

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SHAWN MICHAEL COMMIRE,

Defendant-Appellant.

UNPUBLISHED

January 21, 2010

No. 285696

Bay Circuit Court

LC No. 07-010548-FC

Before: Cavanagh, P.J., and Fitzgerald and Shapiro, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree premeditated murder, MCL 750.316(1)(a), and first-degree felony murder, MCL 750.316(1)(b). Although we find that the trial court erred by denying defendant's first motion to suppress, we conclude after reviewing the record that the remaining evidence was sufficient to convict defendant beyond a reasonable doubt. Accordingly, we affirm.

Defendant's convictions arose out of a midnight home invasion he committed at the age of 16 with his slightly older cousin Robert. Defendant and Robert broke into an elderly woman's home armed with hammers and a knife, and began stealing her possessions. She awoke and called 911. Defendant and Robert attacked her, and the 911 operator heard her say, "I'm dying." The two young men fled to the victim's garage, where the police arrested them. The men had the victim's belongings in their possession, along with a plastic bag containing a knife, the hammers, and latex gloves. The police then found the victim's body. She had sustained more than 30 stab wounds, including several lethal wounds in the neck and chest. In addition, she had multiple lethal skull injuries from blunt force trauma.

The police took both suspects into custody, and began interviewing them in the early morning hours. They interviewed defendant three times, and made video recordings of each interview. In the first two interviews, defendant denied any involvement in the victim's death. In the third interview, the police told him that Robert had admitted stabbing the victim after defendant hit her with a hammer. Defendant eventually acknowledged in the third interview that he hit the victim "once or twice" with a small hammer.

Prior to trial, defendant filed two motions to suppress the interviews. In the first motion, defendant argued that the police had failed to honor his invocation of the constitutional right to silence. The trial court denied the motion, finding that defendant had not invoked the right. The

court noted that even if defendant had invoked a partial right, the police had scrupulously honored that right. In the second motion, defendant argued that the statements made in the second two interviews were involuntary. The trial court found that defendant had voluntarily waived his right to silence, so the court denied the motion to suppress.

Defendant first argues on appeal that the trial court erred by denying his first motion to suppress. We review this argument de novo. *People v Adams*, 245 Mich App 226, 231; 627 NW2d 623 (2001).

Both the United States and the Michigan Constitutions protect defendants against involuntary self-incrimination. US Const, Am V; Const 1963, art 1, § 17; *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966).¹ The *Miranda* warnings are designed in part to ensure that defendants understand this constitutional protection. Even after waiving the *Miranda* rights, a defendant may invoke the right to silence later during a custodial interview. *Michigan v Mosley*, 423 US 96, 102-103; 96 S Ct 321; 46 L Ed 2d 313 (1975). The right to silence enables the suspect to “control the time at which questioning occurs, the subjects discussed, and the duration of the interrogation. The requirement that law enforcement authorities must respect a person’s exercise of that option counteracts the coercive pressures of the custodial setting.” *Id.* at 104. In other words, “a suspect is free at any time to exercise his right to remain silent, and all interrogation must cease if such right is asserted.” *People v Catey*, 135 Mich App 714, 722; 356 NW2d 241 (1984). The determination of whether a statement is admissible if a suspect has opted to remain silent depends upon whether the police “scrupulously honored” the suspect’s “right to cut off questioning.” *Mosley, supra* at 104.

Here, after answering some questions in the first interview, defendant stated, “I don’t even want to talk about all this man. I said my story. That’s all I wanna say.” The interviewing police officer asked, “Do you have anything else to add to it?” Defendant answered, “No, I don’t want nothin else to add to it, nothin else to take it away from it. I’m tight with what I got. I’m straight.” Rather than bringing the interview to a close, the officer immediately asked defendant whether his clothes would have any bloodstains. Defendant responded, and then the interview proceeded.

¹ Pluralities of our Supreme Court have indicated that “the Michigan Constitution imposes a stricter requirement for a valid waiver of the rights to remain silent and to counsel than imposed by the federal constitution.” See, e.g., *People v Bender*, 452 Mich 594, 611; 551 NW2d 71 (1996), citing *People v Wright*, 441 Mich 140, 147; 490 NW2d 351 (1992). However, this Court has stated, “Michigan’s constitutional provision against self-incrimination, Const 1963, art 1, § 17, is construed in line with and no more liberally than the Fifth Amendment of the United States Constitution.” *People v Geno*, 261 Mich App 624, 628; 683 NW2d 687 (2004), citing *Paramount Pictures Corp v Miskinis*, 418 Mich 708, 728; 344 NW2d 788 (1984). The distinction, if any, between the protections of the United States Constitution and the Michigan Constitution are not applicable here, because those distinctions appear to pertain to situations involving the presence of an attorney. See, e.g., *Bender, supra* at 612-613 and *Wright, supra* at 147-148.

