STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 17, 2012
v	No. 299971 Wayne Circuit Court
SHANNON MAURICE HOLMES, Defendant-Appellant.	LC No. 09-031323-FC

Before: DONOFRIO, P.J., and STEPHENS and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of first-degree premeditated murder, MCL 750.316(1)(a). Defendant was sentenced to mandatory life imprisonment without the possibility of parole for this conviction. Defendant appeals as of right. We affirm.

This case arises from the homicide of Christopher Cser, the deceased. He called his wife, Ann Cser, while she was driving home, sounding distraught and told her that "Shannon" stabbed him. Ms. Cser arrived home and found her husband dead on the floor.

First, defendant argues that the prosecution's improper arguments during its closing argument, and Dearborn police officer Frederick Thompson's testimony, buttressed by Dearborn police officer Kenneth Muscat's testimony, each, individually, constitute error requiring reversal. Furthermore, defendant claims the cumulative effect of these errors deprived defendant of due process of law and a fair trial, and thus, a new trial is required. We disagree.

Defendant failed to object at trial to the alleged prosecutorial misconduct and therefore, this claim is unpreserved. This Court reviews unpreserved claims of prosecutorial misconduct for plain error that affected defendant's substantial rights. *People v Fyda*, 288 Mich App 446, 460-461; 793 NW2d 712 (2010). "Reversal is warranted only when the error resulted in the conviction of an actually innocent defendant or when the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. No error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction." *People v Leshaj*, 249 Mich App 417, 419; 641 NW2d 872 (2002).

"[T]he right against self-incrimination prohibits a prosecutor from commenting on the defendant's silence in the face of accusation, but does not curtail the prosecutor's conduct when the silence occurred before any police contact." *People v Goodin*, 257 Mich App 425, 432; 668

NW2d 392 (2003). "In general, any reference to a defendant's post-arrest, post-*Miranda* silence is prohibited, but in some circumstances a single reference to a defendant's silence may not amount to a violation of *Doyle*[1] if the reference is so minimal that 'silence was not submitted to the jury as evidence from which it was allowed to draw any permissible inference....'" *People v Shafier*, 483 Mich 205, 215; 768 NW2d 305 (2009). The Supreme Court of the United States concluded the following in *Doyle*:

> The warnings mandated by [*Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966)], as a prophylactic means of safeguarding Fifth Amendment rights, require that a person taken into custody 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. Silence in the wake of these warnings may be nothing more than the arrestee's exercise of these Miranda rights. Thus, every post-arrest silence is insolubly ambiguous because of what the State is required to advise the person arrested. [*Doyle v Ohio*, 426 US 610, 617; 96 S Ct 2240; 49 L Ed 2d 91 (1976).]

Furthermore, the Supreme Court has held that the use of a defendant's post-arrest, post-*Miranda* silence as direct-substantive evidence, see *Wainwright v Greenfield*, 474 US 284, 295; 106 S Ct 634; 88 L Ed 2d 623 (1986), or to impeach the defendant's trial testimony, see *Doyle*, 426 US at 618, were violations of the defendants' Fifth Amendment right under the United States Constitution against compelled self-incrimination, which is applicable to the states through the Due Process Clause of the Fourteenth Amendment, and required reversal. Also, "when an unresponsive remark is made by a police officer, this Court will scrutinize that statement to make sure the officer has not ventured into forbidden areas which may prejudice the defense." *People v Holly*, 129 Mich App 405, 415; 341 NW2d 823 (1983). However, defendant may be impeached by his earlier failure to state a fact in circumstances where that fact naturally would have been asserted. *People v Goodin*, 257 Mich App 425, 432; 668 NW2d 392 (2003); *People v Alexander*, 188 Mich App 96, 103; 469 NW2d 10 (1991).

Here, the prosecution's colloquy with Thompson individually, or collectively with its closing argument and Muscat's testimony, did not improperly refer to defendant's post-arrest, post-*Miranda* warning silence, under the circumstances.

