

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARK AARON GONZALEZ,

Defendant-Appellant.

UNPUBLISHED
February 11, 2003

No. 229085
Genesee Circuit Court
LC No. 99-005131-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RYAN ALAN KENDRICK,

Defendant-Appellant.

No. 229086
Genesee Circuit Court
LC No. 99-005026-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL DWIGHT WORDEN,

Defendant-Appellant.

No. 230153
Genesee Circuit Court
LC No. 99-005024-FC

Before: Murphy, P.J., and Cavanagh and Neff, JJ.

PER CURIAM.

Following a joint trial before separate juries, each defendant was convicted of conspiracy to commit assault with intent to do great bodily harm less than murder, MCL 750.157a and MCL 750.84, and assault with intent to do great bodily harm less than murder, MCL 750.84, arising

from an assault upon the victim in July 1999, at a semi-trailer where the victim, a homeless person, was living. Each defendant was also tried on a charge of open murder arising from the subsequent beating death of the same victim within a few hours of the earlier assault. Defendants Mark Gonzalez and Ryan Kendrick were convicted of first-degree premeditated murder, MCL 750.316(1)(a), and defendant Michael Worden was convicted of second-degree murder, MCL 750.317. Each defendant was sentenced to concurrent prison terms of five to ten years each for the conspiracy and assault convictions, and life imprisonment for their murder convictions. Defendants now appeal as of right. We affirm.

I. Sufficiency of the Evidence

Defendant Gonzalez argues that, in light of trial evidence that he was intoxicated and under the influence of marijuana, the evidence was insufficient to establish the specific intent element for each of his convictions. We disagree. “[W]hen determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found 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). The prosecution need not negate every reasonable theory consistent with innocence. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). The prosecution need only prove the elements of the crime beyond a reasonable doubt in the face of whatever contradictory evidence a defendant may provide. *Id.*

In general, a defendant’s intent is a question of fact that can be inferred by the trier of fact from the circumstances. *People v Tower*, 215 Mich App 318, 323; 544 NW2d 752 (1996). Because of the difficulty in proving an actor’s state of mind, minimal circumstantial evidence is sufficient. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999). A specific intent can be express, but “[t]he act must be coincident with an intent to bring about the particular result the statute seeks to prohibit.” *People v Beaudin*, 417 Mich 570, 575; 339 NW2d 461 (1983). An intoxication defense is proper “if the facts of the case could allow the jury to conclude that the defendant’s intoxication was so great that the defendant was unable to form the necessary intent.” *People v Mills*, 450 Mich 61, 82; 537 NW2d 909 (1995), mod 450 Mich 1212 (1995).¹

¹ Although not applicable here, we note that the Legislature recently enacted 768.37 (2002 PA 366, effective September 1, 2002), which severely limits the ability of a defendant to raise an intoxication defense. The statute provides in part:

(1) Except as provided in subsection (2), it is not a defense to any crime that the defendant was, at that time, under the influence of or impaired by a voluntarily and knowingly consumed alcoholic liquor, drug, including a controlled substance, other substance or compound, or combination of alcoholic liquor, drug, or other substance or compound.

(2) It is an affirmative defense to a specific intent crime, for which the defendant has the burden of proof by a preponderance of the evidence, that he or

(continued...)

In this case, varying evidence was presented concerning the amounts of alcohol and marijuana consumed by Gonzalez and the effects of those substances on his ability to form the necessary intent to commit the charged crimes. The weight and credibility of that evidence was for the jury to decide. *Wolfe, supra* at 514-515. Viewed most favorably to the prosecution, the evidence was sufficient to enable a rational trier of fact to find beyond a reasonable doubt that Gonzalez had the requisite intent to commit each of the offenses, either as a principal or under an aiding and abetting theory, when he embarked on a course of purposeful conduct with others to harm and eventually to brutally beat the victim to death. See *People v Mass*, 464 Mich 615, 628-629; 628 NW2d 540 (2001) (conspiracy and aiding and abetting); *People v Lavearn*, 201 Mich App 679, 684; 506 NW2d 909 (1993), rev'd on other grounds 448 Mich 207 (1995), *People v Plummer*, 229 Mich App 293, 300-301; 581 NW2d 753 (1998) (first-degree premeditated murder); and *People v Mitchell*, 149 Mich App 36, 39; 385 NW2d 717 (1986) (assault with intent to do great bodily harm less than murder). The prosecution met its burden of proving its own theory of intent in the face of evidence regarding Gonzalez's beer consumption and marijuana use. *Nowack, supra* at 400.

