

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LYNN ANDREW MOTHERAL,

Defendant-Appellant.

UNPUBLISHED

June 20, 2000

No. 219512

Cass Circuit Court

LC No. 98-009649

Before: Hoekstra, P.J., and Holbrook, Jr., and Zahra, JJ.

MEMORANDUM.

Defendant appeals as of right his conviction after a jury trial for larceny over \$100, MCL 750.356a; MSA 28.588(1), and breaking and entering an unoccupied building, MCL 750.110; MSA 28.305. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

At trial, one of the key witnesses against defendant testified that he had been arrested on unrelated charges, and agreed to testify against defendant in return for leniency on the other charges. The witness testified that the agreement required him to take a lie detector test and tell the truth. Defendant did not object to this testimony and did not move for a curative instruction. Accordingly, we review the alleged error under the plain error rule. “To avoid forfeiture under the plain error rule, three requirements must be met: 1) the error must have occurred, 2) the error was plain . . . , 3) and the plain error affected substantial rights. The third requirement generally requires a showing of prejudice” *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Further, if the three elements of the plain error rule are established, “[r]eversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error ““‘seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings’ independent of the defendant’s innocence.”” *Id.* at 763-764, quoting *United States v Olano*, 507 US 725, 736-737; 113 S Ct 1770; 123 L Ed 2d 508 (1993) (quoting *United States v Atkinson*, 297 US 157, 160; 56 S Ct 391; 80 L Ed 555 [1936]).

In *People v Whitfield*, 58 Mich App 585; 228 NW2d 475 (1975), the Court set forth a non-exhaustive set of factors that have been considered relevant to determining whether an unobjected to reference to a polygraph resulted in “sufficient prejudice . . . so as to constitute reversible error.” *Id.* at

588. We believe that a reviewing court is also free to consider these factors when reviewing for plain error under *Carines*. See *People v Ortiz-Kehoe*, 237 Mich App 508, 513; 603 NW2d 802 (1999) (observing the relevance of the factors to appellate review of a trial court's ruling on a motion for mistrial). The factors that can be considered are:

(1) [W]hether defendant objected and/or sought a cautionary instruction; (2) whether the reference was inadvertent; (3) whether there were repeated references; (4) whether the reference was an attempt to bolster the witness's credibility, and (5) whether the results of the test were admitted rather than merely the fact that a test had been conducted. [*Id.* at 514, quoting *People v Yatooma*, 85 Mich App 236, 240; 271 NW2d 184 (1979) (citations omitted).]

Applying these factors, we conclude that defendant has failed to establish the requisite level of prejudice. Defendant did not object or seek a curative instruction. The reference was inadvertent, and was not repeated. The reference was not used to bolster the witness's credibility, and it did not indicate what the test results were. Therefore, we conclude that the issue is forfeited. *Carines, supra* at 772. In any event, and in light of the overwhelming evidence presented against defendant, had defendant avoided forfeiture, we would decline to reverse because the alleged error did not seriously affect the fairness, integrity or public reputation of the judicial proceedings. *Id.*

Affirmed.

/s/ Joel P. Hoekstra
/s/ Donald E. Holbrook, Jr.
/s/ Brian K. Zahra