STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LARRY ROOSEVELT CARTER,

Defendant-Appellant.

UNPUBLISHED
March 19, 1999

No. 206458
Kalamazoo Circuit Court
LC No. 97-0079-FC

Before: Kelly, P.J., and Gribbs and Fitzgerald, JJ.

PER CURIAM.

Defendant was convicted of second-degree murder, MCL 750.317; MSA 28.549, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The trial court sentenced defendant to two years' imprisonment for felony-firearm and a consecutive prison term of life for second-degree murder. We affirm.

The prosecution charged defendant with first-degree murder and the lesser included offense of second-degree murder. At trial, the prosecution attempted to prove that defendant through premeditation and deliberation killed his girlfriend of many years, Lillie Blue. The defense acknowledged that defendant had caused the death of Blue, but asserted that defendant was not guilty of first-degree murder because the killing was not premeditated, deliberate or intentional.

At trial, Kalamazoo County Sheriff's Lieutenant Terry VanStreain testified that defendant confessed to killing Blue. Defendant also testified at trial that he killed Blue. However, defendant's trial testimony as to the events surrounding Blue's death differed from VanStreain's testimony of defendant's initial confession.

The testimony at trial established that when defendant learned that the police wanted to question him in relation to the disappearance of Blue, he voluntarily went to the police station, where he agreed to speak with Kalamazoo County Deputy Sheriff Thomas Harmsen and also VanStreain.

Defendant first spoke with Harmsen and then agreed to speak with VanStreain. During the interview, defendant told VanStreain that he was responsible for Blue's death. After defendant related

enough details to establish that Blue was in fact dead and that he had killed her, VanStreain placed defendant under arrest and provided him his *Miranda*[1] rights. Defendant waived his rights and continued to tell VanStreain the details surrounding Blue's death. After defendant directed the police to Blue's body, which he had buried in Newaygo County, VanStreain prepared a written statement of defendant's confession. VanStreain read the statement aloud to defendant, who also looked at the statement himself before signing it for accuracy.

At trial, VanStreain testified that defendant told him that he met Blue at Verburg Park on August 6, 1996 where the couple sat and talked on the grass for about ten minutes and then went to defendant's van. Defendant grabbed her and threw her on her back and she began struggling. He grabbed a pistol and struck Blue on the head with it. Defendant admitted that he may have struck Blue in the head twice. Blue continued to struggle for the gun, at which time defendant grabbed a quilt from the back of the van and placed it over her face until she stopped struggling. After Blue quit struggling, defendant got into the driver's seat and drove to a gas station in Kalamazoo Township to get gas. Once he got gas, defendant checked underneath the quilt and observed that Blue was still breathing. He was scared and instead of going to Borgess hospital, he decided to drive up to Newaygo County to be by himself. When defendant passed the park, he lifted the quilt again and this time saw that Blue was not breathing and he therefore decided to drive up to Newaygo County to bury her. In Newaygo County, defendant went to a secluded area and backed his van up to the woods and then dragged Blue's body out of the van about 100 yards away. Defendant buried Blue in a shallow grave. He spent the night in a residence up in the Baldwin area or Newaygo County and then returned home the next day, where he learned that the police were looking for his vehicle. Defendant told VanStreain that he did not intend to kill Blue.

Defendant also testified at trial. He acknowledged killing Blue, but asserted that it was self-defense. Defendant testified that Blue became angry after defendant said something that upset her and she raised her fist to hit him. Defendant knocked Blue to the floor of the van and as the two struggled, Blue picked up the gun from the van floor and aimed it at defendant. Defendant grabbed the gun and used it to hit her on her head and then threw it down. Blue picked up the gun again and aimed it at defendant, this time with her finger on the trigger. Defendant grabbed Blue around her neck and told her to drop the gun, but she would not. According to defendant, he blacked out at this point and does not remember hitting Blue with the gun, although he conceded that he must have done so. At the time that defendant came to consciousness, he found himself with his hands still around Blue's neck. He then drove the van to a gas station where he stopped to get gas. He testified that he thought about taking Blue to Borgess hospital, which he passed, but when he looked back, Blue had stopped breathing. He then drove up north and buried the body in the woods.

