STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARRELL LYNNE JOHNSON,

Defendant-Appellant.

UNPUBLISHED
May 15, 1998

No. 196782
Detroit Recorder's Court
LC No. 95-007432

Before: Jansen, P.J., and Kelly and Markey, JJ.

PER CURIAM.

Defendant appeals by of right his convictions of second-degree murder, MCL 750.317; MSA 28.549, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), following a two-day bench trial. Following a juvenile disposition hearing, the trial court sentenced defendant as an adult to twenty to thirty-five years' imprisonment for the murder conviction and a two-year term of imprisonment for the felony-firearm conviction. We affirm.

I

Defendant first argues on appeal that the trial court erred in denying his motion to suppress his confession to police. Defendant claims that he involuntarily waived his constitutional rights because he did not understand his right to have an attorney present during questioning, he was young and of low intelligence, a guardian was not present, and he was scared and intimidated. Defendant further argues that his confession should have been suppressed because it was taken in violation of his right to first be taken before a probate judge for immediate consideration. We disagree.

Whether the defendant's statements were knowing, intelligent, and voluntary is a question of law that the lower court must determine under the totality of the circumstances. *People v Cheatham*, 453 Mich 1, 27, 44; 551 NW2d 355 (1996). When reviewing a trial court's determination of voluntariness, this Court must examine the entire record and make an independent determination. *People v Robinson*, 386 Mich 551, 557; 194 NW2d 709 (1972). Deference is given, however, to the trial court's assessment of the weight of the evidence and credibility of the witnesses in a bench trial, and the trial court's findings will not be reversed unless they are clearly erroneous. See *People v Bordeau*, 206

Mich App 89, 92; 520 NW2d 374 (1994). A finding is clearly erroneous if it leaves this Court with a definite and firm conviction that a mistake has been made. *People v Kvam*, 160 Mich App 189, 196; 408 NW2d 71 (1987).

In determining the voluntariness of a confession, we apply an objective standard when reviewing the circumstances involved, including the education, experience, conduct, and mental and physical state of the defendant, and the conduct and credibility of the police. *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988);[1] *People v Garwood*, 205 Mich App 553, 557-558; 517 NW2d 843 (1994).

The voluntariness of a juvenile's confession is similarly tested but we also consider 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*[2] 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*.

No single factor, such as defendant's IQ, is determinative in deciding whether he knowingly and intelligently waived his rights. In order to establish a valid waiver, the prosecution need only prove by a preponderance of the evidence that the defendant was aware of his available options, not that he was able to comprehend any and all ramifications of exercising or waiving his rights. *Cheatham, supra* at 28, 36, 44. The United States Supreme Court has held that absent police coercion, a confession could not be deemed involuntary and that a deficiency in the defendant that is not exploited by the police cannot annul the voluntariness of a confession. *Colorado v Connelly*, 479 US 157, 164-167; 107 S Ct 515; 93 L Ed 2d 473 (1986).

Here, the record evidences that the prosecution met its burden of proof and that the court did not commit clear error in determining that defendant voluntarily spoke to the police. Testimony revealed that defendant read aloud each right, that he placed his initials next to each one to indicate that he understood it and wished to waive it, he answered the officer's questions without opposition, he never asked for an attorney or guardian, and he never revealed any anxieties, fears, or claimed misunderstandings to the officer. Furthermore, we find no evidence of threats, coercion, or exploitation used in any way to compel defendant to speak against his will.

With respect to defendant's second claim concerning his confession, MCL 764.27; MSA 28.866 states in pertinent part that "[e]xcept as otherwise provided in section 606 of the revised judicature act of 1961 . . . if a child less than 17 years of age is arrested, with or without a warrant, the child shall be taken immediately before the juvenile division of the probate court of the county . . . ." MCL 600.606; MSA 27A.606, referred to as the automatic waiver statute, provides that the circuit court has jurisdiction to hear and determine a violation of certain enumerated offenses, including murder, if committed by a juvenile between the ages of fifteen and seventeen. In *People v Spearman*, 195 Mich App 434, 444-445; 491 NW2d 606 (1992), overruled in part on other grounds *People v Veling*, 443 Mich 23, 42-43; 504 NW2d 456 (1993), this Court held that the immediate probate appearance requirement of § 27 does not apply where, as in this case, the prosecutor chooses to

charge the defendant under the automatic waiver rules instead of filing a petition with the probate court. This Court continued by noting that the probate courts have exclusive jurisdiction with regard to such juveniles *only* if the prosecutor chooses to proceed against them as minors by filing a petition with the probate court. *Id*. at 445; see also *People v Brooks*, 184 Mich App 793, 797-798; 459 NW2d 313 (1990) (because MCL 600.606; MSA 27A.606 divests the juvenile court of jurisdiction and gives the circuit court original jurisdiction in the matter, the mandatory provisions set forth in § 27 do not apply to those juveniles charged as adult offenders).

