STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRIAN L. MCLEOD,

Defendant-Appellant.

UNPUBLISHED
December 4, 1998

No. 201272
Recorder's Court
LC No. 96-001303

Before: Markey, P.J., and Sawyer and Whitbeck, JJ.

PER CURIAM.

Defendant was charged with two counts of first-degree murder, MCL 750.316; MSA 28.548. Following a bench trial, the trial court convicted defendant of two counts of second-degree murder, MCL 750.317; MSA 28.549. The trial court sentenced defendant to life in prison for each conviction. Defendant appeals as of right. We affirm.

I. Basic Facts

The issues in this case arise primarily from Monica Childs' interrogation of defendant. Childs was a homicide investigator with the Detroit Police Department who was assigned this interrogation on November 22, 1995.[1] Childs testified that she advised defendant of his constitutional rights using the department's standardized form. Defendant had difficulty reading the form, so Childs read the form to him. Defendant then initialed the rights, indicating he understood them.[2]

Defendant did not wish to eat or speak to an attorney. Childs advised defendant that he was a murder suspect. She did not take a formal statement from defendant at this time as she believed he was not telling the truth. Defendant told Childs that he did not want to answer her questions, stating, "I don't want to lie." Defendant also spoke of his dark side and being high. Childs permitted defendant's use of a telephone, as he wished to speak to his mother. Childs' first interview with defendant commenced at 10:35 a.m. and ended at 3:45 p.m., when defendant's mother arrived. Defendant met with his mother outside Childs' presence.

After his mother departed, defendant advised Childs that his mother was sending an attorney and that his mother did not want him to sign anything. Childs then took defendant to the ninth floor of the police station. Defendant indicated that he wished to continue talking, but he apparently spoke more to himself than to Childs. At the conclusion of the interview, Childs turned her notes over to squad six, the group handling the investigation.

On November 24, 1995, defendant called for Childs, who brought him from his cell, apparently to an investigation room. Defendant advised Childs that he wished to talk about what happened. Childs advised defendant of his constitutional rights, and he again indicated he understood these rights. However, defendant did not sign the department's standardized form, apparently based on his mother's advice. Defendant then admitted to killing Helen Thomas and Latisha Thomas. Defendant stated that he had gone to Helen Thomas' apartment to spend the night, that he was high, and that he picked up a pipe and killed Helen Thomas. Defendant further stated that Latisha Thomas woke up, so he killed her as well.[3]

II. Standard Of Review

We do not reverse a trial court's denial of a motion to suppress on appeal in the absence of clear error. "A decision is clearly erroneous if, although there is evidence to support it, the Court is left with a definite and firm conviction that a mistake has been made." *People v Shields*, 200 Mich App 554, 556; 504 NW2d 711 (1993). The legality of an arrest is a question of law. "'Questions of law and questions of the application of the law to the facts receive *de novo* review . . . .'" *People v Barrera*, 451 Mich 261, 269, n 7; 547 NW2d 280 (1996) (citation omitted, emphasis in the original).

III. Suppression Because Of Allegedly Illegal Arrest

Defendant asserts that the trial court erred in failing to suppress his statements to police as probable cause to arrest was not present, resulting in an illegal arrest. We disagree. In reviewing a claim that police lack probable cause to arrest, this Court must:

> ". . . determine whether facts available to the officer at the moment of arrest would justify a fair-minded person of average intelligence in believing that the suspected person had committed a felony. Each case must be analyzed in light of the particular facts confronting the arresting officer." [*People v Oliver*, 111 Mich App 734, 747; 314 NW2d 740 (1981) (citation omitted).]

Where probable cause to arrest is not present, but police have taken the defendant into custody for investigatory purposes, any evidence obtained as a result of that unlawful detention, including any statements, must be suppressed. *People v Lewis*, 160 Mich App 20, 25; 408 NW2d 94 (1987).

Our review of defendant's conduct reveals that the police had probable cause to believe he committed the murders. Defendant was observed at the murder scene during the evening of November 20, 1995. Defendant initially denied having contact with the victims, Helen and Latisha Thomas. He later changed his story to indicate that he had seen them and could describe what Helen Thomas was

wearing at the time of her death. Defendant also acted nervously and blurted out questionable information.[4]

Examining the facts available to police, a fair-minded person of average intelligence would believe defendant was involved in the commission of a felony. As the police had probable cause to arrest defendant, the arrest was not illegal. Therefore, suppression of the statement was unnecessary. *Lewis, supra*. Further, defendant failed to present evidence of the necessary causal connection between his allegedly unlawful detention and his statement such as to warrant suppression. *People v Spinks*, 206 Mich App 488, 496; 522 NW2d 875 (1994); see also *People v Lumsden*, 168 Mich App 286, 294; 423 NW2d 645 (1988). Therefore, the trial court did not err in denying defendant's motion to suppress.

IV. Alleged Violation Of MCL 764.13; MSA 28.871(1)

Defendant asserts that his confession was obtained when police violated MCL 764.13; MSA 28.871(1), which provides that a person arrested without a warrant shall be taken before a magistrate without unnecessary delay. Defendant contends the police used the delay to coerce a confession from him. We disagree. When reviewing an appeal from a *Walker* hearing, this Court will examine the entire record and determine independently whether the defendant's statements were voluntary. We will affirm the trial court unless the ruling is clearly erroneous. *People v Leighty*, 161 Mich App 565, 569; 411 NW2d 778 (1987).

