

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BURTON DAVID CORTEZ,

Defendant-Appellant.

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FOR PUBLICATION  
March 12, 2013

No. 298262  
Montcalm Circuit Court  
LC No. 2009-012502-FH

Advance Sheets Version

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ON REMAND

Before: O'CONNELL, P.J., and METER and BECKERING, JJ.

BECKERING, J. (*dissenting*).

I respectfully dissent from the lead opinion. Our task on remand is to determine whether, in light of the United States Supreme Court's decision in *Howes v Fields*, 565 US \_\_\_; 132 S Ct 1181; 182 L Ed 2d 17 (2012), defendant, Burton David Cortez, was entitled to be advised of his rights under *Miranda v Arizona*<sup>1</sup> before being interrogated about his alleged possession of two shanks—a violation of MCL 800.283(4)<sup>2</sup>—that were found in his prison cell at the time of a siren-drill cell search. I would hold that, on the basis of all the features of the interrogation in this instance, defendant should have been advised of his *Miranda* rights before questioning and, thus, that his subsequent confession should have been suppressed.

I. PERTINENT FACTS

As summarized in our earlier opinion and recapped in the lead opinion, defendant was serving a prison sentence at the Carson City Correctional Facility at the time of the subject

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

<sup>2</sup> MCL 800.283(4) provides as follows:

Unless authorized by the chief administrator of the correctional facility, a prisoner shall not have in his or her possession or under his or her control a weapon or other implement which may be used to injure a prisoner or other person, or to assist a prisoner to escape from imprisonment.

offense. On July 21, 2009, prison officials decided to conduct a “siren drill” to search for weapons after encountering several episodes of violence among the inmates and discovering two homemade weapons on an inmate who was a suspected gang member. Prison officials targeted defendant’s cell among those to be searched. Pursuant to protocol, upon the initiation of a siren drill inmates are required to return to their cells for a lockdown. The corrections officers then search various cells for contraband. When a particular inmate’s cell is going to be searched, the corrections officers have the inmate step out of the cell, undergo a pat-down search, and then proceed to a day room to await completion of the search.

When defendant’s cell was to be searched, he was patted down and sent to the day room. Michigan Department of Corrections Officer Robert Hanes searched defendant’s cell, which defendant shared with another inmate. Officer Hanes discovered two homemade metal shanks hidden in the cell in the area considered to be under defendant’s control. He also found pieces of metal in what was considered to be defendant’s trash can and noted that a metal shelf was missing from defendant’s desk.

Pursuant to departmental policy, an inmate found with dangerous contraband is placed in segregation until his or her misconduct report is heard. Officer Hanes prepared a misconduct report regarding his findings in defendant’s cell. Rather than returning defendant to his cell after the search, Lieutenant Robert Vashaw ordered staff members to escort defendant to a segregation cell or solitary confinement.

After some time in solitary confinement, defendant was handcuffed and taken by a staff member to a back office in the control center to meet with Lieutenant Vashaw, who was “an acting Inspector” for the facility. In his testimony about the incident, Lieutenant Vashaw did not claim to have obtained defendant’s permission or consent for the interview or to have otherwise advised him that the meeting was optional. Lieutenant Vashaw did not claim to have told defendant at the meeting that defendant could end the questioning at any time, refuse to speak, or elect to leave and be escorted back to his cell upon request. Lieutenant Vashaw testified that, when he questioned defendant, he had already “bagged and tagged” the shanks and placed them in the Michigan State Police evidence locker (it would not escape the mind of any corrections officer that an inmate’s possession of shanks constitutes an offense subject to criminal prosecution). But, Lieutenant Vashaw thought he may have had with him in the interview room the trash can containing metal pieces, presumably remnants of the missing desk shelf used to craft the shanks.<sup>3</sup>

Lieutenant Vashaw testified that defendant hesitated to speak at the outset of the interrogation and “denied everything.” Lieutenant Vashaw then told defendant that the evidence the corrections officers had obtained was “pretty damaging” and that two weapons had been

