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*STATE OF MICHIGAN*  
*IN THE*  
*SUPREME COURT*

APPEAL FROM THE MICHIGAN COURT OF APPEALS  
Meter, P.J., Talbot and Murray, JJ.

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**PEOPLE OF THE STATE OF MICHIGAN,**

**Plaintiff-Appellee,**

**Supreme Court**  
**No. 138161**

**-vs-**

**ANTHONY MARION REDD,**

**Defendant-Appellant.**

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Court of Appeals No. 283934  
Circuit Court No. 2007-215277-FH

**BRIEF ON APPEAL – APPELLEE**

**ORAL ARGUMENT REQUESTED**

JESSICA R. COOPER  
*Prosecuting Attorney*  
*Oakland County*

JOHN S. PALLAS  
*Chief, Appellate Division*

BY: DANIELLE WALTON (P52042)  
*Assistant Prosecuting Attorney*  
Oakland County Prosecutor's Office  
1200 North Telegraph Road  
Pontiac, MI 48341  
(248) 858-0656

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## ISSUES PRESENTED

I. DID THE TRIAL COURT COMMIT LEGAL ERROR WHEN IT GRANTED A NEW TRIAL WHEN THERE WAS NO CONSTITUTIONALLY PROTECTED SILENCE INVOLVED NOR ANY EVIDENTIARY ERRORS, AND DEFENDANT WAIVED ANY CLAIMS BY FOREGOING A MISTRIAL IN LIEU OF CURATIVE INSTRUCTIONS?

The Court of Appeals answered the question “yes.”

The trial court granted a new trial.

The People answer the question, “yes.”

Defendant answers the question, “no.”

A. DID COUNSEL WAIVE ANY CLAIMS REGARDING HIS OBJECTIONS WHEN HE OPTED FOR CURATIVE INSTRUCTIONS RATHER THAN A MISTRIAL?

The Court of Appeals answered the question, “yes.”

The trial court did not specifically answer this question.

The People answer the question, “yes.”

Defendant answers the question, “no.”

B. WAS THERE ANY CONSTITUTIONALLY PROTECTED SILENCE INVOLVED IN THIS CASE WHICH CONSISTED OF OMISSIONS FROM A VOLUNTARY UNCOMPELLED STATEMENT PRIOR TO READING *MIRANDA* WARNINGS AND NONTESTIMONIAL CONDUCT DURING THE INTERVIEW?

The Court of Appeals answered the question, “no.”

The trial court answered the question, “yes.”

The People answer the question, “no.”

Defendant answers the question, “yes.”

C. WAS THE RULE ESTABLISHED IN *PEOPLE v BIGGE*, 288 MICH 417; 285 NW 5 (1939) VIOLATED BY OMISSIONS FROM DEFENDANT'S STATEMENT TO THE POLICE AS WELL AS HIS LEAVING THE INTERVIEW WHICH WAS INTRODUCED AS NONASSERTIVE NONVERBAL CONDUCT SHOWING CONSCIOUSNESS OF GUILT?

The Court of Appeals answered the question, "no."

The trial court implicitly answered the question, "yes."

The People answer the question, "no."

Defendant answers the question, "yes."

D. HAS DEFENDANT DEMONSTRATED PLAIN ERROR BY THE ADMISSION OF DEFENDANT'S REFERENCE THAT HE HAD BRIEFLY BEEN IN JAIL, WHEN HE WAS BEING PURPOSELY VAGUE ABOUT HIS WHEREABOUTS AT THE TIME OF THE CRIME, WHEN THE EVIDENCE WAS RELEVANT TO SHOW CONSCIOUSNESS OF GUILT AND IN ANY EVENT ANY PREJUDICE WOULD HAVE BEEN CURED BY THE INSTRUCTION GIVEN BY THE COURT?

The Court of Appeals answered the question, "no."

The trial court did not answer whether the reference to the incarceration alone would have caused the court to grant a new trial.

The People answer the question, "no."

Defendant answers the question, "yes."

## COUNTER STATEMENT OF FACTS

The defendant was charged with one count of criminal sexual conduct in the third degree contrary to MCL 750.520d for events occurring on or about May of 2005. The victim was 14-year-old Mary Newman, a friend of the defendant's sister. The victim had grown up with the defendant and considered him "family." The evidence showed that when the victim was at a sleep-over at the defendant's sister's home, the defendant sexually assaulted her. The victim revealed her sexual assault to the defendant's sister shortly thereafter. The defendant's sexual assault came to the attention of the authorities after the defendant again tried to assault the victim and when she revealed her sexual assault to the nurse when she was undergoing a test for HIV.