Defendant first claims on appeal that the trial court improperly admitted hearsay statements of Cathy McLiechey regarding threats defendant allegedly made to Blue under MRE 803(1) and (2), the excited utterance and present sense impression hearsay exceptions. The decision whether to admit evidence is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *People v Coleman,* 210 Mich App 1, 4; 532 NW2d 885 (1995). An abuse of discretion is found where the result is so violative of fact and logic that it evidences a perversity of will, a

defiance of judgment, or an exercise of passion or bias. *Id.* Regardless of whether the trial court erred in admitting at trial McLiechey's hearsay statements under the present sense impressions and excited utterance hearsay exceptions under MRE 803(1) and (2), the statements were admissible under MRE 803(3) as statements of Blue's existing state of mind.

At issue here is the admissibility of McLiechey's testimony that Blue told her that defendant threatened to kill Blue if she saw another man or if she refused to see defendant. McLiechey's testimony involves two hearsay statements, i.e., the threatening statement made by defendant to Blue and Blue's statement to McLiechey repeating the first statement. MRE 805 provides that hearsay included within hearsay is admissible when each part of the combined statements conforms with an exception to the hearsay rule. Therefore, we must review both portions of the double hearsay statements to determine whether McLiechey's testimony is admissible.

We initially address whether the statement made by defendant to Blue, falls within a hearsay exception. As did the trial court, we find that defendant's statement is admissible under MRE 803(3), which provides that a "statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health) . . ." is not excluded by the hearsay rule. The trial court relied on *People v Melvin*, 70 Mich App 138; 245 NW2d 178 (1976), and *People v Miller*, 211 Mich App 30; 535 NW2d 518 (1995), for the proposition that the presentation of evidence of threats is admissible even though it may involve hearsay implications in a homicide case when intent or motive is at issue. In *Melvin*, we addressed whether a letter, written two and one-half years before the defendant killed his wife, was admissible to show premeditation and deliberation for first-degree murder. We held that the letter was admissible because it was related to the declarant-defendant's state of mind, which was a material issue in that case. *Melvin, supra* at 145. As such, it was admissible under MRE 803(3), which allows into evidence a statement of the declarant's then existing state of mind. Our ruling in *Melvin* is authority for the trial court's finding that the first part of the challenged statement, i.e., defendant's statement to Blue that he would kill her if she refused to see him or saw another man, is admissible under MRE 803(3). Additionally, *Miller, supra* at 39, also supports the trial court's finding that defendant's statement to Blue is relevant and admissible under MRE 803(3) to show his state of mind with regard to the killing, notwithstanding that the statement was made approximately two months before Blue's death.

Next, we conclude that Blue's statement to McLiechey that defendant threatened to kill her is also admissible under MRE 803(3) because it is the declarant's statement of her then existing mental, emotional, or physical condition; that is, Blue's fear of defendant. In this case, defendant testified at trial that he killed Blue in self-defense because it was Blue that first grabbed the gun and pointed it at him. Because defendant claimed self-defense, Blue's state of mind was relevant to show her fear of defendant and is admissible as statements "of the declarant's then existing . . . intent, plan . . . [or] mental feeling." MRE 803(3). Furthermore, evidence of marital discord, or in this case, relationship discord, between defendant and Blue was relevant. In *People v Fisher,* 449 Mich 441, 450; 537 NW2d 577 (1995), the Supreme Court explained that statements by murder victims regarding their plans and feelings can be admitted as hearsay exceptions. The *Fisher* Court held that the victim-wife's statements not known to the defendant about her plans to be with her lover and divorce the defendant

were admissible hearsay under MRE 803(3) because the statements involved the victim-wife's intent, plan, or mental feeling. *Id.* at 450-451. In this case, Blue's statements regarding defendant's threats and her obvious concern for whether defendant could carry out such a threat, is evidence of Blue's mental feeling in that it shows her fear of defendant. This evidence of "marital discord" is relevant to the issues of self-defense, motive, intent and premeditation and its probative value is not outweighed by any unfair prejudice. See *id.* at 451; *People v Riggs*, 223 Mich App 662, 705; 568 NW2d 101 (1997) (husband-victim's statements of then existing intent, plan or mental feeling were evidence of marital discord, which was relevant to the defendant's motive in his murder).

Next, defendant claims on appeal that the trial court improperly scored Offense Variable 3 and 4 (OV 3 and OV 4) under the sentencing guidelines, which resulted in a sentence disproportionate to the crime. A sentencing judge has discretion in determining the number of points to be scored provided there is evidence on the record which adequately supports a particular score. *People v Milton*, 186 Mich App 574, 577-578; 465 NW2d 371 (1990). A sentencing court abuses its discretion when it violates the principle of proportionality. *People v Milbourn*, 435 Mich 630, 635-636, 654; 461 NW2d 1 (1990). We find that the trial court in this case did not abuse its discretion because defendant's sentence of life imprisonment is proportionate to the offense of second-degree murder and the sentencing judge based his decision on facts supported by the record.

