

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HAMIN LORENZO DIXON,

Defendant-Appellant.

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UNPUBLISHED

June 14, 2005

No. 252559

St. Clair Circuit Court

LC No. 02-002600-FH

Before: Talbot, P.J., and Zahra and Donofrio, JJ.

PER CURIAM.

A jury convicted defendant of felonious assault, MCL 750.82. The trial court sentenced him to nine months in jail. Defendant appeals as of right. We affirm.

I. Basic Facts

On September 15, 2002, Anthony Bark, Nicholas Bark, and Robert McCauley were driving in Anthony's pickup truck when Anthony saw his former girlfriend, Natalie Higgins, get into an Escort with defendant, Roberta Cleland, and Megan Schuster. Anthony approached the Escort to talk to Higgins. Anthony, Nicholas, and McCauley testified that defendant got out of the Escort, pulled out a pistol, pointed it at Anthony, and threatened to kill him. As Anthony returned to his truck, defendant threatened to kill him again, and hit him on the back of his head with the gun.

Defendant testified that he and Cleland were driving when they stopped to offer a ride to Higgins and Schuster. As they were getting into the car, Anthony pulled ahead of the Escort in his pickup truck, got out, and demanded to speak to Higgins. Defendant confronted Anthony, and told him that Higgins did not want to talk to him. Nicholas then got out of the truck and approached defendant while brandishing a "bar" or a "pole." Anthony and Nicholas shouted something to the effect that defendant had something in his pocket, but defendant testified that he only had his hand in his pocket. Defendant claimed that he got back into the Escort, and Cleland drove off.

II. Testimony that Defendant Exercised His Right to Remain Silent

Defendant argues that a new trial is required because the prosecutor improperly introduced evidence that he exercised his right to remain silent after receiving *Miranda*<sup>1</sup> warnings.

#### A. Standard of Review

Because defendant did not object to the challenged testimony, this issue is unpreserved. MRE 103(a)(1); *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 949 (2001). This Court reviews unpreserved issues for plain error. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *People v Houston*, 261 Mich App 463, 466; 683 NW2d 192 (2004), lv gtd in part on other grounds 471 Mich 913 (2004). To warrant reversal, defendant must establish that a plain error affected his substantial rights, meaning that the error was outcome-determinative. *Carines, supra; Houston, supra*.

#### B. Analysis

At trial, the prosecutor questioned Port Huron Police Officer Douglas Decker concerning how he determined that defendant was the assailant. Decker testified that the Barks and McCauley gave him the names of Higgins and Schuster. Higgins and Schuster told Decker that Cleland had been driving the vehicle. Cleland gave him defendant's name. Decker disseminated this information and two other officers, Gilbert and Wood, detained defendant while he was driving the Escort. Decker testified that he reported to the scene of the arrest and determined that the Escort matched the description of the car involved in the September 15 incident. The prosecutor then asked Decker:

Q. Did you have contact with the Defendant at that location?

A. The Defendant was already in custody, I believe he was in the back of Officer Gilbert's patrol car.

Q. Did you, yourself, have any, any conversation or any opportunity to interview the Defendant at that time?

A. I don't recall if I spoke to him. I know I didn't—I don't believe he was questioned there. I believe Officer Gilbert advised him of his *Miranda* rights and at that time he declined to answer—

Q. Okay.

A. --any questions.

Q. Did you look at him yourself when you were--

A. Oh, --

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

Q. --at the scene?

A. --yes, I did.

Q. And when you looked at the person that was in custody, was that person Mr. Dixon?

A. That was Mr. Dixon, yes.

Q. And did he appear to match the description that you had been given of the suspect?

A. Yes, he did.

Defendant argues on appeal that Decker's reference to his assertion of his *Miranda* rights violated his constitutional right against self-incrimination.

The constitutional privilege against self-incrimination and the right of due process restrict the use of a defendant's silence in a criminal trial. *Doyle v Ohio*, 426 US 610, 618-619; 96 S Ct 2240; 49 L Ed 2d 91 (1976); *People v Dennis*, 464 Mich 567, 573; 628 NW2d 502 (2001).

This case is similar to *Dennis, supra*, wherein the prosecutor asked a police officer an open-ended question about the "type of investigation follow-up," and the officer responded that he attempted to question the defendant, but the defendant asserted his right to consult an attorney before answering questions. *Id.* at 570. The trial court denied the defendant's motion for a mistrial, "stating that it was convinced the prosecutor did not intend to elicit testimony on this point and that it did not think 'the jury picked it up or caught it in any way.'" *Id.* at 571. The trial court also gave the jury a curative instruction explaining that the defendant had "an absolute right" not to speak with the police, and that his refusal to talk to the officer could not be used by the jury "in any way and is not an indication of anything." *Id.*

The Supreme Court in *Dennis* agreed that the officer's answer was responsive to the prosecutor's question, but concluded that the prosecutor did not intend to elicit the response about the defendant's silence:

We recognize that Detective Cooper's answer may not reasonably be viewed as nonresponsive to the prosecutor's open-ended question asking about the "type of investigation follow-up" pursued by the detective. Detective Cooper's reply about his attempt to interview defendant described something that he did in attempting to investigate the case after defendant was arrested. On the other hand, there is nothing to reasonably support a conclusion that the prosecutor intended for this question to elicit a reference to the attempted interview. Immediately after the detective's answer referencing defendant's refusal of the police interview, the detective began testifying about his other investigative efforts. In our view, it is evident that the prosecutor's question, while it may have been inartfully phrased, was aimed at eliciting testimony about these investigative efforts, not about the defendant's refusal of a police interview. [*Dennis, supra* at 575.]

