STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARWIN WAYNE AVERY,

Defendant-Appellant.

UNPUBLISHED
September 28, 1999

No. 210685
Saginaw Circuit Court
LC No. 97-014674 FH

Before: Talbot, P.J., and Fitzgerald and Markey, JJ.

PER CURIAM.

Defendant appeals by right his jury conviction of possession with intent to deliver under fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv), and his sentencing as a fourth habitual offender, MCL 769.12; MSA 28.1084, to eight to twenty years' imprisonment. We affirm.

Defendant contends that the prosecutor improperly questioned a police witness regarding defendant's assertion of his right to silence and then, in closing argument, suggested to the jurors that they could use defendant's invocation of his right as evidence of his guilt. Defendant did not object to these alleged instances of prosecutorial misconduct at trial. Therefore, this Court will only review this issue to determine if any misconduct was so egregious that a curative instruction would have been insufficient to overcome the prejudice to defendant, or if manifest injustice would result from our failure to review the alleged misconduct. *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996). We find neither egregious misconduct nor manifest injustice.

Our Supreme Court has held that, in appropriate circumstances, a prosecutor may properly introduce evidence concerning a defendant's post-*Miranda*[1] statements, demeanor, and silence, including his refusal to answer certain questions. *People v Sholl*, 453 Mich 730, 732-738; 556 NW2d 851 (1996); *People v McReavy*, 436 Mich 197, 217-222; 462 NW2d 1 (1990); *People v Sutton (After Remand)*, 436 Mich 575, 579-580; 464 NW2d 276, amended 437 Mich 1208 (1990). This Court has likewise held that a prosecutor may properly question witnesses and comment in closing argument on the defendant's failure to offer an exculpatory statement regarding a defense that he

subsequently claims at trial. *People v Avant*, 235 Mich App 499, 509; ___ NW2d ___ (1999); *People v Davis*, 191 Mich App 29, 33-36; 477 NW2d 438 (1991).

Considered in context, *People v Bahoda*, 448 Mich 261, 267, 277; 531 NW2d 659 (1995), the prosecutor's questioning at trial was directed at establishing that defendant lied about who owned the car in which defendant was arrested (and in which the cocaine was found). The prosecutor also questioned the officer who conducted the voluntary post-arrest, post-*Miranda* questioning of defendant and defendant's subsequent desire to end the questioning *before* denying that he owned the cocaine. This testimony was offered in contrast to defendant's statement to the arresting officer that he did not own the drugs. The prosecutor's questioning did not suggest that defendant's decision to stop the interview was evidence of his guilt. Rather, as in *Rowan v Owens*, 752 F2d 1186, 1190 (CA 7, 1984), the prosecutor sought to demonstrate that defendant completed and signed his statement without mentioning his prior assertion that he did not own the cocaine.

Furthermore, the prosecutor's comments in closing argument, considered in context were not improper. *Bahoda, supra* at 267. The prosecutor sought to contrast defendant's statement to the arresting officer with the absence of a similar statement during defendant's interview with the officer-in-charge. The prosecutor even parenthetically indicated that the jurors would have to first decide if they believed the recitation of defendant's statements at the interview -- an admonition that foreshadowed the trial court's instruction to the same effect. Given the propriety of the prosecutor's attempt to contrast the two statements allegedly given by defendant, we conclude that no manifest injustice resulted from the prosecutor's questions or argument.

Defendant also contends that the trial court abused its discretion by declining to grant his motion for a new trial. This motion was based on the claim that justice had not been done because an alleged exculpatory witness discovered during the trial supposedly retracted his favorable testimony, and the defense was not given additional time to determine if it could discover other such witnesses. We review this issue for an abuse of the trial court's discretion, *People v Lemmon*, 456 Mich App 625, 647 n 27; 576 NW2d 129 (1998); *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998), and find none.

A trial court can grant a new trial where it appears that justice has not been done. MCR 2.611(A)(1)(a); *People v Jehnsen*, 183 Mich App 305, 310; 454 NW2d 250 (1990). In this case, defendant was given the opportunity to present the allegedly exculpatory witness, but because that witness evidently would not testify favorably to the defense, defendant decided not to call him. Apparently, defendant recently gave this witness a ride, so it is presumed that defendant was aware of his existence prior to trial. With reasonable diligence, defendant could also have ascertained the names of other individuals who had access to the car shortly before defendant borrowed it. Nevertheless, defendant chose not to present any witnesses at trial, and between his conviction and sentencing he did not locate any other allegedly exculpatory witnesses. The trial court therefore did not abuse its discretion in declining to grant defendant's motion where

defendant failed to present any new evidence, *People v Clark*, 363 Mich 643, 647; 110 NW2d 638 (1961), and made no showing that an injustice had occurred.

We affirm.

/s/ Michael J. Talbot
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey

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