2013 IL App (2d) 111218-U
No. 2-11-1218
Order filed May 8, 2013

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Lake County.
Plaintiff-Appellee,	)	
v.	)	No. 09-CF-1876
EDWIN J. HERNANDEZ,	)	Honorable Daniel B. Shanes,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Presiding Justice Burke and Justice Spence concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The trial court properly denied defendant's motion to suppress incriminating statements: the police's misrepresentation as to whether they would record the interview did not render the incriminating statements involuntary, nor did it render the preceding *Miranda* waiver invalid; (2) the trial court erred in imposing an extended-term sentence, and thus we remanded for resentencing, as the evidence did not establish that defendant committed the offense pursuant to an agreement with two or more persons whom he led or managed.

¶ 2 Defendant, Edwin J. Hernandez, challenges in this appeal the trial court's denial of his motion to suppress statements and the imposition of an extended-term sentence of 80 years in prison.

For the following reasons, we affirm the denial of the motion to suppress statements, vacate the sentence, and remand for resentencing.

¶ 3 I. BACKGROUND

¶ 4 Following a stipulated bench trial in the circuit court of Lake County, defendant was found guilty of first-degree murder (720 ILCS 5/9-1(a)(2) (West 2008)), as charged in count II of an indictment, and sentenced to an extended term of 80 years in prison. The facts relevant to this appeal are derived from a stipulation entered into by defendant and the State, as well as those developed at the sentencing hearing and other proceedings.

¶ 5 In the early morning hours of May 9, 2009, someone threw a Molotov cocktail into the residence of Raphael Juarez in Mundelein. While Raphael was not home at the time, tragically his 12-year-old brother died in the resulting fire, and several other family members were seriously injured.

¶ 6 Prior to this incident, defendant and his older brother, Elver Hernandez, attended a Latin Kings gang meeting with several other gang members at a house in Antioch. At that meeting, it was agreed that a "smash on sight" (SOS) order was to be carried out against Raphael, a disgruntled fellow gang member. Elver was assigned to carry out the SOS and, in turn, decided to recruit defendant to assist him in doing so.

¶ 7 When it was discovered that Raphael was a disgruntled member of the Latin Kings gang, the investigators quickly focused on other members of the gang. As part of their investigation, the police contacted defendant and Elver. Defendant was interviewed at the Mundelein police station at about 10:45 p.m. on May 9, 2009, after Elver was interviewed at the Waukegan police station earlier on that same date. Defendant was advised of and waived his *Miranda* rights prior to the

initial interview. Although defendant denied any involvement in the fire, the police learned from Elver that he and defendant were responsible for starting it.

¶ 8 After defendant was implicated by Elver, the police transported defendant to the Waukegan police station at about 2 a.m. on May 10, 2009. Officers Dominic Cappelluti and Charles Schletz met with defendant briefly as he was being placed in a holding cell at the Waukegan police station. Defendant told them that he was tired, so they decided to talk to him later in the morning.

¶ 9 Later that morning, at about 10 a.m., Officers Cappelluti and Schletz interviewed defendant. Prior to meeting with defendant in an interview room, the officers activated a video and audio recorder in the room. Defendant was again given his *Miranda* warnings, stated that he understood them, and said that he was willing to talk. According to Officer Schletz, defendant was given a soda at the start of the interview. Defendant did not complain or request anything, including an attorney. Officer Schletz denied seeing anyone threaten defendant. The interview lasted until just after 11 a.m. that morning.

¶ 10 According to Officer Schletz, defendant asked if he was being recorded via the video camera. The officers told him no even though they in fact were recording the interview.

¶ 11 The transcript of the recorded interview reflects that, immediately before Officer Cappelluti advised defendant of his *Miranda* rights the second time, defendant asked if he was being recorded. Officer Cappelluti responded, "No, you're not. Okay? Don't worry about that. Okay, you're not." Officer Cappelluti then continued with the *Miranda* warnings, which defendant acknowledged he understood.

¶ 12 Shortly into the interview, Officer Cappelluti asked defendant "[w]hy [he] asked, uh, if we're being recorded," to which defendant responded that he did not "want to be heard *** talking to you."

