

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
May 29, 2012

v

SYLVESTER GILES, JR.,

Defendant-Appellant.

No. 302839
Oakland Circuit Court
LC No. 2010-233531-FH

Before: BORRELLO, P.J., and JANSEN and GLEICHER, JJ.

PER CURIAM.

Defendant was convicted by a jury of possession with intent to deliver between 50 and 450 grams of cocaine, MCL 333.7401(2)(a)(iii), felon in possession of a firearm, MCL 750.224f, and two counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. He was sentenced, as a third habitual offender, MCL 769.11, to 9 to 40 years' imprisonment for the possession with intent to deliver conviction, 2 to 10 years' imprisonment for the felon in possession conviction, and two years' imprisonment for each felony-firearm conviction. Defendant appeals by right. We affirm.

I. FACTS

This case arose from the execution of a search warrant conducted by members of the Narcotics Enforcement Team (NET),¹ on July 30, 2010, at 191 Ridgemont in Pontiac. Approximately an hour before the search warrant's execution, NET Deputy Derrick Myers was conducting visual surveillance on the home at 191 Ridgemont, when he saw defendant walk up to the door alone and enter the home using a key. Deputy Myers was sitting in an unmarked police vehicle approximately 75 yards from the home.

¹ NET is a team of law enforcement officials from multiple jurisdictions in Oakland County, specifically tasked with enforcement of drug laws.

Shortly after defendant entered the home, Deputy Myers observed Marcus Kelley² arrive at the home in a white van with chrome rims. Kelley was let into the residence, but Deputy Myers could not see who let him in. After about five minutes, Kelley left the residence and drove away in the van. NET Detective Michael Pankey, who was travelling in an unmarked police truck, followed Kelley's van. Detective Pankey requested that a marked police car, driven by Officer Tim Morton of the Pontiac Police Department, stop the van. Officer Morton drove behind Kelley's van and turned on his lights and sirens. Instead of pulling over, Kelley switched lanes several times. Detective Pankey pulled in front of Kelley's van. Kelley finally stopped the van, and the officers exited their vehicles, weapons drawn, and ordered Kelley to get on the ground. Kelley did not comply; instead, he put the van in reverse and backed into Officer Morton's patrol vehicle, damaging its bumper and body. The van then stopped, and the officers pulled Kelley from his seat and searched the van. The search revealed that a passenger in the van, Qurtis Williams, was in possession of cocaine. Kelley did not possess any drugs, but did possess over \$1,300.

Meanwhile, back at 191 Ridgemont, members of NET executed a search warrant on the premises. This occurred approximately 20 minutes after Kelley left in his van. The NET members noticed that a camera on the second level of the home was pointed at the front door. Concerned for their safety, they entered the home. In the living room, police found defendant sitting on a couch and a large dog in a cage. Defendant was ordered to the ground and handcuffed.

During the search of the kitchen, NET members found a handgun, ammunition, scales, plastic baggies filled with cocaine, 145 grams of crack cocaine, a health food supplement commonly used to cut cocaine, latex gloves, medical masks, and nearly \$3,000 in cash. They also found approximately 200 grams of uncut cocaine, the street value of which is approximately \$20,000. Detective Mark Ferguson, the affiant for the search warrant, searched the living room. There, he found a loaded handgun on the floor under the couch, immediately beneath where defendant was sitting when police entered the premises. The gun's serial number had been filed away. According to Detective Ferguson, had he been sitting on the couch, he could have reached the gun. Also recovered from the living room was defendant's cell phone. From the remainder of the house, officers recovered adult male clothing and ammunition. Police obtained two of defendant's driver licenses; neither listed 191 Ridgemont as his address.

Detective Ferguson had conducted surveillance on 191 Ridgemont for three days before obtaining the search warrant. He did not have the name of the person allegedly selling drugs from the premises, but did have a description: a black male, approximately 175 pounds, five feet, nine inches tall, with thick glasses. Defendant is a black male with thick glasses.

² Kelley was charged with malicious destruction of property, MCL 750.377b. Although Kelley was jointly tried with defendant, he was acquitted.

A. DEFENDANT'S STATEMENTS TO DETECTIVE FERGUSON

Detective Ferguson was the last officer to arrive at 191 Ridgemont. When he arrived, he saw defendant handcuffed and on the ground. According to Detective Ferguson, he asked defendant his name and whether he lived at the home. According to Detective Ferguson, defendant replied that his name was Sylvester Giles and only he and the dog lived there. Defendant recounted these events differently; he claims that Detective Ferguson asked him “who all is in the house,” not who lived there. According to defendant, he responded that only he and the dog were present. In any case, defendant was not read his *Miranda* rights prior to this interchange.

