STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 15, 2010
v	No. 289819 Lenawee Circuit Court
JONATHAN ADAM PERKINS, Defendant-Appellant.	LC No. 08-013811-FC

Before: ZAHRA, P.J., and CAVANAGH and FITZGERALD, JJ.

PER CURIAM.

A jury convicted defendant of carrying a dangerous weapon with unlawful intent, MCL 750.226; and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced him to 5 years' probation on his carrying a dangerous weapon with unlawful intent conviction to be served consecutive to 2 years' imprisonment on his felony-firearm conviction. Defendant appeals as of right. We affirm but remand to the trial court to correct an error in sentencing.

Defendant first argues that his due process rights were violated when the prosecutor relied on defendant's post-arrest, post-*Miranda*[1] silence. In reviewing a preserved, constitutional error, we examine the error in the context of the other evidence produced at trial to determine whether the error was harmless beyond a reasonable doubt. *People v Anderson (After Remand)*, 446 Mich 392, 405-406; 521 NW2d 538 (1994).

"As a general rule, if a person remains silent after being arrested and given *Miranda* warnings, that silence may not be used as evidence against that person. Therefore, in general, prosecutorial references to a defendant's post-arrest, post- *Miranda* silence violate a defendant's due process rights under the Fourteenth Amendment of the United States Constitution." *People v Shafier*, 483 Mich 205, 212-213; 768 NW2d 305 (2009) (internal citations omitted). "[A] defendant's post-arrest, post-*Miranda* silence cannot be used to impeach a defendant's exculpatory testimony, see *Doyle*[*v Ohio*, 426 US 610; 96 S Ct 2240; 49 L Ed 2d 91 (1976)], or as direct evidence of defendant's guilt in the prosecutor's case-in-chief, see *Wainwright* [*v*

[1] *Miranda v Arizona*, 384 US 436, 444-439, 467-468; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

Greenfield], 474 US [284] at 292-294[; 106 S Ct 634; 88 L Ed 2d 623 (1986)]." *Id.* at 213-214. The only exceptions to the prohibition are when "a defendant testifies to an exculpatory version of events and claims to have told the police the same version upon arrest," *Doyle,* 426 US at 619 n 11; *People v Dennis,* 464 Mich 567, 573 n 5; 628 NW2d 502 (2001), or claims to have cooperated with police, or claims that trial was the first opportunity to explain his version of events, *People v Solmonson,* 261 Mich App 657, 664; 683 NW2d 761 (2004).

In the present case, Officer Jamie Mercer testified during direct examination that she read defendant his *Miranda* rights in jail at 12:07 a.m. and affirmed that she offered defendant "an opportunity to indicate what had happened during the day." The prosecutor asked, "did [defendant] indicate that he wanted to tell you what happened?" Mercer responded, "[n]o."

Defendant objected, and the following discussion occurred:

Trial court. Is that correct?

Prosecutor. He was offered the opportunity—That's true.

Defense counsel. Yeah, so she just lied to the jury, okay.

Prosecutor. No, no. No, no.

Defense Counsel. I'm not gonna bring—He has an absolute right to say I want to have an attorney.

Prosecutor. He has an absolute—

Defense Counsel. And you can't bring it up to the jury.

Prosecutor. *Cellinski* and *Boho* are not that way anymore. We know that. We can ask that question now.

Defense Counsel. You can ask if you refuse to answer questions? He didn't refuse to answer questions. He said he wanted an attorney present. She never got that. She never got an attorney present to ask him questions.

Prosecutor. No, I think—I think what we did was accurate and he's gonna testify anyway.

Defense Counsel. She can't testify to what he said after he said he wants an attorney.

Prosecutor. I'm not gonna ask him that question cause he didn't make a statement after that. I'm not gonna ask him that question.

The Court. What question are you gonna ask?

Prosecutor. I'm done.

Trial court. You're done

Prosecutor. I'm done.