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<sup>3</sup> In our earlier opinion, we relate facts stated in testimony by defendant, including his claim that the shanks were in the interview room. Defendant did not, however, testify at the suppression hearing. As such, we are prohibited from considering in our analysis defendant’s trial testimony when evaluating whether the trial court should have granted defendant’s suppression motion on the basis of the failure to advise him of his *Miranda* rights.

found in defendant's area of control. Lieutenant Vashaw told defendant that he needed to tell him what was going on inside the prison. As soon as defendant started to talk, Lieutenant Vashaw pulled out a tape recorder and recorded defendant's confession, which was later given to the prosecution in order to help prove the instant criminal offense. After the interrogation, which lasted approximately 15 minutes, a staff member escorted defendant back to the segregation unit.

## II. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision on a motion to suppress evidence. *People v Lapworth*, 273 Mich App 424, 426; 730 NW2d 258 (2006). However, we defer to the trial court's findings of fact unless the findings are clearly erroneous. *People v Herndon*, 246 Mich App 371, 395; 633 NW2d 376 (2001). A finding is clearly erroneous if we are "left with a definite and firm conviction that a mistake has been made." *People v Muro*, 197 Mich App 745, 747; 496 NW2d 401 (1993).

## III. DISCUSSION

### A. *MIRANDA*

The Fifth Amendment of the United States Constitution provides a right against self-incrimination: "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ." In *Miranda*, the Supreme Court of the United States established "procedural safeguards . . . to secure the privilege against self-incrimination." *Miranda*, 384 US at 444. Specifically, when a criminal defendant is subjected to a custodial interrogation, the defendant must be warned of the following before any questioning: he or she has the right to remain silent, any statement that the defendant makes may be used as evidence against him or her, and he or she has a right to an attorney, either retained or appointed. *Id.* A custodial interrogation is defined as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Id.* When determining whether a defendant was "in custody" in the context of *Miranda*, courts consider (1) whether a reasonable person in the defendant's situation would believe that he or she was free to leave and (2) "whether the relevant environment present[ed] the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*." *Fields*, 565 US at \_\_\_; 132 S Ct at 1190. "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 the subject." *People v Raper*, 222 Mich App 475, 479; 563 NW2d 709 (1997). Statements made by a defendant during a custodial interrogation are inadmissible unless the defendant knowingly, voluntarily, and intelligently waived his or her Fifth Amendment rights. *People v Tierney*, 266 Mich App 687, 707; 703 NW2d 204 (2005); see also *Miranda*, 384 US at 444-445.

### B. *FIELDS*

The United States Supreme Court in *Fields* affirmed the longstanding principle that incarceration alone does not deprive a person of his or her Fifth Amendment right against self-incrimination. Rather, "[a]n inmate who is removed from the general prison population for questioning" and is thereafter subjected to treatment in connection with the interrogation that

renders him or her “in custody” for practical purposes is “entitled to the full panoply of protections prescribed by *Miranda*.” *Fields*, 565 US at \_\_\_; 132 S Ct at 1192 (quotation marks and citation omitted). But the Court rejected the idea of a categorical rule that deems any questioning of a prisoner custodial if he or she is removed from the general prison population and questioned. *Id.* at \_\_\_; 132 S Ct at 1187-1188. Instead, the determination of custody should focus on all the features of the interrogation and whether it manifests the coercive pressure that *Miranda* was designed to guard against—“the danger of coercion [that] results from the *interaction* of custody and official interrogation.”<sup>4</sup> *Id.* at \_\_\_; 132 S Ct at 1188 (quotation marks and citations omitted). Because we are tasked with determining whether defendant was entitled to “the full panoply” of protections prescribed by *Miranda* in light of the United States Supreme Court’s ruling in *Fields*, its facts and analysis merit discussion.

