

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LEWIS ALBERT HEAD,

Defendant-Appellant.

UNPUBLISHED

July 26, 2002

No. 227053

Kent Circuit Court

LC No. 99-012620-FC

Before: Jansen, P.J., and Smolenski and Wilder, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of armed robbery, MCL 750.529. He was thereafter sentenced as a fourth-offense habitual offender, MCL 769.12, to twenty to thirty-five years in prison. Defendant appeals as of right and we affirm.

This case arises out of an armed robbery that occurred on November 28, 1999, at a Clark gas station in the city of Wyoming. The gas station clerk identified defendant and another man, who had a gun, as the perpetrators. After the two men left the gas station, the clerk called the police, who apprehended the perpetrators about five minutes after the crime occurred. Although the clerk was able to positively identify defendant as one of the perpetrators, he could not positively identify the man who had the gun. However, the police apprehended defendant and codefendant Michael Allen Bolton in the same car immediately after the robbery. Defendant and his codefendant were tried before the same jury and both were convicted of armed robbery.¹

I

Defendant first argues that the prosecutor impermissibly injected evidence in two instances that defendant exercised his post-arrest, post-*Miranda*² right to remain silent. Specifically, defendant argues that the prosecutor improperly introduced evidence that defendant refused to speak to the police when he was arrested and given his *Miranda* warnings, and that the

¹ We note that codefendant Bolton's appeal is also being decided today by this panel. *People v Bolton*, unpublished opinion per curiam of the Court of Appeals, issued ___/___/2002 (Docket No. 227054).

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

prosecutor improperly introduced evidence and argued as proof of guilt that defendant had not asserted his innocence to his girlfriend. Defendant also contends that defense counsel's failure to object to this evidence constituted ineffective assistance of counsel.

A

First, defendant complains of testimony by a police officer elicited during direct examination by the prosecutor that defendant "stated nothing" after the officer asked him if he understood the *Miranda* rights just read to him.

Defense counsel did not object to the testimony, but the trial court immediately instructed the jury that "no one is required to speak to the police officers if they do not wish to do so." During closing argument, defense counsel again pointed out that defendant's "evasiveness" or "lack of tact" was not improper because defendant did "not have a duty to say anything to the police." Indeed, defense counsel "begged" the jury not to use defendant's silence against him. In its final instructions to the jury, the trial court instructed the jury that it could not use defendant's silence against him.

The constitutional privilege against self-incrimination and the right of due process restrict the use of a defendant's silence in a criminal trial. *People v Dennis*, 464 Mich 567; 628 NW2d 502 (2001). The privilege applies when a defendant is subjected to police interrogation while in custody or is deprived of his freedom in any significant way and when a defendant's silence is in reliance on *Miranda* warnings. *People v Schollaert*, 194 Mich App 158, 164-165; 486 NW2d 312 (1992).

Here, the police officer's testimony was nonresponsive to the prosecutor's question, and the prosecutor did not argue that defendant's silence was evidence of his guilt in the charged offense. The jury was well instructed regarding defendant's constitutional privilege against self-incrimination and that it should not consider the police officer's statement about defendant's silence. Jurors are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Therefore, we find no misconduct on the part of the prosecutor and no prejudice resulting from the single impropriety.

B

Second, defendant complains of testimony elicited by the prosecutor during cross-examination of defendant's girlfriend that defendant did not deny his participation in the armed robbery in her exchange of letters with defendant in prison.

Defense counsel successfully objected to the line of questioning by the prosecutor, and the prosecutor did not elicit any further testimony, nor argue the point during closing argument. Defense counsel returned to the issue during his closing argument, however, stating that there was no reason for defendant to admit his participation in the crime to his girlfriend. In rebuttal argument, the prosecutor countered that it was "ridiculous" to believe that defendant would not have told the mother of his child about whether he participated in the crime. The prosecutor posited that defendant's girlfriend was merely protecting defendant in answering the prosecutor's question in the manner that she did. Defense counsel interrupted the prosecutor's rebuttal

argument, stating that the prosecutor was “perilously close to shifting the burden,” and the trial court instructed the prosecutor to move on to another topic in the argument.

