2015 IL App (5th) 120478-U

NO. 5-12-0478

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Madison County.
	)	
v.	)	No. 06-CF-110
	)	
BRIAN ERIC GARY,	)	Honorable
	)	Ann Callis,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE GOLDENHERSH delivered the judgment of the court.
Justices Chapman and Schwarm concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm the trial court's finding that *Miranda* rights were effectively given to defendant and the *Miranda* waiver form was valid where defendant was not misled by detectives, and with the State's confession of error, we vacate defendant's felony murder conviction and correct the mittimus to reflect a single conviction for first-degree murder.

¶ 2 This case concerns an appeal from a final judgment of conviction in a criminal case. Defendant, Brian E. Gary, appeals the trial court's denial of his posttrial motion in which he alleged his murder confession should have been suppressed because he did not receive proper *Miranda* warnings and, as a result, did not knowingly and intelligently waive his fifth amendment privilege against self-incrimination. The State contends the

trial court did not err in admitting defendant's murder confession, as the *Miranda* warnings defendant received adequately informed him of the nature of his fifth amendment privilege and the consequence of abandoning that privilege. We affirm.

¶ 3 BACKGROUND

¶ 4 On January 7, 2006, Granite City police officers responded to a report of domestic disturbance and arrested defendant at the scene. Two days later, Detective Mike Parkinson interrogated defendant about a possible burglary. On January 12, 2006, Detective Parkinson, now joined by Sergeant Nordstrom, interrogated defendant again, this time about the same burglary discussed in the prior interrogation and also about the murder of Carol Newby.

¶ 5 Before both interrogations, Detective Parkinson read defendant his *Miranda* rights as written in the Granite City police department's *Miranda* waiver form. After reading defendant his *Miranda* rights, Detective Parkinson asked defendant if he understood what had been read to him and asked defendant to sign the *Miranda* waiver form if he did. Defendant then signed the waiver form.

¶ 6 Detective Parkinson opened the January 12 interrogation by questioning defendant about the same burglary that had been the focus of the prior interrogation. Later in the January 12 interrogation, Detective Parkinson informed defendant that Newby was dead and advised defendant that the interrogating officers knew defendant was at Newby's apartment when she died. Defendant initially denied murdering Newby, but later confessed following further interrogation.

¶ 7 Defense counsel moved to suppress defendant's murder confession, alleging defendant received defective *Miranda* warnings prior to the confession. Defense counsel argued the Granite City police department's *Miranda* waiver form purported to limit the use of defendant's statements to the crime for which the *Miranda* form had been executed and, therefore, implied that defendant could speak with immunity regarding any offense so long as the interrogating officers had not previously indicated they were investigating it. The defense alleged that by failing to execute the *Miranda* waiver form for a specific offense, the interrogating officers implied that nothing defendant said could be used against him in court.

¶ 8 The trial court denied defendant's motion to suppress, finding the *Miranda* waiver form was "constitutionally sound" and that defendant had received and waived his *Miranda* rights. On September 26, 2012, following a stipulated bench trial, defendant was convicted of two counts of first-degree murder.

¶ 9 Defendant timely filed a posttrial motion for judgment notwithstanding the verdict asserting the trial court erred in denying defendant's motion to suppress. The trial court denied defendant's posttrial motion. Defendant was subsequently sentenced to two concurrent, natural life sentences. Defendant timely filed a notice of appeal.

¶ 10 ANALYSIS

¶ 11 Defendant raises two issues on appeal. First, defendant alleges the trial court erred in admitting defendant's murder confession, as defendant received defective *Miranda* warnings and, therefore, did not knowingly and intelligently waive his privilege against

self-incrimination. Before defendant's interrogation commenced, Detective Parkinson advised defendant that "[a]nything you say can and may be used against you in a court or courts for the offense or offenses by which this warning is executed." Defendant claims this warning was misleading because it qualified the warning and implied that defendant's statements would only be used for the particular offenses the interrogating officers explicitly stated they were investigating.

¶ 12 The State contends the trial court did not err in admitting defendant's confession, as the *Miranda* warnings defendant received adequately informed him of the nature of his fifth amendment privilege against self-incrimination and the consequence of abandoning that privilege. After careful consideration, we agree with the State and affirm the finding of the trial court.

¶ 13 In *Miranda v. Arizona*, 384 U.S. 436 (1966), the United States Supreme Court established procedural safeguards that require police officers to advise criminal suspects of their rights under the fifth and fourteenth amendments before commencing custodial interrogation. *Duckworth v. Eagan*, 492 U.S. 195. The fifth amendment's self-incrimination clause, which applies to the states through the fourteenth amendment, provides that no person "shall be compelled in any criminal case to be a witness against himself." (Internal quotation marks omitted.) *Allen v. Illinois*, 478 U.S. 364, 368 (1986). This privilege is fully applicable during a period of custodial interrogation. *Colorado v. Spring*, 479 U.S. 564, 572 (1987).

