2017 IL App (1st) 143901-U
Order filed: December 8, 2017

FIFTH DIVISION

No. 1-14-3901

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	No. 10 CR 14675 (02)
	)	
EDWIN PANIAGUA,	)	Honorable
	)	Kay Hanlon and
	)	Bridget Jane Hughes,
Defendant-Appellant.	)	Judges Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
Presiding Justice Reyes and Justice Lampkin concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's murder conviction is affirmed where his motion to suppress was properly denied and where amendments to the automatic transfer provision of the Juvenile Court Act do not apply retroactively to this case.

¶ 2 A jury convicted defendant, Edwin Paniagua, of first-degree murder for his participation in the July 21, 2010, robbery of the victim, Jean Wattecamps, during which codefendant Marco Guardiola killed the victim. The jury found that the offense was accompanied by exceptionally brutal and heinous behavior indicative of wanton cruelty, and the trial court sentenced defendant to 26 years' imprisonment. On appeal, defendant contends: (1) the trial court erred in denying his motion to suppress; and (2) his case should be remanded to the juvenile court in light of retroactive amendments to the automatic transfer provisions of the Juvenile Court Act of 1987

(Act) (705 ILCS 405/1-1 *et seq*. (West 2014)) contained in Public Act 99-258, section 5 (eff. Jan. 1, 2016) (amending 705 ILCS 405/5-130 (West 2014)). For the following reasons, we affirm the denial of defendant's motion to suppress and affirm his conviction and sentence.

I. BACKGROUND

¶ 3 Defendant filed a pre-trial motion to suppress his statements made during interviews at the police station, arguing they were not knowing and voluntary. At the hearing on the motion, the State had the burden of showing by a preponderance of the evidence that the statements were voluntary (*People v. Macias*, 2015 IL App (1st) 132039, ¶ 53), and it called the police officers to satisfy the burden.

¶ 4 Officer Alvaro Fernandez testified he is an investigator with the Hoffman Estates police department and is a juvenile officer who "looks out for the best interest of a juvenile defendant" by making sure he understands his *Miranda* rights and has had adequate food, sleep, and bathroom breaks while in custody. In 2010, Officer Fernandez was a member of the Major Case Assistance Team (MCAT), which is a "group of investigators and forensic personnel who respond to a crime scene and assist the town with the investigation." On July 22, 2010, Officer Fernandez and some other investigators received an assignment to locate defendant in connection with a homicide investigation. After locating defendant at the Willow Way Trailer Park on the following day, Officer Fernandez asked defendant if he would come speak with them about an "incident that occurred in Mount Prospect." Defendant replied affirmatively. Officer Fernandez asked defendant his age, and he replied that he was 15 years old. Officer Fernandez spoke to defendant in English; they had no trouble understanding each other. Defendant spoke both English and Spanish fluently.

¶ 5 Defendant took Officer Fernandez and Officer Cook to his residence, where Officer Fernandez met defendant's mother, Ms. Paniagua, who only spoke Spanish. Officer Fernandez spoke to Ms. Paniagua in Spanish and asked her permission to bring defendant to the police station for questioning and told her she could accompany defendant. She stated that she needed to stay home, but she gave the officers permission to drive defendant to the police station and to "bring him back when [they] were done."

¶ 6 Officer Fernandez drove defendant to the police station. During transport, defendant was not handcuffed or searched, and none of his property was taken away from him.

¶ 7 Detective Anthony Lietzow of the Mount Prospect police department testified he spoke with defendant at the police station at about 9:45 p.m. on July 23, 2010. Defendant was not given his *Miranda* warnings because he was considered a witness and not a suspect. Detective Michael Landeweer, acting as a juvenile officer, was present during the questioning and attended to defendant's wellbeing, asking if he needed any food or drink.

¶ 8 During the questioning, defendant received a phone call on his personal cell phone from Mr. Guardiola and agreed to have the officers listen to a portion of the conversation. Shortly after the phone call, Detective Lietzow asked defendant about his relationship to Mr. Guardiola, and defendant "began to implicate himself." Detective Lietzow then stopped the questioning and made arrangements for Ms. Paniagua to be contacted so that she should come to the police station.

¶ 9 At about 2:21 a.m. on July 24, 2010, Detective Lietzow resumed interviewing defendant at the police station. The interview was videotaped. Ms. Paniagua was present, and Officer Fernandez translated for her since she only spoke Spanish. Ms. Paniagua never indicated that she did not want defendant to talk with the officers.

