

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
October 10, 2013

v

SHARON ELAINE HINOJOSA,
Defendant-Appellant.

No. 308327
Wayne Circuit Court
LC No. 10-002954-FC

Before: BECKERING, P.J., and O'CONNELL and SHAPIRO, JJ.

PER CURIAM.

A jury convicted defendant, Sharon Hinojosa, of two counts of first-degree premeditated murder, MCL 750.316(1)(a), two counts of first-degree felony murder, MCL 750.316(1)(b), and arson of a dwelling house, MCL 750.72, in connection with the deaths of her two children in a house fire on October 9, 2009. The trial court sentenced defendant to life imprisonment without parole for each of the four murder convictions and to a concurrent prison term of 10 to 20 years for the arson conviction. Defendant appeals as of right. We vacate two of defendant's convictions and sentences for first-degree murder, affirm her remaining convictions and sentences, and remand for correction of the judgment of sentence to reflect two convictions and life sentences for first-degree murder, each supported by two different theories.

I. MOTION TO SUPPRESS

Defendant first argues that the trial court erred by denying her motion to suppress her confession to the police. The record discloses that defendant was detained at the scene of the fire but was not questioned. She was then taken to the police station where she was questioned. Defendant was not advised of her constitutional rights before the initial police questioning but was twice advised of her rights thereafter. The issue raised by defendant touches on three separate matters: whether she voluntarily waived her *Miranda*¹ rights, the voluntariness of her confession having voluntarily waived her *Miranda* rights, and the effect of defendant's initial unwarned statement on the admissibility of her subsequent warned statements, known as "*Miranda-in-the-Middle*." *United States v Pacheco-Lopez*, 531 F3d 420, 425 (CA 6, 2008).

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

In reviewing a trial court's determination of voluntariness on a motion to suppress a confession, this Court reviews the record de novo but will defer to the trial court's factual findings unless they are clearly erroneous. *People v Harris*, 261 Mich App 44, 53; 680 NW2d 17 (2004). A finding is clearly erroneous when, although there is evidence to support it, this Court is left with a definite and firm conviction that a mistake has been made. *People v Lanzo Constr Co*, 272 Mich App 470, 473; 726 NW2d 746 (2006). However, if resolution of a disputed fact depends on the credibility of the witnesses or the weight of the evidence, this Court will defer to the trial court's determination. *People v Sexton (After Remand)*, 461 Mich 746, 752; 609 NW2d 822 (2000). Questions of constitutional law are reviewed de novo. *People v Attebury*, 463 Mich 662, 668; 624 NW2d 912 (2001).

The Fifth Amendment of the United States Constitution and its state counterpart guarantee that no person "shall be compelled in any criminal case to be a witness against himself." US Const, Am V; Const 1963, art 1, § 17. "A statement obtained from a defendant during a custodial interrogation is admissible only if the defendant voluntarily, knowingly, and intelligently waived [her] Fifth Amendment rights." *People v Akins*, 259 Mich App 545, 564; 675 NW2d 863 (2003). A formal advice of rights is only required when the defendant is subject to custodial interrogation. See *People v Hill*, 429 Mich 382, 397, 399-400; 415 NW2d 193 (1987). "Custodial interrogation means questioning initiated by law enforcement officers after a person has been taken into custody," which questioning the police should know is reasonably likely to elicit an incriminating response from the defendant. *People v Anderson*, 209 Mich App 527, 532-533; 531 NW2d 780 (1995); *People v Honeyman*, 215 Mich App 687, 695; 546 NW2d 719 (1996). A person is in custody where the "person has been formally arrested or subjected to a restraint on freedom of movement or of the degree associated with a formal arrest." *People v Peerenboom*, 224 Mich App 195, 197; 568 NW2d 153 (1997). Whether the defendant was in custody depends on the totality of the circumstances. *People v Zahn*, 234 Mich App 438, 449; 594 NW2d 120 (1999). "The determination of custody depends on the objective circumstances of the interrogation rather than the subjective views harbored by either the interrogating officers or the person being questioned." *Id.* The key question is whether the defendant "reasonably could have believed that he was not free to leave." *Id.*

A waiver of rights is voluntary if it is "the product of a free and deliberate choice rather than intimidation, coercion, or deception." *People v Daoud*, 462 Mich 621, 635; 614 NW2d 152 (2000). "[W]hether a waiver of *Miranda* rights is voluntary depends on the absence of police coercion." *Id.* A defendant's mental condition or other deficiency that renders him susceptible to coercion does not render the waiver involuntary absent evidence that it was exploited by the police. *People v Cheatham*, 453 Mich 1, 16-17; 551 NW2d 355 (1996).

