

Two inquiries are pertinent to whether an error of constitutional dimension is harmless. One is whether the error is so offensive to the maintenance of a sound judicial process that it can never be regarded as harmless, and the other is whether the error is harmless beyond a reasonable doubt. *People v Robinson*, 386 Mich 551, 563; 194 NW2d 709 (1972).

To answer the first inquiry, notwithstanding the importance of cross-examination in the search for the truth, not every limitation placed upon cross-examination is so offensive to the maintenance of the judicial process that reversal is required. *People v Minor*, 213 Mich App 682, 687-688; 541 NW2d 576 (1995). As for the second inquiry, we believe any error was harmless beyond a reasonable doubt. The jury was presented with evidence concerning the times, lengths and locations of defendant's interviews, as well as evidence that Herrera was present at the location of Ellerbrake's interview with defendant, that Herrera spoke with Ellerbrake following the interview, that Ellerbrake gave Herrera a synopsis of the interview (including the fact that defendant told Ellerbrake that he [defendant] was responsible for the death), and that the taped statement came after the interview and after Herrera spoke with Ellerbrake. Herrera was asked on both direct and cross-examination whether he coerced,

threatened or tricked the taped statement out of defendant, and was even asked on cross-examination if he used what Ellerbrake told him to "make [defendant] feel responsible" for the death. With this evidence, it was possible for defense counsel to make the argument to the jury and create the inference he offered to the trial court, i.e., that Herrera used the statement made to Ellerbrake to coerce the taped statement from defendant. We do not consider this to be a case where the limitation placed on the scope of cross-examination effectively deprived the defendant of his defense. See *People v Monet*, 90 Mich App 553, 559; 282 NW2d 391 (1979). In light of all this, we believe any error was harmless beyond a reasonable doubt.

Defendant also argues that the trial court incorrectly scored offense variables three and seven. However, defendant was sentenced as an habitual offender, and the sentencing guidelines do not apply to habitual offender convictions. *People v Dixon*, 217 Mich App 400, 411; 552 NW2d 663 (1996). Appellate review of habitual offender sentences using the sentencing guidelines in any fashion is inappropriate; our review is limited to considering whether the sentence violates the principle of proportionality set forth in *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990), without reference to the guidelines. *People v Gatewood (On Remand)*, 216 Mich App 559, 560; 550 NW2d 265 (1996). In this case, the evidence shows that the seventeen-month-old child suffered multiple blows to the head and body which were inconsistent with CPR treatment. Defendant's four prior felonies have escalated in severity. Upon reviewing the record, we believe that defendant's sentence was proportionate.

Affirmed.

/s/ William B. Murphy
/s/ Charles D. Corwin

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