At the end of closing arguments, defense counsel moved for a mistrial on the basis of the prosecutor’s remarks during rebuttal argument. The trial court denied the motion, without fully explaining its decision, but noting that it would attend to the issue during final jury instructions. In its final instructions to the jury, the trial court instructed the jury that it could not use defendant’s silence against him.

Defense counsel asked the trial court to recall the jury for an additional instruction to “ignore” the testimony of defendant’s girlfriend that defendant did not deny to her his participation in the armed robbery. The trial court denied the request, ruling that the right against self-incrimination applied to statements made to the police, not girlfriends, and that there was “some probative value” to the girlfriend’s testimony. Further, the trial court stated that it had carefully instructed on the presumption of innocence as well as how the jury should use the fact of defendant’s silence at the time of arrest.

The propriety of a prosecutor’s remarks depends on all the facts of the case. *People v Johnson*, 187 Mich App 621, 625; 468 NW2d 307 (1991). Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *Id.*

Here, defense counsel successfully objected to the prosecutor’s line of questioning, and the jury was instructed during final jury instructions not to consider testimony that was stricken. To the extent the prosecutor returned to the topic during rebuttal argument, he did so in response to defense counsel’s closing argument. Otherwise improper prosecutorial remarks do not require reversal if they address issues raised by defense counsel. *People v Duncan*, 402 Mich 1, 16; 260 NW2d 58 (1977); *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). Further, the “evidence” was of limited probative value, as demonstrated by defense counsel’s strategic decision to argue during closing argument that there was no reason for defendant to admit his participation in the crime to his girlfriend. Accordingly, we find no prosecutorial misconduct in this regard.

C

Defense counsel was not ineffective for failing to object to the testimony elicited from the police officer where the trial court immediately instructed the jury on defendant’s constitutional privilege against self-incrimination. Because of the trial court’s instruction, any prejudice to defendant was immediately cured. Furthermore, defense counsel aided his client by emphasizing the privilege against self-incrimination during his closing argument to the jury. Additionally, the record does not support defendant’s contention that defense counsel failed to object when the prosecutor elicited testimony that defendant had not asserted his innocence to his girlfriend because defense counsel successfully objected to this line of questioning by the prosecutor. Further, the trial court properly instructed the jury that it could not use defendant’s silence against him. Defendant has not shown either deficient performance or prejudice with regard to counsel’s conduct at trial. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000).

II

Next, defendant argues that the introduction of the codefendant's statement at trial, without a limiting instruction, violated the hearsay rule, MRE 802, and his right of confrontation, thereby denying him a fair trial. Defendant also argues that trial counsel was ineffective for failing to object to the alleged improper admission of evidence.

The prosecutor elicited testimony from a police officer that, after arresting the codefendant, the codefendant said that he had a new baby and had no reason to "pull any shit." Further, the police officer testified that when he asked the codefendant whether he had been at the gas station in question, the codefendant was crying and replied "can you help me," but then refused to talk anymore with the police officer. The police officer then testified that when he returned to the police car, the codefendant was lying in the back seat, crying loudly and saying, "No, no, no; I can't do this; I'm just trying to help people out. . . . Can you help me." Defendant did not object to the police officer's testimony regarding the codefendant's statements.

Codefendant's counsel used the statements during closing argument to support the theory that the codefendant was not guilty and that he was driving the car stopped by the police merely because he gave defendant a ride to "help out a friend." The prosecutor argued in rebuttal that the statements were instead admissions revealing the codefendant's guilt. The prosecutor argued that the codefendant's statements were inculpatory, because he would have no need to "ask for help" if he were innocent.

