STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 10, 2004
v	No. 245016 Berrien Circuit Court
CLARENCE MONTGOMERY SCOTT, Defendant-Appellant.	LC No. 02-402157-FH

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

PER CURIAM.

Defendant appeals by right his convictions after jury trial of being a felon in possession of a firearm, MCL 750.224f; and felony-firearm, MCL 750.227b. Defendant argues that he was denied a fair trial by the prosecutor's misconduct, that the trial court should have given a "missing witness" instruction, and that his trial counsel was constitutionally deficient. For the same reasons, defendant argues that the trial court abused its discretion by not granting him a new trial. Our review of the record convinces us that defendant received a fair and impartial trial. We therefore affirm.

At trial, Officer Joel Deenik testified that while responding to a report of a man with a gun, he observed defendant leaning into the passenger side of a maroon car parked in a driveway. Two people were sitting in the front seat of the car; Maurice Grubbs was in the front passenger's seat. Deenik testified that defendant removed a metallic object from his waistband and tossed it through the front passenger window of the maroon car.

When Officer Tom Lavanway, Jr., arrived, he approached the driver's side of the car, and observed a silver or metallic handgun on the car floor next to Grubb's leg. Deenik also observed the gun in plain view on the front passenger floorboard and testified it looked like the metallic object he had seen in defendant's possession. Lavanway seized the gun, which was identified as a loaded semiautomatic .40-caliber Smith and Wesson.

Defendant's parole agent testified that because defendant was a convicted felon he was not allowed to possess a gun.

Defendant first argues that he was denied a fair trial when the prosecutor introduced evidence he exercised his constitutional right to remain silent. Defendant also contends the

prosecutor compounded this error by eliciting a hearsay statement that Grubbs, who absconded during the trial and was unavailable, told the police that it was defendant's gun. We disagree.

We review claims of prosecutorial misconduct de novo, but any factual findings of the trial court are reviewed for clear error. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001). The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Goodin*, 257 Mich App 425, 432; 668 NW2d 392 (2003). Where a curative instruction could have alleviated any prejudicial effect, reversible error will not be found. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). Further, we must review a prosecutor's conduct in context, *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001), and must review claimed error in light of defense arguments and the relationship they bear to the evidence admitted at trial, *Schutte*, *supra*. Thus, otherwise improper prosecutorial conduct might not require reversal if it addresses an issue raised by defense counsel. *People v Jones*, 468 Mich 345, 353; 662 NW2d 376 (2003). "Under the doctrine of invited response, the proportionality of the response, as well as the invitation, must be considered to determine whether the error, which might otherwise require reversal, is shielded from appellate relief." *Id*., citing *United States v Young*, 470 US 1, 12-13; 105 S Ct 1038; 84 L Ed 2d 1 (1985).

The use of a defendant's post-arrest, post-*Miranda*[1] warning silence for impeachment or as substantive evidence violates due process guaranteed by the Fourteenth Amendment, except to contradict the defendant's trial testimony that he made a statement, that he cooperated with police, or that trial was his first opportunity to explain his version of events. *Doyle v Ohio*, 426 US 610, 619 n 11; 96 S Ct 2240; 49 L Ed 2d 91 (1976); *People v Dennis*, 464 Mich 567, 573 n 5; 628 NW2d 502 (2001). In *Doyle*, the Supreme Court held that due process precludes the use of a defendant's silence after arrest and *Miranda* warnings because (1) silence may only reflect the exercise by the accused of his rights and (2) the *Miranda* warnings "carry an implicit assurance that silence in reliance on those warnings will not be penalized." *Dennis, supra* at 574.

The present case is far different from *Doyle*, where "the prosecution unabashedly used the silence of each of the two defendants." *Dennis*, *supra* at 574. It is much closer factually to *Dennis*, where "a single question and answer in which [a police officer] revealed in response to an open-ended question that defendant had refused to be interviewed by the detective before speaking with an attorney." *Id*. at 575. In *Dennis*, our Supreme Court found a "*Doyle* violation" had not occurred because the prosecutor did not attempt to use the defendant's silence against him. *Dennis*, *supra* at 578, 581, 582. Thus, the *Dennis* Court held that the trial court had not abused its discretion by denying the defendant's motion for mistrial. *Id*. at 581. Further, the Court noted that jurors are presumed to follow a trial court's "instruction to disregard inadmissible evidence inadvertently presented to it, unless there is an 'overwhelming probability' that the jury will be unable to follow the court's instructions, and a strong likelihood that the effect of the evidence would be 'devastating' to the defendant." *Id.*, quoting *Greer v Miller*, 483 US 756, 767 n 8; 107 S Ct 3102, 97 L Ed 2d 618 (1987)(citations omitted).

