STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DANIEL KENNETH CRAIG,

Defendant-Appellant.

UNPUBLISHED
July 15, 1997

No. 185882
Recorder's Court
LC No. 94-007591

Before: Sawyer, P.J., and Saad and Gage, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of criminal sexual conduct in the first degree (intercourse—during felony), MCL 750.520b(1)(c); MSA 28.788(2)(1)(c), criminal sexual conduct in the first degree (intercourse—weapon used), MCL 750.520b(1)(e); MSA 28.788(2)(1)(e), kidnapping, MCL 750.349; MSA 28.581, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to twenty-five to fifty years on each of the first-degree criminal sexual conduct convictions, as well as on the kidnapping conviction. Defendant was also sentenced to a mandatory two-year term on the felony-firearm conviction. We affirm.

Defendant first argues on appeal that the trial court erroneously denied defendant's motion to suppress the evidence received pursuant to an illegal search and seizure. We disagree. The trial court's decision to deny a motion to suppress evidence will not be reversed unless it is clearly erroneous. *People v Houstina,* 216 Mich App 70, 73; 549 NW2d 11 (1996). Clear error exists when the reviewing court is left with a definite and firm conviction that a mistake has been made. *People v Lombardo,* 216 Mich App 500, 504; 549 NW2d 596 (1996).

Defendant contends that the trial court erroneously concluded that the apartment building appeared abandoned, thereby justifying the police officers' entry. We disagree. The testimony given by VinteVoghel indicated that the building appeared vacant and had boarded-up windows. The main entrance doors to the building were open and the first floor was empty, but for a lawnmower in an empty apartment. The second floor also appeared vacant and all of the doors were open. While

walking through one of the units, VinteVoghel observed a stove, dresser, couch, and other furniture items.

We are not left with a definite and firm conviction that a mistake was made by the trial court in finding that the building appeared abandoned: this justified the officers' search of the building without a warrant. *Lombardo, supra.* We hold that the officers' search of the apartment building was reasonable under all of the circumstances presented because an owner no longer has an expectation of privacy in the property he has abandoned. Abandonment is an ultimate fact or conclusion that generally is based on a combination of act and intent. *People v Rasmussen,* 191 Mich App 721, 725; 478 NW2d 752 (1991).

Defendant also claims that the trial court erroneously concluded that exigent circumstances existed which obviated the need for a search warrant of defendant's premises. We disagree. Generally, a search conducted without a warrant is unreasonable unless there exists both probable cause and exigent circumstances establishing an exception to the warrant requirement. *People v Jordan,* 187 Mich App 582, 586; 468 NW2d 294 (1991). Probable cause to search exists when facts and circumstances warrant a reasonably prudent person in believing that a crime has been committed and that the evidence sought will be found in a stated place. Whether probable cause exists depends on the information known to the officers at the time of the search. *Id.,* 586-587. The exigent-circumstance exception is applicable where the police have probable cause to believe that an immediate search will produce specific evidence of a crime and that an immediate search without a warrant is necessary in order to (1) protect the officers or others, (2) prevent the loss or destruction of evidence, or (3) prevent the escape of an accused. *Id.*at 587.

We are not left with a definite and firm conviction that a mistake was made by the trial court in finding that exigent circumstances existed which justified the officers' warrantless search of defendant's premises. *Lombardo, supra.* Based on the information given to VinteVoghel by the complainant while in the EMS unit briefly after she had escaped from the building, we conclude that VinteVoghel and his partner had both probable cause and exigent circumstances which established an exception to the warrant requirement. *Jordan, supra.* The officers had sufficient facts and circumstances which warranted a belief that a crime had been committed and that the evidence sought would be found at 8509 Moffett, the location that the complainant described as where the crimes took place.

