

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

REGINALD HARRISON,

Defendant-Appellant.

UNPUBLISHED

January 26, 2001

No. 215842

Macomb Circuit Court

LC No. 97-000492-FC

Before: Saad, P.J., and Griffin and R.B. Burns,* JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of first-degree criminal sexual conduct, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a), and second-degree criminal sexual conduct, MCL 750.520c(1)(a); MSA 28.788(3)(1)(a). The court sentenced defendant as a fourth habitual offender, MCL 769.12; MSA 28.1084, to twenty to forty years' imprisonment for the first-degree criminal sexual conduct conviction to be served concurrently to ten to fifteen years' imprisonment for the second-degree criminal sexual conduct conviction. We affirm.

Defendant says that his videotaped confession was improperly admitted because the interview continued despite his request for an attorney, and because he was sufficiently intoxicated to render his confession involuntary. Though defendant moved for the suppression of his confession, arguing that he was under the influence of drugs, defendant did not argue that he had requested an attorney and that the police improperly continued with the interview. Accordingly, he has waived his argument regarding his request for a lawyer. *People v Howard*, 226 Mich App 528, 536; 575 NW2d 16 (1997).

However, defendant challenges the trial court's ruling that intoxication did not affect the voluntariness of his waiver of *Miranda* rights. This Court must examine the entire record and make an independent determination of voluntariness, and the trial court's findings are reviewed for clear error. *People v Sexton*, 458 Mich 43, 68; 580 NW2d 404 (1998). The burden is on the prosecutor to prove voluntariness by a preponderance of the evidence. *People v DeLisle*, 183 Mich App 713, 719; 455 NW2d 401 (1990).

* Circuit judge, sitting on the Court of Appeals by assignment.

No person shall be compelled to be a witness against himself in a criminal case. US Const, Am V; Const 1963, art 1 § 17. “Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence.” *Miranda, supra*, 384 US 478. “The ultimate test of admissibility is whether the totality of the circumstances surrounding the making of the confession indicates that it was freely and voluntarily made.” *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988). The Court, in *Cipriano*, as recently affirmed by *Sexton, supra*, 458 Mich 66, established that the following factors should be considered in determining if a statement was voluntarily made:

. . . 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 accused was threatened with abuse. [*Cipriano, supra*, 431 Mich 334.]

The factors must be considered in totality and the absence or presence of one factor is not necessarily conclusive on voluntariness. *Cipriano, supra*, 431 Mich 334.

At the *Walker* hearing, Detective Gabriel testified that defendant turned himself in on January 24, 1997 at about 12:30 p.m., and that Gabriel interviewed defendant about forty-five minutes later. Gabriel discussed defendant’s *Miranda* rights and defendant signed the form, waived his *Miranda* rights and started to talk to Gabriel. Defendant never asked for an attorney nor requested that the interview stop. The discussion was videotaped. Gabriel did not ask defendant about medication or drugs and did not notice any signs of drug or alcohol use by defendant and defendant’s speech was not different than at other times that he had spoken to defendant on the telephone. Defendant did not tell Gabriel that he was under the influence of drugs. The videotape of the confession was played for the trial court at the *Walker* hearing.

Defendant also testified at the *Walker* hearing. Defendant testified that he turned himself in between 11:00 a.m. and 12:00 p.m. and that before doing so, he ingested eight to ten Tylenol 4 pain pills, heroin and Valium. Defendant said that he felt groggy on the way to the police station and that he could not keep his eyes open or stand well. He says he did not remember the interview or Gabriel.

The trial court found that defendant voluntarily waived his rights and was not intoxicated. In making this finding, the court considered the following factors: defendant was able to fill in the time and date on his *Miranda* waiver form after being orally informed of the correct information; he received his *Miranda* rights and acknowledged them, Detective Gabriel testified that defendant did not appear intoxicated; the videotape showed that defendant interacted appropriately and timely and his speech was not garbled; defendant was able to articulate what happened on each instance in an articulate and easily understood manner; defendant showed the capacity to understand the difference between right and wrong, defendant corrected the victim’s

story; and defendant discussed bond issues with Gabriel. Therefore, the trial court did not clearly err in finding that defendant's voluntary waiver of his rights was not affected by alleged intoxication.