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

In this case, it cannot be said that the admission of defendant's invocation of his right to silence was inadvertent. On the other hand, defendant did not remain silent or invoke his right to counsel after his arrest. Instead, he chose to make a statement: he claimed that the gun was not his, but then he informed the officers that he did not want to talk further about the matter. Defendant's invocation of his right to silence was admitted because it was intertwined with his statement. Like *Dennis*, the prosecutor here did not attempt to affirmatively use defendant's silence against him, and because defendant did not testify, there is no possibility his post-arrest silence was impermissibly used for impeachment. *Dennis, supra* at 578-579. Moreover, the trial court gave the jury a strong cautionary instruction immediately following the testimony. Thus, the present case is far different from *Doyle*, and even less prejudicial than *Dennis*. Accordingly, no *Doyle* violation occurred here.

Furthermore, because defense counsel expressed satisfaction with the manner in which the trial court handled the situation by giving a cautionary instruction to the jury, defendant has waived any claim of error. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).

With respect to the prosecutor eliciting Grubb's hearsay statement that the gun belonged to defendant, misconduct warranting reversal did not occur. Defense counsel specifically elicited from the investigating officer that he had asked Grubbs, "Whose gun is it?" Thus, the prosecutor's redirect examination of the officer asking for Grubbs' answer to that question was an "invited response." *Jones, supra* at 353. Further, the trial court sustained the defense objection, struck the testimony, and immediately instructed the jury, and again at the end of the trial, that it was not to consider the testimony. In light of the "invited response" doctrine, and because juror's are presumed to follow the trial court's instructions, *Dennis, supra* at 581, error warranting reversal did not occur.

Moreover, defendant also waived any error on this issue. After the trial court struck the hearsay, defendant reintroduced it on further cross-examination in the process of eliciting testimony that Grubbs and the other occupant of the car never said defendant tossed the gun into the car. A party may not claim error when it contributes to the alleged error by plan or negligence. *People v Griffin*, 235 Mich App 27, 46, 597 NW2d 176 (1999). Further, a party waives alleged error by making affirmative use of otherwise inadmissible evidence. See, e.g., *People v Riley*, 465 Mich 442, 448-449; 636 NW2d 514 (2001)(defendant waived any error by affirmatively using hearsay).

In sum, any prosecutorial misconduct was cured by the trial court's instructions, *Schutte, supra* at 721, and any error regarding possible remaining prejudice has been waived, *Carter, supra* at 215; *Griffin, supra* at 46. Accordingly, defendant's argument fails. Defendant received a fair and impartial trial. *Goodin, supra* at 432.

Next, defendant argues that he was denied a fair trial when the trial court neglected to give a "missing witness" instruction[2] after res gestae witness Grubbs absconded during the trial. He also argues his trial counsel was constitutionally ineffective for not requesting the instruction. Again, we disagree.

Grubbs was a res gestae witness endorsed as a witness the prosecutor intended to call at trial. The record reflects that Grubbs was present in the courtroom when the prosecutor called him to testify. But before the prosecutor could begin his examination, defense counsel requested a hearing outside the presence of the jury. He advised that he had spoken to Grubbs and believed that Grubbs might incriminate himself if he testified. So, defense counsel requested that the trial court advise Grubbs of his Fifth Amendment right not to testify if the testimony might implicate him in a crime. The trial court advised Grubbs of his rights and offered to appoint an attorney to provide further advice. Grubbs accepted the trial court's offer of appointed counsel. Later in the afternoon, it became apparent that Grubbs had left the courthouse. The following colloquy occurred when the trial court asked the prosecutor if Grubbs had "absented himself."

> MR. VIGANSKY [Prosecutor]: He has. He currently walked out, and we don't know where or when or how. He is gone.
>
> THE COURT: Well, I guess he's not available to testify at this point. He has made himself unavailable
>
> Mr. Jordan, what's your position on that witness?
>
> MR. JORDON [Defense Counsel]: Your Honor, we are not going to request that he be produced.

The missing witness instruction[3] was not requested or given. Defense counsel expressed satisfaction with the jury instructions as given by the trial court.

We review claims of instructional error de novo. *People v Perez*, 469 Mich 415, 418; 670 NW2d 655 (2003). Unlike the former res gestae witness statute, MCL 750.40a no longer imposes a duty on the prosecutor to discover, endorse and produce all res gestae witnesses. *People v Burwick*, 450 Mich 281, 288-289; 537 NW2d 813 (1995). Rather, the Legislature has "eliminated the prosecutor's burden to locate, endorse, and produce unknown persons who might be res gestae witnesses and has addressed defense concerns to require the prosecution to give initial and continuing notice of all known res gestae witnesses, identify witnesses the prosecutor intends to produce, and provide law enforcement assistance to investigate and produce witnesses the defense requests." *Id*. at 289. Nevertheless, the missing witness instruction may be

[2] CJI2d 5.12 provides: "[Name] is a missing witness whose appearance was the responsibility of the prosecution. You may infer that this witness's testimony would have been unfavorable to the prosecution's case."

