STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 30, 2009
v	No. 283791 Wayne Circuit Court
JOHNNY D. WALKER, Defendant-Appellant.	LC No. 07-012127-FH

Before: Wilder, P.J., and Meter and Fort Hood, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of carrying a concealed weapon, MCL 750.227, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent prison terms of nine months to five years each for the CCW and felon in possession convictions, and to a consecutive two-year prison term for the felony-firearm conviction. He appeals as of right. We affirm defendant's convictions and sentence for felony-firearm, and we also affirm his convictions for CCW and felon in possession, but we vacate his sentences for CCW and felon in possession and remand for resentencing.

I. Basic Facts

Defendant's convictions arose from allegations that on the evening of July 6, 2007, he was driving his minivan while armed with a handgun, shot himself in the leg while driving, and crashed into a parked vehicle. In contrast, defendant claimed that he was shot during an attempted carjacking. At trial, Dominick Wiggins, the son of defendant's friend, Frederick Wiggins, testified that defendant was at his house with his father and uncles, and he later saw defendant drive away in his minivan. Dominick subsequently heard a crash and a gunshot, but did not know which sound came first because they were "like all together." Frederick did not hear the crash or the shot, but went to the scene after Dominick told him what he heard. When Frederick walked down the street, he saw that defendant had crashed his van and was non-responsive; blood and a gun were on the floor of the van. The doors were closed, but Frederick could not recall if the windows were also closed. Frederick opened the passenger door, leaned in, and pushed defendant off the steering wheel. The police then arrived.

Among the police officers who responded were Officer Mario White and an evidence technician. Both officers testified that defendant's minivan struck a parked pickup truck, causing significant damage. Defendant was in the driver's seat, slumped over the steering wheel, and bleeding heavily from his left leg. There was a great deal of blood on the driver's seat, the interior of the driver's door, and on the driver's side floor, but no blood on the window. The officers indicated that the windows and doors of the minivan were closed and nothing was broken. A loaded, nine-millimeter, semi-automatic handgun was on the driver's side floorboard underneath defendant's leg, and one spent shell casing was on the floor between the driver's seat and the driver's door. White noticed a strong odor of alcohol emanating from defendant's vehicle. When White asked defendant what happened, defendant was not coherent and did not respond. White called for emergency medical personnel, who arrived five minutes later. White explained that defendant began to speak as he was being treated for the gunshot wound, and he again asked defendant what happened. According to White, defendant was groggy, but said, "I accidentally shot myself in the leg." White did not ask defendant any further questions, although defendant remained conscious. Defendant was transported to the hospital, and the minivan was impounded.

Defendant testified that he drank a couple of beers during the 20- or 30-minute visit at the Wiggins' house. He left, proceeded down the street, stopped at a stop sign, and started to drive away when a person approached the driver's side and pointed a gun at him. While the person was pointing the gun, defendant grabbed the person's arm, drove off, and dragged the person as he traveled down the street. Defendant crashed, blacked out, and did not know he had been shot until he woke up in the hospital. Defendant denied being awake at the scene of the accident or talking to any police officers, and had no recollection of being removed from his minivan or being treated by emergency medical personnel. Defendant indicated that about a week later, he went to the police station to make a report and to obtain his minivan. He was told to return because the lead officer was not there. Defendant and his wife went to the police station a second time, but only his wife went inside. When he went to the precinct a third time, he spoke with the lead officer, Investigator James Fisher. Defendant claimed that he tried to tell Fisher what happened, but he "didn't want to hear it" and arrested him. On cross-examination, defendant explained that he intentionally crashed into the pickup truck because he wanted "to run" the person into an object. He could not answer if he was shot before or after he hit the parked truck. He maintained that his windows were rolled down.

Investigator Fisher was called in rebuttal. Fisher responded to the scene, observed emergency medical personnel attending to defendant, and spoke to defendant briefly, and defendant provided his name. The windows on the driver and passenger sides of the van were closed. Fisher indicated that when defendant came to the police station with his wife, the purpose was to retrieve the minivan, not to make a report. Because Fisher had completed his investigation, read White's report, and made a "determination," he advised defendant of his *Miranda*[1] rights and interviewed him. Defendant claimed that he was the victim of an attempted carjacking, but could not provide a description of the perpetrator, and Fisher indicated that he did not believe him. Defendant allegedly put his head down, paused, looked up, and said, "I'm

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

going to prison. I think I need to consult an attorney." Everything ceased, and defendant was arrested. On cross-examination, Fisher indicated that he did not include defendant's oral statement in the Investigator's Report because it was not a written statement.

