STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DALE ALEXANDER,

Defendant-Appellant.

UNPUBLISHED
January 17, 1997

No. 180229
Recorder's Court
LC No. 93-012795

Before: Griffin, P.J., and T. G. Kavanagh* and D. B. Leiber**, JJ.

PER CURIAM.

Following a jury trial, defendant appeals as of right his convictions for murder in the second degree, MCL 750.317; MSA 28.549, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to a mandatory two years' imprisonment for the felony-firearm conviction, consecutive to fifteen to thirty years' imprisonment for the second-degree murder conviction. Defendant appeals as of right. We affirm.

On appeal, defendant first contends that the trial court abused its discretion in admitting defendant's confession because it was coerced and, therefore, involuntary. We disagree. A confession may not be introduced into evidence unless the prosecution proves by a preponderance of the evidence that defendant's statements were voluntary. *People v Bender*, 208 Mich App 221, 226-227; 527 NW2d 66 (1994); *People v Etheridge*, 196 Mich App 43, 57; 492 NW2d 490 (1990). The determination whether a confession was voluntary is a question of law for the trial court. *People v Walker (On Rehearing)*, 374 Mich 331, 338; 132 NW2d 87 (1965); *Mack, supra* at 17. In reviewing the trial court's findings, this Court examines the entire record to make an independent determination of voluntariness. *Bender, supra* at 227. However, we accord deference to the trial court's superior ability to assess the credibility of the witnesses and will reverse the trial court's factual findings only if clearly erroneous. *Id.*

* Former Supreme Court Justice, sitting on the Court of Appeals by assignment pursuant to Administrative Order 1996-10.
** Circuit judge, sitting on the Court of Appeals by assignment.

In determining voluntariness, the court should consider, inter alia, defendant's age, education, intelligence, and experience; the duration of the preconfession detention and questioning; any unnecessary delay in arraignment; defendant's physical and mental state; whether defendant was threatened or abused; and whether defendant was advised of his constitutional rights. *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988).

After a thorough review, we conclude that the trial court did not clearly err in ruling that defendant confessed voluntarily. At the *Walker* hearing, defendant claimed that he was threatened by an officer who subjected him to prolonged questioning, denied his requests to speak with an attorney, and forced him to sign a fabricated confession. In stark contrast to defendant's version, the officer who took defendant's statement testified that defendant was promised nothing, confessed voluntarily, and was neither coerced nor threatened. The officer also testified that defendant read and initialed his rights before he confessed, was alert and sober, and was given the opportunity to review and make changes to the written confession before signing it. Further, the evidence suggests that defendant was not subjected to prolonged questioning, and was in fact given a lengthy break between the first and last parts of his confession. In short, the determination of the voluntariness and admissibility of defendant's confession depends on an evaluation of the credibility of two witnesses who gave drastically different accounts of the same scene. It is in this scenario that deference to the trial court's superior ability to assess witness credibility is most appropriate. *Mack*, *supra* at 17-18. Hence, because defendant points to no evidence that persuades this Court that the trial court clearly erred in disbelieving defendant's testimony and finding his confession voluntary, we hold that defendant's confession was properly admitted into evidence.

Defendant further argues for the first time on appeal that his confession was inadmissible because it was neither videotaped nor audiotaped. We disagree. In *People v Eccles*, 141 Mich App 523, 524-525; 367 NW2d 355 (1984), this Court held that there is no requirement that a confession be recorded, or even documented, to render it admissible in court. Therefore, we hold that the admissibility of a confession does not depend on whether it was taped. *Id*.

Next, defendant contends that the trial court violated his due process rights by failing to instruct the jury that accident is a defense to second-degree murder. However, defendant failed to raise this issue below or object to the jury instructions at trial. Therefore, this issue is unpreserved and will be reviewed only for the existence of manifest injustice. *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993); *People v Haywood*, 209 Mich App 217, 230; 530 NW2d 497 (1995). Generally, "this Court is hesitant to reverse the judgment of a lower court because of an error in jury instructions where no objection was raised at trial." *People v Hess*, 214 Mich App 33, 36; 543 NW2d 332 (1995).

Here, the trial court advised the jury that, "[i]f the defendant did not mean to pull the trigger, he is not guilty of murder. The prosecution must prove beyond a reasonable doubt that the defendant meant to shoot the complainant with the required state of mind." The trial court did not state that this instruction applied only to first-degree murder and not to second-degree murder. Thus, unlike the situation in *People v Newman*, 107 Mich App 535; 309 NW2d 657 (1981), where it was clear that

the trial court's accident instruction applied only to one of the charged offenses, the trial court's instruction in this case appears to have applied to both first and second-degree murder. Thus, assuming without deciding that the instructions were imperfect, we conclude that the instructions fairly presented the jury with the requisite issues to be tried and sufficiently protected defendant's rights. See, e.g., *People v Holt*, 207 Mich App 113, 116; 523 NW2d 856 (1994); *People v Gaydosh*, 203 Mich App 235, 237; 512 NW2d 65 (1994); *People v Caulley*, 197 Mich App 177, 184; 494 NW2d 853 (1992).

Additionally, in view of the fact that defendant fired four shots and multiple wounds were inflicted, defendant's accident defense that "the gun went off" is totally implausible. Because it is not reasonable to conclude that the jury would have accepted defendant's accident defense even if a perfect instruction had been given, we find no manifest injustice in defendant's conviction. *Van Dorsten, supra* at 545.

Affirmed.

/s/ Richard Allen Griffin
/s/ Thomas Giles Kavanagh
/s/ Dennis B. Leiber