[Cite as *State v. Western*, 2015-Ohio-627.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	C.A. CASE NO. 26058
	:	
v.	:	T.C. NO. 12CR1991
	:	
RICHARD WESTERN	:	(Criminal Appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the __20th__ day of ____February____, 2015.

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FROELICH, P.J.

{¶ 1} Richard A. Western was found guilty after a jury trial in the Montgomery County Court of Common Pleas of two counts of murder and two counts of aggravated robbery, all with firearm specifications. A charge of having weapons while under disability was tried to the court, which found him guilty. The murder and aggravated

robbery counts were merged into a single murder conviction, and the trial court sentenced Western to an aggregate 21 years to life in prison.[1] Western was also ordered to pay restitution of $3,869.10.

{¶ 2} Western appeals from his convictions, claiming that the trial court erred in denying his motion to suppress statements that he made to the police and in ordering him to pay restitution when he lacked an ability to pay. For the following reasons, the portion of the trial court's judgment that ordered restitution will be reversed, and the matter will be remanded for the trial court to consider the issue of restitution. In all other respects, the trial court's judgment will be affirmed.

I. Procedural History

{¶ 3} The charges against Western stemmed from the attempted robbery and shooting of Geoffrey Andrews at Andrews's apartment on June 15, 2012. According to the State's evidence, LeMichael Jones decided to rob Andrews, an individual from whom Jones and his girlfriend sometimes bought marijuana. On June 15, 2012, Western, Jones, and two other individuals, James Dunson and Aaron Baker, went to Andrews's apartment with the intent to rob Andrews. Western brought a gun. Jones contacted Andrews on the pretext of buying drugs, and Andrews allowed Jones to enter his (Andrews's) apartment. When Andrews saw Western's gun, he reached for his own weapon. Western fired several shots, one of which struck Andrews. Western, Jones, and the others fled. Andrews died from the gunshot wound.

{¶ 4} Two witnesses in the apartment informed police that Andrews had received

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[1] The trial court's judgment entry states that the total sentence imposed is 25 years to life. This aggregate sentence includes four years that Western received upon the revocation of his community control in Montgomery C.P. No. 2009 CR 4307. The court ordered the four-year sentence in that case to run consecutively to the 21 years imposed in this case.

phone calls shortly before the shooting. Andrews's cell phone records led the police to Jones, and ultimately to Western. Western was arrested on June 28, 2012, by a joint state and federal taskforce.

{¶ 5} At approximately 10:15 a.m. on June 28, Detective Sergeant Jeffrey Trego of the Riverside Police Department began interviewing Western at the Riverside police station. Sgt. Trego advised Western of his *Miranda* rights, which Western waived. Western initially denied involvement in the robbery and murder and provided an alibi. Shortly before noon, Detective Matt Sturgeon joined Trego in conducting the interview. Numerous references were made to the death penalty, that there was a "big difference" between premeditated murder and a "robbery gone bad," and that, to avoid a charge of premeditated murder, they needed corroboration of Jones's version of events that he (Jones), Western, and others had gone to Andrews's apartment simply to rob Andrews. Eventually, at approximately 1:15 p.m., Western made incriminating statements. Shortly thereafter, Western provided a written statement stating that the victim had pointed a pistol at him, that he (Western) "then opened fire out of fear for my life," and that the shooting occurred during a robbery "gone wrong."

{¶ 6} On July 6, 2012, Western was indicted on two counts of murder (deadly weapon and serious physical harm), two counts of aggravated robbery (deadly weapon and serious physical harm), and having a weapon while under disability; the murder and aggravated robbery counts had firearm specifications. Western subsequently moved to suppress the statements he made to the police.

{¶ 7} After a hearing and additional briefing by the parties, the trial court overruled the motion to suppress. The trial court found that Western was fully apprised of his

constitutional rights, and that he knowingly, intelligently and voluntarily waived those rights. The court further concluded that Western's statements were made voluntarily, reasoning:

> The Court further finds that the Defendant made statements voluntarily and without coercion from Detective Trego or Detective Sturgeon. The Defendant was not deprived of food, medicine, or sleep and there were no threats to arrest members of the Defendant's family. The Defendant's main argument is that the death penalty was referenced by the Detectives several times. However, the Court finds that the death penalty was not a misstatement of the law and not unduly coercive as a charge for Aggravated Murder was an entire possibility. Further, the Defendant was twenty-one years of age at the time of the interview and has prior criminal experience. The Detectives did not make any promises of leniency to the Defendant. Therefore, the Court finds that the Defendant's statements were not obtained in violation of his constitutional rights and are, therefore, admissible.