The sentencing court sentenced defendant to life imprisonment for second-degree murder. Defendant claims on appeal that the sentencing judge based his life sentence on inaccurate information, and therefore, he is entitled to resentencing.

In *People v Mitchell*, 454 Mich 145, 174-175; 560 NW2d 600 (1997), the Michigan Supreme Court reiterated its finding in *Milbourn, supra*, 435 Mich at 656-657, that the second edition of the sentencing guidelines, currently in effect, do not have the force of law in that the guidelines have not been adopted by the Legislature. Because the guidelines lack the force of law, a guidelines error does not violate the law. *Mitchell, supra* at 175. We acknowledged in *People v Harris (On Remand)*, 225 Mich App 439, 441; 571 NW2d 741 (1997), that the majority opinion in *Mitchell* instructs appellate courts "'not to interpret the guidelines or to score and rescore the variables for offenses and prior record to determine if they were correctly applied'" (quoting *Mitchell, supra* at 178). However, where the defendant's challenge is directed to the accuracy of the factual basis for the sentence, rather than the sentencing judge's calculation of the sentencing variable on the basis of his discretionary interpretation of the undisputed facts, the challenge states a cognizable claim for relief. *Mitchell, supra* at 176. In her majority opinion in *Mitchell, supra*, Justice Boyle stated:

> Thus, application of the guidelines states a cognizable claim on appeal only where (1) a factual predicate is wholly unsupported, (2) a factual predicate is materially false, and (3) the sentence is disproportionate. [*Id.* at 177.]

We find that the record in this case establishes none of the prongs to this three-part test.

Defendant contends that the trial court erred in assessing twenty-five points under OV 3 rather than ten points which is the appropriate score when a killing is intentional under the definition of second-degree murder but the death occurred in a combative situation.

The autopsy revealed that Blue was struck on the head many times. Defendant told VanStreain that when Blue continued to struggle for the gun, he grabbed a quilt and placed it over her face until she stopped struggling. Defendant admitted during his own testimony that although he blacked out, when he awoke, he had his hands around Blue's neck. The autopsy also revealed that Blue had many scratch marks on her neck, probably her own in an attempt to prevent defendant from strangling her to death. The pathologist concluded that the cause of Blue's death was asphyxia by manual strangulation.

Defendant contends that the judge should have found from the record that Blue's death resulted from a "combative situation" which would correspond to a lesser guidelines score and a reduced sentence. However, the sentencing judge specifically found there was no combative situation present at the time defendant killed Blue. The sentencing judge found that "[t]he behavior that the jury adopted, which I accept and believe is accurately interpreted from the evidence, is that at a minimum [defendant] had an intent to do great bodily harm to [Blue] or created a very high risk of death or great bodily harm knowing that it would occur as a probable result." This finding corresponds to a guidelines score of twenty-five, which was the score given to defendant. See Michigan Sentencing Guidelines (2d ed), p 77. There is no indication from the record that the judge's findings are based on facts not in the record or false facts. We conclude that the sentencing judge based its OV 3 score on facts found in the record.

Defendant also contends that the judge misscored OV 4, which assesses "Aggravated Physical Abuse," by scoring defendant twenty-five points for "aggravated physical injury or criminal sexual penetration" instead of zero points for no aggravated physical abuse. See Guidelines, *supra*, p 77. Although defendant contends that the judge based his guidelines score on inaccurate information, defendant is really asking us to review the sentencing judge's interpretation of the undisputed facts, which does not state a cognizable claim. See *Mitchell, supra* at 176. The facts relied on by the sentencing judge in scoring OV 4, which are found in the record, are that Blue had at least four lacerations on the top of her head, a number of bruises on her hand and forearm, a scraped and fractured finger, a bruised neck with many fingernail scrapes and a laceration on her forehead and nose. Moreover, the pathologist testified at trial that death by strangulation involves the constant application of pressure to the neck for a period of three to four minutes even though the victim loses consciousness after the first minute and one-half. This means that defendant had to have kept pressure on Blue's neck for another minute and one-half after she stopped struggling. Defendant fails to allege that any of these facts are inaccurate. Therefore, we find that defendant fails to state a claim on appeal with regard to OV 4. See *Mitchell, supra* at 176.