In *Fields*, Randall Fields was serving a sentence in a Michigan jail when a corrections officer escorted him to a conference room that was “down one floor and . . . through a locked door that separated two sections of the facility.” *Id.* at \_\_\_; 132 S Ct at 1186. Fields arrived at the conference room between 7:00 p.m. and 9:00 p.m. *Id.* The room was well lit and “average” in size. *Id.* at \_\_\_; 132 S Ct at 1193. Two sheriff’s deputies were in the conference room to interview Fields about allegations that Fields had had sexual contact with a 12-year-old boy before his incarceration. *Id.* at \_\_\_; 132 S Ct at 1185. The two deputies were armed, but Fields was not handcuffed, otherwise restrained, or uncomfortable. *Id.* at \_\_\_, \_\_\_; 132 S Ct at 1186, 1193. He was offered food and water. *Id.* at \_\_\_; 132 S Ct at 1193. Both at the beginning of and later in the interview, the deputies told Fields that he was free to leave and return to his cell. *Id.* at \_\_\_; 132 S Ct at 1186. The conference-room door was open sometimes during the interview. *Id.* About halfway through the interview, Fields became agitated and began to yell after being confronted with the allegations of abuse. *Id.* According to Fields, one of the deputies spoke to him in “a very sharp tone” and, using an expletive, told him to sit down and that, “if [he] didn’t want to cooperate, [he] could leave.” *Id.* at \_\_\_, \_\_\_; 132 S Ct at 1186, 1193-1194.

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<sup>4</sup> Upholding the tenets of *Miranda* in a prison setting does not necessarily hinder the safety and security of the facility, as my colleague suggests in his concurring opinion. Department of Corrections officers are free to place prisoners in segregation as necessary, handcuff them during transport, and investigate, pursue, and punish acts of misconduct as well as crimes that occur within the prison. Furthermore, the right against self-incrimination does not prohibit corrections officers from interviewing inmates regarding their conduct. An inmate’s statements are admissible in a future criminal proceeding: (1) if all the features of the interrogation do not amount to “custody” as set forth in *Miranda* and addressed in *Fields*; (2) when the questioning amounts to an on-the-scene investigation such as in *Cervantes v Walker*, 589 F2d 424, 427 (CA 9, 1978); or (3) in circumstances where “objectively reasonable question[ing is] necessary to protect the police or the public from an *immediate* danger.” *People v Attebury*, 463 Mich 662, 671-672; 624 NW2d 912 (2001) (emphasis added). If circumstances mandate that the inmate be read his or her *Miranda* rights, violating such requirement merely results in an exclusion of the inmate’s statements from being used as evidence against him or her in a criminal proceeding. Protecting the inmate’s constitutional right in this regard should not jeopardize the safety and security of the prison facility.

Fields eventually confessed to engaging in sexual conduct with the boy. *Id.* at \_\_\_; 132 S Ct at 1186. The questioning lasted between five and seven hours, and at no point during the interview did Fields ask to go back to his cell. *Id.* When Fields was eventually ready to go back to his cell, he had to wait 20 minutes for a corrections-officer escort. *Id.* He returned to his cell well after the hour of his normal bedtime. *Id.* “At no time was Fields given *Miranda* warnings or advised that he did not have to speak with the deputies.” *Id.*

The state of Michigan charged Fields with criminal sexual conduct. *Id.* Fields moved the trial court to suppress his statements to the deputies, but the trial court denied the motion. *Id.* A jury convicted Fields of two counts of third-degree criminal sexual conduct. *Id.* This Court affirmed the conviction, and the Michigan Supreme Court denied leave to appeal. *Id.* Fields filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Michigan; the court granted Fields relief, *id.*, concluding that this Court’s “decision that [Fields’s] confession was properly admitted was an unreasonable application of *Mathis v. United States*, 391 U.S. 1, 88 S.Ct. 1503, 20 L.Ed.2d 381 (1968)[, and] that the error was not harmless.” *Fields v Howes*, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued February 9, 2009 (Docket No. 2:06-CV-13373, 2009 WL 304751), unpub op, p 9. The United States Court of Appeals for the Sixth Circuit affirmed, opining that the Supreme Court of the United States “clearly established in *Mathis* . . . that ‘*Miranda* warnings must be administered when law enforcement officers remove an inmate from the general prison population and interrogate him regarding criminal conduct that took place outside the jail or prison.’” *Fields*, 565 US at \_\_\_; 132 S Ct at 1187, quoting *Fields v Howes*, 617 F3d 813, 820 (CA 6, 2010).