{¶ 8} The matter was tried in December 2013, and Western was convicted of all counts and specifications. As stated above, the trial court merged the aggravated robbery and murder counts into a single murder conviction and sentenced Western to 15 years to life for murder, 36 months for having weapons while under disability, and three years for the firearm specification, all to be served consecutively. Western was ordered to pay restitution of $3,869.10.

{¶ 9} Western appeals from his convictions, raising two assignments of error.

II. Motion to Suppress Statements

{¶ 10} Western's first assignment of error states: "The trial court erred in overruling the Appellant's motion to suppress statements that were obtained in violation of his constitutional rights." Western claims that his confession to the police on June 28, 2012 was made involuntarily. He does not challenge the trial court's ruling that he knowingly, intelligently, and voluntarily waived his *Miranda* rights.

{¶ 11} In ruling on a motion to suppress, the trial court "assumes the role of the trier of fact, and, as such, is in the best position to resolve questions of fact and evaluate the credibility of the witnesses." *State v. Retherford*, 93 Ohio App.3d 586, 592, 639 N.E.2d 498 (2d Dist.1994); *State v. Knisley*, 2d Dist. Montgomery No. 22897, 2010-Ohio-116, ¶ 30. Accordingly, when we review suppression decisions, we must accept the trial court's findings of fact if they are supported by competent, credible evidence. *Retherford* at 592. "Accepting those facts as true, we must independently determine as a matter of law, without deference to the trial court's conclusion, whether they meet the applicable legal standard." *Id*.

{¶ 12} Under the Fifth Amendment to the United States Constitution, no person shall be compelled to be a witness against himself. In order to ensure that this right is protected, statements resulting from custodial interrogations are admissible only after a showing that the procedural safeguards described in *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), have been followed. *In re R.L.*, 2014-Ohio-5065, 23 N.E.3d 298, ¶ 17 (2d Dist.), citing *In re Haubeil*, 4th Dist. Ross No. 01CA2631, 2002-Ohio-4095, ¶ 9.

{¶ 13} Whether a statement was made voluntarily and whether an individual

knowingly, voluntarily, and intelligently waived his or her *Miranda* rights are distinct issues. *State v. Eley*, 77 Ohio St.3d 174, 178, 672 N.E.2d 640 (1996); *State v. Kelly*, 2d Dist. Greene No. 2004-CA-20, 2005-Ohio-305. Regardless of whether *Miranda* warnings were required and given, a defendant's statement may have been given involuntarily and thus be subject to exclusion. *Kelly* at ¶ 11.

{¶ 14} A defendant's statements to police after a knowing, intelligent, and voluntary waiver of the individual's *Miranda* rights are presumed to be voluntary. *Miranda*, *supra*. "The *Miranda* presumption applies to the conditions inherent in custodial interrogation that compel the suspect to confess. It does not extend to any actual coercion police might engage in, and the Due Process Clause continues to require an inquiry separate from custody considerations and compliance with *Miranda* regarding whether a suspect's will was overborne by the circumstances surrounding his confession." *State v. Porter*, 178 Ohio App.3d 304, 2008-Ohio-4627, 897 N.E.2d 1149, ¶ 14 (2d Dist.), citing *Dickerson v. United States*, 530 U.S. 428, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000).

{¶ 15} "In deciding whether a defendant's confession is involuntarily induced, the court should consider the totality of the circumstances, including the age, mentality, and prior criminal experience of the accused; the length, intensity, and frequency of interrogation; the existence of physical deprivation or mistreatment; and the existence of threat or inducement." *State v. Edwards*, 49 Ohio St.2d 31, 358 N.E.2d 1051 (1976), paragraph two of the syllabus, overruled on other grounds, 438 U.S. 911, 98 S.Ct. 3147, 57 L.Ed.2d 1155 (1978). *See also State v. Brewer*, 48 Ohio St.3d 50, 58, 549 N.E.2d 491 (1990); *State v. Beaty*, 2d Dist. Montgomery No. 24048, 2011-Ohio-5014, ¶ 16.

