

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARK WILLIAM HOLLAND,

Defendant-Appellant.

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UNPUBLISHED

April 19, 2002

No. 229435

Muskegon Circuit Court

LC No. 97-140409-FH

Before: Owens, P.J., and Markey and Murray, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of one count of possession with intent to deliver less than fifty grams of a mixture containing cocaine and/or heroin, MCL 333.7401(2)(a)(iv).<sup>1</sup> He was sentenced as a fourth habitual offender, MCL 769.12, to seven to twenty years' imprisonment, to be served consecutively to the sentences for which defendant had already been incarcerated. Defendant appeals by leave granted. We affirm.

Defendant contends that he was deprived of a fair trial when a police officer testified that defendant invoked his right to remain silent. We note the following exchange between the prosecutor and the police officer:

*Q.* And did you, during your investigation, also have an opportunity to sit down with the Defendant, Mark Holland?

*A.* Yes, I did.

*Q.* And during that period of time, can you tell me, Detective Sergeant, whether or not—what was the purpose of you sitting down with Mark Holland?

*A.* To allow him the opportunity to give me his version of what occurred of the story [sic].

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<sup>1</sup> Defendant was also charged, in the alternative, with one count of possession of a controlled substance by a prisoner, MCL 800.281(4). The jury's finding that defendant violated MCL 333.7401(2)(a)(iv) obviated its consideration of defendant's guilt with respect to MCL 800.281(4).

Q. Did you then read him his *Miranda*<sup>2</sup> warning?

A. Yes. Since he's incarcerated and I'm asking him questions, I have to read his *Miranda* warnings, so I read it right off a *Miranda* card.

Q. And at that point did Mr. Holland give you a detailed statement as to the events of what had occurred on the 29<sup>th</sup> of January '97?

A. No, he invoked his right to remain silent, so I didn't ask him any questions.

Defendant contends that the last question and answer, by referencing his post-*Miranda* silence, violated his constitutional right to remain silent, US Const, Am V, and denied him his constitutional right to due process and a fair trial.

It should be noted that defendant did not object to this testimony below, nor did he raise the issue in any other context, such as prosecutorial misconduct or as a deprivation of due process. Accordingly, this issue is forfeited. Nevertheless, defendant may avoid forfeiture under the plain error rule, if the following three requirements are met: (1) error must have occurred, (2) the error was plain, i.e. clear or obvious, and (3) the plain error affected substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Generally, the third requirement requires a showing of prejudice, that is, "that the error affected the outcome of the lower court proceedings." *Id.*

Our Supreme Court has recognized that "it would not comport with due process" to allow the prosecution to call attention to a defendant's silence after the defendant has received *Miranda* warnings. *People v Dennis*, 464 Mich 567, 574; 628 NW2d 502 (2001), quoting *Doyle v Ohio*, 426 US 610, 620; 96 S Ct 2240; 49 L Ed 2d 91 (1976). However, the *Dennis* Court noted that the prosecutor in *Doyle* "unabashedly used the silence of each of the two defendants in the face of *Miranda* warnings against them at their respective trials." *Dennis, supra* at 574-575. In contrast, the Court found that the facts in *Dennis* involved only "a single question and answer" in which the detective, in response to an open-ended question, revealed that the "defendant had refused to be interviewed by the detective before speaking with an attorney." *Id.* at 575. The *Dennis* Court further noted that there "was no further questioning or argument regarding defendant's silence." *Id.* Thus, the Court opined that the defendant was not deprived of his constitutional right to due process by the question and answer. *Id.* at 581.

Here, the prosecutor must have known that defendant declined to provide the police officer "a detailed statement of the events" during the interview. Moreover, the prosecutor must have known that defendant invoked his right to remain silent. As such, we believe that the prosecutor's question, at the very least, invited the police officer to improperly comment on defendant's silence. In addition, the prosecutor's question was not open-ended. Accordingly, unlike the facts in *Dennis*, we believe that the prosecutor's question and the resulting answer were plainly contrary to defendant's constitutional rights. *Carines, supra* at 763.

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

However, to avoid forfeiture, defendant must also establish that the error affected the outcome of the proceedings. *Carines, supra* at 763. In the instant matter, there was ample evidence of defendant's guilt. For example, there was testimony indicating that defendant was essentially caught "red handed" in possession of the controlled substance. Moreover, this is not a situation where the reference to defendant's silence impeached his otherwise exculpatory testimony, nor did the prosecutor follow up on the line of questioning or reference it during closing argument. The *Dennis* Court relied on these two factors in declining to find a due process violation. *Dennis, supra* at 578. Here, we believe that the factors are similarly relevant to a determination that the prosecutor's questioning did not affect the outcome of the proceedings. Consequently, we conclude that defendant may not avoid forfeiture of this issue.<sup>3</sup> *Carines, supra* at 763.

Defendant also asserts that as a result of defense counsel's failure to object to the testimony regarding his silence or seek a mistrial, he was deprived of his constitutional right to effective assistance of counsel. Because defendant did not request a new trial or an evidentiary hearing on this issue, our review is limited to the facts on the record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). A successful claim of ineffective assistance of counsel requires a defendant to "show that counsel's performance was deficient and that there is a reasonable probability that, but for the deficiency, the factfinder would not have convicted the defendant." *Id.* at 423-424. Here, the prosecutor's question was plainly erroneous. As such, one could argue that defense counsel's performance, at least as to this one specific instance of the trial, was deficient. However, as noted above, there was overwhelming evidence of defendant's guilt. Accordingly, we do not believe that, but for the prosecutor's question, the jury would not have convicted defendant. Consequently, we do not believe that defendant was deprived of his constitutional right to effective assistance of counsel.

Affirmed.

/s/ Donald S. Owens  
/s/ Jane E. Markey  
/s/ Christopher M. Murray

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<sup>3</sup> The *Carines* Court further opined that, even if a defendant satisfies the three requirements to avoid forfeiture, the appellate court must exercise its discretion in deciding whether to reverse. *Carines, supra* 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 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). In light of the overwhelming evidence of defendant's guilt, we do not believe that defendant is actually innocent, nor do we believe that this one plain error affected the fairness, integrity or public reputation of judicial proceedings. Consequently, there are separate grounds to reject defendant's challenge to the prosecutor's questioning of the police officer.