¶ 10 Detective Landeweer was also present as a juvenile officer and he gave defendant his *Miranda* warnings from a written form, but also paraphrased them to ensure that they were understandable to defendant. Defendant stated he understood each of the *Miranda* warnings and he signed a waiver of rights form.

¶ 11 Detective Lietzow interviewed defendant for about an hour, during which his demeanor was "relaxed, calm, just an everyday person, at ease." He never asked for an attorney. After the interview, defendant remained at the police station while the officers continued their investigation. Defendant was released at around 11:20 p.m.

¶ 12 As the investigation continued, Mr. Guardiola was located, after which defendant was arrested at about 4:45 p.m. on July 27, 2010, and brought back to the police station where a recorded interview commenced at about 8:22 p.m. Ms. Paniagua was again present for this interview, with Officer Fabio Calderon translating for her. Detective Landeweer gave defendant his *Miranda* warnings and again paraphrased them to ensure they were understandable to him. Defendant stated he understood his *Miranda* rights and he was "alert" and "cooperative." He was provided food and drink and allowed to use the bathroom and he did not voice any complaints about his treatment.

¶ 13 Detective Lietzow testified he made no threats or promises to get defendant to speak to him. The video recordings of defendant's interviews from July 24 and July 27 were admitted into evidence. The video recordings show defendant receiving his *Miranda* warnings and indicating that he understood them.

¶ 14 Ms. Paniagua testified she was at home at about 9:10 p.m. on July 23, 2010, when defendant walked inside and said some police officers wanted to speak with her. Three or four officers came to her door, and one of the officers told her in Spanish that they needed to take

defendant to the police station and talk with him because he had witnessed a robbery. The officer told Ms. Paniagua she could come to the police station if she wanted. She decided not to go, and the officer told her they would return defendant in about two hours.

¶ 15 At about midnight or 1 a.m., the officer called her and told her to come to the police station. Officers picked her up and drove her to the station, where she saw defendant being interviewed. She was not able to talk to him before the interview. She signed the *Miranda* form that defendant had signed, but she did not understand what she was signing. As she listened to the questions being asked of defendant, she learned that defendant had been present at a place where someone had died.

¶ 16 Defendant was subsequently allowed to go home, but he was arrested three days later.

¶ 17 On cross-examination, Ms. Paniagua testified defendant had completed ninth grade. She never told defendant not to cooperate with the police, and he never told her that the police mistreated him.

¶ 18 Chicago Police Officer Brian Murphy testified that on February 10, 2010, approximately five months prior to the murder at issue here, he arrested defendant for criminal trespass and gave him his *Miranda* warnings. Defendant never told the officer that he did not understand his *Miranda* rights.

¶ 19 Defense expert, Dr. Tiffany Masson, a forensic psychologist who has conducted about 100 forensic evaluations and testified 20-25 times in court, conducted a forensic psychological examination of defendant to determine whether he was capable of knowingly, intelligently, and voluntarily waiving his *Miranda* rights. She also considered the police reports, and the DVDs of the July 24 and July 27 interviews.

¶ 20 Dr. Masson determined that defendant had a "low average IQ" of 85, but he read at a 12th grade level, which was above average. *Miranda* warnings are written at a sixth grade level. Defendant told her that he previously had been enrolled in gifted classes but began displaying disciplinary problems in sixth or seventh grade and thereafter started falling behind academically.

¶ 21 Defendant was briefly hospitalized in 2010 and diagnosed with "mood disorder not otherwise specified" and substance abuse. Dr. Masson learned that defendant drank one bottle of alcohol per day by the time he was 14 years old and smoked four to five blunts per day of marijuana. Defendant told her that he utilized alcohol and marijuana to help him relieve depression and stress. Defendant also told her that he had no prior arrests, but Dr. Masson subsequently learned that defendant had a prior arrest for trespass and had been given *Miranda* warnings.

¶ 22 Defendant told her that when he was initially questioned by police in this case, he thought they wanted to talk to him about Mr. Guardiola, that the police were "on his side," and that he was helping the police investigation by answering their questions. Since he was not provided an attorney during his initial questioning, he thought he "wasn't in trouble," and that if he cooperated, he would be released, but that if he did not speak, he would be punished. During his later interrogations, he waived his *Miranda* rights because he felt "pressure" and thought that "he had to cooperate."

