STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 12, 2013
v	No. 304936 Genesee Circuit Court
GARY LEE ROBINSON, Defendant-Appellant.	LC No. 10-026762-FC

Before: FORT HOOD, P.J., and FITZGERALD and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant, Gary Lee Robinson, appeals as of right his jury trial convictions of first-degree murder, MCL 750.316(1)(a), felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Robinson was sentenced to life in prison on the first-degree murder conviction, 24 to 60 months' imprisonment for the felon in possession of a firearm conviction, and two years in prison for the felony-firearm conviction. This case arises from the murder of Gregory Ingram, Jr. on February 26, 2010, in Flint, Michigan. Robinson was tried with his co-defendants, Dequeze Dixon and Calvin LeSears, before separate juries. Dixon and LeSears appeal separately in Docket Nos. 305185 and 305314, respectively. We affirm.

The primary witness was Jason Sutton, who was present during the murder but uninvolved. He testified that he knew Robinson and Dixon already at the time, but he discovered LeSears's identity later. Sutton testified that he was picked up by defendants while walking home. Dixon was driving a vehicle owned by his girlfriend, Devonda Jiles. Either Dixon or Robinson told Sutton, "If we didn't know who you was, we were going to get you." They drove past the victim, at which point Dixon said, "There's Greg, let's get on him." Robinson got out of the car first, and then Dixon turned the car around and parked, whereupon Dixon and LeSears also got out. Sutton remained in the vehicle using his telephone.

Sutton testified that he heard a barrage of gunfire from multiple guns: an assault rifle, a shotgun, and a handgun. He saw all three defendants outside shooting the victim. A medical examination would later identify the victim's cause of death as multiple gunshot wounds from at least three different kinds of guns. When defendants returned to the vehicle, Sutton observed Robinson with an assault rifle, Dixon with a shotgun, and LeSears with a handgun. Dixon advised Sutton that they would kill him if he told anyone about the events of the evening. They

then dropped Sutton off at his house. Sutton continued to associate with defendants out of fear that they would believe he had told authorities about the shooting. A few weeks later, Sutton was again in the same vehicle with Dixon and Sutton's cousin, when police attempted to pull the vehicle over, apparently for unrelated reasons. All of the occupants jumped out and fled; Sutton was the only one apprehended. He was taken into custody for fleeing and eluding, and Jiles's car was impounded.

When Jiles discovered that her car had been impounded, she falsely informed 9-1-1 and a police officer that her vehicle had been stolen. While incarcerated, Sutton asked to talk to the police about the victim's murder. After Sutton was interviewed, Robinson was arrested two days later, and Dixon was arrested later that same day. Sutton subsequently picked LeSears out of a photographic lineup as the third individual, asserting that he was about 80 percent certain. LeSears was arrested about a month later for an unrelated matter, after which Sutton identified LeSears with certainty out of a physical lineup.

Defendant Robinson was interviewed several times by the police, and defendant contends that his inculpatory statements were inadmissible because they were involuntary. We disagree. We review a trial court's ultimate decision on a motion to suppress de novo, but we review the court's factual findings for clear error. *People v Elliott*, 295 Mich App 623, 631; 815 NW2d 575 (2012). The trial court held a *Walker*[1] hearing and reviewed the video recording of defendant's interviews. At the hearing, defendant was read his *Miranda*[2] rights, and defendant waived those rights. The interviewing officer asked defendant some preliminary questions to establish defendant's identity and coherence. The first interview lasted approximately three hours and ended when defendant "denied any knowledge of the homicide, stated that he wasn't involved." Although defendant placed his head down on the table and appeared tired, defendant continued to be questioned. At the end of that interview, defendant was returned to a holding cell.

Defendant was given some food and was interviewed a second time after the police continued their investigation and obtained more information. Defendant was not re-read his *Miranda* rights, but he was advised that he was still under arrest and he verified that he recalled and understood his rights. Robinson was specifically asked about the homicide and informed that Dixon had been arrested. Defendant stated, "I'm done, I got nothing to say." The police continued to question defendant, noting that Dixon and Sutton had both given statements that Robinson participated in the homicide. Defendant did not specifically ask to terminate the questioning or request an attorney, but he eventually said, "I'm ready to go and I'm done with it." The interview was terminated after less than half an hour, after which an evidence technician took defendant's shoes into evidence.