The United States Supreme Court granted certiorari and rejected the Sixth Circuit’s characterization of Supreme Court precedent, opining that “our decisions do not clearly establish that a prisoner is always in custody for purposes of *Miranda* whenever a prisoner is isolated from the general prison population and questioned about conduct outside the prison.” *Id.* at \_\_\_; 132 S Ct at 1188-1189. The Court emphasized that “imprisonment alone is not enough to create a custodial situation within the meaning of *Miranda*” for several reasons: (1) “questioning a person who is already serving a prison term does not generally involve the shock that very often accompanies arrest” because they “live in prison” where “the ordinary restrictions of prison life, while no doubt unpleasant, are expected and familiar”; (2) a prisoner is “unlikely to be lured into speaking by a longing for prompt release”; and (3) a prisoner “knows that the law enforcement officers who question him probably lack the authority to affect the duration of his sentence.” *Id.* at \_\_\_; 132 S Ct at 1190-1191 (quotation marks and citation omitted). In addition, the Court explained that questioning a prisoner outside the presence of other inmates “does not necessarily convert a noncustodial situation . . . to one in which *Miranda* applies” because such questioning “does not generally remove the prisoner from a supportive atmosphere.” *Id.* at \_\_\_; 132 S Ct at 1191 (quotation marks and citation omitted). Moreover, with respect to the subject matter of the questioning, the Court opined that the distinction between events occurring inside the prison and events occurring outside the prison is not significant because there is a potential for additional criminal liability and punishment in both instances. *Id.* at \_\_\_; 132 S Ct at 1192.

After rejecting the Sixth Circuit’s “categorical rule” as “unsound,” the Court explained the proper analysis to determine whether a prisoner is in custody for *Miranda* purposes:

When a prisoner is questioned, the determination of custody should focus on all of the features of the interrogation. These include the language that is used in summoning the prisoner to the interview and the manner in which the interrogation is conducted.<sup>[5]</sup> An inmate who is removed from the general prison population for questioning and is thereafter . . . subjected to treatment in connection with the interrogation that renders him in custody for practical purposes . . . will be entitled to the full panoply of protections prescribed by *Miranda*.

Fidelity to the doctrine announced in *Miranda* requires that it be enforced strictly, but only in those types of situations in which the concerns that powered the decision are implicated. [*Id.* at \_\_\_; 132 S Ct at 1192 (quotation marks and citations omitted).]

The Court then held that Fields was not in custody for purposes of *Miranda*. *Id.* at \_\_\_; 132 S Ct at 1194. The Court recognized that there were factors that supported a custody finding: Fields did not initiate or consent to the interview in advance, Fields was not told that he was free to decline to speak, the interview lasted five to seven hours and continued past Fields’s regular bedtime, the deputies were armed, and one of the deputies spoke in “a very sharp tone” and used profanity. *Id.* at \_\_\_; 132 S Ct 1193. Nevertheless, the Court concluded that these factors were outweighed by other factors illustrating that Fields was not in custody: Fields was not physically restrained, threatened, or uncomfortable in the conference room, he was offered food and water, the conference room was well lit and “average” sized, and the conference-room door was sometimes left open. *Id.* But, the most important factor to the Court was that Fields was told both at the outset of the interview and again thereafter that he could return to his cell whenever he wanted. *Id.* According to the Court, “[a]ll of these objective facts [were] consistent with an interrogation environment in which a reasonable person would have felt free to terminate the interview and leave.” *Id.*, quoting *Yarborough v Alvarado*, 541 US 652, 664-665; 124 S Ct 2140; 158 L Ed 2d 938 (2004).