A confession is voluntary if the totality of all the surrounding circumstances show that it is the product of an essentially free and unconstrained choice and not the result of an overborne will. *People v Cipriano*, 431 Mich 315, 333-334; 429 NW2d 781 (1988). Relevant factors in determining voluntariness include the defendant's age; the defendant's education or intelligence level; the extent of the defendant's previous experience with the police; whether the defendant was subjected to repeated and prolonged questioning; whether the defendant was advised of her constitutional rights; whether there was an unnecessary delay in bringing the defendant before a magistrate before she made her statement; whether the defendant was injured, intoxicated, drugged, or in ill health when she made the statement; whether the defendant was deprived of

food, sleep, or medical attention; and whether the defendant was physically abused or threatened with abuse. *Id.* at 334. “The absence or presence of any one of these factors is not necessarily conclusive on the issue of voluntariness,” *id.*, and no single factor is determinative, *People v Tierney*, 266 Mich App 687, 708; 703 NW2d 204 (2005).

In *Oregon v Elstad*, 470 US 298, 314; 105 S Ct 1285; 84 L Ed 2d 222 (1985), the United States Supreme Court held that where police do not use “deliberately coercive or improper tactics” while questioning a defendant but fail to advise the defendant of his or her *Miranda* rights, the “subsequent administration of *Miranda* warnings . . . ordinarily should suffice to remove the conditions that precluded admission of the earlier statement.” In other words, “if the prewarning statement was voluntary, then the postwarning confession is admissible unless it was involuntarily made despite the *Miranda* warning.” *United States v Carter*, 489 F3d 528, 534 (CA 2, 2007). If, however, the police deliberately refrain from advising a defendant of his or her rights in order to obtain a confession and, having once obtained the confession, then advise the defendant of his or her rights and obtain the same confession, the *Miranda* warning is ineffective and the postwarning statement is inadmissible. *Missouri v Seibert*, 542 US 600, 616-618, 620-621; 124 S Ct 2601; 159 L Ed 2d 643 (2004).

In this case, the trial court never actually determined whether defendant was in custody when she first arrived at the police station. Assuming that she was, that alone is not determinative of whether *Miranda* warnings were required because, as previously noted, questioning of a person in custody is not custodial interrogation unless the questioning is reasonably likely to elicit an incriminating response. *Honeyman*, 215 Mich App at 695; see also *United States v Bogle*, 114 F3d 1271, 1274-1275 (CA DC, 1997) (“We agree with these circuits that only questions that are reasonably likely to elicit incriminating information in the specific circumstances of the case constitute interrogation within the protections of *Miranda*.”). The trial court found that when defendant was first questioned, the police were working under the assumption that she was the victim of a firebombing based on her initial statements. The police asked just general questions to determine what happened. Because defendant was believed to be a victim, the officers had no reason to believe that questioning defendant at that point would elicit an incriminating response, and indeed it did not. Cf. *Honeyman*, 215 Mich App at 695. Therefore, the initial questioning “did not implicate the privilege against compelled self-incrimination.” *Id.*

The police became suspicious of defendant shortly after interviewing her boyfriend after inconsistencies arose between their statements. Once the police began to suspect that defendant was not just a victim, she was questioned further after being advised of her constitutional rights, and she ultimately incriminated herself. The evidence also showed that under the totality of the circumstances, defendant’s statements were voluntarily made. Defendant had a twelfth-grade education and was literate. Although she had a low-average IQ, she does not argue that she was not sufficiently intelligent to understand her rights. Defendant was twice advised of her rights and agreed to waive them. The trial court found that “there is no evidence of coercion on the part of the police” and that defendant voluntarily waived her rights. While defendant’s expert believed that defendant was coerced into waiving her rights because the circumstances left her “run down and in a vulnerable state,” he did not identify anything the police did to exploit her weakness apart from the simple act of questioning her. The trial court “was not impressed with” the defense expert’s testimony and rejected it in favor of plaintiff’s expert’s testimony to the

contrary. There is no basis for concluding that this was an improper use of “*Miranda-in-the-Middle*” as in *Seibert* because defendant’s initial statement was not the product of custodial interrogation. Defendant was questioned briefly about an incident in which she appeared to be a victim, there is nothing to suggest that the police sought to obtain a confession from defendant and deliberately refrained from advising her of her rights to get one, and defendant did not actually confess in the initial police questioning. Although 15 hours elapsed from the time of the initial investigatory questioning until defendant produced her final statement, the questioning itself was not prolonged. The evidence indicated, and the trial court found, that there were frequent breaks during which the police allowed defendant to go to the bathroom, smoke cigarettes, and sleep; the police also provided her with food and drinks. The trial court further found that defendant was not injured during the fire and was not denied medical attention. The court also found no evidence that the police employed any sort of physical or mental force, threatening behavior, or intimidation. Defendant does not take issue with these factual findings, which are supported by the record. The totality of the circumstances supports the trial court’s determination that defendant’s statements to the police and her waiver of *Miranda* rights were voluntary.

Accordingly, the trial court did not err by denying defendant’s motion to suppress her statements.

II. DOUBLE JEOPARDY

Defendant next argues that her convictions and life sentences for four counts of first-degree murder, arising from the deaths of two persons, violate her right against double jeopardy. The prosecutor agrees, and so do we.

