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STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

v

JOHN HEROLD SANDERS,
Defendant-Appellee.
_____/

Supreme Court No. 167899

Court of Appeals No. 371677

Circuit Court No. 13-227-FC

PLAINTIFF-APPELLEE'S ANSWER IN OPPOSITION OF DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

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COUNTERSTATEMENT OF QUESTIONS INVOLVED

I. Whether the trial court correctly found Defendant's statement to police was voluntary when it applied the proper legal standards and made factual findings supported by the record?

Plaintiff-Appellee answers, "Yes."

Defendant-Appellant answers, "No."

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COUNTERSTATEMENT OF APPELLATE JURISDICTION

Defendant-Appellant's jurisdictional statement is complete and correct. Plaintiff-Appellee agrees this Court has jurisdiction.

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INTRODUCTION

In a nineteen page written opinion, the trial court properly applied well-established precedent to determine Defendant's statement to police was voluntary. The trial court reviewed the hearing testimony, made findings supported by the record, and appropriately used them to assess the voluntariness of Defendant's confession, including a pre-arraignment delay of 64 hours. The trial court's ruling was well based in the law and completed with sound analysis of the appropriate factors it was required to assess. The Court of Appeals declined Defendant's application for leave to appeal. This Court should as well: there was no error by the trial court and no basis to grant this application.

Defendant's application requests this Court disregard both precedent and the proper standard of review. He first asks this Court to ignore its opinion of 24 years and find that his pre-arraignment delay alone requried the trial court find his statement to police to be deemed involuntary, and therefore suppressed. Secondly, he asks this Court to disregard the trial court's factual findings on the circumstances surrounding Defendant's statement and the record they were based upon. We ask this Court to apply the proper legal precedent and review the trial court's findings by the proper standard, clear error, and and deny leave.

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COUNTERSTATEMENT OF FACTS

On January 7, 2013, Detective Mark Lewandowsky was a violent crimes detective with the Lansing Police Department. WH, 9-11.[1] On that date, he went to his usual Monday morning meeting with his detective bureau and had contact with Detectives Shannon Thielen and Elizabeth Reust, two detectives within the child crimes unit. WH, 21. He learned at that time there had been a suspicious infant death the Friday before and that the child had suffered significant traumatic brain inury that resulted in her death. WH, 22, 24.

The suspect in the infant's death was her father, John Sanders, who had been arrested on Friday. WH, 25-26. The autopsy of the infant was conducted Saturday and Defendant had not yet been re-interviewed with those results. WH, 28. Lewandowsky was asked to interview him Monday morning, and agreed. WH, 27. At that time, Defendant had not yet had formal charges issued against him, or been arraigned before a judge WH, 30-31. Detective Lewandowsky began the interview with Defendant at 10am in one of the interview rooms of the police precinct,[2] 64 hours and 35 minutes after Defendant was arrested. WH, 5, 33.

At the time of the interview, Defendant was 37 years old and taking collegiate classes at an online university. WH, 47. He also had an extensive prior history with police; he had five prior felony convictions, from 1998, 2005, and 2011. CH, 47. At the time of the interview, Defendant was still for his most recent conviction. CH, 47.

[1] For reference, the People will use the same identifiers of the two-part motion hearing as Defendant: WH, Motion hearing, 04/05/2024; CH: Motion hearing, 04/19/2024.
[2] In addition to Lewandowsky's testimony, a video and transcript of the interview was admitted into evidence at the hearing. WH, 36; People's Exhibits 2, 3.

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During the interview, Lewandowsky did not wear a uniform; he wore a button up dress shirt and a pair of dress pants. WH, 37. He was not wearing a badge, nor carrying a firearm. WH, 37. He introduced himself to Defendant as "Mark," and removed Defendant's handcuffs. WH, 37-38. Lewandowsky also removed any barriers between the two of them so they could sit and talk knee to knee, face to face, WH, 40. His tone was modulated, he did not yell, and he tried to build a report with Defendant, explaining how he was also a father. CH, 21-22, 26. Lewandowsky did not threaten Defendant with physical abuse or any other type of threat. CH, 33-34. He also did not observe any injuries on Defendant, and Defendant did not seem excessively fatigued. WH, 41. Rather, he was alert, had no complaints about sleep, answered questions appropriately, and was oriented to time and place. WH, 41-42. Defendant also did not appear to be under the influence of drugs or alcohol, had no physical injuries, and did not say he was hungry or denied water. WH, 42. Lewandowsky also took a break in the interview, retrieved water for Defendant, and allowed him to use the restroom. WH, 52, 54.

