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IN THE
COURT OF APPEALS OF INDIANA

ASHANTI CLEMONS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0703-CR-319
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Tanya Walton Pratt, Judge
Cause No. 49G01-0509-FA-148898

December 31, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Ashanti Clemons ("Clemons") appeals his voluntary manslaughter conviction, arguing that the trial court abused its discretion when it admitted a videotaped statement that he gave to police because his waiver of *Miranda* rights was not knowing, voluntary, or intelligent, and that the police violated his Fifth Amendment right to counsel by ignoring his request for counsel. He additionally contends that the evidence is insufficient to support his conviction. Finding that Clemons knowingly, voluntarily, and intelligently waived his *Miranda* rights, that his Fifth Amendment right to counsel was not violated, and that sufficient evidence exists to support his conviction, we affirm the judgment of the trial court.

Facts and Procedural History

On August 30, 2005, Clemons, who lived with his mother, Letiate Tate ("Tate"), argued with Prentice Webster ("Webster") in the upstairs hallway of Tate's apartment building. Shortly thereafter, Webster died from multiple gunshot wounds. Police searched the apartment complex for witnesses and were told that Webster was heard saying to Clemons "get off of me," Tr. p. 93, and that someone had been entering and exiting Tate's apartment. A witness saw a man run into an apartment wearing a white t-shirt and leave a few minutes later wearing a black shirt. Police knocked on Tate's door, and when she opened it, they observed bullets, a box full of live ammunition rounds, and several live rounds scattered on Tate's living room floor, all of which were consistent in caliber, brand, and composition to the fired casings. The police also observed a white t-shirt on Tate's living room couch. Tate informed the police where they could find

Clemons. When the police located Clemons, he was wearing a black shirt and agreed to go to the police station for questioning.

Once there, the police conducted a videotaped interview of Clemons. A police officer read aloud the advisement of each *Miranda* right to Clemons and then handed him the Advice of Rights/Waiver of Rights form ("the form") for him to initial by each right if he understood it. Clemons wrote his initials next to each right. The officer then read aloud to Clemons the waiver of rights portion of the form and again handed him the form and requested that he initial by each statement to indicate his understanding. Clemons wrote his initials next to each statement and signed the waiver. During this process, the officer explained certain words and concepts from the form that he feared Clemons might not understand. For example, the officer explained the meaning of the word "coercion" and what it meant to say that he would "make a statement." Ex. p. 37-38. Clemons gave no indication that he did not understand what these rights meant after they were explained to him. During his interview with the officer, Clemons made certain comments indicating to the officer that he understood and was fully aware of his rights. For instance, Clemons stated, "You see what I'm saying, I mean I, like you read, read my rights, you see what I'm saying, I don't have to, I've got the right, you see what I'm saying to stop talking at any time or whatever." *Id.* at 57. Clemons also admitted to carrying a gun without a license and that he fired the gun.

The State charged Clemons with Count I, Voluntary Manslaughter as a Class A felony,[1] and Count II, Carrying A Handgun Without A License as a Class A

[1] Ind. Code § 35-42-1-3.

misdemeanor,[2] which was later enhanced to a Class C felony due to a previous conviction. On June 1, 2005, Clemons filed a Motion To Suppress the videotaped statements, which was denied following a hearing. At the conclusion of his trial, a jury found Clemons guilty of carrying a handgun without a license but was hung as to the voluntary manslaughter charge. Clemons pursued a direct appeal of his handgun conviction. On appeal, Clemons argued that the trial court abused its discretion when it admitted the videotape and transcript of statements he gave to police, claiming that the police violated his Fifth Amendment right to counsel when they failed to stop the interview after he requested counsel. Concluding that Clemons' procedural questions and comments about attorneys did not constitute an unequivocal request for an attorney, a panel of this Court held that the police did not violate his Fifth Amendment right to counsel and that therefore the trial court did not abuse its discretion when it admitted the evidence. *See Clemons v. State*, No. 49A02-0608-CR-722 (Ind. Ct. App. May 10, 2007), *trans. denied*.