At the hearing on the suppression motion, the interviewing officer testified that he interpreted defendant's statements to mean that defendant did not wish to talk about the victim's car. We find this to be a misinterpretation of defendant's statements. By the time defendant stated that he did not want to talk about "all this," the topics under discussion were considerably broader than a potential theft of the victim's car. Moreover, when the officer sought a clarification of defendant's refusal to answer, defendant unequivocally stated that he had nothing more to add. This was an invocation of the right to cut off questioning, and the officer was obligated to close the interview. See *Mosely, supra* at 102-104.

Having found that the trial court erred, we must determine whether the error was harmless beyond a reasonable doubt. See *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). We conclude that it was. If the invalidly obtained interview evidence had been excluded, the prosecutor would have been able to show the jury only the first portion of the first interview. In that portion, defendant acknowledged (1) that his bicycle was by the victim's house; (2) that he and Robert entered the house; (3) that he and Robert were wearing latex gloves in the house so as not to leave fingerprints; (4) that Robert said he thought he killed the victim; and (5) that when he and Robert left the house, defendant was holding a bag that contained hammers and gloves.

In addition to this evidence, a police officer testified that defendant had some of the victim's possessions in his pockets. Further, the victim's DNA was on defendant's jeans and on his belt. Perhaps most damning to defendant, one of the latex gloves contained DNA from the victim and from defendant. This evidence, combined with the testimony from the medical examiner that the victim died from stab wounds and from blunt force trauma to her head, would allow a reasonable jury to conclude that defendant participated in killing the victim during an armed robbery or a home invasion. Therefore, even without the interview evidence, the prosecutor presented sufficient evidence from which a reasonable jury could find defendant guilty of first-degree premeditated and felony murder. Accordingly, we reject defendant's claim that the admission of the interviews into evidence requires reversal.

Similarly, we also reject defendant's contention that the evidence was insufficient to convict him of premeditated murder. The evidence was plainly sufficient to allow the jury to infer that defendant aided and abetted Robert in the murder. Prior to any invocation of the right to silence, defendant acknowledged that he went into the house with Robert. Although defendant claimed that he was with Robert just to "keep him out of trouble," there were at least four facts in evidence to discredit this claim: (1) defendant placed his bicycle by the victim's house earlier in the day; (2) defendant wore latex gloves while in the house; (3) defendant had some of the victim's belongings when the police caught him; and (4) the victim's DNA was on defendant's clothing. The prosecutor thus presented sufficient evidence to allow the jury to determine that defendant aided and abetted in the murder. See MCL 750.316(1)(a); MCL 767.39.

Defendant next argues that the trial court erred by denying his second motion to suppress. We find no error. Voluntariness hinges on whether there is evidence of police coercion. *People v Daoud*, 462 Mich 621, 635; 614 NW2d 152 (2000). Evidence of coercion includes:

[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. [*People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988).]

The record contains no indication of physical abuse or of any threats by the police. Although defendant was age 16, the DVDs of the interviews indicate that he had sufficient intelligence and experience to perceive the gravity of the situation and to understand the *Miranda* warnings. Although defendant indicated in the first interview that he was tired, and in the third interview that he wanted to sleep, his lack of sleep was not overly oppressive under the circumstances. Further, even if sleep deprivation were an issue, it would not outweigh the other factors indicative of voluntariness. Based upon the totality of the circumstances, the trial court was correct to find defendant's statements voluntary.

Defendant also challenges the trial court's decision to admit autopsy photographs into evidence. We review the trial court's evidentiary rulings for abuse of discretion. *People v Washington*, 468 Mich 667, 670; 664 NW2d 203 (2003). We find no error warranting reversal. Defendant's theory of the case was that Robert killed the victim by stabbing her. The photographs were relevant both to the cause of the victim's death and to defendant's knowledge of Robert's intent in the stabbing. We acknowledge that the photographs were prejudicial, but we find nothing in the record to indicate that they were unfairly prejudicial. See *People v Herndon*, 246 Mich App 371, 414; 633 NW2d 376 (2001). The graphic or gruesome nature of autopsy photographs does not warrant exclusion of the photographs from evidence. *People v Unger*, 278 Mich App 210, 257; 749 NW2d 272 (2008).

Lastly, defendant argues that his counsel was ineffective for failing to seek redaction of statements attributed to Robert in the third interview. We disagree. To obtain a reversal based upon ineffective counsel, defendant must establish that counsel's "representation fell below an objective standard of reasonableness." *Strickland v Washington*, 466 US 668, 688; 104 S Ct 2052; 80 L Ed 2d 674 (1984). If counsel's decisions were consistent with a reasonable trial strategy, the representation cannot be deemed ineffective. *People v Rodgers*, 248 Mich App 702, 715; 645 NW2d 294 (2001).

We find that the decision not to seek redaction of the challenged statements was consistent with counsel's strategy, which was to ascribe to Robert all culpability for the victim's death. Given the potency of the evidence against defendant, this was a reasonable trial strategy.

Affirmed.

/s/ Mark J. Cavanagh
/s/ E. Thomas Fitzgerald
/s/ Douglas B. Shapiro