Later, during the interview, defendant stated, "This better not be recorded too, man," to which Officer Cappelluti responded, "No, it's not." Finally, at the very end of the interview, defendant asked if he had been recorded, and Officer Schletz answered no.

¶ 13 Defendant was ultimately charged with several counts of first-degree murder and arson based on his involvement with the fire. Relevant to this appeal, count II of the indictment notified defendant that the State was seeking an extended-term sentence of "not less than 60 years and not more than 100 years" because, at the time of the offense charged, defendant was "engaged in furtherance of the criminal activities of an organized gang *** pursuant to 730 ILCS 5/5-5-3.2(b)(13)."[1]

¶ 14 Defendant filed a motion to suppress his statements, which was denied. In denying defendant's motion, the trial court found that defendant had been advised of his *Miranda* rights, that no promises or threats had been made, and that the statements were voluntary. The trial court further explained that it considered the statements voluntary notwithstanding that the officers falsely told defendant that he was not being recorded.

¶ 15 Defendant opted for a stipulated bench trial to preserve his right to challenge on appeal the denial of his motion to suppress statements. Prior to the stipulated bench trial, the trial court explained defendant's potential sentencing possibilities. In doing so, the trial court stated that if defendant were found guilty of first-degree murder the sentence it "would impose would be between

[1]While the section cited by the State in its notice was section 5-5-3.2(b)(13), the language of the notice itself clearly refers to section 5-5-3.2(b)(8) (730 ILCS 5/5-5-3.2(b)(8) (West 2008)). There is no indication in the record that this obvious misstatement of the citation prejudiced defendant in any way. Thus, we will refer to the correct section in our analysis.

60 to 100 years." The trial court repeated that if it found defendant guilty it "would sentence [defendant] to between 60 and 100 years in prison." On a later date prior to the stipulated bench trial, the trial court reiterated that if it found defendant guilty of first-degree murder it would "have to sentence [defendant] to between sixty and a hundred years." The court repeated that if defendant were found guilty the "minimum sentence" would be 60 years in prison.

¶ 16 Following the stipulated bench trial, defendant was found guilty of first-degree murder as charged in count II. The trial court sentenced him to 80 years in prison, finding that the gang-activity enhancement applied. Following the denial of his motion to reconsider sentence, defendant filed this timely appeal.

¶ 17 II. ANALYSIS

¶ 18 On appeal, defendant raises the following issues: (1) whether his right against self-incrimination was violated when, after telling the officers, both before and after he was advised of and waived his *Miranda* rights, that he did not want his statements recorded, they falsely told him that they would not do so; and (2) whether his extended-term sentence must be vacated because he did not receive proper notice of the basis for the extended-term sentencing range, because the evidence of his gang activity did not support application of the extended-term sentencing range, and because the trial court erroneously believed that it had to sentence him within the extended-term sentencing range and could not impose one below it. We consider each issue in turn.

¶ 19 A trial court's ruling on a motion to suppress evidence is reviewed under the two-part test of *Ornelas v. United States*, 517 U.S. 690, 699 (1996). *People v. Hunt*, 2012 IL 111089, ¶ 22. The court's factual findings are upheld unless they are against the manifest weight of the evidence. *Hunt*,

2012 IL 111089, ¶ 22. The ultimate legal question of whether suppression is warranted is reviewed *de novo*. *Hunt*, 2012 IL 111089, ¶ 22.

¶ 20 A confession is voluntary if it is the result of free will, rather than an inherently coercive atmosphere. *People v. Willis*, 215 Ill. 2d 517, 535 (2005). In deciding whether a confession was voluntary, we consider the totality of the circumstances surrounding it, including the defendant's age, intelligence, education, experience, and physical condition at the time of the interrogation; the duration of the interrogation; the existence of any physical or mental abuse; and the duration of the detention. *People v. Nicholas*, 218 Ill. 2d 104, 118 (2005). No one factor is dispositive. *People v. Gilliam*, 172 Ill. 2d 484, 500 (1996).