Before the interview began, Lewandowksy read Defendant his *Miranda* warnings and Defendant agreed to waive them, which he did in writing. WH, 43-44. This was not the first time; Defendant had been advised of those rights and waived them prevously, during his first interview about his daughter's death. WH, 48. Lewandowsky described Defendant's affect throughout the intervew as flat, with a lack of emotion. WH, 42. He did not cry, cover his face with his hands, or make any statements about his emotional condition. WH, 43. Moreover, he did not say he was

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sad about his daughter dying; rather, he said he was "having a bad year" because he was being charged with murder. CH, 29. Throughout the interview, Defendant changed his factual version of events multiple times, especially once confronted with the autopsy results. WH, 54; CH, 35.

Trial Court's Findings

Following the two day motion hearing in this case, the trial court issued a written opinion, granting the People's request to admit Defendant's statement to Detective Lewandowsky after a thorough analysis of the "the critical factors a trial court should consider in determining the voluntariness of a statement" according to *People v Cipriano,* 431 Mich 315, 331 (1998).[3] Opinion and Order, 6. The trial court found (as conceded by the People), the length of his detention and unnecessary delay in bringing him before a magistrate were factors that suggested his statement was involuntary. *Id.* at 17. However, it noted those were only factors to consider, and were not that it "should not, and will not, find coerciveness or involuntariness just because of the delay factor." *Id.* at 15. The trial court also weighed against the People that, although Defendant was given breaks in questioning, he "seemed tired" and was not provided with mental health assistance. However, the trial court found the remainder of the factors lent a finding of voluntariness. The trial court found Defendant's age and education/intelligence weighed in favor of voluntariness:

[3] The trial court began its opinion noting its authority to hear the motion. Defendant had previously been convicted at a jury trial, but that conviction had been reversed on a successful Motion for Relief from Judgment. Thus, this motion was once again before the trial court, in a pretrial motion to admitted Defendant's statement. Order and Opinion, 1-4. Defendant did not contest the trial court's authority to re-hear this motion, nor does he contest it in this application.

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Defendant was not at a "diminished capacity of understanding what was going on around him," and he was a "high school graduate actively enrolled in college courses." *Id.* at 16. The trial court noted Defendant had an extensive criminal history and was "very familiar with interactions with law enforcement;" this weighed in favor of finding his statement voluntary. *Id.* Defendant was also advised of his *Miranda* rights, "consistent with constitutional protections" and the record showed no evidence that Defendant "was injured, in ill-health, or intoxicated during the time of the questioning." *Id.* That factor weighed in favor of the People's request for admission. Moreover, Defendant was never deprived of food, sleep, or medical attention,[4] nor was he physically abused or threatened with physical or mental abuse. *Id.* Thus, the trial court granted the People's Motion to Admit Defendant's Statement. *Id.* at 17.

[4] Although making the finding that Defendant was not deprived of food, sleep, or medical attention, the trial court still found this factor "neutral" in its analysis because Defendant was not "afforded mental health treatment regarding the abrupt death of his daughter." *Id.* at 16-17.

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ARGUMENT

I. Applying the proper legal standard to the trial court's factual findings supported by the record, Defendant's statement to police was voluntary.

A. *Defendant's Argument*

Defendant argues his statement to police must be suppressed because it was made during a more than 48-hour detainment prior to arraignment, and the prosecutor did not "prove the existence of a bona fide emergency or that other extraordinary circumstances necessitated the delay." Defendant's Application, 5. Defendant also argues, even under the factors articulated in *People v Cipriano,* his statement should be suppressed "because of the unreasonable delay and unnecessary length of time of his detention, and because he was in shock and operating under the duress of just having lost his infant daughter." Defendant's Application, 12.