In this case the prosecution, as allowed by MCL 764.1f; MSA 28.860(6), filed a complaint and warrant in the circuit court charging defendant with murder instead of filing a petition with the probate court. Thus, under the automatic waiver statute, the probate court was divested of its jurisdiction over defendant, and defendant was taken directly under the charge of the circuit court and afforded the adult procedural safeguards. *Spearman*, *supra* at 445. Hence, as case law holds, defendant was not entitled to an appearance before the probate court, so, having determined that his confession was otherwise voluntary, we conclude that it was properly admitted in the court below. *Good*, *supra* at 188.

II

Defendant next argues that he was denied a fair trial because the prosecution failed to exercise due diligence in identifying, listing, and producing at trial several res gestae witnesses who were present when the shooting occurred. Defendant claims that had the witnesses testified, he would have prevailed on his self-defense argument. We disagree.

Following its amendment in 1986, MCL 767.40; MSA 28.980 now requires only that the prosecutor list and give continuing notice of all known res gestae witnesses, identify witnesses it intends to produce, and provide law-enforcement assistance to investigate and produce witnesses should the defense so request. *People v Burwick*, 450 Mich 281, 288-289; 537 NW2d 813 (1995). The purpose of the "listing" requirement is merely to notify the defendant of the witness' existence and res gestae status; therefore, if the defendant knew of the witness or witnesses in question, the prosecution's failure to list them would be harmless error at most. See *People v Calhoun*, 178 Mich App 517, 521, 523; 444 NW2d 232 (1989). Moreover, where the absence of the witness is determined to be of no prejudice to defendant, his convictions should be affirmed, despite any error. *Id.* at 523.

Here, we believe that defendant is not entitled to relief. First, the record reveals that defendant knew of these potential witnesses, that he had been with them on the day in question, that he was aware of their presence when he approached the residence they intended to rob, and he knew that they saw him shoot the victim. In fact, when speaking to the police, defendant gave the officer the first names of several of the witnesses, and he even implicated a few of them as having been involved to some extent in the shooting.

Second, we agree with the trial court that even if the witnesses had testified or assuming their testimonies would be favorable to defendant, their testimonies would not have supported defendant's self-defense claim. The evidence presented at trial, even when viewed in defendant's favor, established

that defendant was the aggressor, that the movement of the victim's hand just before the shooting did not create a reasonable inference of immediate danger of death or great bodily harm to defendant, that defendant could have attempted to retreat, and that the circumstances did not justify defendant using deadly force. Hence, the defense was not available to defendant. See *People v Bright*, 50 Mich App 401, 406; 213 NW2d 279 (1973).

III

Finally, defendant argues that he is entitled to a new juvenile disposition hearing and resentencing because the sentencing judge erroneously relied on his status as a long-standing ward of the state and improperly assumed that he had already received treatment as an offender. Defendant notes that he had no criminal history and had never been "treated" while being housed in juvenile facilities. Defendant's argument is without merit.

We review a trial court's decision to sentence a minor as a juvenile or as an adult in two steps. First, we review for clear error the trial court's factual findings regarding each factor enumerated in MCL 769.1(3); MSA 28.1072(3). MCR 2.613(C); *People v Passeno*, 195 Mich App 91, 103-104; 489 NW2d 152 (1992). The trial court's findings are clearly erroneous if, after a review of the entire record, this Court is left with a definite and firm conviction that a mistake has been made. *Passeno, supra*. Second, we review for an abuse of discretion the ultimate decision whether to sentence the minor as a juvenile or as an adult. Reversal is required where this Court determines that the lower court's decision was not proportionate to the circumstances surrounding the offender or the offense. *Id.* at 104-105.

We hold that although the sentencing judge did make reference to defendant's wardship and his lifelong contact with the juvenile system, he did not sentence defendant to prison for those reasons. Instead, what concerned the court most was the fact that defendant had been in a regulated setting from an early age and had been exposed to various forms of treatment to no avail.

When sentencing defendant, the court stressed that defendant had killed an innocent person, that defendant continued to be disruptive, rebellious, and abusive, despite the treatment he received while being housed in various juvenile homes, that defendant was involved in a gang, that he was an abnormal loner, that his inappropriate conduct appeared to be escalating, and he had apparently not cooperated with any previous attempts at rehabilitation.

We further note that when defendant raised this same argument below in a motion for resentencing, the trial court denied the motion, specifically stating that apart from the reason why defendant had been housed in the juvenile facilities, the testimony at the sentencing hearing revealed that he had received treatment, that he had essentially exhausted the programs available to him, and that he had benefited from none of them. The court concluded by stating that it based its decision on the evidence, not on defendant's class or status as a ward. It also added that the juvenile system could provide defendant with nothing more should he now be readmitted as an offender rather than a victim of abuse and neglect.

Accordingly, because each finding is supported by the record and the circumstances surrounding the offense and the characteristics of the offender are congruent with the court's decision to sentence defendant as an adult, we conclude that defendant is not entitled to resentencing.

We affirm.

/s/ Kathleen Jansen
/s/ Jane E. Markey

I concur in result only.

/s/ Michael J. Kelly

[1] Our Supreme Court in *Cipriano, supra*, listed the following factors the trial court should consider, among others, in determining whether a statement was voluntary:

> the age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse.

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