

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN PHILLIP ENGEL,

Defendant-Appellant.

UNPUBLISHED

May 14, 2002

No. 229933

Ogemaw Circuit Court

LC No. 00-001609-FH

Before: Saad, P.J., and Owens and Cooper, JJ.

PER CURIAM.

Defendant appeals by right his jury trial conviction of assault with intent to inflict great bodily harm, MCL 750.84, and aggravated stalking, MCL 750.411i. Defendant was sentenced as a fourth habitual offender, MCL 769.12, to concurrent sentences of 40 to 240 months' imprisonment for the assault with intent to do great bodily harm conviction and 36 to 240 months' imprisonment for the aggravated stalking conviction. We reverse and remand for a new trial.

Defendant contends that his right to a fair trial was denied due to a violation of his constitutional right to remain silent. Specifically, defendant challenges the following exchange between the prosecutor and a police officer:

Q. Did you have an occasion at one time to speak to Phil Engel?

A. Yes, I did.

Q. What were the circumstances under—I will strike that. How much longer was it from the 16th that you spoke with Phil Engel?

A. I[t] would have been on the 20th of March.

Q. Just yes or no. Did he make a statement?

A. No.

Q. You did, however, give him a chance to tell his side of the story?

A. Yes, I did.

Defendant immediately objected and moved for a mistrial. The trial court denied defendant's motion for a mistrial opining that the above questioning was "proper" direct examination. On appeal, defendant challenges this ruling, and also contends that he was denied a fair trial.

The United States and Michigan Constitutions prohibit the state from compelling self-incriminating statements from a criminal defendant. *People v Cheatham*, 453 Mich 1, 9-10; 551 NW2d 355 (1996). In fact, we have opined that "silence in the face of an accusation of criminal conduct cannot be used as evidence." *People v Scobey*, 153 Mich App 82, 87; 395 NW2d 247 (1986). Indeed, "[w]hen a defendant exercises his right to silence, his silence cannot be used against him at trial." *People v Taylor*, 245 Mich App 293, 304; 628 NW2d 55 (2001). Thus, we agree with defendant's assertion that the challenged testimony was an improper reference to defendant's silence in the face of criminal accusations, and should not have been introduced into evidence.

However, there are two "narrow" exceptions to the rule that reference to a defendant's silence is inadmissible: (1) "evidence of a defendant's post-arrest silence may be used to contradict his assertion at trial that he made a statement"; and (2) "evidence of a defendant's silence on certain matters may be presented to elicit the full extent of a defendant's statement made to the arresting officer." *Scobey*, *supra* at 87. Here, defendant had not testified when the prosecutor introduced the testimony, nor was defendant's silence introduced to explain a separate statement he made. Accordingly, neither exception to the general rule applied, and the testimony was improperly introduced. *Id.*

In addition, we would note that the trial court's inference that defendant could remedy any prejudice by testifying on his own behalf regarding his decision not to make a statement improperly assumed that defendant would be testifying—even though defendant obviously was not required to testify. Indeed, requiring a defendant to remedy the prejudice caused in the prosecution's case-in-chief would violate a defendant's right against self-incrimination by compelling him to testify. Moreover, unlike the facts in *Taylor*, we do not believe that the improper testimony was the result of a non-responsive answer. *Taylor*, *supra* at 304. Accordingly, we conclude that the challenged testimony was a plain violation of defendant's constitutional right to remain silent.

Nevertheless, a violation of a defendant's right to remain silent is a "trial error," rather than a "structural error;" therefore, reversal is only required if the error was "outcome determinative." *People v Watkins*, 247 Mich App 14, 25-29; 634 NW2d 370 (2001). Where the disposition of a case boils down to a credibility contest between the victim and the defendant, testimony or evidence that corroborates one side's version of events could "tip the scales" in favor of that party. *People v Gee*, 406 Mich 279, 283; 278 NW2d 304 (1979). In other words, if the defendant's guilt is based on the determination of witness credibility and an error contributes to the jury's resolution of the credibility contest, the error is less likely to be "harmless," and is, therefore, more likely to be outcome determinative. See *id.* In the present case, the only two witnesses to the assault were the victim and defendant. Thus, the outcome of the case was resolved by the trier of fact's resolution of the credibility contest between the victim and

defendant. Indeed, the jury may have found that the victim's accusations were more credible because defendant elected not to make a statement to the police when initially questioned. Alternatively, the jury may have found that the defendant's testimony was less credible because he had not offered this story to the police when he was first questioned. Either way, defendant's decision to exercise his constitutional right to remain silent would have been used against him. Accordingly, we believe that the improper testimony was sufficiently outcome determinative, and that reversal of defendant's convictions is required. See *id.*

However, both the United States and Michigan Constitutions prohibit multiple criminal prosecutions for the same act. *People v Dawson*, 431 Mich 234, 235-236; 427 NW2d 886 (1988). On the other hand, a defendant's motion for a mistrial is essentially a consent to a retrial. *Id.* at 236. An exception to this rule is where the prosecutor intentionally provoked the motion. Here, there are no facts suggesting that the prosecution's questioning was a deliberate act to provoke defendant moving for a mistrial. Rather, the purpose of the questioning was to demonstrate that defendant declined to offer an exculpatory statement. Indeed, unlike the facts in *Dawson*, the prosecutor opposed defendant's motion. *Id.* at 257-259. Accordingly, we do not believe that a retrial would violate defendant's constitutional right to be free from multiple prosecutions, and we remand for a new trial.¹

Reversed and remanded for a new trial. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Donald S. Owens
/s/ Jessica R. Cooper

¹ In light of our ruling, we decline to consider defendant's remaining issues.