¶ 23 Dr. Masson opined that defendant did not fully understand the consequences of waiving his *Miranda* rights and did not knowingly, intelligently, and voluntarily waive those rights.

¶ 24 The State's rebuttal expert, Dr. Susan Messina, a forensic psychologist, has 23 years' experience and has conducted thousands of investigations concerning one's ability to understand

Miranda rights. In preparing her report, Dr. Messina spoke with defendant three times and reviewed a number of records, including the police reports, the DVDs and transcripts of the July 24 and July 27 interviews, and medical records.

¶ 25 Defendant told her that he had been in some advanced classes at school but that he "could have done better." He had been stopped by police several times at the ages of 13-15 for smoking weed, for mob action, and for criminal trespass. He was taken to the police station each time.

¶ 26 Defendant told her that in July 2010, when he was 15 years and 10 months old, he was taken to the police station two times in connection with the murder of the victim. A youth officer twice read him his *Miranda* warnings. Dr. Messina asked him about his understanding of the right to remain silent, and he told her that he "could stay quiet," that he did not "have to say nothing." He expressed no confusion about his right to remain silent.

¶ 27 Dr. Messina asked him about his understanding of the right against self-incrimination, and defendant stated, "whatever I say could be used against me in court as a statement." He expressed no confusion about the right against self-incrimination.

¶ 28 Dr. Messina asked him about his understanding of the right to counsel, and defendant stated, "I can get a paid lawyer or a public defender to represent me." He expressed no confusion about his right to counsel.

¶ 29 Dr. Messina asked if he understood his right to court-appointed counsel, and defendant stated, "they will appoint a public defender for your case *** [if] I don't have the money for it."

¶ 30 Dr. Messina viewed the DVDs of the July 24 and July 27, 2010, interviews, and saw that in each interview the youth officer who gave the *Miranda* warnings paraphrased them by breaking them down into simpler words, thereby making it easier for defendant to understand

them. Dr. Messina saw nothing in the DVDs indicating that defendant was confused about any of his *Miranda* rights.

¶ 31 Dr. Messina noted that in a second interview she conducted with defendant, he indicated that he did not understand his right to an attorney. Dr. Messina opined that this statement was not credible given his level of intelligence and his prior contact with police.

¶ 32 Dr. Messina concluded that defendant had the ability to comprehend his *Miranda* rights on July 24th and when he was arrested on July 27th. Defendant gave no indication that he suffered from any serious cognitive dysfunction or intellectual impairment.

¶ 33 The trial court denied defendant's motion to suppress, finding that "[t]he State's expert [Dr. Messina] *** was a much better expert" than the defense expert, Dr. Masson, and that the court agreed with her assessment that defendant knowingly and voluntarily waived his *Miranda* rights. The trial court stated it had considered the totality of the circumstances, including defendant's age (15 years and 10 months) when he received the *Miranda* warnings, his ability to read at a 12th grade level, and his previously having received *Miranda* warnings from Officer Murphy, in denying the motion to suppress.

¶ 34 At trial, Officer Robert Etchingham testified that on July 22, 2010, he discovered the victim dead in his apartment, with a shirt tied around his neck, puncture marks on his chest, and his legs tied with a cord. There was blood on his legs and torso. The assistant medical examiner testified that the victim died from multiple stab wounds and the manner of death was homicide.

¶ 35 Erica Yanez testified that on July 20, 2010, she and her boyfriend, Mr. Guardiola, went with Cody Shore to the Colony Apartments in Mount Prospect and eventually all of them went inside the victim's second floor apartment. Mr. Guardiola left after about an hour. At about 1:30 a.m., the victim asked Mr. Shore and Ms. Yanez to leave because he wanted to go to sleep.

¶ 36 Mr. Shore and Ms. Yanez left the victim's apartment and went downstairs, where they saw Mr. Guardiola and defendant. Ms. Yanez wanted to leave so that she could find a bathroom to use, but Mr. Guardiola told her to go back inside the victim's apartment to use the bathroom there. Defendant, Mr. Guardiola, and Ms. Yanez went upstairs, knocked on the door, and the victim answered. They all entered the apartment and Ms. Yanez went into the bathroom.