¶ 21 A confession is involuntary where a defendant's will was overborne at the time of his confession such that it cannot be deemed the product of a rational intellect and free will. *People v. Bowman*, 335 Ill. App. 3d 1142, 1153 (2002). The police are allowed to play on a suspect's fears, anxieties, and ignorance so long as they do not magnify those emotionally charged matters to the point where a rational decision becomes impossible. *Bowman*, 335 Ill. App. 3d at 1153.

¶ 22 Police deception does not invalidate a confession as a matter of law, but rather is one factor to consider when deciding whether a confession was voluntary. *People v. Martin*, 102 Ill. 2d 412, 427 (1984). However, a defendant's confession must not result from deceptive interrogation tactics designed to overcome the defendant's free will. *People v. Minniti*, 373 Ill. App. 3d 55, 70 (2007).

¶ 23 When we consider the totality of the circumstances in this case, we are convinced that the trial court correctly found that defendant's statements were voluntary. Defendant was given the *Miranda* warnings, and he stated that he understood those. Although he was only 17 years old, he had prior experience with the criminal justice system. He was well rested, and there was no evidence

whatsoever that he had been threatened, coerced, or mistreated in any way. Nor was the interview or the detention particularly lengthy.

¶ 24 Defendant's argument that his statements were involuntary is based solely on the fact that the officers lied to him about whether he was being recorded. This single fact, when viewed in light of the totality of the circumstances, did not render defendant's statements involuntary. Although defendant was led to believe that he was not being recorded, such belief did not induce him to make any incriminating statements. There is no indication that the deception regarding the camera overrode defendant's free will and caused him to incriminate himself. See *Matthews v. Commonwealth*, 168 S.W.3d 14, 21 (Ky. 2005) (deception as to whether statement was recorded did not compel the defendant to confess). Rather, it appears from the evidence that defendant was more than willing to talk to the officers about the incident, including making incriminating statements. His apparent concern was not about incriminating himself, but rather was about fellow gang members finding out that he had talked to the police. The officers' deception was designed to mitigate that concern and not to trick defendant into making any incriminating statements. The evidence clearly demonstrates that, despite his concern about being recorded, defendant was ready and willing to make incriminating statements to the officers.

¶ 25 Although defendant points to the fact that the police deception began prior to his waiving his *Miranda* rights and agreeing to speak to the officers, defendant does not specifically contend that this rendered his *Miranda* waiver either involuntary or not knowing and intelligent. See *People v. Bernasco*, 138 Ill. 2d 349, 354-55 (1990) (citing *Moran v. Burbine*, 475 U.S. 412, 421 (1986)). Even if defendant had raised such a claim here, it would fail. For the same reasons that we concluded his statements were voluntary despite the police deception, the deception regarding the recording did

not affect the voluntariness of the *Miranda* waiver. See *Matthews*, 168 S.W.3d at 22. Nor did it impact his awareness of the State's intention to use his statements to secure a conviction and that he could stand mute, which is the operative question as to a knowing and intelligent *Miranda* waiver. *Bernasco*, 138 Ill. 2d at 359-60 (citing *Burbine*, 475 U.S. at 422).

¶ 26 The cases relied on by defendant are distinguishable, as there were other factors present in those cases beyond the police deception that colored the voluntariness assessment. For example, while defendant strongly relies on *Bowman*, that case is different from this one in that the police there engaged in a complicated scheme that played on the defendant's emotions which made a rational decision to confess impossible. *Bowman*, 335 Ill. App. 3d at 1153-54. The police conduct here comes nowhere close to the intricate deception in *Bowman*. The *Bowman* case, and similar others, do not support defendant's position.

¶ 27 In light of the various factors relevant to the question of the voluntariness of defendant's statements, including the fact that the police lied about whether they were recording him, the police deception did not overcome defendant's free will. Thus, the trial court did not err in finding that defendant's statements were voluntary and in denying his motion to suppress the statements.

¶ 28 We next address defendant's contention that his sentence must be vacated and this case remanded for resentencing. In that regard, he argues the following: (1) that his sentence is void because he was not properly notified of the basis for an extended-term sentence and was thus prejudiced in his defense; (2) that the evidence was insufficient to prove that he was eligible for an extended-term sentence based on the enhancement under section 5-3.2(b)(8); and (3) that the trial court erroneously believed that it was required to sentence him within the extended-term sentencing range.

