

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RAYMOND R. HARRIS,

Defendant-Appellant.

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UNPUBLISHED

December 18, 2001

No. 222307

Wayne Circuit Court

LC No. 99-000399

Before: Owens, P.J., and Holbrook, Jr. and Gage, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession of more than 50 grams, but less than 225 grams, of cocaine, MCL 333.7403(2)(a)(iii). Defendant was sentenced to eight to twenty years' imprisonment. He appeals as of right. We affirm.

Defendant's contends that the prosecutor improperly elicited testimony regarding defendant's post-arrest silence, thereby violating defendant's constitutional right to remain silent. Because defendant did not object to the elicitation of this evidence below, he has forfeited appellate review of this issue. Nevertheless, forfeiture may be avoided under the "plain error" rule where the following three requirements are satisfied: (1) error must have occurred, (2) the error was plain, i.e. clear or obvious, and (3) the plain error affected substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Generally, the third requirement requires a showing of prejudice—that the error affected the outcome of the lower court proceedings. *Id.* Even where a defendant satisfies these three requirements, however, an appellate court must exercise its discretion in deciding whether to reverse. *Id.* Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant, or when the error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings" independent of the defendant's innocence. *Id.*, 763-764, quoting *United States v Olano*, 507 US 725, 736-737; 113 S Ct 1770; 123 L Ed 2d 508 (1993).

Defendant's challenge arises out of the following exchange between the prosecutor and the arresting officer:

Q. Okay. Now what was going on with Mr. Harris at th[e] time that you took the items from his pocket?

A. He was facing the wall.

Q. Did he say anything to you at that particular point?

A. He didn't say anything, he just looked at his foot.

Q. Looking down?

A. Yes.

Q. While you're going in his pockets?

A. Yes.

Q. Doesn't say anything to you at all?

A. Didn't make any comment.

What the record does not mention, however, is whether defendant had been advised of his *Miranda*<sup>1</sup> rights to remain silent at that point.<sup>2</sup>

In *People v Alexander*, 188 Mich App 96, 100; 469 NW2d 10 (1991), the defendant contended that his constitutional right to remain silent was infringed because the prosecutor questioned him about his silence at the time of his arrest and then commented on the silence during closing argument.<sup>3</sup> The record was unclear “whether and, if so, when defendant received his *Miranda* warnings.” *Id.* at 104. We noted: “[I]f the prosecutor’s questioning and commentary concerned silence which occurred after *Miranda* warnings were given, the issue is a constitutional one. If not, the issue is strictly an evidentiary matter.” *Id.* We opined that the prosecution’s use of the defendant’s silence did not require reversal on merely an evidentiary basis because the trial court would have been within its discretion to admit the evidence for impeachment purposes. *Id.* However, to the extent the issue was one of constitutional import, reversal was required because “the prosecutor’s injection of the silence issue into trial was deliberate, the defendant’s silence was further emphasized during closing argument, and defendant’s credibility was critical to his defense. *Id.* at 104-105. Accordingly, we remanded for an evidentiary hearing to determine whether and, if so, when the defendant received his *Miranda* warnings, directing the trial court to order a new trial if it determined that “the prosecutor’s questioning and commentary concerned silence after *Miranda* warnings were given.” *Id.* at 105.

Here, if defendant was not advised of his *Miranda* rights before the search of his pockets, the “plain error” determination would be solely an evidentiary question. *Alexander, supra* at

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

<sup>2</sup> Defendant did testify that he was advised of his *Miranda* rights before he answered questions at the police station following his arrest. Nevertheless, it is not clear whether, and, if so, when he was advised of his rights at the scene of his arrest.

<sup>3</sup> The prosecutor’s use of the defendant’s silence was not challenged below. *Alexander, supra* at 101, 104.

104. From a purely evidentiary standpoint, defendant's silence when the police officer found the contraband in his pocket was relevant to his consciousness of guilt. See *People v Schollaert*, 194 Mich App 158, 167; 486 NW2d 312 (1992). Thus, we are not persuaded that the prosecutor's elicitation of testimony regarding defendant's silence was irrelevant or that the admission of the evidence was plainly erroneous.

