

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MONTIE KENNETH MORRIS,

Defendant-Appellant.

UNPUBLISHED

October 30, 2001

No. 225285

Eaton Circuit Court

LC No. 99-020173-FC

Before: Whitbeck, P.J., and Neff and Hoekstra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a) (penetration involving a person under thirteen), and the trial court sentenced him to concurrent terms of ten to twenty years' imprisonment on both counts. Defendant appeals as of right. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

On appeal, defendant contends that State Police Detective Sergeant John Palmatier's testimony was improperly admitted, necessitating a new trial. Palmatier interviewed defendant after defendant waived his rights under *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966). He testified that near the end of the interview, he told defendant that he did not think defendant was being truthful about his interaction with the victim. Defendant responded by hanging his head low and not saying anything. When he told defendant he believed the victim was telling the truth, defendant nodded his head, "signaling to me that in fact he was understanding and agreeing." Upon defense counsel's objection that this was speculation, Palmatier explained that he was trained in observing nonverbal responses. The detective next asked defendant whether he apologized to the victim for what he had done, and defendant shook his head no. He also asked defendant whether he was sorry for what he had done and he nodded yes. Palmatier recalled that when he encouraged defendant to speak to his attorney and tell him the entire truth, defendant "continued to shake his head in, in an affirmative manner. Never did he stop and say 'Wait a minute. You think I did this?' or 'Your idea that I did this is wrong' or 'I didn't do it.' I never received any of that."

Defendant claims that Palmatier's testimony was improper for several reasons, none of which was raised at trial. Evidentiary issues fall into the nonconstitutional error category. *People v Herndon*, 246 Mich App 371, 402, n 71; 633 NW2d 376 (2001). Unpreserved claims of both nonconstitutional and constitutional error are reviewed to determine whether a plain error

occurred that affected the defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764, 774; 597 NW2d 130 (1999). This generally requires a showing of prejudice, that is, that the error affected the outcome of the proceedings. *Id.* at 763. Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity, or public reputation of judicial proceedings independent of the defendant's innocence. *Id.*

Defendant's primary claim is that Palmatier's testimony was inadmissible because defendant's nonverbal conduct was an invocation of his right to remain silent. When a defendant waives his right to remain silent, makes some statements, and then manifests by silence a total revocation of his earlier waiver, the prosecutor may not introduce evidence of that silence. *People v Rice (On Remand)*, 235 Mich App 429, 436-437; 597 NW2d 843 (1999). However, nonverbal conduct such as hanging one's head and nodding does not rise to the level of manifesting a revocation of the waiver and testimony concerning the nonverbal conduct may be admitted. *Id.* Accordingly, Palmatier's testimony was not an impermissible commentary on defendant's constitutionally protected silence and did not create plain error. As for defendant's claim that he did not intend his conduct to be an assertion, the argument posits a factual issue that was for the jury to decide and does not establish plain error. Defendant's argument that the testimony was contrary to MRE 408 also does not give rise to plain error; by its terms, it applies to evidence of an offer "to compromise a claim which was disputed as to either validity or amount." Defendant contends that use of his nonverbal responses was improper because the responses were made in violation of his right to remain silent and right to counsel. However, the record establishes that defendant waived those rights at the beginning of the interview, and, as noted above, there is nothing in the record indicating that he revoked that waiver. Similarly, the fact that the responses were made during a polygraph examination does not amount to plain error since the jury was not informed of that context.

In our view, defendant's strongest argument is that the testimony was improperly admitted as expert testimony without qualifying Palmatier as an expert witness. Even if this constituted plain error, however, defendant has failed to establish that the error was outcome decisive, he is actually innocent, or affected the integrity of the proceedings. *Carines, supra*. Independent of Palmatier's testimony, the testimony of the victim, her grandmother, and the pediatrician who examined the victim was sufficient to establish that defendant committed the charged offenses. Reversal on this basis is therefore not warranted.

Affirmed.

/s/ William C. Whitbeck
/s/ Janet T. Neff
/s/ Joel P. Hoekstra