{¶ 16} The Supreme Court of Ohio has held that the State has the burden to show by a preponderance of the evidence that a defendant's confession was voluntarily given. *State v. Melchior*, 56 Ohio St.2d 15, 381 N.E.2d 195 (1978). However, R.C. 2933.81, effective July 6, 2010, provides, in part:

> All statements made by a person who is the suspect of a violation of or possible violation of section 2903.01, 2903.02, or 2903.03 * * * during a custodial interrogation in a place of detention are presumed to be voluntary if the statements made by the person are electronically recorded. The person making the statements during the electronic recording of the custodial interrogation has the burden of proving that the statements made during the custodial interrogation were not voluntary. * * *

R.C. 2933.81(B).

{¶ 17} Western did not challenge the constitutionality of R.C. 2933.81 in the trial court, and he has not raised the issue in this court. We have some questions about shifting the burden to a defendant. *See, e.g., Lego v. Twomey*, 404 U.S. 477, 489, 92 S.Ct. 619, 30 L.Ed.2d 618 (1972) ("[T]he prosecution must prove at least by a preponderance of the evidence that the confession was voluntary. Of course, the States are free, pursuant to their own law, to adopt a higher standard."). Nevertheless, we need not address the question since we find, as discussed below, that the State has met its burden of proving that Western's statements were voluntarily given.

{¶ 18} We have reviewed the transcript of the suppression hearing and the exhibits admitted at that hearing, including the video recording of Western's interrogation by the police.

{¶ 19} The recording begins at approximately 10:00 a.m. on June 28, 2012, when Western was brought, handcuffed, into a small interview room with a round table and three chairs; Western was given a bottle of water and left alone. Sergeant Trego entered the room at 10:16 a.m. Western's handcuffs were removed, and Trego obtained preliminary information from Western, including Western's address, nickname ("Chicago"), and cell phone number. At 10:24 a.m., Trego began informing Western of his *Miranda* rights by reviewing each *Miranda* right from a pre-interview form. Western orally acknowledged that he understood each right, and he initialed next to each right on the form. Trego next read a waiver of rights paragraph, adding that the officers were not trying to trick Western and that his statements had to be of his own free will. Western signed the waiver portion of the form.

{¶ 20} Sergeant Trego then informed Western that his investigation showed that Western was "clearly involved" with a robbery and murder and drugs. Trego told Western that the police knew about the car, the driver, and the people involved, that the police had cell phone records, and that Western needed to "come to terms with [himself]." Western denied any involvement and stated that he was at his brother's house on the night of June 15, 2012. For the next 25 minutes or so, Western told Trego about his activities on June 15 and the people who were with him. At 11:00 a.m., Sgt. Trego left the room.

{¶ 21} When Sgt. Trego returned at 11:03 a.m., he asked Western about the individuals with whom Western had called or texted on June 15. Western did not recall. Trego then asked Western what he knew about various individuals, including Aaron Baker, April Turner, and James Dunson. Western was provided another break at 11:30

a.m., and he went to the restroom at 11:40 a.m.

{¶ 22} When questioning resumed at approximately 11:54 a.m., Sgt. Trego was joined by Detective Sturgeon. Det. Sturgeon told Western that they were going to "give you a chance to keep you alive" and to "keep a needle out of your arm." Sturgeon told Western that more than 26 calls were made between Western and Jones on June 15, and the calls stopped between 8:30 p.m. and 9:00 p.m. Sturgeon stated that the calls stopped because the two were together, and the detective emphasized that the police knew he was with Jones, what car he was in, the path the car took, and that both people and texts placed him at Andrews's apartment. Sturgeon told Western that the police were trying to figure out if the shooting was over the disrespect of a girl, i.e., whether Andrews was shot in cold blood. Sturgeon repeatedly stated that the bottom line was "Was this premeditated murder or a robbery gone bad?" Western responded, argumentatively, that he "didn't do anything" and "I wasn't there." The detectives told Western that they wanted him to tell the truth and keep himself "from facing the needle."

{¶ 23} At approximately 12:09 p.m., Western asked to see the witness statements that had been given. Detective Sturgeon read a statement from Holly McReynolds, who had driven Western, Jones, "Blood," and "Ghost" to Andrews's apartment. Sturgeon then read a portion of the written statement given by Jones. When Western asked to see more witness statements, Det. Sturgeon responded that he had Western "buried" and that Western's "ass is gonna have fun in prison." The detectives told Western that his probation was going to be revoked, so he was going to serve four years "no matter what." The detectives emphasized that Western should do himself a favor and say what had happened.

