

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES PAUL BUCKLAND,

Defendant-Appellant.

UNPUBLISHED

October 26, 2004

No. 251534

Delta Circuit Court

LC No. 03-007032-FH

Before: Murphy, P.J., and Sawyer and Markey, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction for domestic assault, third offense, MCL 750.81(4). He was sentenced as a third-habitual offender, MCL 769.11, to two to four years' imprisonment.¹ Defendant argues on appeal that the conviction must be reversed because the jury found him guilty of only simple assault and not domestic assault. Defendant further argues that the prosecutor committed misconduct by introducing evidence of defendant's recent incarceration on a prior conviction and by referencing defendant's pretrial silence in closing argument. We affirm, holding that the jury clearly and properly found defendant guilty of domestic assault, that there was no prosecutorial misconduct, and that, assuming misconduct, it did not prejudice defendant.

I. FACTS

This case arises out of an assault against Glenn Gafner on March 18, 2003. Gafner, a disabled individual who is legally blind² and on disability, testified that at the time of the assault

¹ For purposes of clarity, we note that the charge of domestic assault, third offense, arose out of the fact that defendant had previous misdemeanor convictions for domestic assault. See MCL 750.81(4). The record reflects that he actually had four prior domestic assault convictions. The sentence enhancement predicated on third-habitual offender, MCL 769.11, arose out of prior felony convictions for drunk driving and fleeing and resisting an officer.

² Gafner indicated that he suffers from a degenerative eye disease that impacts his ability to see clearly. He is able to see forms, shapes, light, and darkness, along with being able to distinguish people but within five or six feet only. The record reflects that Gafner has many physical ailments and mental health problems, e.g., seizures, manic-depression, and asthma, and takes

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he resided in an apartment located in a large home that was divided into four separate apartments. Gafner was separated from his wife, and they were living apart.³ He came to know defendant when defendant resided briefly at the home of Gafner's wife.⁴ Approximately a year before the assault, defendant moved into Gafner's apartment. Gafner explained that he allowed defendant to move into his home because defendant was in-between jobs and did not have a place to stay. Defendant was permitted to sleep on the couch and, according to Gafner, no rent was charged.

During a two-month period directly preceding the assault, defendant was not residing in Gafner's home, although he left behind some personal belongings, including some clothes, a leather jacket, and some toiletries. Defendant apparently spent those two months in jail on a previous conviction. On the day of the assault, defendant came to Gafner's apartment shortly before noon. Gafner testified that defendant's appearance surprised him as defendant had been in jail. Gafner was sitting on the edge of his bed when defendant entered the bedroom and walked around looking for his leather jacket. Gafner assisted in trying to find the jacket, without luck, and defendant began angrily and furiously flinging coats off a coatrack and from out of a closet in an effort to find his leather jacket. Defendant then proceeded to physically pin Gafner to the bed and choke him around the throat for about thirty to forty seconds. Defendant yelled about Gafner owing him money, \$3,000, all the while continuing to choke the victim. Defendant demanded money and said that if he was not paid by Friday, Gafner was a dead man. Gafner denied owing any money to defendant. Mike Racicot, a friend of Gafner who was in the home in another room at the time of the assault, hollered about the commotion, and defendant let Gafner up and exited the room. Gafner testified that afterwards, "I just sat on the edge of the bed trying to get my breath because he had pretty much – you know, he was strangling me." The victim stated that defendant, after first having an argument with Racicot and telling Racicot to mind his own business, left the home. Gafner called his wife, and she called the police. Later in the day, defendant made threatening phone calls to a fearful Gafner. Gafner ended up staying the night at his wife's home.

Police officer James Silverstone, who was not a responding officer to the assault, testified that he went to Gafner's home later in the day following the assault in response to Gafner's request to add additional information to the police report and because of the threatening phone calls made by defendant. In the phone calls, defendant was demanding \$3,000 and his leather jacket and threatening Gafner's life. Silverstone stated that Gafner was very distraught, excited, and extremely scared and that Gafner was keeping a knife close by in case defendant returned. Silverstone and other officers arrested defendant, but they did not make any attempt to question defendant; he was just escorted directly to jail.

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about a dozen different prescription medicines. He also acknowledged that he is an alcoholic, but he denied drinking alcohol at the time of the assault. Further, Gafner denied that his medications affected his observations regarding the assault.

³ There is some indication in the record that Gafner may have actually been divorced at the time of the assault.