Finally, defendant contends that his sentence was disproportionate considering he has no prior record, has close ties with his children and ex-wife, was only one semester away from earning a master's degree in English, and not a threat to society. We disagree.

Under the sentencing guidelines, defendant's score for the second-degree murder conviction resulted in a minimum range of 120 to 300 months or life. See Guidelines, *supra*, p 80. The judge sentenced defendant to life. A sentence imposed within an applicable sentencing guidelines range is presumptively neither excessively severe nor unfairly disparate. *People v Kennebrew*, 220 Mich App 601, 609; 560 NW2d 354 (1996). Defendant's life sentence in this case is within the guidelines range and is presumptively proportionate and there are no facts in this case leading to a different conclusion. The record establishes that Blue's death was brutal and unprovoked, thus making a life sentence proportionate. Therefore, resentencing is not required.

Next, defendant claims on appeal that he was denied effective assistance of counsel. Defendant argues that numerous specific errors of trial counsel constitute ineffective assistance of counsel mandating reversal in this case under the standard set forth in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Allegations pertaining to ineffective assistance of counsel must first be heard by the trial court to establish a record of the facts pertaining to such allegations. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). In cases such as this, where a *Ginther* hearing has not been held, review by us is limited to mistakes apparent on the record. *People v Price*, 214 Mich App 538, 547; 543 NW2d 49 (1995). To establish that the defendant's right to effective assistance of counsel was so undermined that it justifies reversal of an otherwise valid conviction, we must find that counsel's representation fell below an objective standard of reasonableness and that the representation so prejudiced the defendant as to deny him a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). We find that the record does not support defendant's claim that he was denied effective assistance of counsel.

Defendant first argues that trial counsel was ineffective for failing to subpoena and call police officer Mackey to appear and testify at trial. The decision whether to call a witness at trial is a matter of trial strategy, and failure to call witnesses can constitute ineffective assistance of counsel only when it deprives defendant of a substantial defense. *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vacated in part 454 Mich 900 (1996). A substantial defense is one which might have made a difference in the outcome of the trial. *Id.* Defendant admits in his brief that he had no expectation of the police officer testifying in his favor. There is no indication whatever that failure to call officer Mackey deprived defendant of a substantial defense. Therefore, any alleged failure to call Mackey as a witness does not constitute ineffective assistance of counsel.

Defendant next claims that defense counsel's assistance was ineffective because defense counsel asked the prospective jurors during voir dire, "How many of you have said something in your relationship that you did not mean?" Defendant asserts that such a statement gave credence to the hearsay witnesses called at trial who testified regarding threats made to Blue that he would kill her if he ever caught her with another man or if she refused to see him.

Before trial began in this case, the trial court denied defendant's motion to suppress hearsay statements of the victim's co-workers regarding defendant's alleged remarks to the victim that he would kill her if she was with another man or if she refused to see defendant. In anticipation of the presentation of such testimony at trial, defense counsel obviously attempted to convince the prospective jurors that any such alleged statement by defendant about killing Blue was not an indication of his true intention.

We will not substitute our judgment for that of defense counsel regarding matters of trial strategy, nor will we assess counsel's competence with the benefit of hindsight. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987); *People v Kvam*, 160 Mich App 189, 200; 408 NW2d 71 (1987). We find that defense counsel's attempt to preempt the anticipated detrimental effect of the introduction of defendant's threatening statements can only be viewed as trial strategy. Therefore, defendant's claim in this regard cannot provide the basis for his ineffective assistance of counsel claim.

Next, defendant contends that defense counsel was ineffective because she failed to share with defendant one of the copies of three of defendant's journals which were turned over by the prosecutor. Defendant asserts that the journal was used by the prosecutor at trial to impeach defendant and defendant's lack of preparation with regard to the contents of the journal caused him to be "noticeably caught off balance" and he "struggled to put into context statements charged to him." Defendant claims that had he reviewed his journal before the prosecutor questioned him about statements contained therein, the prosecutor's ability to impeach defendant would have been substantially reduced. However, defendant fails to establish or even provide any details as to how his testimony would have been different such that it would have changed the outcome of the trial had he been given the opportunity to review his journal before the prosecution's questioning. We find that defendant has not met his burden of proving that but for counsel's alleged errors, the outcome of the trial would have been different.