{¶ 24} For the next 45 minutes or so, the detectives emphasized that there was a "big difference" if the shooting were premeditated versus a robbery gone bad, and Western said little. The death penalty was mentioned numerous times, and the detectives made clear that premeditated murder was a capital offense. Sgt. Trego told Western that all the participants in the incident would be subject to the same penalty because of complicity. They repeatedly asked Western to tell them if this was a premeditated shooting or whether the shooting occurred during the robbery of a drug dealer. They reiterated that they could place him at the scene and explained to Western how cell phone signals moved from tower to tower.

{¶ 25} When Western asked if he was going to jail, Det. Sturgeon told him that he was definitely going to jail, specifically that he was "stickered" and going to jail for violating his probation.

{¶ 26} Det. Sturgeon emphasized to Western that if Andrews had reached for a gun and "it's shoot or be shot," the situation would be "different." When Western asked what the difference was, the detectives responded that premeditated murder is a capital offense, but if there were the possibility of self-defense or a robbery gone bad, it would be a "whole other ballgame." The detectives told Western that Jones had said the plan was to commit a robbery.

{¶ 27} The detectives related to Western that they could understand why the shooter had shot Andrews. They stated that, based on the way Western and his friends were "stacked in the doorway," one of them probably would have been shot if Andrews had been able to fire his own gun. Det. Sturgeon told Western that his gut was that no one had intended Andrews to be shot, that no one probably knew if Andrews had been

shot when they left the apartment, and that it makes a "big difference" if Andrews was going for a gun and the shooter defended himself versus intending to shoot Andrews. The detectives stated that they needed corroboration of Jones's statement that this was a robbery, not a premeditated shooting.

{¶ 28} At one point, around 12:36 p.m., after Sgt. Trego said, "It's either premeditated or a robbery, it's that simple. It's that simple," the following exchange occurred:

Western: "It's still murder, though."

Sturgeon: "How do you figure it's murder?"

Western: "It's still robbery."

Sturgeon: "Well, yeah, it's robbery."

Western: "It's still murder and robbery."

Sturgeon: "I wouldn't say it's murder if somebody goes for it [a gun]."

Trego: "It's not premeditated murder."

Sturgeon: "Premeditated's totally different, though. That's the thing."

Det. Sturgeon then told Western that Ohio executes the most people after Texas and Florida, that Ohio "needle[s] people all the time," and that Western did not "want to risk that end of it." Sturgeon said it was bad luck that Andrews had died, but people still needed to be accountable for Andrews's death. Western responded that it was still "life without parole." Sturgeon responded, "No, it's not. How do you figure?" Sturgeon told Western that a prior shooting in Riverside had resulted in the shooter getting 17 years for involuntary manslaughter. Sturgeon stated that the only way to keep this case from being a capital case was to show that Andrews's shooting was not premeditated. The

detectives again emphasized that they had to clear Western of premeditated murder, and there was big difference between planning a murder and planning a robbery.

{¶ 29} Sgt. Trego told Western that he could not explain everyone's role to a prosecutor unless the people told the detectives what happened. The detectives said they were going to the prosecutor's office the next day and that the prosecutors would charge the most serious charge they could. The detectives told Western that the truth would save him.

{¶ 30} Western responded that he was "still going to do life." Det. Sturgeon again told Western about the prior shooting in Riverside where the defendant had tried to rob a drug dealer and shot the drug dealer seven times; the shooter had received a 17-year sentence. Sgt. Trego added that the shooter would probably get early release. Sturgeon said that the defendant in that case had told detectives what had happened, but still had "to do his time." Sturgeon ended the story by again telling Western that he (Western) did not want to risk premeditated murder.

{¶ 31} After additional discussion about the evidence that the detectives had accumulated, continued statements about needing corroboration for Jones's story that the shooting was not premeditated, and admonitions to Western to tell the truth, Western eventually admitted to being the shooter.

{¶ 32} At 1:15 p.m., Western told the detectives that Andrews's gun was in the couch next to him (Andrews) and that Andrews had gotten his gun "all the way out." Western stated that he aimed his gun, fired three times, and shot Andrews. Western indicated that he had gone to the apartment to rob Andrews and that it "wasn't supposed to go that way." Western told the detectives the kind of gun he had used, how long he

had it, and what he did with the gun after the botched robbery.

