STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT JAVAR MAZE,

Defendant-Appellant.

UNPUBLISHED
October 1, 1999

No. 199224
Kent Circuit Court
LC No. 96-001872 FC

Before: McDonald, P.J., and Neff and Smolenski, JJ.

PER CURIAM.

Defendant, a juvenile, was convicted by a jury of first-degree felony murder, MCL 750.316(1)(b); MSA 28.548(1)(b), conspiracy to commit armed robbery, MCL 750.157(a); MSA 28.354(1) and MCL 750.529; MSA 28.797, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Following a juvenile sentencing hearing, he was sentenced as an adult to concurrent terms of life imprisonment for the armed robbery and felony murder convictions, and a consecutive two-year term for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant's convictions arise from the fatal shooting of a store employee, Rodney Corp, during the commission of a robbery. On appeal, defendant first argues that the trial court erred in denying his motion to suppress a statement that he made to an employee of a juvenile detention facility.

Following his arrest, defendant was placed in the Kent County Juvenile Court Detention Facility. As he was being escorted to his room by an employee at the facility, the employee asked defendant why he was being held. Defendant replied, "Felony murder." The employee responded, "Yeah, right," whereupon defendant stated, "S***, I shot his a** in the chest." Defendant moved to suppress this statement on the basis that it was made during custodial interrogation by a government agent and, therefore, was inadmissible because he was not advised of his *Miranda*[1] rights before making the statement.

The failure to give *Miranda* warnings to a person before the person makes a statement during a custodial interrogation renders the statement inadmissible for purposes other than impeachment. *People*

v Anderson, 209 Mich App 527, 531; 531 NW2d 780 (1995). "The critical issue to be resolved is whether there was a custodial interrogation to trigger the requirements of *Miranda*." *Id*. at 532. "Custodial interrogation means questioning initiated by law enforcement officers after a person has been taken into custody." *Id*. "'Interrogation' . . . must reflect a measure of compulsion above and beyond that inherent in custody itself." *Id*. However, volunteered statements of any kind are not barred by the Fifth Amendment and are admissible. *Id.*

In *Anderson, supra* at 533-534, this Court stated:

> [C]onstitutional protections apply only to governmental action. Thus, a person who is not a police officer and is not acting in concert with or at the request of the police is not required to give *Miranda* warnings before eliciting a statement. Accordingly, it has been held that private security guards not acting at the instigation of the police or functioning with their assistance or cooperation need not give *Miranda* warnings before eliciting an inculpatory statement.
>
> * * *
>
> In this case, Williamson testified that she is a juvenile correction officer supervisor and that she is a State of South Carolina employee. However, Williamson does not carry a badge, does not carry any type of weapon, and does not wear a uniform. Her duties do not include the interrogation of criminal suspects. She does not have the authority to arrest or detain anyone. There was no evidence that Williamson was working at the behest of the police. Thus, contrary to defendant's assertion, Williamson is not a police officer for the purposes of *Miranda*. Therefore, Williamson was not required to give defendant his *Miranda* warnings. [citations omitted.]

Here, although defendant was in custody, the volunteered statement was not made in response to interrogation or its functional equivalent. Moreover, the detention center employee was not a police officer and was not acting in concert with or at the request of the police. He did not have the authority to arrest or detain anyone and bore none of the accouterments of a police officer. Thus, the subject statement did not stem from a custodial interrogation and, therefore, was not subject to the *Miranda* requirements. *Anderson, supra*; *People v Raper*, 222 Mich App 475, 479; 563 NW2d 709 (1997). Accordingly, the trial court did not err in admitting the statement into evidence.

Next, defendant claims that he was denied the effective assistance of counsel because his attorney failed to move to suppress a statement made to a police officer during the "booking" process and also failed to object to its admission at the trial. Defendant again argues that the statement was obtained in violation of his rights under *Miranda*. Because defendant did not raise the issue of ineffective assistance of counsel in an appropriate motion in the trial court, appellate review is limited to mistakes apparent from the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995).

To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that there is a reasonable probability that, but for the unprofessional errors, the result of the proceeding would have been different. *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994); *People v Eloby (After Remand)*, 215 Mich App 472, 476; 547 NW2d 48 (1996).

Defendant was arrested inside a store. One of the forms to be filled out during the "booking" process required that the location of the arrest be disclosed. The arresting officer could not remember the name of the specific store where the arrest occurred and asked defendant "what store they were in." Instead of identifying the store where the arrest occurred, defendant gave the name of the store where the charged offenses were committed. The officer then clarified that he was referring to the store where defendant was arrested.