Carmella Jenkins, the mother of the victim, testified that she dated the defendant's uncle for a number of years. The victim was friendly with the defendant's sister, Jasmine Tate [who was close in age]. Ms. Jenkins said that the members of the two families called each other "family" and she wouldn't be surprised if the victim had referred to the defendant as "cousin."<sup>1</sup>

Ms. Jenkins first heard that her daughter had been sexually assaulted when she was informed by the police. The detective then came to her home to speak with Mary.<sup>2</sup>

After she found out about the sexual assault, Ms. Jenkins thought back to the time when the sexual assault would have occurred. She had noticed a change in her daughter's demeanor. Mary had become sad, angry, and uncommunicative. Her daughter still refused to talk to her about the sexual assault.<sup>3</sup>

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<sup>1</sup> V I (10/9/07 Trial Transcript) at 26-27, 28; 6b-7b.

<sup>2</sup> V I at 29, 32-33; 7b-8b.

<sup>3</sup> V I at 30-32; 7b-8b.

The victim, who was 16 years old at the time of trial, testified that she was friends with Jasmine Tate, the sister of the defendant, who was close in age.<sup>4</sup> Mary testified that near the end of eighth grade (in the 2004-2005 school year) when she was 14 years old, she had spent the night at her friend Jasmine's home. She, Jasmine, Jasmine's friend Melinda, and the defendant's two daughters, Zakesia and Tiandria, were watching a movie and they fell asleep on the couch.<sup>5</sup> At some point, the defendant and his wife Shahanna came in and moved their sleeping daughters to separate couches and the defendant told her that she should sleep on the bigger couch.<sup>6</sup>

Later, the defendant [who was 27 years old] came back into the room where the victim was sleeping and tapped her on her shoulder. He told her to move down to the end of the couch. When she did, he attempted to remove her underwear. However, the victim heard the defendant's wife calling him and he went back to see what she wanted. The victim then moved back up the couch and pulled up her underwear.<sup>7</sup>

The defendant then came back into the living room and took the victim into the kitchen. He picked her up and placed her on the kitchen floor, took off her underwear, and placed his penis inside her vagina.<sup>8</sup> The victim could not understand why the defendant was acting the way he was since they all had grown up together. The defendant then told the victim not to say anything to his sister, Jasmine. The victim then went back to the couch.<sup>9</sup>

Mary told Jasmine what had occurred a couple days after the incident. She did not want to tell her mother because she knew she would have to go to court which she did not want to do.

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<sup>4</sup> V I at 59; 18a.

<sup>5</sup> V I at 61-63; 18a-19a.

<sup>6</sup> V I at 63-65; 19a.

<sup>7</sup> V I at 66; 19a.

<sup>8</sup> V I at 67-68; 20a.

<sup>9</sup> V I at 69-70; 20a.

She also knew that the “family” would be destroyed if she revealed what had occurred.<sup>10</sup>

In December of 2006, the victim again went over to her friend Jasmine’s home. The defendant was there and Mary said the defendant offered to bring her home. She got in the car with the defendant and John, the boyfriend of Jasmine’s sister.<sup>11</sup> The defendant dropped off John and parked his car in the back of the victim’s apartment complex. After they parked, the defendant started pulling on the victim’s jacket to pull her closer to him, but the victim’s phone rang. The defendant then drove the victim home.<sup>12</sup>

While they were at school the next day, Mary told Jasmine what had occurred.<sup>13</sup> Mary revealed her sexual assault to a nurse when she went to the Teen Health Center in December [of 2006].<sup>14</sup> Though she had previously been to the health center, she testified she disclosed on this occasion when she was being asked about taking an HIV test.<sup>15</sup> She stated that she also told the nurse that after the defendant had raped her, that that December the defendant had attempted to sexually assault her one day while they were in a car.<sup>16</sup>

After she revealed that she had been raped to the nurse, a detective came to see her.<sup>17</sup> She was supposed to go for an interview at Care House but she did not want to go since she did not want to talk about it.<sup>18</sup> When the detective came to her house, Jasmine and her mother were also

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<sup>10</sup> V I at 79, 81-82; 22a.

