STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED October 25, 2012
v	No. 308399 Alger Circuit Court
MOHAMMED EL FECHTALI, Defendant-Appellee.	LC No. 11-001977-FC

Before: MURPHY, C.J., and SAWYER and HOEKSTRA, JJ.

PER CURIAM.

In this interlocutory appeal, the people appeal by leave granted the trial court's suppression of statements made by defendant during a police interview. We reverse and remand for additional proceedings consistent with this opinion.

I. BACKGROUND

Defendant is 40 years old and lives in Montreal, Quebec, Canada. Originally from Morocco, defendant moved to Canada in 2003 and obtained Canadian citizenship in 2007. He speaks French fluently as a second language and English is his third language. He has a Bachelor of Arts degree in English with an "option" in linguistics from a university in Morocco.

Defendant was charged with and bound over on charges of attempted kidnapping-child enticement, MCL 750.350, and accosting and soliciting a child for immoral purposes, MCL 750.145a. Relevant to this appeal, the complainant told her stepfather about certain interactions she had with defendant, who in turn contacted Munising City Police Chief John Nelson about the encounter. Nelson put out a be-on-the-lookout message for a dark-colored two-door sedan with a Canadian license plate, driven by a Latino or Mexican male. Michigan State Police Troopers Thomas Nolan and William Crisp found defendant in the Seney area around 5:30 p.m. The troopers and defendant dispute the tenor of the stop and whether defendant was asked or ordered to do a variety of things. However, they do not dispute that defendant was pulled over and approached by the troopers, that defendant got out of his car and was frisked for weapons with his hands held behind his back, that he remained outside his car for 10 to 20 minutes, that he was given his hat and gloves after he requested them, and that he moved his car to a different location and accompanied the troopers back to the Munising police station to answer questions.

According to the troopers, they advised defendant that they were doing an investigative stop, that there had been inappropriate action with a young girl in Munising, and that he closely resembled the description given by the complainant. They maintain that they asked defendant to exit his vehicle and step to the rear for questioning. They denied ever raising their voices. They asserted that after a frisk revealed that defendant had no weapons, the discussion was conversational. They acknowledged that they ordered him not to move from between the cars, but said they did so to prevent him from wandering into traffic. The troopers assert that they asked whether defendant would accompany them to the police station for questioning, and he was "very willing." They say they offered to let him drive his own car, but indicated they thought their four-wheel-drive vehicle was safer given the weather conditions. Defendant agreed to ride with them back to the station and he chatted amiably with them the entire ride there.

Both troopers testified that each had advised defendant that he was not under arrest and that he was free to leave. Nolan testified that he remembered talking to defendant during the ride, telling "him that he was not under arrest and ma[d]e sure that he understood that and that . . . this was a voluntary ride."

Defendant presents a different picture of his interaction with the police. According to defendant, after he was pulled over, the troopers approached his car with their hands on their guns. He said they yelled at him to get out of the car, and Nolan asked whether he tried to kidnap a girl. Defendant said Nolan put his hand on him and held his arm tight. He claimed the troopers shined their spotlights on him so he could not see, and told him to not move. He also indicated that the troopers did not initially respond when he asked for his hat and gloves as he stood behind his car for 10 to 15 minutes in the snow. Defendant denies the troopers ever told him he was free to go, and in fact told him he had to go back with them for questioning. He said they ordered him to move his car and to ride back to Munising with them.

When they arrived at the police station, the troopers and defendant entered through the main door. Nelson took defendant to an interview room and asked him to have a seat. The interview room was part of the public portion of the building. There is no lock on the interview room door, and the building can be exited at any time. Nolan and Crisp remained at the station, but they were not involved in defendant's interview. No fingerprinting or photographing took place.