II. Rebuttal Evidence

Defendant argues that evidence of an unrecorded admission as rebuttal evidence denied him a fair trial. We disagree. The admissibility of rebuttal evidence is within the discretion of the trial court and the court's decision "will not be disturbed absent a clear abuse of discretion." *People v Figgures*, 451 Mich 390, 398; 547 NW2d 673 (1996). However, because defendant failed to object to this evidence below, we review this claim for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

During defense counsel's direct examination of defendant, the following exchange occurred:

Q. Were you able to tell the officer [Fisher] what happened?

A. He didn't want to hear it.

Q. What happened after that?

A. After that, I was placed under arrest.

During the prosecutor's cross-examination of defendant, the following occurred:

Q. Okay. All right. And you never gave a description of this person to the police, did you?

A. They never came up and asked me for one.

Q. So, because the police didn't ask when they talked to you, when you talked to Investigator Fisher, you didn't think it was important to give him a description?

A. I explained to him. He had typed it on the computer and told me to quit blowing smoke up his ass.

* * *

Q. Okay. All right. And isn't it true, sir, that the reason you went to the police station was not to report a crime, but to get your van back from impound?

A. It was to report the crime first, then locate the van. That's when Officer Fisher said quit blowing smoke up his ass.

The prosecutor thereafter called Investigator Fisher and questioned him about his contact with defendant at the police station before defendant's arrest:

Q. All right. And when you came in contact with the defendant, Johnny Walker, what did you do?

A. The contact I had with him was in regards to him getting his minivan back. It was not in regards to making a report. They were adamant about getting this minivan back. So, that was the first conversation.

In the interim of speaking about the minivan, at that point in time, because I had already conducted my investigation and made my determination, I advised Mr. Walker of his constitutional rights. And at that point, we sat at my desk and I began speaking with him about the incident.

Q. Okay. All right. Was he under arrest at that time now?

A. At that particular point in time, no. He was not.

Q. Okay. And did he agree to talk to you about what had happened?

A. Yes. He did.

Q. Okay. And what happened when you talked?

A. Basically, he attempted to give me a scenario as far as somebody tried to carjack him. However, he could not give me any type of description of this person or what the person looked like, what they were wearing, or anything.

After he tried to do that, that's when I confronted him and let it be known that he was not telling the truth. At that point, Mr. Walker put his head down and paused. *And then he looked back up at me and said, I'm going to prison. And he said, I think I need to consult an attorney*. And at that point, everything ceased.

Q. Okay. So, then was he arrested at that point in time?

A. Yes. He was. [Emphasis added.]

In *Figgures, supra* at 399, our Supreme Court explained the proper purpose and scope of rebuttal evidence:

> Rebuttal evidence is admissible to contradict, repel, explain or disprove evidence produced by the other party and tending directly to weaken or impeach the same. The question whether rebuttal is proper depends on what proofs the defendant introduced and not on merely what the defendant testified about on cross-examination. . . . [T]he test of whether rebuttal evidence was properly admitted is not whether the evidence could have been offered in the prosecutor's case in chief, but, rather, whether the evidence is properly responsive to evidence introduced or a theory developed by the defendant. As long as evidence is responsive to material presented by the defense, it is properly classified as

rebuttal, even if it overlaps evidence admitted in the prosecutor's case in chief. [Internal citations and quotation marks omitted.]

Defendant has not established a plain error in the admission of the rebuttal evidence. We agree with plaintiff that the overall impression of defendant's testimony was that he went to the police station to report a crime, did not fully have an opportunity to give his version of the events, and was arrested only because Fisher did not believe him when he attempted to explain his version of the events. The evidence that defendant's purpose was to procure his minivan and not to report a crime, and that the interview ceased and he was arrested *after* his oral statement, contradicted or explained defendant's testimony and tended directly to weaken the same. *Id*. Further, the rebuttal evidence was "narrowly focused on refuting the witness' statements." See *People v Spanke*, 254 Mich App 642, 644-645; 658 NW2d 504 (2003). We note that the prosecutor did not mention the unrecorded statement in closing argument, or otherwise improperly discuss it.

Further, even if the rebuttal evidence could be considered plain error, it was not outcome-determinative. Two officers explained the damaging evidence in the case, including the location of the gun and blood inside the van, that the windows and doors of the van were closed, and that no windows were broken. There was evidence that defendant had been drinking. Also, there was evidence that defendant told Officer White at the scene that he "accidentally shot himself in the leg." Given the compelling evidence in this case, it is highly improbable that the challenged rebuttal evidence affected the outcome of the proceedings. *Carines, supra* at 763.

III. Failure to Disclose the Unrecorded Statement

Defendant argues that the "surprise" introduction of the unrecorded statement was a "'trial-by-ambush' tactic" that denied him a fair trial. We disagree. Again, because defendant failed to object to this evidence below, we review this claim for plain error affecting substantial rights. *Id*. at 763-764.