Defendant next contends that his counsel failed to afford him reasonable time to review the presentence report before sentencing. He also contends that defense counsel was ineffective for failing to call additional character witnesses during sentencing to testify to defendant's good character. Defendant argues that his counsel failed to employ available and vital information in order to depict his true character during his sentencing hearing. We have reviewed defendant's arguments in this regard and conclude that defendant simply disagrees with the sentence ordered by the trial court and does not establish the ineffective assistance of his counsel. For this reason, defendant has not met his burden of establishing that defense counsel's assistance prejudiced him and but for her unprofessional conduct, the trial judge would have sentenced defendant differently. See *Mitchell*, *supra* at 157-158.

Next, defendant claims that defense counsel's assistance was ineffective because defense counsel failed to object when the prosecutor asked the jury venire, comprised of fourteen Caucasians at the time, "How many of your are familiar with the O.J. Simpson trial?" and then asked, "How many of you recall how you felt after hearing the verdict?" Defendant contends that these statements were an attempt by the prosecutor to take advantage of the venire's racial composition in an attempt to convince the jury that the missed opportunity to convict O.J. Simpson can be rectified by now convicting defendant, an African-American, of first-degree murder. Initially, we point out that the record reflects no such statement made by the prosecutor. Defendant explains this by contending that the court reporter inaccurately transcribed the prosecutor's statements. However, defendant has provided no support for this contention, such as affidavits from any of the public observing the trial. The statements of record made by the prosecutor to which we believe defendant is referring are as follows:

> Mr. Brower [The Prosecutor]: You couldn't live in society over the last couple of years without hearing a whole lot about much publicized case in Los Angeles. What I would

like to do is ask if there's any of you that think there was anything normal about that case? Is there any jurors that think that's the standard I want to see here in Kalamazoo during this trial?

The Court: I think that probably is an unfair question, Mr. Brower. I don't know that any of us know enough about that other than some vague impression through the media that we could base an honest judgment on that.

Mr. Brower: All right.

Although the prosecutor did make some inappropriate remarks about what is clearly the O.J. Simpson case, he did not make the remarks alleged by defendant. Most important, however, was the trial court's immediate admonishment of the prosecutor, stating that the question was probably unfair. The prosecutor abandoned the question and moved on. Given this exchange, defendant cannot establish that his trial counsel's failure to object to the prosecutor's remark prejudiced him in any way. Therefore, as with defendant's other claims of ineffective assistance of counsel, we conclude that this claim, too, fails. See *Mitchell, supra* at 157-158.

Next, defendant claims on appeal that the trial court erred in failing to grant defendant's motion to suppress his confession at the *Walker* hearing because defendant's confession was not voluntary because police failed to end the interrogation after defendant requested to leave. Additionally, defendant contends that the court erred when it denied defendant's motion to suppress statements made during interrogation where defendant was the focus of the police investigation, but was not read his *Miranda* rights. The ultimate question whether a person is in custody, and thus entitled to *Miranda* warnings before being interrogated by law enforcement officers, is a mixed question of law and fact which must be answered independently by the reviewing court after de novo review. *People v Mendez*, 225 Mich App 381, 382; 571 NW2d 528 (1997). A reviewing court will defer to the trial court's finding of historical fact absent clear error. *Id.* A finding of historical fact is clearly erroneous if, after review of the entire record, an appellate court is left with a definite and firm conviction that a mistake has been made. *Id.* In this case, the trial court did not err in admitting defendant's statements to police, as defendant was not in custody at the time he confessed to killing Blue. Furthermore, once defendant confessed to killing Blue, he was placed under arrest and provided his *Miranda* rights, which he waived, and continued to tell the police the circumstances surrounding Blue's death. Therefore, the trial court did not err in determining that defendant's statements made to police post-arrest are also admissible.

The right against self-incrimination is guaranteed by both the United States and Michigan Constitutions. US Const, AM V; Const 1963, art 1, § 17; *People v Cheatham*, 453 Mich 1, 9 (Boyle J), 44 (Weaver, J); 551 NW2d 355 (1996). Compulsion proscribed by the right is that resulting from circumstances in which a person is unable to remain silent because of threats of violence, improper influence, or direct or implied promises, however slight, *Malloy v Hogan*, 378 US 1,7; 84 S Ct 1489, 1493; 12 L Ed 2d 653 (1964), unless he chooses to speak in the unfettered exercise of his own will, *id.; In re Stricklin*, 148 Mich App 659, 664; 384 NW2d 833 (1986).