¶ 37 When Ms. Yanez exited the bathroom, she saw defendant and Mr. Guardiola "tussling" with the victim in the living room and patting him down like they were searching him. Defendant and Mr. Guardiola shoved the victim onto a couch. Mr. Guardiola held the victim down while defendant grabbed a cord from the entertainment center and tied the victim's feet. Defendant then went into a bedroom and returned with a knife, which he held to the victim's neck. Mr. Guardiola told defendant to "chill, calm down," and Ms. Yanez took the knife from defendant and put it on the kitchen counter.

¶ 38 Defendant grabbed a piece of white cloth and wrapped it around the victim's neck. Defendant and Mr. Guardiola also tried to tie the victim's hands together with a scarf. Mr. Guardiola hit the victim in the chest; defendant kicked the victim in the chest. Mr. Guardiola then stabbed the victim in the chest "a lot of times."

¶ 39 Ms. Yanez and Mr. Guardiola left the apartment. Mr. Guardiola had the victim's wallet, and he took out some credit cards and threw them underneath a bush. On July 27, 2010, Ms. Yanez directed officers to the bush and they recovered the victim's bank card, ID, and insurance card.

¶ 40 Mr. Shore gave a handwritten statement on July 27, 2010. In the statement, Mr. Shore described meeting Mr. Guardiola and his girlfriend on July 20, 2010. Mr. Guardiola bought some

liquor and then the three of them walked to the Colony Apartments, met up with the victim, and entered his apartment.

¶ 41 Eventually, Mr. Guardiola left the apartment. The victim later told Mr. Shore and Mr. Guardiola's girlfriend to leave because he had to go to sleep. They went downstairs and saw Mr. Guardiola and defendant. They all went back up the stairs, but Mr. Shore left before they entered the victim's apartment.

¶ 42 The next day, Mr. Shore saw defendant at a trailer park, and defendant stated that he had seen Mr. Guardiola stab the victim "all over the front body area."

¶ 43 Defendant's July 27 interview with Detective Lietzow was played for the jury. In the interview, defendant stated that in the evening of July 21, 2010, he received a phone call from Mr. Guardiola asking him to help find his girlfriend. Defendant walked to a nearby grocery store, where he met Mr. Guardiola and two members of the Latin Kings. They all got into a car and drove to the Colony apartment complex. During the ride, Mr. Guardiola tried to convince the gang members to rob somebody.

¶ 44 When they arrived at the apartment complex, they looked for Mr. Guardiola's girlfriend. Eventually, the two Latin Kings left. Defendant and Mr. Guardiola found his girlfriend with Mr. Shore. Mr. Guardiola decided he wanted to rob the victim, so he told his girlfriend to go to the victim's apartment and tell him she needed to use his bathroom.

¶ 45 Defendant, Mr. Guardiola, and his girlfriend went to the victim's apartment. The girlfriend knocked on the door, and the victim answered and let them all into the apartment. The victim sat on a couch. Mr. Guardiola sat down next to him, put him in headlock, and asked him, "Where's the money?" The victim stated he did not have any money. Mr. Guardiola told defendant to go find something they could use to tie up the victim's legs. Defendant protested,

but Mr. Guardiola got angry and so defendant grabbed a computer cord and tied it around the victim's legs.

¶ 46 Defendant went through the victim's pockets and found a credit card, which he gave to Mr. Guardiola. Mr. Guardiola hit the victim with his elbow. Defendant kicked the victim in the ribs and wrapped a shirt around his mouth to keep him from yelling. Defendant went into another room, found a knife, and gave it to Mr. Guardiola. He gave it back to defendant, who held the knife near the victim's throat. The girlfriend took the knife from defendant and gave it to Mr. Guardiola. Mr. Guardiola then stabbed the victim multiple times in the chest. The next day, defendant told Mr. Shore how Mr. Guardiola had stabbed the victim.

¶ 47 Following all the evidence, the jury convicted defendant of first-degree murder and found that he engaged in exceptionally brutal and heinous behavior indicative of wanton cruelty. Defendant's motion for a new trial was denied. The trial court subsequently sentenced defendant to 26 years' imprisonment. Defendant appeals.

¶ 48 II. ANALYSIS

¶ 49 First, defendant contends the trial court erred in denying his motion to suppress where his waiver of his *Miranda* rights on July 27, 2010, was not knowingly and intelligently made.

