

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JIMMIE REED, JR.,

Defendant-Appellant.

UNPUBLISHED

August 13, 2009

No. 283851

Oakland Circuit Court

LC No. 2006-211735-FC

Before: Saad, C.J., and Sawyer and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions following a bench trial of two counts of first-degree premeditated murder, MCL 750.316(a), first-degree felony murder, MCL 750.316(b), arson, MCL 750.72, and possession of a firearm during the commission of a felony (felony-firearm), 750.227b. Defendant was sentenced to serve concurrent prison terms of life without parole for the first-degree premeditated and felony murder convictions, and 95 months to 20 years for the arson conviction. Defendant was also sentenced to serve two years in prison for the felony-firearm conviction, consecutive to the arson conviction. For the reasons set forth in this opinion, we affirm defendant's convictions but remand for modification of the judgment of sentence.

Defendant was convicted of murdering his girlfriend, Markeda Byas, and their two-month-old daughter, Artavia Reed. Defendant shot Byas while she slept and returned roughly several hours later to set the apartment on fire, killing Artavia. During police questioning, defendant admitted to accidentally killing Byas and confessed to the arson and the murder of Artavia. Defendant argues on appeal that his statement¹ was not voluntarily given and was coerced by the police. After a *Walker* hearing, the circuit court decided that defendant's incriminating statement was voluntarily given and admissible. See *People v Walker*, 374 Mich

¹ “[W]here the defendant’s statements were admissions of fact, rather than a confession of guilt, no finding of voluntariness is necessary.” *People v Gist*, 190 Mich App 670, 671; 476 NW2d 485 (1991). However, because the admission to accidentally shooting Byas is so bound to the confession of setting the fire and killing Artavia, we choose to review the entire statement for voluntariness.

331, 338; 132 NW2d 87 (1965).² The constitutional privilege against self-incrimination protects a defendant from being compelled to testify against himself or from being compelled to provide the state with evidence of a testimonial or communicative nature. *People v Burhans*, 166 Mich App 758, 761-762; 421 NW2d 285 (1988). We review de novo whether a statement to the police was voluntarily given. *People v Sexton (After Remand)*, 461 Mich 746, 752; 609 NW2d 822 (2000).

Coercive police activity is a necessary predicate to finding that a confession is not voluntary within the meaning of the Due Process Clause. *Colorado v Connelly*, 479 US 157, 167; 107 S Ct 515; 93 L Ed 2d 473 (1986). A confession must be the product of an essentially free and unconstrained choice and be made without intimidation, coercion, or deception. *People v Akins*, 259 Mich App 545, 564; 675 NW2d 863 (2003). The burden is on the plaintiff to prove by a preponderance of the evidence that a statement was voluntarily made. *People v Daoud*, 462 Mich 621, 634; 614 NW2d 152 (2000). We evaluate the totality of the circumstances in order to determine whether the statement was the result of an essentially free choice or was compelled by overcoming the defendant's capacity for self-determination in violation of this constitutional protection. *People v Geno*, 261 Mich App 624, 628; 683 NW2d 687 (2004).

In *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988), the Supreme Court set forth the following nonexhaustive list of factors that should be considered in determining the voluntariness of a statement:

[T]he 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.

Defendant's knowledge of his rights before offering a confession is a circumstance that is also important to consider in determining whether a statement was voluntary. *Frazier v Cupp*, 394 US 731, 739; 89 S Ct 1420; 22 L Ed 2d 684 (1969). Indeed, "cases in which a defendant can make a colorable argument that a self-incriminating statement was 'compelled' despite the fact that the law enforcement authorities adhered to the dictates of *Miranda* are rare." *Berkemer v McCarty*, 468 US 420, 433 n 20; 104 S Ct 3138; 82 L Ed 2d 317 (1984).

In support of his claim of error, defendant points to the actions of Pontiac Police Department Detective, Darrin McAllister, during his recorded interview of defendant. Defendant

² It appears that not all of the transcripts from the multiple day hearing have been provided on appeal. However, given the apparent repetitive nature of the missing testimony (a police officer) and the existence of the DVD of the police interview under examination, we excuse defendant from the duty to supply missing transcript. MCR 7.210(1)(a).

cites falsehoods told by the officer, the officer's promise to help defendant if he was straight with him, the officer threatening to "release[defendant] into the streets and let 'the motherfuckers' get him," and the officer's invocation of God once he found out defendant was religious. The fact that the police misrepresented evidentiary facts is a factor to be considered, but standing alone, is insufficient to make an otherwise voluntary statement involuntary, *People v Hicks*, 185 Mich App 107, 113; 460 NW2d 569 (1990); accord *People v Givans*, 227 Mich App 113, 122-123; 575 NW2d 84 (1997), as are the other factors cited by defendant, see generally *Davis v North Carolina*, 384 US 737, 746-751; 86 S Ct 1761; 16 L Ed 2d 895 (1966). Here, defendant argues that under the totality of the circumstances, his confession was not voluntary.

