

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTOINE DAMON ASHWORTH,

Defendant-Appellant.

UNPUBLISHED

May 5, 2005

No. 251881

Saginaw Circuit Court

LC No. 02-021750-FH

Before: Cavanagh, P.J., and Jansen and Gage, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree home invasion, MCL 750.11a(2), felonious assault, MCL 750.82, felon in possession of a firearm, MCL 750.224f, possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, and carrying a dangerous weapon with unlawful intent, MCL 750.226. He appeals as of right. We reverse and remand for a new trial.

Defendant argues that the prosecutor violated his constitutional rights when the prosecutor questioned defendant regarding, and made comments about, defendant's pre-arrest and post-arrest silence. We agree.

Defendant did not preserve this issue, so review is under the test set forth in *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999), which requires that for relief to be possible there must have been plain error that affected substantial rights. Reversal is warranted only when a plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity or public reputation of judicial proceedings. *People v Walker*, ___ Mich App ___; ___ NW2d ___ (Docket No. 250006, issued March 24, 2005) slip op p 7.

The propriety of a prosecutor's questions and remarks depends on all the facts of the case. See *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004).

At trial, during cross-examination of defendant, the prosecutor elicited the following testimony regarding defendant's failure to come forward with exculpatory evidence before trial:

Q. This Charles Aldrich, you didn't mention his name to Detective Courtney on April 24 during that telephone conversation, did you?

A. I didn't mention no name to Detective Courtney.

Q. On that day, April 24, during that telephone conversation, you didn't mention a fact that you loaned your car out to anyone, did you?

A. I didn't mention nothing to Detective Courtney.

Q. On April 25 when Detective Courtney and Detective McInerney came to your trailer and spoke to you, you didn't mention anything about this Charles Aldrich, did you?

A. I didn't mention nothing to Detective Courtney.

Q. And you didn't mention anything to her about loaning your car out?

A. No, I did not.

Q. At the lineup on May 16, 2002, while you're in jail, you didn't pull Detective Courtney aside and say, hey, it wasn't me, it was this Charles Aldrich?

A. No. I had counsel with me. I had nothing to say to Detective Courtney.

Q. But you certainly were free to say something at that time, weren't you, sir?

A. I was not allowed to talk to Detective Courtney, no prosecutor, or no – nobody. I had counsel to represent me.

Q. You didn't tell your counselor to go talk to Detective Courtney and give the name Charles Aldrich, did you?

A. No, I did not.

Q. You didn't tell your counsel to go talk to Detective Courtney about how you loaned this car out, did you?

A. I told my counsel, but I didn't tell her to go tell –

Q. You didn't instruct her to go tell Courtney, did you?

A. You know, I did. I told her –

Q. Now you did?

A. I told her when I first came to jail to get a photo and show it to Detective Courtney and have Detective Courtney show it to Diana Barajas, and Detective Courtney didn't want to do it.

* * *

Q. Sir, at the preliminary hearing on June 5, 2002, you heard witnesses testify against you, didn't you?

A. Yes, I did.

Q. You didn't get up and testify and tell the judge at that time that it wasn't you, that you had loaned the car out to Charles Aldrich?

A. Because I was advised by counsel we wasn't supposed to say nothing.

Q. But you have a right to testify and you knew that at that time.

A. But I trust my counsel, and I'm going off what she said.

Q. That was a decision you made then, wasn't it?

A. To trust my counsel, yes.

Q. And instead, you decided just to sit in jail longer?

A. I trust my attorney and whatever decision she make.

Q. At the second lineup in October of 2002, you didn't tell anybody about this Charles Aldrich –

A. No.

Q. -- or loaning out the car?

A. No.

Q. In fact, Mr. Ashworth, isn't it true that the first time the police or prosecutor finds out about Charles Aldrich being involved in this case was at the trial last month?

A. Yes.

* * *

Q. In March of this year, did you decide to tell anybody about Charles Aldrich?

A. Yes.

Q. Who did you tell?

A. My attorney.

Q. You didn't tell the police or the prosecutor, did you?

A. How was I going to contact them?

Q. How about a telephone?

A. I can't contact them by telephone. I got an attorney. I told my attorney. And whatever she decide to do with the information that I gave her, I trusted her decision.

Q. In April, May, June, or July of this year, after Charles Aldrich's death, did you tell the police or the prosecutor that he was involved?

A. No.

Defense counsel did not object to this questioning.

Later, during his closing argument, the prosecutor made the following statements regarding defendant's failure to come forward with exculpatory evidence before trial:

And does he tell anybody about loaning the car out? Not on April 24, not on April 25, not on May 16 at the lineup, not at the preliminary hearing, not at the second lineup. He waits and waits 'till trial in August of 2003, 15 months later.