During Clemons' retrial on the voluntary manslaughter charge, Clemons again objected to the admission of his videotaped statements on the basis that he did not knowingly and voluntarily waive his right to counsel. The trial court denied Clemons' objection, stating that the totality of the circumstances indicated that Clemons "freely and voluntarily waived his rights and that he did have sufficient comprehension and understanding to knowingly waive his rights." Tr. p. 168. At the conclusion of his retrial, the jury found Clemons guilty of voluntary manslaughter. Clemons now appeals.

[2] Ind. Code § 35-47-2-1.

Discussion and Decision

Clemons raises two issues on appeal: (1) whether the trial court properly admitted his videotaped statements and (2) whether the evidence is sufficient to support his conviction for voluntary manslaughter.[3]

I. Admission of Evidence

Clemons first maintains that the trial court abused its discretion by admitting the videotaped statements he gave to the police. The admission or exclusion of evidence is within the trial court's discretion. *Newman v. State*, 751 N.E.2d 265, 270 (Ind. Ct. App. 2001), *trans. denied*. "When a trial court makes a decision that is clearly against the logic and effect of the facts and circumstances before the court, the decision involves an abuse of discretion." *Id*.

A. Waiver of Rights

Clemons first contends that the trial court abused its discretion by admitting his videotaped statements because "[his] waiver of rights was not knowing, intelligent or voluntary." Appellant's Br. p. 9. The State bears the burden of proving beyond a reasonable doubt that the defendant voluntarily and intelligently waived his rights. *Ringo v. State*, 736 N.E.2d 1209, 1211 (Ind. 2000). A waiver of one's *Miranda* rights occurs when the defendant, after being advised of those rights and acknowledging an understanding of them, chooses to make a statement without taking advantage of those rights. *Id*. at 1211-12. The voluntariness of a defendant's waiver of rights is judged by

[3] In the "Summary of the Arguments" section of Clemons' appellate brief, he states, "By permitting the jury to see [Clemons] in jail clothing at the end of the videotape the trial court denied [Clemons] his right to a fair trial." Appellant's Br. p. 5. Because this argument is neither developed nor mentioned in any other part of his brief, he has waived this issue for failing to make a cogent argument. *See* Ind. Appellate Rule 46(A)(8)(a).

considering the totality of the circumstances. *Id*. at 1212. "A signed waiver form is one item of evidence showing the accused was aware of and understood his rights." *Id*. Nevertheless, "[w]hen challenged, the State may need to show additional evidence tending to prove that Defendant's waiver and decision to speak were voluntary." *Id*.

Specifically, Clemons maintains that his waiver of *Miranda* rights was not knowing, intelligent, or voluntary because "[d]uring [his] interrogation the police rushed through the advisements and waiver forms in a callous and cursory manner when it was obvious that [he] was not focused, alert or comprehending the process." Appellant's Br. p. 9. We disagree.

Here, while interviewing Clemons, the police officer read aloud the advisement of each *Miranda* right and then handed him the written form to initial each right if he understood its meaning. Clemons wrote his initials next to each right. The officer then read aloud to Clemons the waiver of rights portion of the form and again handed him the form and requested that he initial each statement if he understood its meaning. Clemons wrote his initials next to each statement and signed the waiver.

Furthermore, the officer took the time to explain certain words and concepts from the form to ensure that Clemons understood the rights that he was waiving. Clemons gave no indication that he did not understand what these rights meant after they were explained to him. Even more, during the interview Clemons indicated that he was aware of his right to stop talking with the police. This further indicated to the officer that Clemons understood and was fully aware of his rights.

The totality of the circumstances shows that Clemons was fully advised of his *Miranda* rights and that he knowingly, intelligently, and voluntarily waived those rights.

