STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 18, 2001
v	No. 218597 Wayne Circuit Court
ROCELIOUS WILLIAMS, Defendant-Appellant.	LC No. 98-008369

Before: Markey, P.J., and McDonald and K. F. Kelly, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession with intent to deliver more than 50 grams, but less than 225 grams, of a mixture containing cocaine, MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii). He was sentenced as an habitual offender second, MCL 769.10; MSA 28.1082, to ten to thirty years' imprisonment. He was tried with his brother, Kaerkye Williams, before a single jury. Defendant appeals as of right and we affirm.

I

On appeal, defendant first claims that he was denied the effective assistance of counsel when his attorney represented both defendant and his brother. *People v Lafay*, 182 Mich App 528, 530; 452 NW2d 852 (1990). We disagree.

The trial court raised this issue. The court explained to defendants that each had the right to his own attorney and that using the same attorney gave rise to the possibility of conflicting defenses. Both defendant and his brother stated on the record that they wished to have the same attorney represent them. Defendant personally made an informed waiver of his right to have separate counsel. This waiver extinguishes any error and precludes defendant from raising the issue on appeal. *People v Carter*, 462 Mich 206, 209, 216, 218; 612 NW2d 144 (2000).

Even if defendant had preserved this issue, upon review of the record, we find that defendant has failed to establish a prima facie case of ineffective assistance of counsel. Representation of multiple codefendants by one attorney can lead to a conflict of interest serious enough to deprive any of them of effective assistance of counsel. *Lafay*, *supra*, citing to *Holloway v Arkansas*, 435 US 475; 98 S Ct 1173; 55 L Ed 2d 426 (1978). Such a conflict is never presumed or implied. A defendant has the burden of establishing a prima facie case of

ineffective assistance of counsel. *Id*. In order to demonstrate that a conflict of interest has violated his Sixth Amendment rights to the effective assistance of counsel, a defendant "must establish that an actual conflict of interest adversely affected his lawyer's performance." *People v Smith*, 456 Mich 543, 556; 581 NW2d 654 (1998), citing to *Cuyler v Sullivan*, 446 US 335, 350; 100 S Ct 1708; 64 L Ed 2d 333 (1980).

Defendant and his brother stated clearly on the record that they desired to proceed with the same attorney and did not believe that there would be a conflict of interest. Defendant has failed to identify an actual conflict of interest that adversely affected his lawyer's performance. Both defendants presented the identical defense so there was no conflict between their interests.

II

Defendant contends that his on-the-record agreement to the joint representation was not sufficient or valid because the trial court waited until after the jury was selected to make the record and the court failed to comply with the requirements of MCR 6.005(F). Defendant did not object on the record to the procedure used by the court. Thus, the issue is forfeited. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

In order to obtain appellate review of a forfeited error, regardless of whether the error is constitutional or non-constitutional, three requirements must be met: (1) error must have occurred, (2) the error was plain, i.e., clear or obvious, and (3) the plain error affected substantial rights. *Id*., citing to *United States v Olano*, 507 US 725; 113 S Ct 1770; 123 L Ed 2d 508 (1993). An appellate court must exercise its discretion in deciding whether to reverse. Reversal 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. *Carines, supra*, at 763-764.

Our review of the record reveals that defense counsel did not comply with subsection (1) and the court did not comply with subsection (3) of MCR 6.005(F), and that the failure to do so was plain error. *Carines, supra*. However, we find that the plain error did not affect defendant's substantial rights. *Id*.

The court made an inquiry into a possible conflict of interest, and defendant and his brother made knowing waivers on the record. They represented they had previously discussed the possibility of a conflict of interest and understood the risk of using the same attorney. However, they agreed there would be no conflict of interest if defense counsel represented both of them. We find that the purpose and intent of the rule were accomplished. In addition, defendant has failed to demonstrate any conflict of interest that affected defense counsel's performance.

Most importantly, there was strong evidence to support the verdict. The first police officer to enter the house, Norrod, testified that he saw defendant throw a brown paper bag across the room. The bag, upon lab analysis, contained 83.64 grams of cocaine. Thus, there was an eyewitness to defendant's possession of a large amount of illegal drugs. This evidence would not have changed if defendant had his own attorney separate from that of his brother. That evidence, coupled with the drug paraphernalia found in the house and the large sum of money found on

defendant's person, was sufficient to convict defendant of possession with intent to deliver more than 50 grams, but less than 225 grams, of a mixture containing cocaine. Defendant has failed to demonstrate that anything would have been different if he was represented at trial by a separate attorney. Accordingly, we conclude that defendant's substantial rights were not affected by the failure to comply with two subsections of the rule.

Moreover, even if we found that defendant's substantial rights were affected by the failure to comply with two subsections of MCR 6.005(F), the strong evidence against defendant precludes him from demonstrating he was "actually innocent," and defendant has supplied nothing to support a conclusion that the "fairness, integrity or public reputation" of the court was seriously affected. *Carines, supra.* Thus, reversal is not required based on the failure to comply with all the provisions of MCR 6.005(F).

III

Defendant claims the prosecutor's questions and arguments impermissibly commented on his silence in violation of the Fifth Amendment. We disagree.

After being advised of and waiving his *Miranda* rights, defendant was asked by a police officer whether he knew that drugs were being sold from his home. He replied that he did not want to make any more statements. He was also asked whether he knew that there were drugs in the house. He answered that he didn't have anything to say about that. At trial, during cross-examination, the prosecutor asked defendant about those answers and, in his closing argument, the prosecutor commented that whenever the topic of the question was drugs in the house, defendant did not want to talk about it. The prosecutor asked the jury, "What does that tell you about guilty knowledge?"