Furthermore, we conclude that VinteVoghel had probable cause to believe that an immediate search would produce specific evidence of a crime and that an immediate search without a warrant was necessary in order to prevent the loss or destruction of evidence or prevent the escape of an accused. *Jordan, supra.* Complainant told VinteVoghel that she had just escaped from the basement of an apartment building where she had been held captive, tied up and raped repeatedly. She also told him about a shotgun located in the apartment. Based on this information, we hold that the trial court properly concluded that exigent circumstances existed which permitted a search of the building without a warrant.

Defendant further asserts that the trial court erroneously denied defendant's motion to suppress his statement. We disagree. Traditionally, a determination by a trial court concerning whether a statement is involuntary, and therefore inadmissible, is a determination made on the basis of the totality of the circumstances, and this Court reviews that determination under a clearly erroneous standard. *People v Brannon*, 194 Mich App 121, 131; 486 NW2d 83 (1992). The issue of voluntariness is a question of law for the court's determination. *People v Walker (On Rehearing)*, 374 Mich 331, 338; 132 NW2d 87 (1965). The prosecution has the burden of proving voluntariness by a preponderance of the evidence. *People v Etheridge*, 196 Mich App 43, 57; 492 NW2d 490 (1992). In reviewing the trial court's findings, this Court makes an independent determination of voluntariness. This Court gives deference to the trial court's superior ability to judge the credibility of the witnesses, and will not reverse the trial court's factual findings unless they are clearly erroneous. *Id.*

Defendant argues that the trial court committed clear error in failing to suppress his statement because (1) Lewis admitted that he took information from defendant before reading him his constitutional rights, (2) defendant asserted that Lewis did not read him his rights until after the statement was taken down, and (3) defendant mistakenly believed that as soon as his rights were read to him, he automatically was assigned an attorney. We disagree.

This Court has held that the simple asking of a defendant's name is not interrogation or an investigative question requiring the issuance of *Miranda*[1] warnings. *People v Armendarez*, 188 Mich App 61, 73; 468 NW2d 893 (1991); *People v Cuellar*, 107 Mich App 491, 493; 310 NW2d 12 (1981). This Court has also held that interrogation refers to express questioning and to any words or actions on the part of the police that the police should know are reasonably likely to elicit an incriminating response from the subject. *People v Anderson*, 209 Mich App 527, 532-533; 531 NW2d 780 (1995). Lewis testified that he asked defendant various background questions prior to reading defendant his rights and taking his statement to determine if he was coherent. Lewis did not read defendant his rights while making the interrogation record because he was not asking defendant anything pertaining to the allegations against him. Since the simple asking of a defendant's name is not interrogation or an investigative question requiring the issuance of *Miranda* warnings, *Armendarez, supra; Cuellar, supra,* and since these questions were not reasonably likely to elicit incriminating responses, *Anderson, supra,* we hold that the trial court did not commit clear error in denying defendant's motion to suppress these answers.

In determining voluntariness, the court should consider all of the circumstances, including: (1) the age, education and intelligence of the accused, (2) the extent of his previous experience with the police, (3) the repeated and prolonged nature of the questioning, (4) the length of the detention of the accused before he gave the statement in question, (5) the lack of any advice to the accused of his constitutional rights, (6) whether the accused was deprived of food, sleep, or medical attention, and (7) whether the suspect was threatened with abuse. *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988). In addition, a defendant must be informed by the police that a retained attorney is immediately available for consultation. The failure to do so before a confession is obtained precludes a knowing and intelligent waiver of defendant's right to remain silent. *People v Bender*, 452 Mich 594, 597; 551 NW2d 71 (1996).