First, during the direct examination of Thompson, after Thompson testified that he and the other officers had placed defendant under arrest, the prosecution, focusing particularly on an injury to defendant's right arm, asked Thompson the following about his observations when defendant walked out of from his residence:

> *Q.* Did you-- did he say anything to you guys?
>
> *A.* (No response)

[1] *Doyle v Ohio*, 426 US 610; 96 S Ct 2240; 49 L Ed 2d 91 (1976).

Q. Did he make any-- did you give him Miranda rights?

A. Yes, absolutely.

It is reasonable to conclude, as asserted by plaintiff, that the prosecutor expected from Thompson the response later given by police officer Nickolwitz---that defendant was not silent, but instead had stated that the injury on his arm was from a dog bite. Plaintiff then introduced photographs of the injuries observed by Thompson at that time and asked who took them. Thompson indicated that police officer Nickolwitz had also been at the scene with him and had taken the photographs of defendant's arm injury. Then the prosecutor asked Thompson:

> *Q.* Did you do-- what did you do after this, after you confronted the defendant and he was handcuffed? What happened next?
>
> *A.* Well, as I was saying, we noticed the injury on his arm. And we had Corporal Nickolwitz respond and take a picture, right away. Mr. Holmes had nothing really to say, so we transported him to the police station.

However, while Nickolwitz was photographing this injury on defendant's arm, defendant stated to Nickolwitz that this injury occurred the day before from his dog. Defendant did not object to any of this questioning and in context, there was nothing improper about it.

Defendant next argues that there was error regarding the prosecutor's reference to "mythical" Shawn during closing argument. We disagree.

"Prosecutorial arguments are [ ] considered in light of defense arguments." *People v Lawton*, 196 Mich App 341, 353; 492 NW2d 810 (1992). "[A] prosecutor is free to argue the evidence and all reasonable inferences arising from it as they relate to the prosecutor's theory of the case." *Goodin*, 257 Mich App at 433. Also, the prosecution's remarks may be permitted, when in context, they concern the weakness of the defendant's alibi defense and failure to produce corroborating witnesses. *People v Dixon*, 217 Mich App 400, 407; 552 NW2d 663 (1996).

Defendant testified at trial and, for the first time, implicated "Shawn" as the killer. Defendant had a very elaborate version of events, including that "Shawn" showed up at defendant's residence in bloody clothes the night of the murder that he had sold the murder weapon to "Shawn" the month before the murder. Defendant knew no details about Shawn, including his last name. Defense counsel had defendant explain to the jury why he had failed to reveal this information previously. During closing argument, the prosecution argued the following:

> [W]e're just looking at possibilities, and speculation; something that's fanciful, that some mythical guy named Shawn, who he doesn't even know the last name of, comes in and commits this crime, and yet he was not willing to tell anyone about this? That doesn't add up to reasonable doubt.

This is wholly appropriate argument. Defendant raised this issue during direct examination making defendant's failure to tell the police about facts that one would naturally expect to be relayed under the circumstances completely permissible. *Goodin*, supra; *Alexander*, supra.

Additionally, even if there was any error, plaintiff presented compelling and consistent evidence to prove that defendant was the person that committed this crime, such as: Ann Cser's testimony that the deceased made a dying declaration that defendant committed this crime; Thompson's testimony that he back-tracked footprints in the snow leading to and from defendant's home going in the direction of the deceased's home; defendant's girlfriend, Jennifer Evans's, testimony that the knife with the deceased's blood on it once belonged to defendant; Thompson's testimony that he saw a blood spot and a puncture wound on defendant's right arm during defendant's arrest; and Michigan State Police Crime Lab Forensic Scientist Andrea Halvorson's testimony that the suspected blood stain samples taken from the knife and blue jeans that were found in the barbeque grill at defendant's home, and the suspected blood stain sample taken from defendant's door handle, all produced a DNA profile that matched the deceased. See *People v Borgne*, 483 Mich at 178, 198-199; 768 NW2d 290 (2009).

Therefore, we hold that defendant's constitutional rights were not violated and therefore, he is not entitled to reversal.