B. *Issue Preservation*

These arguments were raised before the trial court; they are preserved.

C. *Standard of Review*

This Court reviews a trial court's decision on a motion to suppress evidence de novo. *People v Henry (After Remand),* 305 Mich App 127, 137 (2014). However, this Court will not reverse the trial court's findings regarding the voluntariness of a confession unless they were clearly erroneous. *People v Manning,* 243 Mich App 615, 620 (2000). "A finding is clearly erroneous if it leaves [this Court] with a definite and firm conviction that the trial court made a mistake." *Id.*

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D. *People's Argument*

Citizens are protected against self-incrimination and afforded due process of law under both the United States and Michigan Constitutions. US Const, Ams V and XIV; Const 1963, art 1, §17. "The use of an involuntary statement elicited by coercive state action in a criminal trial violates these constitutional protections. *People v Stewart,* 512 Mich 472, 480 (2023) (citation omitted). To determine whether a statement was involuntary because of state coercion, a reviewing court must consider "whether the totality of the circumstances surrounding the making of the confession indicates that it was freely and voluntarily made." *People v Cipriano*, 431 Mich 315, 334 (1988). While all relevant circumstances must be considered, the Michigan Supreme Court has specifically directed consideration of the following factors:

> 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. [*Id.*].

Our courts have also reconciled the United States Supreme Court's decision in *Riverside Co v McLaughlin*, 500 US 44 (1991) with *Cipriano.* In *Riverside,* the United States Supreme Court ruled on a civil case dealing *solely* with the Fourth Amendment prohibition against unreasonable seizures and held that any delay of more than forty-eight hours must be presumed unreasonable. *Id.* at 56-57. It did not, however,

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address the effect of the unreasonable delay on the prosecutor's ability to introduce a confession obtained during a delay. *Manning,* 243 Mich App at 628. Our Court of Appeals did:

> This automatic exclusion is not required by the Fifth Amendment or the Fourth Amendment. The proper analysis is voluntariness under the *Cipriano* factors. The delay of more than eighty hours presumptively violated the Fourth Amendment, but an unnecessary delay does not require automatic suppression of the confession. It is *not* automatic that evidence obtained during a Fourth Amendment violation must be excluded. When a confession was obtained during an unreasonable delay before arraignment, in Michigan the *Cipriano* factors still must be applied. The unreasonable delay is but one factor in that analysis. The longer the delay, the greater the probability that the confession will be held involuntary. At some point, a delay will become so long that it alone is enough to make a confession involuntary. [*Id.* at 643].

Even further, "a trial court is free to give greater or lesser weight to any of the *Cipriano* factors, including delay in arraignment." *Id.*

The trial court in this case applied the appropriate law. While Defendant seemingly acknowledges *Manning*, he still argues that in order to admit Defendant's statement the government had to "prove the existence of a bona fide emergency or that other extraordinary circumstances necessitated the delay," and, because the government could not, Defendant's statement should have been suppressed. (Defendant's Application, 6). This argument is an incorrect statement of the law. In fact, it was what *Manning* rejected – the trial court had suppressed Manning's statement solely because of the length of the pre-arraignment delay and the Court of Appeals reversed. "A trial court cannot, however, give preemptive weight to that one factor, as the trial court did here. To do so is to adopt a rule of automatic suppression of a confession obtained during the period of delay, a result that is directly contrary

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to *Cipriano* and that neither *Riverside Co., McCray,* or *Whitehead* requires." *Id.* at 643. To wit: "[t]he unreasonable delay is but one factor in the analysis." *Id.*

While *Manning* does recognize the factor of delay in arraignment could become so long that it renders a confession involuntary, this decision still lies with the trial court, who is "free to give greater or lesser weight to any of the *Cipriano* factors, including delay in arraignment." *Id.* Moreover, Defendant has provided no caselaw that supports a finding that the delay in this case, 64 hours, was "so long that it alone is enough to make a confession involuntary." *Id.* In fact, the cases have provided the opposite. See *People v Harrison,* 431 Mich 315 (1988)(finding a statement given after a 96 hour pre-arraignment delay was still voluntary); *People v Cipriano,* 431 Mich 315 (1988)(finding a statement given after a 48 hour delay was still voluntary); *People v Manning*, 243 Mich App 615 (2000)(finding a statement given after an 80 hour pre-arraignment delay was still voluntary), *People v Evans,* unpublished per curiam of the Court of Appeals, issued March 18, 2004 (Docket No. 238184)(finding a statement given after an 96 hour delay was still voluntary). Thus, there is no basis for this Court to conclude Defendant's statement should have been suppressed based on the pre-arraignment delay alone.

