STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DUWAYNE CHARLES BLAND,

Defendant-Appellant.

UNPUBLISHED
March 7, 1997

No. 185751
Kent Circuit Court
LC No. 94-1929-FC

Before: Reilly, P.J., and MacKenzie and B. K. Zahra*, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to murder, MCL 750.83; MSA 28.278, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to ten to twenty-five years' imprisonment for the assault conviction, to run consecutively to the mandatory two-year term imposed for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant first claims that the trial court invaded the province of the jury by instructing the jury that the court had already determined that there was no *Miranda* violation [*Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966)] in the case. Because defense counsel failed to object to the court's instruction at trial, the issue has not been preserved for appeal. *People v Kincaid*, 136 Mich App 209, 216; 356 NW2d 4 (1984). In any event, the claim is without merit. Although it is error requiring reversal for a trial judge to inform a jury that the defendant's statement has been found to be voluntary based on a pretrial *Walker* hearing [*People v Walker (On Reh)*, 374 Mich 331; 132 NW2d 87 (1965)], *Kincaid, supra*, p 215, that was not the situation in this case. Here, the court merely informed the jury that the issue whether the police were to give *Miranda* warnings was a question of law that the court already decided. The trial judge did not tell the jury that defendant's statement was found to be voluntary. In addition, the trial judge's comments were not prejudicial because the judge did not comment on the actions of the police. *Kincaid, supra*.

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* Circuit judge, sitting on the Court of Appeals by assignment.

Defendant next argues that he was denied his right to a trial by jury because the court excused an ailing juror. We disagree. The trial court's decision to remove a juror will only be reversed when there has been a clear abuse of discretion and where the defendant can show prejudice. *People v Weatherspoon*, 171 Mich App 549, 560; 431 NW2d 75 (1988). The trial court's decision to excuse a juror is governed by MCL 768.18; MSA 28.1041, which provides in pertinent part:

> Should any condition arise during the trial of the cause which in the opinion of the trial court justifies the excusal of any of the jurors so impaneled from further service, he may do so and the trial shall proceed, unless the number of jurors be reduced to less than 12.

In this case, a juror informed the court after closing arguments, but before instructions, that he had a temperature of 101 degrees and was feeling achy and cold. The judge then excused the juror and proceeded with the instructions. Excusing the juror did not require the trial to proceed with fewer than twelve jurors. MCL 768.18; MSA 28.1041. Furthermore, the trial judge's decision to excuse the juror protected defendant's fundamental right to have a fair and impartial jury decide his case. *People v Dry Land Marina*, 175 Mich App 322, 326; 437 NW2d 391 (1989). We find no abuse of discretion.

Defendant next argues that his constitutional right of silence was violated when testimony was elicited that, following his arrest, he refused to make a tape recorded statement and attempted to retract his pre-arrest statement. On this record, we find no error. Where a defendant's silence is attributable to an invocation of his Fifth Amendment privilege or a reliance on *Miranda* warnings, use of his silence is error. *People v McReavy*, 436 Mich 197, 201; 462 NW2d 1 (1990). A defendant is free to invoke his Fifth Amendment right to remain silent at any time; however, for this right to attach, the defendant must unequivocally invoke that right. *People v Catey*, 135 Mich App 714, 722; 356 NW2d 241 (1984). In this case, there is no indication from the record that defendant unequivocally invoked his right to remain silent. Defendant never stated that he wanted an attorney; he only inquired if he were going to get an attorney. Such a future reference does not constitute a request for counsel or a right to remain silent. *People v Granderson*, 212 Mich App 673, 676-677; 538 NW2d 471 (1995). Nor did defendant state that he did not want to continue talking to Officer Wysocki. Instead, he stated that he wanted to recant an earlier incriminating statement, which statement he has not challenged on appeal. A defendant cannot choose to speak and at the same time retain his right to remain silent. *People v Davis*, 191 Mich App 29, 36; 477 NW2d 438 (1991). Because defendant never unequivocally asserted his right to remain silent, no error occurred when defendant's post-*Miranda* statements were admitted into evidence. *McReavy, supra*, 436 Mich 218.

Affirmed.

/s/ Maureen Pulte Reilly
/s/ Barbara B. MacKenzie
/s/ Brian K. Zahra