Also, we find the defendant's contention, that the prosecution's argument that "defendant's DNA is included in the sample from the waistband" was improper, is without merit. We conclude that this statement was not disparaging and does not require reversal because, read in context, this statement referred to the fact the defendant's DNA was not excluded from the sample like the prosecution mentioned earlier in its argument, not that defendant's DNA matched the sample. However, even if this argument was improper, it was cured by the trial court giving the instruction that the parties opening statements and closing arguments are not evidence. Thus, we hold that on the basis of this statement made by the prosecution, defendant's conviction does not require reversal. See *Leshaj*, 249 Mich App at 419.

Lastly, defendant argues that he we was denied the effective assistance of counsel because counsel failed to object to the prosecution's inaccurate and highly prejudicial arguments, did not object to Thompson's testimony relating to defendant's Fifth Amendment right to remain silent, and opened the door to Muscat's testimony regarding defendant's silence. We disagree.

A claim of ineffective assistance of counsel must be raised by a motion for a new trial or an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). Defendant did not move for a new trial or request an evidentiary hearing. Therefore, this issue has not been properly preserved for review. In the absence of an evidentiary hearing, this Court reviews a defendant's claim of ineffective assistance of counsel based on the existing record. *People v Riley*, 468 Mich 135, 139; 659 NW2d 611 (2003). An ineffective assistance of counsel claim, which is a question of constitutional law, is reviewed by this Court de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

To demonstrate ineffective assistance of counsel, a defendant must show that his attorney's performance fell below an objective standard of reasonableness under prevailing

professional norms and this performance prejudiced him. *People v Kimble*, 470 Mich 305, 314; 684 NW2d 669 (2004). To demonstrate prejudice, the defendant must show the probability that but for counsel's errors the result of the proceedings would have differed. *People v Solmonson*, 261 Mich App 657, 663-664; 683 NW2d 761 (2004).

Counsel is presumed to be effective and engaged in trial strategy, and the defendant has the heavy burden to prove otherwise. *LeBlanc*, 465 Mich at 578; *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). Declining to raise objections to evidence can be reasonable trial strategy. *People v Unger*, 278 Mich App 210, 242; 749 NW2d 272 (2008). Furthermore, this Court refuses to substitute its judgment for that of counsel regarding trial strategy. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009).

Here, defendant cannot show that he was prejudiced by trial counsel, and thus, his claim of ineffective assistance of counsel is without merit. Defendant argues that his counsel's failure to object to Thompson's testimony and the prosecution's closing argument regarding his silence in the face of accusation were errors, which denied defendant the effective assistance of counsel. We hold, like the Supreme Court's order in *People v Borgne*, 485 Mich 868; 771 NW2d 745 (2009), even if defendant's trial counsel erred by failing to object, reversal is not required as defendant suffered no prejudice in light of the compelling, untainted evidence against him. This evidence, as listed previously, collectively supports the conclusion that but for counsel's errors, the outcome of the trial would not have differed.

Defendant argues that defense counsel was ineffective because counsel opened the door to Muscat's testimony regarding defendant's silence upon arrest. Defense counsel engaged Muscat in the following line of questioning:

> *Q.* Okay. Did you ever have any contact with Shannon Holmes at the police station?
>
> *A.* Yes.
>
> *Q.* And what was the extent of your contact with him?
>
> *A.* I attempted to sit down, both my partner and I, with him, in an interview room, and talk to him about this-- about this crime.
>
> * * *
>
> *Q.* All right. And when you talked to him, or tried to talk to him at the police station, you didn't ask whether or not he was [ ] under the influence of alcohol or narcotics?
>
> *A.* He didn't answer any questions.

The record reflects that defendant was given *Miranda* warnings upon arrest. Thus, Muscat's reference to defendant's post-arrest, post-*Miranda* warning silence, ventured into forbidden area by violating defendant's constitutional rights. *Wainwright*, 474 US at 295; *Doyle*, 426 US at 618; *Shafier*, 483 Mich at 217-219; *Holly*, 129 Mich App at 415-416. However,

defendant has not met his burden of showing that this error prejudiced him, considering the overwhelming and untainted evidence against him previously discussed. See *Borgne*, 483 Mich at 199-203. Therefore, we hold this constitutional error does not require reversal. See *Id*. at 201-203.

Affirmed.

/s/ Pat M. Donofrio
/s/ Cynthia Diane Stephens
/s/ Amy Ronayne Krause