STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 1, 2002
v	No. 230881 Calhoun Circuit Court
QUINCY KARELL JOHNSON, Defendant-Appellant.	LC No. 00-000513-FC

Before: Holbrook, Jr., P.J., and Zahra and Owens, JJ.

PER CURIAM.

Defendant appeals, as of right, from his convictions for open murder, MCL 750.316(1)(c),[1] first-degree murder, MCL 750.316(1)(b), assault with intent to murder, MCL 750.83; assault with a dangerous weapon, MCL 750.82; and four counts of felony firearm, MCL 750.227b.

These charges and convictions arise out of the shooting death of Candice Irwin, defendant's former girlfriend, which took place at her residence on Goquac Street on January 18, 2000. Defendant, who had shot Irwin two days earlier, broke into the house where the victim and her mother, Lisa O'Connell, were, and killed Irwin. Defendant also shot O'Connell once in the forehead, but she survived. After leaving the house, defendant, armed with the murder weapon, was stopped by several police officers. Defendant refused to obey the orders by the police to stop, and, according to police testimony, pointed the weapon at an officer. As a result, the police were forced to shoot defendant several times before arresting him.

Defendant first takes issue with the admission of several inculpatory statements he made while in the hospital following his arrest. According to the testimony taken at the hearing on defendant's motion to suppress this evidence, defendant's mother was permitted to visit her son, who she feared would die as a result of his injuries. Defendant's mother was admonished that police officers would be in the room with her and defendant. When defendant's mother entered the room, she and defendant began talking about the instant offenses. One of the officers present

[1] The statute number reflected on defendant's judgment of sentence for open murder is incorrect, and serves as the basis for defendant's third issue on appeal. Defendant was convicted of first-degree murder under two different theories.

cautioned defendant that he did not have to answer her questions.[2] However, defendant continued to speak, and one of the officers placed a tape recorder near him to record his statements. At no time during this conversation did either of the police officers direct any questions to defendant. The trial court denied defendant's motion to suppress, ruling that defendant failed to show any coercion on the part of the police officers.

Now on appeal, defendant takes issue with this ruling, arguing that the inculpatory statements were not voluntary. Implicit in this argument is that defendant argues his constitutional right to protection against self-incrimination is implicated because he was in custody and subjected to interrogation. We disagree that defendant's *Miranda*[3] rights were even implicated because no evidence existed that the police officers either attempted to interrogate him or employed a practice which they knew or believed would invoke an incriminating response.

Defendant is correct that statements of an accused made during custodial interrogation are inadmissible unless the accused voluntarily, knowingly and intelligently waived his Fifth Amendment rights. *Miranda, supra; People v Abraham*, 234 Mich App 640, 644; 599 NW2d 736 (1999). However, *Miranda* warnings are not required unless the accused is subject to a custodial interrogation. *People v Hill*, 429 Mich 382, 384; 415 NW2d 193 (1987); *People v Kulpinski*, 243 Mich App 8, 25; 620 NW2d 537 (2000). 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; People v Zahn*, 234 Mich App 438, 449; 594 NW2d 120 (1999). Here, there is no question that defendant was in custody at the time the statements were made.

However, defendant fails to demonstrate that he was ever subject to police interrogation. Police conduct constitutes an interrogation triggering *Miranda* when the conduct constituted express questioning or a practice which the police knew or reasonably should have known was likely to invoke an incriminating response. *People v Anderson*, 209 Mich App 527, 532-533; 531 NW2d 780 (1995). Here, no evidence was presented that the police ever directly asked defendant any questions regarding his involvement with the instant offenses. Therefore, defendant's argument on appeal is that the police utilized a technique that they should have known would elicit an incriminating statement from defendant. Defendant, in his brief, states "[b]y having his mother see son [sic], Callahan, who fully appreciated that incriminating statements could be made, knowingly took full advantage of the situation [defendant] was in, as a way to gain admissions from him. This, even though *Johnson had just invoked Miranda*. Therefore, any statements made were involuntary under the circumstances of this case."

However, defendant's argument that "incriminating statements could be made" fails to satisfy the requirement that an officer's actions were likely to elicit an incriminating statement. Here, the police officers simply allowed defendant's mother to visit him in the hospital room. There was no evidence that the police officers encouraged her to ask defendant any questions.

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[2] It is undisputed that defendant had already invoked his right to remain silent before his mother arrived.

[3] *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602, 1612; 16 L Ed 2d 694 (1966).

