

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT TAYLOR,

Defendant-Appellant.

UNPUBLISHED

March 21, 2013

No. 303208

Macomb Circuit Court

LC No. 09-005243-FC

Before: JANSEN, P.J., and FITZGERALD and K. F. KELLY, JJ.

PER CURIAM.

A jury convicted defendant of first-degree felony murder, MCL 750.316(1)(b), carjacking, MCL 750.529a, conspiracy to commit carjacking, MCL 750.157a and MCL 750.529a, kidnapping, MCL 750.349, conspiracy to commit kidnapping, MCL 750.157a and MCL 750.349, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to concurrent prison terms of mandatory life without parole for the murder conviction, and 25 to 50 years each for the carjacking, kidnapping, and conspiracy convictions, to be served consecutive to a two-year term of imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm defendant's convictions, but vacate his mandatory life sentence for first-degree felony murder and remand for resentencing on that offense.

Defendant's convictions arise from his participation with codefendant Ihab Masalmani in the August 9, 2009, carjacking and abduction of Matt Landry. The prosecutor's theory was that defendant aided and abetted Masalmani in carjacking and abducting Matt Landry from outside an Eastpointe restaurant, after which they held Landry captive for several hours before Masalmani shot him in the back of the head and left his body at an abandoned burnt-out house in a drug-infested neighborhood. Both defendant and Masalmani were juveniles at the time of the offenses but were charged as adults.

I. SUFFICIENCY OF THE EVIDENCE

Defendant argues that there was insufficient evidence to sustain his convictions for first-degree felony murder and felony-firearm. We disagree. When ascertaining whether sufficient evidence was presented at trial to support a conviction, we must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440

Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). Circumstantial evidence and reasonable inferences arising from the evidence can constitute satisfactory proof of the elements of the crime. *People v Truong (After Remand)*, 218 Mich App 325, 337; 553 NW2d 692 (1996). “[A] reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict.” *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

A. FELONY MURDER

First-degree felony murder requires proof that the defendant killed the victim with malice while committing, attempting to commit, or assisting in the commission of a felony specifically enumerated in MCL 750.316(1)(b). *People v Gayheart*, 285 Mich App 202, 210; 776 NW2d 330 (2009).

Initially, defendant incorrectly contends that the offense of robbery was the sole predicate felony for the felony-murder charge. In the complaint, the prosecution originally listed “larceny, or a kidnapping, or a carjacking” as the predicate felony for felony murder. Before trial, the information was amended to list robbery as the underlying felony. At trial, before closing argument, the prosecutor moved to amend the information to reflect “the original complaint language, which is that of the basis of kidnapping and carjacking.” Defendant did not object to the amendment. Consistent with its ruling, the trial court instructed the jury on felony murder with kidnapping and carjacking as the underlying felonies, and also instructed the jury on the separate charges of kidnapping and carjacking. Consequently, the felony-murder charge in this case was based on the alleged predicate felonies of kidnapping and carjacking, both of which are specifically enumerated in MCL 750.316(1)(b).

“Kidnapping is defined as restraining another person, meaning restricting or confining their liberty, and thus necessarily is an ongoing offense until the victim is released.” *People v McDonald*, 293 Mich App 292, 300; 811 NW2d 507 (2011). In this case, evidence was presented that defendant, in conjunction with codefendant Masalmani, carjacked and kidnapped Landry outside an Eastpointe Quiznos restaurant. While defendant, who witness Lawrence Wata testified was armed with a weapon, acted as a lookout, Masalmani forced Landry into Landry’s green Honda. Defendant also got in the car, and Masalmani drove away with Landry inside. The defendants held Landry captive for several hours before taking him to a vacant drug house in a drug-infested area in Detroit. According to witness Frederick Singleton, while Masalmani used drugs, defendant sat next to Landry, who was visibly “out of place.” Defendant told witness Michael Sadur that he and Masalmani ultimately took Landry to an abandoned house, which was near the drug house, where Masalmani punched Landry and shot him once in the back of the head. Viewed in a light most favorable to the prosecution, the evidence that defendant and Masalmani abducted Landry and restrained his freedom until taking him to an abandoned house and shooting him, was sufficient to establish beyond a reasonable doubt that Landry was killed during the perpetration of the offense of kidnapping.

MCL 750.529a(1) states that a person commits carjacking when that person, “in the course of committing a larceny of a motor vehicle uses force or violence or the threat of force or violence, or who puts in fear any operator, passenger, or person in lawful possession of the motor vehicle[.]” MCL 750.529a(2) states, “As used in this section, ‘in the course of committing a

larceny of a motor vehicle' includes acts that occur in an attempt to commit the larceny, or during commission of the larceny, or in flight or attempted flight after the commission of the larceny, or in an attempt to retain possession of the property.”

Viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could also find beyond a reasonable doubt that the defendants were still in the process of a carjacking when they killed Landry. After initially carjacking Landry, the defendants continued to drive Landry’s car about town, threatening Landry with a firearm, and ultimately drove Landry’s car, with Landry inside it, to a drug-infested area in Detroit where Masalmani used drugs. The defendants then took Landry to a nearby vacant house where they shot him. On the next day, Masalmani continued his use of Landry’s Honda to commit a bank robbery. From the evidence, a jury could reasonably infer that when Landry was shot, the defendants were harboring an intent to avoid detection and retain possession of Landry’s vehicle. The defendants’ actual reason for killing Landry at that time was a question of fact for the jury. Consequently, there was sufficient evidence to support defendant’s felony-murder conviction.

B. FELONY-FIREARM

“The elements of felony-firearm are that the defendant possessed a firearm during the commission of, or the attempt to commit, a felony.” *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). “Under the aiding and abetting statute, MCL 767.39, the correct test for aiding and abetting felony-firearm in Michigan is whether the defendant procures, counsels, aids, or abets in [another carrying or having possession of a firearm during the commission or attempted commission of a felony].” *People v Moore*, 470 Mich 56, 70; 679 NW2d 41 (2004) (internal quotation marks omitted). Further,

[e]stablishing that a defendant has aided and abetted a felony-firearm offense requires proof that a violation of the felony-firearm statute was committed by the defendant or some other person, that the defendant performed acts or gave encouragement that assisted in the commission of the felony-firearm violation, and that the defendant intended the commission of the felony-firearm violation or had knowledge that the principal intended its commission at the time that the defendant gave aid and encouragement. In determining whether a defendant assisted in the commission of the crime, the amount of advice, aid, or encouragement is not material if it had the effect of inducing the commission of the crime. It must be determined on a case-by-case basis whether the defendant performed acts or gave encouragement that assisted in the carrying or possession of a firearm during the commission of a felony. [*Id.* at 70-71.]

Viewed in the light most favorable to the prosecution, defendant’s actions and words demonstrated an intent to procure, counsel, aid, or abet the possession of a firearm during the commission of the felony murder. Defendant, while armed with a gun, acted as a lookout while codefendant Masalmani initially forced Landry inside his car. When Masalmani signaled for defendant, defendant also got inside Landry’s car and Masalmani drove away. While in the car, Masalmani showed Landry a gun, and defendant and Masalmani told Landry “what time it was,” meaning they intended to hurt him. Thus, defendant encouraged and assisted Masalmani’s possession of firearm by specifically relying on the firearm to threaten Landry. Together,

defendant and Masalmani took Landry to an abandoned house where Masalmani shot Landry in the head. Afterward, defendant took physical possession of the firearm and sold it. Accordingly, the evidence was sufficient to support defendant's conviction for felony-firearm under an aiding and abetting theory.

II. MOTION TO SUPPRESS DEFENDANT'S STATEMENTS

Defendant next argues that the trial court erred in admitting his custodial statements. Defendant argues that the statements were inadmissible because they were taken in violation of MCL 764.27, which provides for the arrest procedure of a person who is under the age of 17, and because he did not understand or knowingly waive his *Miranda*¹ rights. We disagree.

Whether a defendant's statement was knowing, intelligent, and voluntary is a question of law that a court evaluates under the totality of the circumstances. *People v Cheatham*, 453 Mich 1, 27, 44; 551 NW2d 355 (1996); *People v Garvin*, 235 Mich App 90, 96; 597 NW2d 194 (1999). Deference is given to the trial court's assessment of the weight of the evidence and the credibility of the witnesses, and the trial court's findings of fact will not be disturbed unless they are clearly erroneous. *People v Sexton (After Remand)*, 461 Mich 746, 752; 609 NW2d 822 (2000); *People v Howard*, 226 Mich App 528, 543; 575 NW2d 16 (1997). A finding is clearly erroneous if it leaves the reviewing court with a definite and firm conviction that a mistake has been made. *People v Givans*, 227 Mich App 113, 119; 575 NW2d 84 (1997).