The trial court did not instruct the jury that the codefendant's statements could not be used to prove defendant's guilt or defendant's guilt by association as required by *Richardson v Marsh*, 481 US 300; 107 S Ct 1702; 95 L Ed 2d 176 (1987). Defendant did not object to the absence of any limiting instruction. Because defendant failed to object to either the admission of the codefendant's statements or the absence of any limiting instruction, he must demonstrate plain error that was prejudicial, i.e., that could have affected the outcome of his trial. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Defendant has not shown plain error that was prejudicial. As evidenced by the contrasting use of the codefendant's ambiguous statement by counsel for the codefendant, the statement did not, on its face, constitute a confession that inculpated either the codefendant or defendant. Therefore, introduction of the codefendant's ambiguous statement did not affect the outcome of defendant's trial.

Because defendant cannot show that the result of the trial would have been different absent the codefendant's statement, neither can defendant show that he was denied the effective assistance of counsel by his counsel's failure to object to the statement or failure to request an instruction limiting its use. *Toma, supra*.

III

Lastly, defendant argues that he was denied a fair trial because of repeated instances of prosecutorial misconduct. Specifically, defendant argues that the prosecutor argued a fact not in

evidence, that the prosecutor improperly attacked two defense witnesses, and that the cumulative effect of these improper arguments denied defendant a fair trial.

A

Defendant first contends that the prosecutor's reference during closing argument to a pack of menthol cigarettes found on defendant's person was not based on any evidence introduced at trial.³ Again, defense counsel did not object to the prosecutor's reference during closing argument. Consequently, defendant's claim of error is reviewed under the plain error standard. *Schutte, supra* at 720.

Defendant has not demonstrated plain error that was prejudicial. In light of the gas station clerk's positive identification of defendant, the prosecutor's reference during closing argument to a fact apparently not borne out at trial did not affect the outcome of defendant's trial. Whether defendant was found with the cigarettes to which the gas station clerk testified were bought shortly before the armed robbery would have been, at best, cumulative identification evidence. Further, the trial court instructed the jury that the attorney's statements and arguments were not evidence and that the jury's recollection of the facts was controlling, thereby dispelling any prejudice. *People v Bahoda*, 448 Mich 261, 281; 531 NW2d 659 (1995).

B

Defendant also argues that the prosecutor improperly attacked the characters of the two defense witnesses by: (1) the prosecutor's inflammatory suggestion that defendant's acquaintance ran a drug house, to which counsel for the codefendant successfully objected⁴; and (2) the prosecutor's inflammatory suggestion that defendant's girlfriend was previously fired from her job at the same gas station for stealing from her employer, to which counsel for defendant successfully objected.

Because each of the instances described resulted in a successful objection by defense counsel, there is no merit to defendant's claim that he was deprived of a fair trial as a result of the alleged misconduct. Any prejudice caused by the testimony elicited by the prosecutor was cured by the timely objections, which ceased the questioning. Further, the trial court instructed the jury during final jury instructions that the attorneys' questions were not evidence and not to consider any testimony that the trial court had ordered excluded or stricken. *Bahoda, supra*.

³ A gas station clerk testified at trial that shortly before the robbery, defendant purchased a pack of menthol cigarettes. During the robbery, three cartons of cigarettes were taken. The cartons of cigarettes were recovered from the vehicle in which defendant and the codefendant were stopped. However, there was no testimony that a pack of menthol cigarettes was found in defendant's possession or in the vehicle in which they were stopped.

⁴ It was unnecessary for counsel for defendant to repeat the objection made by counsel for the codefendant because the codefendant's objection was sufficient to direct the trial judge's attention to the situation. See, e.g., *People v Bradford*, 69 Mich App 583, 586; 245 NW2d 137 (1976).

Accordingly, defendant has failed to demonstrate a reasonable probability that the outcome of his trial would have been different absent either the individual or cumulative effect of the alleged prosecutorial misconduct.

Affirmed.

/s/ Kathleen Jansen
/s/ Michael R. Smolenski
/s/ Kurtis T. Wilder