# STATE OF MICHIGAN

# COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL CRAIG OBIDZINSKI,

Defendant-Appellant.

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UNPUBLISHED
October 1, 1999

No. 207727
Washtenaw Circuit Court
LC No. 96 7219 FH

Before: Talbot, P.J., and Fitzgerald and Markey, JJ.

PER CURIAM.

Defendant was convicted of one count of larceny in a building, MCL 750.360; MSA 28.592. Defendant appeals by right his conviction. We affirm.

The sole issue in this case is whether defendant was denied effective assistance of counsel when defense counsel failed to move for suppression of the statements defendant made to Officer Joseph Braunschneider both before and after defendant was advised of his *Miranda*[1] rights. *People v Stanaway*, 446 Mich 463, 687-688; 521 NW2d 557 (1994). Defendant failed to create a testimonial record to support his claim that counsel was ineffective. See *People v Ginther*, 390 Mich 436, 443-444; 212 NW2d 922 (1973). Accordingly, review is limited to mistakes that are apparent on the record. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997). We find insufficient evidence on the record to verify defendant's allegations.

The Fifth Amendment to the United States Constitution guarantees the right against self-incrimination. US Const, Am V; *People v Mayes* (*After Remand*), 202 Mich App 181, 189; 508 NW2d 161 (1993). Statements of an accused during custodial interrogation are inadmissible unless the accused knowingly, voluntarily, and intelligently waived his Fifth Amendment rights. *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966); *People v Garwood*, 205 Mich App 553, 555-556; 517 NW2d 843 (1994); *Mayes, supra* at 189-190.

*Miranda* warnings are required whenever the accused is in custody or otherwise deprived of freedom of action in any significant manner. *People v Hill*, 429 Mich 382, 384; 415 NW2d 193 (1987). Whether an accused was in custody at the time of an interrogation depends on the totality of

the circumstances. *People v Williams*, 171 Mich App 234, 237; 429 NW2d 649 (1988). The definitive question is whether the accused reasonably could have believed he was not free to leave. *Id*. Similarly, whether an accused knowingly, voluntarily, and intelligently waived his Fifth Amendment rights depends on the totality of the circumstances. *People v Etheridge*, 196 Mich App 43, 57; 492 NW2d 490 (1992). While "[a]dvanced intoxication, whether the product of drugs or alcohol, may preclude an effective waiver of *Miranda* rights," *People v Davis*, 102 Mich App 403, 410; 301 NW2d 871 (1980), that a defendant was under the influence of drugs "is not dispositive of the issue of voluntariness," *People v Leighty,* 161 Mich App 565, 571; 411 NW2d 778 (1987).

We conclude that defendant has failed to establish that a motion to suppress the statements he made to Officer Braunschneider would have been successful. First, defense counsel moved the trial court to strike defendant's statements from the record but did so only after the prosecution rested and based the objection upon the police officer's failure to read defendant his Miranda warning. The court denied the motion as untimely and found no custodial situation requiring the warning. We find no error on the record. The undisputed facts adduced at trial indicate that defendant stayed at the bar where the alleged larceny took place after the bar owner told him to leave; he refused to leave because he wanted to talk to the police. Moreover, no one ever told defendant he was under arrest. Any detention before his arrest and before talking with the police was brief and occurred at a table in the bar where the police officer asked defendant to wait while the officer interviewed the complainant. The "environment was not 'police dominated.'" *Mayes, supra* at 191. Accordingly, the trial court's finding that defendant was not in custody was not error.

Second, the record contains no evidence that defendant was in a state of intoxication, let alone "advanced" intoxication. *Davis, supra*. Thus, based upon our review, we do not believe that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms or that the results of the proceeding would have been different absent counsel's deficient performance. *Stanaway, supra*. Accordingly, defendant was not denied effective assistance of counsel.

We affirm.

/s/ Michael J. Talbot
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey

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