

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

DANNY HURT

APPELLANT

VS.

NO. 2008-KA-0424

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE ISSUES

ALLOWING THE PROSECUTOR TO MAKE THE NOW COMPLAINED OF REMARKS DOES NOT CONSTITUTE PLAIN ERROR.

STATEMENT OF THE FACTS

The Appellant, Danny Hurt, was arrested in New Albany, Mississippi for an armed robbery which occurred in Franklin County, Mississippi. (Transcript p. 128). After his arrest, officers from the Franklin County Sheriff's Department drove to New Albany to pick him up and transport him back to Franklin County. (Transcript p. 129). Near the end of the three-hour trip back to Franklin County, Hurt told the officers that he had numerous alibi witnesses in New Albany. (Transcript p. 132).

During the State's opening arguments and closing arguments at Hurt's trial, the prosecutor questioned why Hurt did not tell the officers about these alibi witnesses while they were still in New

Albany so that the officers could interview the witnesses and determine whether Hurt did, in fact, have an alibi. At the conclusion of the trial, Hurt was convicted of armed robbery and sentenced as a habitual offender to serve twenty-five years in the custody of the Mississippi Department of Corrections without the possibility of parole.

SUMMARY OF THE ARGUMENT

The prosecutor's remarks during opening and closing arguments do not constitute plain error. First, there is no evidence on the record indicating that Hurt received a *Miranda* warning prior to his arrival in Brookhaven. The prosecutor's comments referred to his decision not to mention his alleged alibi witnesses in New Albany until after the three-hour drive from New Albany to Brookhaven. Second, Hurt did not remain silent. After his arrival to Brookhaven, Hurt told officers that he had numerous alibi witnesses in New Albany. Third, there was no error as the remarks were not comments on Hurt's right to remain silent but instead on his decision not tell the officers about the alleged alibi witnesses in New Albany until they were three hours away from New Albany. Lastly, even if allowing the remarks were error, the remarks did not rises to the level of prejudicing Hurt's case.

ARGUMENT

ALLOWING THE PROSECUTOR TO MAKE THE NOW COMPLAINED OF REMARKS DOES NOT CONSTITUTE PLAIN ERROR.

Hurt raises the following question on appeal: "whether repeated references by the prosecution to the defendant's exercise of his right to remain silent violated the defendant's 5th Amendment rights and denied the defendant a fundamentally fair trial?" (Appellant's Brief p. 1). As Hurt recognized in his brief "no objection to harping on Hurt's post-arrest silence was ever interposed." (Appellant's Brief p. 11). As such, the matter is procedurally barred. *See Smith v. State*, 724 So.2d

280, 319 (Miss.1998) (holding that “[a] trial judge will not be found in error on a matter not presented to him for decision.”) and *Walker v. State*, 913 So.2d 198, 224 (Miss. 2005) (holding that “failure to raise an issue at trial bars consideration on an appellate level”).

Hurt, however, argues that “this complained of error is patently plain error and is error of constitutional proportions.” (Appellant’s Brief p. 11). This Court has previously held the following in that regard:

The law is well settled that if no contemporaneous objection is made, the error, if any, is waived. Procedural bar notwithstanding, an appellate court may review the merits of the underlying claim knowing that any subsequent review will stand on the bar alone. A defendant who fails to make a contemporaneous objection must rely on plain error to raise the assignment on appeal. The right of an appellate court to notice plain error is addressed in M.R.E. 103(d). The Mississippi Supreme Court applies the plain error rule only when a defendant's substantive rights are affected. “The plain error doctrine has been construed to include anything that ‘seriously affects the fairness, integrity or public reputation of judicial proceedings.’” The plain error doctrine requires that there be an error and that the error must have resulted in a manifest miscarriage of justice.

Stubbs v. State, 811 So.2d 384, 387 (Miss. Ct. App. 2001)(quoting *Dobbins v. State*, 766 So.2d 29, 31 (Miss. Ct. App. 2000)) (*emphasis added*). Accordingly, an analysis of the issue “necessarily includes a determination of whether there is, in fact, “error,” that is, some deviation from a legal rule; that error “plain” or “clear” or “obvious;” and it is prejudicial in its effect upon the outcome of the trial court proceedings.” *Porter v. State*, 749 So.2d 250, 261 (Miss. Ct. App. 1999) (quoting *United States v. Olano*, 507 U.S. 725, 732-735, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993)). In the case at hand, there was no plain error as there was no error. Further, even if there were error in allowing the State to make the complained of statements, it is not reversible as it did not create unjust prejudice against the accused or result in prejudicial effect upon the outcome of the trial.