<sup>11</sup> V I at 71-73; 21a. The victim continued to maintain friendship with the defendant’s sister and she considered the defendant as “family”, assuredly resulting in conflicting emotions.

<sup>12</sup> V I at 73-76; 21a-22a, 15b.

<sup>13</sup> V I at 79-80; 22a.

<sup>14</sup> V I at 83, 86, 132; 23a, 32a.

<sup>15</sup> V I at 86; 23a. It was reasonable that the victim, who maintained she did not want anything to happen to the defendant, would reveal all those who had sexual intercourse with her when discussing the frightening issue of HIV tests.

<sup>16</sup> V I at 96-97; 26a.

<sup>17</sup> V I at 88-89; 24a.

<sup>18</sup> V I at 117-118; 16b.

there. Mary said that she did not want her mother present when she spoke with the detective. She said that Jasmine could stay, however.<sup>19</sup>

When the detective started asking her questions, she broke down crying.<sup>20</sup> Because she was crying, Jasmine told the detective about what had occurred.<sup>21</sup> At trial, Mary said that Jasmine's description of the sexual assault was partially incorrect because before the sexual assault Mary had been asleep on a couch, not in Jasmine's bed. Mary testified that she did not remember Jasmine relating anything to the detective about Mary sleeping in Jasmine's bedroom before the sexual assault, however.<sup>22</sup> Mary said that while the detective was there she had been tuning Jasmine out because she was upset and was thinking about what she wanted to do. She said she did not want anything to happen to the defendant because she regarded him as a cousin. ". . . I grew up with them, and I love Anthony like a-my real cousin, like my blood. . . and I don't want to see it destroyed or nothin' and nobody to hate me. . ." <sup>23</sup>

Cindy Slavick, a nurse at the Teen Health Center at Pontiac Northern High School [the school the victim attended], testified that Mary Newman came in for HIV testing on December 15, 2006 and when she and the victim were discussing the risk factors involved, she revealed that she had been raped.<sup>24</sup> Ms. Slavick said she did not press the victim for details.<sup>25</sup> Ms. Slavick had

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<sup>19</sup> V I at 120; 31a.

<sup>20</sup> V I at 121; 21a.

<sup>21</sup> V I at 89, 121; 24a, 31a.

<sup>22</sup> V I at 93, 96; 25a, 26a.

<sup>23</sup> V I at 121-122; 31a.

<sup>24</sup> V I at 129-130, 132, 135; 32a, 18b, 19b.

<sup>25</sup> V I at 131; 32a.

written down that the victim had revealed that she had been raped on December 11.<sup>26</sup> After the victim left, Ms. Slavick called Protective Services.<sup>27</sup>

Jasmine Tate testified that in 2005 she had been living in Pontiac and spent a lot of time with Mary Newman. She said that her brother, the defendant, had been living in Tennessee but would come to visit upon occasion.<sup>28</sup>

Jasmine testified that Mary had confided in her [about the rape] she believed a couple months after it had occurred. But she said she did not remember either the time or date. Jasmine recommended that the victim tell her mother what had happened. However, the victim did not do so.<sup>29</sup>

Jasmine also revealed that Mary had told her about another incident which had occurred in a car. She said that the victim told her the day after it happened. Jasmine again advised the victim to reveal what had occurred.<sup>30</sup>

Jasmine said that she was present at the victim's home when the detective came to see Mary. Mary's mother left the room but Jasmine remained. Mary, however, was choking on her words and crying. Jasmine relayed the information concerning the sexual assault to the detective. Jasmine said that Mary continued to cry pretty much throughout Jasmine's conversation with the detective.<sup>31</sup> Jasmine said that she believed that Mary told her that the first incident occurred when Mary had been sleeping in Jasmine's bedroom.<sup>32</sup> However, she did recollect a time when

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<sup>26</sup> V I at 134; 32a. The victim testified that she had told the nurse that her cousin had only attempted to rape her when they had been in the car, however. V I at 96-97; 26a.

<sup>27</sup> V I at 131; 32a.

<sup>28</sup> V I at 145-147; 21b-22b.

<sup>29</sup> V I at 147-149; 22b.

<sup>30</sup> V I at 149-150; 22b.

<sup>31</sup> V I at 150-151; 22b-23b.