B. Right to Counsel

Clemons also argues that the trial court abused its discretion by admitting his videotaped statements to the police because the police violated his Fifth Amendment right to counsel when they failed to stop the interview after he requested counsel. Another panel of this Court addressed this same issue on direct appeal from Clemons' handgun conviction and wrote the following:

> Clemons argues the incriminating evidence collected during his interview should not have been admitted because those statements were made after he requested counsel. He believes the continuation of his interview after his statements regarding counsel constituted a violation of his Fifth Amendment right to counsel.
>
> > The right to have counsel present during an interrogation is indispensable to the protection of the Fifth Amendment privilege against self-incrimination. When a suspect invokes his right to counsel during custodial interrogation, the police must stop questioning until counsel is present or the suspect reinitiates communication and waives his right to counsel. Invocation of the *Miranda* right to counsel requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney. If a suspect makes a request for counsel that is ambiguous or equivocal and, if in light of the circumstances, a reasonable officer would not understand the statement to be a request for an attorney, then the police are not required to stop questioning the suspect. The Supreme Court in *Davis* noted that it will be good police practice for the interviewing officers to clarify whether or not he actually wants an attorney when a suspect makes an ambiguous statement, but it declined to adopt a rule requiring officers to ask clarifying questions.
>
> *Edmonds* [*v. State*], 840 N.E.2d [456,] 460 [(Ind. Ct. App. 2006), *trans. denied*] (internal citations and quotations omitted).

During Clemons' interview with police on the morning after Webster was shot, the following dialogue occurred:

> [Detective]: You're 27 years old. I want to express how much of a man you were here to us today. How truthful and honest you were here to us today, I want to be able to express that.
>
> [Clemons]: Oh you're going to be able to express it, only thing I, I just want my momma sitting right here, you know what I'm saying can I have somebody sitting here with me though?
>
> [Detective]: I, I understand that …
>
> [Clemons]: That, that's all I'm asking, I mean I ain't asking saying I want, I want to talk to my lawyer. I ain't said none of that.
>
> [Detective]: I know.
>
> [Clemons]: You see what I'm saying, I mean I, like you read, read me my rights, you see what I'm saying, I don't have to, I've got the right, you see what I'm saying to stop talking at any time or whatever.
>
> [Detective]: Exactly.
>
> [Clemons]: You see what I'm saying, ask for a lawyer or something like that, you see what I'm saying. Hey look could I still have a lawyer? Sit here and talk to me right now?
>
> [Detective]: I'm sorry what?
>
> [Clemons]: If, you know what I'm saying I don't have a paid lawyer could I still have a, you all said I could have a lawyer or somebody come talk to me right now, sit here while I . . .
>
> [Detective]: As I stated at any time you can have a lawyer present when talking to us. Okay. Now . . .
>
> [Clemons]: Even when it's paid or not?

> [Detective]: A lawyer is not going to let you talk to us. But if you want one, we'll walk out of here right now and it's all yours. You know. If you do, but what you think you need to do. I will not violate your civil rights. I've made a promise to your mother and I'm going to stand up to the promise. I mean it looks like this guy got shot through the leg and shot through the arm and got hit in the neck.
> [Clemons]: Let me see [the pictures].

(Ex. at 102-03.)

> We find no unequivocal request for counsel in those statements. Rather, his statements indicate he understood he had signed the waiver of rights form prior to speaking with the officers and he understood the police had to stop questioning him if he requested counsel. His questions regarding whether he could obtain counsel were procedural questions that were not an unequivocal request for counsel. *See Stroup v. State*, 810 N.E.2d 355, 359 (Ind. Ct. App. 2004) (defendant's question regarding how long would it be before she could get a court-appointed lawyer "is clearly a procedural question rather than an unequivocal request for counsel"). Therefore, the court did not abuse its discretion when it admitted the videotape and transcript of Clemons' admissions. *See Edwards*, 840 N.E.2d at 461.

Clemons, No. 49A02-0608-CR-722 at 1-2.