In *People v Cipriano*, 431 Mich 315, 334-335; 429 NW2d 781 (1998), the Supreme Court set forth the following test to determine the voluntariness of a statement where there is a prearraignment delay:

> In determining whether a statement is voluntary, the trial court should consider, among other things, the following factors: the 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.
>
> The absence or presence of any one of these factors is not necessarily conclusive on the issue of voluntariness. The ultimate test of admissibility is whether the totality of the circumstances surrounding the making of the confession indicates that it was freely and voluntarily made. Unnecessary delay is one factor to consider in reaching this conclusion, the focus being not just on the length of delay, but rather on what occurred during the delay and its effect on the accused.

> In relegating prearraignment delay to its status as one of several factors to be considered in judging the voluntariness of a confession, we do not condone the failure of the police to comply with the statutes. An arrested suspect should not be subjected to prolonged, unexplained delay prior to arraignment; and such delay should be a signal to the trial court that the voluntariness of a confession obtained during this period may have been impaired. However, we hold that an otherwise competent confession should not be excluded solely because of a delay in arraignment. [Citations omitted].

The trial court afforded defendant the opportunity to present evidence of the involuntariness of his confession. However, defendant did not testify at the *Walker* hearing. Defendant was thirty-one years old at the time of the offense. While defendant had difficulty reading the advice of rights form, he indicated that he understood his rights when Childs read them aloud. Additionally, defendant had prior experience with the criminal justice system as he was on parole for an offense in North Carolina. The questioning was not repeated and prolonged. Childs testified that the interview commenced in the morning and ended in the afternoon. However, she testified that an interrogation did not occur the entire time that defendant was with her. Rather, she permitted defendant to make telephone calls and even made calls on his behalf. After defendant met with his mother, defendant was to be returned to the ninth floor. However, he indicated that he wanted to speak with Childs. Defendant sat with Childs but seemingly spoke aloud to himself. Our review of the record convinces us that this statement, such as it was, was voluntary.

Defendant asserts that his second, and inculpatory, statement was involuntary because Childs conducted an interview three and one-half days after his mother indicated an attorney would be secured. The assertion is not substantiated by the record. The record indicates that defendant was not taken for questioning in violation of his right to counsel but rather that defendant himself *initiated* the conversation. In *People v Bender*, 452 Mich 594, 620-623; 551 NW2d 71 (1996), the Supreme Court adopted, as a prophylactic rule, that a defendant's statement to police will be suppressed where the police knowingly fail to inform the defendant that an attorney has been retained for the defendant. Here, there is no record of counsel being retained for defendant. Accordingly, defendant's contention that the police violated his right to counsel is unsupported. Further, the *Bender* prophylactic rule is inapplicable to defendant's statement here because the statement was made before July 23, 1996 (the date of the *Bender* opinion). *People v Sexton*, 458 Mich 43, 69; 580 NW2d 404 (1998).

We note that in *People v McElhaney*, 215 Mich App 269, 274; 545 NW2d 18 (1996), this Court held that where an accused chooses to initiate communications, the accused must be sufficiently aware of his Fifth and Sixth Amendment rights to make a voluntary, knowing, and intelligent waiver of such rights. Our review of the record reveals defendant voluntarily waived his rights, as Childs advised him of his rights on two occasions and as defendant himself initiated the confession. Pursuant to *McElhaney, supra*, we hold the trial court did not clearly err in admitting the confession.

V. Alleged Police Misconduct

In his brief on appeal, defendant submits various newspaper articles which report that members of the Detroit Police Department's homicide unit have been accused of improper conduct. Defendant

raises this issue for the first time on appeal, contending his constitutional

rights were violated. Therefore, we consider this issue for the first time on appeal. *People v Grant*, 445 Mich 535, 546-547; 520 NW2d 123 (1994). Our review of the articles reveals that there have been no allegations of impropriety against Childs. In fact, the articles indicate that Childs reported allegedly improper activity by her peers to prosecutors and superiors. Additionally, defendant did not present evidence of impropriety at the *Walker* hearing. *Walker, supra*. Accordingly, we hold that remand for an evidentiary hearing is unnecessary.

Affirmed.

/s/ Jane E. Markey
/s/ David H. Sawyer
/s/ William C. Whitbeck

[1] On defendant's motion, the trial court held a *Walker* hearing, *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965), concerning this interrogation. Childs testified to the basic facts of the interrogation as set out above.

[2] Defendant advised Childs of a prior offense in another jurisdiction for which he was on parole. Therefore, he was familiar with *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966) when he signed the form.

[3] At trial, Richard Ivy, homicide investigator for the Detroit Police Department, testified that he arrived at 21510 West Seven Mile, apartment 110, on November 21, 1995, and that he discovered the bodies of Helen and Latisha Thomas in the northwest bedroom. Ivy also testified that a neighbor identified defendant as the person who had been knocking on the window and the apartment door the previous evening. Defendant arrived at the scene of the murder while Ivy was interviewing the neighbor; ultimately defendant went to the police station where Ivy placed him under arrest.

[4] For instance, defendant told Childs that he was on parole and had only recently returned to Michigan.