Statements of a defendant made during a custodial interrogation are inadmissible unless the defendant voluntarily, knowingly, and intelligently waived his or her Fifth Amendment rights. *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966); *People v Abraham*, 234 Mich App 640, 644; 599 NW2d 736 (1999). The confession of a juvenile is admissible if, under the totality of the circumstances, the statement was voluntary. *In re SLL*, 246 Mich App 204, 209; 631 NW2d 775 (2001). The "test of voluntariness is whether, considering the totality of all 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." *Givans*, 227 Mich App at 121. Whether a statement was voluntary is determined by examining police conduct, while whether it was made knowingly and intelligently depends in part upon the defendant's capacity to understand the warnings given. *Howard*, 226 Mich App at 538. The following factors should be considered when determining the admissibility of a juvenile's confession:

(1) whether the requirements of *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966) have been met and the defendant clearly understands and waives those rights, (2) the degree of police compliance with MCL 764.27; MSA 28.886 and the juvenile court rules, (3) the presence of an adult parent, custodian, or guardian, (4) the juvenile defendant's personal background, (5) the accused's age, education, and intelligence level, (6) the extent of the defendant's prior experience with the police, (7) the length of detention

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

before the statement was made, (8) the repeated and prolonged nature of the questioning, and (9) whether the accused was injured, intoxicated, in ill health, physically abused or threatened with abuse, or deprived of food, sleep, or medical attention. [*In re SLL*, 246 Mich App at 209.]

Defendant claims that the trial court should have suppressed his statement because it was obtained in violation of MCL 764.27, which provides:

Except as otherwise provided in . . . section 600.606 . . . if a child less than 17 years of age is arrested, with or without a warrant, the child shall be taken immediately before the family division of circuit court of the county where the offense is alleged to have been committed, and the officer making the arrest shall immediately make and file, or cause to be made and filed, a petition against the child. . . .

The record discloses that the detectives did not bring defendant before the family court, but transported him to the police station to question him regarding his involvement in the crimes.² However, a statement obtained in violation of MCL 764.27 does not mandate automatic suppression. *People v Hall*, 249 Mich App 262, 267; 643 NW2d 253 (2002), remanded in part on other grounds 467 Mich 888 (2002); *People v Good*, 186 Mich App 180, 187-188; 463 NW2d 213 (1990). Rather, the violation is one factor to consider in applying the totality of the circumstances test. *Hall*, 249 Mich App at 267; *Good*, 186 Mich App 187. See also *In re SLL*, 246 Mich App at 209.

Here, the totality of the circumstances indicates that defendant understood his rights and knowingly and intelligently waived them, and that his statement was voluntary. The trial court considered the testimony from the evidentiary hearing and determined that the detectives' testimony was credible, and also observed the videotaped recordings and formed its own opinion. Defendant has not demonstrated that the trial court's findings are clearly erroneous. This Court will defer to the "trial court's superior ability to view the evidence and witnesses." *People v Peerenboom*, 224 Mich App 195, 198; 568 NW2d 153 (1997).

The interviewing detectives informed defendant of his *Miranda* rights, and defendant appeared to fully understand his rights and waived them. Although defendant was technically a juvenile, he was 16 years and 10 months old, merely two months from his 17th birthday. Defendant could read and write, had completed the 11th grade, and "was on his way to the 12th."

² There is no indication that the detectives intentionally violated the statute or that defendant was detained or questioned for a prolonged period. A total of 90 minutes elapsed from the time the officers picked defendant up from the juvenile facility, drove him to the police station where he was booked and interviewed, and transported him back to the facility. Most of the detectives' interaction with defendant was videotaped. There is no indication that the detectives engaged in any coercive behavior. See *People v Cipriano*, 431 Mich 315, 332; 429 NW2d 781 (1988); *Good*, 186 Mich App 187-188 (the purpose of suppressing a confession obtained in violation of a court rule is to deter official misconduct).

There is no indication that defendant had any learning disabilities or psychological problems, and he appeared “to be quite literate” and “well educated, mature” to an interrogating officer. The detective even noted defendant’s good penmanship. Defendant was not under the influence of alcohol or drugs, or in ill health. After the detective recited defendant’s constitutional rights, as defendant followed along, defendant signed and initialed the form in the appropriate places indicating that he understood his rights. Throughout the brief 20-minute interview, defendant appeared to fully understand the detectives’ questions and gave appropriate answers to the questions. The fact that the nearly 17-year-old defendant clearly asserted his right to counsel 20 minutes into the interview further supports that he possessed an understanding of his constitutional rights. Moreover, defendant had prior experience with the police. Viewing the totality of the circumstances, the trial court did not clearly err in finding that defendant knowingly and intelligently waived his Fifth Amendment rights.

