

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JASON GALLOWAY,

Defendant-Appellant.

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UNPUBLISHED

August 2, 1996

No. 176525

LC No. 93-12077

Before: Gribbs, P.J., and Saad and J. P. Adair,\* JJ.

PER CURIAM.

Defendant was convicted by a jury of involuntary manslaughter, MCL 750.321; MSA 27.4071, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to consecutive sentences of two years' imprisonment for the felony firearm conviction, and eight to fifteen years' imprisonment for the involuntary manslaughter conviction. We affirm.

Defendant first asserts three bases upon which he contends that the lower court erred in admitting into evidence a statement he made to police a short time after the shooting. Initially, defendant states that the lower court improperly shifted the burden of proof onto the defendant to show coercion, rather than requiring the prosecution to show voluntariness, pointing to a statement made by the court that it was "not convinced that this statement was coerced." We disagree. The question of whether a defendant's confession is voluntary is for the court to decide by examining all of the facts and circumstances surrounding the making of the statement. *People v DeLisle*, 183 Mich App 713, 718; 455 NW2d 401 (1990); *People v Spinks*, 184 Mich App 559, 563; 458 NW2d 899 (1990). The burden is on the prosecutor to prove voluntariness by a preponderance of the evidence. *DeLisle, supra*, 183 Mich App 718. Viewing the lower court's findings as a whole, and particularly noting the court's summation of the prosecution's proofs of voluntariness, it is clear that the court did not shift the burden of proof.

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\* Circuit judge, sitting on the Court of Appeals by assignment.

Defendant also contends that his confession should be excluded as the trial judge failed to use the proper legal factors in assessing whether the statement was voluntary. We find this contention to be erroneous. This Court has laid out the factors to be considered when testing a juvenile's confession for voluntariness in *People v Good*, 186 Mich App 180, 189; 463 NW2d 213 (1990). In this case, at a two-day *Walker*<sup>1</sup> hearing, brought pursuant to defendant's motion to suppress the statement, three police officers testified, stating that defendant was sixteen years old, just three weeks short of his seventeenth birthday, when he was interviewed for a total of approximately two hours. Prior to being interrogated, defendant was given his rights. Defendant specifically stated that he understood his rights, and initialed them individually. The officers testified that defendant never asked to talk to an attorney or speak with his mother. Although defendant testified that he asked to speak with his mother and was told that she had been called or was being notified, he never asserted that at the time of questioning he was injured, intoxicated, in ill health, deprived of food, sleep or medical attention.

In making its ruling on admissibility, the court summarized the testimony of all of the witnesses. As the testimony presented evidence on all of the factors outlined in *Good, Id.*, and as the trial judge incorporated this testimony into her ruling, it can be inferred that the lower court used the proper legal factors in determining that defendant's statement was voluntary.

In addition, defendant contends that even if his statement was otherwise voluntary, as a matter of law it should have been suppressed because he was a juvenile and requested to speak with his mother, which is comparable to an adult's invocation of his rights to silence and to counsel. We do not address this question as the clear inference from the testimony presented at the hearing and the judge's ruling is that the lower court did not believe that the threshold question of whether defendant had actually requested to speak with a parent had been established.

Defendant next appeals on the basis that the instructions given by the lower court on first-degree premeditated murder and on aiding and abetting denied defendant of the right to a unanimous verdict. Because the defendant never objected to the instruction, the issue has not been properly preserved, and we will consider it only to the extent that a substantial right was affected in order to avoid manifest injustice. *People v Hoffman*, 205 Mich App 1, 22; 518 NW2d 817 (1994).

We see no manifest injustice from our review of the lower court's instructions. MCL 767.39; MSA 28.979 has abolished the distinction between principal and accessory, stating in pertinent part:

Every person concerned in the commission of an offense, *whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission* may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense. [Emphasis added.]

When a statute lists alternative means of committing an offense which themselves do not constitute separate and distinct offenses, jury unanimity is not required with regard to the alternate theory. *People v Johnson*, 187 Mich App 621, 629-630; 468 NW2d 307 (1992). Therefore, as the instructions

given to the jury fairly presented the issues to be tried and sufficiently protected the rights of the defendant, we find no manifest injustice.

Defendant also contends that the trial court abused its discretion in ruling that defendant should be sentenced as an adult rather than as a juvenile. This Court reviews a trial court's decision to sentence a minor as a juvenile or as an adult by a bifurcated standard. *People v Passeno*, 195 Mich App 91, 103; 489 NW2d 152 (1992). We evaluate for clear error the sentencing court's findings with regard to each of the factors enumerated in MCL 769.1(3); MSA 28.1072(3), with the ultimate decision whether to sentence the minor as a juvenile or as an adult reviewed for abuse of discretion. *Id.*

Pursuant to MCL 769.1(3); MSA 28.1072(3), a trial judge must assess certain factors in making its determination whether to sentence a youth as a juvenile or adult. Evidence on each of the requisite factors was presented at the sentencing hearing. Although there was evidence that defendant lacked a prior record and was amenable to treatment, there was also evidence of the seriousness of the crime. The trial court did not clearly err in its findings, or abuse its discretion by concluding that a longer period of detention was needed than would be afforded by the juvenile system.

Finally, we do not agree that defendant's sentence is disproportionate. Despite defendant's lack of prior record, this offense involved the senseless killing of a child on his way home from school. The trial court articulated appropriate reasons for departing from the guidelines range, and we find no abuse of discretion. *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990).

Affirmed.

/s/ Roman S. Gribbs  
/s/ Henry William Saad  
/s/ James P. Adair

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<sup>1</sup> *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965)