II. Right of Confrontation

Defendant Gonzalez also claims that the prosecutor's use of prior testimony from the preliminary examination of Worden, Kendrick, and another codefendant, Ricky Beggs, deprived him of his constitutional right to confront witnesses. Initially, we find that Gonzalez failed to preserve this issue for appeal by failing to specifically object on this ground at trial. MRE 103(a)(1). The objection raised during Chris Crandell's trial testimony concerning Gonzalez's absence at the preliminary examination was insufficient to preserve an appellate attack based on the constitutional right of confrontation. *People v Asevedo*, 217 Mich App 393, 398; 551 NW2d 478 (1996). In any event, regardless of whether we treat this matter as a preserved evidentiary issue reviewable under the abuse of discretion standards in *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999), or an unpreserved issue subject to forfeiture under the plain error standards in *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999), we conclude that reversal is not warranted because Gonzalez has not shown that he was denied his right to confront Crandell or any other prosecution witness who was questioned about prior testimony at the preliminary examination.

“The right of confrontation insures that the witness testifies under oath at trial, is available for cross-examination, and allows the jury to observe the demeanor of the witness.” *People v Watson*, 245 Mich App 572, 584; 629 NW2d 411 (2001), quoting *People v Frazier (After Remand)*, 446 Mich 539, 543; 521 NW2d 291 (1994) (BRICKLEY, J.). The Confrontation Clause is not violated by the admission of a declarant's out-of-court statements if the declarant testifies at trial and is subject to full and effective cross-examination. *People v Malone*, 445 Mich 369, 382; 518 NW2d 418 (1994). See also *People v Chavies*, 234 Mich App 274, 283; 593 NW2d 655 (1999).

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she voluntarily consumed a legally obtained and properly used medication or other substance and did not know and reasonably should not have known that he or she would become intoxicated or impaired.

Because Gonzalez has not shown that he was denied the opportunity for full and effective cross-examination of Crandell or any other prosecution witness who was questioned about prior testimony at the preliminary examination, we reject Gonzalez's claim that his constitutional right to confront witnesses was violated. We do not construe the trial court's evidentiary ruling during Crandell's testimony as restricting the use of preliminary examination testimony solely for the purpose of refreshing a witness' memory. Specifically, there is no indication in the record that the trial court precluded the use of prior testimony for impeachment purposes if a witness did not accept the earlier testimony as true after having an opportunity to review the prior testimony. See *People v Alphas Harris*, 56 Mich App 517, 525-526; 224 NW2d 680 (1974). To the contrary, as Gonzalez concedes on appeal, the jury was later instructed that an inconsistent statement given under oath at the preliminary examination could be considered as proof of the facts in the statement. Because Gonzalez's attorney informed the trial court that he was satisfied with the jury instructions, any challenge to the court's instruction is deemed waived. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000); *People v Riley*, 465 Mich 442, 448-449; 636 NW2d 514 (2001). We note, however, that the jury instruction accurately stated the law. MRE 801(d)(1)(A). Further, as previously discussed, the substantive use of the prior testimony did not violate the Confrontation Clause. *Malone, supra*; *Chavies, supra*.

III. Photograph Evidence

Defendant Gonzalez also argues that the trial court abused its discretion by admitting a photograph depicting the victim's facial injuries after a smaller copy of the same photograph was introduced at trial. We disagree. The photograph was relevant because it provided a more accurate depiction of the victim's facial injuries than those apparent in the smaller copy of the photograph. MRE 401; *Mills, supra* at 66-71. Additionally, the probative value of the photograph was not substantially outweighed by the danger of unfair prejudice. MRE 403; *Mills, supra* at 76-77.

IV. Motion to Sever Charges

Defendants Gonzalez and Kendrick both argue that the trial court erred by denying their motions to sever the murder charge from the assault and conspiracy charges for trial. We disagree. Severance was not mandatory because the charged offenses were based on a series of connected acts. MCR 6.120(B)(2); *People v Tobey*, 401 Mich 141, 152; 257 NW2d 537 (1977). Further, we find no basis for disturbing the trial court's discretionary decision not to sever the charges for trial. MCR 6.120(C); *People v Daughenbaugh*, 193 Mich App 506, 509-510; 484 NW2d 690 (1992), mod 441 Mich 867 (1992). As the trial court observed, the murder charge could not be tried without evidence relevant to the assault and conspiracy counts. See generally *People v Sholl*, 453 Mich 730, 742; 556 NW2d 851 (1996) (evidence of other criminal acts is admissible when so blended or connected with the crime that proof of one incidentally involves the other or explains its circumstances).

V. Failure to Preserve the Crime Scene

Defendants Gonzalez and Kendrick both challenge the trial court's denial of their motions to suppress physical evidence based on the failure of the police to preserve the crime scene and, in particular, the semi-trailer where the victim was living. We review a trial court's factual findings in deciding a motion to suppress evidence for clear error. *People v Head*, 211

Mich App 205, 209; 535 NW2d 563 (1995). However, to the extent that a constitutional due process claim is presented, our review is de novo. *People v Walker*, 234 Mich App 299, 302; 593 NW2d 673 (1999).