¶ 50 The fifth amendment to the United States Constitution (U.S. Const., amend. V) and article 1, section 10, of the Illinois Constitution (Ill. Const. 1970, art. I, §10) provide that no person shall be compelled in any criminal case to be a witness against himself. The United States Supreme Court has extended the fifth amendment privilege against self-incrimination to custodial interrogation and required that a defendant be warned that he has the right to remain silent, he has the right to an attorney, and that any statement given may be used against him in a court of law. *People v. Dennis*, 373 Ill. App. 3d 30, 42 (2007) (citing *Miranda v. Arizona*, 384

U.S. 436, 475-77 (1966)). Before a defendant's confession can be admitted at trial, the State must prove by a preponderance of the evidence that defendant validly waived his privilege against self-incrimination and his right to counsel. *People v. Daniels*, 391 Ill. App. 3d 750, 780 (2009). Once the State has established its *prima facie* case, the burden shifts to defendant to show that his *Miranda* waiver was not knowing, intelligent or voluntary. *People v. Johnson*, 385 Ill. App. 3d 585, 591 (2008).

¶ 51 Defendant does not dispute that the State established its *prima facie* case; rather, he argues that he met his burden of showing that the *Miranda* waiver was not knowing and intelligent.

¶ 52 A valid waiver of *Miranda* rights occurs where: (1) defendant's decision to relinquish those rights was voluntary and not the product of intimidation, coercion, or deception; and (2) defendant knowingly and intelligently waived his rights, *i.e.*, he made the waiver while fully aware of the nature of the rights being abandoned and the consequences of his decision to abandon them. *People v. Crotty*, 394 Ill. App. 3d 651, 662 (2009). The voluntariness of a *Miranda* waiver is a question of fact, which must be determined in light of the totality of the circumstances (*id.*), including defendant's age, intelligence, background, experience, mental capacity, education and physical condition at the time of the questioning; the legality and duration of the detention; the duration of the questioning; and any physical or mental abuse by the police. *In re G.O.*, 191 Ill. 2d 37, 54 (2000). An additional factor when determining the voluntariness of a juvenile's confession is whether he had an opportunity, either before or during the interrogation, to consult with an adult interested in his welfare. *Id.* at 55.

¶ 53 The test to be used in determining whether an accused knowingly and intelligently waived his rights is whether the words in the context used, considering the age, background and

intelligence of the individual being interrogated, impart a clear, understandable warning of all of his rights. *Daniels*, 391 Ill. App. 3d at 781.

¶ 54 On appeal, defendant's only argument is that the totality of the circumstances shows that he did not knowingly and intelligently waive his *Miranda* rights prior to making his confession on July 27; he makes no argument that his confession was otherwise coerced or involuntary because the duration of the interrogation or detention was too lengthy or that he was the subject of physical or mental abuse. Accordingly, we consider only whether, under the totality of the circumstances, considering defendant's age, background, and intelligence, the *Miranda* warnings were explained to defendant in such a way as to ensure that his waiver of his *Miranda* rights on July 27 was knowingly and intelligently made. *Id*.

¶ 55 The issue of whether a *Miranda* waiver was knowing and intelligent is factual, which we review under a manifest weight of the evidence standard. *Id*. at 780 (citing *G.O.*, 191 Ill. 2d at 50). "A finding is against the manifest weight of the evidence only if the opposite conclusion is clearly evident or if the finding is unreasonable, arbitrary, or not based on the evidence presented." *People v. Deleon*, 227 Ill. 2d 322, 332 (2008). We give deference to the trial court as the finder of fact, and we will not substitute our judgment for that of the trial court regarding the credibility of witnesses, the weight to be given to the evidence, or the inferences to be drawn therefrom. *Id*. See also *People v. Brown*, 2012 IL App (1st) 091940, ¶¶ 24-26.

¶ 56 Defendant contends that as a result of his low IQ and his incorrect belief that he could be punished for exercising his right to remain silent, he had an incomplete understanding of the nature of this constitutional right, and therefore his waiver was not knowingly and intelligently made.

¶ 57 Our supreme court has held that "where the record shows that a defendant's subpar intellectual capacity does not interfere with his or her ability to comprehend the meaning of *Miranda* warnings, the defendant's inculpatory statements will not be suppressed." *People v. Mahaffey*, 165 Ill. 2d 445, 462-63 (1995).

