

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT PERSON,

Defendant-Appellant.

UNPUBLISHED

May 27, 2003

No. 234916

Wayne Circuit Court

LC No. 99-010641

Before: Murray, P.J., and Neff and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree premeditated murder, MCL 750.316(1)(a), first-degree felony murder, MCL 750.316(1)(b), and armed robbery, MCL 750.529. Defendant was sentenced to separate concurrent terms of mandatory life imprisonment for each of the murder convictions and a concurrent term of twenty to forty years' imprisonment for the armed robbery conviction. We affirm in part, vacate in part, and remand.

I

Defendant allegedly¹ confessed to the beating and stabbing death of a Detroit newspaper employee whom he accosted outside the newspaper distribution center in the early morning hours of October 5, 1999. According to defendant's signed statements to the police, he went to the distribution center at approximately 12:30 or 12:45 a.m., looking for work stuffing papers, but the supervisor said it was too early. Defendant left, but returned five or six minutes later, and the supervisor again said he could not work and could not come inside.

Defendant subsequently encountered the victim outside the distribution center, forcibly drove the victim, in the victim's van, up the street to a wooded lot, where defendant asked for money. A fight ensued; and defendant struck the victim with a thermos and cut him with a box

¹ Defendant did not deny that he signed two statements to the police, but claimed variously that the statements were coerced, and that the inculpatory portions attributed to him were fabricated by the police and that he was unable to read what the police had written in the statements he signed.

cutter until the victim opened the passenger door and fell out. Defendant got out of the van and continued to hit the victim with sticks and bricks. Defendant took some money and other items, then drove away in the van, which he later abandoned.

In a pretrial motion on the morning of trial, defendant sought to suppress his statements to the police. The trial court conducted a *Walker*² hearing and granted the motion for suppression. The prosecutor filed an interlocutory appeal, and this Court vacated the order granting suppression and remanded for articulation of the court's factual findings and the legal basis for suppression. This Court retained jurisdiction. On remand, the court reconvened the *Walker* hearing and, after hearing additional testimony, again suppressed defendant's statement. On consideration following the remand, this Court again vacated the trial court's order granting suppression and remanded for a *Walker* hearing before a different judge. On remand before a different judge, the court ruled that defendant's statements were voluntary and admissible.

II

Defendant first claims that there was insufficient evidence to convict him of murder because there was no physical evidence linking him to the crime and there was no evidence that the killing was premeditated. Rather, defendant stated that the victim struck defendant first, which suggested that the killing was an act of passion. Further, although the victim had injuries to his knuckles, suggesting that he struck his assailant, defendant had no injuries at the time of his arrest. We find defendant's arguments without merit.

A

In reviewing a claim of insufficient evidence, this Court views the evidence de novo in the light most favorable to the prosecutor to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). However, this Court will not interfere with the jury's role of determining the weight of evidence or the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 478, amended 441 Mich 1201 (1992). It is for the trier of fact rather than this Court to determine what inferences can be fairly drawn from the evidence and to determine the weight to be accorded to the inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). A prosecutor need not negate every reasonable theory of innocence, but must only prove his own theory beyond a reasonable doubt in the face of whatever contradictory evidence the defendant provides. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

B

Defendant made two inculpatory statements, which were admitted into evidence. Defendant stated that he planned to get money from the victim, that he demanded the victim's keys, forced the victim to go with him against the victim's will, that he drove to a secluded area,

² *People v Walker (On Rehearing)*, 374 Mich 331, 338; 132 NW2d 87 (1965).

demanded money, and then struck the victim repeatedly and cut the victim with a box cutter. After the victim attempted to get out of the van and “slid out” onto the ground, defendant got out of the van and continued to beat the victim, apparently with sticks and bricks he picked up from the ground. He took money and personal items from the victim and drove away. A forensic pathologist testified that the victim died from multiple blows and trauma and incise wounds to the head and neck. He also opined that the decedent was unconscious when the incise wounds were inflicted. The testimony and evidence coincided with defendant’s confession. The supervisor at the newspaper distribution center testified that defendant was at the center between 1:30 and 1:40 a.m., and there was evidence that the victim had arrived at the center for work around that time.

