STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 12, 2002
v	No. 226946 Oakland Circuit Court
FELIX HARPER, JR., Defendant-Appellant.	LC No. 99-167099-FH

Before: Talbot, P.J., and Smolenski and Wilder, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession with intent to deliver less than fifty grams of a mixture containing cocaine, MCL 333.7401(2)(a)(iv), and was sentenced to nine months to thirty years in prison, to be served consecutive to an existing sentence defendant was serving due to his status as a parolee. Defendant appeals by right. We affirm.

Defendant raises claims of prosecutorial misconduct. Defendant first alleges that the prosecutor improperly elicited testimony and argued to the jury about defendant's silence and his non-verbal conduct when questioned by police after he had been given *Miranda*[1] warnings. Defendant argues that admission of this testimony violated his Fifth and Fourteenth Amendment right against self-incrimination. Defendant also claims that the prosecutor and the police committed misconduct by injecting evidence of defendant's status as a parolee.

Defendant objected to the statements concerning his parole status. Also, during closing argument, defendant objected to the prosecution's argument that defendant answered, "yes" when he nodded his head in response to the police questioning. Therefore, these claims of error are preserved and we will evaluate the challenged conduct in context to determine if the defendant was denied a fair and impartial trial. *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001); *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Because defendant did not timely and specifically object to the other alleged prosecutorial improprieties, we will review these claims only for plain error that affected his substantial rights. *People v Carines*, 460 Mich 750, 752-753, 763-764; 597 NW2d 130 (1999); *People v Schultz*, 246 Mich App 695,

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

709; 635 NW2d 491 (2001); *People v Wyngaard*, 462 Mich 659, 668; 614 NW2d 143 (2000). Similarly, we review unpreserved claims of evidentiary error for plain error. *People v Coy*, 243 Mich App 283, 287; 620 NW2d 888 (2000). We find no error in this case.

The use of a defendant's post-arrest, post-*Miranda* warning silence for impeachment or as substantive evidence violates due process guaranteed by the Fourteenth Amendment, except to contradict the defendant's trial testimony that he made a statement, that he cooperated with police, or that trial was his first opportunity to explain his version of events. *Doyle v Ohio*, 426 US 610, 619 n 11; 96 S Ct 2240; 49 L Ed 2d 91 (1976); *People v Dennis*, 464 Mich 567, 573 n 5; 628 NW2d 502 (2001). However, where a defendant has waived his *Miranda* rights and voluntarily speaks to the police, evidence of omissions in his statements, as well as evidence of a nonverbal response to a question, does not violate the right to silence and may be admitted at trial. *People v McReavy*, 436 Mich 197, 211-212, 218, 222; 462 NW2d 1 (1990); *People v Rice* (*On Remand*), 235 Mich App 429, 435-447; 597 NW2d 843 (1999). Provided the rules of evidence are otherwise satisfied, "evidence of a defendant's behavior and demeanor during a custodial interrogation after a valid waiver of his Fifth Amendment privilege against compelled self-incrimination" is admissible. *McReavy*, *supra* at 200-202, 218, 222. See *People v Sholl*, 453 Mich 730, 738; 556 NW2d 851 (1996).

In the present case, the alleged silence of defendant occurred while he was in custody during a conversation with one of the investigating police officers with another officer present. The uncontradicted testimony of the two police officers established that defendant was advised of his *Miranda* rights and waived them. According to one of the officers' testimony, after defendant commented that the police must know defendant never left his house, the interviewing officer told defendant that he knew "your runners come and then they distribute the drugs for you," and defendant nodded his head up and down. Further, the officer testified that when defendant was asked if the drugs found in the home were his, defendant "hunched" over in his chair and hung his head, but did not say anything. This evidence was properly before the jury. *Scholl*, *supra* at 738; *Rice (On Remand)*, *supra* at 437. The introduction of evidence of what defendant said, his demeanor, and his nonverbal conduct, did not violate either defendant's Fifth Amendment right against self-incrimination or his rights under the Fourteenth Amendment Due Process Clause. *McReavy*, *supra* at 220-222; *Rice (On Remand)*, *supra* at 437. Moreover, the prosecutor did not engage in misconduct by introducing admissible evidence and arguing all reasonable inferences derived from the evidence. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995); *Rice (On Remand)*, *supra* at 437.

