

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRIAN KEITH COLEMAN,

Defendant-Appellant.

UNPUBLISHED

October 26, 2010

No. 292804

St. Joseph Circuit Court

LC No. 08-015269-FC

Before: HOEKSTRA, P.J., and FITZGERALD and STEPHENS, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for armed robbery, MCL 750.529, first-degree home invasion, MCL 750.110a(2), and two counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. We affirm.

I. BASIC FACTS

Defendant's convictions arise from a robbery that occurred on July 29, 2008. Defendant and an accomplice, his son, approached the complainant as she was smoking outside her apartment. Defendant was armed with a shotgun and ordered the complainant into the apartment. Once inside, defendant demanded cash and drugs. The complainant initially refused, but cooperated after defendant cocked the shotgun and held it to the back of her head while threatening to kill her. Defendant and his accomplice exited the apartment after obtaining two wallets and a quantity of marijuana.

II. PROSECUTORIAL MISCONDUCT

Defendant first maintains he is entitled to a new trial because the prosecutor violated his right to remain silent by emphasizing during defendant's cross-examination the two-month time period that passed before defendant provided an exculpatory statement. Defendant further maintains the prosecutor compounded this error when he again commented on the timing of the exculpatory statement during closing arguments. We disagree.

Defendant objected to the prosecutor's statements during defendant's cross-examination, and the trial court ruled on this issue. Thus, this portion of defendant's argument was preserved. Preserved constitutional claims of error are reviewed de novo. *People v Geno*, 261 Mich App 624, 627; 683 NW2d 687 (2004). However, defendant did not object to the prosecutor's

reference to the delay during closing argument and has thus failed to preserve that portion of his argument. *People v Barber*, 255 Mich App 288, 296; 659 NW2d 674 (2003). Our review of defendant's unpreserved claim of prosecutorial error is for outcome-determinative, plain error. *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008).

The test for prosecutorial misconduct is whether the defendant was deprived of a fair trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995). Claims of prosecutorial misconduct are reviewed on a case-by-case basis and the challenged remarks are reviewed in context. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). Moreover, error requiring reversal will not be found where a curative instruction could have alleviated any prejudicial effect. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003).

Generally, the credibility of a witness may be attacked by showing that he failed to speak or act when it would have been natural to do so if the facts were in accordance with his testimony. *People v Martinez*, 190 Mich App 442, 446; 476 NW2d 641 (1991). However, the constitutional privilege against self-incrimination and the right to due process can restrict the use of a defendant's silence in a criminal trial. *Doyle v Ohio*, 426 US 610, 618; 96 S Ct 2240; 49 L Ed 2d 91 (1976). Our Supreme Court has recognized the *Doyle* framework prohibiting the use of a defendant's silence in cases where the defendant maintains his silence after receiving "governmental assurances." *People v Cole*, 411 Mich 483, 488; 307 NW2d 687 (1981); *People v Borgne*, 483 Mich 178, 184; 768 NW2d 290, aff'd on reh 485 Mich 868; 771 NW2d 745 (2009). However, the *Doyle* rule's prohibition against the use of a defendant's silence for impeachment purposes does not apply "if the silence occurred either (1) before arrest or (2) after arrest and before *Miranda*¹ warnings were given." *Borgne*, 483 Mich at 187, citing *Fletcher v Weir*, 455 US 603, 605-607; 102 S Ct 1309; 71 L Ed 2d 490 (1982); *Jenkins v Anderson*, 447 US 231, 239-240; 100 S Ct 2124; 65 L Ed 2d 86 (1980).

In the instant case, the record is unclear as to whether defendant's silence occurred subsequent to being given *Miranda* warnings. If we were to conclude that *Miranda* warnings were not administered, the *Doyle* rule would not apply in this case, and we could easily conclude that it was permissible to impeach defendant's exculpatory testimony with his silence. *Borgne*, 483 Mich at 187. Yet, even if we assume for the sake of argument that defendant was given *Miranda* warnings prior to his silence, thereby invoking the protections of the *Doyle* rule, we nevertheless conclude that defendant is not entitled to a new trial.

The prosecution's initial reference to defendant's silence occurred during defendant's cross-examination. Defendant's timely objection to this line of questioning prompted the trial court to instruct the jury that it should make no inference based on the fact that defendant had not provided a statement to the police and to reiterate that defendant had no obligation to make a statement, either at the time of his arrest or anytime later.² We can presume this instruction

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

² We reject defendant's argument that the trial court merely informed the jury that defendant had no obligation to talk to police and should have provided additional instruction, specifically

would have cured any error related to the prosecution's questions and that the jury followed this instruction. See *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). Thus, defendant cannot show he was prejudiced by the prosecutor's questions.

The prosecutor's reference to the delayed exculpatory statement during closing argument also does not warrant a new trial. To the extent the comment could be said to give the jury license to treat the prior silence as substantive evidence of guilt, an objection, and another curative instruction to remind the jury of the proper use of this evidence, would have been likely to cure any prejudice. Therefore, because defense counsel failed to object and the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction, defendant cannot show error requiring reversal. *Unger*, 278 Mich App at 235; *Callon*, 256 Mich App at 329-330.