{¶ 33} At the suppression hearing, the State called Sergeant Trego to testify about Western's interview; defense counsel called Detective Sturgeon. In addition, Detective Alan Meade of the Englewood Police Department testified for the State that Western had previously been given *Miranda* rights on December 29, 2009, in connection with a robbery investigation.

{¶ 34} Considering the totality of the circumstances, we cannot conclude that Western's statements were made involuntarily. Western was 21 years old when he was interviewed. He could read and write. In speaking with the police, Western was articulate and intelligent, and there was no indication that he was under the influence of drugs or alcohol. Western had previous involvement with the police; he had been given and waived *Miranda* warnings in 2009 in connection with a robbery investigation, and he was subsequently convicted of robbery. The trial court found that Western voluntarily waived his *Miranda* rights prior to questioning by Sgt. Trego and Det. Sturgeon, and Western does not dispute that finding.

{¶ 35} Western was not handcuffed during the interview. He was provided a bottle of water before the interview began, and he had two breaks during the course of the interview, one at 11:00 a.m. and a longer break at 11:30 a.m. Western was permitted to use the restroom during the second break. (After 1:30 p.m., Western was provided lunch and allowed to use the restroom; at this point, Western had already made incriminating statements.)

{¶ 36} Throughout the interview, the detectives sat in the available chairs; neither detective made any threatening actions toward Western, and their tone of voice was

predominately conversational. The video reflects that Western was not intimidated or frightened by Trego and Sturgeon. Rather, he appeared to be trying to discover what evidence the detectives had accumulated against him and his co-conspirators, and at one point he refers to Det. Sturgeon as playing the "bad cop."

{¶ 37} The principle question is whether Western's will was overborne by the detectives' references to the death penalty, to self-defense, and to the prior shooting in Riverside where the defendant received a 17-year sentence. Western claims that these statements from the detectives constituted misstatements of the law or promises of leniency, which rendered his confession involuntary. Specifically, he argues:

> In reviewing the totality of the circumstances, it is plain and clear that the police coerced Western into an involuntary confession with promises of leniency if he cooperated and threats of capital punishment if he did not. In addition, there were numerous misstatements of law and promises of leniency by the police. There are a number of ways a defendant can commit aggravated murder, all of which carry the possibility of the death penalty. While Det. Sturgeon was correct in stating that premeditated murder could be a capital offense, he was incorrect in stating that "a robbery gone bad" could not carry the death penalty. Further, Sturgeon falsely implied that Western could be out of prison at thirty-five years old if he would give a statement that corroborated the co-defendant's. In fact, Western's murder conviction carried a minimum sentence of eighteen years to life, meaning that at the time of the interrogation, he would have been thirty-nine when he first could go in front of the parole board. As it turned out, the

> police procured a confession and under the current sentence, Western will not go in front of the parole board for the first time until he is forty-five. Further, Sturgeon falsely implied that Western could utilize self-defense if the decedent were to have "gone for his gun first" during the robbery. However, as the court is aware, self-defense can only be utilized if the defendant was not at fault in creating the situation that gave rise to the use of force, and it cannot be utilized in a situation where the defendant is committing a robbery. * * *

{¶ 38} "Generally, a correct statement of the law does not rise to the level of coercion necessary to render a confession involuntary." *State v. Robinson*, 9th Dist. Summit No. 16766, 1995 WL 9424 (Jan. 11, 1995). Accordingly, a police officer's correct statements about potential punishment do not rise to the level of coercive conduct. *Id.* at *4. However, a police officer's misstatement of the law may render a confession involuntary. *Robinson* at *4.

{¶ 39} "[F]alse promises made by police to a criminal suspect that he can obtain lenient treatment in exchange for waiving his Fifth Amendment privilege so undermines [sic] the suspect's capacity for self-determination that his election to waive the right and incriminate himself in criminal conduct is fatally impaired. His resulting waiver and statement are thus involuntary for Fifth Amendment purposes. * * * The simple result is that officers must avoid such promises, which are not proper tools of investigation." *State v. Petitjean*, 140 Ohio App.3d 517, 534, 748 N.E.2d 133 (2d Dist.2000). *See also State v. Jackson*, 2d Dist. Greene No. 02 CA 1, 2002-Ohio-4680, ¶ 40.

