

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JESUS ANTONIO RODRIGUEZ,

Defendant-Appellant.

UNPUBLISHED
November 1, 2005

No. 256226
Wayne Circuit Court
LC No. 03-013433-01

Before: Cooper, P.J., and Fort Hood and Borrello, JJ.

PER CURIAM.

Defendant was convicted of first-degree murder, contrary to MCL 750.316, and possession of a firearm during the commission of a felony, contrary to MCL 750.227b. He was sentenced to life in prison for the first-degree murder conviction, and to two years in prison for the felony-firearm conviction. He appeals as of right, and we affirm.

Defendant's first issue on appeal is that the trial court committed plain error when it allowed defendant's arrest scene statements into evidence because defendant had not been read his *Miranda*¹ rights when he gave the statements.

The admission of defendant's arrest scene statements was not objected to at trial, and thus, this issue was not properly preserved. *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004). Unpreserved evidentiary claims are reviewed for plain error which affect substantial rights. A reviewing court should reverse only if the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *People v Rodriguez*, 251 Mich App 10, 24; 650 NW2d 96 (2002).

Generally, the prosecutor may not use custodial statements as evidence unless he demonstrates that prior to any questioning the accused was warned that he had a right to remain silent, that his statements could be used against him, and that he had the right to retained or appointed counsel. *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966); *People v Daoud*, 462 Mich 621, 633; 614 NW2d 152 (2000). *Miranda* warnings are not required

¹ *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

unless the accused is subject to a custodial interrogation. *People v Hill*, 429 Mich 382, 384, 395; 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. *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. *Id.* The key question is whether the accused could reasonably believe that he was not free to leave. *Id.* The determination of custody depends on the objective circumstances of the interrogation rather than the subjective views harbored by either the interrogating officers or the person being questioned. *Id.* Police conduct constitutes interrogation triggering *Miranda* when the police knew or reasonably should have known that their conduct was likely to invoke an incriminating response. *People v Anderson*, 209 Mich App 527, 532-533; 531 NW2d 780 (1995).

Here, defendant and his fellow passengers were ordered to step out of the car, at gun point, with their hands on their heads. They were then handcuffed, placed on their knees and searched. Looking objectively at these circumstances, we conclude that defendant could not have reasonably believed he was free to leave, and therefore, for purposes of our analysis, we find that defendant was in custody at the time the statements were made to police officers. *Zahn, supra* at 449.

While searching defendant, officer Patrick Lane found a nine millimeter clip/magazine in defendant's "crotch area." After an unsuccessful attempt by another officer to find the gun to which the clip/magazine belonged, Lane asked defendant: "Where's the gun?" Defendant responded that the gun was underneath the dashboard and then pointed to where the gun was located. Defendant also stated that he was "tired of Sorrento's² always shooting at [him], [and that is] why [he] shot at them." Given the facts that Officers Jason McDonald and Lane had just conducted a felony stop of defendant to investigate his possible involvement in a homicide and that Lane had just found a loaded clip on defendant's person, we hold that Lane's question "where's the gun," should have been reasonably expected to invoke an incriminating response. Therefore, given the fact that defendant was in custody, the question should be considered interrogation that would generally trigger defendant's right to be read his *Miranda* rights. *Anderson, supra* at 532-533.

However, under circumstances in which overriding considerations of public safety exist, informing an accused of his *Miranda* rights may be excused. *New York v Quarles*, 467 US 649, 651; 104 S Ct 2626; 81 L Ed 2d 550 (1984); *People v Attebury*, 463 Mich 662, 670; 624 NW2d 912 (2001). To merit omission of *Miranda* warnings, the circumstances must present an immediate threat to public or police safety, and the questions posed to the accused must be objectively reasonably necessary to protect the public or the police from an immediate danger. *Quarles, supra* at 655-656; *Attebury, supra* at 670-671.

² The "Sorrentos" are a gang that is known to hang out at the Panama Bar, where the shooting in question took place.

Here, police officers had just pulled over defendant because his vehicle fit the description of one used in a possible homicide. Shortly after requiring defendant to exit the vehicle, Officer Lane found a loaded nine millimeter clip/magazine shoved down defendant's pants. It was highly probable that the gun for which defendant possessed the magazine was located in the vehicle or had been discarded somewhere nearby. Thus, the gun was most likely in a place where it posed an immediate danger to the police officers present and the general public. Furthermore, Lane's question, "where's the gun," was a narrowly drawn question that was only posed to help locate the gun and protect the police officers and the public. The question was not an investigatory question meant to elicit details about the preceding shooting. Therefore, the public safety exception to the *Miranda* rights requirement has been met. *Quarles, supra* at 655-656; *Attebury, supra* at 670-671. Thus, we cannot conclude that the trial judge committed plain error when he failed to sua sponte suppress defendant's arrest scene statements.