[3] CJI2d 5.12.

appropriate if the prosecutor fails to produce a witness he has endorsed for trial, MCL 767.40a(3), unless the witness's production is excused because the prosecutor exercised due diligence to produce the witness. *Perez, supra* at 420, *People v Wolford*, 189 Mich App 478, 484; 473 NW2d 767 (1991). Whether the missing witness instruction is appropriate will depend on the facts of the case involved. *Perez, supra* at 421. The trial court's decision to permit additions or deletions from the prosecutor's witness list and the fashioning of any remedy if the prosecutor has not been duly diligent, including whether to give the missing witness instruction, are reviewed for an abuse of discretion. *Burwick, supra* at 291, 298; *People v Snider*, 239 Mich App 393, 422; 608 NW2d 502 (2000).

But in this case the prosecutor fulfilled the duties imposed by the res gestae witness statute. The prosecutor produced Grubbs to testify at trial. There is nothing in the record to suggest that the prosecutor was responsible for the witness' absconding pending procurement of counsel to advise the witness of his Fifth Amendment rights. Because the prosecutor complied with MCL 767.40a the trial court had no reason to instruct the jury with CJI2d 5.12. Further, defendant waived any alleged error because defense counsel waived production of the witness after he absconded and also expressed satisfaction with jury instructions that did not contain the missing witness instruction. *Carter, supra* at 215, 218.

Defendant's claim of ineffective assistance of counsel is without merit. Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). In order to overcome the presumption, defendant must first show that counsel's performance was deficient as measured against objective reasonableness under the circumstances according to prevailing professional norms. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Second, defendant must show that the deficiency was so prejudicial that he was deprived of a fair trial such that there is a reasonable probability that but for counsel's unprofessional error(s) the trial outcome would have been different. *Id.* Because a request for the missing witness instruction would have been futile, defendant cannot establish his claim of ineffective assistance of counsel. *Id.* at 715.

Finally, defendant argues that the trial court erred by not granting his motion for new trial based on the same issues raised on appeal. We disagree.

A new trial in a criminal case may be granted on any ground that would support reversal on appeal or because the verdict resulted in a miscarriage of justice. MCR 6.431(B); MCL 770.1; *People v Crear*, 242 Mich App 158, 167; 618 NW2d 91 (2000). The trial court's decision on a motion for new trial will not be reversed absent a clear abuse of discretion. *Id.* An abuse of discretion occurs when the trial court's decision was so violative of fact and logic that it evidenced a perversity of will, a defiance of judgment, or an exercise of passion or bias. *People v Cress*, 250 Mich App 110, 149; 645 NW2d 669, vac'd in part on other grds 466 Mich 883; 646 NW2d 469 (2002), rev'd on other grds 468 Mich 678; 664 NW2d 174 (2003). Here, defendant based his motion for new trial on the same meritless issues he raises on appeal. Accordingly, the trial court did not abuse its discretion denying defendant's motion.

Defendant also argues Grubbs and Robert Henderson, the occupants of the car, would now testify favorably to him; therefore, a new trial should be granted on the basis of this newly discovered evidence. A new trial may be granted on the basis of newly discovered evidence,

when: (1) the evidence itself, and not merely its materiality, is newly discovered; (2) the evidence is not merely cumulative; (3) including the new evidence on retrial would probably cause a different result; and (4) the party could not with reasonable diligence have discovered and produced the evidence at trial. *People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003). Because defendant could have produced both Grubbs and Henderson with reasonable diligence, their testimony cannot be considered newly discovered evidence. *Id*.; MCR 2.611(A)(1)(f).

Moreover, testimony by Grubbs and Henderson would not probably cause a different result if a new trial were granted. Were Grubbs to testify favorably to defendants, he would be impeached by his statement to the police that the gun belonged to defendant and because he absconded when given the opportunity to testify. The Henderson's affidavit contains the handwritten statement, "I don't know if [defendant] threw or if [Grubbs] put the gun in the car." At best, Henderson's proffered testimony would be neutral and would not probably cause a different result.

In sum, the trial court did not abuse its discretion by denying defendant's motion for new trial because the issues raised below and on appeal lack merit. Also, a new trial is not warranted on claims that Grubbs and Henderson would testify favorably to defendant because the proffered testimony is not "newly discovered evidence." MCR 2.611(A)(1)(f); *Cress, supra* at 692.

We affirm.

/s/ Christopher M. Murray
/s/ William B. Murphy
/s/ Jane E. Markey