{¶ 40} Western cites to several cases in which we held that misstatements of the

law and promises of leniency by the police rendered the defendant's confession involuntary and inadmissible. For example, in *State v. Jenkins*, 192 Ohio App.3d 276, 2011-Ohio-754, 948 N.E.2d 1011 (2d Dist.), the police questioned the suspect regarding residential burglary, a felony of the third degree. We held that statements by the police suggesting that treatment in lieu of conviction were possible, when it was statutorily unavailable, undermined the suspect's capacity for self-determination and impaired his decision to provide incriminating statements. *Id.* at ¶54. In *State v. Phillips*, 2d Dist. Clark No. 2003 CA 15, 2004-Ohio-4688, we held that the defendant's statement was coerced when the defendant made a statement based on the detective's representation that he would be charged with a misdemeanor if he confessed.

{¶ 41} Again, in *Jackson*, we held that the defendant's confession to rape was involuntary where the detective told the defendant that probation and sexual counseling were possible if he cooperated, but he would do a "stretch of time" if he did not cooperate. We stated:

> * * * The benefit suggested was not merely that which flows naturally from a truthful and honest course of conduct. Rather, Defendant was given to understand that he might benefit from lenient treatment from police, the prosecutor, and the courts, in the form of probation in exchange for his statement. Defendant's oral and written confessions contradicting his prior denials of culpability were given in exchange for, and presumably in reliance on, those statements.
>
> This suggestion of leniency was false, misleading, and a misstatement of the law. The offense of which Defendant was accused

> and for which he was subsequently indicted and convicted, rape of a child, is not probationable, and it requires a mandatory period of incarceration of three to ten years. There was, therefore, no possibility at all that Defendant could receive the lenient treatment that [the detective] told him was available in exchange for his cooperation. The mere fact that this false promise of leniency was itself expressed in terms of "possibilities" and was contingent on the cooperation of the prosecutor, the grand jury, and, ultimately, the court, does not save the misrepresentation from rendering Defendant's confession involuntary, because the benefit offered was impossible to achieve.

(Citations omitted.) *Jackson* at ¶ 38-39.

{¶ 42} In contrast to misstatements and false promises of leniency, admonitions to tell the truth are not unduly coercive. *State v. Cooey*, 46 Ohio St.3d 20, 28, 544 N.E.2d 895 (1989); *State v. Knight*, 2d Dist. Clark No. 2004 CA 35, 2008-Ohio-4926. A police officer's assertion to the suspect that he or she is lying or that the suspect would not have another chance to tell his or her side of the story does not automatically render a confession involuntary. *Knight* at ¶ 111. "Similarly, assurances that a defendant's cooperation will be considered or that a confession will be helpful do not invalidate a confession." *State v. Stringham*, 2d Dist. Miami No. 2002-CA-9, 2003-Ohio-1100, ¶ 16. Even a "mere suggestion that cooperation may result in more lenient treatment is neither misleading nor unduly coercive, as people 'convicted of criminal offenses generally are dealt with more leniently when they have cooperated with the authorities.'" *Id*., quoting *State v. Farley*, 2d Dist. Miami No. 2002-CA-2,

2002-Ohio-6192; *State v. Strickland*, 2d Dist. Montgomery No. 25545, 2013-Ohio-2768, ¶ 19.

{¶ 43} In this case, we find nothing improper in the detectives' repeated references to the death penalty, including statements that Western did not want to risk "facing the needle," that the officers were trying to keep Western alive, and the like. R.C. 2903.01, the aggravated murder statute, provides in part that no person shall (A) "purposely, and with prior calculation and design, cause the death of another * * *," [or] (B) "purposely cause the death of another * * * while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit * * * aggravated robbery, robbery, aggravated burglary, burglary, trespass in a habitation when a person is present or likely to be present, terrorism, or escape[.]" "An interrogator may inform the suspect of the penalties for the offense of which he is suspected." *State v. Bays*, 87 Ohio St.3d 15, 23, 716 N.E.2d 1126 (1999).

{¶ 44} Here, the detectives had information that Andrews, a known drug dealer, was shot almost immediately after Western and his accomplices entered Andrews's apartment; nothing was stolen from the apartment. Based on these facts, it was reasonable to suspect Western of committing aggravated murder, a capital offense, based on a theory of prior calculation and design. Sergeant Trego and Detective Sturgeon did not overstate the potential charges against Western, and they did not misstate the law in telling Western that he faced a possible death sentence if he were charged with premeditated murder.

