STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 18, 2006
v	No. 259830 Muskegon Circuit Court
ROBERT MICHAEL COLLINS, Defendant-Appellant.	LC No. 03-049684-FC

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

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to rob while armed, MCL 750.89, for acts that occurred during an attempted robbery that occurred on December 2, 2003, at a liquor store. The trial court sentenced defendant as a habitual offender, third offense, MCL 769.11, to 19 to 35 years' imprisonment. Defendant appeals as of right. We affirm.

I.

On appeal, defendant first argues that the trial court erred in allowing into evidence testimony of a silent observer tip. He argues that the testimony was irrelevant hearsay, which was highly prejudicial. This Court reviews a trial court's ruling regarding the admission of evidence for an abuse of discretion. *People v Washington*, 468 Mich 667, 670; 664 NW2d 203 (2003). In a criminal case, an abuse of discretion exists when an unprejudiced person, considering the facts on which the trial court acted, would conclude that there was no justification or excuse for the ruling made. *People v Tate*, 244 Mich App 553, 559; 624 NW2d 524 (2001).

A police witness testified over objection that a silent observer tip led to defendant's arrest. The purpose of the testimony was not to prove that defendant committed the crimes, but to show how the police investigated the case and came into contact with defendant. An out-of-court statement introduced to show its effect on a listener, as opposed to proving the truth of the matter asserted in it, does not constitute hearsay under MRE 801(c). *People v Byrd*, 207 Mich App 599, 603; 525 NW2d 507 (1994). Here the "tip" was not used to show that defendant committed the robbery, but to show how the police conducted their investigation and made their case. In *People v McAllister*, 241 Mich App 466, 470; 616 NW2d 203 (2000), the Court accepted that evidence of a tip was not hearsay in a similar circumstance:

> At trial, the police testified that the anonymous tip identified the defendant, his clothing, his car, and his location. The prosecution asserted that the substance of the information provided by the anonymous tip was admissible because it was not offered for the truth of the matter asserted. Rather, the evidence was offered to establish the reason that the police took subsequent action.

In the case before us, like *McAllister*, the evidence was admitted to show the subsequent actions of the detectives and was not hearsay. And, we note that the trial court took the proper precautions by issuing a limiting instruction to the jury regarding how to use this testimony.

Defendant also asserts that the testimony in question was not relevant or material to the case and, as such, should not have been admitted according to MRE 402. This argument is not preserved because a relevancy objection was not made to the challenged testimony. Unpreserved allegations of error are reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). "Materiality" of evidence, for purpose of relevancy determinations, is a requirement that proffered evidence be related to any fact that is of consequence to action, i.e., a fact that is of consequence to an action is a material fact. *People v Mills*, 450 Mich 61, 67; 537 NW2d 909, mod 450 Mich 1212 (1995). For purposes of the relevancy rule, "materiality" does not mean that proffered evidence must be directed at an element of crime or applicable defense. *Id.* The silent observer tip, and the relaying of that tip, was the principal reason the police focused their attention on defendant. This "tip" provided the initial link between the occurrence of the robberies and defendant. Without this tip, the jurors would be missing a crucial step in understanding how the authorities came to eventually arrest defendant. As such, this evidence is relevant, albeit marginally so, to the case. Regardless, even if we agreed that it was irrelevant, reversal is not required. Defendant was identified in a photo line-up by one witness and identified in the video of a subsequent robbery by three different witnesses, two of which were defendant's aunt and uncle. Two witnesses observed defendant climb into a car at the scene of the crime. The car was later identified as belonging to defendant. Further, clothing matching that worn by the attempted robber was found in a hotel room that defendant had recently occupied. All of this evidence leads to the unmistakable conclusion that defendant committed this crime. The admission of evidence regarding the silent observer tip did not affect the outcome of trial, and reversal is not required. *Carines, supra.*

The final argument defendant makes concerning the challenged silent observer evidence is that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice or confusion of the issues. Evidence is not inadmissible simply because it is prejudicial. *Mills, supra* at 75. All evidence offered by the parties is "prejudicial" to some extent, but the fear of prejudice does not generally render the evidence inadmissible. *Id.* It is only when the probative value is substantially outweighed by the danger of unfair prejudice that evidence is excluded. *Id.* MRE 403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

We do not find the testimony of this "tip" to be unfairly prejudicial. Nothing in the record supports that it was misleading or may have caused the jury to decide the case in an improper way. The evidence overwhelmingly supported that defendant committed the crime for which he was convicted. The silent observer tip simply explained how the police came to suspect defendant in the first place. There was no plain error requiring reversal. *Carines, supra.*

II.

Defendant also argues he was deprived of a fair trial when testimony was introduced that he had exercised his constitutional right to remain silent and consult counsel. This issue was not preserved at trial.

Where defendant fails to preserve for appeal arguments related to the admission of evidence, we review for plain error affecting defendant's substantial rights. *People v Herndon*, 246 Mich App 371, 404; 633 NW2d 376 (2001). To avoid forfeiture of issue on appeal under the plain error rule, three requirements must be met: (1) error must have occurred; (2) the error was plain, that is, clear or obvious; (3) and the plain error affected substantial rights. *Carines, supra* at 763. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. *Id*. If a defendant satisfies these three requirements, then this Court must exercise its discretion in deciding whether to reverse. *Id*. Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error "'seriously affected the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence." *Id*. at 763-764, quoting *United States v Olano*, 507 US 725, 736-737; 113 S Ct 1770; 123 L Ed 2d 508 (1993).

A defendant's silence may not be used against him at trial. *Doyle v Ohio*, 426 US 610, 617-619; 96 S Ct 2240; 49 L Ed 91 (1976). It is error for the prosecutor to comment on defendant's exercise of his Fifth Amendment right because it diminishes the privilege by making its assertion costly. *Wainwright v Greenfield*, 474 US 284, 295; 106 S Ct 634; 88 L Ed 2d 623 (1986). Although comments by a prosecutor on an accused's silence after the issuance of *Miranda*[1] warnings arguably constitute plain, fundamental error, *United States v Remigio*, 767 F2d 730, 734 (CA 10, 1985); see also *People v Bobo*, 390 Mich 355, 359-361; 212 NW2d 190 (1973), under the circumstances of this case, the prosecution witness did not infringe on defendant's rights. The police witness testified that defendant invoked his rights to remain silent and to consult counsel. Questioning immediately ceased. However, after a short time, defendant changed his mind and knowingly and voluntarily decided to waive those rights and speak with the police. Because defendant did not remain silent, but instead chose to speak, he has not

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

exercised his right to remain silent. *People v Avant*, 235 Mich App 499, 509; 597 NW2d 864 (1999); *People v Davis*, 191 Mich App 29, 36; 477 NW2d 438 (1991). Thus, there was no infringement on defendant's right to remain silent.

Affirmed.

/s/ Michael J. Talbot
/s/ Donald S. Owens
/s/ Christopher M. Murray