⁴ Gafner later testified that there was no intimate relationship between defendant and his wife as far as he was aware.

Police officer Todd Zeise testified that he and other officers responded to the assault scene after receiving a call from Gafner's wife. On arrival, Gafner was upset and agitated. Gafner indicated to Zeise that defendant had choked him and kicked him in the leg.⁵ Zeise testified that he saw no signs of injury, no visible marks.

The parties stipulated that two prosecution witnesses, who did not testify because of the stipulation, would have stated that, during the past year in which the witnesses provided home health care assistance to Gafner, defendant "was a resident in that home [Gafner's] during a significant portion of that time up to approximately two months before this incident occurred." Defense counsel added to the above statement, which was made by the prosecutor, stating that "we are willing to stipulate that [defendant] was a resident in the home two months prior to the alleged incident." Defense counsel then noted that Gafner and defendant "were considered roommates for a period of time." The trial court then immediately instructed the jury that, "when lawyers agree on a statement of facts, these are called stipulated facts. You may regard such stipulated facts as true, but you are not required to do so."

The prosecution rested, and defendant moved for a directed verdict that was denied. Defendant then chose to rest without presenting a witness. The jury deliberated and ultimately returned a verdict of guilty on the sole charge of domestic assault. We shall address the facts surrounding the jury's verdict in greater detail below in our discussion of defendant's first appellate issue.

II. ANALYSIS

A. Domestic Assault Conviction

Defendant contends that the jury found defendant guilty of only simple assault, not domestic assault, and because the only charge for the jury's consideration was domestic assault, he was in fact completely acquitted and reversal is mandated. We do not agree.

This issue requires us to delve into events and circumstances that arose during and immediately following jury deliberations. To view the facts in proper context, however, it is first necessary to address the statutory provision under which defendant was charged. MCL 750.81(4), which was the sole offense for consideration by the jury, provides:

An individual who commits an assault *or* an assault and battery in violation of subsection (2),⁶ and who has 2 or more previous convictions for assaulting or assaulting and battering . . . a resident or former resident of his or

⁵ Gafner did not recall telling police that defendant kicked him in the leg.

⁶ Subsection (2) of MCL 750.81 provides:

Except as provided in subsection (3) or (4), an individual who assaults *or* assaults and batters . . . a resident or former resident of his or her household . . . is guilty of a misdemeanor [Emphasis added.]

her household . . . is guilty of a felony punishable by imprisonment for not more than 2 years or a fine of not more than \$2,500.00, or both[.] [Emphasis added.]

The jury was not told of defendant's prior domestic assault convictions. The record makes clear, and to any reasonable juror it would be clear, that there was only one crime upon which the jury was to deliberate and resolve, i.e., domestic assault. During instructions, the trial court, after earlier providing the elements of the crime, discussed the jury form, stating: "[T]his couldn't be any simpler, it says, We, the jury, find the defendant – and it gives the instructions to mark only one – again, the possible verdicts are not guilty or guilty."

The trial court instructed the jury on domestic assault and specific intent as follows:

The defendant is charged with the crime of domestic assault. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

First, that the defendant assaulted and battered Glenn Gafner. A battery is a forceful, violent, or offensive touching of a person or something closely connected with him or her. The touching must have been intended by the defendant, that is, not accidental, and it must have been against Glenn Gafner's will. An assault is an attempt to commit a battery or an illegal act that caused Glenn Gafner to reasonably fear an immediate battery. The defendant must have intended either to commit a battery or to make Glenn Gafner reasonably fear an immediate battery. An assault cannot be caused by accident. At the time of the assault, the defendant must have had the ability to commit a battery, or must have appeared to have the ability, or must have thought he had the ability.

Second, that at that time Glenn Gafner was a resident or former resident of the same household as the defendant.

* * *

The crime of domestic assault requires proof of a specific intent. This means that the prosecution must prove not only that the defendant did certain acts, but that he did the acts with the intent to cause a particular result.

For the crime of domestic assault, this means that the prosecution must prove that the defendant intended either to commit a battery, or to make Glenn Gafner reasonably fear an immediate battery. . . .