Neither Gonzalez nor Kendrick have demonstrated a due process violation. We reject Kendrick's claim that the intent of the police or prosecutor was not relevant because discovery requests were made by defendants. Kendrick's failure to support his argument with record evidence that a demand was made for the preservation of the semi-trailer is dispositive of this claim. A party may not leave it to this Court to search for a factual basis to sustain or reject a position. *People v Norman*, 184 Mich App 255, 260; 457 NW2d 136 (1990).

Gonzalez likewise has failed to establish any basis for disturbing the trial court's determination that the return of the semi-trailer to its owner did not constitute bad faith. Because nothing more can be said than the police failed to preserve potentially useful evidence and bad faith was not shown, neither Gonzalez nor Kendrick were denied due process. *Arizona v Youngblood*, 488 US 51, 57; 109 S Ct 333; 102 L Ed 2d 281 (1988); *People v Johnson*, 197 Mich App 362, 365; 494 NW2d 873 (1992); *People v Leigh*, 182 Mich App 96, 98; 451 NW2d 512 (1989).

VI. The Defendants' Custodial Statements

All three defendants challenge the trial courts' denial of their respective motions to suppress evidence of statements made to Burton police detectives. Having considered each defendant's arguments, we uphold the trial court's denial of their motions.

A. Gonzalez's Statement

Gonzalez argues that his statement to Detective Moffit should have been suppressed because it was not knowingly and voluntarily made. Initially, in light of the concession by Gonzalez's attorney at the *Walker*² hearing that the trial court could find that the requirements of *Miranda*³ were met and that Gonzalez clearly understood and waived his rights, we find that Gonzalez has waived any claim that he did not knowingly and intelligently waive his *Miranda* rights. *Carter, supra* at 215-216.

Whether Gonzalez's statement was voluntarily made presents a separate question, which is dependent on the absence of police coercion. *People v Daoud*, 462 Mich 621, 635; 614 NW2d 152 (2000). "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." *People v Givans*, 227 Mich App 113, 121; 575 NW2d 84 (1997). The factors considered by a court in making this determination, when the accused is a juvenile, are as follows:

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

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

(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 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. [*Givans, supra* at 121.]

In deciding this issue, an appellate court conducts an independent review, but will affirm the trial court's factual findings unless they are clearly erroneous. *In re SLL*, 246 Mich App 204, 208; 631 NW2d 775 (2001). "A finding of fact is clearly erroneous if, after reviewing the entire record, an appellate court is left with a definite and firm conviction that a mistake has been made." *Id.* at 208-209. See also *People v Sexton (After Remand)*, 461 Mich 746, 752; 609 NW2d 822 (2000).

Having independently considered this issue, but giving deference to the trial court's factual findings, we are not left with a definite and firm conviction that the trial court erred in finding that Gonzalez's statement to Detective Moffit was voluntary.

Further, the second factor in *Givans, supra* at 121, is not applicable because Gonzalez was charged as an adult under the automatic waiver statute, MCL 600.606. See *People v Spearman*, 195 Mich App 434, 444-445; 491 NW2d 606 (1992), rev'd in part on other grounds 443 Mich 870 (1993), overruled in part on other grounds by *People v Veling*, 443 Mich 23, 42-43; 504 NW2d 456 (1993); see also *People v Brooks*, 184 Mich App 793; 459 NW2d 313 (1990). We are not persuaded that the rationale in *People v Plummer*, 306 Ill App 3d 574; 714 NE2d 63; 239 Ill Dec 505 (1999), is applicable to Michigan's statutory scheme. *Spearman, supra*.

We note that any unnecessary delay in bringing Gonzalez before a magistrate prior to his statement is still a relevant consideration in determining whether his statement was voluntary. See *Sexton (After Remand), supra* at 753; *People v Cipriano*, 431 Mich 315, 333-335; 429 NW2d 781 (1988). See also MCL 764.13. The evidence at the *Walker* hearing reflected that, while Gonzalez was arrested before the prosecutor's authorization of a formal complaint and warrant to charge him under the automatic waiver statute, the police contacted the prosecutor's office to determine how the prosecutor intended to proceed. The evidence does not reflect that the police attempted to exploit procedural distinctions between juveniles charged as adults by the filing of a complaint and warrant and juvenile proceedings in the family division of circuit court, for purposes of coercing a statement from Gonzalez. Hence, even if some procedural error did occur, the second factor does not weigh in favor of a finding that Gonzalez's statement was the product of police coercion.

With regard to the third factor in *Givans, supra* at 121, concerning whether an adult parent, custodian, or guardian was present, we decline to adopt any prophylactic rule requiring an adult adviser or an opportunity for a juvenile to consult with such an adult before questioning.

