STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RODNEY LEE CROTON,

Defendant-Appellant.

UNPUBLISHED
January 17, 2013

No. 309085
Isabella Circuit Court
LC No. 2011-001495-FC

Before: OWENS, P.J., and FITZGERALD and RIORDAN, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction for possession of 1000 grams or more of cocaine, possession with intent to deliver 1000 grams or more of cocaine, and conspiracy for the same. MCL 333.7401(2)(a)(*i*). We vacate his conviction for possession of 1000 grams or more of cocaine and remand for resentencing, but affirm his convictions in all other respects. We also affirm the trial court's decision to deny defendant's motion to suppress inculpatory statements he made to the police.

Around Labor Day weekend in 2010, defendant and his daughter, Megan Harry, traveled to Texas to obtain cocaine. Defendant borrowed $500 from Tanya Harry, another daughter, promising to repay her with an ounce of cocaine. When they arrived in Texas, defendant dropped Megan at a Subway restaurant, met with his contact, obtained two kilos of cocaine, and then returned to pick Megan up. They immediately returned to Michigan. Throughout the return trip, Megan begged defendant to let her use some of the cocaine, but he told her no because she was pregnant. Back in Michigan, defendant told both of his daughters that he needed to "cut" the cocaine because it was too potent for the area.[1] Defendant told them that he had buried the cocaine. The cocaine was never recovered in this case.

Defendant first argues that the prosecution failed to establish the corpus delicti of the crime. This Court reviews a lower court's decision regarding the application of the corpus delicti rule for an abuse of discretion. *People v King*, 271 Mich App 235, 239; 721 NW2d 271 (2006).

[1] Cutting involves diluting the cocaine with substances that mimic cocaine in appearance and texture. Cutting is also referred to as "stepping on" the cocaine.

The prosecution cannot introduce a defendant's inculpatory statements without proof of the corpus delicti of the crime. *People v Schumacher*, 276 Mich App 165, 180; 740 NW2d 534 (2007). The purpose of the corpus delicti rule is "to prevent the use of a defendant's confession to convict him of a crime that did not occur." *People v Konrad*, 449 Mich 263, 269; 536 NW2d 517 (1995).

> [T]he rule provides that a defendant's confession may not be admitted unless there is direct or circumstantial evidence independent of the confession establishing (1) the occurrence of the specific injury . . . and (2) some criminal agency as the source of the injury. [*Id*. at 269-270.]

The corpus delicti of possession with intent to deliver is that the cocaine existed and someone possessed it. See *Konrad*, 449 Mich at 270. "Possession, like other elements of the corpus delicti, may be proved by circumstantial evidence and reasonable inferences therefrom." *People v Mumford*, 60 Mich App 279, 283; 230 NW2d 395 (1975).

Here, defendant argues that his confession is the sole evidence that any cocaine existed or was possessed by defendant. However, absent the confession, the testimony established (1) defendant intended to purchase cocaine in Texas; (2) Megan saw a package that, based on her experience with drugs and drug-dealers, she assumed was cocaine; (3) large quantities of cocaine are typically transported the same way that the cocaine was allegedly transported in this case; (4) defendant told Tanya he had purchased two kilos of cocaine; (5) defendant told Tanya and Megan that he buried the cocaine; and (6) defendant told Tanya and Megan that he needed to cut the cocaine. That is all circumstantial evidence that defendant had cocaine and that he possessed it. Perhaps, standing alone, they do not show defendant's guilt beyond a reasonable doubt; however, in order to satisfy the corpus delicti rule there only needs to be a preponderance of direct or circumstantial evidence other than the inculpatory statement. *King*, 271 Mich App at 239.

Furthermore, there was sufficient evidence to convict defendant of the charges. The prosecution must prove the elements of the crime beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). However, "[i]t is not obligated to disprove every reasonable theory consistent with innocence to discharge its responsibility. *Id*. (quotation marks and citation omitted). Further, "[o]nce it is established that a crime occurred, the defendant's statement may be introduced to establish the degree to guilt." *King*, 271 Mich App at 241. Here, the corpus delicti of the crimes was established, so defendant's confession could be used to determine the degree of guilt. In the interview, defendant confessed to all the elements of the crime and his statements were corroborated by the testimony of his daughters. On these facts we simply cannot find that there was insufficient evidence.

Defendant argues that the inculpatory statements should be excluded because they were taken in violation of *Miranda v Arizona*[2] and were not voluntary. We disagree.

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

This Court reviews de novo a trial court's ultimate decision on a motion to suppress, but reviews a trial court's factual findings for clear error. *People v Williams*, 240 Mich App 316, 319; 614 NW2d 647 (2000). Whether a person is "in custody" for *Miranda* purposes is a mixed question of fact and law that must be answered independently after de novo review of the record. *People v Mendez,* 225 Mich App 381, 382; 571 NW2d 528 (1997). Deference should be given to the trial court's findings of historical fact absent clear error. *Id*.

The right against self-incrimination is guaranteed by both the United States and the Michigan Constitutions. US Const, Am V; Const 1963, art I, § 17. In *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966), the United States Supreme Court established procedural safeguards to protect the privilege against self incrimination. Thus, criminal defendants subject to a custodial interrogation must be warned that they have the right to remain silent, that any statement they make can be used against them in court, and that they have a right to either a retained or appointed attorney. *Id*. "It is well settled that *Miranda* warnings need be given only in situations involving a custodial interrogation." *People v Coomer*, 245 Mich App 206, 219; 627 NW2d 612 (2001). A custodial interrogation is "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." *Miranda*, 384 US at 444. Whether the defendant is in custody depends on the totality of the circumstances. *Coomer*, 245 Mich App at 219. There must be a connection between the custody of the defendant and the subject of the interrogation. The key question is whether the defendant reasonably could have believed that he could not leave. *Id*. Factors relevant to whether there is a custodial environment include the location of the questioning, statements made during the interview, the presence or absence of physical restraints, and the release of the accused at the end of the questioning. *Howes v Fields*, ___ US ___; 132 S Ct 1181, 1189; 182 L Ed 2d 17 (2012). "[S]ervice of a term of imprisonment, without more, is not enough to constitute *Miranda* custody." *Id*. at 1191.

