STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 16, 2004
v	No. 242747 Monroe Circuit Court
ROBERT GLEN ALDRED, Defendant-Appellant.	LC No. 01-031734-FH

Before: Griffin, P.J., and White and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of one count of uttering and publishing, MCL 750.249. Defendant was sentenced as a third habitual offender, MCL 769.11, to 57 months to 28 years' imprisonment. He was also ordered to pay $211.98 in restitution. We affirm.

Defendant's conviction stems from the passing of a check stolen from the complainant's home. The check was written and presented as payment at a Meijer store in Monroe County in payment for a two-way radio set the day after the check was stolen. The check was written out by the woman who accompanied defendant to the Meijer store. Defendant gave two statements to the police about his involvement in this crime. Both times he was read and waived his *Miranda*[1] rights.

Defendant first argues that the trial court erred in denying his motion for mistrial where the prosecutor improperly shifted the burden of proof by referring to defendant's failure to deny involvement in the passing of this check in either of defendant's custodial statements. We disagree.

"In order to protect the right of post-arrest silence, silence in the face of an accusation of criminal conduct cannot be used as evidence. An exception to this rule exists in cases where defendant does make a statement and the questions concerning defendant's silence relate to omissions from the statement." *People v Whitty*, 96 Mich App 403, 420; 292 NW2d 214 (1980) (citation omitted). "Evidence of a defendant's silence on certain matters may be presented to

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

elicit the full extent of a defendant's statement made to the arresting officer." *People v Siler*, 171 Mich App 246, 257; 429 NW2d 865 (1988).

When viewed in context, it is clear that the prosecutor was referring to defendant's earlier statements, and not his failure to testify at trial, and that the prosecutor's comments fall squarely within this exception. Throughout trial, defendant focused on the fact that although he made many admissions, he never indicated in his custodial statements that he had been involved in passing this particular check. In response, the prosecutor observed that defendant never denied involvement in passing this check. The prosecutor's comments regarding these omissions were appropriate in order to establish "the full extent of a defendant's statement made to the arresting officer[s,]" in the context of the defense raised at trial. *Id.* See also *People v Avant*, 235 Mich App 499, 509; 597 NW2d 864 (1999) ("Where a defendant makes statements to the police after being given *Miranda* warnings, the defendant has not remained silent, and the prosecutor may properly question and comment with regard to the defendant's failure to assert a defense subsequently claimed at trial."). Defendant opened the door to this matter, and the prosecutor took advantage of the opportunity to highlight omissions in defendant's custodial statements. *Whitty, supra.*

Defendant also argues that the trial court abused its discretion in admitting a copy of the check into evidence, in lieu of the original. Again, we disagree.

MRE 1002 provides that "[t]o prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute." Under MRE 1003, "[a] duplicate is admissible to the same extent as the original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original." MRE 1003. MRE 1001(4) defines a duplicate as "a counterpart produced by . . . means of photography . . . , or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques, which accurately reproduces the original."

Defendant did not challenge the authenticity of the original. He argues on appeal that the admission of a duplicate without a showing of what happened to the original is unfair. Similarly, defendant's argument below focused on a lack of explanation of what happened to the original. However, there is nothing in the language of MRE 1003 that requires a party to first establish that an original is unavailable before a duplicate can be admitted into evidence. *People v Johnson*, 100 Mich App 594, 598; 300 NW2d 332 (1980). We also reject defendant's assertion that either the person who wrote the check or the person(s) who supervised the reproduction of the check should have testified as to its authenticity. Such testimony was unnecessary where the Meijer store supervisor who approved acceptance of the check testified that the exhibit was a copy of the check in question.

Defendant asserts that the admission of the duplicate was unfair, but asserts no cogent explanation of why it was unfair. Further, although defendant asserts that the requirements for offering a document as a business record were not met, the check was not offered as a business record.

Affirmed.

/s/ Richard Allen Griffin
/s/ Helene N. White
/s/ Pat M. Donofrio