Nelson stated that he and defendant talked from about 6:40 p.m. to 10:00 p.m. Nelson testified that he told defendant both before the initial interview and between the interview and the interrogation that he was not under arrest. Nelson said the door to the interview room was closed, but not "all the way." According to Nelson, defendant left the room at one point to use the restroom and get some water. He also took his cell phone out of his coat pocket on several occasions and, at least once, appeared to be texting someone. Nelson maintained that defendant initially denied any contact with a girl in Munising, but later admitted the contact, and explained that he was hoping for consensual sexual contact with the girl, who he thought was 22 or 24 years old.

Defendant testified that when they arrived at Munising, Nelson met them at the door and told him that he was not under arrest, but he did not believe it. Defendant indicated that no one ever told him he was free to leave. He said that he was taken to a small room, where he was left

alone many times. He also said that the lights went out for 10 to 15 minutes. According to defendant, he was scared that he would be tortured, particularly when Nelson told him that there was an "agent" outside who was "itching to come in and work on this." He said that he told Nelson what he thought Nelson wanted to hear. According to defendant, he "was scared to death."

Defendant moved to suppress his statements in circuit court, and a *Walker*[1] hearing was held. During the hearing, a DVD of the police interview was played in court. The interview reflects a gradual change in defendant's story from denying that he stopped to ask directions in Munising to admitting an innocent contact, to confessing a desire for a consensual sexual contact. The interview also reveals a gradual change in defendant's behavior. In the beginning he appears quite casual and relaxed. Later, however, defendant cries and essentially begs Nelson to help him.

After viewing the DVD and hearing testimony from Nelson, Nolan, Crisp, and defendant, the trial court took the motion under advisement and, ultimately, granted the motion to suppress. The people filed an application for leave to appeal the trial court's order granting defendant's motion to suppress, which this Court granted. *People v El Fechtali*, unpublished order of the Court of Appeals, entered June 26, 2012 (Docket No. 308399).

II. STANDARD OF REVIEW

> "The ultimate question whether a person was 'in custody' for purposes of *Miranda*[2] warnings is a mixed question of fact and law, which must be answered independently by the reviewing court after review de novo of the record." This is so because an "in custody" determination calls for application of the controlling legal standard to the historical facts. Findings concerning the circumstances surrounding the giving of a statement are factual findings that are reviewed for clear error. A finding 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. [*People v Coomer*, 245 Mich App 206, 219; 627 NW2d 612 (2001), quoting *People v Mendez*, 225 Mich App 381, 382; 571 NW2d 528 (1997) (citations omitted).]

III. ANALYSIS

Plaintiff argues that the trial court erred in concluding that defendant was in custody during his interview.

> "It is well settled that *Miranda* warnings need be given only in situations involving a custodial interrogation. *People v Anderson*, 209 Mich App 527, 532; 531 NW2d 780 (1995). The term 'custodial interrogation' means '"questioning

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

[2] *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

> initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of [her] freedom of action in any significant way."' *People v Hill*, 429 Mich 382, 387; 415 NW2d 193 (1987), quoting *Miranda*, 384 US at 444. To determine whether a defendant was in custody at the time of the interrogation, we look at the totality of the circumstances, with the key question being whether the accused reasonably could have believed that she was not free to leave. *People v Roark*, 214 Mich App 421, 423; 543 NW2d 23 (1995). 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. *Stansbury v California*, 511 US 318, 323; 114 S Ct 1526; 128 L Ed 2d 293 (1994)." [*Coomer*, 245 Mich App at 219-220, quoting *People v Zahn*, 234 Mich App 438, 449; 594 NW2d 120 (1999), lv den 461 Mich 873 (1999) (alteration by *Coomer*).]

Looking first at the trial court's findings of fact, generally, "if resolution of a disputed factual question turns on the credibility of witnesses or the weight of the evidence, [this Court] will defer to the trial court, which had a superior opportunity to evaluate these matters." *People v Sexton* (*After Remand*), 461 Mich 746, 752; 609 NW2d 822 (2000); see also MCR 2.613(C) (cautioning that review of a court's factual findings must give "regard . . . to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it"). However, where there exists an indication that the trial court clearly erred in making its findings of fact, no such deference is required and the findings may be set aside. MCR 2.613(C).

