

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FRANK ADORNO,

Defendant-Appellant.

UNPUBLISHED

March 21, 1997

No. 191279

Recorder's Court

LC No. 94-011929

Before: Doctoroff, P.J., and MJ Kelly and Young, JJ.

PER CURIAM.

Defendant was convicted of one count of felony-murder, MCL 750.316; MSA 28.548, two counts of assault with intent to inflict great bodily harm, MCL 750.84, MSA 28.279, and one count of possessing a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). For the felony-murder conviction, defendant was sentenced to life in prison to be served concurrently with two sentences of five to ten years for the convictions of assault with intent to inflict great bodily harm. These sentences were to be served consecutive to a two-year term for the felony-firearm violation. We affirm.

Defendant first argues that his convictions should be reversed because the trial court failed to suppress his confessions which he claims were induced by promises of leniency by the police. We disagree. It is well established that statements of an accused made during a custodial interrogation are inadmissible unless made following a knowing, intelligent, and voluntary waiver of the accused's constitutional rights. *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602, 1612; 16 L Ed 2d 694 (1966). It is the prosecutor's burden to prove by a preponderance of the evidence that a confession was made voluntarily. *People v DeLisle*, 183 Mich App 713, 719; 455 NW2d 401 (1990). Confessions induced by promises of leniency by the police amount to involuntary confessions. See *People v Shelson*, 150 Mich App 718, 724-725; 389 NW2d 159 (1986).

In determining whether a confession was involuntarily induced by promises of leniency, a court must assess the totality of the circumstances, considering such factors as the nature of the inducement, the length and condition of detention, the physical and mental state of the defendant, the conduct of the police, and the adequacy and the frequency of the advice of rights. *People v Conte*, 421 Mich 704, 751, 754 (Boyle, J), 761 (Ryan & Brickley, JJ), 761-762 (Cavanagh, J); 365 NW2d 648 (1984).

Our review of a motion to suppress a confession is made independent of the trial court's determination. *People v Heffron*, 175 Mich App 543, 546; 438 NW2d 253 (1988); *People v Young*, 212 Mich App 630, 634; 538 NW2d 456 (1995). However, to the extent the decision of the trial court turned upon the credibility of witnesses or the weight of the evidence, this Court will ordinarily defer to the trial court. *Young, supra*. The trial court will not be reversed unless its findings were clearly erroneous. *People v DeLisle*, 183 Mich App 713, 719; 455 NW2d 401 (1990). Therefore, the trial court's findings will not be reversed unless the appellate court is left with a definite and firm conviction that a mistake has been made. *People v Shelson*, 150 Mich App 718, 724; 389 NW2d 159 (1986).

After assessing the totality of the circumstances and concluding that defendant's testimony lacked credibility, the trial court denied defendant's motion to suppress his two separate confessions. We are not left with a definite and firm conviction that the trial court made a mistake when it chose to disbelieve defendant, and instead accepted as true the testimony of the interviewing police officer to whom defendant confessed. The officer testified that she never threatened defendant or promised him leniency and/or freedom in exchange for his confession. Furthermore, defendant, who can read and write and has an eleventh-grade education, was read his constitutional rights and signed a constitutional rights waiver form before each instance of police questioning. In addition, defendant has had prior contact with the police and has been advised of his constitutional rights on other occasions. Under these circumstances, we find that defendant's confessions were voluntary.

Defendant next argues that he was denied the effective assistance of counsel because his attorney failed to move to suppress the pretrial lineup identification of him by an eyewitness. Again, we disagree.

To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate that his attorney was not functioning as "counsel" as guaranteed by the Sixth Amendment, and that the deficient performance of the attorney prejudiced the defendant to the extent that the defendant was denied a fair trial. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996). An attorney is not functioning as "counsel" if his or her performance falls below an objective standard of reasonableness. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). A defendant is prejudiced if there is a reasonable probability that but for the counsel's errors, the result would have been different. *Johnson, supra*. To be successful, the defendant "must . . . overcome the presumption that the challenged action was trial strategy." *Id.*

Defendant argues that his attorney should have moved to suppress the pretrial identification of him because the lineup was unduly suggestive. Defendant argues that every other individual participating in the lineup was four to six inches shorter than he. We reject defendant's argument. Whether an identification procedure was so suggestive that it resulted in defendant's denial of due process is evaluated in light of the totality of the circumstances. *People v Vaughn*, 200 Mich App 611, 620; 505 NW2d 41 (1993), rev'd on other grounds 447 Mich 217; 524 NW2d 217 (1994). The fact that there are differences in the physical characteristics of those participating in a lineup does not necessarily lead to the conclusion that the lineup was impermissibly suggestive. *Id.* Rather, differences in physical

characteristics are only significant to the extent “that they are apparent to the witness and substantially distinguish the defendant from the other participants in the lineup.” *Id.*

In this case, the members of the lineup were viewed in the sitting position so as to prevent any prejudice caused by the height differential. In addition, even if we were to conclude that the differences in physical characteristics were so significant that they rendered the lineup unduly suggestive, defendant has failed to demonstrate that, but for defense counsel’s alleged failure to move to suppress the pretrial lineup identification, the result would have been different. At trial, defendant was independently identified as the attacker. In addition, defendant confessed his involvement in the homicide at issue. Based on the overwhelming evidence against defendant, we find that he failed to show the requisite prejudice to sustain his claim of ineffective assistance of trial counsel.

Affirmed.

/s/ Martin M. Doctoroff

/s/ Michael J. Kelly

/s/ Robert P. Young, Jr.