<sup>32</sup> V I at 156; 24b.

she, Melinda, Mary, and the defendant's daughter had been watching a movie in the living room and she did recall an occasion when she had fallen asleep on the couch while Mary had been there.<sup>33</sup> Jasmine said that Mary had not told her that she had been raped in the motor vehicle; Mary instead had said that she and the defendant had been in a car and he had tried to touch her until he was interrupted by a phone call.<sup>34</sup>

Detective Betts from the Pontiac Police Department testified that he was assigned the sexual assault case on December 26, 2006 after a referral had come through the Department of Human Services.<sup>35</sup> He set up an interview for the victim at Care House, an organization specially designed for interviewing children.<sup>36</sup> However, the victim, Mary Newman, said she did not want to go to Care House because then she would have to reveal what had occurred to a number of people. The detective went to her home to interview her on January 23, 2007.<sup>37</sup>

When he got to the victim's home, she appeared to be uncomfortable speaking about the incident in front of her mother. Mary said that she would prefer speaking to the detective with Jasmine present. After the detective started asking questions, however, Mary put her head down on the table and started sobbing. The detective said that because Mary was distraught, Jasmine supplied a lot of the information in lieu of the victim.<sup>38</sup>

Detective Betts stated that after he spoke with the victim, he sent a letter to the defendant to come into the Pontiac Police Department.<sup>39</sup> Detective Betts testified that when investigating a

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<sup>33</sup> V I at 173-174; 28b.

<sup>34</sup> V I at 153, 161; 23b, 25b.

<sup>35</sup> V I at 177, 179-180; 33a-34a.

<sup>36</sup> V I at 177; 33a. Detective Betts indicated that he had not had much experience in investigating sex crimes especially those with children as victims. V I at 176, 182, 220; 33a, 34a, 33b.

<sup>37</sup> V I at 177-179; 33a, 34a.

<sup>38</sup> V I at 182-184; 34a-35a.

<sup>39</sup> V I at 187; 36a.

criminal complaint he always wants to get the other account of the incident.<sup>40</sup> The detective stated that the letter outlined the allegations, but not in detail.<sup>41</sup> The defendant voluntarily came to the department on February 22, 2007. The defendant obtained his own transportation to the department and eventually left during the interview. At the beginning of the interview Detective Betts told the defendant that he would like to speak with him but that he was free to go at any time, and that no matter what he said he would not be placed under arrest.<sup>42</sup> There was no indication that there were any restraints involved nor that the room was locked.

The detective then asked the defendant about his relationship with Mary Newman.<sup>43</sup> The defendant stated that Mary's mother had married his uncle.<sup>44</sup> (The detective later found that that information was not correct.<sup>45</sup>)

The detective told the defendant he was accused of criminal sexual conduct. The defendant responded that he never touched Mary when they had been in the car together and stated he had other people with him. The detective had not informed the defendant that the victim had indicated that the defendant had attempted to sexually assault her in a vehicle.<sup>46</sup> The detective told the defendant that he would get back to that subject, but said that he wanted to question him about the criminal sexual conduct against Mary Newman which she said had occurred in the kitchen. The detective said that, although the defendant had denied the incident in the car, he did not deny the incident in the kitchen.<sup>47</sup>

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<sup>40</sup> V II [10/10/07 Trial Transcript] at 27-29; 45b.

<sup>41</sup> V I at 188; 36a.

<sup>42</sup> V I at 187-189; 36a.

<sup>43</sup> V I at 190; 36a.

<sup>44</sup> V I at 191, 200; 37a, 38a.

<sup>45</sup> V I at 200; 38a.

<sup>46</sup> V I at 191-192; 37a.

<sup>47</sup> V I at 193; 37a.

Detective Betts said that he wanted to know where the defendant was during June of 2005. The defendant responded that he had been living in Tennessee for nine years and then returned to Michigan in 2006.<sup>48</sup> He later changed the date to the summer of 2004. The defendant volunteered that he had been in Lebanon, Tennessee with his wife in 1998 and moved around Tennessee.<sup>49</sup> The defendant then said that he lived in Tennessee in 1998, moved back to Pontiac in 1999. The defendant then said that he was in jail for two months in 2006.<sup>50</sup>

The detective told him he was attempting to obtain a time line but was confused by the information that the defendant had been providing to him. The defendant said that it wasn't his fault the detective was confused. The defendant got upset and said he was done and he wasn't talking to the detective. Then he left.<sup>51</sup> Because the defendant left, Detective Betts was unable to clarify the time line.<sup>52</sup> Detective Betts also indicated that he had been unable to question him regarding the kitchen incident.<sup>53</sup>

Defense counsel then objected and the court, during the detective's testimony, instructed the jury that a person who is being interviewed by the police has an absolute right to get up and leave the interview. When the court asked defense counsel whether he wanted anything else

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<sup>48</sup> V I at 193; 37a.