Defendant's second issue on appeal is that the trial court erred when it concluded that defendant voluntarily, knowingly and intelligently waived his *Miranda* rights, and thus, subsequently abused its discretion when it admitted defendant's written statement into evidence. According to defendant, he did not sufficiently understand the English language to knowingly and voluntarily waive his rights under *Miranda*. Because defendant does not dispute that he was given his *Miranda* rights or that he gave his statement voluntarily without police coercion, our determination of this issue must necessarily focus on whether defendant "knowingly and intelligently" waived his *Miranda* rights when he voluntarily chose to give a written statement.

This Court reviews de novo the issue whether a defendant voluntarily, knowingly and intelligently waived his *Miranda* rights. *Daoud, supra* at 629-630. However, this Court will not disturb a trial court's factual findings regarding a knowing and intelligent waiver unless the trial court's findings are clearly erroneous. *Id.* This court will affirm the trial court's decision unless it is left with a definite and firm conviction that a mistake has been made. *People v Sexton (After Remand)*, 461 Mich 746, 752; 609 NW2d 822 (2000).

The prosecutor may not use custodial statements as evidence unless he demonstrates that prior to any questioning the accused was warned that he had a right to remain silent, that his statements could be used against him, and that he had the right to retained or appointed counsel. *Miranda, supra* at 444. An advice of rights may be made orally or in written form, and is adequate to inform someone who does not speak English when explained by an interpreter familiar with and competent in the defendant's primary language. *People v Brannon*, 194 Mich App 121, 130-131; 486 NW2d 83 (1992). Statements of an accused made during custodial interrogation are inadmissible unless the accused voluntarily, knowingly and intelligently waived his right to silence and his right to counsel. *Daoud, supra* at 632-634.

The prosecutor must establish a valid waiver by a preponderance of the evidence. *People v Harris*, 261 Mich App 44, 55; 680 NW2d 17 (2004). "Whether a waiver of *Miranda* rights is voluntary and whether an otherwise voluntary waiver is knowing and intelligent are separate questions." *People v Howard*, 226 Mich App 528, 538; 575 NW2d 16 (1997). Whether a statement was voluntary is determined by examining police conduct, and whether it was made knowingly and intelligently depends in part upon the defendant's capacity. *Id.* "Whether a suspect has knowingly and intelligently waived his *Miranda* rights depends in each case on the totality of the circumstances, including the defendant's intelligence and capacity to understand the warnings given." *Id.* When determining whether a waiver of the right to silence was

knowing and intelligent, an objective standard must be applied through an inspection of the circumstances involved, including the education, experience and conduct of the defendant and the credibility of the police. *Daoud, supra* at 633-634; *People v Garwood*, 205 Mich App 553, 557; 517 NW2d 843 (1994). The necessary awareness of the defendant is that of his available options; he need not comprehend the ramifications of exercising or waiving his rights. *Daoud, supra* at 636-637. To “establish a valid waiver, the state must present evidence sufficient to demonstrate that the accused understood that he did not have to speak, that he had the right to the presence of counsel, and that the state could use what he said in a later trial against him.” *Id.* at 637. “The mental state that is necessary to validly waive *Miranda* rights involves being cognizant at all times of the State’s intention to use one’s statements to secure a conviction and of the fact that one can stand mute and request a lawyer.” *Id.* at 640. “[A] very basic understanding is all that is necessary for a valid waiver.” *Id.* at 642.

The record establishes that Sergeant Glen Davis read defendant his *Miranda* rights in English and that defendant initialed and signed the constitutional rights notification form declaring that he had been read his rights. Defendant then volunteered to give a statement. Defendant claims that he did not knowingly and intelligently waive his rights because he did not understand what had been read to him. In support of defendant’s claim, Dennis Bloch, who is the curriculum leader for the Detroit public school system, testified that in the year 2000, defendant tested at the level of an English speaking four-year-old and received an “F” in an English class. In Bloch’s opinion, defendant would have problems understanding the constitutional rights notification form and some of Davis’ questions. At the motion hearing to suppress defendant’s written statement, Carlos Lopez, who is the division director of bilingual education in Detroit schools, stated that he believed defendant would have a problem understanding the terminology contained in his *Miranda* rights. However, the prosecution pointed out that defendant’s standardized test was given over three years before defendant gave his statement and that neither Bloch nor Lopez had had any contact with defendant for over a year. Davis testified that defendant told him he understood his rights and that, in Davis’ opinion, he and defendant had no problems communicating with each other in English. The trial court that conducted defendant’s preliminary examination found that defendant had no difficulty understanding the English language. Furthermore, officers Lane and McDonald both testified that defendant had no problem communicating in English. The trial court also considered the fact that defendant received an “A” in an English survival class and that his failing grade was likely due to approximately thirty-five absences during the marking period in which he received the “F”.

Given the aforementioned relevant facts on the record relating to the education, experience and conduct of defendant, we hold that the trial judge could reasonably conclude that defendant understood that his statements could be used against him and that he could stand mute and request a lawyer if he so chose. Therefore, we are not left with a definite and firm conviction that the trial court made a mistake when it held that defendant knowingly and intelligently waived his *Miranda* rights. *Daoud, supra* at 633-634, 640, 642. Thus, we cannot disturb the trial court’s decision to admit defendant’s written statement into evidence.