These instructions are not crystal clear regarding whether the crime of domestic assault requires both an assault and a battery, or whether an assault can stand on its own to support a conviction without a battery requirement.⁷ As reflected in the clear statutory provisions cited above, a domestic assault conviction can be predicated on either an assault *or* an assault and

⁷ Both parties voiced their approval of the court's instructions on the record.

battery. The trial court's instructions quoted above were patterned on CJI2d 17.2a and CJI2d 3.9. CJI2d 17.2a(2) provides, in relevant part, that the prosecution must first prove "that the defendant [assaulted/assaulted and battered] [*name complainant*]." This provision, and specifically the "assaulted/assaulted and battered" language, is footnoted with the direction to "[u]se either or both as warranted by the evidence." The evidence here supported both theories, and the trial court never found to the contrary. However, the court's instruction, ostensibly based on CJI2d 17.2a, suggested that the prosecution needed to prove both an assault and a battery. But the specific intent instruction and other portions of the domestic assault instruction, when considered with the definition of an assault and a battery provided by the trial court, could potentially be interpreted as suggesting that only an assault without a battery is sufficient to support a domestic assault conviction.

There is no need for purposes of this appeal to attempt to reconcile the trial court's instructions with the statutory provisions and the criminal jury instructions. However, the background recited by us explains the question posed by the jury during its deliberations as reflected in the following statement made by the trial court some two hours into deliberations:

We received a note from the jury, quote, ["Can we convict on just assault, or does it have to be assault and battery?"] The note goes on and says, ["17.2a"] – which is the instruction I referred to them earlier – ["is not clear as [to] if it has to be both or just one. Is assault an included offense?"]

The trial court stated that the jury's confusion concerns whether an assault and a battery must be proven to establish the crime of domestic assault, or whether an assault in and of itself is sufficient. The trial court, responding to the question submitted by the jury, instructed the triers of fact as follows:

All right. Let me advise you that in this case, the defendant is charged and it says as follows:

["Did make an assault or an assault and battery upon Glenn Gafner, a resident or former resident of the same household."]

To answer your question, if you find that the defendant committed just an assault, and if you find so beyond a reasonable doubt, then you may convict.

And, please, as I said before, please, refer to the definitions of assault and battery, those are – battery or assault in 17.2a, that will tell you how we define a battery, that will tell you how we define as assault.⁸

⁸ Defendant objected to the trial court answering the question. Defendant asserted that the court should simply refer the jury to the instructions previously given because the parties agreed to those instructions. We also note that the lower court record contains another note from the jury, which asks: "If we are a hung jury, will the next trial have more evidence? Can we convict on assault w/out battery?" In a written response, the trial court stated: "Your first question cannot be answered. Do not speculate on what may happen in the event you are unable to reach a verdict.

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On inquiry from the trial court, the jury foreperson indicated that the court's instruction provided the assistance sought. The jury returned to its deliberations and subsequently reached a verdict. The verdict was read in open court, with the foreperson stating that defendant was guilty of assault. The verdict form, which is found in the lower court file, reflects that the jury marked the box providing that defendant was guilty, but next to the word "guilty," the jury wrote in the words "of assault." The trial court, believing that a problem was caused by the jury writing in the words "of assault," sent the jury back to the jury room. The trial court then stated:

I have no idea what in the world they mean by this verdict. We did not give them the choice of finding him guilty of assault. We gave them the choice of finding him guilty or not guilty of domestic assault, that's the name of the charge.

The prosecution took the position that the jury was simply indicating that an assault, as opposed to an assault and battery, formed the basis of its domestic assault conviction, especially considering that there was never an issue on the stipulated matter that defendant was a former resident of Gafner's household. Defendant argued that the verdict reflected a conclusion that defendant was guilty only of simple assault, not domestic assault, and that the jury was not required to accept the stipulation regarding residency. Defendant contended that, because the jury only found defendant guilty of simple assault, and because domestic assault was the only pending charge, defendant was in fact acquitted.

The trial court discussed re-instructing the jury to address the confusion and having them further deliberate to settle the quandary. Defendant first vehemently objected to proceeding any further; a verdict was reached. Defendant, however, then suggested that if the court was going to continue, it should only tell the jury that it did not resolve the case as required, either guilty or not guilty of domestic assault, and then provide them with a new verdict form without further instruction. The prosecutor, although believing it not necessary to proceed any further because the jury clearly found defendant guilty of domestic assault, sought to have the court explain to the jury the dilemma before further deliberations occurred.

The jury returned, and the trial court addressed the panel:

Court. In your verdict form, you have indicated guilty of assault, this has created a problem. As I advised you before, there were two possible verdicts, not guilty or guilty of domestic assault, and I gave you the definitions and I gave you the elements at that 17.2a.