{¶ 45} Nor do we find that the detectives made a misleading misstatement of law by telling Western that there was a "big difference" between premeditated murder and a

"robbery gone bad." The detectives repeatedly characterized a "robbery gone bad" as a planned robbery with an unplanned shooting of the victim. Murder, as defined by R.C. 2903.02, states that no person shall (A) purposely cause the death of another or (B) cause the death of another as a proximate result of committing or attempting to commit an offense of violence that is a first- or second-degree felony other than voluntary manslaughter or involuntary manslaughter. In general, a person who commits murder in violation of R.C. 2903.02, including felony murder, must be imprisoned for an indefinite term of 15 years to life. R.C. 2929.02(B)(1).

{¶ 46} The video recording of Western's interview reflects that the detectives attempted to impress upon Western the differences between the penalties for aggravated murder under R.C. 2903.01 and for felony murder under R.C. 2903.02, and they emphasized that the death penalty could be avoided if the shooting was not premeditated. Western was not promised that he would be charged with a lesser crime (felony murder or involuntary manslaughter) if he made a statement corroborating Jones's statement or otherwise. Rather, he was presented with an opportunity to clarify the facts of the case, so that the officers and prosecutor could better determine whether an aggravated murder charge was appropriate.

{¶ 47} In this respect, Western's interrogation is similar to that in *State v. Bays*, 2d Dist. Greene No. 95 CA 118, 1998 WL 32595 (Jan. 30, 1998), affirmed, 87 Ohio St.3d 15, 716 N.E.2d 1126 (1999). On appeal, Bays claimed that his confession was involuntarily given, in part because the detective's statements regarding the various homicide crimes and penalties amounted to an implicit promise that cooperation would result in a lesser sentence. We noted that it was not improper for an interrogator to inform a suspect –

accurately and noncoercively – of the maximum penalties for the offenses of which he is suspected, and that an officer may suggest to a suspect that it is better to tell the truth. We rejected Bays's claim that the detective's statements to him were improper, reasoning:

> It is clear from [the detective's] testimony that he informed Bays of the various homicide crimes and their penalties, including probation, during the November 16th interview in order to impress upon Bays the seriousness of the Aggravated Murder charge and to permit Bays to clarify any facts that could affect the identity of the crime charged. [The detective's] representations must be distinguished from a police officer's promise to an accused that he will be charged with a lesser crime or receive a lesser penalty if he cooperates by rendering a statement. In the case before us, the implicit suggestion was that any information provided by Bays could alter the facts upon which the various crimes were charged. The merit to such a suggestion is confirmed by Bays's First Assignment of Error, in which he argues that the facts established by his confession were insufficient to support his conviction for Aggravated Murder. Had Bays's confession been otherwise, the facts may have only been sufficient to establish a lesser homicide crime. In other words, Bays's statement to the Xenia police was vital evidence from which the prosecution determined the crimes charged. Accordingly, it was not improper for [the detective] to suggest to Bays that his statement could affect the crimes charged and to inform Bays of the penalties associated with the lesser homicide crimes.

Bays at *11. We find that this reasoning applies to the statements made by Sturgeon and Trego to Western.

{¶ 48} Western claims that the detectives misled him as to the penalty for his actions by comparing his case to a prior shooting in Riverside in which the defendant received 17 years for involuntary manslaughter. Detective Sturgeon twice told Western about a prior shooting in Riverside, in which the defendant and the victim got into a fistfight and, after a few minutes of fighting, the defendant shot the victim seven times. Sturgeon emphasized that the defendant in that case "wasn't looking to kill" the victim, and received a 17-year sentence for involuntary manslaughter. Sturgeon never promised Western that he would receive a 17-year sentence if he confessed to killing Andrews, and the suggestion that Western might be released from prison when he was close to 38 years old was not "so remote from reality as to be illusory." *Compare State v. Petitjean*, 141 Ohio App.3d 517, 533, 748 N.E.2d 133 (2d Dist.2000).

{¶ 49} Finally, Western states that Det. Sturgeon incorrectly stated that Western could avail himself of self-defense if it were shown that Andrews had pulled a gun on Western. While Det. Sturgeon mentioned self-defense and told Western that it could be a "whole other ballgame," there was no suggestion that Andrews's grabbing his own gun provided Western with a defense to the shooting. Detective Sturgeon and Sgt. Trego repeatedly told Western that the case was not going to "go away" and that people needed to be "held accountable" for Andrews's death. Their reference to self-defense was made to distinguish between a premeditated killing and one that occurred out of self-preservation. The detectives did not suggest that self-defense could provide a defense to either prosecution or a prison term for Andrews's death.