Later that night, while the police officer was interviewing Dixon, Robinson asked to talk to the police officer. Robinson confirmed that he understood his rights and made an inculpatory statement regarding his involvement in the Ingram homicide and verbally provided a statement

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

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

that was written out by the interviewing officer. Robinson then added information pertaining to the location of the gun used during the homicide, indicated his willingness to take police to the location, and signed the statement. In his own hand, Robinson also wrote out apologies to the prosecutor and Ingram's aunt. Following an inquiry regarding his treatment, Robinson agreed to write down that he had been treated fairly.

The interviewing officer testified at the *Walker* hearing that Robinson had never requested an attorney or to stop the interviews. He acknowledged that he was not always truthful with Robinson during the interviews, in part, suggesting that Dixon and Sutton had "put it all on him." He also acknowledged the possibility that he raised his voice during the interview. He opined that a suspect's indication that he refused to answer a specific question did not require termination of the interview. After reviewing the video recording of the interview, the trial court denied Robinson's motion to suppress his statement, finding the reminder of his rights, as opposed to completely re-reading him his *Miranda* rights, was sufficient, particularly given that the third interview occurred on Robinson's request.

At issue is whether "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 Cipriano*, 431 Mich 315, 333-334; 429 NW2d 781 (1988) (citation omitted). There is no dispute that defendant was in custody and under arrest, so his interrogation was "custodial" and subject to the requirement that he must be advised of his rights prior to questioning. See *Elliott*, 295 Mich App at 631-632. However, "[t]he police are not required to read *Miranda* rights every time a defendant is questioned." *People v Littlejohn*, 197 Mich App 220, 223; 495 NW2d 171 (1992), citing *People v Godboldo*, 158 Mich App 603, 605; 405 NW2d 114 (1986) (footnote omitted). The delays between the reading of defendant's rights and his subsequent interviews were not substantial, there was no evidence defendant was impaired or incompetent, and defendant confirmed that he still understood his rights. His final interview was, in fact, at his own initiative.

To determine whether a defendant's statement was voluntary the totality of the circumstances are to be considered, including:

> 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. [*Cipriano*, 431 Mich at 334.]

The voluntariness of a defendant's statement is evaluated by an examination of the conduct of the police. *People v Tierney*, 266 Mich App 687, 707; 703 NW2d 204 (2005). "[T]he voluntariness prong cannot be resolved in defendant's favor absent evidence of police coercion or misconduct." *People v Howard*, 226 Mich App 528, 543; 575 NW2d 16 (1997). "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 fact that the police were untruthful to defendant can influence whether a defendant's statement is voluntary, but will not necessarily render an otherwise voluntary statement involuntary. *People v Hicks*, 185 Mich App 107, 113; 460 NW2d 569 (1990). The police may use psychological tactics in conducting the interrogation of a suspect. *Haynes v Washington*, 373 US 503, 514-515; 83 S Ct 1336; 10 L Ed 2d 513 (1963). Here, although the police lied that Dixon *and* Sutton had *both* implicated Robinson, the statement was actually accurate as to Sutton. Consequently, it was at least broadly truthful to tell defendant that the police had evidence from witnesses against him. Furthermore, suggesting that defendant may have had lesser culpability is hardly the kind of tactic that would undermine an interviewee's free will. Significantly, defendant's third interview was at his *own* initiative. The evidence was that defendant was supposed to have been transported back to jail after the second interview, but the transport was delayed. There is no indication that police continued any form of interaction with Robinson that improperly influenced his election to initiate the third interview or affected its voluntary nature.

Robinson also contends that the length of time he was subjected to interrogation, from the time of provision of his *Miranda* rights, should be considered in determining the voluntary nature of his confession. We agree, but we find no extraordinarily time periods here. He was in custody for approximately 17.5 hours from the time of his arrest until the conclusion of his third interview and spent a total of just over five and a half hours being interviewed. He was fed and offered a beverage, and although he only received one meal, there is no indication that he requested and was denied any other sustenance. In fact, Robinson wrote out a statement, which has not been contradicted, indicating he was treated fairly and not substantially deprived of necessities, such as food and water, while in custody.