After viewing the objective facts in this case, we do not find defendant was in custody. Two major facts lean towards a custodial situation. First, defendant was incarcerated. Second, the interview was long. However, the trial court found that the interview was long because defendant made it long, so that fact actually cuts against a custodial environment. Moreover, several key facts weigh strongly in favor of a non-custodial environment. First, defendant initiated the interview. Next, defendant was not restrained during the interview. Additionally, defendant was allowed coffee and bathroom breaks. Finally, in this case, there were also no threats or abuse alleged. Instead the record shows that this was a relaxed conversation between the police detective and defendant that was initiated by defendant and primarily directed by defendant. Therefore, the detective was not required to read defendant his *Miranda* rights because he was not in a custodial environment.

Moreover, defendant's statements were voluntary. In determining voluntariness, the court should consider all the circumstances, including: the duration of the defendant's detention and questioning; the age, education, intelligence and experience of the defendant; whether there was unnecessary delay of arraignment; the defendant's mental and physical state; whether the defendant was threatened or abused; and any promises of leniency. *People v Gipson*, 287 Mich App 261, 265; 787 NW2d 126 (2010). No single factor is determinative. *People v Sexton* (*After Remand*), 461 Mich 746, 753; 609 NW2d 822 (2000).

In this case, defendant is 53 years old. He has criminal cases going back to 1975 and in one of the interviews defendant indicated that he had been in prison for over twenty years. He is very familiar with the criminal justice system. The duration of the interview was long; however, the trial court found that it was long because defendant made it long. Defendant appeared to be in good health during the interview. Defendant indicated in his brief on appeal that he suffered from Crohn's disease, but he has not explained how that affected him physically or mentally during the interview. In any event, defendant also claimed that he was under a lot of pressure because he was being harassed with false murder allegations. However, the plaintiff correctly points out that a lot of people accused of crimes are under pressure. The trial court further found that defendant was not threatened or abused. He was provided coffee and bathroom breaks. All in all, it does not appear that the statement was involuntary.

Defendant next argues that he was denied his due process rights because the jury was not instructed to treat accomplice testimony with extra caution. He also argues that he was denied effective assistance of counsel when defense counsel did not request the accomplice instructions. We disagree.

Any potential error with the jury instructions is unpreserved because defendant did not object to the instructions given to the jury. See *People v Paquette*, 214 Mich App 336, 339; 543 NW2d 342 (1995), 453 Mich 977 (1996). We review unpreserved nonconstitutional claims for plain error affecting the defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). "To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *Id*. at 763. In order to satisfy the third requirement, the defendant must show that the error affected the outcome of the lower court proceedings. *Id*.

Defendant argues that the failure to give the accomplice jury instructions was plain error. Assuming arguendo that the failure to include the jury instruction was plain error, we nevertheless find that reversal is not warranted because defendant has failed to show that his substantial rights were affected. Defendant asserts that if the jury was given the accomplice witness instruction it would have very likely not believed Megan's testimony, and therefore, the "key pillar of the prosecution's case would have fallen." Defendant is mistaken. The key pillar of the prosecution's case was not Megan's testimony. It was defendant's confession. The jury did not simply weigh Megan and Tanya's credibility against defendant's credibility. Instead the jury weighed defendant's statements during the police interview against his testimony at trial. Given that defendant's inculpatory statements matched up with Tanya and Megan's testimony, it is unlikely that the jury would have come to a different result even if it was told to view Megan and Tanya's testimony with increased caution.

Moreover, defense counsel was not ineffective for failing to request the cautionary accomplice jury instruction. The right to counsel guaranteed by the United States and Michigan Constitutions, US Const, Am VI; Const 1963, art 1, § 20, is the right to the effective assistance of counsel. *People v Pubrat*, 451 Mich 589, 594; 548 NW2d 595 (1996). Defendant argues that if defense counsel had requested the accomplice jury instructions, the outcome of the case would have been different. However, as indicated *supra*, that is not the case. Moreover, defendant has not even shown that defense counsel was deficient. "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Solmonson,* 261 Mich

App 657, 663; 683 NW2d 761 (2004). Defense counsel has wide discretion regarding matters of trial strategy. *Odom*, 276 Mich App at 415. Defendant's theory of the case was that the cocaine never existed. The accomplice jury instruction presumes that there was a crime in which accomplices aided the defendant. Requesting the accomplice jury instructions would have, therefore, been contrary to defendant's theory of the case. Not requesting the instructions was part of the trial strategy.

Defendant next argues that his convictions of possession and possession with intent to deliver the same substance violate his double jeopardy protections. The prosecutor concedes that defendant's conviction of possession of 1000 or more grams of cocaine must be vacated. We, therefore, vacate defendant's cocaine possession conviction and sentence. "[I]t is an appropriate remedy in a multiple punishment double jeopardy violation to affirm the conviction of the higher charge and to vacate the lower conviction." *People v Herron*, 464 Mich 593, 609; 628 NW2d 528 (2001). We remand for resentencing on defendant's remaining convictions. See *People v Jackson*, 487 Mich 783, 801-802; 790 NW2d 340 (2010).

Affirmed in part, vacated in part, and remanded for resentencing consistent with this opinion. We do not retrain jurisdiction.

/s/ Donald S. Owens
/s/ E. Thomas Fitzgerald
/s/ Michael J. Riordan