The Supreme Court also contrasted the circumstances in *Dennis* from cases in which the prosecutor directly questioned a defendant about his failure to speak with the police, or actively suggested that a defendant's silence was indicative of his guilt. *Id.* at 574-580. Although the Supreme Court disapproved of "the inappropriate injection of a defendant's exercise of the *Miranda* rights into a trial by either prosecutors or the police," the Court concluded that reversal was not required, explaining:

In the present case, considering (1) the limited nature of the improper testimony, (2) the lack of any effort by the prosecution to improperly use defendant's invocation of the *Miranda* rights against him, (3) the strong curative instruction used by the trial court, and (4) that defendant did not testify so there is no concern of his post-*Miranda* silence having been used for impeachment purposes, we conclude that there was no constitutional violation and that the trial court did not abuse its discretion by declining to order a mistrial. [*Id.* at 583.]

In this case, although the prosecutor should have realized that her question, "Did you, yourself, have any, any conversation or any opportunity to interview the Defendant at that time?" was likely to elicit a reference to defendant's assertion of his right to remain silent, we agree that the prosecutor promptly refocused the questioning to Decker's identification of defendant. Decker made only a brief, limited reference to defendant's post-*Miranda* silence, and the prosecutor did not attempt to use this testimony against defendant. Although defendant testified, the prosecutor did not attempt to impeach him with his silence. Under these circumstances, we conclude that Decker's brief testimony did not constitute plain, outcome-determinative error affecting defendant's substantial rights.

### III. Prosecutorial Misconduct

Defendant next argues that the prosecutor committed misconduct by arguing facts not in evidence.

#### A. Standard of Review

Defendant did not object to the prosecutor's remarks, so we review this unpreserved issue for plain error affecting defendant's substantial rights. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001).

#### B. Analysis

In her rebuttal argument, the prosecutor stated:

The Defense wants you to believe a certain version of events. They want you to believe that the Defendant really didn't do anything wrong, really didn't cause any problems, that nothing really happened here other than what the victim started. There's been no corroboration of that. No evidence has been presented to you other than the testimony of the Defendant to corroborate that.

Defendant asserts that his testimony was corroborated by other evidence and that the prosecutor's rebuttal argument was therefore improper.

This Court decides prosecutorial misconduct issues case by case, examining the pertinent portion of the record and evaluating the prosecutor's remarks in context. *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). Prosecutors may not make a statement of fact to the jury that is unsupported by the evidence, but they are free to argue the evidence and all reasonable inferences arising from it as they relate to their theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995).

Defendant argues that the prosecutor's remarks were contrary to the evidence because Decker's cross-examination testimony corroborated the defense theory. Defendant asked Decker whether he interviewed Schuster, Higgins, and Cleland, and Decker replied that he did. Defendant asked, "Did any of them acknowledge to you that there was a gun involved?" Decker replied, "No, they did not." Defendant asked, "Did you specifically ask them?" Decker answered, "Yes, I did."

Decker's testimony did not establish that the women corroborated defendant's testimony. That the women did not "acknowledge" the presence of a gun during the dispute does not entail that defendant did not brandish the gun. The testimony also fails to corroborate other aspects of defendant's version, such as his claim that Anthony started the confrontation, and that Nicholas brandished a metal bar. Consequently, the prosecutor's remarks were not contrary to the evidence. Moreover, defendant's reliance on these statements as substantive evidence is problematic because the statements are hearsay, i.e., "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c); *People v Chavies*, 234 Mich App 274, 281; 593 NW2d 655 (1999). Hearsay is not admissible, except as provided by the rules of evidence. *Id.*; MRE 802. Defendant does not identify any applicable exception to the hearsay rule that would permit these statements to be considered for the truth of the matter asserted. For these reasons, defendant has not shown a plain error affecting his substantial rights.

#### IV. Ineffective Assistance of Counsel

Finally, defendant claims that trial counsel was ineffective for failing to object to the alleged errors previously discussed in this opinion, and for failing to argue in closing that Decker's testimony corroborated the defense theory.

##### A. Standard of Review

"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). A trial court's finding of fact are reviewed for clear error. *Id.* Questions of constitutional law are reviewed de novo. *Id.*

##### B. Analysis

To establish ineffective assistance of counsel, a defendant must show (1) that the attorney's performance was objectively unreasonable in light of prevailing professional norms and (2) that, but for the attorney's error or errors, a different outcome reasonably would have resulted. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001); *People v Harmon*, 248 Mich App 522, 531; 640 NW2d 314 (2001). A defendant must affirmatively demonstrate

that counsel's performance was objectively unreasonable and so prejudicial as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994); *People v Ortiz*, 249 Mich App 297, 311; 642 NW2d 417 (2002).

If defense counsel had objected to Decker's testimony that defendant exercised his right to silence, the trial court could have instructed the jury that it could not draw any inferences from defendant's post-*Miranda* silence. *Dennis, supra* at 583. But because Decker made only a brief reference to defendant's post-*Miranda* silence, and the prosecutor did not attempt to use that reference against defendant, any error was not prejudicial and a curative instruction was not critical to protecting defendant's rights. Therefore, defense counsel's failure to object or request the curative instruction does not constitute ineffective assistance of counsel.

Finally, as discussed previously, Decker's testimony did not corroborate defendant's testimony. Consequently, defense counsel did not err in failing to object to the prosecutor's rebuttal argument, nor did he err in failing to argue that Decker's testimony corroborated defendant's version of events.

Affirmed.

/s/ Michael J. Talbot  
/s/ Brian K. Zahra  
/s/ Pat M. Donofrio