Statements of an accused made during custodial interrogation are inadmissible unless the accused voluntarily, knowingly and intelligently waived his Fifth Amendment rights. *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602, 1612; 16 L Ed 2d 694 (1966); *People v Garwood*, 205 Mich App 553, 555-556; 517 NW2d 843 (1994). However, *Miranda* warnings are not required unless the accused is subject to a custodial interrogation. *People v Anderson*, 209 Mich App 527, 532; 531 NW2d 780 (1995). A custodial interrogation is a questioning initiated by law enforcement officers after the accused has been taken into custody or otherwise deprived of his freedom of action in any significant way. *Miranda, supra,* 384 US 444; *People v Mayes (After Remand)*, 202 Mich App 181, 190; 508 NW2d 161 (1993). Whether the accused was in custody depends on the totality of the circumstances. The key question is whether the accused could reasonably believe that he was not free to leave. *Mayes, supra*.

The trial court in this case found that at the time that defendant went to the police station and spoke with Officer Harmsen and Lieutenant VanStreain, he was not in custody, but rather, was free to leave at any time until the confession took place. The record supports the trial court's findings of fact. First, the record in this case clearly establishes that defendant was not in custody and was free to leave the police station from the time he arrived at the police station until the time he provided the details of his killing Blue, rendering his statements made during this time period to police admissible at trial. Both Harmsen and VanStreain testified at the *Walker* hearing in this case that they neither threatened nor coerced defendant during their interrogation, nor did either officer promise defendant anything in return for a confession. Rather, the record shows that defendant chose to inform the police of his own free will that he had killed Blue. He voluntarily came into the police station, he agreed to speak with Harmsen, he voluntarily went up to the interview room with Harmsen, Harmsen specifically told defendant he was not under arrest, nor was he in custody, his answers were coherent and defendant did not seem to be under the influence of drugs or alcohol, and he agreed to speak with VanStreain. Furthermore, at the point that defendant did say that he wanted to leave and stood up to go, VanStreain did not stop him from leaving, but did ask him to take his business card before he left. This can hardly be interpreted as the officer preventing defendant from leaving. It was at this point that defendant confessed. Once he confessed, VanStreain placed defendant under arrest and read him his *Miranda* rights, which defendant waived. Defendant voluntarily continued to tell the police the details surrounding his killing of Blue. Therefore, all the statements defendant made to the police are admissible at trial.

Next, defendant contends that because defendant was the focus of their investigation, he should have been given his *Miranda* warnings from the outset of the interrogation. However, in *Hill, supra* at 384, the Supreme Court held that the proper test for determining whether *Miranda* rights must be provided is whether the accused is in custody, not whether the accused is the focus of a police investigation. Therefore, the police in this case were not required to give defendant his *Miranda* rights until the time that defendant was arrested and placed in custody which was at the time he confessed to killing Blue.

Defendant next claims on appeal that the prosecutor's reference to the O.J. Simpson trial was meant by the prosecutor to divide the white jury against defendant, who is black, and therefore constituted an improper remark by the prosecutor that prejudiced defendant. Appellate review of a

prosecutor's allegedly improper remarks is precluded if the defendant fails to timely and specifically object unless an objection could not have cured the error or a failure to review the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994), cert den sub nom *Michigan v Caruso*, 573 US 1121; 115 S Ct 923; 130 L Ed 2d 802 (1995). A miscarriage of justice will not be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction. *People v Rivera*, 216 Mich App 648, 651-652; 550 NW2d 593 (1996). Thus, if defense counsel fails to object, review is foreclosed unless the prejudicial effect of the remark was so great that it could not have been cured by an appropriate instruction. *People v Duncan*, 402 Mich 1, 15-16; 260 NW2d 58 (1977); *People v Turner*, 213 Mich App 558, 575; 540 NW2d 728 (1995). In this case, defense counsel failed at trial to place any objection on the record to the prosecutor's alleged improper remarks. Furthermore, given that the trial court instructed the prosecutor to move on to another question because the question regarding the O.J. Simpson trial were unfair, there is no prejudice to defendant and therefore, no miscarriage of justice is caused by defense counsel's failure to object. We find, therefore, that defendant has failed to preserve this claim for review.

Affirmed.

/s/ Michael J. Kelly
/s/ Roman S. Gribbs
/s/ E. Thomas Fitzgerald

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