Defendant also contends that the trial court erred by finding that the prosecution exercised due diligence in attempting to produce a res gestae witness, Dr. Kleiner. A trial court's determination that the prosecution exercised due diligence in attempting to produce a res gestae witness and that a witness is indeed res gestae, are reviewed for clear error. *People v Wolford*, 189 Mich App 478, 484; 473 NW2d 767 (1991).

If the defendant raises the issue of a missing res gestae witness at trial, the trial court should follow the following procedure:

. . . [T]he court should hold a hearing and decide first whether the witness is in fact a res gestae witness. If it is determined that the person is a res gestae witness, the court should order the prosecution to produce him or her. If the witness is not produced, then the court should hold a hearing on the issue of whether the prosecution was duly diligent in its attempts to produce the witness. [*People v Pearson*, 404 Mich 698, 721; 273 NW2d 856 (1979).]

Although the trial court did not specify the grounds for its ruling that the prosecution had not violated its duty (either because Dr. Kleiner was not res gestae or because the prosecution used due diligence in attempting to produce him), *Pearson* dictates that the trial court first decide whether Dr. Kleiner was a res gestae witness.

“A res gestae witness is a person who witnesses some event in the continuum of a criminal transaction and whose testimony will aid in developing a full disclosure of the facts.” *People v Calhoun*, 178 Mich App 517, 521; 444 NW2d 232 (1989) (citations omitted). The prosecution listed Kleiner on its witness list. Dr. Kleiner was the doctor who examined the victim at the hospital following the last occurrence and the author of the medical report on her injuries. While Dr. Kleiner did observe the victim's injuries, this was not an event “in the continuum of the criminal transaction” because the crime was completed before Dr. Kleiner examined the victim. Were we to consider his observations as part of the continuum, Dr. Kleiner's testimony would not aid in developing a full disclosure of the facts beyond the evidence contained in the medical records. *Id.* Dr. Kleiner's testimony would have been cumulative to the medical records. The trial court did not clearly err in finding that the prosecution did not violate its duty because Kleiner was not a res gestae witness. *Wolford, supra*, 189 Mich App 484.

Furthermore, the prosecution exercised due diligence in attempting to produce Dr. Kleiner. Where a witness is endorsed as a res gestae witness, the prosecution has the duty to produce that witness, unless, the prosecution can show that they could not produce the witness despite an exercise of due diligence, defined as an attempt to do everything reasonable, but not everything possible, to produce the witness. *People v Cummings*, 171 Mich App 577, 585; 430 NW2d 790 (1988).

Here, the prosecution stated that it had attempted to reach Dr. Kleiner at Mount Clemens General Hospital, but the hospital would only forward the information to Dr. Kleiner, it would not release his forwarding address. Dr. Kleiner telephoned the prosecutor the day before trial was to begin and informed the prosecution that he was in Kansas City, Missouri and was scheduled to work the day of trial until 7:00 a.m. The prosecution attempted to make flight arrangements for Dr. Kleiner, but due to a time conflict and the labor strike at Northwest, they could not. Accordingly, we find that the prosecution did everything reasonable to produce Dr. Kleiner and that the trial court did not clearly err in finding that the prosecution did not violate its duty where the prosecution exercised due diligence in its attempts to produce Dr. Kleiner.¹ Therefore, the trial court did not clearly err in determining that the prosecution did not violate its duty as Dr. Kleiner was not a res gestae witness and the prosecution fulfilled its duty of due diligence in attempting to produce Dr. Kleiner.

Defendant also says that the trial court abused its discretion in admitting the victim's medical records because the records were prepared in anticipation of litigation and not during the course of regular business. A party opposing the admission of evidence must object at trial and specify the same grounds for objection that it asserts on appeal. MRE 103(a)(1); *People v Grant*, 445 Mich 535, 545, 553; 520 NW2d 123 (1994). Defendant did not object to the admission of the medical records, and therefore he waived his right to appeal this evidentiary ruling.

