STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RIO R. BELL,

Defendant-Appellant.

UNPUBLISHED
March 30, 1999

No. 204927
Recorder's Court
LC No. 96-008134

Before: MacKenzie, P.J., and Gribbs and Wilder, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions by a jury 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 him to twenty-five to fifty years' imprisonment for the second-degree murder conviction and to two years' imprisonment for the felony-firearm conviction. We affirm.

Defendant argues that the trial court erred when it failed to sua sponte instruct the jury on the unreliability of accomplice testimony with regard to the testimony of Shawn Smith. We review jury instructions as a whole in deciding whether reversal is warranted. *People v Moldenhauer*, 210 Mich App 158, 159; 533 NW2d 9 (1995). As long as the instructions as a whole fairly presented the issues to the jury and protected the rights of the defendant, imperfections do not constitute error. *People v Brown*, 179 Mich App 131, 135; 445 NW2d 801 (1989). When, as in the instant case, a trial is essentially a credibility contest between the defendant and a possible accomplice, a court is required to give a cautionary instruction on accomplice testimony sua sponte if "potential problems with an accomplice's credibility have not been plainly presented to the jury." *People v Reed*, 453 Mich 685, 692-693; 556 NW2d 858 (1996). Here, defendant's attorney asked Smith on cross-examination why he did not come forward immediately with his information about the crime, and Smith admitted that he accused defendant only after he was told that defendant had accused him. This exchange was sufficient to apprise the jury of the potential problems with Smith's credibility. Accordingly, we conclude that the trial court did not err in failing to sue sponte give an instruction on accomplice testimony.

Defendant also claims that his trial counsel was ineffective for failing to request a cautionary instruction on accomplice testimony. Because defendant did not raise the issue of ineffective assistance of counsel in the trial court, our review is limited to mistakes that are apparent on the record. *People v Fike*, 228 Mich App 178, 181; 577 NW2d 903 (1998). To establish ineffective assistance of counsel, a defendant must overcome a strong presumption that counsel's assistance constituted sound trial strategy and show that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). Here, although there was no actual accomplice instruction, the possible problems with Smith's credibility were plainly presented to the jury on cross-examination. Moreover, the fact that Smith was not charged with anything related to the instant crime significantly lessened the potential impact of an accomplice instruction, which focuses, in part, on any plea bargains a witness may have received in exchange for testifying. See CJI2d 5.6. Thus, counsel's failure to request an accomplice instruction was not outcome determinative and did not amount to ineffective assistance of counsel.

Next, defendant argues that a statement he gave to police should not have been admitted at trial because it was involuntary and was obtained in violation of his constitutional right against self-incrimination. See US Const, Am V, Const 1963, art 1, § 17, and *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966). In reviewing a trial court's determination of voluntariness, we examine the entire record and decide the issue independently. *People v Sexton*, 458 Mich 43, 68; 580 NW2d 404 (1998). We defer, however, to the trial court's assessment of the credibility of witnesses, and we disturb the court's factual findings only if they are clearly erroneous. *People v Cheatham*, 453 Mich 1, 29-30 (Boyle, J.), 44 (Weaver, J.); 551 NW2d 355 (1996). A finding is clearly erroneous if it leaves this Court with a definite and firm conviction that a mistake has been made. *People v Givans*, 227 Mich App 113, 119; 575 NW2d 84 (1997).

Under *Miranda*, a statement made during a custodial interrogation by police is inadmissible unless the defendant voluntarily, knowingly, and intelligently waived his right to remain silent. *Miranda, supra* at 444. Here, defendant does not argue that he lacked the capacity to make a knowing and intelligent waiver; instead, he focuses on whether his statement was voluntary or coerced. As we stated in *People v Howard*, 226 Mich App 528, 538; 575 NW2d 16 (1997), whether a waiver of *Miranda* rights is knowing and intelligent and whether it is voluntary are two separate questions, and the voluntariness prong is determined solely by examining police conduct.

The interrogating officer in this case denied employing any coercive tactics in obtaining defendant's statement. The officer testified that (1) prior to giving the statement in question, defendant initialed and signed a form to indicate that he understood his *Miranda* rights; (2) defendant initialed each of the questions asked during the interview to indicate that he understood them; (3) he offered defendant food; (4) defendant did not request an attorney or ask to contact his family during the interview; (5) he did not tell defendant that Smith had accused him of the crime; (6) he did not tell defendant that the case had to be solved quickly because the murder victim was related to the Detroit Police Chief; and (7) although he did not personally know where defendant was held prior to the interview, he would not have been handcuffed to a chair unless he were being unusually disruptive. Defendant contradicted the officer's testimony on several of these points. As indicated earlier, we must

defer to the trial court's ability to judge the credibility of witnesses, and we conclude that the court did not clearly err in accepting the officer's testimony. *People v Heffron*, 175 Mich App 543, 547; 438 NW2d 253 (1988).

Defendant emphasizes the duration of his pre-statement detention and his lack of sleep in arguing that the statement was involuntary. However, the length of detention is only one factor to consider in ascertaining voluntariness, *Fike*, *supra* at 181-182, and in this case it is insufficient, standing alone, to establish that the statement was coerced. Moreover, defendant's sleepiness resulted not from any coercive police tactics but from defendant's own decision to remain awake during the night of the murder. Accordingly, it does not factor into our determination of voluntariness. *Sexton*, *supra* at 68-69. Having reviewed the record in its totality, we conclude that the trial court did not err in finding that defendant's statement was freely made and admissible.

Finally, defendant argues that the trial court erred in failing to give the "mere presence" instruction regarding aiding and abetting. The record reveals, however, that the court did give this instruction. We take this opportunity to remind defendant's counsel of MRPC 3.3(a)(1), which prohibits an attorney from making "a false statement of material fact or law to a tribunal."

Affirmed.

/s/ Barbara B. MacKenzie
/s/ Roman S. Gribbs
/s/ Kurtis T. Wilder