With regard to whether defendant’s statement was voluntary, the interview lasted for about 20 minutes, and defendant was with the detectives for a total of 90 minutes, which included transporting defendant to and from the juvenile facility. There is no evidence that defendant was threatened, abused, or promised anything in exchange for his statements. There is likewise no evidence that he was deprived of sleep, food, or drink. In fact, a detective offered defendant food and provided him a soda upon request. While a parent was not present during the questioning, defendant was a ward of the state and had not lived with a parent for quite some time. Although defendant might have felt “crazy” and frightened by the very nature of being interrogated, there is no indication that he was disturbed to a degree that he was not operating of his own free will. Thus, the trial court did not err in finding that defendant’s custodial statements were voluntarily made.

Accordingly, the trial court did not err in allowing defendant’s statements to be admitted at trial.

III. PROSECUTOR’S CONDUCT

Defendant lastly argues that the prosecutor engaged in misconduct by eliciting unduly prejudicial testimony from a detective about defendant’s prior juvenile incarceration. This claim is based on the following questioning of a police detective about the course of the police investigation that led to defendant’s arrest:

The prosecutor: At this time we move for the introduction of People proposed number 83?

Defense counsel: No objection, Your Honor.

Q. If you would describe for the jury then what is the information that is contained on that description.

A. It is at top in red “person of interest.” Below that in black: Cash reward up to a thousand. Robert Taylor is a person of interest wanted for questioning in the abduction homicide of Matthew Landry which occurred on August 9, 2009 in the city of Eastpointe.

Taylor is also wanted for escaping custody out of the Third District Court.

Then shows a photograph of Mr. Taylor and a brief description of him, as well as his alias Fat Daddy. Then it goes on to say:

If you have information, please call Crime Stoppers and gives the phone number.

Q. Now, that is, that press conference conducted on what date?

A. It was either the 19th or, I believe the 20 of August. [Emphasis added.]

Although defendant argues that the prosecutor improperly elicited the detective's testimony that defendant was wanted for escaping custody from the Third District Court, that testimony merely described the contents of the Crime Stoppers flyer, which defense counsel expressly agreed could be admitted. By expressly agreeing to the admission of the flyer, which included the written information on it, defendant waived any right to challenge the contents of the flyer. *People v Carter*, 462 Mich 206, 214-216; 612 NW2d 144 (2000). Defendant's waiver extinguished any error. *Id.* at 216.

Defendant alternatively argues that defense counsel was ineffective for failing to object to the flyer. Defendant has not overcome the strong presumption that counsel chose not to object as a matter of strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). The purpose of the Crime Stoppers flyer and the detective's accompanying testimony only concerned the course of the police investigation. It was not introduced for the purpose of establishing defendant's character. Although the evidence included a reference to defendant also being wanted for escaping from custody in connection with another matter, defense counsel reasonably may have determined that the reference was not particularly prejudicial because it was brief, isolated, and did not reveal any details of the other matter, and that any objection would only have drawn more attention to the testimony. *People v Bahoda*, 448 Mich 261, 287 n 54; 531 NW2d 659 (1995). This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999).

Moreover, defendant has not established that he was prejudiced by defense counsel's failure to object. Given the evidence connecting defendant to the crimes, it is not reasonably probable that defense counsel's failure to object affected the outcome of the trial. *Armstrong*, 490 Mich at 289-290. Consequently, defendant cannot establish a claim of ineffective assistance of counsel.

IV. DEFENDANT'S MANDATORY LIFE SENTENCE FOR FIRST-DEGREE MURDER

Although defendant does not raise the issue, codefendant Ihab Masalmani, a juvenile, filed a supplemental brief in his related appeal seeking relief from his mandatory life sentence for first-degree felony murder. Defendant, like codefendant Masalmani, was also a juvenile at the time he committed the felony-murder offense and received a mandatory life sentence for his first-degree murder conviction. Under *Miller v Alabama*, 567 US ___; 132 S Ct 2455; 183 L Ed 2d 407 (2012), and *People v Carp*, ___ Mich App ___; ___NW2d ___ (Docket No. 307758,

issued November 15, 2012), lv pending, defendant's sentence of mandatory life imprisonment without the possibility of parole violates the Eighth Amendment ban on "cruel and unusual" punishment. US Const, Amend VIII. Accordingly, pursuant to MCR 7.216(A)(7), we vacate defendant's mandatory life sentence for first-degree murder and remand for resentencing on that offense consistent with *Miller* and *Carp*.³ See *Carp*, slip op at 24, 40.

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

/s/ Kathleen Jansen
/s/ E. Thomas Fitzgerald
/s/ Kirsten Frank Kelly

³ In *Carp*, slip op at 31-41, this Court provided guidelines for trial courts to follow until the Legislature adopts new sentencing standards for juvenile offenders. The trial court shall reconsider defendant's sentence for first-degree felony murder under those guidelines, rather than wait until the Legislature acts. *Carp*, slip op at 31.