Defendant’s third issue on appeal is that the trial court committed plain error when it failed to sua sponte suppress all evidence seized as a result of the investigatory stop of

defendant's vehicle because the police did not have reasonable suspicion of criminal activity when they stopped defendant's vehicle.

Defendant failed to object to the admission of the evidence stemming from the alleged improper stop, and thus, failed to properly preserve this issue. *Knox, supra* at 508. When reviewing an unpreserved evidentiary claim, this Court reviews for plain error which affect substantial rights. A reviewing court should reverse only if the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Carines, supra* at 763; *Rodriguez, supra* at 24.

To be constitutional, an investigative stop must be supported by a particularized suspicion, based upon the totality of the circumstances as understood by a law enforcement officer, that the person being investigated has been, is, or is about to be engaged in criminal activity. *People v Dunbar*, 264 Mich App 240, 247; 690 NW2d 476 (2004). The suspicion must be reasonable and articulable. *Id.* The scope of a search conducted during an investigatory stop is limited to that which is necessary for the discovery of weapons which might be used to harm the officers or others nearby. *Id.* Fewer facts are needed to establish reasonable suspicion when a person is in a moving vehicle than in a house, but a minimum threshold of reasonable suspicion must be established to justify an investigatory stop even if a person is in a vehicle or on the street. *People v Oliver*, 464 Mich 184, 192; 627 NW2d 297 (2001). An officer's reasonable suspicion may be based on information obtained from another officer, *People v Chambers*, 195 Mich App 118, 122; 489 NW2d 168 (1992), or an informant, *Dunbar, supra* at 248. The officer must be able to articulate specific facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion. *People v Rice*, 192 Mich App 512, 518; 482 NW2d 192 (1992). The determination whether there was reasonable suspicion must be made case by case under the totality of the circumstances, and based on common sense and inferences about human behavior. *People v Jenkins*, 472 Mich 26, 32; 691 NW2d 759 (2005). A police officer may arrest a person without a warrant if a misdemeanor is committed in the officer's presence or if there is reasonable cause to believe a felony was committed and that the person arrested committed it. *People v Manning*, 243 Mich App 615, 622; 624 NW2d 746 (2000).

Here, the investigatory officers received information over the police radio that a shooting had occurred at the Panama Bar and that an "older white Grand Marquis" was involved in the shooting. On their way to the Panama Bar, officers McDonald and Lane saw a vehicle that matched the "exact description" of the vehicle that was allegedly involved in the shooting at the Panama Bar. McDonald testified that he and Lane followed and subsequently stopped the vehicle because he believed that it was the vehicle involved in the shooting at the Panama Bar. Based upon the totality of the circumstances as understood by McDonald and Lane, we conclude that McDonald and Lane had a reasonable and articulable suspicion, based on common sense and the information they had received, to believe that the car they stopped to investigate had been engaged in criminal activity. The vehicle McDonald and Lane stopped was close to where a shooting had just taken place that involved a vehicle that fit the exact description of the vehicle stopped. Therefore, McDonald and Lane's investigatory stop of the vehicle in question was proper. *Dunbar, supra* at 247.

Furthermore, after conducting the investigatory stop, McDonald and Lane properly patted down the men in the vehicle for weapons which could have been used to harm the officers or others nearby. *Id.* During the pat down of defendant, Lane found a loaded nine millimeter

clip/magazine in defendant's "crotch area." At this point in time, McDonald and Lane had reasonable cause to believe defendant had committed a felony, and therefore, defendant was properly arrested. *Manning, supra* at 622.

Defendant's final issue on appeal is that his trial counsel was ineffective for failing to object to the admission of defendant's arrest scene statements and the evidence obtained as a result of the allegedly improper investigatory stop.

This issue was not properly preserved. *People v Westman*, 262 Mich App 184, 192; 685 NW2d 423 (2004). When reviewing an unpreserved claim of ineffective assistance of counsel when an evidentiary hearing is not previously held, this Court's review is limited to the facts contained on the record. *Rodriguez, supra* at 38; *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000). As a matter of constitutional law, this Court reviews the record de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

To establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was below an objective standard of reasonableness, and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). To show that counsel's performance was below an objective standard of reasonableness, defendant must overcome the strong presumption that his counsel's actions constituted sound trial strategy under the circumstances. *Id.* at 302. Counsel's performance must be measured against an objective standard of reasonableness and without benefit of hindsight. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). Counsel does not render ineffective assistance by failing to raise futile objections. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003).

As discussed, *supra*, per the public safety exception, defendant's arrest scene statements were not obtained in violation of his *Miranda* rights, and McDonald and Lane's investigatory stop of defendant's vehicle was proper. Therefore, any objections to the admission of defendant's arrest scene statements or the evidence that was obtained as a result of the investigatory stop of defendant's vehicle would have been futile. Thus, defendant was not denied his right to the effective assistance of counsel when defense counsel failed to object to the admission of defendant's arrest scene statements and to the admission of the evidence obtained as a result of the investigatory stop of his vehicle. *Ackerman, supra* at 455.

Affirmed.

/s/ Jessica R. Cooper
/s/ Karen M. Fort Hood
/s/ Stephen L. Borrello