B. DEFENDANT'S STATEMENTS TO OFFICER ROBERTS

Shortly after his interchange with Detective Ferguson, Officer Ryan Roberts took custody of defendant. He led defendant out of the house, and asked him questions while filling out paperwork that, according to Officer Roberts, was required for booking. Officer Roberts had a booking form on a clipboard, and, during the process of filling it out, asked defendant for, among other things, his social security number, driver license number, citizenship status, and emergency contact person. Officer Roberts also asked defendant for his address. According to Officer Roberts, defendant responded that his address was 191 Ridgemont. Defendant denied giving 191 Ridgemont as his address. Defendant then asked Officer Roberts to contact his mother for him so that she could pick up the dog. According to Officer Roberts, the two “talked for probably a half hour about the dog,” because the dog was the “biggest dog [Officer Roberts] had ever seen in [his] life,” and the two discussed the breed of the dog. They also discussed dog feces, which were “all over” the front yard. Defendant told Officer Roberts that he had received a notice from the building manager that he would be evicted because of the dog feces. This led to a conversation between Officer Roberts and defendant regarding the building manager, who, in defendant’s opinion, did a poor job maintaining the facilities. Following defendant’s conversation with Officer Roberts, he was advised of his *Miranda* rights.

Prior to trial, defendant filed a motion to suppress all statements he made prior to being advised of his *Miranda* rights. The trial court denied defendant’s motion.

II. *MIRANDA*

Defendant first argues that the trial court erred in denying his motion to suppress and consequently admitting into evidence statements he made before he was advised of his *Miranda*³ rights. Regarding defendant’s statement to Detective Ferguson, although we agree that the trial court erred in admitting this statement, this error was harmless. However, the trial court’s admission into evidence of defendant’s statement to Officer Roberts was not error in the first instance. Accordingly, reversal is unwarranted.

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

“We review for clear error a trial court’s findings of fact in a suppression hearing, but we review de novo its ultimate decision on a motion to suppress.”⁴ A trial court’s error in admitting into evidence statements obtained in violation of *Miranda* is a nonstructural constitutional error.⁵ Preserved, nonstructural constitutional errors are not grounds for reversal where they are harmless.⁶ An error is harmless if “it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.”⁷

The Fifth Amendment’s privilege against self-incrimination requires that a suspect be informed of certain rights before he is subject to a custodial interrogation.⁸ The *Miranda* warnings require officers to inform the suspect:

[T]hat he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.⁹

When determining whether a suspect is in custody for *Miranda* purposes, “the pertinent inquiry is whether there is restraint on freedom of movement in any significant way such as of the degree associated with a formal arrest.”¹⁰ Whether a suspect is in custody depends on the totality of the circumstances, and “must be determined on the basis of how a reasonable person in the suspect’s situation would perceive his or her circumstances and whether the reasonable person would believe that he or she was free to leave.”¹¹

“Interrogation refers to express questioning and to any words or actions on the part of police that the police should know are reasonably likely to elicit an incriminating response from

⁴ *People v Hyde*, 285 Mich App 428, 436; 775 NW2d 833 (2009).

⁵ See *People v Duncan*, 462 Mich 47, 52; 610 NW2d 551 (2000), citing *Neder v United States*, 527 US 1; 8, 119 S Ct 1827; 144 L Ed 2d 35 (1999) (describing and giving examples of the “very limited class of cases” in which constitutional errors are structural, and accordingly subject to automatic reversal).

⁶ *People v Miller*, 482 Mich 540, 559; 759 NW2d 850 (2008); *People v Anderson (After Remand)*, 446 Mich 392, 406; 521 NW2d 538 (1994).

⁷ *Hyde*, 285 Mich App at 447.

⁸ *Miranda*, 384 US at 444-445; *People v Shafier*, 483 Mich 205, 212; 768 NW2d 305 (2009).

⁹ *Miranda*, 384 US at 479.

¹⁰ *People v Roberts*, 292 Mich App 492, 504; 808 NW2d 290 (2011); see also *Miranda*, 384 US at 444.

¹¹ *Roberts*, 292 Mich App at 504-505.

the subject.”¹² However, “routine booking question[s]” that are biographical in nature and asked for administrative purposes are not covered by *Miranda* unless they are designed to elicit incriminating statements.¹³ In addition, “volunteered statements of any kind are not barred by the Fifth Amendment and are admissible.”¹⁴

The first statement at issue in this case was a response to Detective Ferguson’s question, “who lives here,” to which defendant answered that only he and the dog lived there.¹⁵ The second statement was in response to Officer Roberts’s request for defendant’s address while Officer Roberts was filling out the booking form. Defendant gave his address as 191 Ridgemont.