After reviewing the record, we conclude that the trial court clearly erred with respect to multiple findings of fact. First, the trial court concluded that "[a]t no time did the Defendant attempt to leave, ask to leave, or give any indication that he thought he was free to leave. He remained seated throughout the entire interview/interrogation process." It is not clear whether the court was concluding that defendant never asked to leave the police station, but it is clear that defendant requested to use the restroom, left the interview room for a period of time, returned to the interview room unaccompanied, and proceeded to kneel down and pray in the corner before sitting himself back in his chair.

Likewise, the trial court stated that defendant was kept outside his car "for a considerable period of time, without jacket or gloves." Defendant's testimony was that he was kept outside without gloves or hat, but no one testified that defendant did not have his jacket.

The trial court also found that "[t]hroughout the interview it is apparent that [defendant] is struggling to understand the nature of the questioning, in large part, in the Court's opinion, due to his lack of understanding of our language, its phrases, jargon, or nuances." The record does not support this conclusion. Although there were certainly some words that defendant did not understand, each time defendant asked what a word meant, Nelson was able to describe it in a manner that defendant apparently could understand. Further, defendant immediately understood the term "hooking up" when it was used, which indicates he has a greater comprehension of the English language than the trial court gave him credit for. He also appeared to understand the terms "vouch" and "pervert." The trial court relied in part on defendant's testimony that he did not know the term "grab" until Nelson explained it to him. However, during the interview, Nelson first uses the term "grab" without defendant displaying any confusion or asking its

meaning and, moments later, defendant spontaneously used the term himself in a completely different context, all without any explanation of what it meant.

In addition, the trial court's acceptance of defendant's statement that he was generally scared of police interaction and was specifically scared in this situation was based on testimony that was either internally inconsistent, or contradicted by what defendant told Nelson during the taped interview. For example, defendant told Nelson that when Crisp and Nolan checked him for weapons, they "explain[ed] to me they are there doing their job" and that he was not scared and took "it normal." He told Nelson that he "was laughing when he doing like that to me [frisking him] because I did—I did nothing." Defendant indicated that the troopers asked him questions such as why did he stop and why was he in Saskatchewan and he told them he was there for interviews. Defendant then told Nelson that he joked with the officers who were checking his car at the border and told one of them "can I give you, since I'm looking for a job, can I give you my resume so that I can speak Arabic and French. If you have some criminal Arabic, I can speak to them in Arabic. I can really help" Defendant also stated that unlike at the border, Nelson's "colleague" treated him "nice, with respect." And when Nelson asked if he was scared or nervous about Nelson talking to him, defendant said that he was "not scared because I know I don't even think of kidnapping somebody."

However, once Nelson told defendant that they knew he had talked with the complainant and asked why he had lied about not talking with her, defendant said he was "really scared" when the troopers got him out of his car. He complained that he was never treated so poorly in his life and he was very scared and denied that the troopers were good to him. Defendant denied telling Nelson that the troopers had treated him well and declared that it was "tough in the beginning." He further alleged that he was badly treated at the border crossing and that he was scared because he resembled an Arab Yemeni that was on a wanted poster there.[3]

Looking at the record as a whole, we conclude the trial court reached multiple erroneous findings that were predicated on inconsistent and contradictory testimony offered by defendant at the *Walker* hearing.[4]

Turning to the trial court's conclusions of law, we also find multiple errors. First, the trial court utilized the standard for voluntariness instead of custody in making its determination. Although the trial court properly noted that whether a defendant is in custody is determined by

---

[3] On a related note, it also appears that the trial court misunderstood plaintiff's argument regarding the comparison of United States and Canada law enforcement. Plaintiff was not arguing that the proximity of the United States to Canada would give defendant a "working knowledge of the laws of this county," as the court concluded. Rather, plaintiff was arguing that defendant's eight years in Canada would have exposed him to a system of law similar to ours in the respect that it is not filled with the corruption and brutality defendant claims exists in the Moroccan police and court systems.