Again, defense counsel did not object.

The constitutional privilege against self-incrimination and the right of due process restrict the use of a defendant's silence in a criminal trial. *People v Dennis*, 464 Mich 567, 573; 628 NW2d 502 (2001); *People v Sutton (After Remand)*, 436 Mich 575, 592; 464 NW2d 276 (1990). A defendant waives his privilege against self-incrimination when he testifies at trial. *People v Dixon*, 217 Mich App 400, 405; 552; NW2d 663 (1996). But, a defendant's exculpatory testimony at trial may not be impeached with evidence of silence resulting from defendant's assertion of his Fifth Amendment¹ rights. *Id.* at 405-406. The Fourteenth Amendment² right to due process bars the use of such silence either as substantive evidence or to impeach the defendant's exculpatory explanation at trial, provided the defendant does not claim to have told the police the same version upon arrest, or to have cooperated with the police. *Id.* at 406; *People v Alexander*, 188 Mich App 96, 102; 469 NW2d 10 (1991). In essence, "where a defendant's silence is attributable to an invocation of his Fifth Amendment right or a reliance on the *Miranda* warnings, the use of his silence is error." *People v Schollaert*, 194 Mich App 158, 163; 486 NW2d 312 (1992).

¹ US Const, Am V.

² US Const, Am XIV.

Clearly, the prosecutor's continuing questioning of defendant, as to why he did not talk to Detective Courtney or tell anyone about Aldrich at the two lineups, following the lineups, and during the preliminary examination subsequent to defendant's arrest, was improper because defendant answered that he had counsel with him and was not supposed to say anything. The lineups and preliminary examination were all post arrest. Defendant informed the prosecutor that he had counsel and had decided to remain silent. The prosecutor continued to ask questions in this regard, attempting to impeach the credibility of defendant's exculpatory testimony, and emphasized defendant's silence during the lineups and during the preliminary examination in his closing arguments in an attempt to attack defendant's credibility. Defendant indicated that his silence on these occasions was a result of his being with counsel and asserting his Fifth Amendment right to remain silent, but the prosecution continued to question defendant in this regard and commented during his closing argument.

To the extent that the prosecutor's questioning and comments implicated defendant's silence attributable to the assertion of his Fifth Amendment rights, defendant has identified plain error. We find that the plain error, resulting from the prosecutor's comments and questioning, seriously affected the fairness, integrity or public reputation of judicial proceedings.

The evidence of defendant's guilt in this case was not overwhelming. While the two victims identified defendant at trial as the man who broke into the house, they were unable to identify defendant at a corporeal line-up held soon after the crime. A third eyewitness who had written down the license plate number of the car in which the man who broke into the home fled, and who identified defendant at trial, also failed to identify defendant at a police line-up. Further, defendant presented alibi evidence from two witnesses (his aunt and girlfriend) that suggested he could not have been at the victims' home at the time the charged crimes occurred. In addition, defendant testified that he had loaned his car, which was seen at the scene of the crimes, to a friend shortly before the charged crimes occurred. Even when considering the possible motives of the witnesses, and deferring to the jury's superior position to judge the credibility of those witnesses, we conclude that there is a reasonable probability that, but for the prosecutor's improper questions and comments, the trial outcome would have been different. However, this does not mean the errors resulted in the conviction of an actually innocent defendant, which is required for reversal. See *Walker, supra*. Thus, we will review to determine if the plain error seriously affected the fairness, integrity or public reputation of judicial proceedings.

Viewing the prosecutor's improper comments in light of the defense arguments and the other evidence admitted, the impact of the questions and comments significantly tarnished defendant's credibility and significantly impacted the reliability of his exculpatory testimony. The role and responsibility of a prosecutor differs from that of other attorneys because his duty is to seek justice, and not merely to convict. *People v Jones*, 468 Mich 345, 354; 662 NW2d 376 (2003); *People v Pfaffle*, 246 Mich App 282, 291; 632 NW2d 162 (2001). The prosecution's questioning of defendant and closing argument comments in this case were egregious, and this combined with the reasonable probability that without the questioning and comments the outcome may have been different seriously calls into question the fairness of the proceedings and could seriously affect the integrity and public reputation of judicial proceedings, which requires that we reverse defendant's convictions and sentences. We also note that this line of questioning and the comments by the prosecution resulted in a miscarriage of justice that could not be cured

by instruction. See *People v Duncan*, 402 Mich 1, 15-16; 260 NW2d 58 (1977); *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Further, even if this error was not sufficient to reverse, when coupled with the ineffective assistance of counsel discussed, *infra*, reversal is required.