(...continued)

As to your second question, if you find beyond a reasonable doubt that an assault was committed, you may convict. Please refer to instruction 17.2a for definitions." While there is no direct discussion of this question and the court's response reflected in the transcript, vague references made by the court and counsel indicate that this question was submitted earlier in deliberations than the question already recited by us above. Possibly, the jury submitted the question, the court and parties discussed the question off the record, and the court submitted a written response to the jury. We glean this from the transcript, wherein defense counsel, when objecting to the court's on-record response to the jury, stated that, "[w]hen the last question came in it was similar to that, we sent the jury instruction in and [the prosecutor] and I both initialed that, that that would suffice. Now they're saying that they're confused by the jury instruction."

Now, I know that there was some confusion about the question of whether or not – if you found that there was an assault, would that be sufficient to support a conviction. Let me ask you this, is there still in any juror’s mind confusion about that question concerning assault?

Foreperson. I do not believe so.

Court. Okay. What I’m going to do is, I’m going to prepare a new verdict form which will indicate the same verdict possibilities not guilty or guilty, okay? Because when you added language here, you created some legal confusion for us, and we need the jury to resolve based on the instructions that I gave you whether the defendant is not guilty or guilty. Do you understand?

Foreperson. Yes, sir.

Court. Okay. If you need to know what your two possible verdicts are again, you can refer to the instructions and the roster that we gave you. And, again, the possible verdicts are not guilty or guilty of domestic assault, all right?

Foreperson. Yes.

Court. I’m going to send you back in there along with the new form asking to resolve that problem for us, all right? Okay. We’ll send this form in.

Members of the jury, you’re excused to your jury room to help us with that and to continue your deliberations.

Defendant moved for a mistrial, which the trial court denied in cursory fashion. Within six minutes of the commencement of new deliberations, the jury returned with a verdict of guilty of domestic assault. The jurors were polled with each affirmatively indicating that this was his or her verdict.

We conclude that there is no basis for reversal. Initially, we find that it was appropriate and imperative that the trial court give the jury further instructions concerning the crime of domestic assault. Where confusion is expressed by a jury, it is incumbent on the court to guide the jury by providing a lucid statement of the relevant legal criteria. *People v Martin*, 392 Mich 553, 558; 221 NW2d 336 (1974), overruled in part on other grounds by *People v Woods*, 416 Mich 581, 621 n 12; 331 NW2d 707 (1982). The decision to provide additional instructions at the request of the jury rests within the sound discretion of the trial court. *Id.* Here, after initial, justifiable confusion on the elements of domestic assault, the trial court correctly instructed the jury that a conviction for domestic assault can be predicated on either an assault or an assault and battery. Defendant makes no claim that the instruction was legally incorrect.

With respect to the initial verdict, the trial court had the authority to re-instruct the jury and have it clarify, after further deliberation, its intended verdict. In *People v Henry*, 248 Mich App 313, 320 n 20; 639 NW2d 285 (2001), this Court, quoting *People v McNary*, 43 Mich App 134, 142-143; 203 NW2d 919 (1972), rev’d in part on other grounds 388 Mich 799 (1972), stated that “[t]he judge has a right to clarify the form of the verdict if the jury has not been

discharged; and the jury can always change the form and the substance of the verdict to coincide with its intention, before it is discharged.” Here, the jury had not been discharged before the trial court requested that it clarify the verdict, and defendant does not argue to the contrary. Rather, defendant argues that the jury conclusively found him guilty of mere simple assault and not domestic assault; therefore, the jury should not have reconvened as he had been acquitted of domestic assault.

We find that, although it was not necessary for the trial court to have the jury clarify its verdict, there was no error in so proceeding. We agree with the prosecutor that it is beyond reasonable dispute that the jury was simply indicating that assault, not assault and battery, formed the basis for its finding that defendant was guilty of domestic assault. Residency was never an issue, and it was the subject of a stipulation. While we recognize that the jury did not have to agree with the stipulation, it is quite apparent from the record that the jury’s focus and struggle was with the assault-assault and battery issue and that it accepted that defendant had been a former resident of Gafner’s household as required by the statute. This is clearly reflected in the fact that the jury returned within six minutes after the trial court re-instructed the jury and asked for clarification. Further, the only charge for the jury’s consideration, which was made expressly clear throughout the trial, was domestic assault.