<sup>49</sup> V I at 194; 37a. The detective also asked the defendant if his wife's name was Crystal and asked for Crystal's phone number and the defendant gave it. V I at 194; 37a. When the defendant was giving the detective Crystal's phone number, he never corrected the detective and said that Crystal was his mother and that he should be asking for defendant's wife, whose name was Shahanna Redd. V I at 196, V II at 36; 31b, 47b.

<sup>50</sup> V I at 194; 37a.

<sup>51</sup> V I at 194; 37a.

<sup>52</sup> V I at 201; 37a.

<sup>53</sup> V I at 211; 41a.

done, he said no.<sup>54</sup> Defense counsel did *not* request a mistrial or tell the trial court that “no amount of limiting instruction could cure the attention placed on this issue at trial.”<sup>55</sup>

On cross examination, defense counsel questioned whether the detective asked where the defendant had been employed in Tennessee and the detective responded that he did not know because the defendant had left the interview.<sup>56</sup> When asked what information the defendant possessed at the time he came in for the interview, the detective again responded he did not know because the defendant had left.<sup>57</sup>

The court then engaged in a dialogue with the detective regarding whether he viewed the defendant’s decision to leave in a negative light.<sup>58</sup> The detective responded that not everyone leaves an interview and he had to take that into consideration.<sup>59</sup>

At the conclusion of the detective’s testimony, defense counsel asked for another cautionary instruction which the court agreed to give. Defense counsel concluded by saying, “That’s all I want to do, your Honor—”<sup>60</sup> Just before closing arguments, the court cautioned the jury, “. . . you are not permitted at all to go into the jury room arguing or thinking that if—if you would have just heard Defendant’s side of the story. He chooses to have you decide based on the evidence only presented by the People. That is your responsibility. Keep that in mind, number

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<sup>54</sup> V I at 202; 38a.

<sup>55</sup> Appellant’s Brief at 2

<sup>56</sup> V I at 203; 39a. Defense counsel had asserted in opening statements that the defendant possessed documentation regarding his whereabouts. V I at 21; 5b.

<sup>57</sup> V I at 210; 40a.

<sup>58</sup> V I at 211-213; 41a. The court later indicated to the jury during instructions that the court’s own questions, comments, and rulings were not evidence and if the jury believed that the court had an opinion on the case, the jury should disregard this opinion. V II at 95; 13a Furthermore, though the court also discussed how the detective would view an individual who asserts his Fifth Amendment rights (V I at 212; 41a), in this case the defendant did not invoke the Fifth.

<sup>59</sup> V I at 212; 41a.

<sup>60</sup> V II at 52-53; 16a.

one.”<sup>61</sup> During jury instructions, the court reiterated that the defendant had an absolute right not to testify.<sup>62</sup> The court also gave another curative instruction which had been provided by defense counsel concerning the defendant’s own reference to his incarceration as well as the instruction that “[a]ny defendant has an absolute right to choose not to be interviewed, and in so choosing, you may—you are not permitted to hold that against him in any way.”<sup>63</sup> Defense counsel expressed satisfaction with the jury instructions.<sup>64</sup>

At the conclusion of the evidence the jury found the defendant guilty as charged.<sup>65</sup> After the verdict and prior to sentencing, defendant moved for a new trial. Defense counsel claimed that due to the reference to defendant’s incarceration (defendant’s comment that he had been in jail two months) and the reference to defendant leaving the interview and not denying the charges, he was reversibly prejudiced.<sup>66</sup> The prosecution argued that the testimony which had come from the officer did not violate defendant’s constitutional rights and did not violate *People v Bigge*, 288 Mich 417; 285 NW 5 (1939). The prosecution also noted that defense counsel specifically asked for a curative instruction which he prepared for the court and therefore waived his claim.<sup>67</sup>

The court, however, granted a new trial finding a Fifth Amendment violation due to reference to defendant’s silence (failure to deny the allegations) and leaving the interview. The court also noted that “references to Defendant’s prior incarceration are generally inadmissible”

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<sup>61</sup> V II at 57; 17a.