Viewing the totality of the circumstances, *Garwood, supra,* we hold that the trial court correctly concluded that defendant knowingly, intelligently, and voluntarily made a statement to Lewis after he had been informed of his rights. Although the testimony of Lewis and defendant was conflicting, the trial court held that the confusion arose because Lewis initially took down background information prior to reading defendant his rights, which was consistent with defendant's testimony. The trial court found that the setting was not coercive, and that by defendant's own admissions, he was not promised anything or threatened in any way. Lewis testified that defendant appeared coherent, and that defendant told him that he was not under any influences. Defendant did not appear hungry, tired or injured to Lewis when making his statement. Since this Court gives deference to the trial court's superior ability to judge the credibility of the witnesses and will not reverse the trial court's factual findings unless they are clearly erroneous, *Etheridge, supra,* we conclude that the trial court did not commit clear error in finding defendant's statement to be knowing, intelligent and voluntary.

This Court has held that an ambiguous indication of interest in having counsel requires cessation of police interrogation. *People v White,* 191 Mich App 296, 298; 477 NW2d 143 (1991); *People v Myers,* 158 Mich App 1, 9; 404 NW2d 677 (1987). We hold that the trial court properly concluded that defendant did not invoke his immediate right to counsel when he mistakenly believed that he was requesting an attorney by signing the rights form. Defendant expressed his willingness to talk to Lewis and relay his side of the story to him without any concern of having an attorney present. The facts of the instant case are distinguishable from prior cases where the defendants have made such comments as, "Could I talk to someone"[2] and "Maybe I should have an attorney."[3] Defendant did not ask for an attorney or make any comment regarding his desire for outside assistance, although he may have wanted an attorney or thought he was automatically assigned one. Therefore, we find no error in the trial court's ruling.

Defendant next argues on appeal that the trial court erroneously decided that the police exercised due diligence in attempting to locate the cab driver. We disagree. Because a finding of due diligence is a finding of fact, this Court will not set it aside absent clear error. MCR 2.613; *People v Briseno,* 211 Mich App 11, 14; 535 NW2d 559 (1995).

The test for due diligence is whether good-faith efforts were made to procure the testimony of the witnesses, not whether increased efforts would have produced it. *People v Watkins,* 209 Mich App 1, 4; 530 NW2d 111 (1995). The prosecution is required to do everything reasonable, rather than everything possible, in locating a res gestae witness. *People v Joseph LeFlore (After Remand),* 122 Mich App 314, 319; 333 NW2d 47 (1983). We conclude that a good-faith effort was made by Evans when she contacted Checker Cab Company and learned that the records had been destroyed. All of the records were on computer, and were only saved for ninety to ninety-five days. Even if Evans had called on November 22, 1994, the date of the entry of the trial court's order, the records still would have been destroyed as ninety-five days had passed. Since each cab driver worked as an independent contractor, there was no way to determine who worked what shift without knowing the cab number. The trial court did not err in its due diligence determination.

Lastly, defendant contends that his minimum sentences of twenty-five years on the two first-degree criminal sexual conduct convictions and the kidnapping conviction violate the principle of proportionality. We disagree. Defendant's twenty-five-year minimum sentences were within the guidelines minimum sentence range of ten to twenty-five years. Therefore, they are presumed proportionate unless unusual circumstances exist. *People v Milbourn*, 435 Mich 630, 661; 461 NW2d 1 (1990).

Although defense counsel argues that defendant's lack of criminal history constituted an unusual circumstance, this Court has held that a defendant's lack of prior criminal history is not an unusual circumstance which would warrant a finding that the trial court abused its discretion in imposing a sentence within the guidelines. *People v Piotrowski*, 211 Mich App 527, 533; 536 NW2d 293 (1995); *People v Daniel*, 207 Mich App 47, 54; 523 NW2d 830 (1994). Because defendant has failed to overcome the presumptive proportionality of his sentences, and given the gravity of the offenses committed, we conclude that the court did not abuse its sentencing discretion.

Affirmed.

/s/ Henry William Saad

We concur in result only

/s/ David H. Sawyer
/s/ Hilda R. Gage

[1] *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602, 1612; 16 L Ed 2d 694 (1966).

[2] *White, supra*, 191 Mich App 297.

[3] *Myers, supra*, 158 Mich App 7.