"The law of the case doctrine mandates that an appellate court's determination of a legal issue binds both the trial court and the court on appeal in any subsequent appeal involving the same issue and relevantly similar facts." *State v. Huffman*, 643 N.E.2d 899, 901 (Ind. 1994), *reh'g denied*. Facts determined at one stage of a proceeding, which were part of an issue on which judgment was entered and an appeal taken, unalterably and finally are established as part of the law of the case and may not be relitigated at a subsequent stage. *Cunningham v. Hiles*, 439 N.E.2d 669, 676 (Ind. Ct. App. 1982). We acknowledge that while courts typically refuse to reopen what has previously been decided, the law of the case doctrine is a discretionary rule of practice. *Otte v. Otte*, 655

N.E.2d 76, 83-84 (Ind. Ct. App. 1995), *reh'g denied, trans. denied*. "A court has the power to revisit prior decisions of its own or of a coordinate court in any circumstance, although as a rule courts should be loathe to do so in the absence of extraordinary circumstances." *Id*. at 84.

Because another panel of this Court has already determined this precise issue on the same facts, we conclude that the law of the case doctrine applies. Notwithstanding this conclusion, we agree with the previous panel that Clemons' right to counsel was not violated and that therefore the trial court did not abuse its discretion by admitting the videotaped statements.

II. Sufficiency of the Evidence

Finally, Clemons contends that the evidence is insufficient to support his conviction for voluntary manslaughter. When reviewing a claim of sufficiency of the evidence, we do not reweigh the evidence or judge the credibility of witnesses. *Jones v. State*, 783 N.E.2d 1132, 1139 (Ind. 2003). We look only to the probative evidence supporting the judgment and the reasonable inferences from that evidence to determine whether a reasonable trier of fact could conclude the defendant was guilty beyond a reasonable doubt. *Id*. We will uphold the conviction if there is substantial evidence of probative value to support it. *Id*.

In order to prove that Clemons was guilty of voluntary manslaughter as a Class A felony as charged in this case, the State was required to prove that he knowingly or intentionally killed Webster with a deadly weapon.[4] Ind. Code § 35-42-1-3(a)(1).

[4] "The existence of sudden heat is a mitigating factor that reduces what otherwise would be murder . . . to voluntary manslaughter." Ind. Code § 35-42-1-3(b); *see also Boesch v. State*, 778 N.E.2d

Clemons argues that that the State failed to prove beyond a reasonable doubt that he committed voluntary manslaughter because

> there was no forensic evidence, no eyewitnesses to the actual shooting of [Webster] and no weapon recovered. The witness that heard [Clemons] ask [Webster] to stop knocking on the door said that [Clemons] did so in a calm manner. There was no evidence [Clemons] was upset or capable of sudden heat. The witness that observed someone running in the apartment complex after hearing gunshots did not identify [Clemons] as the person running even though she was familiar with him.

Appellant's Br. p. 13. We disagree.

The evidence presented at trial indicates that Clemons was heard speaking and arguing with Webster minutes before several witnesses heard gunshots fired. Additionally, Webster was heard saying to Clemons "get off of me." Tr. p. 93. Moreover, a witness saw a man run into an apartment wearing a white t-shirt and leave a few minutes later wearing a black shirt. The police found a white t-shirt on Tate's living room couch and Clemons was wearing a black shirt when the police located him. The police also found a box full of live ammunition rounds and several live rounds scattered on Clemons' living room floor, all of which were consistent in caliber, brand, and composition to the fired casings and the fired bullet. Finally, Clemons acknowledged that he was involved in a tussle with the victim and that he fired the gun. Clemons' arguments are merely an invitation for us to reweigh the evidence, which we cannot do. The evidence is sufficient to prove beyond a reasonable doubt that Clemons committed voluntary manslaughter.

1276, 1279 (Ind. 2002) ("It is well settled in Indiana that sudden heat is not an element of voluntary manslaughter."), *reh'g denied*.

Affirmed.

BAKER, C.J., and BAILEY, J., concur.