STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 24, 2009
v	No. 283217 Oakland Circuit Court
EDWIN FRANKLIN HALL, Defendant-Appellant.	LC No. 2007-216267-FH

Before: Cavanagh, P.J., and Fort Hood and Davis, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of felonious assault, MCL 750.82. He was sentenced as an habitual offender, second offense, MCL 769.10, to a prison term of 1-1/2 to 6 years. He appeals as of right. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

The complainant testified that she and defendant argued because she would not sit next to him. She asked him to leave. He went outside and tried to take their dog. She started running after the dog and felt "something like hurt her arm, like it felt like a whip," but did not see anything. She turned and defendant was running away. She called 911. The recording of her call was played for the jury. A photograph of her injury and her statement to the police was also admitted.

Joshua Baughman, defendant's roommate and a friend of both defendant and the complainant, did not see defendant strike the complainant, but heard the sound of a slap. When Baughman turned, he saw defendant running from the complainant. Defendant asked Baughman to check on her. She was conversing on the phone. She was crying and appeared upset. When Baughman asked her if she was okay, she responded, "Does this look like I'm okay?" and displayed a black mark on her arm.

Deputy Sheriff Weir arrived at the scene and the complainant told him that defendant struck her with a belt. Weir observed bruising, redness, and a break in the skin. Efforts to contact defendant to interview him were unsuccessful. At some point, defendant "came in on his own."

Defendant argues that the prosecution violated his due process rights by introducing evidence that he failed to complete and return a written statement to police before his arrest. Defendant bases this claim of error on the following exchange:

> *Q.* . . . [D]o you know whether the defendant was given an opportunity to give you, as the officer-in-charge, his side of this?
>
> *A.* Yes, sir.
>
> *Q.* Tell me about that.
>
> *A.* Mr. Hall came into the substation in Addison Township. There was a detective/sergeant and a deputy on duty, at which time Mr. Hall was given a written witness statement form and asked to provide a statement. And he left and never returned with the statement.
>
> *Q.* So he took the witness statement, the blank witness statement and just left the building?
>
> *A.* Yes, sir.
>
> *Q.* Did you ever hear from him since that time?
>
> *A.* No, sir.

Defendant argues that, through these questions, the prosecutor improperly used his prearrest silence as substantive evidence of guilt.

Because defendant did not object to the challenged testimony, we review this issue for plain error pursuant to *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). No plain error occurred. The admission as substantive evidence of testimony concerning a defendant's silence before custodial interrogation and before *Miranda*[1] warnings have been given is not a violation of the defendant's constitutional rights. *People v Schollaert*, 194 Mich App 158, 164-166; 486 NW2d 312 (1992). "The defendant's right to due process is implicated only where his silence is attributable to either an invocation of his Fifth Amendment right or his reliance on the *Miranda* warnings." *People v Solmonson*, 261 Mich App 657, 664-665; 683 NW2d 761 (2004). See, also, *People v Dunham*, 220 Mich App 268, 274; 559 NW2d 360 (1996) (no error in introducing testimony that the defendant canceled a scheduled interview with the police). There is no indication that defendant invoked his right to silence in the present case. Defendant's reliance on *Combs v Coyle*, 205 F3d 269 (CA 6, 2000), is misplaced because that case is distinguishable. In *Combs*, the defendant invoked his right to silence by requesting a lawyer. *Id*.

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

at 286. The prosecutor's questioning in this matter was not plain error. Further, because the evidence was not improper, trial counsel was not ineffective for failing to object. *Solmonson*, *supra* at 667-668.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood
/s/ Alton T. Davis