

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES TODD GLEASON,

Defendant-Appellant.

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UNPUBLISHED

November 16, 2004

No. 247615

Ingham Circuit Court

LC No. 02-001168-FH

Before: Donofrio, P.J., and Markey and Hood, JJ.

PER CURIAM.

Defendant appeals as of right following a jury trial conviction for first-degree home invasion, MCL 750.110a(2), and the denial of his motion for a new trial. The trial court sentenced defendant to ten to forty years in prison. In his claim for new trial, defendant fails to establish that the prosecution's improper questioning and comment affected his substantial rights, and he further fails to establish his claim of ineffective assistance of counsel. We affirm.

The case stems from the larceny of a generator from a residential garage. Defendant first argues that the trial court abused its discretion by denying his motion for a new trial, contending that his trial counsel seriously erred by not attempting to preclude the prosecutor from introducing evidence and commenting about defendant's post-arrest, post-*Miranda*<sup>1</sup> silence. We review the trial court's denial of a motion for a new trial for abuse of discretion. *People v Hampton*, 407 Mich 354, 373; 285 NW2d 284 (1979). We review allegations of prosecutorial misconduct de novo to determine whether a defendant was denied a fair and impartial trial. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review a trial court's findings of fact for clear error, while we review questions of constitutional law de novo. *Id.*

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

Generally, a defendant's right to due process is violated where the prosecutor uses his post-arrest, post-*Miranda* silence for impeachment purposes. *Doyle v Ohio*, 426 US 610, 611, 617-618; 96 S Ct 2240; 49 L Ed 2d 91 (1976). In this case, defendant testified that he had assisted in taking the generator from the victims' garage because his friend, Pete Rauls, told him that Rauls had been given the generator. However, defendant did not testify on direct examination that he had informed, or attempted to tell this story to the police. On cross-examination, the prosecutor asked defendant why he had not told the police this story. Defendant testified that he had attempted to tell the police his story, but they had not responded to any of several written notes he had passed indicating that he wanted to speak with the police. In his closing argument, the prosecutor asserted that defendant had not identified his friend to "anybody . . . , certainly not the police, even though he claims he tried hard to give this information."

The prosecutor's questions were ambiguous with respect to the time frame being inquired about, i.e., whether the silence impacted came before or after defendant was advised of his *Miranda* rights. With respect to any reference to defendant's pre-*Miranda* silence to impeach his exculpatory testimony, no misconduct occurred because a defendant's prearrest silence is admissible for impeachment purposes. *People v Hackett*, 460 Mich 202, 213; 596 NW2d 107 (1999). However, a prosecutor may not use a defendant's post-*Miranda* silence as evidence of guilt or to cast doubt on a defendant's credibility. See *People v Dennis*, 464 Mich 567, 572-574; 628 NW2d 502 (2001). Nonetheless, defendant is unable to establish the requisite prejudice under the plain error rule. *Ackerman, supra*, 257 Mich App 448-449. The prosecution showed defendant was both in the proximity of the crime and had engaged in incriminating conduct during the crime. *Hackett, supra*, at 202. Vicki Tebeau specifically identified defendant as the man she saw leaving her home with the generator in his car. In fact, defendant admitted that he had taken the generator. Under these circumstances, defendant has failed to establish that the prosecution's improper questioning and comments affected his substantial rights. See *People v McNally*, 470 Mich 1, 7; 679 NW2d 301 (2004).

Defendant next challenges the effectiveness of his counsel. Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). In order to overcome this presumption, defendant must first show that counsel's performance was deficient as measured against an objective standard of reasonableness. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Second, defendant must show that the deficiency was so prejudicial that he was deprived of a fair trial such that there is a reasonable probability that but for counsel's unprofessional errors the trial outcome would have been different. *Id.*, at 302-303, 314.

Defendant has not overcome the presumption on appeal that the actions of his trial counsel were the product of a sound trial strategy. *People v Carbin*, 463 Mich 590, 600; 628 NW2d 884 (2001). Defendant's trial strategy was to show that he had been duped by a friend into helping steal the generator. Defense counsel could have reasonably concluded not to object to the questions at issue because they provided defendant an opportunity to buttress his exculpatory story. Further, given the evidence adduced at trial, defendant is unable to establish that the outcome of trial would have been different had counsel objected. See *People v*

*Solomonson*, 261 Mich App 657, 667-668; 683 NW2d 761 (2004). Consequently, the trial court did not abuse its discretion in denying the motion for a new trial.

Affirmed.

/s/ Pat M. Donofrio  
/s/ Jane E. Markey  
/s/ Karen M. Fort Hood