Pursuant to MCR 6.201(B)(3), a prosecutor must disclose "any written or recorded statements" by a defendant. Because the oral statement was not evidenced in any writing signed, adopted, or approved by defendant, or contemporaneously recorded, it was not a "statement" as defined by the court rules. MCR 2.302(B)(3)(c). Although defendant acknowledges that MCR 6.201(B)(3) may not apply, he argues that the prosecution was obligated to produce the unrecorded statement pursuant to Fed R Crim P 16(a)(1)(A), which provides:

> Defendant's Oral Statement. *Upon a defendant's request*, the government must disclose to the defendant the substance of any relevant oral statement made by the defendant, before or after arrest, in response to interrogation by a person the defendant knew was a government agent *if the government intends to use the statement at trial*. [Emphasis added.]

Even under the federal court rules, which are not applicable in this state prosecution, defendant has not established a plain error. Defendant has not shown that he made a proper request for any unrecorded statements. As the appellant, defendant is required to do more than merely announce his position and leave it to this Court to discover and rationalize the basis for

his claim. See *Goolsby v Detroit*, 419 Mich 651, 655 n 1; 358 NW2d 856 (1984). Further, because the statement was not presented during the prosecution's case in chief, it is apparent that the prosecution did not intend to use it as evidence at trial. Finally, as previously indicated, any error in the admission of the unrecorded statement was not outcome-determinative and, thus, did not affect defendant's substantial rights. *Carines*, *supra* at 763. For these reasons, defendant is not entitled to appellate relief.

IV. Use of the Unrecorded Statement as Evidence of Defendant's Silence

Defendant further argues that the admission of the unrecorded statement constituted improper evidence of his post-*Miranda* silence and request for an attorney. We disagree. We review this unpreserved issue for plain error affecting substantial rights. *Id*.

"The Fifth Amendment and Const 1963, art 1, § 17 provide that no person shall be compelled to be a witness against himself in a criminal trial." *People v Schollaert*, 194 Mich App 158, 164; 486 NW2d 312 (1992). Accepting that defendant actually invoked his right to remain silent, defendant is not entitled to a new trial. Generally, testimony concerning a defendant's post-*Miranda* silence is inadmissible. *Doyle v Ohio*, 426 US 610, 619-620 n 11; 96 S Ct 2240; 49 L Ed 2d 91 (1976); *People v Crump*, 216 Mich App 210, 214; 549 NW2d 36 (1996), lv den 454 Mich 877 (1997). However, testimony regarding a defendant's silence properly may be admitted for a reason other than to contradict a defendant's assertion of innocence. *Id*. at 214-215. Evidence of a defendant's silence may be used to rebut an inference raised by the defense that the defendant was treated unfairly by the police, such as where it is suggested that the police did not afford the defendant an opportunity to present his side of the story. *Id*. ("the door was opened to the prosecutor").

As discussed in part II, defendant testified that he tried to report that he was carjacked, but Fisher "didn't want to hear it," told him to "quit blowing smoke up his ass," and arrested him. On rebuttal, the prosecutor elicited from Fisher that after waiving his *Miranda* rights, defendant gave his version of events, Fisher told defendant that he was not telling the truth, and defendant then stated, "I'm going to prison. I think I need to consult an attorney." At that point, everything ceased and defendant was arrested. We conclude that under the entirety of these circumstances, there was no plain error in permitting Fisher's testimony in response to the defense implication that defendant was treated unfairly and not afforded an opportunity to fully explain his version of the events. *Id*.[2] Moreover, as noted earlier, any error in the admission of the statement was not outcome-determinative and, thus, did not affect defendant's substantial rights. *Carines*, *supra* at 763.

[2] Admittedly, it is not entirely clear whether defendant is claiming that he attempted to explain his version of events *before being read his* Miranda *rights* but was denied the opportunity, in which case the "door" to admitting the post-*Miranda* statement in question might not have been opened under the analysis in the recent Supreme Court case of *People v Borgne*, ___ Mich ___; ___ NW2d ___ (2009) (Docket No. 134967, decided July 1, 2009), slip op at p 18. However, as we note, any error in the admission of the statement did not affect defendant's substantial rights.

V. Effective Assistance of Counsel

We reject defendant's alternative argument that he was denied the effective assistance of counsel because defense counsel failed to object to the unrecorded statement made to Investigator Fisher. Given the admissible evidence against defendant, there is no basis for concluding that there is a reasonable probability that, but for counsel's failure to object, the jury's verdict would have been different. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995).

VI. Admission of Inadmissible Hearsay

Defendant also argues that he was denied his rights of confrontation and to a fair trial when Investigator Fisher testified about "damaging" statements from unidentified witnesses. We disagree.