The trial court then appropriately applied this correct law to the factual record before it. It walked through the *Cipriano* factors and evaluated them based on the evidence in the record and properly found that, although the length of Defendant's detention and the unnecessary delay in bringing him before a magistrate suggested

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his statement to police was involuntary, it did not outweigh the balance of the other factors.[5] This was the correct analysis and conclusion.

Defendant does not dispute many of the trial court's findings and the ones he does dispute, he does so without contending with the proper standard of review: clear error. He agrees he was a 37-year-old man who was advised of his *Miranda* rights on two separate occasions, by two separate detectives, and waived them. He also does not contest that he was not injured, intoxicated or deprived food, sleep, or medical attention. Defendant's remaining arguments invite this Court to re-evaluate the same evidence as the trial court, and make a different factual finding, without addressing the clear error standard. For example, although the trial court found Defendant was not in "ill-health," Defendant argues "the trial court got it wrong" because he was "extremely upset and in severe emotional distress over is daughter's death" and therefore in ill health. The record belies that. Lewandowsky described Defendant's affect as flat – he did not cry, cover his face with his hands, or make any statements about his emotional condition. In fact, Defendant did not say he was sad about his daughter dying; rather, he said he was having a bad year because he was being charged with murder. CH, 29. Defendant similarly argues he was in "extreme distress" and "duress under the circumstances," but this has no support in the record. Defendant did not testify at the hearing nor present any evidence. And, to the contrary, Lewandowsky tried to make the interview as comfortable as possible – he introduced himself as "Mark," removed Defendant's handcuffs, and removed any

[5] The People conceded both the length of the detention before Defendant gave his statement and the delay in bringing him before a magistrate.

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barriers between the two of them so they could sit and talk knee to knee, face to face. WH, 37-38, 40. Lewandowsky's tone was modulated, he did not yell, and he tried to build a report with him. CH, 21-22, 26. There was no evidence Defendant was in any distress or under duress.

Defendant similarly disagrees with the trial court's findings surrounding his education and previous experience with police. He does not deny he was an articulate man engaged in collegiate coursework, he merely argues he was no match for the Detective's questions "unleashed upon [him] while he was in an emotionally and mentally subtracted capacity." Defendant's Application, 14. Defendant also does not deny he had an extensive criminal history and experience with police, he merely argues that, because he always chose to plead guilty, he was "not learned" in the criminal justice process. Those arguments do not show any error in the trial court's findings, let alone clear error. The record supports the trial court's finding that Defendant was an articulate, educated man with college experience and that he had an extensive prior history with police; he had five prior felony conviciont, form 1998, 2005, and 2011. CH, 47. Moreover, at the time of the interview, Defendant was still on probation for his most recent conviction. CH, 47. These factors weigh in favor of voluntariness and the trial court correctly evaluated them as such. Finally, Defendant concedes he suffered no physical abuse or threats, but notes there could be "more sophisticated modes of persuasion." Defendant's Application, 14. That argument has no merit, legally or factually. Applying the proper standard of review

to the trial court's findings, and a review of the extensive record supporting them, there is no basis to grant Defendant's request for leave.

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RELIEF REQUESTED

WHEREFORE, Plaintiff-Appellee respectfully requests that this Court deny Defendant-Appellant's Application for Leave to Appeal.

Respectfully submitted,

/S/ Elizabeth L. Allen

Dated: December 19, 2024

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STATEMENT OF WORD COUNT

There are 3,045 countable words in this brief.

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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARIO EVANS,

Defendant-Appellant.