The parties agree that when defendant made these statements, he was in custody. He was handcuffed and not free to leave. The issue before us, therefore, is whether the police questioning constituted an interrogation.

A. DEFENDANT’S STATEMENT TO DETECTIVE FERGUSON

Detective Ferguson’s question to defendant constituted an interrogation under *Miranda*. Detective Ferguson asked the question to elicit information pertinent to his investigation of the activities at the home. Detective Ferguson testified that when he asked defendant who lived at 191 Ridgemont, defendant was the only individual in the home other than law enforcement officers. Detective Ferguson was the affiant on the search warrant and the officer in charge. He was therefore aware that the search was expected to yield evidence of illegal activity. Asking “who lives here?” to a suspect found in the living room of a home where contraband is expected to be found is reasonably likely to elicit an incriminating response, because the suspect’s answer may indicate whether he or she constructively possesses any contraband discovered. There is no indication that Detective Ferguson asked defendant who lived at the home as a routine booking

¹² *People v Raper*, 222 Mich App 475, 479; 563 NW2d 709 (1997); see also *Rhode Island v Innis*, 446 US 291, 301; 100 S Ct 1682; 64 L Ed 2d 297 (1980) (“[T]he term ‘interrogation’ under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police ... that the police should know are reasonably likely to elicit an incriminating response from the suspect.”).

¹³ *Pennsylvania v Muniz*, 496 US 582, 601-602; 110 S Ct 2638; 110 L Ed 2d 528 (1990).

¹⁴ *People v Anderson*, 209 Mich App 527, 532; 531 NW2d 780 (1995); see also *Innis*, 446 US 291, 300.

¹⁵ Defendant testified at the suppression hearing that Detective Ferguson asked him, “who all is in the house?”, not “who lives here?”. In addition, defendant testified that he never gave 191 Ridgemont as his address to Officer Roberts. It is the responsibility of the fact-finder to make determinations on the credibility of witnesses. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). It appears that the trial court chose not to believe defendant’s testimony; it did not even address this testimony when ruling on defendant’s motion to suppress. The trial court’s conclusion that defendant was not credible was not clearly erroneous, and so it should not be disturbed by this Court. See MCR 2.613(C).

question. Detective Ferguson was not filling out any booking forms. He also did not ask defendant where he lived, but rather, who lived at that address, 191 Ridgemont. Moreover, defendant's response that he and the dog lived there was not volunteered, as it came in response to Detective Ferguson's question. Accordingly, the admission of defendant's incriminating statement that only he and the dog lived in the home, offered at trial through Detective Ferguson's testimony, violated defendant's right against self-incrimination under *Miranda*.

However, the admission of defendant's statement to Detective Ferguson was harmless error, because it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error."¹⁶ The evidence that defendant possessed the drugs and firearms found at 191 Ridgemont is substantial. Approximately an hour before the search warrant's execution, Deputy Myers witnessed defendant use a key to enter the home. Shortly thereafter, Deputy Myers witnessed Kelley knock on the door and be let into the home. Deputy Meyers could not see who let Kelley in, but defendant was the only person found in the home when police executed the search warrant a short time later, and Deputy Myers had not observed anyone leave, so it is reasonable to presume that defendant let Kelley in the home. These actions indicate that defendant was the home's resident. In addition, approximately \$20,000 worth of cocaine was found in the home, and it is unlikely that nonresidents would have a key to access these valuable drugs.

Furthermore, defendant was found in the home when police executed the search warrant. He was sitting on the couch and watching television. There was no evidence that anyone else lived there. Police found male clothing in the living room and bedroom. In addition, defendant's dog was in a large cage in the living room. Defendant also told police that the phone found under the couch, next to a handgun, belonged to him. Finally, defendant had a casual conversation with Officer Roberts about how defendant had received a notice of eviction because he was not picking up his dog's feces, which were all over the front lawn.¹⁷ Defendant also discussed the building's management with Officer Roberts. Given this evidence, it is likely that a jury would have concluded that defendant lived in the home and had possession of the drugs, firearms, and other items found there, even without defendant's direct statement to Detective Ferguson that defendant lived at the home. Accordingly, although it was error for the trial court to admit defendant's statement to Detective Ferguson, the error was harmless, and reversal is unwarranted.

B. DEFENDANT'S STATEMENT TO OFFICER ROBERTS

However, the admission of defendant's second oral statement, where he gave his address as 191 Ridgemont to Officer Roberts, did not violate his Fifth Amendment rights, because the

¹⁶ *Hyde*, 285 Mich App at 447.