The jury could reasonably conclude that defendant committed murder and that the murder was premeditated. *Johnson, supra* at 731-733. Evidence of a struggle and defendant’s repeated and continued beating of the victim supports an inference that defendant had the opportunity to “take a second look.” *Id.* at 733. Evidence that a defendant took the victim to a secluded area can also be indicative of premeditation. *Id.*

The evidence also supports an inference of malice to support a conviction of felony-murder. *People v Carines*, 460 Mich 750, 758-760; 597 NW2d 130 (1999). Malice may be inferred from evidence that the defendant intentionally set in motion a force likely to cause death or great bodily harm. *Id.* at 759. Malice may also be inferred from the use of a deadly weapon. *Id.* Given defendant’s statements and other evidence of the circumstances of the crime, we find that there was sufficient evidence to support defendant’s murder convictions.

III

Defendant next argues that he did not voluntarily waive his *Miranda*³ rights and that the trial court’s admission of his involuntary statements violated his constitutional right against self-incrimination. We disagree.

A

When reviewing the denial of a motion to suppress a confession, this Court reviews the record de novo, but reviews the trial court’s factual findings under the clearly erroneous standard. *People v Adams*, 245 Mich App 226, 230; 627 NW2d 623 (2001). This Court will affirm the trial court’s determination unless left with a definite and firm conviction that a mistake was made. *People v Sexton (After Remand)*, 461 Mich 746, 752; 609 NW2d 822 (2000).

B

Defendant’s claimed basis for suppressing his statements was limited to two grounds: 1) the police improperly questioned defendant after he had requested an attorney, and 2) his statement resulted from psychological coercion by lengthy and repeated interrogation. The trial

³ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

court determined that defendant knowingly waived his *Miranda* rights and that his statement was voluntary.

First, the issue whether defendant waived his right to counsel was a question of fact that rested on a credibility determination by the trial court. *People v McElhaney*, 215 Mich App 269, 277; 545 NW2d 18 (1996). The two police officers who took statements from defendant testified that defendant himself read his rights aloud and did not request counsel. To the contrary, defendant testified that he was unable to read, that the officers read his rights to him, and that he told each officer that he wanted counsel. It was undisputed that defendant signed three separate constitutional rights notification forms, initialing each right, and that he understood these rights, including his right to remain silent and his right to counsel. Defendant testified that he answered some questions, which were included in his alleged statements, and that he signed the statements, but he denied making the incriminating statements attributed to him. The trial court resolved these factual conflicts and determined that defendant knowingly waived his rights. This Court gives deference to the trial court's superior ability to judge the credibility of the witnesses. *People v Daoud*, 462 Mich 621, 629; 614 NW2d 152 (2000). We find no clear error in the court's findings. *McElhaney, supra*.

Second, defendant argues that his prolonged detention and prolonged questioning rendered his statements involuntary. Defendant contends that because he was interrogated after midnight, when most persons are asleep, it is probable that he was deprived of sleep and was sleepy at the time of his interrogation. Further, the police used trickery to obtain defendant's statement by falsely telling him that they had a videotape of him committing the crime.

Whether a waiver is voluntary depends on the absence of police coercion. *Daoud, supra* at 635. The test is whether, considering the totality of the surrounding circumstances, "the confession is 'the product of an essentially free and unconstrained choice by its maker,' or whether the accused's 'will has been overborne and his capacity for self-determination critically impaired'" *People v Cipriano*, 431 Mich 315, 333-334; 429 NW2d 781 (1988) (citation omitted). In determining whether a statement is voluntary, the following factors should be considered, although no single factor is necessarily determinative:

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. [*Id.* at 334.]

In this case, defendant claimed that he was coerced into confessing because after he voluntarily appeared at the police station for questioning at approximately 4:00 p.m., he was kept in a room and denied counsel to "wear him down" until he gave a statement sometime after midnight. In considering the totality of the circumstances vis-à-vis defendant's allegations, the court found that there was no trickery or deceit in obtaining the confession, and no evidence of

deprivation of food or sleep. The court found that the delay in questioning was not used to coerce a confession and that his statements were voluntary. We agree.

Defendant was arrested after he arrived at the precinct and subsequently transported to the homicide division. He was advised of his rights at approximately 8:00 p.m. by Investigator Adams, but no statement was taken until sometime after midnight, by Sergeant Kirk. Police officers testified that defendant was physically normal, and that he did not appear to have been deprived of food and water. It is undisputed that defendant was not injured, intoxicated, ill, or under medication. Defendant was thirty-four years old and had attended high school through the tenth grade. Although he subsequently claimed that could not read or write, he testified that he had understood his rights. Defendant had previous experience with the law and admitted that he was very familiar with his rights and the consequences of making a statement. Defendant was advised of his rights several times during the course of his custody and signed a written notification of constitutional rights before making each of two statements, one after midnight and one the following afternoon. There was no evidence that the questioning was prolonged or that defendant was abused or threatened.