Defendant next claims the prosecutor and the police committed misconduct by injecting defendant's status as a parolee. A defendant's opportunity for a fair trial can be jeopardized when the prosecutor injects issues broader than the guilt or innocence of the accused. *Rice (On Remand)*, *supra* at 438. In the instant case, however, it was defendant's cross-examination of one of the investigating police witnesses that first injected defendant's parole status into the trial by pressing the witness for an explanation of how he learned that defendant was working on the day of the police raid.

Defendant's argument that the officer violated "a special duty not to venture into forbidden areas of testimony," *People v O'Brien*, 113 Mich App 183, 209; 317 NW2d 570

(1982), fails. The cases relied upon by defendant are factually distinguishable and involve nonresponsive comments or answers, *People v Holly*, 129 Mich App 405, 414; 341 NW2d 823 (1983); *People v Page*, 41 Mich App 99, 100-101; 199 NW2d 669 (1972), or nonresponsive answers introducing evidence specifically ruled inadmissible by the trial court, *People v McCarver (On Remand)*, 87 Mich App 12, 15; 273 NW2d 570 (1978). In the present case, the officer's answer was responsive to a defense question, which although somewhat ambiguous, could easily have been understood by the officer as calling for the answer given. Moreover, the officer's answer should have been anticipated by the defense. Further, the trial court granted defendant's request that evidence that defendant was on parole and tethered to his residence would not be permitted unless defendant chose to present it. Defendant did so by calling his parole agent as a defense witness. Accordingly, defendant has waived any claim of error. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000); *Carines*, *supra* at 762 n 7.

Defendant's affirmative use of his parole status and past drug use further demonstrates a waiver in this case. *People v Sutton (After Remand)*, 436 Mich 575, 596; 464 NW2d 276 (1990). Defense counsel, by questioning police witnesses and in closing argument, painted a picture of defendant as a drug user who could not be trusted with the large quantity of drugs found by the police. Through testimony of his parole officer and closing argument defense counsel portrayed defendant as a drug user, trying to better himself through counseling and employment, but forced to live in a home with his drug-dealing brother as a condition of parole. The parole officer also established a critical element of the defense, that defendant left his home at 7:59 a.m., about ten hours before the police raid, and did not return. Further, the defense used defendant's parole status to argue that his status as an "ex-con" explained why he was charged even though the bulk of the drugs were found in his brother's bathrobe.

Defendant also claims the prosecutor improperly shifted the burden of proof by arguing that defendant's actions, statements, and omissions were inconsistent with an innocent state of mind. This argument is unpreserved and is reviewed for plain error affecting substantial rights. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). As discussed above, because defendant waived his *Miranda* rights and chose to speak to the police, his "lack of responsiveness" was "nonassertive conduct evidence that was admissible along with [] defendant's express statements indicating consciousness of guilt []." *McReavy, supra* at 203. "In such a conversation, [defendant's] statements, the manner in which he phrased those statements, and [defendant's] varying degrees of candor all were fit matters for the jury to consider." *Sholl, supra* at 738. Therefore, the prosecutor's argument did not shift the burden of proof; rather, it merely argued that defendant's statement, demeanor, and conduct indicated a consciousness of guilt, *McReavy, supra*, and also attacked the credibility of the theory advanced by defendant at trial that it was his brother alone who possessed the large quantity of cocaine and that defendant was the victim of circumstances such as police bias because of his parole status. *People v Fields*, 450 Mich 94, 107, 115; 538 NW2d 356 (1995).