In *People v Rand*, 397 Mich 638, 643; 247 NW2d 508 (1976), our Supreme Court, applying a rule of reasonableness in construing jury verdicts, stated:

Jurors are not trained in the law, and therefore will often fail to state their verdict with technical legal precision. The very purpose of language is to express ideas. The written form of the verdict should not be exalted over the substantive intent of the jury. We hold, therefore, that a jury verdict is not void for uncertainty if the jury’s intent can be clearly deduced by reference to the pleadings, the court’s charge, and the entire record. This standard of “clear deducibility” adequately protects the defendant’s right to trial by jury while it avoids artificiality in the construction of the jury verdict. [Citation omitted.]

Here, the jury’s intent can be clearly deduced by reference to the pleadings, the court’s charge, and the entire record, and that substantive intent reflects a verdict that defendant was guilty of domestic assault.

In *People v Gabor*, 237 Mich App 501; 603 NW2d 840 (1999), the jury foreperson misread the verdict form on the record indicating that the defendant was guilty of first- and second-degree criminal sexual conduct on the two offenses or counts charged; however, the only offenses charged were for fourth-degree criminal sexual conduct. Soon after the jury was discharged, the error was discovered and defense counsel moved to set aside the verdicts. The trial court was able to gather the jurors, and the foreperson clarified that the verdict on both offenses was guilty of fourth-degree criminal sexual conduct. The jurors were polled and agreed to the clarified verdict, but the trial court ultimately agreed with defendant to set aside the verdict on both counts. *Id.* at 502-503. The *Gabor* panel held:

As the trial court correctly recognized, the jury’s function ceased after it had been discharged. *People v Rushin*, 37 Mich App 391, 398-399; 194 NW2d 718 (1971). The trial court wrongly concluded, however, that dismissal of the

charges against defendant was required in this case. On the whole record, in keeping with “a rule of reasonableness” in construing the jury verdict, we can easily deduce that the jury intended to convict defendant of both counts of the charged offense. The two counts of fourth-degree CSC were the only charges on which defendant was tried and the only counts on which the jury was instructed. There were no lesser offense instructions. The written verdict form clearly and unambiguously reflects the jury’s verdict of guilty of both counts of fourth-degree CSC. [*Gabor, supra* at 503-504.]

In the case at bar, applying the rule of reasonableness and viewing the entire record, we can easily deduce that the original verdict returned by the jury showed an intent to convict defendant of domestic assault. As in *Gabor*, there were no lesser instructions, and the crime of simple assault was never before the jury. There is no basis for reversal.

B. Prior Incarceration

Defendant next argues that the conviction must be reversed because the prosecutor committed misconduct by introducing evidence at trial that defendant had been incarcerated just before the offense was committed. As noted in the recitation of facts, Gafner made a fleeting reference to defendant having been in jail. Defense counsel objected to the “jail” testimony and demanded a mistrial. The prosecutor argued that Gafner’s jail reference was not responsive to the question posed⁹ and that he had spoken to Gafner before trial about not making any comments about defendant’s past incarceration. Defense counsel did not want a curative or cautionary instruction as she believed it would draw greater attention to the matter. And counsel asserted that the damage done could not be corrected with any curative instruction. Nonetheless, the trial court, after first denying the motion for mistrial, noting that Gafner’s answer was not solicited, and admonishing Gafner not to mention jail thereafter, informed the jury:

All right. Members of the jury, before we start again, before we sent you to the jury room, there had been – the witness had made a statement suggesting that he thought that the defendant was somewhere else before encountering him that evening. I’m instructing you that the witness’ statement about he thought that the defendant was somewhere else, wherever you may have heard or wherever you may have thought that was is to be completely disregarded by you. It has no bearing and is not relevant to the issues that are before us today; and, therefore, I’m instructing you to disregard that testimony

In general, a claim of prosecutorial misconduct is a constitutional issue which is reviewed de novo, but the trial court’s factual findings are reviewed for clear error. *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003); *People v Pfaffle*, 246 Mich App 282, 288; 632

⁹ Gafner indeed was rambling when he made the jail reference in response to the prosecutor’s question, which was as follows: “Now, directing your attention to March 18th, 2003, what were you doing at the time that Mr. Buckland came to your place?” We also note that immediately after Gafner made the jail reference, in fact before another word was spoken by Gafner, the prosecutor cut him off by quickly attempting to interject another question.