¹⁷ Defendant did not address this conversation with Officer Roberts in his motion to suppress or at the suppression hearing. He also did not discuss it in his brief on appeal. Regardless, the admission of *volunteered* statements made before a suspect is notified of his *Miranda* rights does not violate the Fifth Amendment. *Anderson*, 209 Mich App at 532.

question did not amount to an interrogation. Officer Roberts asked defendant his address in order to fill out a booking form. Officer Roberts was filling out the form when he asked defendant his address, and asked him other basic biographical questions at the same time, including his name, birth date, and social security number. These questions were “routine booking question[s],”¹⁸ asked for administrative rather than interrogatory purposes. Accordingly, these questions were not covered by *Miranda*, and the trial court did not err when it admitted defendant’s answers to them.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant next argues that he was denied effective assistance of counsel because his trial attorney did not move to sever his trial from the trial of his codefendant, Kelley. We disagree.

“Whether a defendant received ineffective assistance of trial counsel presents a mixed question of fact and constitutional law.”¹⁹ “The trial court must first find the facts and then decide whether those facts constitute a violation of the defendant’s constitutional right to effective assistance of counsel. The trial court’s factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo.”²⁰ Where, as here, claims of ineffective assistance of counsel have not been preserved, this Court’s review is limited to errors apparent on the record.²¹

Determining whether a defendant’s trial counsel was ineffective requires a two-stage inquiry. First, “the defendant must show that counsel’s performance fell below an objective standard of reasonableness.”²² “In doing so, the defendant must overcome the strong presumption that counsel’s assistance constituted sound trial strategy.”²³ Second, “the defendant must show that, but for counsel’s deficient performance, a different result would have been reasonably probable.”²⁴

¹⁸ *Muniz*, 496 US at 601-602.

¹⁹ *People v Armstrong*, 490 Mich 281, 289; 806 NW2d 676 (2011); see also *People v Grant*, 470 Mich 477, 481; 684 NW2d 686 (2004).

²⁰ *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

²¹ *Id.*

²² *Armstrong*, 490 Mich at 290; see also *Strickland v Washington*, 466 US 668, 687-688; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

²³ *Armstrong*, 490 Mich at 290; see also *People v Rice (On Remand)*, 235 Mich App 429, 444; 597 NW2d 843 (1999).

²⁴ *Armstrong*, 490 Mich at 290; see also *Strickland*, 466 US at 694-696.

“On a defendant’s motion, the court must sever offenses that are not related. . . .”²⁵ Offenses are related if they are based on “(a) the same conduct or transaction, or (b) a series of connected acts, or (c) a series of acts constituting parts of a single scheme or plan.”²⁶

Defense counsel’s failure to move to sever the trials was objectively reasonable. Kelley’s charged offense, malicious destruction of police property, was arguably unrelated to defendant’s. Kelley’s charged offense was the result of a chain of events beginning with his visit to 191 Ridgemont. Police began following the white van driven by Kelley because of his stop at 191 Ridgemont. Kelley’s offense arose from the white van backing into the police car parked behind it during the stop. Although this occurrence does trace back to defendant’s presence at 191 Ridgemont and the drugs and firearms found there, it is a somewhat tenuous connection.

Nonetheless, defendant has not explained why he was prejudiced by the joint trial. Indeed, the police testimony regarding the surveillance and stop of the white van driven by Kelley indicates that the joint trial was minimally prejudicial to defendant, if prejudicial at all. Kelley was not charged with a drug possession offense. Police discovered that he possessed no drugs. Officers did testify that Williams, the van’s passenger, possessed cocaine. This information may have been prejudicial to defendant because the jury could infer that Kelley bought cocaine at 191 Ridgemont and then gave it to Williams. However, that Kelley possessed no drugs supports the conclusion that Williams purchased the cocaine elsewhere. Defendant has, therefore, not overcome the “strong presumption” that his counsel’s failure to file a motion to sever was sound trial strategy and reasonable.²⁷

Even assuming, *arguendo*, that the trial court would have granted a motion to sever, defendant’s counsel’s failure to make such a motion does not constitute ineffective assistance because the result of the trial would have been the same even if defendant and Kelley were tried separately. As discussed above, there was substantial evidence that defendant possessed the drugs, firearms, and other evidence found at 191 Ridgemont.

Affirmed.

/s/ Stephen L. Borrello
/s/ Kathleen Jansen
/s/ Elizabeth L. Gleicher

²⁵ MCR 6.121(B).

²⁶ MCR 6.120(B)(1).

²⁷ *Armstrong*, 490 Mich at 290.