[4] In addition, throughout much of the interview, including when the motion lights went out, defendant appears relaxed, which belies his testimony that he was scared during the interview.

looking at the totality of the circumstances, the factors it considered were the voluntariness factors and, indeed, it cited *People v Cipriano*, 431 Mich 315; 429 NW2d 781 (1998)—a voluntariness case.

As noted above, the "key question" of whether a person is in custody is whether defendant reasonably could have believed that he was not free to leave. *Coomer*, 245 Mich App at 219. Furthermore, because "[t]he determination of custody depends on the objective circumstances of the interrogation rather than the subjective views harbored by . . . the person being questioned," *id.* at 219-220, defendant's statements that he did not believe the officer's statements that he was not under arrest are irrelevant to this determination. Accordingly, even if defendant's testimony was credible, the trial court erred by giving any weight to defendant's subjective beliefs.

The trial court also concluded that the roughly three-and-a-half-hour interview was "prolonged." However, lengthy interviews do not necessarily render a person in custody. Likewise, the fact that the interview was conducted by a police officer in a police station was also not dispositive of defendant being in custody. *People v Mendez*, 225 Mich App 381, 383-384; 571 NW2d 528 (1997).

> "Any interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime. But police officers are not required to administer *Miranda* warnings to everyone whom they question. Nor is the requirement of warnings to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect. *Miranda* warnings are required only where there has been such a restriction on a person's freedom as to render him 'in custody.' It was *that* sort of coercive environment to which *Miranda* by its terms was made applicable, and to which it is limited." [*Id.*, at 383-384, quoting *Oregon v Mathiason*, 429 US 492, 495; 97 S Ct 711; 50 L Ed 2d 714 (1977) (emphasis in *Mathiason*).]

The trial court noted that although the troopers testified that they had repeatedly told defendant he was not under arrest and was free to leave, "no confirmation of this fact is available, as no video or audio equipment was affixed to the patrol vehicle in use at the time of this stop" and that "[t]here is no verifiable statement that [defendant] was told he was free to go." Certainly, the trial court was free to disbelieve the troopers. However, there is no constitutional right to a recorded interview. *People v Fike*, 228 Mich App 178, 183-185; 577 NW2d 903 (1998). Further, because there was no video equipment on the vehicle, the lack of any video does not reach the level of an adverse inference. See *People v Davis*, 199 Mich App 502, 514-515; 503 NW2d 457 (1993), overruled in part on other grounds by *People v Grissom*, ___ Mich ___; ___ NW2d ___ (Docket No. 140147, decided July 31, 2012). Finally, triers of fact are always instructed that, if believed, one person's testimony, without corroboration, is sufficient. See *People v Smith*, 205 Mich App 69, 71; 517 NW2d 255 (1994) (holding that belief in the victim's testimony alone was sufficient to uphold a conviction).

Assuming that the trial court cited the lack of a recording as support for discrediting the troopers' testimony that they told defendant he was free to leave, there is no requirement that a defendant be told explicitly that he is free to leave for him to be considered not in custody. It is, however, one circumstance to consider in the calculus of the totality of the circumstances.

Ultimately, the troopers' repeated statements that defendant was free to leave and not under arrest, defendant's presence in an area of the police station generally open to the public and in a room that did not lock, defendant's freedom of movement at all times, and his ability to use his cell phone at any time, all belie the trial court's conclusion that defendant was in custody.

Although both parties address the voluntariness of defendant's statements, the trial court has not explicitly decided this issue and we decline to make such a determination in the first instance. Instead, on remand we direct the trial court to consider whether defendant's statements were voluntary in light of the above holdings.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Joel P. Hoekstra