

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRANDON J. MILES,

Defendant-Appellant.

UNPUBLISHED
October 15, 1999

No. 211330
Recorder's Court
LC No. 97-007861

Before: White, P.J., and Hood and Jansen, JJ.

PER CURIAM.

Defendant was convicted, following a bench trial, of felonious assault, MCL 750.82; MSA 28.277, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to six months to four years' imprisonment for the felonious assault conviction and a consecutive two-year term for the felony-firearm conviction. He appeals as of right. We affirm.

The complainant, Steven Hopkins, went to a party store near his house. Defendant was known to loiter in front of the store. On the day of the assault, Hopkins passed by defendant and entered the store. Defendant entered the store also. Hopkins left the store and drove to his house, which was located approximately five houses away. Defendant subsequently knocked on Hopkins' door. When Hopkins answered, defendant asked Hopkins whether he had picked up "ten bones" inside the party store. Hopkins denied that he had. Defendant produced a handgun from his waistband, pointed it at Hopkins' head, and told him he would kill him if he found out he had picked up something that belonged to him.

According to defendant's version of the events, Hopkins owed him money for drugs. Defendant said he went to Hopkins' house unarmed in order to collect the debt, but Hopkins never paid him what he was owed. Hopkins denied being a drug user.

On cross-examination, the prosecutor asked defendant why, if he had an explanation for the events, he did not tell his story to anyone, failed to appear in court on his first scheduled trial date, and thereafter did not resurface until some three months later. Defendant contends that this questioning

amounted to an improper comment on his decision to exercise his Fifth Amendment right to silence. We disagree.

The right against self-incrimination is guaranteed by both the United States and Michigan Constitutions. US Const, Am V; Const 1963, art 1, sec 17. In *People v Dixon*, 217 Mich App 400, 405-406; 552 NW2d 663 (1996), this Court explained:

A defendant waives his privilege against self-incrimination when he takes the stand and testifies. Consequently, the defendant may be impeached with evidence of both prearrest and postarrest silence without violating the Fifth Amendment as long as the silence precedes the advising of the defendant of his rights pursuant to *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966). Where silence follows the receipt of *Miranda* warnings, however, the Fourteenth Amendment right to due process bars the use of such silence to impeach the defendant's exculpatory explanation at trial provided the defendant does not claim to have told the police the same version upon arrest, or to have cooperated with the police. Generally, when a prosecutor cross-examines a defendant regarding the defendant's failure to advance his exculpatory explanation upon arrest and the record is unclear whether, and, if so, when, the defendant received his *Miranda* warnings, the procedure is to remand the case to the trial court for an evidentiary hearing. The defendant may forfeit his right to an evidentiary hearing, however, if the defendant fails to allege sufficient facts to justify a remand, i.e., that any comment was made in the presence of the jury regarding the defendant's silence following receipt of *Miranda* warnings. [Citations omitted.]

Defendant has not shown that he is entitled to reversal of his convictions or an evidentiary hearing to determine whether and when he received his *Miranda* warnings. The prosecutor did not ask defendant specifically why he did not give police his side of the story during a custodial interrogation, when defendant would have been entitled to *Miranda* warnings. See *People v Hill*, 429 Mich 382, 384; 415 NW2d 193 (1987). Instead, the prosecutor's line of questioning explored why defendant did not appear in court when scheduled to do so and why he remained at large for approximately three months thereafter. Defendant's silence during this period was not privileged because he was not subjected to a custodial interrogation. Thus, the prosecutor was free to argue that his flight and evasion were circumstantial evidence of defendant's guilty knowledge. *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995).

Furthermore, under the newly enunciated standard for unpreserved,¹ constitutional, plain error, assuming that plain error occurred, the error did not affect defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; ___ NW2d ___ (1999). Hopkins' testimony established all the necessary elements of felonious assault and felony-firearm, as defendant acknowledges. Although this case amounted to a credibility contest between Hopkins and defendant, defendant did all he could to eviscerate his own credibility by admitting that he was a liar, a drug dealer, and had confronted Hopkins to collect a debt Hopkins owed defendant for drugs. Most importantly, defendant received a bench trial. A trial court possesses an understanding of the law that allows it to ignore errors and decide a

case based solely on the properly admitted evidence. *People v Jones*, 168 Mich App 191, 194; 423 NW2d 614 (1998). Defendant does not contend that the trial court considered his choice to exercise his right to silence as substantive evidence of his guilt. Cf. *People v Smith*, 190 Mich App 352; 475 NW2d 875 (1991). Therefore, any error did not affect the outcome of the trial and reversal is not required. *Carines, supra* at 763.

Next, defendant claims that the prosecutor committed misconduct when he argued that Hopkins was not, as defendant had alleged, a drug user, because, among other things, he was a volunteer with the Detroit Police Department. We disagree.

In the context of this case, we believe that it was appropriate for the prosecutor to argue, based on the evidence, that defendant's characterization of Hopkins was inaccurate, given Hopkins' standing in his community. See *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995) (a prosecutor is free to argue the evidence and all reasonable inferences from the evidence as it relates to the theory of the case). Furthermore, this was a bench trial and the trial court, unlike a jury, possessed an understanding of the law that enabled it to consider the challenged remarks in their proper light and decide the case based on the evidence properly admitted at trial. See *Jones, supra*.

Lastly, defendant argues that the trial court convicted him of felonious assault and felony-firearm on the basis of insufficient evidence. We disagree. Defendant acknowledges that the prosecutor established the elements of these offenses. He contends, however, that this Court should reverse his convictions because Hopkins' testimony was not worthy of credence. Generally, this Court will not reverse a conviction on the basis of the credibility of a witness. *People v Hughes*, 217 Mich App 242, 248; 550 NW2d 871 (1996). We refuse to do so here because defendant has failed to show that Hopkins' testimony was incredible.

Affirmed.

/s/ Helene N. White
/s/ Harold Hood
/s/ Kathleen Jansen

¹ Defendant did not object to the prosecutor's questions in this regard.