UNPUBLISHED
March 18, 2004

No. 238184
Wayne Circuit Court
LC No. 01-003572

Before: Hoekstra, P.J., and Fitzgerald and White, JJ.

PER CURIAM.

Defendant appeals as of right his convictions of first-degree murder, MCL 750.316, possession of a firearm by a felon, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to life imprisonment for the murder conviction and forty to sixty months' imprisonment for the felon-in-possession conviction, to be served consecutive to two years' imprisonment for the felony-firearm conviction. We affirm.

On appeal, defendant argues that he was denied the effective assistance of counsel. Because this Court denied defendant's motion to remand this case to the lower court for a *Ginther*[1] hearing, our review of this issue is limited to errors apparent on the existing record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000); *People v Johnson*, 144 Mich App 125, 129-130; 373 NW2d 263 (1985).

We will not reverse a conviction based on ineffective assistance of counsel unless the defendant establishes that (1) counsel's performance was below an objective standard of reasonableness under prevailing professional norms; and (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). "'A reasonable probability is a probability sufficient to undermine confidence in the outcome."' *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001), quoting *Strickland, supra* at 694. Effective assistance of counsel is presumed, and

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

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the defendant bears a heavy burden of proving otherwise. *Carbin, supra*; *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

Defendant first claims that he was denied the effective assistance of counsel because defense counsel failed to move to suppress his custodial statement and the lineup identification on the ground that they were illegally obtained during an unreasonable prearraignment delay. We disagree.

"A delay of more than forty-eight hours between an arrest without a warrant and a probable cause arraignment shifts the burden to the government to show the existence of a bona fide emergency or other extraordinary circumstances." *People v Manning*, 243 Mich App 615, 631; 624 NW2d 746 (2000), citing *Riverside Co v McLaughlin*, 500 US 44, 56-57; 111 S Ct 1661; 114 L Ed 2d 49 (1991). "Absent such a showing, the delay is unreasonable per se under the Fourth Amendment." *Id.* Nevertheless, such a delay does not necessarily require the suppression of statements obtained while a person is in police custody during the delay. *Manning, supra* at 631-632, 643. Instead, the proper analysis is whether the accused's statement was obtained voluntarily as determined by the factors listed in *People v Cipriano*, 431 Mich 315, 333-334; 429 NW2d 781 (1988), and unreasonable delay before arraignment is only one of the factors that should be considered in determining whether a defendant's custodial statement was voluntary. *Id.*; *Manning, supra* at 634-635, 643.

In this case, the prosecutor does not dispute that defendant was held for over forty-eight hours before defendant made the statement introduced at trial. In fact, defendant was detained for over ninety-three hours before he made his inculpatory statement and the record indicates that a magistrate issued an arrest warrant based on probable cause more than seven days following defendant's arrest. Therefore, a judicial determination of probable cause was made well outside the forty-eight hour requirement set forth in *Riverside, supra*. Although plaintiff contends on appeal that the delay was justified, the record reveals that during the delay the police were attempting to locate persons to verify defendant's initial exculpatory statements concerning an unrelated homicide and to locate an eyewitness to identify defendant in a lineup in this case. These circumstances do not constitute extraordinary circumstances to justify the unreasonable delay. Rather, a delay for the purpose of gathering additional evidence to justify an arrest constitutes an unreasonable delay. *Riverside, supra* at 56-57; *Manning, supra* at 630.

However, our analysis does not end here; rather, "[w]hen a confession was obtained during an unreasonable delay before arraignment, in Michigan the *Cipriano* factors still must be applied." *Manning, supra* at 643. According to the *Cipriano* Court, 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." *Cipriano, supra* at 333-334 (internal quotations and citation omitted). In *Cipriano, supra*, our Supreme Court set forth the following nonexclusive list of factors to consider in determining whether a statement is voluntarily made:

> In determining whether a statement is voluntary, the trial court should consider, among other things, the following factors: 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

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> 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. [*Id.* at 334.]
>
> In *Manning, supra*, this Court explained:
>
> > In engaging in the balancing process that *Cipriano* outlines, a trial court is free to give greater or lesser weight to any of the *Cipriano* factors, including delay in arraignment. A trial court cannot, however, give preemptive weight to that one factor . . . . To do so is to adopt a rule of automatic suppression of a confession obtained during the period of delay, a result that is directly contrary to *Cipriano* and that … *Riverside Co* [does not require]." [*Id.* at 643.]