There was also no evidence that the police officers at the hospital room, or Hampton, arranged the visit in hopes of acquiring incriminating statements from defendant. The argument that, by merely allowing defendant's mother to visit him, incriminating statements were likely to be made is dubious. Defendant's mother was concerned about whether her son would survive his shooting, and the officers could not predict that, after she was permitted to visit him, she would interrogate him about his knowledge of the instant crimes. Therefore, defendant fails to show that he was ever interrogated by the police.

Because defendant fails to show any interrogation by the police, he fails to show how his *Miranda* rights, or rights against self incrimination, were ever implicated. Therefore, defendant's argument that his waiver of those rights was not voluntary is irrelevant. Accordingly, defendant fails to show how the trial court's denial of his motion to suppress those statements amounts to clear error.

Defendant's next argument on appeal is that the trial court erred in granting plaintiff's motion for joinder of the charges stemming from the shooting of Irwin and O'Connell with those stemming from defendant's arrest. The trial court based its decision on MCR 6.120, which reads, in pertinent part:

> (A) An information or indictment may charge a single defendant with any two or more offenses. Each offense must be stated in a separate count. Two or more informations or indictments against a single defendant may be consolidated for a single trial.
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> (B) On the defendant's motion, the court must sever unrelated offenses for separate trials. For purposes of this rule, two offenses are related if they are based on
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> (1) the same conduct, or
>
> (2) a series of connected acts or acts constituting part of a single scheme or plan.

Here, the prosecutor moved for joinder of the charges, which is permissible under subrule (A). Defendant argued in opposition that, in essence, the offenses were unrelated and that he was unfairly prejudiced by the number of charges.

Pursuant to subrule (B), the trial court is required to sever those offenses that are unrelated to the other offenses. However, defendant fails to establish that these crimes were unrelated. Regarding "related," our Supreme Court has stated that "separate and distinct offenses may be charged as separate counts in an information and joined for trial where they are committed by the same acts at the same time and the same testimony must be relied on for conviction." *People v Tobey*, 401 Mich 141, 148; 257 NW2d 141 (1977)(citations omitted; punctuation modified). The Court clarified that it actually meant "the offenses charged in the several counts must arise out of substantially the same acts committed at the same time" *Id.* at 149.

Here, the events are part of the same incident. Defendant kicked in the door to the O'Connell house, shot and killed Irwin, shot O'Connell, and fled. Soon thereafter, defendant encountered the Battle Creek police officers who ordered defendant to stop. Defendant had with him a handgun (the same gun used in the shooting at the Goquac Street residence), which he pointed at the police, and the police shot him before arresting him. In *Tobey*, *supra* at 149, the Supreme Court distinguished between heroin sales made several days apart as not being at substantially the same time. Here, however, there was testimony that the Goquac Street shooting happened only an hour before defendant was arrested. The decision of the trial court, therefore, that these events occurred in substantially the same period, does not amount to an abuse of discretion.

We disagree with defendant's contention that the additional charges serve to unfairly prejudice him because the jury would tend to view him in a poor light. Although defendant cites language from *People v Daughenbaugh*, 193 Mich App 506, 510-511; 484 NW2d 690 (1992), for the proposition that joining unrelated counts "casts [a defendant] as a bad person" and unfairly prejudices him, in that case the counts were unrelated, but here all of the charges against defendant are related. Although the number of counts may prejudice him, defendant fails to show how that prejudice is unfair. Defendant cites no precedent for, and we decline to adopt, the novel proposition that the joinder of related charges is not permitted because the number of charges may unfairly prejudice a defendant.

Finally, defendant asserts that the trial court made several mistakes in completing its judgment of sentence. Plaintiff concedes these errors, and we remand this issue to the trial court for entry of an order correcting the administrative error. See *People v Herndon*, 246 Mich App 371, 392-393, 423; 633 NW2d 376 (2001). The record reflects that defendant was convicted of one count of first-degree murder under two theories, MCL 750.316(1)(a) and (b). The record also reflects that the victim was not a peace officer, pursuant to MCL 750.316(1)(c). However, the judgment of sentence incorrectly states that defendant was convicted of two counts of first degree murder, MCL 750.316(b) and (c). The lower court shall enter an order correcting these errors.

We affirm defendant's conviction, and remand for entry of an order correcting the administrative errors associated with defendant's judgment of sentence. We do not retain jurisdiction.

/s/ Donald E. Holbrook, Jr.
/s/ Brian K. Zahra
/s/ Donald S. Owens