Absent a state-based law requiring suppression of a juvenile's statement without such procedures, we adhere to the totality of the circumstances test applicable in this state for determining voluntariness. See *People v Good*, 186 Mich App 180, 188; 463 NW2d 213 (1990), and *People v Inman*, 54 Mich App 5, 7-8; 220 NW2d 165 (1974) (absence of parent, guardian, attorney or adult adviser does not per se require suppression of a statement). See also *In re SLL*, *supra* at 210 (separating a juvenile from a parent is potentially troubling in analyzing the voluntariness of a statement, but does not result in an involuntary statement).

Affording deference to the trial court's determination that Gonzalez did not ask for his parents and the court's other factual findings, and upon conducting an independent review of the voluntariness issue in light of the totality of the circumstances, we are not left with a definite and firm conviction that the trial court erred in finding that Gonzalez's statement was voluntary.

B. Kendrick's Statement

Defendant Kendrick argues that his statement to Detective Matthew Bade should have been suppressed because he invoked his right to remain silent. Giving deference to the trial court's evaluation of the credibility of the witnesses who testified at the *Walker* hearing in finding that Kendrick volunteered to give the statement, we disagree. *In re SLL*, *supra* at 208. The trial court did not err in concluding that Kendrick's right to cut off questioning was scrupulously honored by Detective Bade. *Michigan v Mosley*, 423 US 96, 100-101; 96 S Ct 321; 46 L Ed 2d 313 (1975); *People v Slocum (On Remand)*, 219 Mich App 695, 698; 558 NW2d 4 (1996).

Kendrick also argues that the trial court erred in finding that his statement was knowingly and voluntarily made. We disagree. The trial court did not err in finding that the dialogue between Detective Bade and Kendrick was sufficient to establish Kendrick's understanding of his rights, notwithstanding the evidence regarding Kendrick's Attention Deficit Hyperactivity Disorder. *Daoud*, *supra* at 636. Further, giving deference to the trial court's factual findings, and upon conducting an independent review of the question of voluntariness in light of the totality of the circumstances, we are not left with a definite and firm conviction that the trial court erred in finding that Kendrick voluntarily gave a statement. *Givans*, *supra* at 121. Similar to Gonzalez's claim on appeal, we reject Kendrick's claim that parental presence should be mandated in Michigan.

C. Worden's Statement

Defendant Worden argues that his statement to Detective Elford should have been suppressed because he invoked his right to counsel. Because Worden has not shown that he presented this issue to the trial court, we review this issue under the plain error standards for unpreserved issues. *Carines*, *supra* at 763. In considering this issue, we accept the trial court's factual findings at the *Walker* hearing that Worden told the police that his stepfather told him that he should have an attorney before making a statement and that Worden asked whether he could speak to his parents. *In re SLL*, *supra* at 208; *Head*, *supra* at 209. However, because a reasonable police officer in light of the circumstances could have understood from Worden's statements only that he might be invoking the right to counsel, we do not find it plain that Worden unequivocally invoked his right to counsel. *People v Adams*, 245 Mich App 226, 237-238; 627 NW2d 623 (2001).

Worden also argues that the trial court erred in finding that he voluntarily, knowingly, and intelligently waived his rights to counsel and to remain silent. We disagree. Worden has not shown that the *Miranda* requirements were unsatisfied or that his level of understanding was such that he could not knowingly and understandingly waive his rights. *Daoud, supra* at 636. Although the eleven-year-old defendant's access to his mother was considered a significant factor by the majority in *People v Abraham*, 234 Mich App 640, 651; 599 NW2d 736 (1999), in finding that the defendant knowingly and understandingly waived his rights, giving due deference to the trial court's findings in the case at bar that Worden was a fifteen-year old student in the tenth grade of high school, appeared to be of average intelligence, and clearly understood both his rights and his stepfather's advice, we conclude that Worden's lack of access to his parents does not establish a basis for disturbing the trial court's findings that Worden's waiver of his rights was an understanding one.

Further, upon conducting an independent review of the question of voluntariness in light of the totality of the circumstances, we are not are not left with a definite and firm conviction that the trial court erred in finding that Worden gave a voluntary statement. *Givans, supra* at 121. Contrary to Worden's claim on appeal, the record reflects that the trial court considered his statement to Detective Elford about his stepfather's advice that he obtain an attorney. However, because no one factor is necessarily conclusive on the issue of voluntariness, *Sexton (After Remand), supra* at 753, the trial court appropriately considered Worden's personal awareness of the circumstances for which he was arrested, the brief period of Worden's detention before making a statement, the absence of threats or promises, Worden's understanding of his rights, and other circumstances in determining that Worden's statement was voluntarily made.

Affirmed.

/s/ William B. Murphy
/s/ Mark J. Cavanagh
/s/ Janet T. Neff