

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HASSAN MOHAMAD RIZK,

Defendant-Appellant.

UNPUBLISHED

October 16, 2007

No. 269865

Wayne Circuit Court

LC No. 05-011168-01

Before: Owens, P.J., and White and Murray, JJ.

PER CURIAM.

Defendant was convicted of first-degree murder, MCL 750.316, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to life imprisonment for the first-degree murder conviction and to two years' imprisonment for the felony-firearm conviction. He appeals as of right, and we affirm.

Defendant first asserts that the trial court violated his due process right to present a defense by excluding evidence of drug dealing at the gas station where the shooting occurred, when offered by defendant to show an alternative explanation for the shooting. We disagree.

While the trial court might have permitted further questioning of Walker, who worked at the gas station and was present at the time of the shooting, regarding drug activity at the location, Officer Pellerito provided testimony supporting that there was drug activity in the area. Further, the evidence was overwhelming, and it is highly unlikely that the additional testimony would have affected the outcome.

Next, defendant asserts that his due process rights were violated by the prosecutor's use of his prearrest silence. Because this issue was not preserved, defendant argues in the alternative that counsel was ineffective in failing to object to the testimony. This Court reviews unpreserved claims of constitutional violations for plain error. *People v McNally*, 470 Mich 1, 5; 679 NW2d 301 (2004). Reversal is warranted only when a plain error resulted in a conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

The Fifth Amendment of the United States Constitution provides, "No person . . . shall be compelled in any criminal case to be a witness against himself." See also Const 1963, art I, § 17. This privilege against compelled self-incrimination generally prohibits the prosecution from

using a defendant's silence, postarrest or post-*Miranda*¹ warnings, for impeachment or as substantive evidence. *Doyle v Ohio*, 426 US 610, 619 n 11; 96 S Ct 2240; 49 L Ed 2d 91 (1976); *People v Solomson*, 261 Mich App 657, 664; 683 NW2d 761 (2004). Defendant's challenge, however, involves prearrest silence.

The Sixth Circuit has held that, while the prosecution may use prearrest silence to impeach a defendant, it is prohibited from using prearrest silence as substantive evidence of guilt. *Combs v Coyle*, 205 F3d 269, 283 (CA 6, 2000). Other circuits have come to the contrary conclusion.² Assuming, arguendo, that defendant's right to remain silent was violated by the use of his silence as substantive evidence, we conclude that any such error was harmless. Officer King's testimony that when he asked defendant questions about his activities before King took the gunshot residue samples from him, defendant did not volunteer that he had changed his shirt, was relatively innocuous in light of the testimony that defendant denied washing his hands, although he had in fact done so. There was abundant evidence supporting defendant's guilt without King's testimony regarding defendant's prearrest silence. There were two eyewitnesses to the murder, a positive gunshot residue test on defendant's hands and face, testimony that defendant washed his hands before the sample was taken, and a surveillance tape that showed that defendant changed his shirt before the gunshot residue sample was taken. Thus, even if there was error, defendant failed to carry his burden of establishing that it affected his substantial rights.

For the same reason, defendant's claim of ineffective assistance must fail. To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and that this performance was so prejudicial that it denied the defendant a fair trial. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000) (quoting *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984)). A defendant must show a reasonable probability that, but for counsel's error, the outcome would have been different. *Toma, supra* at 302-303. Here, defendant has failed to show that the outcome was affected by the testimony at issue.

Affirmed.

/s/ Donald S. Owens
/s/ Helene N. White

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

² As noted in *Combs v Coyle*, 205 F3d 269, 283 (CA 6, 2000), the Federal Circuit Courts are split regarding the use of prearrest silence. The First, Sixth, Seventh and Tenth Circuits have held that prearrest silence can be used for impeachment but cannot be used as substantive evidence of a defendant's guilt. The Fifth, Eighth, Ninth and Eleventh Circuits have held that prearrest silence may be used for both impeachment and substantive evidence. *Id.* at 281-283. However, the United States Supreme Court has not passed on the issue of whether the prosecution can use prearrest silence substantively, but has held that prearrest silence may be used to impeach a defendant, *Jenkins v Anderson*, 447 US 231, 238; 100 S Ct 2124; 85 L Ed 2d 86 (1980).