Defendant went to the police station on his own accord. The record reveals that he waited an extended period of time before the officers arrived to question him. Once he was brought into a room to be questioned, defendant was informed of his *Miranda* rights and he waived them. However, it is clear from the context that defendant was somewhat reluctant to do so, particularly concerning the right to consult a lawyer, and only signed the waiver form after persistent appeals from McAllister. Nonetheless, defendant's initial reluctance did not operate to invoke the requirement that contact between McAllister and defendant end. *Montejo v Louisiana*, ___ US ___; 129 S Ct 2079, 2090; ___ L Ed 2d ___ (2009). Further, McAllister's framing the waiver inquiry as a dilemma between finding out from the officer what was going on and invoking the right to talk to a lawyer did not serve to undermine defendant's "awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Moran v Burbine*, 475 US 412, 421; 106 S Ct 1135; 89 L Ed 2d 410 (1986). The fact that McAllister indicated he would not provide defendant any information is not contrary to any of the other rights explained. See *Hart v Attorney General of Florida*, 323 F3d 884, 894 (CA 11, 2003). Moreover, defendant did not have an absolute right to find out what the police were thinking and doing regarding the investigation. Indeed, a corollary to the police discontinuing contact with a suspect once the right is invoked is the fact that the suspect cannot then expect the police to provide any and all information the suspect might want to know. Further, we note that the officer's contentions that he does not speak to lawyers does not infringe on the voluntariness of defendant's confession and defendant was unable to produce any such legal precedent.

Turning to other considerations, there was no evidence that defendant was of an age, or education and intelligence level that would interfere with his ability to choose to voluntarily make a statement about the crimes. Further, the interview was relatively brief (35 minutes) and was initiated by defendant when he went to the police station without an obligation to do so. There was also no evidence that defendant was in a physically compromised condition. Defendant had some experience interviewing with this officer, as he spoke to him three days earlier and left that interview voluntarily. Defendant had not been arrested or even questioned by police for three days prior to making the statement and was advised of his constitutional rights immediately before the interview began.

McAllister did lie to defendant about collecting gunpowder residue from his hands, about the existence of gas residue, and about the videotape evidence the police had obtained. However, these lies are not so extreme that they undermine confidence in the validity of the waiver. See *US v Velasquez*, 885 F2d 1076, 1089 (CA 3, 1989) (concluding that a *Miranda* waiver was not invalidated by police deception regarding evidence connecting the defendant to the crime). McAllister also portrayed himself as acting in defendant's best interest, but such

assurances are not likely to induce a false confession. And contrary to defendant's characterization, McAllister did not threaten to release defendant into the streets and let the "motherfuckers" get him. What he did say was, "I'm all ya got. Now I can walk outta here and the mother-fucks gonna get you." Not only is there no reference to "the streets," but in context McAllister seems to be implying that other police officers who do not understand defendant the way McAllister does will take over and not give him the same consideration McAllister would.

Finally, McAllister's use of prayer and the general invocation of religion do not render the confession involuntary. It is true that immediately after the prayer defendant provided his explanation on how the killings occurred. However, considered together with all of the circumstances, this appeal to any religious convictions that defendant might hold does not amount to the type of police overreaching that would tend to overcome a suspect's will. In sum, defendant has not shown that the actions of the officer conducting the interview overcame defendant's will and impaired his capacity for self-determination. See *Cipriano, supra* at 334.

Defendant additionally argues that an incriminating statement that he made to his parents while on the phone in a police car after he was in custody should be excluded as a "fruit of the poisonous tree" because he would not have made the statement if he was not in custody as a result of an inadmissible involuntary confession. See *Wong Sun v United States*, 371 US 471, 485-486; 83 S Ct 407; 9 L Ed 2d 441 (1963). Because the initial statement was voluntarily given, this argument is without merit.

The parties are in agreement, as are we, that defendant's right to be protected from double jeopardy was violated by his conviction of both first-degree murder and first-degree felony murder for the death of Artavia. *People v Bigelow*, 229 Mich App 218, 220; 581 NW2d 744 (1998). We therefore remand to the circuit court in order to correct the judgment of sentence to reflect a single murder conviction (for Artavia) that is supported by two theories: premeditated murder and felony murder.

Defendant's convictions and sentences are affirmed. We remand for amendment of the judgment of sentence in accord with this opinion. We do not retain jurisdiction.

/s/ Henry William Saad

/s/ David H. Sawyer

/s/ Stephen L. Borrello