STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JASON BENJAMIN SYMONDS,

Defendant-Appellant.

UNPUBLISHED
October 10, 1997

No. 186002
Calhoun Circuit Court
LC No. 94-3085 FC

Before: O'Connell, P.J., and MacKenzie and Gage, JJ.

PER CURIAM.

Defendant appeals as of right his conviction by jury of first-degree murder. MCL 750.316; MSA 28.548. Although a juvenile at the time he committed the offense, sixteen-year-old defendant was sentenced as an adult to life in prison without parole. We affirm.

According to the testimony presented at trial, defendant lured his stepsister's five-year-old playmate into the basement of an abandoned and boarded-up house owned by his father and located near defendant's own home. Once in the basement, defendant sexually molested the victim, and struck her numerous times with the blunt edge of a hatchet, with a wooden dowel wrapped with wire, and with a metal rod, killing her. Defendant then placed her naked body in a black garbage bag and buried her behind the abandoned house. The following day, defendant allegedly incriminated himself to a friend and after agreeing to be interviewed by the police, defendant confessed that he had killed the victim.

I

On appeal, defendant first argues that he was denied his right to confront and cross-examine the witnesses against him when he was not allowed to impeach a prosecution witness who was awaiting sentencing on a fourth-degree criminal sexual conduct conviction at the time he spoke to the police concerning defendant's confession. Defendant contends that because the witness was awaiting sentencing when he implicated defendant, he should have been able to explore the witness' motive and potential bias. We find that even if the lower court abused its discretion in refusing to allow for cross-examination on that issue, such an error was harmless considering the overwhelming evidence presented against defendant at trial, including defendant's own detailed confession that was properly admitted and

played for the jury via videotape. Therefore, defendant is not entitled to reversal on this issue. See, e.g., *People v Anderson (After Remand)*, 446 Mich 392, 405-407; 521 NW2d 538 (1994); *People v Reed*, 172 Mich App 182, 188; 431 NW2d 431 (1988).

II

Defendant next argues that the trial court erred in failing to instruct the jury sua sponte on his primary defense of accident, and that his trial counsel was ineffective for failing to request the instruction or at least object to its omission. We first note that because defendant failed to raise this issue in the court below, reversal is only required if we find that a manifest injustice has been perpetrated against defendant. *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993). Moreover, because defendant failed to move for a new trial or request an evidentiary hearing in relation to his ineffective assistance of counsel claim, review is foreclosed except where the record contains sufficient detail to support defendant's position on appeal. *People v Sharbnow*, 174 Mich App 94, 106; 435 NW2d 772 (1989).

Although a criminal defendant has the right to have a properly instructed jury consider the evidence against him, the trial court is not required to present an instruction sua sponte on the defendant's theory of the case unless the defendant makes such a request. *People v Mills*, 450 Mich 61, 80-81; 537 NW2d 909, modified 450 Mich 1212; 539 NW2d 504 (1995). According to MCR 2.516(B)(3), the court shall instruct the jury on the applicable law, the issues presented by the case, and if a party requests, that party's theory of the case. Furthermore, MCL 768.29; MSA 28.1052, reads in pertinent part that "[t]he failure of the court to instruct on any point of law shall not be ground for setting aside the verdict of the jury unless such instruction is requested by the accused." Thus, absent a request, we conclude that the lower court had no sua sponte duty to instruct the jury on defendant's complete defense of accident.

Moreover, before an instruction on defendant's theory of the case can go to the jury, not only must it be requested, it must also be supported by the evidence presented during trial. *Mills*, *supra*, 80-81. It is for the latter reason that this Court has determined that counsel was not ineffective as argued by defendant. The evidence presented at trial would not have supported an instruction on accident even if one had been requested.