However, if defendant had been advised of his rights before the search of his pockets, his silence was a constitutionally protected exercise of his right to remain silent. *Alexander, supra* at 105. If so, the prosecution's elicitation of this testimony was plainly erroneous. However, reversal is only required where the plain error was outcome determinative. *Carines, supra* at 763. Here, while the prosecutor's questions were improper, read in context, the testimony was largely innocuous. For example, the testimony was elicited during the questioning of a police officer and defendant was not asked to comment on his silence. In addition, the prosecutor did not use defendant's silence during closing arguments. Moreover, there was ample testimony indicating that defendant was found in possession of more than 50 grams of cocaine. Thus, we do not believe that the prosecutor's elicitation of testimony regarding defendant's silence affected the outcome of the proceedings. Accordingly, even if defendant's silence followed *Miranda* warnings and was, therefore, plainly erroneous, defendant may not avoid forfeiture of this issue.<sup>4</sup>

Defendant also contends that he was denied a fair trial by the trial court's admission of certain evidence. Generally, we review a trial court's decision to admit evidence for an abuse of discretion. *People v Cain*, 238 Mich App 95, 122; 605 NW2d 28 (1999).

Specifically, defendant contends that the trial court abused its discretion by admitting evidence that weapons were found upstairs in the house where he was arrested. However, our review of the record reveals that defense counsel did not object to the introduction of the weapons, but objected to the weapons being *shown* to the jurors. In fact, defendant was willing to stipulate that the weapons were found in the house, so long as the weapons were not shown to the jurors:

I can stipulate that guns were found. I don't believe there is any doubt that the officers testified that they found guns. I would stipulate to that. We don't have to have the actual guns . . . . They testified they found the guns. If you want me to stipulate, I would stipulate rather than showing the guns.

Indeed, defendant conceded that he did not object to the admission of the weapons into evidence. Despite defendant's objections, the trial court ruled that the jurors would be permitted to see the weapons, if requested.

An argument could be made that defendant not only forfeited appellate review of the admissibility of the weapons, he actually waived appellate review of the issue. See *People v*

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<sup>4</sup> Defendant also contends that if the lack of objection is outcome determinative of this issue, then he was "denied the effective assistance of counsel." However, defendant cites no authority in support of this assertion, thereby abandoning the issue. See *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000).

*Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000). Nevertheless, the trial court, had its discretion been invoked, would have been well within its discretion to admit the weapons into evidence. Defendant was charged with possession of cocaine with intent to deliver, rather than merely possession of cocaine. The weapons were circumstantial evidence supporting the delivery element. Consequently, the admission of the weapons was not plainly erroneous, as necessary for defendant to avoid forfeiture of the issue. *Carines*, *supra* at 763-764.

Defendant also contends that hearsay evidence regarding the street value of the cocaine was erroneously admitted. “Testimony regarding the street value of a drug has been held relevant to intent to deliver,” and a trial court does not abuse its discretion by allowing its admission. *People v Ward*, 133 Mich App 344, 356; 351 NW2d 208 (1984). Nevertheless, defendant correctly notes that it became clear during the officer’s testimony that he was relying on hearsay information, rather than personal knowledge, to determine his “street value” calculation. Thus, the trial court promptly instructed the jury to disregard any testimony about street value, and later generally instructed the jury to disregard all stricken testimony. However, defendant contends that the instructions were ineffectual, and that the testimony denied him a fair trial. We disagree.

As noted above, the trial court’s instruction to disregard the street value testimony was prompt. Moreover, juries are presumed to follow the trial court’s instructions. *People v Mette*, 243 Mich App 318, 330-331; 621 NW2d 713 (2000). Here, the jury only found defendant guilty of possessing cocaine, declining to find defendant guilty of possession of cocaine with intent to deliver. This would suggest that, if anything, the jury heeded the trial court’s instruction to disregard the “street value” testimony, which would have circumstantially supported the delivery element. Thus, we do not believe that defendant was denied a fair trial.

Defendant contends that he was denied a fair and impartial trial because the prosecutor asked defendant to comment on the credibility of the police officers. Because defendant did not raise this issue below, our review is limited to a determination of whether defendant may avoid forfeiture under the “plain error” rule. *Carines*, *supra* at 763-764.