During defense counsel's cross-examination of Fisher, the following exchange occurred:

> *Q.* You indicated that - - Did you yourself canvass or speak to neighbors or speak to individuals out there?
>
> *A.* That's correct. I did.
>
> *Q.* Besides the two Wiggins reports that we have, did you take any reports down from any other individuals?
>
> *A.* No. I did not.
>
> *Q.* So, your investigation ceased after you believed that my client had shot himself?
>
> *A.* That's fair to say. From my scene investigation, everything - - that's correct.

Thereafter, during the prosecutor's redirect examination of Fisher, he revisited that line of questioning:

> *Q.* Okay. Now while you were at the scene that particular night, the night of the accident, besides the statements from the Wiggins, why didn't you take any other statements from anyone else?
>
> *A.* They were really – Excuse me. In my opinion, no need to really take statements from anyone else because everyone that I spoke with was along the same lines as far as their consistently that they didn't observe the actions that the defendant got up here and tried to state happened.
>
> The vehicle was rolling down the street. They heard a gunshot coming from within the vehicle, then - -
>
> *Defense counsel*: (Interposing) I'm going to object.

[*Fisher*]: The crash.

Defense counsel: As to hearsay. Now, we're saying somebody else told him something. And that's hearsay coming in.

The court: All right. I'll sustain it.

Defendant asserts that, despite his objection and the trial court's ruling, he was nonetheless denied a fair trial because he did not have an opportunity to confront these unnamed witnesses. However, defendant obtained a favorable ruling and did not request any further action by the trial court. The prosecutor did not discuss these statements further. In its final instructions, the court instructed the jury to decide the case based only on the properly admitted evidence, and to follow the court's instructions. Jurors are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Further, we note that defendant invited the testimony he now challenges. Defendant suggested that Fisher determined that defendant shot himself without fully investigating the matter, i.e., without taking more witness statements. The challenged testimony was made in the context of Fisher explaining why he did not take more statements, and why he considered the police investigation complete. A defendant cannot complain of testimony that he invited or instigated in an effort to support his defense. In other words, defendant "opened the door" to the challenged evidence. See, generally, *People v Lipps*, 167 Mich App 99, 108; 421 NW2d 586 (1988), and *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995), lv den 453 Mich 977 (1996). Defendant was not denied a fair trial.

VII. Sentencing

Defendant's last argument is that he is entitled to be resentenced because the trial court did not articulate a substantial and compelling reason for departing from the sentencing guidelines when sentencing him to concurrent prison terms of nine months to five years' imprisonment for his CCW and felon in possession convictions rather than an intermediate sanction. The prosecution concedes this issue, and we agree. "The proper interpretation and application of the legislative sentencing guidelines are questions of law, which this Court reviews de novo." *People v Cannon*, 481 Mich 152, 156; 749 NW2d 257 (2008).

Under the sentencing guidelines statute, the trial court must ordinarily impose a minimum sentence within the sentencing guidelines range. MCL 769.34(2) and (3); *People v Babcock*, 469 Mich 247, 272; 666 NW2d 231 (2003). In this case, the sentencing guidelines range was zero to nine months. However, if the upper limit of the recommended sentence range is 18 months or less,

> the court shall impose an intermediate sanction unless the court states on the record a substantial and compelling reason to sentence the individual to the jurisdiction of the department of corrections. An intermediate sanction may include a jail term that does not exceed the upper limit of the recommended minimum sentence range or 12 months, whichever is less. [MCL 769.34(4)(a).]

Even though the nine-month minimum sentences do not exceed the upper end of the range established by the sentencing guidelines, MCL 769.34(4)(a) required the court to impose an intermediate sanction unless it stated a substantial and compelling reason to impose a prison sentence. The court did not set forth any substantial and compelling reasons for its sentence. Consequently, as plaintiff concedes, defendant is entitled to be resentenced for the CCW and felon in possession convictions. MCL 769.34(11). We therefore vacate defendant's CCW and felon in possession sentences and remand for resentencing. On remand, the trial court must sentence defendant to an intermediate sanction, or articulate on the record a substantial and compelling reason for imposing a prison sentence in accordance with *Babcock* and *People v Smith*, 482 Mich 292, 300, 318; 754 NW2d 284 (2008) (even where a departure is warranted, "a trial court must justify why it chose the particular degree of departure").

We affirm defendant's convictions and his sentence for felony-firearm, and we also affirm his convictions for CCW and felon in possession, but we vacate his sentences for CCW and felon in possession and remand for resentencing. We do not retain jurisdiction.

/s/ Kurtis T. Wilder
/s/ Patrick M. Meter
/s/ Karen M. Fort Hood