Defendant's final claim of misconduct is that the prosecution denied him a fair trial by equating an up-and-down headshake with a spoken "yes" in its closing argument. Defendant's argument is without merit. The prosecutor is accorded great latitude in her argument and is free to argue all reasonable inferences based on the evidence as it relates to her theory of the case. *Bahoda*, *supra* at 282. We find no error.

Next, defendant claims he was denied his right to the effective assistance of counsel based on his attorney's failure to move for a mistrial when testimony indicated defendant was on parole and by exacerbating the error by calling defendant's parole agent as a defense witness. We disagree.

In *People v Pickens*, 446 Mich 298, 312-313; 521 NW2d 797 (1994), our Supreme Court held that the Michigan Constitution does not provide a higher standard for effective assistance of counsel than the United States Constitution, and adopted the test formulated in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Under the two-pronged test to determine if counsel's performance fell below the constitutional standard, the defendant has the burden of overcoming the presumption that counsel was effective. *Strickland, supra* at 689. First, the defendant must show that counsel's performance was deficient as measured against an objective standard of reasonableness under the circumstances according to prevailing professional norms. *Id.* at 687-688; *Pickens, supra* at 312-313. Second, counsel's deficiency must have been so prejudicial that the defendant was deprived of a fair trial. *Strickland, supra* at 687-688; *Pickens, supra* at 309. To prove prejudice, defendant must show that there is a reasonable probability that but for counsel's unprofessional error(s) the trial outcome would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000); *Pickens, supra* at 312.

Defendant has failed to overcome the presumption that his trial counsel provided effective assistance. *People v Carbin*, 463 Mich 590, 599; 623 NW2d 884 (2001); *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). His attorney employed a reasonable strategy, as discussed above, to argue that although defendant was a drug user, he would not have been trusted to possess the large quantity of drugs (which indicated intent to deliver) found in his brother's bathrobe. Further, trial counsel argued that even though the evidence pointed to his brother as the drug dealer, defendant was charged because he was an "ex-con." Finally, calling defendant's parole officer may have been the only way trial counsel could show defendant's ten-hour absence from his home before the police raid, which had not been established by the police testimony, without subjecting defendant to potentially devastating cross-examination, as well as avoiding possible ethical problems. *Toma, supra* at 303 n 16.

The fact that the strategy that counsel pursued was unsuccessful does not mean he was ineffective. *People v Williams*, 240 Mich App 316, 332; 614 NW2d 647 (2000). Also, it is not ineffective assistance of counsel to admit guilt to a lesser offense in the hope of raising reasonable doubt about a greater charge. *People v Emerson (After Remand)*, 203 Mich App 345, 348-349; 512 NW2d 3 (1994). Moreover, trial counsel's decisions whether to call witnesses and the manner of questioning witnesses are presumed to be matters of trial strategy. *Rockey, supra* at 76. This Court will not second-guess counsel concerning trial strategy with the aid hindsight or on the basis that the strategy was unsuccessful. *Rice (On Remand), supra* at 445; *People v Wise*, 134 Mich App 82, 97-98; 351 NW2d 255 (1984).

Defendant next argues that admission of evidence that he used cocaine, was on parole, and violated parole by using cocaine required that a cautionary instruction on bad acts evidence be given in this case. Defendant has waived review of this issue by acquiescing in the trial

court's decision not to give a cautionary instruction. *Carter*, *supra* at 215-216; *People v Taylor*, 159 Mich App 468, 488; 406 NW2d 859 (1987).

Finally, defendant argues that the cumulative effect of trial errors denied him a fair trial. We disagree. In order to reverse based upon cumulative error, there must be errors of consequence that are seriously prejudicial to the point that defendant was denied a fair trial. *People v Knapp*, 244 Mich App 361, 387-388; 624 NW2d 227 (2001). Prejudicial error has not been demonstrated in this case and absent such a showing, there can be no cumulative effect of errors warranting reversal. *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999).

Affirmed.

/s/ Michael J. Talbot
/s/ Michael R. Smolenski
/s/ Kurtis T. Wilder