Defendant did not object to the prosecutor's line of questioning concerning the fact he declined to answer certain questions during his statement to the police. Thus, the issue is forfeited. In order to prevail, defendant must satisfy the requirements set forth in *Carines, supra*.

Defendant is not contending there was a violation of his *Miranda* rights. Instead, defendant claims, even after waiving his rights and giving a statement, if he decides to not answer a question by silence or verbally, the prosecutor may not comment on this. This argument has been rejected by our Courts.

In *People v McReavy,* 436 Mich 197, 203; 462 NW2d 1 (1990), the Court held anything a defendant says after compliance with the procedural requirements of *Miranda*, is admissible as the statement of a party opponent, so long as it is relevant. MRE 801(D)(2)(A). In *McReavy*, when giving his statement to the police, the defendant answered some questions and not others. He then stated that he did not want to answer any more questions. *Id*., at 206. On appeal, he contended the testimony and the prosecutor's arguments about his refusal to answer some questions impermissibly infringed on his Fifth Amendment right to remain silent. *Id*., at 209.

Citing to *United States v Goldman*, 563 F2d 501 (CA 1, 1997), cert den 434 US 1067 (1978), the Court held:

> When a defendant speaks after receiving *Miranda* warnings, a momentary pause or even a failure to answer a question will not be construed as an affirmative invocation by the defendant of the right to remain silent. [*Id*., at 222.]

In *People v Davis*, 191 Mich App 29, 35-36; 477 NW2d 438 (1991), the Court concluded, in light of *McReavy*, that "a defendant who speaks following *Miranda* warnings must affirmatively reassert the right to remain silent."

We conclude that no error occurred. "Where a defendant makes a statement to the police after being given *Miranda* warnings, the defendant has not remained silent, and the prosecutor may properly question and comment with regard to the defendant's failure to assert a defense [i.e., to remain silent] subsequently claimed at trial." *People v Avant*, 235 Mich App 499, 509; 597 NW2d 864 (1999). Defendant's refusal to answer the questions "was admissible . . . so as to allow the factfinder to more fully determine the probative significance of the defendant's complete statement to the police." *McReavy, supra,* 436 Mich at 203. There was no prosecutorial misconduct. The evidence was properly admitted.

IV

Finally, defendant claims the prosecutor's closing argument to the jury contained impermissible prejudicial arguments which could not be cured by a cautionary instruction. Defendant did not object to the complained-of remarks. In considering the defendant's unpreserved allegations of prosecutorial misconduct, review is foreclosed unless no curative instruction could have removed any undue prejudice to the defendant or manifest injustice would result from failure to review the alleged misconduct. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994); *People v Reid*, 233 Mich App 457, 466; 592 NW2d 767 (1999).

The prosecutor's remarks must be read in context. *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996). A prosecutor may not argue facts not entered into evidence. *People v Lee*, 212 Mich App 228, 255; 537 NW2d 233 (1995). However, the prosecutor is free to argue the evidence and all reasonable inferences from the evidence as it relates to the prosecutor's theory of the case. *Id*. Prosecutors "should not resort to civic duty arguments that appeal to the fears and prejudices of jury members." *People v Cooper*, 236 Mich App 643, 651; 601 NW2d 409 (1999), citing to *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). When impermissible comments are made by a prosecutor in response to arguments previously raised by defense counsel, reversal is not mandated. *People v Ricky Vaughn*, 200 Mich App 32, 39; 504 NW2d 2 (1993).

A prosecutor may not vouch for the credibility of a witness. A prosecutor may not suggest that the government has some special knowledge that the witness is testifying truthfully. *Bahoda, supra,* 448 Mich at 276. The mere statement of the prosecutor's belief in the honesty of the complainant's testimony is not error requiring reversal when, as a whole, the remarks were fair. Any error from such a statement would be cured by a prompt admonishment to the jury regarding its role as factfinder. *People v McElhaney*, 215 Mich App 269, 284; 545 NW2d 18 (1996). The prosecutor is permitted to comment on the testimony in a case and to argue that, upon the facts presented, a witness is not worthy of belief or is lying. When the prosecutor's

comments are based upon the evidence at trial, he can properly argue the testimony was not credible. *People v Gilbert*, 183 Mich App 741, 745-746; 455 NW2d 731 (1990).

Defendant contends that the prosecutor impermissibly argued facts not in evidence, vouched for the credibility of his witnesses, and implied the existence of special knowledge about evidence which was not adduced. Additionally, defendant argues the prosecutor's use of the words "we," "community," and "our community" was an impermissible appeal to civic duty. We disagree.

The prosecutor's argument concerning why the police did not attempt to trace fingerprints on the bags of cocaine was made in response to defendant's argument that the police did not present any corroborating evidence, most especially, fingerprints. The prosecutor's statements that there was no need to fingerprint the brown paper bag and that the police seek fingerprints when they don't know who handled a piece of evidence, was based upon the testimony of the police officer who saw defendant throw the bag of cocaine across the room. This was not impermissible vouching for the credibility of his witnesses or the implication of special knowledge about the evidence. Finally, the prosecutor's use of the words "we," "community," and "our community" was not an impermissible appeal to civic duty. We find no appeal to the fears and prejudices of the jury members in these statements. Accordingly, we conclude there is no support for the argument that, based on rebuttal statements to the jury, there was prosecutorial misconduct.

Affirmed.

/s/ Jane E. Markey
/s/ Gary R. McDonald
/s/ Kirsten Frank Kelly