### C. ANALYSIS

Focusing on all the features of Lieutenant Washaw’s interview of defendant, I would conclude that defendant was in custody during the interrogation for purposes of *Miranda*. See *Fields*, 565 US at \_\_\_; 132 S Ct at 1192. While defendant’s cell was being searched during a siren drill, he was passing time in the day room along with other inmates. Instead of being returned to his cell after the search, however, defendant was ordered to be placed in the segregation unit. A prisoner is not typically placed in the segregation unit unless prison officials believe he or she has done something wrong, and a reasonable person in defendant’s situation

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<sup>5</sup> The *Fields* Court also listed several other factors to consider when examining “all of the circumstances surrounding the interrogation”: the location and duration of the questioning, statements made during the interview, the presence or absence of physical restraints during the interview, and the release of the interviewee at the conclusion of questioning. *Id.* at \_\_\_; 132 S Ct at 1189 (quotation marks and citation omitted).

could safely assume that to be the case. After some time had passed, defendant was then placed in handcuffs (not a normal situation for him) and taken to a back office of the control center, where Lieutenant Vashaw was waiting for him. A reasonable reading of the record indicates that defendant had no choice but to attend the meeting with Lieutenant Vashaw. Once in the interrogation room, Lieutenant Vashaw did not tell defendant that he could decline the interrogation, end it at any time, refuse to answer questions, or be returned to his cell—in the segregation unit or otherwise—upon request. It is also clear from the record that defendant was singled out for interrogation on the basis of the offense for which he was convicted in the instant case, even if an additional purpose of the interview was to investigate suspected gang violence in the prison. Defendant remained handcuffed during the interrogation. Early in the interrogation, defendant hesitated to speak and denied everything. However, defendant ultimately confessed once Lieutenant Vashaw told him about the discovery of two weapons in defendant’s “area of control,” that the evidence was “pretty damaging,” and that defendant needed to tell him what was going on inside the prison. At no time was defendant told that he was free to leave. After defendant made incriminating statements regarding the weapons, the 15-minute interrogation ended, and defendant was taken back to the segregation unit.

In comparison to *Fields*, there are factors in the present case that suggest that defendant was not in custody. For example, Lieutenant Vashaw testified that he did not threaten defendant, other than his remarks as stated above. There is no indication that defendant was uncomfortable or subjected to expletives. There was one less interviewer than in *Fields*. There is no indication that Lieutenant Vashaw was armed as the deputies were in *Fields*, and defendant’s 15-minute interrogation was significantly shorter than the questioning in *Fields* (likely because defendant confessed quickly).

However, the present case and *Fields* share similarities that demonstrate that defendant was in custody. Here, as in *Fields*, defendant did not invite the interview. And, there is no indication that defendant was told that he could decline to speak with Lieutenant Vashaw. Furthermore, the present case is distinguishable from *Fields* in several respects that strongly illustrate that defendant was in custody. First, defendant’s experience leading up to the interrogation supports the conclusion that a reasonable person in defendant’s position would not have felt free to terminate the questioning and leave; the same cannot be said about the defendant in *Fields*. More specifically, Fields was taken directly from his jail cell to a conference room without any indication to him that he had done something wrong. *Fields*, 617 F3d at 815. In contrast, defendant here was awaiting the completion of a “shakedown”—a search of his cell—when he was handcuffed, taken out of the general prison population and into the segregation unit, and then, shortly thereafter, taken for questioning while he remained in handcuffs. A reasonable person in defendant’s position would recognize, or at least suspect, that his placement in the segregation unit in physical restraints was directly linked to the shakedown of his prison cell. Second, defendant was not told that he was free to leave. Fields, however, was told both before and during his interview that he was free to leave, and the *Fields* Court characterized this fact as the “[m]ost important” circumstance of the interrogation. *Fields*, 565 US at \_\_\_; 132 S Ct at 1193. Third, defendant in this case was in handcuffs during the interrogation; Fields was not physically restrained. *Id.* Finally, defendant was returned to the segregation unit after the interrogation, whereas Fields was taken back to his cell. See *id.* at \_\_\_; 132 S Ct at 1189 (stating that the release of the interviewee at the end of the questioning is a relevant factor to consider when determining custody). I view this “treatment” of defendant as the functional equivalent of