NW2d 162 (2001). The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Prosecutorial misconduct issues are decided on a case-by-case basis, and the reviewing court must examine the record and evaluate a prosecutor's remarks in context and in light of the defendant's arguments. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). The defendant's opportunity for a fair trial can be jeopardized when the prosecutor interjects issues broader than the guilt or innocence of the accused. *People v Rice (On Remand)*, 235 Mich App 429, 438; 597 NW2d 843 (1999).

“As a general rule, unresponsive testimony by a prosecution witness does not justify a mistrial unless the prosecutor knew in advance that the witness would give the unresponsive testimony or the prosecutor conspired with or encouraged the witness to give that testimony.” *People v Hackney*, 183 Mich App 516, 531; 455 NW2d 358 (1990), citing *People v Barker*, 161 Mich App 296, 305-306, 307; 409 NW2d 813 (1987).

The challenged testimony by Gafner was clearly not responsive to the question posed by the prosecutor. Further, there is no indication that the prosecutor knew in advance that Gafner would divulge defendant's imprisonment and no indication that the prosecutor elicited the testimony by way of encouragement or conspiracy. To the contrary, the record reflects that the prosecutor specifically informed Gafner not to refer to defendant's stint in jail. Moreover, Gafner is not a police officer, which would have heightened our inquiry. See *People v McCartney*, 46 Mich App 691, 693-694; 208 NW2d 547 (1973). There was no prosecutorial misconduct. Of course, regardless of fault, the jail reference was indeed made, and there was no argument presented under MRE 404(b) to admit the evidence. However, considering the trial court's curative instruction, the fleeting nature of the comment, the evidence of guilt, and the vagueness of the jail reference, we find no basis for reversal as any error was harmless. MCL 769.26; *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999).

C. Pretrial Silence

Finally, defendant argues that the prosecutor committed misconduct by commenting on defendant's pretrial silence in closing argument such that it denied defendant a fair trial.

During cross-examination of officer Silverstone, he was asked whether he, or any other officers, interviewed defendant, attempted to interview defendant, or made an effort to obtain defendant's side of the story following defendant's arrest. Silverstone responded in the negative to each question. No questions had been posed by the prosecutor on direct examination of Silverstone regarding interviews, statements, comments, or lack thereof, with respect to defendant and his arrest.

During cross-examination of officer Zeise, he was also asked whether he, or any other officers, interviewed defendant, attempted to interview defendant, or made an effort to obtain defendant's side of the story following defendant's arrest. Zeise responded in the negative to each question. No questions had been posed by the prosecutor on direct examination of Zeise regarding interviews, statements, comments, or lack thereof, with respect to defendant and his arrest.

In the prosecutor's closing argument, not rebuttal, he stated without objection:

Mr. Buckland was not present for the officers to question that night, they arrested him apparently in a matter of some days later. And counsel may well say, well, you don't have his side of the story. That's true, we don't. The only evidence for you to consider in this particular case is the evidence that Mr. Gafner has given and the questions that have been asked of him to impeach whether or not he – whether or not Mr. Gafner is reporting to you accurately what happened. The officers didn't take a statement from Mr. Buckland when he was arrested or apparently at any other time. But that's not evidence, you can't infer from the lack of a statement what the context of that statement would have been if there had been one, so it doesn't really advance things or not. The only thing it does is it gives defense counsel . . . the opportunity to attack not just the testimony that Mr. Gafner gives, but to attack the case that the police – the way in which the police informed in this particular case. Oh, the cops could have done better, they could have done this, they could have done that. Well, to be sure if the police don't present to you and I don't present to you with enough evidence to convict beyond a reasonable doubt, then your verdict should be not guilty. But the question is, does what counsel is asking the cops to have done really make any difference in terms of your deliberations in the case? A non statement from Mr. Buckland doesn't advance us and doesn't move us in either direction, so the interview – the lack of the interview doesn't make it more likely that he's guilty or less likely that he's guilty.

Defense counsel, consistent with her questioning of the police officers, maintained in her closing argument:

The third area that I'd like to discuss with you is the fact that there was no interview of Jim Buckland, none. Now, back in voir dire when we wanted to determine, you wanted to determine who's telling the truth, you get both sides of the story. Five police officers were involved in this case and not one of them attempted an interview with Mr. Buckland, not one. Three officers were present at his arrest, not one said, Mr. Buckland, what happened?