During the prosecution’s questioning of defendant, the prosecution asked the following questions:

Q. You didn’t know either of the officers before that day, is that correct?

A. No.

Q. You sat here and listened to their testimony, right?

A. Yes.

Q. You’re telling us that they made up everything, right?

A. They made it up, yeah.

Q. Okay. They made up the cocaine that was in your pocket, right?

A. Yes.

Q. You don't know them, they don't know you, right?

A. I don't know the[m], they don't know me.

Q. Don't know any reason that they had anything against you, correct?

A. I wouldn't know if they had anything against me.

"It is not proper 'for a prosecutor to ask defendant to comment on the credibility of prosecution witnesses since a defendant's opinion on such a matter is not probative and credibility determinations are to be made by the trier of fact.'" *People v Knapp*, 244 Mich App 361, 384; 624 NW2d 227 (2001), quoting *People v Loyer*, 169 Mich App 105, 117; 425 NW2d 714 (1988). Thus, the prosecutor's questioning was plainly erroneous.

However, even a "plain error" does not require reversal unless it was also outcome determinative. *Carines, supra* at 763-764. Here, defendant's testimony was consistent with his theory of the case—that the arresting officers deliberately and falsely accused him of possessing cocaine. Even without the above line of questioning, defendant's testimony insinuated that the police officers were lying about his involvement. Thus, we do not believe that the above testimony was outcome determinative.<sup>5</sup> Consequently, despite the plainly erroneous line of questioning, reversal is not warranted.<sup>6</sup>

Defendant also contends that the prosecutor's following line of questioning drew an adverse inference from defendant's presence in court:

Q. You're here to answer the charges, possession with intent to deliver over 70 grams of cocaine, right?

A. Yes.

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<sup>5</sup> In *Knapp*, we opined that the prosecutor's question was harmless error in light of the defendant's similar theory of the case, i.e., that the police officers were lying. *Knapp, supra* at 385.

<sup>6</sup> Alternatively, defendant contends that defense counsel's failure to object to the line of questioning constituted ineffective assistance of counsel. Because defendant did not request a new trial or an evidentiary hearing on this issue, our review is limited to the facts on the record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). There is a strong presumption that counsel was effective. *People v Rice (On Remand)*, 235 Mich App 429, 444; 597 NW2d 843 (1999). To overcome this presumption, defendant must establish that "(1) the performance of his counsel was below an objective standard of reasonableness under prevailing professional norms, and (2) a reasonable probability exists that, but for counsel's unprofessional error, the outcome of the proceedings would have been different." *Id.* Having already concluded that the prosecutor's line of questioning was not outcome determinative, it follows that defense counsel's failure to object to the line of questioning was also not outcome determinative. Consequently, even if we were to conclude that defense counsel's failure to object deviated from prevailing professional norms, defendant would not be able to establish that he was denied his constitutional right to effective assistance of counsel. See *id.*

However, defendant's contention does not reference the prosecutor's next two questions:

Q. [Co-defendant] Mr. Clay was charged with the other cocaine that you saw, 40 some grams, right?

A. Yes.

Q. You were unlucky in that you got the larger amount pinned on you, right?

A. Yes.

Viewed in context, we do not believe that this line of questioning drew an improper inference to defendant's presence in court. In addition, the questioning merely summarized defendant's theory of the case. Thus, the questioning did not deny defendant a fair trial.

Defendant also contends that his sentence was invalid because it was based on inaccurate information. Indeed, a sentence is invalid if it is based on inaccurate information. *People v Miles*, 454 Mich 90, 96; 559 NW2d 299 (1997). At sentencing, the trial court erroneously suggested that defendant was acquitted of one charge, whereas the second charge was actually against co-defendant Clay. Defendant subsequently moved for resentencing. The trial court conceded that its comments reflected a clear misconception. However, the trial court stated that it did not rely on the misconception when sentencing defendant. Thus, defendant's sentence was not "based on inaccurate information." Consequently, defendant is not entitled to resentencing.<sup>7</sup>

Affirmed.

/s/ Donald S. Owens

/s/ Hilda R. Gage

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<sup>7</sup> It should also be noted that defendant's sentence was below the mandatory minimum sentence. MCL 333.7403(2)(a)(iii).