an arrest in a prison setting. The objective circumstances in this case demonstrate that a reasonable person would not have felt free to terminate the interrogation by Lieutenant Vashaw. See *id.* at \_\_\_; 132 S Ct at 1192 (“An inmate who is removed from the general prison population for questioning and is ‘thereafter . . . subjected to treatment’ in connection with the interrogation ‘that renders him “in custody” for practical purposes . . . will be entitled to the full panoply of protections prescribed by *Miranda.*’”) (citation omitted).

The prosecution contends that, under *Fields*, defendant was not in custody for *Miranda* purposes because “[a]ll of the restrictions placed on him were a result of . . . standard prison policy for prisoners found to possess weapons. None of it was related to his questioning.” I do not find this argument to be persuasive. *Fields* simply does not stand for the proposition that a prisoner is not in custody for purposes of *Miranda* when the treatment that the prisoner is subjected to is standard prison policy. Rather, when distinguishing a prisoner’s living environment from the living environment of a person who is not serving a term of incarceration, the *Fields* Court focused on restrictions and prison procedures that are “ordinary” and “familiar” to a prisoner. *Id.* at \_\_\_; 132 S Ct at 1191-1192. The prosecution’s argument takes the *Fields* Court’s distinction between “ordinary” conditions of prisoners and “ordinary” conditions of people who are not serving a term of imprisonment to an extreme by presuming that all standard prison policies are ordinary and familiar to a prisoner. Being sent to a segregation unit in handcuffs following the discovery of weapons in a prison cell is no more an “ordinary” condition to a prisoner than being sent to jail in handcuffs following an arrest on a city street is an “ordinary” condition to a person who is not serving a term of incarceration. Both are unordinary conditions brought about by prohibited conduct. Furthermore, the actions taken by law enforcement officers in both circumstances are executed pursuant to a standard policy.

The prosecution further contends that the public-safety exception to the *Miranda* rule applies in this case. I disagree. I recognize “that the doctrinal underpinnings of *Miranda* [do not] require that it be applied in all its rigor to a situation in which police officers ask questions reasonably prompted by a concern for the public safety.” *New York v Quarles*, 467 US 649, 656; 104 S Ct 2626; 81 L Ed 2d 550 (1984). However, the public-safety exception only applies to “objectively reasonable question[ing] necessary to protect the police or the public from an immediate danger.” *People v Attebury*, 463 Mich 662, 671-672; 624 NW2d 912 (2001) (emphasis added). In the present case, Lieutenant Vashaw’s questioning of defendant was not “objectively reasonable question[ing] necessary to protect the police or the public from an immediate danger.” *Id.* While Lieutenant Vashaw’s questioning may have been connected to concerns for prison safety given the recent, problematic gang activity occurring in the prison, there was no immediate danger. See *id.* There was no active prison violence at the time of defendant’s interview. Rather, there was a potential for more violence in the future and, thus, a need to determine the likelihood of future violence. Lieutenant Vashaw’s testimony illustrates this fact:

Q. And then at some point, do you decide, I’ve got to talk to defendant?

A. Yes.

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Q. And—and you wanted information on the gang members because of what reason?

A. For prison safety. *For future*, I mean, *if we got a war going on* that's something we need to take control of.

\* \* \*

Q. But again, you wanted to know what's going on because of what reason?

A. Prison safety, with—we're having these gang problems and I want to know *are we expecting more trouble*, are we—you know, *is there more weapons floating around out there*, you know, concerned about the prisoner and staff safety. [Emphasis added.]

