STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED December 4, 2008
v	No. 283934 Oakland Circuit Court
ANTHONY MARION REDD, Defendant-Appellee.	LC No. 2007-215277-FH

Before: Meter, P.J., and Talbot and Murray, JJ.

PER CURIAM.

Defendant was convicted by a jury of third-degree criminal sexual conduct (CSC III), MCL 750.520d(1)(a) (person at least 13 but under 16 years of age). Defendant thereafter filed a motion for a new trial with the trial court, and the trial court granted this motion. The prosecutor appeals from this order by delayed leave granted.[1] We reverse.

The prosecutor first argues that trial court erred in considering defendant's motion for a new trial because defendant waived the pertinent issues. We agree.[2]

We review for an abuse of discretion a trial court's decision to grant or deny a motion for a new trial. *People v Blackston*, 481 Mich 451, 460; 751 NW2d 408 (2008). We review questions of law de novo. *People v Thompson*, 477 Mich 146, 151; 730 NW2d 708 (2007).

Waiver is the "intentional relinquishment or abandonment of a known right." *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000) (internal citation and quotation marks omitted). It differs from forfeiture, which is merely the failure to raise a timely objection. *Id*. Waiver, and not forfeiture, extinguishes an error. *Id*. If a party expresses satisfaction with an action by the trial court, or contributes to an alleged error "by plan or negligence," that party has waived its right to raise the error on appeal. *Id*.; *People v Gonzalez*, 256 Mich App 212; 224; 663 NW2d 499 (2003), disapproved of on other grounds 469 Mich 966 (2003).

[1] *People v Redd*, unpublished order of the Court of Appeals, entered March 28, 2008 (Docket No. 283934).

[2] Contrary to defendant's argument, the prosecutor properly preserved this issue for appeal.

In this case, defendant based his motion for a new trial on three grounds. First, that Detective Derrance Betts improperly mentioned defendant's previous period of incarceration. Second, that Betts improperly discussed defendant's silence in the face of Betts's accusation during an interview. Third, that Betts improperly discussed defendant's conduct of prematurely leaving the interview. No objection was made with respect to the incarceration testimony. Defense counsel objected to Betts's testimony regarding whether defendant ever denied the conduct alleged by Betts. The trial court cautioned the jury, stating, "any person who's interviewed by a police officer has an absolute right to get up and leave an interview." The court further asked defense counsel, "What do you wish to have done?" Defense counsel responded, "That's the only instruction that I could have asked for, and the court responded to it immediately. So there's nothing else to . . . say." Subsequently, counsel requested an additional cautionary instruction, stating:

> Now there's one other thing that I – I forgot to do. When we talked about the instructions briefly yesterday, I – I forgot to ask the [c]ourt – and I'll ask the [c]ourt to give a – a cautionary instruction about the fact that I'm concerned about the issue of Mr. Redd going to the – to the police station and – and, ultimately, getting up and – and leaving. Okay. So I – I'm trying to, in my mind's eye to come – the – the one that I gave the [c]ourt, I was more concerned after we talked about the jail situation, that's why this one . . . ."

The court assured counsel that it would provide an additional instruction, and defense counsel stated, "That's all I want to do, your Honor . . . ." The trial court provided an additional instruction cautioning the jury not to draw improper inferences from Betts's arrest or incarceration or from his leaving the interview or choosing not to be interviewed. Defense counsel expressed satisfaction with the jury instructions.

Under the circumstances, we find that defense counsel waived any alleged error. As noted in *People v Milstead*, 250 Mich App 391, 402 n 6; 648 NW2d 648 (2002), a defendant may not "assign error on appeal to something which his own counsel deemed proper at trial" (internal citation and quotation marks omitted). We find this doctrine analogous to a situation in which a defendant seeks a new trial with the trial court, after earlier deeming an alternative remedy proper. Here, defense counsel, in discussing the cautionary instructions, stated, "That's all I want to do, your Honor . . . ." We consider this an abandonment of the right to seek other remedies with respect to the issue.

The prosecutor further argues that the trial court abused its discretion in granting defendant's motion for a new trial because there was no error worthy of a new trial introduced by Betts's testimony. Again we agree.

First, the trial court erred in concluding that defendant's silence was constitutionally protected. Conduct, including silence, that does not occur during a custodial interrogation or in reliance on *Miranda*[3] warnings is not constitutionally protected. *People v Shafier*, 277 Mich App

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

137, 139-140, 142; 743 NW2d 742 (2007), lv granted 480 Mich 1193 (2008); *People v Schollaert*, 194 Mich App 158, 166-167; 486 NW2d 312 (1992). Defendant voluntarily attended the interview with Betts. He had not been arrested and was free to leave the interview. He was never read his *Miranda* warnings. Thus, the trial court erred in concluding that evidence of defendant's silence was inadmissible because it was constitutionally protected.

Defendant argues that he was nevertheless entitled to a new trial under the rationale of *People v Bigge*, 288 Mich 417; 285 NW 5 (1939). *Bigge* prohibits the use of tacit admissions as substantive evidence of a defendant's guilt. See *People v Hackett*, 460 Mich 202, 213-214; 596 NW2d 107 (1999), and *People v Solmonson*, 261 Mich App 657, 664-665; 683 NW2d 761 (2004). A tacit admission occurs if someone "adopt[s] through silence an assertion of another as one's own statement." *Solmonson*, *supra* at 665. "The *Bigge* rule denies admissibility because the inference of relevancy rests solely on the defendant's failure to deny." *People v McReavy*, 436 Mich 197, 213; 462 NW2d 1 (1990).

To implicate the *Bigge* rule, there must have been a statement about which the defendant manifested an adoption or belief in its truth. *Solmonson*, *supra* at 666. The "statement" must conform to the definition set forth in MRE 801(a), which defines "statement" as "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." *Solmonson*, *supra* at 666.

Betts testified that he "just brought up about the criminal sexual conduct against [the complainant]" and that defendant "never denied it. He – he just – he just sat there, and . . . he made a comment about the back of the car." Betts stated that he advised defendant of the allegations of something occurring on the kitchen floor, and defendant "never denied it." Betts later explained that he "told [defendant] that he was being accused of a criminal sexual conduct. I don't believe I came right out and asked him did he do it, 'cause he never did respond to a question." Betts did not provide any details regarding exactly what he said to defendant. He "brought up" the criminal sexual conduct allegations and "advised" defendant of those allegations. This does not mean that he made an "assertion," which is required for there to be a statement as defined by MRE 801(a). An "assertion" is a "positive statement or declaration." Random House Webster's College Dictionary (1997, 2d ed). There is no indication that Betts made a "positive statement or declaration" to which defendant's silence might be construed as an admission of truth. As in *Solmonson*, *supra* at 666, there was "no oral, written, or nonverbal conduct intended as an assertion that defendant adopted as his own statement."[4] Accordingly, no *Bigge* violation occurred.

Finally, we note that any prejudice arising from the brief reference to defendant's incarceration was cured by the court's limiting instruction. See, generally, *People v Lumsden*, 168 Mich App 286; 423 NW2d 645 (1988).

[4] Defendant appears to argue on appeal that Betts revealed the existence of an "assertion" during questioning by the trial court, but we do not read the record in this manner.

We conclude that the trial court abused its discretion in granting defendant's motion for a new trial.

Reversed.

/s/ Patrick M. Meter
/s/ Michael J. Talbot
/s/ Christopher M. Murray