Finally, Robinson does not contend that he ever requested counsel to be present. While his statements near the conclusion of the second interview suggest he did not wish to continue the interrogation, asserting he was ready to go to the county jail, those statements do not serve to contradict the voluntary nature of his third interview. First, the statements by Robinson occurred at 8:26 p.m., only eight minutes before the interview was in fact concluded. Second, Robinson did not confess during this second interview. Thus, even if the failure of police to halt the interview is deemed improper, there is nothing inculpatory to suppress. Third and finally, it cannot be stressed enough that Robinson initiated the third interview, precluding the implication that his statement to police during that interview was involuntary. None of the factors relied on by Robinson are sufficient, individually or in conjunction, to demonstrate that Robinson was so overcome that he was incapable of making a voluntary decision to confess.

Next, Robinson asserts that the closing of the courtroom to the public violated his constitutional right to a public trial. We agree. The federal and Michigan constitutions afford a criminal defendant a right to a public trial. US Const, Ams VI and XIV, and Const 1963, art 1, § 20. However, although a courtroom open to public scrutiny helps insure that a criminal defendant will be given a fair trial, *Waller v Georgia*, 467 US 39, 46; 104 S Ct 2210; 81 L Ed 2d

31 (1984), the right to a public trial is not absolute. *Id*. at 45. Significantly, the right to a public trial must be asserted; because defendant neither objected nor asserted his right to a public trial, our review is for plain error affecting defendant's substantial rights. *People v Vaughn*, 491 Mich 642, 653-664; 821 NW2d 288 (2012). Not only must defendant establish that an error plainly occurred, but "that the error either resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of the proceedings." *Id*. at 664-665, citing *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

At the beginning of Sutton's testimony, the judge heard a ringing telephone in the courtroom and stated:

> Who's got the ringing phone? Whoever's got it better give it up or I'm going to kick everybody out of the courtroom. Who's got the ringing phone? Okay, everybody leave the gallery. You're gone. Everybody's gone.

The courtroom was then cleared. When counsel requested to approach, the following interaction transpired:

> *The Court:* This is my courtroom, sir. Everyone will leave.
>
> *Dixon's Counsel:* No. I'm not-I'm not-that's not my concern. I don't care who's in the gallery. That's not my concern.

The court conducted a bench conference with counsel for approximately two minutes before Sutton's testimony resumed. It appears that no spectators were permitted to re-enter the courtroom that day, although it also appears that a representative from the media, who had previously requested and obtained permission to video record Sutton's testimony, was permitted to continue to do so. On the next day of trial, the restriction regarding spectators was not implemented based on the trial court's permission to counsel to open the courtroom despite the lack of seats available, presumably due to the presence of three juries.

In our view, the trial court's reaction was extreme and excessive; justice is better served by a calmer and more measured response. However, it appears on balance that the trial court's closure was less "to exclude the public, but to control courtroom distractions." *People v Bails*, 163 Mich App 209, 211; 413 NW2d 709 (1987). In any event, none of the defendants objected to the closure, so even if we were—hypothetically—to conclude that the closure was plainly erroneous, reversal would only be warranted of the closure *also* affected defendant's substantial rights. We find no indication that Robinson is actually innocent, especially considering his confession. Because the courtroom closure has not been demonstrated to have impacted the ability of counsel to examine the witness thoroughly or in any manner "seriously affect[] the fairness, integrity, or public reputation of [the] judicial proceedings," Robinson cannot demonstrate entitlement to a new trial. *Carines*, 460 Mich at 774.

Finally, Robinson contends that his trial counsel was ineffective for failing to object to the closure of the courtroom to the public. We disagree. Because defendant did not seek a

Ginther[3] hearing, we review only mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). "In order to obtain a new trial, a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness and (2) but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different." *People v Trakhtenberg*, 493 Mich 51; 826 NW2d 136 (2012). As discussed, we perceive no reason why the outcome of the proceedings would have been different had the courtroom not been closed, so we are unable to conclude that counsel's failure to object to that closure could have affected the outcome. Furthermore, given the importance of Sutton's testimony and the fact that the atmosphere in the courtroom was apparently tense—and had already been seriously disrupted the previous day—we are unable to say that it was unsound strategy for counsel to decline to object to the closure. "This Court does not second-guess counsel on matters of trial strategy, nor does it assess counsel's competence with the benefit of hindsight." *People v Russell*, 297 Mich App 707, 716; 825 NW2d 623 (2012).

Affirmed.

/s/ Karen M. Fort Hood
/s/ E. Thomas Fitzgerald
/s/ Amy Ronayne Krause

[3] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).