<sup>62</sup> V II at 94; 12a.

<sup>63</sup> V II at 52-53 (16a), 98-100 (13a-14a); 82b.

<sup>64</sup> V II at 102, 104; 14a, 15a.

<sup>65</sup> V III (10/12/07 Trial Transcript) at 4; 11a.

<sup>66</sup> 11/7/07 MT at 4-5, 7; 2a-3a, 5a.

<sup>67</sup> 11/7/07 MT at 7; 5a.

and that the defendant was entitled to a new trial for these reasons as well as those mentioned by defense counsel.<sup>68</sup> (Defense counsel had also claimed that there had been a violation of *People v Bigge, supra*<sup>69</sup>).

The People filed an application for leave to appeal which was granted by the Court of Appeals. On December 4, 2008, the Court of Appeals reversed the lower court's order granting a new trial.<sup>70</sup> The Court of Appeals found that the trial court should not have granted a new trial when defense counsel waived his claims during the trial by specifically requesting a curative instruction and specifically indicating to the court that defense counsel wished no further action taken and ultimately expressed satisfaction with the jury instructions.<sup>71</sup> The Court of Appeals also found that the trial court abused its discretion in declaring a new trial where there was no constitutional or evidentiary error and where any prejudice from the brief mention of defendant's prior incarceration would have been cured by the limiting instruction given by the court.<sup>72</sup>

The defendant sought leave to appeal from the Court of Appeals opinion. On May 29, 2009, this Court granted the defendant's application, directing the parties to answer the following questions:

The parties shall address whether the Court of Appeals erred in concluding: (1) that the trial court abused its discretion when it granted the defendant a new trial; (2) that there was no error in the admission of the police detective's repeated testimony about the defendant's failure to deny certain accusations and his act of departing from the police interview, see *People v Bigge*, 288 Mich 417 (1939); and (3) that the defendant waived any error when defense counsel expressed satisfaction with the trial court's instructions to the jury.<sup>73</sup>

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<sup>68</sup> 11/7/07 MT at 8-10; 6a-8a.

<sup>69</sup> 60b-75b.

<sup>70</sup> *People v Anthony Redd*, unpublished per curiam decision of the Court of Appeals dec'd 12/4/08 (Docket No. 283934); 51a-54a.

<sup>71</sup> *Id.*, 51a-52a.

<sup>72</sup> *Id.*, 52a-54a.

<sup>73</sup> *People v Redd*, 483 Mich 1024; 765 NW2d 340 (2009); 50a

Additional pertinent facts will be discussed in the body of the argument section of this brief, *Infra* to the extent necessary to fully advise this Honorable Court as to the issues raised.

### ARGUMENT

I. THE TRIAL COURT COMMITTED LEGAL ERROR WHEN IT GRANTED A NEW TRIAL. NOT ONLY WAS THERE NO CONSTITUTIONALLY PROTECTED SILENCE INVOLVED OR ANY EVIDENTIARY ERRORS, BUT DEFENDANT WAIVED ANY CLAIMS BY FOREGOING A MISTRIAL IN LIEU OF CURATIVE INSTRUCTIONS.

*Standard of Review:*

A trial court's decision to grant a motion for a new trial is reviewed for an abuse of discretion which occurs when the trial court chooses an outcome falling outside the principled range of outcomes.<sup>74</sup> Legal errors, however, are reviewed de novo<sup>75</sup> and the commission of legal error may constitute an abuse of discretion.<sup>76</sup> Furthermore, the facts concerning the disputed issues are not contested. When a ruling involves an interpretation of the law or the application of a constitutional standard to uncontested facts, the review is also de novo.<sup>77</sup> In this case, the trial court was *solely* relying on constitutional and evidentiary error to support its grant of a new trial; if there were no errors, there was no authority to grant a new trial.<sup>78</sup>

Defendant's claim that a new trial should have been declared based on great weight of the evidence grounds is not properly before this Court. Defense counsel did not move for a new trial

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<sup>74</sup> *People v Miller*, 482 Mich 540, 544; 759 NW2d 850 (2008).