Now, the Judge will give you an instruction on this, Mr. Buckland didn't testify. Everyone has a right not to testify, everyone has a right not to be cross-examined by the prosecution in open court. And it's up to the prosecution to prove the case beyond a reasonable doubt, and it's their burden, not ours. There's just not enough here.

The prosecutor then responded in rebuttal argument:

The Judge will give you an instruction that says the defendant need not take the stand, and that you are not to consider that in any way, and I endorse that as I must because that's been the law here forever. But counsel faults the police for not inquiring with the defendant earlier what his side of the story is. Essentially . . . she's saying that the police investigation is deficient, it wasn't fair to the defendant because they could have asked him questions. Had they asked him questions and he refused to speak to them, you would never hear that. I'm not -- [Here defense counsel objected, arguing that there was no evidence

whether or not defendant would have spoken to police; her point was that he just was not interviewed.]

* * *

My point is not to urge you, decidedly not to urge you that the lack of an account from the defendant should be considered by you because it can't be in either direction, but the defense tries to make the argument to you that one could have made the case better had the police asked Mr. Buckland his version of the story. We don't know that. We don't know whether he would have responded or whether he would not have responded, and if the police had him in a situation where he didn't respond, he had a right not to speak to them at that time, too. I'm not saying that that's what happened. All I'm saying to you is that his lack of the statement is not evidence in either direction. . . .

The Fifth Amendment and Const 1963, art 1, § 17, provide that, in a criminal trial, no person shall be compelled to be a witness against himself. *People v Schollaert*, 194 Mich App 158, 164; 486 NW2d 312 (1992). The Fifth Amendment has been extended beyond criminal trials to protect individuals in all settings in which their freedom of action is curtailed in a significant way from being compelled to incriminate themselves. *Id.*, quoting *Miranda v Arizona*, 384 US 436, 467; 86 S Ct 1602; 16 L Ed 2d 694 (1966). The right against self-incrimination precludes a prosecutor from commenting on a defendant's silence in the face of an accusation. *People v Goodin*, 257 Mich App 425, 432; 668 NW2d 392 (2003). It does not comport with due process to permit the prosecution during a trial to call attention to a defendant's silence at the time of arrest after the defendant has received *Miranda* warnings. *People v Dennis*, 464 Mich 567, 574; 628 NW2d 502 (2001). There is no error where the prosecutor makes no specific inquiry regarding a defendant's silence and makes no effort to use testimony about defendant's silence against him. *Id.* at 580-581. Evidence of the defendant's silence may be used to rebut an inference raised by the defense that the defendant was treated unfairly by the police, such as where it is suggested that the police did not afford the defendant an opportunity to present his side of the story. *People v Crump*, 216 Mich App 210, 214-215; 549 NW2d 36 (1996) ("door was opened to the prosecutor").

Here, defendant's argument, which was unpreserved thus invoking the test for plain error affecting substantial rights, *People v Carines*, 460 Mich 750, 763-764, 774; 597 NW2d 130 (1999), fails on multiple levels. First, the prosecutor's comments did not pertain to defendant remaining silent in the face of police questioning or defendant invoking his right to remain silent. Rather, there was no police interrogation, and the comments merely addressed the lack of an interrogation and the impact on the case. Second, defendant opened the door to the prosecutor's comments after first cross-examining the two police officers on the issue in an effort to show a poor investigation and a failure to allow defendant an opportunity to tell his side of the story. It was not the prosecutor who first drew the jury's attention to defendant's silence or inquired about post-arrest events and interrogations. Third, and finally, the prosecutor did not make any effort to use defendant's silence against him. Indeed, we find that the prosecutor acted quite honorably. Defense counsel, through her cross-examination of the police officers, and as became evident during her closing argument, suggested that the police acted sloppily in not attempting to obtain a version of events from defendant, and she implicitly suggested that had questioning taken place, a version of events more favorable to defendant would have been elicited. This

begged some type of response by the prosecutor, and the response given was that the officers' testimony could not be viewed as favorable to either party; it had no bearing. The prosecutor carefully walked a fine line between responding to defense counsel's supposition and not treading on defendant's right to remain silent. The prosecutor did not commit misconduct. Minimally, there was no plain error affecting defendant's substantial rights. Defendant is not actually innocent, nor was the integrity of the judicial system compromised. *Carines, supra* at 763-764, 774.

Affirmed.

/s/ William B. Murphy

/s/ David H. Sawyer

/s/ Jane E. Markey