¶ 58 The record here indicates that the defendant, who was 15 years and 10 months old at the time of his police interviews, and who had completed a year of high school and had previously been arrested and *Mirandized*, had the ability to comprehend the meaning of the *Miranda* warnings, including the warning about his right to remain silent. Specifically, Dr. Messina testified that she saw no indication during any of her interviews that defendant suffered from any serious cognitive dysfunction or intellectual impairment. Dr. Masson testified that although defendant has a "low average IQ" of 85, he reads at a 12th grade level and he reported having previously been enrolled in gifted classes. The *Miranda* warnings are only written at a sixth grade level.

¶ 59 Further, the totality of the circumstances of defendant's July 27 interview shows that he was informed of all his *Miranda* rights, including the right to remain silent, in such a way as to ensure his knowing and intelligent understanding of them. Specifically, the youth officer who gave defendant his *Miranda* warnings on July 27 paraphrased them by breaking them down into smaller words, making it even easier for defendant to understand them. The youth officer asked defendant if he understood his right to remain silent, told him it meant "you don't have to talk," and defendant stated he understood. Dr. Messina saw nothing in the DVD recording of the July 27 interview indicating that defendant was confused about any of his rights, and defendant stated that he understood them. Dr. Messina also spoke with defendant, subsequent to the July 27 interview, asking him about his understanding of each of the *Miranda* rights. With respect to his

understanding of the right to remain silent, defendant accurately told her, "I could stay quiet, I don't have to say nothing." Defendant expressed no hesitation or confusion about that right. Dr. Messina determined that defendant "clearly knew he could have stayed silent, but he chose to speak because he thought that was in his best interest" and she concluded he knowingly and intelligently waived his *Miranda* rights on July 27.

¶ 60 The court found that Dr. Messina was the more credible expert witness, given her experience and her interviews with defendant, and that Dr. Masson's opinions were suspect because they were based on some erroneous factual findings, specifically, Dr. Masson incorrectly believed that defendant had no prior contact with police and she was not aware that the youth officer had paraphrased the *Miranda* rights. The court agreed with Dr. Messina that the totality of the evidence supported her conclusions regarding defendant's ability to understand the *Miranda* warnings, including the right to remain silent. As discussed earlier in this order, we will not substitute our judgment for the trial court's credibility determinations, the weight to be given the evidence, or the inferences drawn therefrom. *Brown*, 2012 IL App (1st) 091940, ¶ 26. The trial court's finding that defendant knowingly and intelligently waived his *Miranda* rights was not against the manifest weight of the evidence, and therefore we affirm the order denying defendant's motion to suppress.

¶ 61 Next, defendant contends his motion to suppress should have been granted because an unrepresented juvenile cannot intelligently waive his *Miranda* rights. Defendant argues that we should "interpret the Illinois Constitution's self-incrimination clause as requiring that a juvenile cannot validly waive his *Miranda* rights unless prior to custodial interrogation the juvenile consulted with an attorney and unless the attorney was present during the interrogation."

¶ 62 Initially, we note that defendant has forfeited review by failing to raise this issue in the trial court (*People v. Enoch*, 122 Ill. 2d 176, 186 (1988)), but argues for plain error review. The plain error doctrine allows the reviewing court to address unpreserved claims of error when either "(1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007).

¶ 63 The evidence in this case was not closely balanced, and therefore the first prong of the plain error doctrine is inapplicable here. We proceed to examine defendant's argument under the second prong, to determine whether his interrogation without counsel present was a clear or obvious error that was so serious that it affected the fairness of his trial and challenged the integrity of the judicial process.

¶ 64 In support of his argument, defendant cites a number of studies, which, he claims, demonstrate that juveniles have lesser abilities to intelligently waive their *Miranda* rights in the absence of counsel. Defendant failed to present these studies to the trial court, and therefore has forfeited our consideration of them. See *People v. Wrencher*, 2015 IL App (4th) 130522, ¶ 23; *Keener v. City of Herrin*, 235 Ill. 2d 338, 346 (2009). Defendant asks us to take judicial notice of the studies. "Courts may take judicial notice of matters which are commonly known or of facts which, while not generally known, are readily verifiable from sources of indisputable accuracy. [Citation.] A court will not take judicial notice of critical evidentiary material not presented in the court below, however, and this is especially true of evidence which may be significant in the proper determination of the issues between the parties." *People v. Mehlberg*, 249 Ill. App. 3d