We agree with defendant that Officer Mercer's statement that defendant "did [not] indicate that he wanted to tell . . . what happened," may be viewed to suggest that defendant refused to answer questions after he invoked his right to remain silent. However, it is also suggested during the discussion that ensued between the trial court and counsel following defendant's objection that defendant intended to testify that he was willing to give police a statement, but he wanted his attorney to be present when he made his statement. This position is made very clear during the prosecution's cross-examination of defendant, in which the following occurred:

> *Q*. You've never told this story to any of the people who were directly involved in the investigation of this case.
>
> *A*. I asked for my attorney, and they never came back to ask me.
>
> *Q*. Did you ever ask to make a statement to any of the people who investigated this case?
>
> *A*. I told her I would be willing to talk to her but [only] with my attorney present.
>
> *Q*. When did you do that?
>
> *A*. I did that at the jail that night.
>
> * * *
>
> *Q*. You said you wanted to give a statement to Officer Mercer, but you wanted your attorney to be present—
>
> *A*. That is correct.
>
> * * *
>
> *Q*. Did you ever follow up with that?
>
> *A*. Did I ever follow up with that?
>
> *Q*. Yes, sir, did you ever follow up with that?
>
> *A*. I personally did not. It's not my job. It's the officer's job.[2]

[2] We note that there is no real dispute that, at the time of defendant's statements, he was in custody because he had been formally arrested and had been advised of his *Miranda* rights. . (continued…)

Given defendant's claim that he wanted to make a statement to police but that law enforcement did not provide him an opportunity to do so, we cannot conclude that the prosecution's inquiry of Officer Mercer regarding defendant's post-arrest desires, conduct and statements amounted to improper presentation of defendant's post-arrest, post-*Miranda* silence. Thus we conclude there was no error by the prosecution.

Moreover, even assuming preserved constitutional error, we would conclude that the error was harmless beyond a reasonable doubt. Significantly, the prosecutor did not emphasize defendant's silence or request for counsel during his opening statement or closing argument. Further, the prosecution did not argue that defendant's silence was actually evidence of his guilt. Moreover, other evidence corroborated the victim's version of events. The victim's family corroborated her testimony as to the events as they unfolded. Trooper Warren Hardy confirmed that the victim was upset, excited, and crying when she exited the house after the incident. Officer Mercer gave a similar account, and found defendant's Glock in the computer office. The record also reflects that the prosecutor believed his inquiry was legally permissible, and it was extremely limited. The prosecutor's inquiry into this matter during Officer Mercer's testimony was brief, only involving two questions with short, one-word answers by Officer Mercer. Further, although the prosecutor questioned defendant about not previously coming forward with his story, the prosecutor did not again refer to this. Cf. *Belanger*, 454 Mich at 577-579 (Granting a new trial where the prosecutor elicited the prohibited testimony and used it during his closing argument as direct evidence of defendant's guilt, the case was closely contested, the defense theory was not frivolous, and the constitutional error related to a key aspect of the case).

Defendant next argues that the victim's prior consistent statements were erroneously admitted as substantive evidence via the responding officers' testimony, and this denied him a fair trial. Alternatively, defendant argues that counsel was ineffective for failing to object to this evidence. Unpreserved claims of error warrant reversal only where defendant establishes plain error that affected his substantial rights. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). To obtain reversal, defendant must also show that he was actually innocent, or that the fairness, integrity, or public reputation of the judicial proceedings was seriously affected. *Id.*

We conclude that the testimony by Trooper Hardy and Officer Mercer relating what the victim stated at the scene constituted hearsay, because the victim's statements were out of court statements that were being offered for their truth, i.e., to prove what transpired during the incident between defendant and the victim. MRE 801(c); MRE 802.[3]

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People v McElhaney, 215 Mich App 269, 278; 545 NW2d 18 (1996). There is also no real dispute that defendant was subject to interrogation and had sufficiently invoked his right to remain silent.

