

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LOUIS JAHMAL JONES,

Defendant-Appellant.

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UNPUBLISHED  
September 11, 2003

No. 237081  
Genesee Circuit Court  
LC No. 01-007632-FC

Before: Wilder, P.J., and Griffin and Gage, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of first-degree premeditated murder, MCL 750.316(1)(a), and sentenced as a third-felony habitual offender, MCL 769.11, to life in prison without parole. He appeals as of right. We affirm.

I

Defendant first argues that the prosecutor committed error requiring reversal by eliciting, and then commenting on, testimony that defendant remained silent when he was initially stopped by the police. We disagree.

In this case, defendant did not preserve this issue with an objection to the challenged line of questioning or commentary. Accordingly, we review this unpreserved issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). Generally, error requiring reversal will not be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction. *Id.* at 720.

The present issue whether custodial pre-*Miranda*<sup>1</sup> silence may be used as substantive evidence of guilt has never been decided in Michigan<sup>2</sup> and has divided the federal circuit courts

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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> *People v Schollaert*, 194 Mich App 158; 486 NW2d 312 (1992), is distinguishable on the basis that the defendant was not in custody. In the present case, defendant was handcuffed and lodged in a police car when he chose to remain silent when questioned. *Defendant does not argue that*  
(continued...)

of appeal. The Ninth, Fifth, and Eleventh Circuit Courts of Appeal have held that the prosecution may comment on the defendant's silence if it occurred before the time he was required to be given his *Miranda* warnings. See *US v Oplinger*, 150 F3d 1061, 1066-1067 (CA 9, 1998);<sup>3</sup> *US v Zanabria*, 74 F3d 590, 593; (CA 5, 1996); *US v Rivera*, 944 F2d 1563, 1568 (CA 11, 1991). However, the Sixth, Tenth, First, and Seventh Circuits have held that it is a violation of the defendant's Fifth Amendment right against self-incrimination for the prosecution to comment on a defendant's pre-*Miranda* silence as substantive evidence of guilt. See *Combs v Coyle*, 205 F3d 269 (CA 6, 2000); *US v Burson*, 952 F2d 1196, 1201 (CA 10, 1991); *Coppola v Powell*, 878 F2d 1562, 1568 (CA 1, 1989); *US ex rel Savory v Lane*, 832 F2d 1011, 1017 (CA 7, 1987). Because the United States Supreme Court has not ruled on the question and the federal circuit courts of appeals are divided, we are not bound by either line of authority. *Schueler v Weintrob*, 360 Mich 621, 633-634; 105 NW2d 42 (1960); *Young v Young*, 211 Mich App 446, 450; 536 NW2d 254 (1995).

At trial, defense counsel did not object to the prosecutor's use of defendant's silence, and accordingly, this constitutional error is forfeited. Pursuant to *People v Carines*, *supra* at 763, we review forfeited constitutional errors for plain error under the test of *United States v Olano*, 507 US 725; 113 S Ct 1770; 123 L Ed 2d 508 (1993):

To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. . . . The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the

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(...continued)

*custodial interrogation occurred.* It is well settled that *Miranda* warnings are required only for custodial interrogation, *Rhode Island v Innis*, 446 US 291, 302; 100 S Ct 1682; 64 L Ed 2d 297 (1980), and that the simple asking of a defendant's name is not interrogation, *People v Armendarez*, 188 Mich App 61, 73; 468 NW2d 893 (1991).

<sup>3</sup> The argument made by the assistant U.S. attorney in *Oplinger*, *supra* at 1066, n 4, is substantially similar to the comments at issue in the present case:

In its closing argument, the government attorney commented on the May 18 meeting as follows:

“It was explained to him, it would have to be reported to the FBI and the bank's regulators. Did he give a response or an explanation? No. Did he ask for time to put together a response? No. Did he rant and rave and scream about being charged unjustly with stealing? No. Did he ask them to contact people at Costco about defective merchandise that he was supposedly returning? No. Did he call Costco and scream about them lying to the bank about merchandise he was returning? No. *Does this sound like the conduct of an innocent person? Of course it doesn't.*” [Emphasis added.]

In *US v Whitehead*, 200 F3d 634, 639 (CA 9, 2000), the Ninth Circuit “strictly limited our ruling in *Oplinger* to the period prior to custody.” See also *US v Velarde-Gomez (En Banc)*, 269 F3d 1023 (CA 9, 2001).

lower court proceedings. . . . “It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice.” . . . Finally, *once a defendant satisfies these three requirements, an appellate court must exercise its discretion in deciding whether to reverse*. Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error “ ‘seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings’ independent of the defendant’s innocence.” . . . [Emphasis added and citations omitted.]