“A double jeopardy issue constitutes an issue of law that is reviewed de novo on appeal.” *People v Artman*, 218 Mich App 236, 244; 553 NW2d 673 (1996). “Multiple murder convictions arising from the death of a single victim violate double jeopardy.” *People v Clark*, 243 Mich App 424, 429; 622 NW2d 344 (2000). If the defendant is convicted of both first-degree premeditated murder and first-degree felony murder, the proper remedy is to modify the judgment of sentence to specify that the defendant’s conviction is for one count and one sentence of first-degree murder supported by two theories. *People v Orlewicz*, 293 Mich App 96, 112; 809 NW2d 194 (2011).

Here, defendant’s murder convictions were based on the deaths of her two children. She was convicted of one count of first-degree premeditated murder and one count of first-degree felony murder for each child’s death. The judgment of sentence improperly reflects four convictions of first-degree murder and four life sentences. Accordingly, we vacate two of defendant’s convictions and sentences for first-degree murder and remand for amendment of the judgment of sentence to reflect only two convictions and life sentences for first-degree murder, each supported by two different theories.

III. SENTENCING DEPARTURE

Defendant's final issue on appeal is that the trial court erred by departing from the minimum-sentence guidelines range for the arson conviction. Defendant contends that the court did not articulate "objective substantial and compelling reasons to depart." We disagree.

A trial court may depart from a defendant's minimum-sentence guidelines range if it has a substantial and compelling reason to do so and states such reason, or reasons, on the record. *People v Anderson*, 298 Mich App 178, 183; 825 NW2d 678 (2012); MCL 769.34(3). In order to be considered substantial and compelling, the reasons must be "objective and verifiable" and "must be of considerable worth in determining the length of the sentence and should keenly or irresistibly grab the court's attention." *People v Smith*, 482 Mich 292, 299; 754 NW2d 284 (2008). The trial court may not base a departure on an offense or characteristic already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the record that the characteristic "has been given inadequate or disproportionate weight." *Id.* at 300. The departure imposed must be proportionate to the defendant's conduct and prior criminal history. *Id.*

We review for clear error whether a particular factor articulated by the trial court exists. *People v Babcock*, 469 Mich 247, 264; 666 NW2d 231 (2003). We review de novo a trial court's determination that a factor is objective and verifiable. *People v Uphaus (On Remand)*, 278 Mich App 174, 178; 748 NW 899 (2008). We review for an abuse of discretion a trial court's conclusion that one or more factors provide a substantial and compelling reason to depart from the guidelines. *Babcock*, 469 Mich at 264-265. "A trial court abuses its discretion if the minimum sentence imposed falls outside the range of principled outcomes." *Smith*, 482 Mich at 300.

In this matter, defendant's minimum-sentence guidelines range for her arson conviction was 57 to 95 months. The trial court sentenced defendant to a minimum of ten years (120 months) imprisonment, which constituted an upward departure of 25 months. The trial court did not acknowledge that it was departing from the guidelines or explain its reasons for doing so until prompted by the prosecution, at which point the trial court stated:

Yes. I [sic] there's a substantial and compelling basis for exceeding the guidelines on the arson of a dwelling house, based upon the horrendous and extenuating circumstances of the death of Anthony and Alayna Hinojosa. Which the jury found to be intentional and premeditated acts. And because those acts were so heinous and so completely unwarranted and not necessary, I find that there's a substantial and compelling basis for exceeding the guidelines range on the arson of a dwelling house.

Defendant acknowledges that the trial court's comments reflect "legitimate and valid concerns," but she argues that the court's findings do not amount to objective substantial and compelling reasons to depart, "especially where the variables already have taken into account the essence of the trial court's decision-making rationale." The prosecution argues that the "horrendous and extenuating circumstances" of defendant's actions of setting her home on fire and intentionally killing her two children, ages three and four, constituted objective and verifiable reasons and that

the sentence was proportional to the offense. The prosecution notes that the guidelines account for neither the ages of the victims nor their relationship to defendant. The prosecution further argues that the minimum sentence was proportionate given that defendant's total offense-variable (OV) score was 245 points—more than three times the points at which the guidelines for this crime, a Class B offense, maxes out (75 points). We note, however, that the trial court did not refer to defendant's total OV score or any particular OV factor as justification for its departure.²

Although we find it to be a close call in light of the trial court's rather summary and cryptic rationale, we cannot conclude that the trial court erred in its upward departure by failing to identify a substantial and compelling reason for the departure. When articulating the basis for its departure, the trial court identified the death of defendant's two children as horrendous and extenuating circumstances. The guidelines do not take into account the fact that the victims whom defendant intentionally killed with premeditation were her own two young children. This fact is objective and verifiable and keenly and irresistibly grabs the court's attention. Moreover, although defendant does not argue to the contrary on appeal, we further conclude that, based upon the facts of record, the trial court's sentence was proportionate to defendant's conduct.

Affirmed in part, vacated in part, and remanded for correction of the judgment of sentence consistent with this opinion. We do not retain jurisdiction.

/s/ Jane M. Beckering
/s/ Peter D. O'Connell
/s/ Douglas B. Shapiro

² As noted in *Smith*, a trial court's failure to address an OV factor "leaves us unable to ascertain whether [the court] believed the factor was given inadequate weight or whether [it] failed to recognize that the guidelines consider" the factor, and a reviewing court may not infer what the trial court concluded on such issue. *Smith*, 482 Mich at 302 n 21.