{¶ 50} Upon review of the record, we find nothing in Det. Sturgeon and Sgt. Trego's behavior or in their statements to Western that overbore Western's will. The video recording of the interrogation reflects that Western actively engaged with the detectives and that he was attempting to ascertain the strength of the State's case against him. The detectives accurately warned Western that he faced the death penalty, and their statements encouraging Western to clarify what had occurred were not improper or unduly coercive.

{¶ 51} Western's first assignment of error is overruled.

III. Ability to Pay Financial Sanction

{¶ 52} Western's second assignment of error states: "The trial court erred when it ordered Appellant to pay financial sanctions even though he has no present or future ability to pay any financial sanction."

{¶ 53} "R.C. 2929.19(B)(5) imposes a duty upon the trial court to consider the offender's present or future ability to pay before imposing any financial sanctions under R.C. 2929.18. The statute does not require the trial court to consider any specific factors when determining the offender's present or future ability to pay financial sanctions. Nor does the statute require a hearing on the matter. The court is also not required to expressly state that it considered a defendant's ability to pay * * *. The record should, however, contain evidence that the trial court considered the offender's present and future ability to pay before imposing the sanction of restitution. The trial court may comply with this obligation by considering a presentence-investigation report, which includes information about the defendant's age, health, education, and work history. The court's consideration * * * may be inferred from the record under appropriate

circumstances." (Citations and internal quotations omitted.) *State v. Tate*, 2d Dist. Montgomery No. 25386, 2013-Ohio-5167, ¶ 52.

{¶ 54} Western argues that, unless his convictions are reversed, he will be in prison for the next 25 years or more, and therefore he has no present or future ability to pay restitution. The State responds that Western can be employed in an institutional work program, and therefore his lengthy prison term will not prevent him from meeting his financial obligations. The State notes that the Ohio Revised Code and Ohio Administrative Code establish a variety of inmate work programs, see R.C. 5145.16 and Ohio Admin.Code 5120-3-01 & 5120-3-08, and that R.C. 5145.16(C)(8)(b)(i) provides that up to 25% of inmate earnings may be distributed to "the victims of the prisoner's offenses for restitution."

{¶ 55} We have rejected the argument that because all inmates can work for pay, they should automatically be subject to paying restitution, reasoning that "[t]his would render superfluous the requirement that the trial court determine ability to pay." *State v. Croom*, 2d Dist. Montgomery No. 25094, 2013-Ohio-3377, ¶ 94. We stated that "the possibility of working while in prison is one factor that a trial court can use in determining an inmate's ability to pay financial sanctions." *Id*.

{¶ 56} The issue of restitution was raised by the prosecutor at the end of the sentencing hearing, after the trial court had imposed the prison sentences, stated Western's post-release control obligation, and informed Western of his appeal rights. The court indicated that it had restitution "written down," but did not "have figures on that." The prosecutor indicated that restitution would reimburse Andrews's funeral costs, and the amount would be the same as the restitution imposed on Western's co-defendants.

The court stated that it would order restitution for funeral expenses, as was calculated in the co-defendants' cases. The judgment entry ordered restitution of $3,869.10.

{¶ 57} In this case, there is no indication in the record that the trial court considered Western's ability to pay restitution. Western was 22 years old and indigent when he was sentenced. In sentencing Western, the court stated that it had considered statutory factors in R.C. 2929.11 and R.C. 2929.12, Western's criminal history, and his conduct in committing the offense at issue. No presentence investigation was conducted. Western received a lengthy prison term, with a minimum of 25 years in prison. There was no discussion of Western's ability to pay financial sanctions while in prison or otherwise. While Western's lengthy prison sentence does not necessarily preclude the imposition of financial sanctions, the record reflects that the trial court imposed restitution without considering Western's present or future ability to pay it and without informing Western of the specific amount of restitution to be paid, denying Western the opportunity to object to the amount. The trial court thus committed plain error in imposing a specific amount of restitution.

{¶ 58} Western's second assignment of error is sustained.

IV. Conclusion

{¶ 59} Having sustained Western's second assignment of error, the portion of the trial court's judgment that ordered restitution will be reversed, and the matter will be remanded for the trial court to consider the issue of restitution. In all other respects, the trial court's judgment will be affirmed.

. . . . . .

DONOVAN, J. and HALL, J., concur.

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