The defense of accident applies in two distinct cases: one, where the defendant claims that he is not guilty of murder because his acts were entirely involuntary or accidental (see CJI2d 7.1); and two, where the defendant claims that he did not intend to kill or did not realize that his acts would cause a death or cause great bodily harm, his acts being voluntary but the consequences unintended (see CJI2d 7.2). We find that neither applies to the case at hand.

Here, aside from a few tangential remarks by prosecution witnesses concerning only defendant's initial claim that the victim's death was accidental, defendant presented no witnesses on his behalf, defense counsel mentioned nothing concerning accident during both his opening and closing arguments, and the evidence presented at trial clearly contradicts such a finding. There was no evidence to support an instruction that defendant "accidentally" took the victim to the basement of the boarded-

up house, undressed her, sexually molested her, and struck her body numerous times, so as to blacken both the victim's eyes, bruise her back and ribs, knock out her front tooth, and cause a massive skull fracture. There was also no evidence that defendant did not realize that his acts would cause death or serious bodily harm.

When confessing to his friend, although defendant claimed that he did not mean to kill the victim, he did admit to intentionally striking her on the head more than once, and when confessing to the police, although defendant initially claimed that he "accidentally" struck the victim with a hatchet while chopping a tree in the back yard, he later contradicted that claim by admitting that he struck her as they walked down the basement steps. Furthermore, we note that even if defendant continued to maintain that the initial blow was accidental, he did admit that he hit the victim with a metal stick after taking her to the basement and discovering that she was still breathing, and further indicated that he hit her with "[a] little of everything" because he wanted to make certain that she was dead and not suffering. Therefore, despite defendant's bald claims of accident, it is clear from his own confessions that his acts were intentional, as well as the consequences of those acts. Based on the evidence presented, we find that no reasonable juror would be convinced that defendant was entitled to acquittal under the theory of accident, and consequently, counsel should not be faulted for failing to request such an instruction. See *People v Tullie*, 141 Mich App 156, 158; 366 NW2d 224 (1985).

III

Third, defendant argues that he was denied a fair trial because the trial court's instructions on first- and second-degree murder were confusing, leading the jury to believe that the elements of premeditation and deliberation were included in both offenses rather than first-degree murder alone. Defendant also argues that the court's instructions did not require the jury to decide the essential issue of whether defendant inflicted the deadly blow to the victim's head. We again note that defendant also failed to properly preserve this issue for appellate review by neglecting to object to the instructions as given during trial, *Van Dorsten, supra*, 544-545.

Jury instructions are reviewed in their entirety, balancing the general tenor of the instructions as a whole against the potentially misleading effect of a single isolated sentence, to determine if reversal is required. *People v Moldenhauer*, 210 Mich App 158, 159; 533 NW2d 9 (1995); *People v Freedland*, 178 Mich App 761, 766; 444 NW2d 250 (1989), cert den 498 US 853; 111 S Ct 147; 112 L Ed 2d 113 (1990). Reversal is not required where the instructions, even if imperfect, sufficiently protect the defendant's rights and fairly present the issues to be tried. *Moldenhauer, supra,*159.

After reviewing the trial court's instructions, we conclude that the trial court adequately distinguished the two crimes by specifically referring to first-degree murder as "first degree premeditated murder," by listing separate elements for the two crimes, and by describing premeditation and deliberation in greater detail following the first-degree murder elements. The court's later references to premeditation and deliberation, while undoubtedly following its instruction on second-degree murder, were made in the context of determining defendant's intent in general. Furthermore, the terms "premeditation" and "deliberation" were never used in conjunction with second-degree murder. In sum, we find that the general tenor of the instructions sufficiently protect the defendant's rights and fairly

present the issues to be tried, and reversal is not required even if the instructions were slightly imperfect. *Moldenhauer, supra,* 159.

Defendant also argues that before convicting him, the jury was not required to first find that defendant delivered the fatal blow to Nicole's head. We conclude that this argument is also without merit. When instructing the jury on both first- and second-degree murder, the court made the following statement when describing the first element to be considered:

> First, that the Defendant caused the death of Nicole Marie VanNoty. That is, that Nicole Marie VanNoty died as a result of a blow to the head.

