

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KELLY RAY TIBBS,

Defendant-Appellant.

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UNPUBLISHED

December 21, 1999

No. 208980

Macomb Circuit Court

LC No. 96-001815 FH

Before: White, P.J., and Sawyer and Griffin, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of felonious assault, MCL 750.82; MSA 28.277, and two counts of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to concurrent terms of two years' imprisonment for the felony-firearm convictions, to be served consecutive to concurrent sentences of two years' probation for the felonious assault convictions. Defendant appeals as of right. We affirm.

Defendant first claims that he was denied his right to counsel at a photographic lineup while in custody. Because defendant failed to present this issue to the trial court, relief is precluded unless defendant establishes plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). The remedy for a violation of the right to counsel at a photographic lineup is suppression of the in-court identification unless there is an independent basis for its admission. *People v Gray*, 457 Mich 107, 114, n 8; 577 NW2d 92 (1998). Because defendant failed to raise this issue in the trial court, no evidentiary hearing to determine whether an independent basis existed for the identification was conducted. For this reason, and giving due regard to the trial evidence and defendant's failure to even argue that the victims' in-court identifications lacked an independent basis, we conclude that defendant has not shown that his substantial rights were affected by plain error.

Defendant next claims that the trial record establishes that a police witness procured a statement from him in violation of his right to remain silent, thereby triggering the safeguards and foundation requirements set forth in *People v Catey*, 135 Mich App 714; 356 NW2d 241 (1984). Defendant failed to preserve this issue with an appropriate objection in the trial court. Further, we note that a totality of the circumstances test is the proper test to apply in determining if the police "scrupulously

honored" a defendant's "right to cut off questioning." *People v Slocum (On Remand)*, 219 Mich App 695, 704-705; 558 NW2d 4 (1996). In any event, the trial record does not plainly show that defendant invoked his right to remain silent. *Catey, supra* at 722. To be plain, error must be clear or obvious. *Carines, supra* at 763. Even if there was plain error, defendant is not entitled to relief because his substantial rights were not affected by the evidence of his exculpatory statement.

We also find that defendant has failed to show that the prosecution's cross-examination of a defense witness about an offer of immunity made during the course of one of the witness' pretrial statements constitutes plain error. Regardless whether there was a basis for the prosecution to make the offer of immunity, there was evidence that the offer was made. Hence, the offer was probative of the context in which the statement was made. Under the rule of completeness, a thought or act cannot be accurately understood without considering the entire context and content in which the thought is expressed. *People v McReavy*, 436 Mich 197, 214-215; 462 NW2d 1 (1990). In any event, even assuming that there was plain error, defendant is not entitled to relief because his substantial rights were not affected. The defense witness did not implicate defendant, but rather was consistent in his position that defendant was not involved in the assault and that he did not identify defendant as the assailant in his statements to the police. The defense witness named a prosecution witness as the individual with the weapon.

Finally, limiting our review to errors apparent from the record, we conclude that defendant has not established any basis for relief based on ineffective assistance of counsel. *People v Plummer*, 229 Mich App 293, 307-308; 581 NW2d 753 (1998). Contrary to defendant's argument, the record contains a notice of an alibi defense. An evidentiary hearing would be needed to determine the reasons why defense counsel did not have the alibi witness testify or pursue the related theory presented in his opening statement about defendant's illness. However, having reviewed the trial record and given due regard to defendant's failure to either move for a remand or provide a satisfactory offer of proof under MCR 7.211(C)(1), we are not persuaded that such relief is warranted. Cf. *People v Price*, 214 Mich App 538, 547; 543 NW2d 49 (1995).

Affirmed.

/s/ Helene N. White  
/s/ David H. Sawyer  
/s/ Richard Allen Griffin