In light of the substantial direct and circumstantial evidence linking defendant to the crime, we conclude that defendant was not actually innocent. Further, because of the split of authority in the federal circuit courts of appeal on the issue, the error was not clear or obvious and did not seriously affect the fairness, integrity, or public reputation of the judicial proceedings. At the present time, such evidence would be admissible in nearly half of the federal circuits that have addressed the issue. For these reasons, we would hold that plain error warranting reversal did not occur.

## II

Defendant also argues that the prosecutor committed misconduct by cross-examining him regarding his prior convictions and then commenting on those matters during closing argument. We disagree.

Reversal cannot be premised on an error to which the aggrieved party contributed by plan or negligence. *People v Griffin*, 235 Mich App 27, 46; 597 NW2d 176 (1999). We agree that defendant opened the door to the prosecutor’s challenged line of questioning regarding the details of defendant’s prior attempted carjacking conviction. On direct examination, defendant minimized his involvement in that offense and testified that he pleaded guilty and told the truth about what happened. Against this backdrop, it was proper for the prosecutor to question defendant about the other details of that crime on cross-examination. Similarly, defendant’s testimony on direct examination that he couldn’t have broken into a house with the victim because he “work[s] for a living” and “do[esn’t] break in people’s houses” opened the door to the prosecutor’s inquiry regarding defendant’s prior conviction for breaking and entering into an automobile, notwithstanding the trial court’s earlier decision to exclude the use of that conviction under MRE 609. Therefore, the prosecutor did not commit misconduct.

We also reject defendant’s argument that the prosecutor improperly argued facts not supported by the evidence or for an improper purpose. *People v Fisher*, 193 Mich App 284, 291; 483 NW2d 452 (1992). The prosecutor did not use defendant’s prior convictions for an improper purpose. Rather, considered in context, his comments were a proper response to defense counsel’s argument.

## III

Next, defendant argues that the trial court erred by admitting into evidence a police report regarding an earlier breaking and entering offense. We disagree.

A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998). A reviewing court may not substitute its judgment for that of the trial court regarding admissibility; there is no abuse of discretion where the evidentiary question is a close one. *Id.* at 550.

MRE 803(8) provides that the hearsay rule does not prohibit the admission of

[r]ecords, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, *excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel*, and subject to the limitations of MCL 257.624.<sup>4</sup> [Emphasis added.]

The police report exclusion is “only intended to apply to observations made by law enforcement officials at the scene of a crime or while investigating the crime, and not to reports of routine matters made in nonadversarial settings.” *People v Stacy*, 193 Mich App 19, 33; 484 NW2d 675 (1992), quoting *United States v Hayes*, 861 F2d 1225, 1229 (CA 10, 1988); see also McCormick, Evidence (3d ed), § 316, pp 891-892.

In this case, the police report was not generated in connection with the investigation of this case. Rather, it involved the report of a citizen's complaint, made in a nonadversarial setting. The trial court did not abuse its discretion in finding that the report was admissible.

#### IV

Finally, defendant argues that the trial court erred in denying his motion for a mistrial where the jury was allowed to view photographs of the victim and crime scene that had not been received into evidence. When this matter arose at trial, defendant elected to hear the jury's verdict in lieu of moving for a mistrial. It was not until sentencing that defendant first moved for a mistrial. Because defendant's motion for a mistrial was not timely brought, we consider this issue unpreserved and, accordingly, limit our review to plain error affecting defendant's substantial rights. *Carines, supra* at 763.

“A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial.” *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001), quoting *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995). Where a jury is allowed to see documents that have not been admitted into evidence, reversal is not warranted absent a showing of substantial prejudice. See *People v Jones*, 128 Mich App 335, 336-337; 340 NW2d 302 (1983).

The record reveals that the jury handled this situation in an exemplary manner. While it was error to allow the jury to have access to the photographs, which had not been received into evidence, only two jurors saw any of the photos. Significantly, the jurors recognized almost

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<sup>4</sup> MCL 257.624 pertains to traffic accident reports. It is not applicable here.

immediately that the photos should not be considered and they were quickly returned and not discussed during deliberations. Further, upon inquiry by the court, the jurors indicated that the photos had no effect on the verdict. On this record, there has been no showing that defendant's substantial rights were prejudiced. *Carines, supra*; MCL 769.26. Accordingly, reversal is not warranted.

Affirmed.

/s/ Kurtis T. Wilder  
/s/ Richard Allen Griffin  
/s/ Hilda R. Gage