[3] With respect to Detective Jeffrey Johnson's testimony, we find that his response at trial to the prosecutor's question was a volunteered, unsolicited response to the prosecutor's proper question, and is thus not grounds for relief. *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995) (Volunteered, unresponsive answers to proper questions were not grounds for a new trial.)

We nonetheless conclude that the statements were admissible as excited utterances. MRE 803(2) provides an exception to the general rule excluding hearsay where the statement relates "to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." MRE 803(2). In order for a statement to fall under this exception, there must have been a startling event and "the resulting statement [must have been] made while under the excitement caused by the event." *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998), citing *People v Straight*, 430 Mich 418, 424; 424 NW2d 257 (1988).

Defendant argues that too much time elapsed between when defendant pointed the gun at the victim and when she made the statements to the police. In *Smith*, 456 Mich at 552-553, a lapse of ten hours between the startling event and the victim's statement did not preclude admissibility under MRE 803(2) where the circumstances indicated that the victim remained excited and was still under the stress of the event when he made the statement. In the present case, the threatening interactions with defendant continued after he pointed the gun at the victim, and the record demonstrates that she remained in a state of excitement thereafter. The victim indicated that defendant had threatened her never to call the police in the past. Defendant prevented her from leaving their bed; he blocked her from exiting the house when she went toward the doors; she heard him racking his gun back; and he tried to enter the bedroom and bathroom after she locked herself in, pounding on the door. The family she spoke with during that time period indicated that the victim was very upset and frantic. She did not leave the bathroom until she heard the police identify their presence over the public address system; and when she left, she went straight to the front door for fear that defendant was still in the house. Thus, there was a plausible explanation for the delay in the victim's statements to police. *Smith*, 456 Mich at 551.

Further, the record reflects that the victim made her statements to Mercer while she was still under the stress and excitement caused by the event. The officers observed that the victim was very upset, crying, talking quickly, and she was in such an agitated state that she could not relate the events chronologically and Mercer had trouble understanding her. The victim was upset the whole time Mercer was there and did not calm down until before the police left; and Mercer observed that the victim was so upset that she had pent-up "energy that needed to be released," so she was "moving around the house a lot." Although the victim's statements were in response to police questioning, this does not render them inadmissible. See *People v McLaughlin*, 258 Mich App 635, 659-660; 672 NW2d 860 (2003) (Finding no error in the admission of a police officer's testimony regarding what the victim told him at the scene of the crime, where the officer indicated that the victim appeared extremely upset or frantic and was having difficulty breathing; the officer arrived within a few minutes of the 911 call; and the victim was shaking when she called the police). Here, there is no indication from the record that the victim's statements were made in response to persistent, suggestive, and insistent questioning by the police.[4]

[4] Because we find that Officer Mercer's and Trooper Hardy's testimony about the victim's statements was admissible under MRE 803(2), we will not address their admissibility under MRE 801(d)(1)(B) or MCL 768.27c. "[U]nder the Michigan Rules of Evidence, evidence that is

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Moreover, we note that even if we were to find that the challenged evidence was inadmissible, defendant has failed to establish that the admission of the challenged evidence affected his substantial rights. *Carines,* 460 Mich at 774. Trooper Hardy's and Officer Mercer's testimony was cumulative of other evidence presented at trial. The victim testified in detail about the entire incident. The victim's family members also related similar versions of what occurred between defendant and the victim. The prosecutor did not use Trooper Hardy's and Officer Mercer's testimony about what the victim told them during his closing argument.

Because the evidence was admissible, defense counsel was not ineffective for failing to raise a meritless objection regarding its admissibility. *People v Snider,* 239 Mich App 393, 424; 608 NW2d 502 (2000).