¶ 14 *Miranda* requires law enforcement officers to warn a suspect before custodial interrogation that: (1) he has the right to remain silent; (2) anything he says can be used against him in a court of law; (3) he has the right to have an attorney present; and (4) if he cannot afford an attorney, one will be appointed for him before questioning if he so desires. *People v. Hunt*, 2012 IL 111089, ¶ 25, 969 N.E.2d 819. "Custodial interrogation" was defined by the *Miranda* Court as "questioning initiated *by law enforcement officers* after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." (Emphasis added and internal quotation marks omitted.) *Hunt*, 2012 IL 111089, ¶ 25, 969 N.E.2d 819.

¶ 15 A suspect may waive his *Miranda* rights, "provided the waiver is made voluntarily, knowingly and intelligently." *Miranda*, 384 U.S. at 444. However, if the suspect indicates in any manner and at any stage of the process that he wants to consult with an attorney before speaking, there can be no questioning. *Miranda*, 384 U.S. at 444-45.

¶ 16 Similarly, if the individual is alone and indicates in any manner that he does not wish to be questioned, the police may not interrogate him. *Miranda*, 384 U.S. at 444. The mere fact that the suspect has volunteered some statements or answered some questions on his own does not deprive him of the right to refrain from answering any further questions until he has consulted with an attorney and consents to be interrogated. *Miranda*, 384 U.S. at 444.

¶ 17 In the instant case, the Granite City police department's *Miranda* waiver form that Detective Parkinson read to defendant prior to his confession stated the following:

> "I have the right to remain silent and not make any statement at all. Anything I say can and may be used against me in a court or courts for the offense or offenses by which this warning is executed. I can hire a lawyer to be present and advise me before and during any questioning. If I am unable to hire a lawyer, I can request and receive a lawyer through the proper authority, without cost or charge to me.
>
> * * *
>
> I have read/had read to me the inclusive segments stipulating my constitutional rights and understand each."

¶ 18 Defendant argues the narrowing language of the *Miranda* warning read to him by Detective Parkinson, specifically the phrase "[a]nything you say can and may be used against you in a court or courts for the offense or offenses by which this warning is executed," instilled false confidence in defendant that his statements could be used against him only for the particular offenses the interrogating officers stated they were investigating. Defendant further claims he was led to believe the detectives were investigating a burglary and, therefore, defendant's confession to the murder of Newby should not have been used against him in court. We disagree.

¶ 19 Words that convey the substance of the *Miranda* warnings and the information which they require are sufficient without strict adherence to a ritualistic form. *People v.*

Gilbert, 58 Ill. App. 3d 387, 389, 374 N.E.2d 739, 741 (1978). To the contrary of defendant's assertion, we find the warnings as given were sufficient to apprise defendant of his rights and inform him that anything he said could be used against him in court, regardless of whether the interrogating officers specified the offenses for which defendant was being interrogated.

¶ 20 At the onset of defendant's interrogation, the two interrogating officers did not specify the offenses being investigated and did not advise defendant they suspected him of committing murder. Prior to receiving *Miranda* warnings, defendant asked the interrogating officers "what's this all about man," to which Detective Parkinson replied "we're going to sit down and talk about all that." After Detective Parkinson advised defendant he was going to read him his *Miranda* rights, defendant asked "you reading my rights for what though," to which Detective Parkinson replied, "well, because, we're going to talk about some things, and I do things by the book, and I do things fairly."

¶ 21 Detective Parkinson then read defendant his *Miranda* rights, defendant stated that he understood his rights, and defendant signed the *Miranda* waiver form. After being Mirandized, defendant asked the interrogating officers several more times why he was being interrogated, to which the officers never specified.

¶ 22 During the interrogation, defendant invoked his fifth amendment right twice. The first time defendant threatened to end his conversation with the interrogating officers and asserted he could have a lawyer present. The second time defendant stated "he wanted a lawyer," at which time the officers ended the interrogation. However, shortly thereafter,

defendant reinitiated contact with the interrogating officers and asked to speak to the officers again, thereby waiving his fifth amendment privilege.

¶ 23 Prior to the interrogation recommencing, defendant looked into the video camera recorder in the interrogation room and stated, "it's okay that I talk to him without the lawyer." Defendant subsequently confessed to the murder of Newby.

¶ 24 We reject defendant's argument that he did not knowingly and intelligently waive his *Miranda* rights. "The Constitution does not require that a criminal suspect know and understand every possible consequence of a waiver of the Fifth Amendment privilege." *Spring*, 479 U.S. at 574. The fifth amendment's guarantee is simpler and more fundamental: A defendant may not ever be compelled to be a witness against himself. *Spring*, 479 U.S. at 574.

¶ 25 The *Miranda* warnings protect this privilege by ensuring that a suspect knows he may choose not to speak to law enforcement officers, may talk only with counsel present, or may discontinue talking at any time. *Spring*, 479 U.S. at 574. The *Miranda* warnings ensure that a waiver of these rights is knowing and intelligent by requiring that the suspect be fully advised of this constitutional privilege, including the critical advice that whatever he says may be used as evidence against him. *Spring*, 479 U.S. at 574.

