

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEPHEN J. MCNALLY,

Defendant-Appellant.

UNPUBLISHED

July 20, 2001

No. 223059

Oakland Circuit Court

LC No. 99-165135-FC

Before: White, P.J., and Sawyer and Saad, JJ.

PER CURIAM.

The jury convicted defendant of second-degree murder, MCL 750.317, and failure to stop at the scene of a serious injury accident, MCL 257.617. The judge sentenced defendant to concurrent prison terms of twenty to fifty years for the murder conviction and two to five years for the failure to stop conviction. He appeals as of right. We affirm.

Defendant argues that, during the prosecution's case-in-chief, the prosecutor improperly elicited evidence from three witnesses concerning his post-arrest silence and his failure to tell police his version of the events. Defendant did not object to the challenged testimony at trial and has not demonstrated outcome-determinative plain error on appeal. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). The challenged testimony did not concern silence during custodial interrogation or silence in reliance on *Miranda*¹ warnings. Therefore, defendant's silence was not constitutionally protected. *People v Schollaert*, 194 Mich App 158, 164-165; 486 NW2d 312 (1992); *People v Stewart (On Remand)*, 219 Mich App 38,43; 555 NW2d 715 (1996). Defendant also argues that defense counsel's failure to object amounted to ineffective assistance of counsel. In light of our conclusion that the testimony was admissible, we do not agree that defense counsel was ineffective for failing to object. Even if the evidence were inadmissible, the outcome was not effective.

Defendant also argues that the prosecution's comparison of the defense to a "tuna noodle casserole" as improper. "A prosecutor may not suggest that defense counsel is intentionally attempting to mislead the jury." *People v Watson*, ___ Mich App ___; ___ NW2d ___ (Docket

¹ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

No. 218218, issued 5/4/2001), slip op at 10. Nevertheless, because defense counsel did not object to the argument, defendant must demonstrate outcome-determinative plain error in order to avoid forfeiture of the issue. *Carines, supra*. “No error requiring reversal will be found if the prejudicial effect of the prosecutor’s comments could have been cured by a timely instruction.” *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). Here, a timely instruction by the trial judge would have dispelled any potential prejudice to defendant. Furthermore, we are not persuaded that the comment was so inflammatory that it affected defendant’s substantial rights. *Carines, supra*. Accordingly, reversal is not warranted.

Affirmed.

/s/ Helene N. White
/s/ David H. Sawyer
/s/ Henry William Saad