Defendant next asserts that the trial court abused its discretion in excluding two of defendant's exhibits that he did not disclose to the prosecution until the eve before trial. The trial court's decisions regarding discovery matters are reviewed for an abuse of discretion. *People v Davie (After Remand),* 225 Mich App 592, 597-598; 571 NW2d 229 (1997). This preserved, nonconstitutional evidentiary error warrants reversal only where it overcomes the presumption that it was harmless, i.e., it is more probable than not that the error affected the outcome; defendant bears the burden of persuasion. *People v Elston,* 462 Mich 751, 765-766; 614 NW2d 595 (2000). Defendant also claims that the trial court's ruling deprived him of the right to present a defense. *People v Hayes,* 421 Mich 271, 279; 364 NW2d 635 (1984). This unpreserved constitutional component of defendant's challenge is reviewed for plain error. *Carines,* 460 Mich at 774.

We conclude that the trial court did not abuse its discretion in excluding the telephone and bank records. *Davie (After Remand),* 225 Mich App at 597-598. The trial court balanced the interests of the court and the parties and considered the reason for noncompliance in deciding to preclude the documents. *People v Banks,* 249 Mich App 247, 252; 642 NW2d 351 (2002). And, the prosecutor demonstrated actual prejudice, *People v Greenfield (On Reconsideration),* 271 Mich App 442, 456 n 10; 722 NW2d 254 (2006), because he had insufficient advance notice of the documents to prepare his case. The documents were provided the night before trial and they were complex. Further, the prosecutor did not have sufficient time or an opportunity to speak with police officers about the documents, to send a police officer to question the victim about the records, or to question the other witnesses who spoke with the victim over the telephone. The record reflects that the prosecutor made a discovery request pursuant to MCR 2.601(A) on June 24, 2008, with the requested discovery materials to be provided within 14 days of the request, MCR 2.601(F). Defendant was under a continuing duty to promptly notify the prosecution of these additional documents that he was possibly going to introduce at trial. MCR 6.201(H); MCR 6.201(A)(6). The record reflects that the defense held on to the exhibits for approximately ten days before notifying and providing them to the prosecution on the eve before trial.

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properly admissible for one purpose need not be excluded because it is not admissible for another purpose." *People v Bauder,* 269 Mich App 174, 187; 712 NW2d 506 (2005).

Although defendant complains that the trial court's rulings were unfair because it did not impose such a sanction on a police report that was not turned over until trial, the record reflects that the trial court excluded a prosecution tape, which was provided to defense counsel the eve before trial, and the police report was not admitted into evidence.

We further find no plain error with respect to defendant's claim that he was deprived of his constitutional right to present a defense. He presented his defense that the mortgage payment had already been made before the victim closed the couple's joint bank account through his own testimony at trial, and he could have cross-examined the victim on the matter. Further, defendant could have used the witnesses' own testimony to point out discrepancies related to the sequence and timing of telephone calls, even absent the telephone records. Regarding the remainder of his claims involving the telephone records, defendant fails to cite specifically which telephone calls he is referring to in support of his claim; he merely references "*See Appendix B: Precluded Exhibits.*" Defendant bore the burden of establishing the factual basis his claim. *Elston*, 462 Mich App at 762. "An appellant may not merely announce a position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority." *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). Moreover, we note that "[i]t is well settled that the right to assert a defense may permissibly be limited by 'established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.'" *People v Toma*, 462 Mich 281, 294; 613 NW2d 694 (2000), quoting *Chambers v Mississippi*, 410 US 284, 302; 93 S Ct 1038; 35 L Ed 2d 297 (1973).

Lastly, defendant argues that the trial court erred in ordering that his prison sentence for felony-firearm run consecutive to his probationary sentence for carrying a dangerous weapon with unlawful intent. We agree. Consecutive sentencing under MCL 750.227b(2) only applies where the sentence for the underlying felony is a term of imprisonment. *People v Brown*, 220 Mich App 680, 682-685; 560 NW2d 80 (1996). Defendant is entitled to a correction of his sentence to reflect concurrent sentences.

Affirmed, but remanded for correction of defendant's judgment of sentence. We do not retain jurisdiction.

/s/ Brian K. Zahra
/s/ Mark J. Cavanagh
/s/ E. Thomas Fitzgerald