499, 531 (1993). Given the significance that defendant attributes to the studies, they should have been submitted below so as to be subject to cross-examination by the State and consideration by the trial court when ruling on the suppression motion, and we may not consider them for the first time on appeal. *Id.*

¶ 65 Defendant argues that, even without consideration of the studies, we should hold that the Illinois constitution requires that a juvenile be represented by counsel before he can knowingly and intelligently waive his *Miranda* rights. A similar argument was addressed and rejected in *People v. M.S.*, 247 Ill. App. 3d 1074 (1993). In *M.S.*, the 12-year-old defendant was found delinquent on a charge of criminal sexual abuse. *Id.* at 1076. On appeal, defendant argued that his confession, made in the absence of counsel, should have been suppressed. *Id.* at 1083-84. Defendant argued that "a child can have no understanding of how a waiver of his *Miranda* rights will impact upon him later in court and in his future life and, therefore, *** the State should not be allowed to use any statements which were given by a minor without the advice and in the presence of an attorney." *Id.* at 1087.

¶ 66 The appellate court first noted that defendant was seeking a new, higher standard for determining whether a confession made by a minor is knowing, intelligent and voluntary. *Id.* However, the appellate court determined that it lacked the authority to alter the totality of the circumstances test, and that "[i]f the 'totality of the circumstances' test is to be abandoned in situations involving statements made by minors and a new rule established, it is for the Illinois Supreme Court to make that decision." *Id.* at 1088. Second, the appellate court noted that even assuming it had the power to set a new standard for determining whether a minor's confession was knowingly, intelligently, and voluntarily given, it would maintain the totality of the circumstances test because such a test "incorporates all the relevant factors" for determining the

constitutionality of the minor's confession. *Id.* Accordingly, the appellate court refused to hold that the State may never use a statement given by a minor in the absence of an attorney, and instead held that the absence of an attorney is just one of the totality of the circumstances considered when determining the constitutionality of the minor's statement. *Id.*

¶ 67 Defendant here argues that *M.S.* was decided under only the federal constitution and not the Illinois constitution. Defendant contends the self-incrimination and due process clauses of the Illinois constitution provide the juvenile with greater protections than the federal constitution and require that he be represented by counsel in order for his waiver of *Miranda* rights to be knowingly and intelligently made.

¶ 68 However, defendant cites no cases in support thereof, and the supreme court has held otherwise in *G.O.*, 191 Ill. 2d at 57. In *G.O.*, the supreme court was asked to adopt a *per se* constitutional rule requiring that all minors of all ages must have an opportunity to consult with a parent, guardian or attorney before the police can interrogate them. *Id.* The supreme court refused to adopt such a *per se* rule, stating that there was "no basis in the law to conclude that this single factor should be dispositive." *Id.* Rather, the supreme court held that the ability to confer with a concerned adult is just one factor to consider among the totality of the circumstances, but that the concerned adult factor is particularly relevant where the minor has demonstrated trouble understanding the interrogation process, he asks to speak with a concerned adult, or the police prevent the concerned adult from speaking with him. *Id.* at 55; see also *People v. Murdock*, 2012 IL 112362, ¶ 33. Defendant here had no trouble understanding the interrogation process, which was attended by his mother after the police called her and drove her to the police station and translated the questions and answers into Spanish for her. Defendant did not ask to speak with his mother or with any other concerned adult, and the officers did not

prevent him from speaking with any concerned adult. Accordingly, defendant's failure to consult with an attorney, or other concerned adult, did not render his confession unconstitutional.

¶ 69 Subsequent to *M.S.* and *G.O.*, the legislature enacted section 5-170 of the Juvenile Court Act of 1987 (Act) (705 ILCS 405/5-170 (West 2010)) which provided, at the time of defendant's offense, that minors under the age of 13 "must be represented by counsel during the entire custodial interrogation of the minor." The Act has since been amended, effective January 1, 2017, to provide that minors under the age of 15 be represented by counsel throughout their entire custodial interrogation. See P.A. 99-882, §10, eff. Jan. 1, 2017. Defendant argues that we should effectively expand section 5-170 and hold that the Illinois constitution requires that "juveniles of *all* ages and in *all* cases must be represented by counsel when interrogated to ensure than any waiver of *Miranda* rights is intelligent." (Emphasis added.)