Although defendant argues on appeal that because he was interrogated at 12:20 a.m., it is likely that he was sleep deprived, we find no evidence to support this argument. In fact, defendant frequently worked assembling newspapers in the early morning hours and had arrived at the newspaper distribution center after midnight on the night of the killing. Further, although the officers admitted informing defendant that there was a video camera on the newspaper building, we do not find that this rendered defendant's statement involuntary. Viewing the totality of the circumstances, we find no error in the court's conclusion that defendant's statements were voluntary.

IV

Defendant claims that the prosecutor's misconduct denied him his right to a fair trial. Defendant argues that in closing argument, the prosecutor improperly evoked sympathy for the decedent, vouched for the degree of defendant's guilt, shifted the burden of proof, and disparaged both defendant and defense counsel. Defendant failed to object to the alleged misconduct, and we find no plain error affecting defendant's substantial rights. *Carines, supra* at 763.

The prosecutor's references to the victim's death as a slaughtering,⁴ while graphic and perhaps exaggerated, are not so prejudicial to require reversal. A prosecutor need not state an argument in the blandest possible terms. *People v Aldrich*, 246 Mich App 101, 112; 631 NW2d 67 (2001). Further, defendant has failed to show that any error affected the outcome of the trial, and we are not persuaded that any alleged error resulted in the conviction of an actually innocent

⁴ The prosecutor stated: "And like a lamb being led to the slaughter, and the Defendant being our butcher, he takes him [the victim] to this isolated area ..."; "this was a slaughtering"; and "When you have this man [the victim] cut, sliced and diced to the extent that he was...."

defendant or seriously affected the fairness, integrity or public reputation of the judicial proceedings independent of defendant's innocent. *Carines, supra* at 763.

Although the prosecutor's use of such exaggerated and graphic descriptions dances on the line of propriety, we cannot conclude that the remarks tainted the argument as a whole. Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *Id.* The propriety of a prosecutor's remarks depends on all the facts of the case. *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). Considering the facts of the victim's death, indicating that this was a brutal killing and that the victim was repeatedly beaten and slashed with a box cutter, we find no error.

We likewise find no error requiring reversal in the prosecutor's references to defendant as a "butcher" and a "madman"; the characterization of defendant's expression of remorse; and several remarks that defense counsel was playing games by lying or being "mistaken" about the evidence. Prosecutorial misconduct issues are decided on a case-by-case basis, and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). Taken in context, the prosecutor's remarks were not improper personal attacks on the credibility of defense counsel, *People v Kennebrew*, 220 Mich App 601, 607; 560 NW 2d 354 (1996). The prosecutor's rebuttal argument concerning defense counsel's "game-playing" properly responded to defense counsel's own argument that the police lied to defendant in obtaining his confession, which defendant himself points out on appeal.

Finally, we find no error requiring reversal in defendant's claim that the prosecutor shifted the burden of proof by "improper vouching of" defendant's guilt, the evidence against him, and the police officers' credibility. The prosecutor did not imply that he had some special knowledge of the officers' truthfulness. *People v Bahoda*, 448 Mich 261, 276-277; 531 NW2d 659 (1995). The argument was not improper given the evidence and the circumstances of the case.

V

Defendant claims that he was denied the effective assistance of counsel because of defense counsel's failure to object to the alleged prosecutorial misconduct. In light of our finding of no error requiring reversal with respect to the alleged prosecutorial misconduct, this claim fails. Defendant failed to show: (1) that counsel's performance was below an objective standard of reasonableness; (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000).

VI

Defendant claims, and plaintiff agrees, that his convictions of first-degree premeditated murder, first-degree felony murder, and armed robbery for a single killing violate double jeopardy principles. We concur that this is plain error, which must be remedied. We vacate defendant's conviction of and sentence for armed robbery. *People v Bigelow*, 229 Mich App 218; 581 NW2d 744 (1998). We remand this case to the trial court and direct the court to vacate defendant's conviction of and sentence for armed robbery and to modify the judgment of

sentence to reflect defendant's conviction of one count of first-degree murder under alternative theories of premeditated murder and felony murder. *Id.*

Affirmed in part, vacated in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Christopher M. Murray

/s/ Janet T. Neff

/s/ Michael J. Talbot