STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CIRVEN DON MERRILL,

Defendant-Appellant.

UNPUBLISHED
January 21, 2000

No. 213458
Kent Circuit Court
LC No. 97-009559-FH

Before: Fitzgerald, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Defendant Cirven Don Merrill was convicted of delivery of less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv), following a jury trial. He was sentenced to three to forty years' imprisonment pursuant to both the fourth habitual offender, MCL 769.12; MSA 28.1084, and controlled substance habitual offender, MCL 333.7413(2); MSA 14.15(7413)(2), statutes. On December 29, 1998, the court amended the sentencing order to delete references to defendant's fourth felony offender status. Defendant appeals by right. We affirm.

I

The first issue is whether defendant was denied a fair trial by the court's refusal to instruct the jury on the defense of duress. Generally, the court's instruction to the jury "must include all elements of the crime charged . . . and must not exclude from jury consideration material issues, defenses, or theories if there is evidence to support them." *People v Reed*, 393 Mich 342, 349-350; 224 NW2d 867 (1975); *People v Piper*, 223 Mich App 642, 648; 567 NW2d 483 (1997). In other words, the trial court "is required to charge the jury concerning the law applicable to the case." *People v Hearn*, 100 Mich App 749, 753; 300 NW2d 396 (1980).

Defendant concedes that the issue was not directly preserved for appeal; therefore, review is governed by the "plain error" test, which prevents review of errors unless they are "outcome determinative." *People v Grant*, 445 Mich 535, 553; 520 NW2d 123 (1994). Where the error involves the jury instruction, this "outcome determinative" test has been further defined in terms of

"prejudice," or whether a properly instructed jury "could have reached a different verdict if the error had not occurred." *People v Vaughn*, 447 Mich 217, 238; 524 NW2d 217 (1994).

In the instant matter, defendant conceded that he participated in a crack cocaine transaction with two undercover police officers. He contended, however, that his participation in the transaction was under circumstances of duress. Specifically, he testified that he was asked to "try" crack cocaine by three individuals and then physically assaulted by two of the individuals when he refused to sell drugs for them in repayment. Defendant further testified that during the criminal transaction, the two assailants were watching him from a nearby porch; one man had a gun and the other had a knife. Thus, he felt as though he had no alternative but to go through with the transaction. In light of this testimony, defendant contends that the trial court should have instructed the jury on the defense of duress. We disagree.

A defendant has the burden of producing the evidence from which a jury can conclude the elements of duress have been satisfied. *People v Lemons*, 454 Mich 234, 246; 562 NW2d 447 (1997). Specifically, the *Lemons* Court held:

> [A] defendant successfully carries the burden of production where the defendant introduces some evidence from which the jury could conclude the following:
>
> > "A) The threatening conduct was sufficient to create in the mind of a reasonable person the fear of death or serious bodily harm;
> >
> > B) The conduct in fact caused such fear of death or serious bodily harm in the mind of the defendant;
> >
> > C) The fear or duress was operating on the mind of the defendant at the time of the alleged act; and
> >
> > D) The defendant committed the act to avoid the threatened harm." [*Id.* at 246-247, quoting *People v Luther*, 394 Mich 619, 623; 232 NW2d 184 (1975).]

The *Lemons* Court further noted that the threatening conduct must be "present, imminent, and impending," that a "threat of future injury is not enough," and that the "threat must have arisen without the negligence or fault of the person who insists upon it as a defense." *Id.* at 247, citing *People v Merhige*, 212 Mich 601, 610-611; 180 NW 418 (1920).

Applying *Vaughn*, this Court must determine whether a properly instructed jury could have reached a different verdict. Although it appears that the jury might have concluded that some of the elements of duress were satisfied, every element would have to be satisfied for the jury to have reached a different result. A proper review of the facts suggests defendant is incapable of satisfying every element.

As noted above, the threatened harm must be "present, imminent, and impending." Defendant conceded that he was able to go around to the back of the house during the transaction with the

officers, and the men on the porch did not follow him. Once he was beyond the vision of the individuals on the porch,[1] the threatened harm was arguably no longer present and imminent. In fact, while defendant was in the house retrieving the drugs, one of the alleged assailants from the porch approached the undercover officers, inquired why they were parked there, and asked them to leave because he did not like them. When the police officers responded that they would leave as soon as they got what they came for, the man said "[a]ll right" and returned to the porch. We agree with the prosecution that if the man on the porch was supposedly forcing defendant to sell drugs, he would have no reason to tell the prospective drug buyers to leave before the transaction was completed. Accordingly, we find that a properly instructed jury could not have reached a different verdict even if the jury had been instructed on the defense of duress. *Vaughn, supra* at 238.

II

Next, defendant argues that the prosecution's closing arguments regarding defendant's failure to protest his innocence when he was arrested was an improper infringement of defendant's right to remain silent. Generally, a defendant's choice to remain silent cannot be used against him at trial. *People v Avant*, 235 Mich App 499, 509; 597 NW2d 864 (1999), citing *People v Bobo*, 390 Mich 355; 212 NW2d 190 (1973). On the other hand, where a defendant makes statements to the police after being given *Miranda* warnings, the prosecutor may question and comment on the defendant's failure to assert a defense later claimed at trial. *Avant, supra* at 509, citing *People v Davis*, 191 Mich App 29, 34-35; 477 NW2d 438 (1991). The rationale for this exception is that the defendant has not remained silent. *Avant, supra* at 509.

The specific commentary at issue is the following statement by the prosecution during its closing argument:

> First of all, he never tells Office Zabriskie in the back of the cruiser on the way to the jail that there was anyone pointing a gun to his head. He never mentions that to him. To get from Oak Street out to Kent County Jail is a ride of some ten or fifteen minutes, and not once during the course of this drive does he indicate to Officer Zabriskie or Officer Taylor that the only reason . . . [he] did this was because some guys put a gun to . . . [his] head . . . .

Defendant testified, however, that he told at least one of the arresting officers about the two individuals on the porch. Specifically, the following testimony was taken:

> And I will say that I told one of the officers, if not two of them, that the two individuals sittin' on the porch had guns on me, and they told me that they would handle them, and they never did.
>
> *Q*. Do you recall which officers it was?
>
> *A*. I know for a fact. I do not know his name, but the one guy that said he was doing the driving.

Q. [Officer] Taylor?

A. Yeah. The one he [sic] said he was doing the transporting, I told him.

Thus, based on defendant's own testimony, the prosecution was justified in referring to defendant's silence regarding the circumstances of the criminal transaction because defendant chose not to remain completely silent.

Moreover, defendant concedes that no objection to the closing argument was made during the trial. An unpreserved claim of error based on a prosecutor's closing argument will not be sustained if a curative instruction would have prevented the prejudicial effect to the defendant. *People v Stout*, 116 Mich App 726, 730-731; 323 NW2d 522 (1982). Other than commenting on the obviously speculative nature of such a review, defendant offered no argument as to why a curative instruction would have been ineffective to cure the alleged prejudicial effect. This Court is not persuaded that a curative instruction would have been insufficient to cure a statement that was only arguably erroneous.

We affirm.

/s/ E. Thomas Fitzgerald
/s/ Joel P. Hoekstra
/s/ Jane E. Markey

[1] Nothing in the record reveals that the alleged assailants on the porch of the neighboring building were able to see defendant as he moved from the undercover officers' vehicle to the back of the house in order to complete the drug transaction.