¶ 70 We disagree with defendant's argument. By mandating that minors under the age of 15 be represented by counsel during custodial interrogation, section 5-170 expressly carves out a limited exception to *M.S.* and *G.O.*, which had refused to categorically exclude confessions given by unrepresented minors and instead applied the totality of the circumstances test to determine the constitutionality of the minors' confessions. *M.S.* and *G.O.* remain good law with regard to minors 15 years of age and older, whose confessions are not categorically excluded when made without representation by counsel; rather, we apply the totality of the circumstances test to determine whether their confessions made in the absence of counsel pass constitutional muster. As discussed earlier in this order, the totality of the circumstances here show that the almost 16-year-old defendant's confession was knowingly and intelligently given, even in the absence of counsel; no argument is made that his confession was otherwise coerced or involuntary.

Accordingly, no plain error occurred in the taking of defendant's confession, and we affirm the order denying defendant's motion to suppress.

¶ 71 Next, we address defendant's argument as to the application of recent amendments to the Act. At the time of defendant's prosecution, section 5-130 of the Act required that all juveniles 15 years and older be automatically transferred to adult court when they were charged with certain offenses, including first-degree murder. 705 ILCS 405/5-130 (West 2014). In Public Act 99-258, section 5 (eff. Jan. 1, 2016) (amending 705 ILCS 405/5-130 (West 2014)), the General Assembly raised the age of automatic transfer from 15 years old to 16 years old. Defendant was 15 years old at the time of his offense, meaning that the amendment, if it retroactively applies to him despite only becoming effective while this appeal was pending,[1] would place him outside the reach of the automatic transfer provision. Defendant argues that the amendment should be retroactively applied to him, and that we should therefore remand to the juvenile court.

¶ 72 The retroactivity of the amendments to section 5-130 of the Act contained in Public Act 99-258 has been discussed in a number of prior decisions. See, *e.g.*, *People ex rel. Alvarez v. Howard*, 2016 IL 120729; *People v. Rodriguez*, 2017 IL App (1st) 141379; *People v. Scott*, 2016 IL App (1st) 141456; *People v. Ortiz*, 2016 IL App (1st) 133294; *People v. Patterson*, 2016 IL App (1st) 101573-B; *People v. Hunter*, 2016 IL App (1st) 141904. However, our supreme court recently addressed the exact question at issue here in *People v Hunter*, 2017 IL 121306, and definitively resolved the issue unfavorably to defendant's position.

[1] Defendant filed his notice of appeal on November 12, 2014. The relevant amendment to section 5-130 of the Act appear in Public Act 99-258, section 5, passed on May 31, 2015, and signed into law on August 4, 2015. No effective date is provided for this amendment. Under section 1 of the Effective Date of Laws Act (5 ILCS 75/1(a) (West 2014)), however, bills passed prior to June 1 of a calendar year "shall become effective on January 1 of the following year, or upon its becoming a law, whichever is later." Thus, the effective date for the amendment to sections 5-130 of the Act is January 1, 2016.

¶ 73 In *Hunter*, our supreme court specifically addressed whether the amendments to section 5-130 of the Act, contained in Public Act 99-258, applied retroactively to a defendant who was convicted and sentenced in criminal court, who's case was pending on direct appeal when the amendments became effective, who's appeal presented no other reversible error, and who had already aged out of the jurisdiction of the juvenile court. *Id.* ¶¶ 32-43. In rejecting the defendant's retroactivity argument, our supreme court summarized its analysis as follows:

> "In sum, because the amendment to section 5-130(1)(a) of the Act did not become effective until after Hunter's trial court proceedings were concluded and his case was pending in the appellate court; because no reversible error necessitates remand for further proceedings to which the amended statute could apply; and because Hunter, in any event, is no longer subject to the jurisdiction of the juvenile court, making remand impracticable, we hold that the amendment to section 5-130(1)(a) of the Act does not apply retroactively to Hunter's case." *Id.* ¶ 43.

¶ 74 The exact same factual circumstances are present in this case, and the same legal analysis therefore applies. Therefore, pursuant to *Hunter*, we reject defendant's contention that the amendments to section 5-130 of the Act apply to his case.

¶ 75 III. CONCLUSION

¶ 76 In sum, we affirm the denial of defendant's motion to suppress and affirm his conviction and sentence.

¶ 77 Affirmed.