¶ 26 After reviewing the record as a whole, especially after watching the video recording of defendant's interrogation, we find that defendant knowingly and intelligently waived his *Miranda* rights and subsequently confessed to the murder of Newby.

Detective Parkinson read defendant his *Miranda* rights, defendant acknowledged that he understood his rights, and defendant signed the *Miranda* waiver form.

¶ 27 Defendant's assertion that the interrogating officers misled defendant into believing he was being interrogated for a burglary is misguided, as neither officer stated any offense as to the reason why defendant was being interrogated. The interrogating officers were silent as to the reason defendant was being interrogated. Moreover, the officers were not required to provide defendant with a specific offense as to the reason defendant was being investigated:

> "This Court has never held that mere silence by law enforcement officials as to the subject matter of an interrogation is 'trickery' sufficient to invalidate a suspect's waiver of *Miranda* rights ***. Once *Miranda* warnings are given, it is difficult to see how official silence could cause a suspect to misunderstand the nature of his constitutional right *** to refuse to answer any questions that might incriminate him." (Internal quotation marks omitted.) *Spring*, 479 U.S. at 576.

¶ 28 We find defendant understood that what he said during the interrogation could be used against him in court, as evidenced by defendant's initially invoking his fifth amendment privilege and later waiving that privilege. Accordingly, the *Miranda* warnings defendant received adequately informed him of his fifth amendment privilege, and the trial court properly admitted defendant's confession into evidence.

¶ 29 Defendant points out that "[o]nly if the totality of the circumstances surrounding the interrogation reveal both an uncoerced choice and the requisite level of

comprehension may a court properly conclude that the *Miranda* rights have been waived." *Moran v. Burbine*, 475 U.S. 412, 421.

¶ 30 Defendant alleges the totality of the circumstances indicate the *Miranda* waiver form misstated the law, the detectives exclusively relied on that *Miranda* waiver form, and at no time before or after defendant's waiver did the detectives properly warn defendant of his *Miranda* rights. Because we find the *Miranda* rights as given sufficiently apprised defendant of his rights for the reasons stated above, we need not address this issue further.

¶ 31 Defendant further alleges the totality of the circumstances indicate his waiver was coerced and his confession was compelled. We disagree.

¶ 32 Under the totality of circumstances standard, we have no doubt that defendant validly waived his right to remain silent and right to the presence of counsel, as evidenced by the video recording of the interrogation. The video recording of defendant's interrogation is devoid of any suggestion that the interrogating officers used physical or psychological pressure to elicit defendant's confession. During his interrogation, defendant invoked his fifth amendment privilege, but reinitiated contact with the interrogating officers shortly thereafter. Defendant looked into the video camera recorder in the interrogation room and stated, "it's okay that I talk to him without the lawyer." Accordingly, defendant validly waived his fifth amendment privilege.

¶ 33 "[I]t seems self-evident that one who is told he is free to refuse to answer questions is in a curious posture to later complain that his answers were compelled."

(Internal quotation marks omitted.) *Spring*, 479 U.S. at 576. We reject the notion that defendant's waiver was coerced and his confession was compelled.

¶ 34 The second issue defendant raises alleges that under the one-act, one-crime rule, the mittimus should be corrected to reflect a single conviction for first-degree murder.

¶ 35 The application of the one-act, one-crime rule is a question of law, which we review *de novo*. *People v. Johnson*, 237 Ill. 2d 81, 97, 927 N.E.2d 1179, 1189 (2010). A defendant may not be convicted of multiple offenses that derive from "precisely the same single physical act." *Johnson*, 237 Ill. 2d at 97, 927 N.E.2d at 1189. If a defendant is convicted of two offenses that derive from the same single physical act, the conviction for the less serious offense must be vacated. *Johnson*, 237 Ill. 2d at 97, 927 N.E.2d at 1189.

¶ 36 Here, Carol Newby was the only person murdered. Defendant was subsequently convicted of two counts of first-degree murder: one count of knowingly causing the death of Carol Newby and one count of felony murder based on the underlying offense of robbery. Pursuant to the one-act, one-crime rule, defendant should have been convicted of only one count of first-degree murder since both convictions resulted from the same single physical act. While felony murder is a very serious offense, it is a less serious offense than the first-degree murder count of knowingly causing death. Accordingly, the trial court should have vacated defendant's felony murder conviction.

¶ 37 The State has confessed error and agrees that defendant's felony murder conviction should be vacated and the mittimus corrected to reflect a single conviction for first-

degree murder. Because we find defendant's felony murder conviction must be vacated under the one-act, one-crime rule, we correct the mittimus to reflect a single conviction for first-degree murder.

¶ 38 CONCLUSION

¶ 39 For the reasons stated herein, we affirm the judgment of the circuit court of Madison County and order that the mittimus be corrected to reflect a single conviction for first-degree murder.

¶ 40 Affirmed; mittimus corrected.