<sup>75</sup> *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003).

<sup>76</sup> *Craig ex rel Craig v Oakwood Hosp.*, 471 Mich 67, 82; 684 NW2d 296 (2004); *People v Brown* 196 Mich App 153, 159; 492 NW2d 770 (1992). See also: *United States v Allen*, 516 F3d 364, 374 (CA 6, 2008)(indicating that "an abuse of discretion occurred when the [] court . . . improperly applies the governing law, or uses an erroneous legal standard.")

<sup>77</sup> *People v Russell*, 471 Mich 182, 187; 684 NW2d 745 (2004).

<sup>78</sup> MCR 6.431(B).

based on great weight grounds,<sup>79</sup> nor did the trial court declare a new trial based on great weight grounds<sup>80</sup> (nor did defendant raise this claim in the Court of Appeals or in this Court when requesting leave).<sup>81</sup>

*Issue Preservation:*

The prosecutor objected to defense counsel's request for a new trial asserting, not only were there no errors, but that the defendant had waived consideration of any error.<sup>82</sup>

Summary of Argument

*Discussion:*

The Court of Appeals correctly found that the trial court's grant of a new trial was based on several legal errors.

(1) The trial court legally erred in granting a new trial based on claims that the defendant waived. Defense counsel's choice at trial of one remedy to cure error over another amounted to a waiver of any claim on appeal that he should have chosen another remedy. Defendant consented to and drafted a curative instruction, specifically indicated that he did not wish any further remedy, and expressed satisfaction with the jury instructions.

(2) The trial court also legally erred when it found a violation of the Fifth Amendment. There was no silence at all, but omissions from voluntary statements, as well as nontestimonial evidence of defendant's evasiveness and his leaving the interview; further, there was no silence

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<sup>79</sup> 60b-75b.

<sup>80</sup> 11/7/07 MT at 7-10; 5a-8a. Though defense counsel indicated that the trial court expressed reservations about the victim's credibility and that the actual tapes of the trial would verify this observation, this is not reflected in the record. 11/28/07 MT at 5; 100b (Furthermore, the transcripts are the formal court record. MCR 7.210(A)(1); MCR 7.311(A)).

<sup>81</sup> See: *People v Johnson*, 421 Mich 494, 496; 364 NW2d 654 (1984)(indicating that this Court normally does not treat errors not asserted in the Court of Appeals)

<sup>82</sup> 11/7/07 MT at 6-7; 4a-5a; 76b-87b.

which was the product of official compulsion, custodial interrogation, or reliance on *Miranda* warnings. The defendant voluntarily came in for an interview, was told he was free to leave at any time, was not advised of his *Miranda* rights (nor was there any need to do so), never invoked any constitutional rights, and after making a statement which was extremely evasive at times, left during the course of the interview.

(3) The grant of a new trial was also inappropriate on the alternative grounds raised by defendant. Again there was no silence in this case, the defendant having met with and talked to the police. The People did not admit tacit admissions in violation of *People v Bigge*, 288 Mich 417; 285 NW 5 (1939) but instead introduced omissions from defendant's statement to the police and his leaving the interview as nonassertive nonverbal conduct to show consciousness of guilt.

(4) The trial court also legally erred when it found that defendant's unpreserved claim that his own reference to his incarceration, when he was being purposely vague about his whereabouts at the time of the crime, was impermissible, and that the cautionary instruction which the jury was presumed to follow was insufficient to alleviate any prejudice.

Since the trial court legally erred and defendant's alternative ground for a grant of a new trial was without merit, the Court of Appeals properly reversed the grant of a new trial.

**A. Counsel waived any claims regarding his objections when he opted for a curative instruction rather than a mistrial.**

*“A defendant should not be allowed to take a gambler’s risk and complain only if the cards [fall] the wrong way.”<sup>83</sup>*

Defense counsel’s choice at trial of one remedy to cure error over others amounted to a waiver of any claim on appeal that he should have chosen another remedy. The Court of Appeals correctly found that the trial court legally erred when, after defendant received an unfavorable verdict, it granted a new trial based on claims which had been waived.