¶ 29 We consider as dispositive defendant's contention that the evidence did not establish his eligibility for an extended-term sentence pursuant to section 5-5-3.2(b)(8). Section 111-3(c-5) of the Code of Criminal Procedure of 1963 (725 ILCS 5/111-3(c-5) (West 2008)) provides, in pertinent part, that an alleged fact that is not an element of the offense, but which is sought to be used to increase the sentencing range beyond the statutory maximum, must be included in the charging instrument or in a separate written notice to the defendant and proved beyond a reasonable doubt. Here, the charge provided written notice that the State was seeking an extended-term sentence based on section 5-5-3.2(b)(8). Therefore, it was required to prove beyond a reasonable doubt that defendant was eligible for an extended-term sentence pursuant to the provisions of section 5-5-3.2(b)(8).

¶ 30 Section 5-5-3.2(b)(8) provides, in relevant part, that for a defendant to be eligible for an extended-term sentence he must have committed a felony as part of an agreement with two or more "other persons" to commit the charged offense and, "with respect to the other individuals," must have "occupied a position of organizer" or "any other position of management or leadership." 730 5/5-5-3.2(b)(8) (West 2008). The court must further find that the felony committed was related to, or in furtherance of, the criminal activities of a gang. We may reverse the trial court's findings only if, viewing the evidence in the light most favorable to the State, no rational trier of fact could have so found beyond a reasonable doubt. *People v. Nevarez*, 2012 IL App (1st) 093414, ¶ 66.

¶ 31 In this case, defendant effectively concedes that the conduct charged in count II was related to gang activity. Defendant contends, however, that the evidence was insufficient to prove that he was in a leadership role for purposes of section 5-5-3.2(b)(8). We agree for the following reasons.

¶ 32 Assuming, *arguendo*, that the agreement included setting the house on fire or committing murder, there is no evidence that defendant was in a leadership role related to the other individuals who were party to the agreement. Defendant's brother, Elver, received a directive from another gang member to carry out the SOS. He, in turn, recruited defendant to assist him. There is no evidence that defendant was anything but a soldier in terms of carrying out the SOS. He was clearly not a leader in that regard.

¶ 33 Elver was the one who concocted the plan to set fire to the house. Although defendant prepared and threw the Molotov cocktail, he did so at the behest and direction of his older brother. This conclusion is consistent with this court's decision in *People v. Hernandez*, 2012 IL App (2d) 110817-U. In that case, involving Elver's appeal, a panel of this court affirmed application of section 5-5-3.2(b)(8) to Elver because it considered him a leader "with respect to his brother." *Hernandez*, 2012 Il App (2d) 110817-U, ¶ 23. Obviously, defendant and Elver both could not be leaders as to each other.

¶ 34 Because we conclude that the evidence failed to establish beyond a reasonable doubt that defendant was subject to an extended-term sentence under section 5-5-3.2(b)(8), we vacate his sentence and remand this case for resentencing absent the extended-term sentencing range. On remand, defendant is to be sentenced within the original sentencing range of 20 to 60 years. See 730 ILCS 5/5-8-1(a)(1)(a) (West 2008). As noted above, we need not address defendant's alternative bases for vacating his 80-year sentence.

¶ 35 Finally, to the extent that defendant can be said to have forfeited any evidentiary challenge to the application of section 5-5-3.2(b)(8), we conclude that such forfeiture was the product of trial counsel's ineffectiveness for failing to raise the issue below. See *People v. Harris*, 206 Ill. 2d 1, 55

(2002). That failure was deficient, and such deficient performance was prejudicial, as defendant received a significantly longer sentence than what was properly authorized for his offense.

¶ 36 III. CONCLUSION

¶ 37 For the reasons stated, we affirm the denial of defendant's motion to suppress statements, vacate his sentence, and remand for resentencing.

¶ 38 Affirmed in part and vacated in part; cause remanded.