Although the court did not specifically state that the jurors must find that defendant inflicted the deadly blow, we find that such a requirement logically follows from the language of the instruction. If the victim died as a result of having sustained a deadly blow to her head, and defendant in turn caused her death, then it is only logical to conclude that defendant inflicted the blow that killed her. At most, the wording of the instruction does not result in a manifest injustice requiring reversal.

IV

Defendant next argues that he was denied a fair trial when a handwritten letter allegedly authored by him was admitted at trial to be viewed by the jury. Defendant contends that the letter was not only seized without justification and in violation of his Fourth Amendment right to privacy as a pretrial detainee, but was also admitted without a proper foundation. We find that any error with regard to the seizure of the letter or its admission at trial was harmless. Any implication that could be drawn from the language of the letter relating to the victim's death being caused by defendant was merely cumulative and inconsequential considering defendant's extensive and detailed confessions to his friend and the police. The admission of the letter was of no unfair prejudice to defendant, and accordingly, does not require reversal. See MRE 103; *People v Travis*, 443 Mich 668, 686; 505 NW2d 563 (1993).

V

Fifth, defendant argues that he is entitled to a new trial because his Fifth Amendment right to remain silent was violated when the trial court erred in refusing to suppress his confessions, one of which was taken without *Miranda* warnings. We find, however, that the lower court did not err in determining that defendant's statements to the police were voluntary, and therefore, admissible at trial.

In order to protect against the violation of an accused's constitutional right against self-incrimination, police are required to advise the accused of his right to remain silent, his right to counsel, and to warn him that any of his statements may be used against him in court, in accordance with *Miranda v Arizona,* 384 US 436, 444; 86 S Ct 1602, 1612; 16 L Ed 2d 694, reh den 385 US 890; 87 S Ct 11; 17 L Ed 2d 121 (1966). Such *Miranda* warnings, however, are only required when the accused is subject to a custodial interrogation, *People v Hill*, 429 Mich 382, 384; 415 NW2d 193 (1987), where the questioning was initiated by law enforcement officers after the accused has been

taken into custody or otherwise deprived of his freedom of action in any significant way, *Miranda, supra*. Whether the accused was in custody depends on the totality of the circumstances, with the key question being whether the accused could reasonably believe that he was not free to leave. *People v Mayes (After Remand)*, 202 Mich App 181, 190; 508 NW2d 161 (1993).

In determining voluntariness, the court should consider all the circumstances, including the duration of the detention and questioning; the age, education, intelligence and experience of defendant; the defendant's mental and physical state; and whether defendant was threatened or abused. *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988); *People v Haywood*, 209 Mich App 217, 225-226; 530 NW2d 497 (1995). The voluntariness of a juvenile's confession is similarly tested by the totality of the circumstances, but with consideration of additional safeguards. *People v Jackson*, 171 Mich App 191, 197; 429 NW2d 849 (1988). Such additional factors to consider include, but are not limited to, whether the juvenile was informed of his *Miranda* rights, the degree of police compliance with statutory requirements and the juvenile court rules, the presence of an adult custodian or parent, and the juvenile's personal background. *People v Good*, 186 Mich App 180, 189; 463 NW2d 213 (1990); *Jackson, supra*.

Here, with respect to the issue of whether defendant was subjected to custodial interrogation, or whether he reasonably believed that he was free to leave during the first interview, we note that there was unrefuted testimony heard and believed by the trial court that defendant was not forced to go to the police station, that he was informed more than once that he was not under arrest and was free to leave, and that he agreed to speak with the police, never indicating that he wished to leave or stop answering questions. There was also no indication that defendant ever requested the presence of an attorney or his father, or that he was in any way coerced into talking to the detective. After reviewing the record, we find that defendant was not taken into custody or otherwise deprived of his freedom of action in any significant way. Thus, it was not necessary that he be advised of his *Miranda* warnings before initially speaking to the police. *Miranda, supra*, 384 US 444.