Mississippi law is clear that “it is error to refer at trial to an accused’s silence after arrest, provided that the silence occurred when the suspect was in custody and had been given warnings

about the right to remain silent.” *Walker v. State*, 880 So.2d 1074, 1077 (Miss. Ct. App. 2004) (citing *Caston v. State*, 823 So.2d 473 (Miss. 2002)) (*emphasis added*). However, it is equally clear Mississippi law that a “defendant's due process rights [are] not violated by the State's [comments] concerning his post-arrest silence where *Miranda* warning [is] not given.” *Emery v. State*, 869 So.2d 405, 409 (Miss. 2004) (citing *McGrone v. State*, 807 So.2d 1232 (Miss.2002)). The record indicates that Franklin County authorities gave him his *Miranda* warning after their arrival in Brookhaven. (Transcript p. 131). The prosecutor’s comments refer to Hurt’s silence regarding his alleged alibi witnesses prior to his arrival in Brookhaven. Thus, there can be no violation of his due process rights and therefore no error in allowing the prosecutor to make these remarks.

Secondly, this Court has held that:

According to our supreme court, a prosecutor's repeated reference to a defendant's post-arrest silence, after he received warnings that he need not answer questions, violated due process. *Caston v. State*, 823 So.2d 473(¶ 97) (Miss.2002); *see also Johnson v. State*, 596 So.2d 865, 868-69 (Miss.1992). However, there can be no infringement upon the right to remain silent when the defendant does not exercise his right to remain silent when questioned at the time of the arrest. *Sheely v. State*, 836 So.2d 798(¶ 10) (Miss.Ct.App.2002).

McCoy v. State, 878 So.2d 167, 171 (Miss. Ct. App. 2004) (*emphasis added*). Hurt ultimately did not remain silent. He told officers about his alleged alibi witnesses after he was given his *Miranda* warnings.

Third, the comments made by the prosecutor were not comments on Hurt’s decision to remain silent. The prosecutor was merely discussing Hurt’s decision not tell the officers about the alleged alibi witnesses in New Albany until they were three hours away from New Albany. The Mississippi Supreme Court has articulated the test regarding an alleged improper comment by a prosecutor as follows:

the test to determine if an improper argument by a prosecutor requires reversal is

whether the natural and probable effect of the prosecuting attorney's improper argument created unjust prejudice against the accused resulting in a decision influenced by prejudice.

Carr v. State, 655 So.2d 824, 845 (Miss. 1995) (quoting *Dunaway v. State*, 551 So.2d 162, 163 (Miss. 1989)). The prosecutor's remarks in no way created unjust prejudice. The State did not, as alleged by Hurt in his brief, "find it necessary to augment its case with improper questions and comments on Hurts remaining silent, using his silence as an implicit admission of guilt. . . ." (Appellant's Brief p. 9). The record shows that Hurt did not remain silent and, in fact, both gave a statement to officers about the alleged alibi witnesses and then also testified at trial. As such, there could be no inference of guilt based on his silence as he was not silent.

As set forth above, these statements, questions, and arguments are permissible; however, even if there were not, not one of these statements, questions, or arguments rises to the level of prejudicing Hurt's case. See *Stigall v. State*, 869 So.2d 410, 414 (Miss. Ct. App. 2003) and *Kennedy v. State*, 766 So.2d 64, 65 (Miss. Ct. App. 2000). Thus, this issue is without merit.

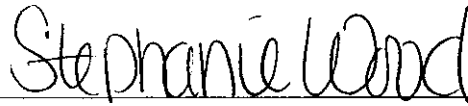
CONCLUSION

The State of Mississippi respectfully requests that this Honorable Court affirm the conviction and sentence of Danny Hurt as the trial court's allowance of the now complained of remarks of the prosecutor does not constitute plain error.

Respectfully submitted,

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CERTIFICATE OF SERVICE

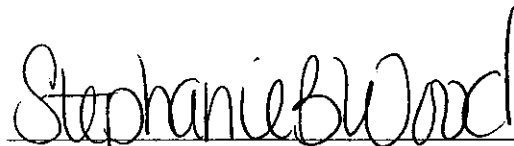
I, Stephanie B. Wood, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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This the 8th day of December, 2008.


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