Routine questions that are not reasonably likely to elicit an incriminating response do not amount to interrogation and, therefore, do not require the giving of *Miranda* rights. *People v Cuellar*, 107 Mich App 491, 493; 310 NW2d 12 (1981). See also *People v Armendarez*, 188 Mich App 61, 73; 468 NW2d 893 (1991). Here, however, considered in the context of this case, we are not convinced that the officer's question was one that was not reasonably likely to invoke an incriminating response. Nonetheless, we are satisfied there is no reasonable probability that the outcome of the trial would have been different had this evidence been excluded. The evidence at trial demonstrated that defendant fit the description given by an eyewitness and that defendant was known to wear a Starter Miami Hurricane's jacket, which was also identified by an eyewitness. Moreover, two of defendant's friends Holcomb and Dulaney, testified that defendant was with the two other perpetrators on the day and evening that the crimes occurred. They further testified that they were present when defendant and the two other perpetrators divided up the stolen money and bragged of shooting the victim. The weapon used in the offense was recovered from the house of Peltier, who was one of the other perpetrators, and testimony also indicated that defendant, Peltier and Dulaney had fired the weapon in a park just days before the offense. Defendant's statement to the juvenile detention employee likewise implicated him in the offense. In light of this evidence, it is not reasonably probable that the outcome of the trial would have been different had the disputed evidence been excluded. Accordingly, defendant was not denied a fair trial because of ineffective assistance of counsel.

Defendant next argues that the trial court erred by failing to give the accomplice testimony instruction, CJI2d 5.6, with regard to the testimony of Troy Holcomb and Patrick Dulaney. We disagree. Defendant did not preserve this issue by requesting an accomplice testimony instruction at trial. *People v Grant*, 445 Mich 535, 547; 520 NW2d 123 (1994); *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993). Although a court has a duty to give a cautionary instruction on accomplice testimony sua sponte in certain situations, that duty does not arise when potential problems with an accomplice's credibility have been plainly presented to the jury. *People v Reed*, 453 Mich 685, 692-693; 556 NW2d 858 (1996). See also *People v McCoy*, 392 Mich 231; 220 NW2d 456 (1974). As our Supreme Court observed in *Reed*, *supra* at 692-693, when the problems are plainly apparent to the jury and the inconsistencies in the testimony are thoroughly cross-examined, the rationale for the obligation to instruct sua sponte does not apply.

In this case, it is doubtful whether Holcomb and Dulaney were indeed "accomplices." MCL 767.39; MSA 28.979; *People v Turner*, 213 Mich App 558, 568; 540 NW2d 728 (1995). Even if they were, however, the trial court cautioned the jury to view their testimony with greater scrutiny if it believed that they were involved in the crimes "in some degree." The court's instructions sufficiently captured the essence of CJI2d 5.6. Moreover, inconsistencies in the testimony of these witnesses were thoroughly cross-examined by defense counsel. Under these circumstances, the rationale for any obligation to instruct sua sponte does not apply. *Reed, supra*. Accordingly, the trial court did not err by failing to sua sponte instruct the jury in accordance with CJI2d 5.6.

Finally, defendant argues that the trial court erred in sentencing him as an adult. We disagree.

The trial court's findings of fact at a juvenile sentencing hearing are reviewed for clear error, while the ultimate decision whether to sentence a minor as a juvenile or as an adult is reviewed for an abuse of discretion, using the principle of proportionality. *People v Brown*, 205 Mich App 503, 504-505; 517 NW2d 806 (1994); *People v Lyons (On Remand)*, 203 Mich App 465, 467-468; 513 NW2d 170 (1994).

The record indicates that the trial court followed the explicit dictates of MCL 769.1(3); MSA 28.1072(3) and MCR 6.931(E)(3), giving the seriousness of the offense factor weight appropriate to the circumstances. Contrary to what defendant argues, the court did not base its decision solely on the gravity of the crime, but considered all of the relevant factors. The trial court's factual findings are supported by the record and, thus, are not clearly erroneous.

In particular, we disagree with defendant's claim that the court clearly erred in its findings with regard to the testimony of Dr. Rosen. The trial court's conclusion that defendant would not benefit from placement in the juvenile system was based not only on Dr. Rosen's testimony, but was also supported by the testimony of Kim Butwell, a delinquency services worker, who testified about the programs that were available in the juvenile system. The court determined that the type of program that Dr. Rosen believed was required in order for defendant to benefit, such that he would not pose a continued risk to the community upon his release, was not available in the juvenile system. This finding is supported by the record.

Finally, having considered the trial court's findings, we conclude that defendant has demonstrated no abuse of discretion with the decision to sentence him as an adult.

Affirmed.

/s/ Gary R. McDonald
/s/ Janet T. Neff
/s/ Michael R. Smolenski

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