We find the present case analogous to *Borgne*. In *Borgne*, the prosecution referred to the defendant's silence both during cross-examination and during closing argument. *Borgne*, 483 Mich 188. The *Borgne* Court determined that the *Doyle* rule was applicable because the record was clear that the defendant's silence had occurred post-arrest and post-*Miranda* warnings, but nevertheless concluded that the defendant was not entitled to a new trial because of the limited nature of the improper remarks, coupled with the strength of the other evidence against the defendant. *Id.* at 197-198. Just as the defendant in *Borgne* failed to demonstrate sufficient prejudice to require a new trial, so too has defendant in this case.

Thus, we hold that the prosecutor's use of defendant's silence to impeach defendant's exculpatory statement and testimony was not a violation of defendant's right to due process that requires reversal because defendant has failed to demonstrate he was prejudiced by the alleged errors. The trial court's admonition to the jury after the prosecutor's cross-examination questioning was in line with the permitted use of defendant's silence, and the prosecutor's brief reference to the delay during closing argument could have been addressed by a timely objection.

III. INEFFECTIVE ASSISTANCE

Defendant next argues he is entitled to a new trial because he was denied the effective assistance of counsel due to defense counsel's failure to object to the admission of a shotgun at trial. We disagree.

Defendant did not move for a new trial on the basis of ineffective assistance of counsel, and failed to request a *Ginther*³ hearing before the trial court. Therefore, his claim of ineffective assistance of counsel is not preserved. *People v Sabin (On Second Remand)*, 242 Mich App 656, 659; 620 NW2d 19 (2000). Our review of an unpreserved claim of ineffective assistance of

requiring them to disregard the testimony. Our review of the record demonstrates that the trial court also instructed the jury that it "should take nothing from the fact that he didn't make a statement to the police officer." This instruction was sufficient to convey that defendant's silence could not be considered to convict him.

³ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

counsel is limited to mistakes apparent on the record. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002).

Effective assistance of counsel is presumed, and a defendant bears a heavy burden of proving otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). In order to prevail on a claim of ineffective assistance of counsel, defendant must show: 1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; 2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different; and 3) the resultant proceedings were fundamentally unfair or unreliable. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

Defendant argues that defense counsel rendered ineffective assistance when he failed to object to the introduction of the shotgun because the prosecution did not lay a proper foundation for its admission. In order to admit physical evidence, such as the shotgun at issue here, "a prosecutor must lay a foundation identifying the items as what they are purported to be and displaying that the items are connected with the accused or the crime." *People v Jennings*, 118 Mich App 318, 322; 324 NW2d 625 (1982). But "such identification is not required to be absolute or certain." *People v O'Brien*, 113 Mich App 183, 204; 317 NW2d 570 (1982). "In short, there must be sufficient evidence of (1) the exhibit's identity and (2) its connection to the crime to support its admission at trial." *People v Hence*, 110 Mich App 154, 162; 312 NW2d 191 (1981). See also MRE 901 (the requirement of authentication is satisfied by evidence "sufficient to support a finding" that the evidence is what its proponent claims). Ultimately, as long as the prosecution presents some evidence of the exhibit's identity and a connection between the exhibit and the crime, objections regarding the sufficiency of the exhibit go to the weight of the evidence, rather than its admissibility. *Hence*, 110 Mich App at 161; *People v Burrell*, 21 Mich App 451, 456-457; 175 NW2d 513 (1970).

Here, the prosecution established a sufficient foundation to permit the introduction of the shotgun. At trial, the complainant identified the shotgun produced by the prosecution as the gun defendant held to her head during the robbery based on its appearance, as well as the sound it made when it was cocked. We are not unmindful of the complainant's at-times conflicting testimony related to the features of the weapon used during the robbery. However, during redirect examination, she stated that she was "pretty sure" that the gun presented was the one that had been pointed at her. A witness is not required to positively identify the weapon as being the weapon used in the crime. *Hence*, 110 Mich App at 162. Thus, the complainant's testimony, taken as a whole, was sufficient to connect the weapon to the crime and to defendant.

In addition to the complainant's direct testimony, other evidence was presented to connect defendant to the shotgun. The shotgun was found by police in the trunk of a white Grand Am owned by the girlfriend of defendant's son, who acted as defendant's accomplice. Defendant's younger son testified that defendant arrived with his other son in a white Grand Am or Grand Prix that belonged to the accomplice's girlfriend. Defendant admitted that he did, in fact, ride to Sturgis and back to Kalamazoo in a white Grand Am. And while defendant did not acknowledge directly that the white Grand Am in which the shotgun was found was the one he rode in, he did identify a jacket (alternately described as a shirt) that the officers found in the car as his son's jacket. Moreover, the complainant identified a Detroit Tigers baseball cap found in

the backseat of the car that the shotgun was discovered in as the one worn by defendant's accomplice during the robbery.

When considered together, the evidence presented below tied the shotgun to defendant and to the robbery, despite the complainant's apparent confusion over whether the shotgun was snapped together or whether the sound she heard was the cocking of the shotgun. Thus, defense counsel was not ineffective for failing to object to the prosecutor's introduction of this evidence. See *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003). ("[C]ounsel does not render ineffective assistance by failing to raise futile objections.").

Affirmed.

/s/ Joel P. Hoekstra
/s/ E. Thomas Fitzgerald
/s/ Cynthia Diane Stephens