However, "[t]he longer the delay, the greater the probability that the confession will be held involuntary." *Manning, supra*. Although this Court has recognized "the possibility that in some situations the length of the delay alone may be a sufficient ground to suppress a defendant's statement, particularly where the delay is so inexplicably long that it raises an inference of police misconduct," *id.* at 645, we do not find this to be such a case.

Here, examining the totality of the circumstances, we conclude that the evidence demonstrates that defendant voluntarily provided his statement to the police. Significantly, the record indicates that defendant was apprised of and understood his *Miranda*[2] rights on at least two occasions before he confessed and he spoke willingly to the police. On both occasions, after the officer advised defendant of his rights, defendant acknowledged that he understood those rights by placing his initials next to each right and signing the constitutional rights form. According to the officer, defendant never expressed any hesitation about talking about the shooting and did not request to speak with a lawyer. The record indicates that defendant had prior experience with the police because he was convicted of second-degree home invasion in 1998, receiving and concealing stolen property over $100 in 1999, and attempted carrying a concealed weapon in 1997, and thus, defendant was familiar with *Miranda*. The record does not indicate that defendant was intoxicated, in ill health, under the influence of drugs or deprived of food, sleep, or water when he gave the statement. To the contrary, officer testimony indicated that defendant was awake and alert and did not complain about lack of sleep when he gave his statement. Nor did defendant appear to be under the influence of drugs or alcohol. The record does not indicate that defendant was threatened with abuse or uneducated, illiterate or unintelligent. Defendant was approximately twenty years old when he confessed and he had obtained a GED. Although there is evidence that the police engaged in repeated questioning before defendant gave his statement, there is no evidence that he was subjected to continuous interrogation or to intimidating police conduct.

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

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In sum, we find, under the totality of the circumstances, defendant's decision to make an inculpatory statement was voluntary, i.e., the product of a free and deliberate choice, notwithstanding the unreasonable prearraignment delay.[3] *Cipriano, supra* at 333-334; *Manning, supra* at 643. Because we find that defendant's statement was voluntary, defense counsel was not ineffective for failing to move to suppress it. Defense counsel was not required to bring a frivolous or meritless motion.[4] *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998).

Defendant further claims that defense counsel was ineffective because he failed to move to suppress the lineup identification as a product of the unreasonable delay. We disagree.

Although the lineup identification occurred approximately eighty-one hours following defendant's arrest during what we find was an unreasonable delay, defendant failed to establish that there is a reasonable probability that, but for counsel's error, the outcome of the trial would have been different. *Strickland, supra* at 694; *Toma, supra* at 302-303. Even if trial counsel had "move[d] to suppress the lineup identification" as defendant now claims his counsel should have done, it is unlikely that such a motion would have been successful. The eyewitness had made a statement to the police on the day of the shooting, and thus the eyewitness' identity was known to the police before defendant's arrest. In light of this circumstance, the eyewitness would have identified defendant despite defendant's unlawful detention. Because the eyewitness identification of defendant was inevitable, it is not evidence that would not have been discovered but for the direct procurement of evidence from an unlawfully detained person. See *People v Lewis*, 168 Mich App 255, 262-263; 423 NW2d 637 (1988), citing *People v Mallory*, 421 Mich 229, 240-241; 365 NW2d 673 (1984). In addition, the eyewitness' testimony concerning the incident largely corroborated defendant's statement, which, as discussed *supra*, was voluntary and admissible. Accordingly, defendant has failed to establish his claim of ineffective assistance of counsel.

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[3] Although the prosecution supports its argument with citation to a *Walker* hearing transcript, see *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965), it is not clear from the lower court record whether defendant moved to suppress his statements to the police relative to this case, whereas it is clear that a motion was made in an unrelated case (*People v Evans*, Docket No. 240357). In the event that the *Walker* hearing was undertaken with respect to the instant case also, we agree with the trial court's ruling that defendant's statements to the police were voluntary.