Finally, defendant argues that the trial court violated the principle of proportionality in sentencing defendant. A reviewing court must determine if the sentence imposed upon an habitual offender was an abuse of discretion. "A trial court does not abuse its discretion in giving a sentence within the statutory limits established by the legislature when an habitual offender's underlying felony, in the context of his previous felonies, evidences that the defendant has an inability to conform his conduct to the laws of society." *People v Hansford (After Remand)*, 454 Mich 320, 323-324, 326; 562 NW2d 460 (1997); *People v Reynolds*, 240 Mich App 250, 252; 611 NW2d 316 (2000).²

First-degree criminal sexual conduct is punishable by life or any term of years. MCL 750.520b(2); MSA 28.788(2)(2). Second-degree criminal sexual conduct is punishable by imprisonment for not more than fifteen years. MCL 750.520c(2); MSA 28.788(3)(2). Under the fourth habitual offender statute, if a sentence punishable by a maximum term of more than five

¹ Defendant argues that the prosecution was required to subpoena Dr. Kleiner through the uniform act. MCL 767.93; MSA 28.1023(193). However, the prosecution did not know Dr. Kleiner's location until the day before trial, and therefore, could not have subpoenaed Dr. Kleiner through the uniform act.

² Although both parties argue that that the "principle of proportionality" standard of review adopted by *People v Milbourn*, 435 Mich 630, 634-635; 461 NW2d 1 (1990), applies here, a review of the *Hansford* majority opinion reveals that the above standard applies to habitual offenders. Both Justice Brickley's concurrence and Justice Kelly's dissent are distinguished by their belief that the *Milbourn* standard should apply. *Hansford, supra*, 454 Mich 327 (Brickley, J), 327-330 (Kelly, J).

years to life, the court may sentence the defendant to imprisonment for life or a lesser term. MCL 769.12(1)(a); MSA 28.1084(1)(a). Sentencing guidelines do not apply to habitual offenders and it is not appropriate for a reviewing court to consider the sentencing guidelines in reviewing an habitual offender's sentence. *Hansford, supra*, 454 Mich 323; *People v Gatewood*, 450 Mich 1025; 546 NW2d 252 (1996).

Defendant has four felony convictions and three misdemeanor convictions. In 1983, defendant was convicted of unlawful use of a motor vehicle and sentenced to one year in the Wayne County Jail. Later that same year, defendant was convicted of breaking and entering and sentenced to one year in the Wayne County Jail. In 1988, defendant was convicted of assault and battery and fined. In 1991, defendant was convicted of attempted unauthorized driving away of an automobile and sentenced to thirty months' probation. Defendant violated his probation and was sentenced to six months in the Wayne County Jail. Later that same year, defendant was convicted of attempted larceny under \$100 and fined. Defendant did not pay his fine and was held in contempt of court until he finally did pay an increased fine.

In 1995, defendant was convicted of receiving and concealing stolen property over \$100 and sentenced to 270 days in the Macomb County Jail. In January 1997, defendant was arrested for the current crime and in November 1997, defendant was arrested for first-degree home invasion. Defendant was sentenced to two to thirty years' imprisonment for the first-degree home invasion. Additionally, defendant admitted to daily use of approximately \$300 in heroin and that he had sold controlled substances to support his addiction.

Defendant has shown an "inability to conform his conduct to the laws of society". Defendant has a long criminal history beginning in 1983 and escalating to more serious crimes. Defendant has previously been incarcerated and apparently has not been rehabilitated. He has violated probation and a court order to pay a fine. As the trial court stated in sentencing, the behavior that defendant engaged in cannot be tolerated in society.

The trial court did not abuse its discretion in sentencing defendant as the sentences were within the statutory limits and defendant's criminal history reflects that defendant is unable to conform his conduct to the laws of society.

Affirmed.

/s/ Henry William Saad
/s/ Richard Allen Griffin
/s/ Robert B. Burns