STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 16, 2003
v	No. 240729 Saginaw Circuit Court
ANTONIO MORRISSETTE, Defendant-Appellant.	LC No. 00-019263-FC

Before: Fitzgerald, P.J., and Griffin and Saad, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree premeditated murder and felony murder, MCL 750.316, and was sentenced to life imprisonment without possibility of parole for the first-degree premeditated murder conviction. Defendant appeals as of right. We affirm.

Defendant first argues that his statement to police was not voluntary because the police mislead defendant to believe that he could "walk away from the situation he was in" as long as he "told the police what they wanted to hear." He contends that the officers told him a false story about a "police officer who was not charged because he was attacked," thus inducing defendant to confess.[1] 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*[2] *rights* were even implicated because no evidence existed that the police either attempted to interrogate him or employed a practice that they knew or believed would invoke an incriminating response.

Defendant is correct that statements of an accused made during custodial interrogation

[1] A false statement by an officer that induces a defendant to respond is not alone sufficient to make the statement involuntary. *People v Hicks*, 185 Mich App 107, 113; 460 NW2d 569 (1990).

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

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). Whether an 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. *People v Marsack*, 231 Mich App 364, 374; 586 NW2d 234 (1998). 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 that must be answered independently by the reviewing court after de novo review of the record. *Thompson v Keohane*, 516 US 99; 116 S Ct 457, 465; 133 L Ed 2d 383, 394 (1995), on remand 145 F3d 1341 (CA 9, 1998).

Here, evidence produced at the *Walker* hearing revealed that defendant agreed to take a polygraph examination and was picked up at his residence by plain-clothes detectives in an unmarked car. Defendant rode unrestrained to the Michigan State Police Crime Lab. After waiting briefly in the lobby, defendant met alone in the interview room with the polygraph examiner. Defendant was not restrained and was not told that he could not leave. Under the totality of the circumstances, defendant could not have reasonably believed that he was not free to leave.[3]

Further, 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 that 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, the detectives waited in the lobby when defendant entered the polygraph examination room. It was defendant who requested to speak to the detectives shortly after entering the room. The detectives, who had interviewed defendant two days earlier, did not initiate the questioning and allowed defendant to make a narrative statement. 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

[3] Nonetheless, the record is clear that *Miranda* warnings were read to defendant by Sgt. Cole and that defendant acknowledged them in writing before making a statement to the detectives less than ten minutes later. Defendant acknowledges in his brief on appeal that "it is not per se necessary to re-warn a defendant of *Miranda* rights prior to a post-polygraph interrogation. Whether the pre-polygraph warnings will extend to cover the post-examination statements must be viewed in the totality of the circumstances, including consideration of any intervening circumstances." Here, defendant requested to talk to detectives and made a statement less than ten minutes after being advised of his *Miranda* rights. There were no intervening circumstances to consider, and the detectives were not required to again warn defendant of his *Miranda* rights.

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. *People v Sexton (After Remand)*, 461 Mich 746, 752; 609 NW2d 822 (2000).

Defendant also argues that his trial counsel was ineffective by failing to object when prosecution witness James Griffin testified that defendant sodomized the victim the month before the murder. Effective assistance of counsel is presumed and defendant bears a heavy burden to prove otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). To establish ineffective assistance of counsel, a defendant must show that (1) counsel's performance was below an objective standard of reasonableness and (2) that this deficient performance prejudiced her to the extent there is a reasonable probability that but for counsel's error, the result of the proceedings would have been different. *People v Carbin*, 463 Mich. 590, 599-600; 623 NW2d 884 (2001). Because defendant did not make a testimonial record in the trial court in connection with a motion for a new trial or an evidentiary hearing, this Court's review is limited to the facts contained on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

Assuming that counsel's failure to object to Griffin's testimony constitutes ineffective assistance of counsel, there is not a reasonable probability that the outcome of the proceeding would have been different but for trial counsel's error. The evidence against defendant, including his admissions to several people that he killed the victim, as well as his statement to police, was overwhelming and there is not a reasonable probability that the outcome of the proceeding would have been different absent Griffin's testimony. *Carbin, supra*.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Richard Allen Griffin
/s/ Henry William Saad