As can be gleaned from Lieutenant Washaw's testimony, there was a potential in the prison for a future danger to prisoner and staff safety given the recent events—but not an immediate danger. There was no exigency. The public-safety exception, therefore, does not apply in this case.

Accordingly, I would conclude that Lieutenant Washaw's questioning of defendant was a custodial interrogation. Therefore, defendant's statements during the custodial interrogation were inadmissible at trial because he was not advised of his *Miranda* rights before questioning and, thus, did not knowingly, voluntarily, and intelligently waive his Fifth Amendment rights. See *Miranda*, 384 US at 444-445; see also *Tierney*, 266 Mich App at 707.

#### D. HARMLESS ERROR

The erroneous admission into evidence of defendant's statements to Lieutenant Washaw, a preserved constitutional error occurring during the presentation of the case to a jury (i.e., a nonstructural error), is not grounds for reversal if the error was harmless. See *People v Miller*, 482 Mich 540, 559; 759 NW2d 850 (2008); *People v Anderson (After Remand)*, 446 Mich 392, 406; 521 NW2d 538 (1994). A preserved constitutional error is harmless if it is “clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.” *People v Hyde*, 285 Mich App 428, 447; 775 NW2d 833 (2009) (quotation marks and citations omitted). “There must be no reasonable possibility that the evidence complained of might have contributed to the conviction.” *Id.* (quotation marks and citations omitted); see also *Anderson*, 446 Mich at 406; *Chapman v California*, 386 US 18, 23; 87 S Ct 824; 17 L Ed 2d 705 (1967).

Given the evidence at trial, I would conclude that the admission into evidence of defendant's statements to Lieutenant Washaw was not harmless error. It is not “clear beyond a reasonable doubt that a rational jury would have found . . . defendant guilty absent the error.” See *Hyde*, 285 Mich App at 447 (quotation marks and citations omitted). To be convicted of being a prisoner in possession of a weapon, MCL 800.283(4) requires that a prisoner either possess a weapon or have a weapon under his or her control. See MCL 800.283(4) (“Unless authorized by the chief administrator of the correctional facility, a prisoner shall not have in his or her possession or under his or her control a weapon or other implement which may be used to injure a prisoner or other person, or to assist a prisoner to escape from imprisonment.”). The

significance of defendant's inadmissible statements to Lieutenant Vashaw lies in the statements' relevance to whether defendant possessed or controlled the prison shanks. See *id.* Defendant told Lieutenant Vashaw that the shanks were his and that he made them. Defendant testified at trial, however, that the shanks belonged to his cellmate and that he had never seen them before they were confiscated as a result of the search. Moreover, the shanks were not found on defendant's person but, rather, under the bed frame of his bunk and in his mattress. Thus, whether the shanks belonged to defendant and whether defendant knew that the shanks were under the bed frame and in his mattress were very significant factual questions with respect to whether defendant possessed or controlled the shanks. The evidence at trial demonstrating that defendant had control over the area where the shanks were found supports the reasonable inference that the shanks belonged to defendant and that he knew where they were. However, defendant's inadmissible statements to Lieutenant Vashaw directly prove these significant facts and, thus, that the shanks were under defendant's possession and control. Without this inadmissible direct evidence, a trier of fact would have to rely on the circumstantial evidence of possession and control offered by the prosecution and could find that the shanks did not belong to defendant and that defendant did not know they were there. There is, therefore, a reasonable possibility that defendant's statements to Lieutenant Vashaw might have contributed to defendant's convictions. See *Hyde*, 285 Mich App at 447.

Accordingly, I would conclude that the admission into evidence of defendant's statements to Lieutenant Vashaw was not harmless beyond a reasonable doubt. I would, therefore, reverse defendant's convictions and remand for a new trial.

/s/ Jane M. Beckering