[4] To the extent that defendant's ineffective assistance of counsel claim arguably could be based on counsel's failure to move for suppression of defendant's statement as the fruit of an illegal arrest, defendant is still entitled to no relief. On this Court's own motion pursuant to MCR 7.216(A)(5) and in light of *People v McKinney*, 251 Mich App 205; 650 NW2d 353 (2002), vacated 468 Mich 926; 663 NW2d 469 (2003), this case was remanded to the trial court for "further fact-finding regarding the issue whether defendant's statements should have been suppressed as the product of an illegal arrest." After an evidentiary hearing, the trial court determined that probable cause to make the initial arrest existed. Because the a fair-minded person of average intelligence would be justified in believing that the suspected individual had committed the felony, *People v Kelly*, 231 Mich App 627, 631; 588 NW2d 480 (1998), we agree that there was probable cause for an arrest, and thus the statement was not the fruit of an illegal arrest.

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Defendant next claims that he was denied the effective assistance of counsel due to defense counsel's failure to move to obtain an expert witness on identification or to seek a cautionary instruction on the dangers of misidentification. We disagree.

"[O]ther than psychiatric experts, a defendant is entitled to the appointment of an expert at public expense only if he cannot otherwise proceed safely to trial without the expert." *People v Leonard*, 224 Mich App 569, 582; 569 NW2d 663 (1997), citing MCL 775.15; see also *People v Jacobsen*, 448 Mich 639; 532 NW2d 838 (1995). An error that deprives an indigent defendant of the appointment of an expert constitutes reversible error only "if defendant was prejudiced and received a fundamentally unfair trial as the result of not having expert assistance." *Leonard, supra* at 583.

In the present case, defendant failed to establish that the outcome of the trial would have differed had an expert testified regarding the fallibility inherent in eyewitness identification. In his statement, defendant admitted to participating in the shooting. The identification evidence corroborated defendant's statement by placing him at the scene of the crime. Thus, even if an expert testified regarding the fallibility inherent in eyewitness identification, defendant implicated himself by his own statement. Furthermore, defense counsel competently attacked the eyewitness' identification through cross-examination by eliciting testimony that it was dark outside at the time of the shooting and concerning the perpetrator's description. Defense counsel then attacked the eyewitness' identification by arguing in his closing argument that his description of the perpetrator also fit the description of Fred Bishop, who defendant implicated as the shooter in his statement, and that the dark conditions might have caused him to misidentify the person he observed fire the shotgun. Further, at the conclusion of trial, the trial court instructed the jury on witness credibility and identification, informing the jury of the proper considerations in determining whether to accept or reject the eyewitness identification. These considerations included, among others, how long the witness observed the offender, how far away from the scene the witness was located, how well the area was lighted, and the circumstances at the time of the identification. Under these facts, we find that defendant's trial, without expert testimony regarding the fallibility of eyewitness identifications, was not fundamentally unfair, *Leonard, supra* at 582, and that the jury was sufficiently informed of the proper considerations in determining whether to accept or reject eyewitness identification, *People v Carson*, 220 Mich App 662, 678; 560 NW2d 657 (1996), adopting certain findings of the vacated decision *People v Carson*, 217 Mich App 801, 807; 553 NW2d 1 (1996). Defendant has not shown that counsel's assistance was deficient.

Finally, defendant argues that a mandatory life sentence, without the possibility of parole, is a determinate sentence that violates the indeterminate-sentence principle of article 4, § 45, of the Michigan Constitution. We disagree.

This Court already has rejected this argument. In *Snider, supra*, we determined that "there is nothing in Const 1963, art 4, § 45 requiring indeterminate sentencing for particular crimes, such as [the defendant's] first-degree premeditated murders." *Id.* at 426-427; *People v Cooper*, 236 Mich App 643, 660-664; 601 NW2d 409 (1999). Thus, defendant's argument is without merit.

Affirmed.

/s/ Joel P. Hoekstra
/s/ E. Thomas Fitzgerald
/s/ Helene N. White

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