

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GARY MONDALE WILLIAMS,

Defendant-Appellant.

UNPUBLISHED

December 20, 2002

No. 234113

Kent Circuit Court

LC No. 00-006595-FH

Before: Sawyer, P.J., and Gage and Talbot, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to murder, MCL 750.83, first-degree home invasion, MCL 750.110a(2), and possession of a firearm during the commission of a felony, MCL 750.227b. He was also convicted by the bench of felon in possession of a firearm, MCL 750.224f. He now appeals as of right. We affirm.

Defendant first asserts that his right to a fair trial was violated when the prosecutor elicited testimony that defendant exercised his right to remain silent. Because defendant failed to object to the prosecutor's question, the police officer's response, or the trial court's curative instruction to the jury, this issue is unpreserved.¹ As such, defendant's claim is reviewed for plain error. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). To avoid forfeiture under the plain error rule, a defendant must prove that: 1) error occurred, 2) the error was plain (i.e., clear or obvious), and 3) the plain error affected substantial rights (i.e., was outcome determinative). *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Reversal is warranted only when plain error results in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Id.* at 764.

During direct examination of the police officer, the prosecutor asked questions regarding the conversation the officer had with defendant in a police cruiser outside defendant's residence. The officer explained to defendant that a complaint had been lodged against him for firing shots at the victim. As the conversation progressed, defendant admitted to having a gun with him, but denied pointing it at anybody. At that moment, officers, who had been searching defendant's

¹ Both parties agree in their briefs on appeal that this issue is unpreserved.

house, emerged with a gun. Immediately on seeing this, defendant stated that he never had a gun. The colloquy about which defendant complains went as follows:

Q. Okay. After seeing your officers – fellow officers come out of the house with a gun, then what happened?

A. I immediately mirandized Mr. Williams, explaining his rights to him, asked if he wanted to make any further comments. He stated that he didn't want to answer anymore questions, and he was no longer questioned.

The Court: Ladies and gentlemen, I should inform you, at this point, that no one is required to answer any questions being asked, that everyone has a constitutional right not to answer any question if they should not choose to. And you should not infer anything from the fact he chose not to answer.

Defense counsel never objected to the prosecutor's line of questioning, or to the police officer's response. Defendant now argues that the prosecutor purposefully elicited such testimony, and that the officer's statement was the equivalent of an improper comment on his right to remain silent.

It is error for the prosecution to deliberately inquire into a defendant's post-*Miranda*² silence and attempt to use that silence against him. See *People v Dennis*, 464 Mich 567, 573, 576-578; 628 NW2d 502 (2001). "In *Doyle v Ohio*, 426 US 610, 619; 96 S Ct 2240; 49 L Ed 2d 91 (1976), the United States Supreme Court held that the use of a criminal defendant's silence 'at the time of his arrest and after receiving *Miranda* warnings' for impeachment purposes violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution." *Dennis*, *supra* at 573.

This case involves a question and answer situation in which the officer revealed in response to an open-ended question that defendant had refused to answer any more questions after being given his *Miranda* rights. The prosecutor thereafter did not call attention to or reference in any way defendant's silence. We recognize that the officer's answer may not reasonably be viewed as nonresponsive to the prosecutor's open-ended question asking "then what happened?". See *Dennis*, *supra*. However, there is no basis to conclude that by this question the prosecutor attempted to introduce prohibited testimony in that it was a deliberate attempt to comment on defendant's right to remain silent. It cannot be said that the prosecutor "seized upon the response of the police officer and used it to maximum advantage." *People v Sain*, 407 Mich 412, 415; 285 NW2d 772 (1979).

Even if the mere reference to defendant's silence in this context constituted error, defendant has failed to show the error was outcome determinative. Again, after the officer's response, the prosecutor never referred to defendant's invocation of his right to remain silent. The curative instruction from the court immediately after the officer's response mitigated any prejudicial effect the officer's answer may have had. Moreover, in light of the overwhelming

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

evidence of defendant's guilt, the error cannot be considered outcome determinative. Therefore, defendant is not entitled to relief on this basis.

Defendant next contends that his due process rights were violated when the prosecutor intentionally elicited testimony from a key prosecution witness that the witness did not appear for the preliminary examination because she had received a threatening phone call from someone, not defendant. Allegations of prosecutorial misconduct are generally reviewed de novo. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001). Even if preserved, a nonconstitutional error is not a ground for reversal unless after an examination of the entire case, it affirmatively appears that it is more probable than not that the error was outcome determinative. *People v Lukity*, 460 Mich 484, 496; 596 NW2d 607 (1999). Defendant bears the burden of demonstrating that such an error resulted in a miscarriage of justice. *Id.* at 497.

Although a defendant's threat against a witness is generally admissible as evidence of consciousness of guilt, *People v Sholl*, 453 Mich 730, 740; 556 NW2d 851 (1996), here there was no apparent link between the threat and defendant; thus, it cannot be considered as evidence of defendant's consciousness of guilt. However, taking into consideration all the facts in this case that point toward defendant's guilt, we do not believe the prosecutor's error was outcome determinative. The brief reference that a prosecution witness received a threatening phone call from someone other than defendant cannot be said to have had any significant impact on the outcome of the case. A letter that defendant tried to mail his brother, instructing his brother to intimidate witnesses for trial, had already been read to the jury. This much more egregious evidence of defendant's consciousness of guilt had already been properly made available to the factfinder.

After an examination of the entire case, it does not appear that the evidence of the threatening phone call had any bearing on the ultimate outcome of this case, especially in light of the properly admitted evidence of defendant's threatening letter and the overwhelming evidence of defendant's guilt. *Lukity, supra* at 496. Defendant has not met his burden of demonstrating that the error resulted in a miscarriage of justice. *Id.* at 497. Therefore, reversal of defendant's conviction is not warranted.

Affirmed.

/s/ Davis h. Sawyer
/s/ Hilda R. Gage
/s/ Michael J. Talbot