

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
March 17, 2015

v

DESHAWN MAURICE COLBERT, JR.,
Defendant-Appellant.

No. 319452
Calhoun Circuit Court
LC No. 2012-003313-FC

Before: JANSEN, P.J., and METER and BECKERING, JJ.

PER CURIAM.

Defendant, Deshawn Maurice Colbert, Jr., appeals as of right his jury trial convictions of armed robbery, MCL 750.529, and first-degree felony murder, MCL 750.316(1)(b). The trial court sentenced him as a second habitual offender, MCL 769.10, to concurrent terms of imprisonment of 30 to 60 years for the armed robbery conviction and life without the possibility of parole for the first-degree felony murder conviction. We affirm.

I. FACTUAL BACKGROUND

In the evening hours of August 10, 2012, defendant and his father and two other cohorts entered the home of the victim, Larry Evans, to steal marijuana and/or money that they believed was inside the home. Ehabb Kelly, one of the victim's sons, was downstairs when the men entered the house. He called 911 because he heard a commotion upstairs. He testified that someone yelled "[w]here's the bag" multiple times. Kelly, who hid behind a cabinet, testified that defendant came downstairs at one point, then went upstairs and told his cohorts that someone was hiding in the basement. Thereafter, defendant's father and another accomplice went downstairs to look for him, with one man indicating that he would "shoot [the] whole basement up." When the police arrived, defendant's father hid in the basement underneath a bed.

When police officers were outside the house, they heard one of the occupants of the house demanding to know "where's the bag[?]" Defendant and his accomplices ran from the home when they realized the police were there. Two of the officers chased and tackled defendant. Defendant's clothes were covered in what appeared to be blood. Laboratory tests later revealed that the victim's blood was on defendant's tennis shoes. When the officers went inside the victim's home, they found the victim on the floor, surrounded by blood. The victim had been the recipient of a savage beating and a single gunshot wound to the head. Officers

found two handguns in the home; testing confirmed that the victim's blood was on both handguns and that one of the handguns fired the bullet that killed the victim.

Officer Jim Blocker of the Battle Creek Police Department interviewed defendant shortly after his arrest. Defendant waived his *Miranda*¹ rights and proceeded to give conflicting versions of what occurred at the victim's house. At first, he admitted to being at the victim's house, but denied knowing any of the other individuals who were present. Later, when confronted with the fact that one of the other individuals at the house was his father, defendant admitted to knowing his father was at the house. Later still, despite initially denying knowing anyone else who was at the house or knowing why they were there, defendant eventually admitted that he knew all of the men who went to the victim's house. He also admitted to knowing that one of the men, Deven Nelson, was known as a "shooter," and that Deven had a gun that evening. He also admitted that, before going to the house, Deven and his brother, Corey Nelson, told him that they were going to the victim's house because "this guy owed 'em money" and that they went there to "get n***** some money, so everybody gonna get his money."

II. ANALYSIS

Defendant raises three arguments on appeal. First, he argues that the trial court erred in admitting statements made by his father, a non-testifying accomplice, through the testimony of the detective who interviewed him. Second, defendant argues that trial counsel was ineffective for failing to object to the admission of those statements. Third, he argues that the trial court erred in permitting the prosecutor to use his post-arrest silence against him.

A. STANDARD OF REVIEW

Defendant did not object to the use of his father's statements or the alleged use of his silence against him; therefore we review these issues "for plain error affecting substantial rights." *People v Pipes*, 475 Mich 267, 270; 715 NW2d 290 (2006). "To avoid forfeiture under the plain error rule, three requirements must be met: 1) the error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999), citing *United States v Olano*, 507 US 725, 731-734; 113 S Ct 1770; 123 L Ed 2d 508 (1993). "The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings." *Id.*, citing *Olano*, 507 US at 734. And, even if defendant satisfies this three-part test, "[r]eversal 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.'" *Id.*, quoting *Olano*, 507 US at 736-737 (internal quotation marks omitted; alteration in original).

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

Defendant failed to raise his assertion of ineffective assistance in either a motion for new trial or a motion for a *Ginther*² hearing. “Failure to move for a new trial or for a *Ginther* hearing ordinarily precludes review of the issue unless the appellate record contains sufficient detail to support the defendant’s claim.” *People v Sabin (On Second Remand)*, 242 Mich App 656, 659; 660; 620 NW2d 19 (2000). “This Court reviews unpreserved claims of ineffective assistance of counsel for errors apparent on the record.” *People v Johnson*, 293 Mich App 79, 90; 808 NW2d 815 (2011).

B. CONFRONTATION CLAUSE

Under the Confrontation Clause of the Sixth Amendment, a criminal defendant is guaranteed the right to confront the witnesses against him or her. *People v Dendel (On Second Remand)*, 289 Mich App 445, 452-453; 797 NW2d 645 (2010). “[T]he Sixth Amendment bars the admission of testimonial statements by a witness who does not appear at trial unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness.” *Id.* at 453, citing *Crawford v Washington*, 541 US 36, 53-54; 124 S Ct 1354; 158 L Ed 2d 177 (2004). “Statements taken by police officers in the course of interrogations are [] testimonial” *Crawford*, 541 US at 52.

Defendant takes issue with the following exchange between the prosecutor and the detective who interviewed his father:

Q. Did you have the occasion to interview [defendant’s] father?

A. I did. . . .

* * *

Q. Did there come a time when he admitted being there with his son?

A. Yes.

Q. Did there come a time where admitted knowing what was going on at that particular date and time?

A. Yes.

Q. Did there come a time where he admitted or told you that the two Nelson boys had guns with them on that particular night?