Next, with respect to the voluntariness of defendant's statements, the record reflects that even after being advised of his rights, defendant was never compelled to speak to the police, that he appeared to understand the questions asked of him, that he intelligently waived his right to remain silent, and that he was not offered any improper promises or otherwise threatened by the police. It is also evident that it was defendant's choice to cooperate with the police even after he was specifically informed that he could leave at any time, and later, that he had the right to remain silent and secure the presence of an attorney. Because the record creates no definite and firm conviction that the trial court erred in finding that defendant's statements were admissible, we conclude that the court's denial of defendant's motion to suppress his statements must stand. *People v Kvam*, 160 Mich App 189, 196; 408 NW2d 71 (1987).

VI

Last, defendant argues that the trial court failed to consider each of the statutory factors and to make clear findings of fact with respect to those factors, and gave undue weight to the seriousness of the instant offense, when it decided to sentence him as an adult rather than a juvenile.

Pursuant to MCL 769.1(3); MSA 28.1072(3) and MCR 6.931(A), the trial court must conduct a juvenile sentencing hearing to determine if the best interests of the juvenile and the public would be served better by placing the minor in the custody of the juvenile offender system or by sentencing the juvenile as an adult. *People v Lyons (On Remand)*, 203 Mich App 465, 468; 513 NW2d 170 (1994). MCR 6.931(E)(3) provides a list of criteria that must be considered by the court in making its determination, with each given weight as appropriate to the circumstances, including:

> (a) the juvenile's prior record and character, physical and mental maturity, and pattern of living;
>
> (b) the seriousness and the circumstances of the offense;
>
> (c) whether the offense is part of a repetitive pattern of offenses which would lead to the determination:
>
> > (i) that the juvenile is not amenable to treatment, or
> >
> > (ii) that, despite the juvenile's potential for treatment, owing to the nature of the delinquent behavior, the juvenile is likely to disrupt the rehabilitation of others in the treatment program;
>
> (d) whether, despite the juvenile's potential for treatment, the nature of the juvenile's delinquent behavior is likely to render the juvenile dangerous to the public when released at age 21;
>
> (e) whether the juvenile is more likely to be rehabilitated by the services and facilities available in the adult programs and procedures than in the juvenile programs and procedures; and
>
> (f) what is in the best interests of the public welfare and the protection of the public security.

Moreover, MCR 6.931(E)(4) requires the trial court to make factual findings and conclusions of law in determining whether to sentence the minor as a juvenile or adult offender. In *People v Hazzard*, 206 Mich App 658, 660-661; 522 NW2d 910 (1994), this Court explained that the court must make complete and detailed findings concerning each statutory factor, and must attempt to weigh the relevant factors in a meaningful way, in order to support its sentencing decision.

Our review of the record reveals that although the court did not address each factor in an orderly fashion as they appear in the statute, findings were made as to each one. The lower court addressed defendant's prior record, finding that it was "not much," as well as defendant's maturity and pattern of living, stating that there was concern about a potential personality disorder, behavioral problems, and a pattern or history of assaultive behavior that seemed to be increasing in magnitude. The court opined that defendant's behavior was an ongoing problem that could not be effectively addressed in three or four years should defendant be placed within the juvenile system and released by

age twenty-one. The court also found that it was in society's best interest to forego the juvenile system and instead sentence defendant as an adult in order to ensure that he would not commit such a crime again. Finally, although the court clearly found that the seriousness of the crime was overwhelming in comparison to the other factors, we find that it did not base its decision solely on that determination. Defendant's argument is therefore without merit.

Affirmed.

/s/ Peter D. O'Connell
/s/ Barbara B. MacKenzie
/s/ Hilda R. Gage