Defendant also argues that trial counsel was ineffective when she questioned a witness regarding defendant's employment status, and when she failed to object to the prosecutor's subsequent questions and comments regarding defendant's employment status and economic situation. We agree, and find that defendant is entitled to reversal because when the ineffective assistance of counsel is coupled with the improper prosecutorial questions and comments the result of trial was fundamentally unfair or unreliable.

The defendant bears the burden of overcoming the presumption that counsel was effective and must meet a two-pronged test to establish ineffective assistance of counsel. *Strickland v Washington*, 466 US 668, 689; 104 S Ct 2052; 80 L Ed 2d 674 (1984). First, the defendant must show that counsel's performance was deficient as measured against objective reasonableness under the circumstances according to prevailing professional norms. *Id.* at 687-688; *People v Pickens*, 446 Mich 298, 312-313; 521 NW2d 797 (1994). Second, the defendant must show the deficiency was so prejudicial that he was deprived of a fair trial, *Strickland, supra* at 687-688; *Pickens, supra* at 309, so that there is a reasonable probability that but for counsel's unprofessional error(s), the trial outcome would have been different, *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). Moreover, constitutional error warranting reversal does not exist unless counsel's error was so serious that it resulted in a fundamentally unfair or unreliable trial. *Lockhart v Fretwell*, 506 US 364, 369-370; 113 S Ct 838; 122 L Ed 2d 180 (1993); *Pickens, supra* at 312 n 12; *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

Prosecutorial questions regarding a defendant's employment status or poverty are improper. *People v Johnson*, 393 Mich 488, 497; 227 NW2d 523 (1975). As this Court stated in *People v Andrews*, 88 Mich App 115, 118; 276 NW2d 867 (1979), the rationale for this rule is as follows:

This Court refuses to "assume that wealth exerts a greater attraction on the poor than on the rich." To do so would "effectively establish a two-tiered standard of justice and demolish *pro tanto* the presumption of innocence." Our system of justice and its constitutional guarantees are simply too fragile to permit this type of unfounded character assassination. [Footnotes omitted.]

In the present case, trial counsel did not object when the prosecutor questioned defendant and another witness regarding defendant's employment status and commented on defendant's need for money during the prosecutor's closing argument. Pursuant to *Johnson* and *Andrews*, such questions and comments were improper. Moreover, trial counsel herself introduced the subject into the trial. While we will not substitute our judgment for that of counsel regarding matters of trial strategy, *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004), we can imagine no reasonable trial strategy that would support introducing this evidence into the trial. See *Andrews, supra*. In particular, where a home invasion is involved and the prosecution is suggesting that defendant went in the home to get money, such evidence of a defendant's

poverty or unemployment is highly prejudicial. See *People v Henderson*, 408 Mich 56, 66; 289 NW2d 376 (1980); see also *Johnson, supra* 496-497; *People v Leverette*, 84 Mich App 268, 271, 269 NW2d 559 (1978). We conclude that trial counsel's performance fell below an objective standard of reasonableness both when she introduced the subject matter into the trial and when she failed to object to the prosecutor's subsequent questions and comments on the subject.

As discussed above, the evidence of defendant's guilt in this case was not overwhelming and defendant presented evidence supporting that he was not guilty. Evidence of a defendant's poverty or unemployment showing that he is short of funds has a high prejudicial impact. *Henderson, supra* 66; see also *Johnson, supra* 496-497; *Leverette, supra* 271. Particularly in this case where the charged offense was first-degree home invasion. See *Henderson, supra* at 66. Thus, we find that it was highly prejudicial for the jury to hear this line of questioning in connection with the prosecutor's contention in closing argument that defendant "needed money." There is a reasonable probability that, but for trial counsel's errors, the trial outcome would have been different. Nonetheless, constitutional error warranting reversal does not exist unless counsel's error was so serious that it resulted in a fundamentally unfair or unreliable trial. *Lockhart, supra* at 369-370; *Pickens, supra* at 312 n 12; *Rodgers, supra* at 714.

We conclude that trial counsel's errors combined with the prosecutorial questions and comments discussed, *supra*, resulted in a fundamentally unfair and unreliable trial for the reasons discussed above. *Lockhart, supra* at 369-370; *Pickens, supra* at 312 n 12; see also *People v Hill*, 257 Mich App 126, 152; 667 NW2d 78 (2003). Because the convictions were the result of an unfair and unreliable trial, we reverse and remand for a new trial.

Reversed and remanded for a new trial. We do not retain jurisdiction.

/s/ Mark J. Cavanagh

/s/ Kathleen Jansen

/s/ Hilda R. Gage