A. Yes, he did.

Q. Did there come a time he indicated to you that he drove over to the house with his son?

² *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

A. Yes.

Q. Did there come a time where he admitted to you why he and his son went over to a particular house?

A. Yes.

Q. Did there come a time where he admitted to you . . . the reason for going over there was to secure some marijuana?

A. Yes.

Q. By purchasing it or through force?

A. Through force.

Q. Did there come a time where he indicated to you that he saw his own son with a gun that particular date and times [sic]?

A. Yes, he did.

Defendant properly argues, and the prosecutor concedes, that the detective's testimony summarizing statements made by defendant's father, a non-testifying witness who was not subject to cross-examination, violated defendant's confrontation rights under the Sixth Amendment. Despite the existence of this error, we decline to reverse under plain error review because there was strong evidence of defendant's guilt apart from the statements of defendant's father. This was not a case, where, as defendant contends, the evidence merely placed him at the home at the time of the robbery and murder. Rather, there was ample evidence of defendant's involvement in the offenses. Defendant, by his own admission, went to the house to "get n***** some money, so everybody gonna get his money." Defendant went with Deven, whom defendant admitted was known as a "shooter." Despite initially denying that he knew the other men involved, one of whom was his father, defendant later admitted to knowing all of the men involved in the crimes. According to Kelly's testimony, defendant acted in concert with the men at the home. Kelly testified that defendant came downstairs, looked around, then told his cohorts that someone was downstairs. This prompted two of the other men to come downstairs and threaten to start shooting. In addition, there was evidence of defendant's involvement in the victim's death because defendant's shoes were covered in the victim's blood, and the rest of defendant's clothes tested positive for blood.

In light of the other evidence adduced, defendant cannot show "that the error affected the outcome of the lower court proceedings[.]" or that it resulted in the conviction of a defendant who was actually innocent. See *Carines*, 460 Mich at 763. Defendant is not entitled to reversal.

C. INEFFECTIVE ASSISTANCE

Defendant also argues that he is entitled to a new trial because trial counsel rendered ineffective assistance by not raising a timely objection to the above testimony. Although defendant has "show[n] that counsel's performance fell below an objective standard of

reasonableness[,]” he has not “show[n] that, but for counsel’s deficient performance, a different result would have been reasonably probable.” *People v Armstrong*, 490 Mich 281, 290; 806 NW2d 676 (2011). Defendant’s assertion that trial counsel’s failure to object “effectively destroyed” his “mere presence” defense again ignores the substantial evidence of guilt adduced at trial.

D. POST-ARREST SILENCE

Defendant also argues that he was denied a fair trial when the prosecutor attempted to use his silence while being arrested both as an admission of guilt and to impeach his subsequent statements to officers that he was merely present at the scene of the robbery and murder. Defendant objected to a portion of the testimony he cites to on appeal, but he raised a ground different from that raised on appeal. “[A]n objection based on one ground at trial is insufficient to preserve an appellate attack based on a different ground.” *People v Bulmer*, 256 Mich App 33, 35; 662 NW2d 117 (2003). Accordingly, review is for plain error affecting substantial rights. *Pipes*, 475 Mich at 270.

Under *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966), “a person taken into custody must be advised immediately that he has the right to remain silent, that anything he says may be used against him, and that he has a right to retained or appointed counsel before submitting to interrogation.” *Doyle v Ohio*, 426 US 610, 617; 96 S Ct 2240; 49 L Ed 2d 91 (1976). “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.” *People v Shafier*, 483 Mich 205, 212; 768 NW2d 305 (2009). “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.” *Id.* at 212-213.

Defendant takes issue with the following series of questions posed by the prosecutor and the answers given by the officer who arrested defendant:

Q. Okay, while you handcuffed [defendant] did he say anything to you, either you or in your presence?

A. He just surrendered at that particular time.

Q. Did he tell you a man inside had been beaten or shot?

A. No, sir.

Q. Did he tell you that he was just there because it was a dope house, he was there to either smoke or buy dope?

A. No, sir.

Q. Did he tell you that his father was also located inside the home?

A. No, sir.

Q. Did he ever indicate who, if anyone, had beat the person that was contained within the home?

A. No, sir.

Under plain error review, we decline to find the existence of an error that was plain or obvious. The record contains no evidence that defendant was questioned by the officer, that he was informed of his *Miranda* rights, or that he invoked his right to remain silent. Rather, on the record before us, the testimony simply reveals that defendant did not volunteer any information about the offenses that occurred in the home. While the questioning could have been inappropriate had the officer indicated that defendant, in response to custodial interrogation, remained silent, there is no indication of as much on the record. Where defendant bears the burden of demonstrating error, we cannot agree that the challenged testimony amounted to plain error.

Furthermore, even assuming the existence of plain error, we do not agree with defendant's assertion that he is entitled to reversal. As noted above, there was ample evidence of defendant's guilt in this case. In light of the evidence adduced, and the fact that the prosecutor did not reference defendant's silence when arguing to the jury, cf. *Shafier*, 483 Mich at 223 (“[I]n light of the prosecutor's extensive references to defendant's silence, the extensive connection of that silence to defendant's guilt, the inconsistencies in the prosecutor's case . . . and the nature of defendant's defense . . . the error was prejudicial”), defendant has failed to prove that the error, if any, affected the outcome of the lower court proceedings, *Carines*, 460 Mich at 763-764.

Affirmed.

/s/ Kathleen Jansen
/s/ Patrick M. Meter
/s/ Jane M. Beckering