**1. The finding of waiver is supported by the record.**

Though the court granted a new trial based on purported errors which occurred during the testimony of Detective Betts, the officer-in-charge, the record supports an intentional relinquishment or abandonment of a known right<sup>84</sup> by defense counsel. The following colloquy occurred at trial during direct examination:

Q. Tell us about that interview.

A. Well, the interview started out with, I asked Mr. Redd what was the relationship with Mary Newman, okay? . . . So he says, yes, he—he knew Mary Newman . . . he knew Mary Newman but he also commented that his uncle, Raymond Woods Jr., married Mary’s mother, Carmella Young. So that established in his—that’s what he told me that established the relationship of how he knew Mary Newman, that he—that his uncle Raymond Woods, Jr., married Carmella Young.

Q. Okay, and what happened next?

A. At that point, I—I—that’s when I came forth and I says, Mister—Mr. Redd, this is the reason why you’re here: You’re accused of sexual conduct—criminal sexual conduct. He responded that he never touched

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<sup>83</sup> *District Attorney’s Office for the Third Judicial District et al v Osborne*, \_\_\_US\_\_\_; 129 S Ct 2308, 2330; \_\_\_L Ed 2d \_\_\_ (2009),(Alito, J., concurring) [citing *Osborne v State*, 163 P3d 973, 984 (Alaska App, 2007)].

<sup>84</sup> *United States v Olano*, 507 US 725, 733; 113 S Ct 1770; 123 L Ed 2d 503 (1993).

Mary and that, when they were in the car together, he had other people in the car. He just came up with that.

Q. He offered that information?

A. He offered that information and I—I—

Q. You had not given him the specific allegations?

A. I—I didn't even come—I didn't say anything except that he was just there for a criminal sexual conduct investigation. That's all I asked him about.

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Q. When you heard that information, what was your reaction?

A. My reaction was—because when I had—did the interview with Mary back at the house, not only did she mention a sexual assault, but she had also mentioned an incident in the back of a car.

Q. And just so we're clear, when you informed Mr. Redd of the allegations at the beginning of the interview, did you literally just say to him something to the effect of, you're accused of a criminal sexual conduct with Mary Newman?

A. That's correct.

Q. And that was it?

A. That's correct.

Q. All right. So after he indicated to you that he didn't touch Mary when Mary was in the car, there were other people in the car, what did you do next?

A. Well, I told Mr. Redd, I says, well, we'll get to that in a minute 'cause I did want to question him about what had happened in the back of the car. I said, let's get to the point where—I just brought up about the criminal sexual conduct against Mary Newman. He never denied it. He—he just—he just sat there, and he was concerned—like I said, he made a comment about the back of the car.

So at that point, I want to know what—where he was during June of 2005. That's the next part of the questioning I—I started with Mr. Redd. He told me that around 2005 of June, that he was living in Tennessee. And he was there for about nine years, then he returned in 2006.

Then he volunteered the information about that he had—that he was in Lebanon Tennessee in 1998 with his wife, and then bounced around Tennessee. I asked him, your wife Crystal? Then he went on—then I went on to ask him the last time—when was the last time you lived in Tennessee? He said—he stated the summer of 2004. Then, he stated he lived in Tennessee for one year, moved back to Pontiac in December of 1999. Then—then Mr. Redd indicated that he was in jail for two months and was released in November of 2006.

Having all that information thrown at me, I was a little bit confused. And I-I-I stopped Mr. Redd and I says, I'm—I'm confused, can we back up a minute here, I'm just trying to get a time line of what you just said. And his response was, well, it's not my fault that you're confused. And then he got upset and he—he wanted-he was done. He got up and he was starting to walk out of the interview room and I tried to explain to Mr. Redd that I'm just conducting an interview here, and I was trying to get a time line of where you were, you know, and I just—this is your chance to talk to me, give me your side of the story. And he says, nope, I'm not talking to you, I'm out of here.

\* \* \*

Q. Okay. All right, and since he walked out of the interview with you at the police station, were you actually ever able to conduct any further investigation into where he was living or when?

A. No. No, I needed to talk to him a little bit more, to get some more information. Because all the information he threw at me about Tennessee, I—I explained to him that I was confused and I needed to talk to him a little bit more, to kind of –to help weed it out a little bit. And that's when he—he became upset and walked out, and stormed out of the interview room. I didn't have a chance to ask him any more questions, 'cause he was free to go.

Q. Okay. Now, there was (sic) some statements made earlier about the Defendant denying the allegations to you.<sup>85</sup> Did he ever deny the allegations to you?

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<sup>85</sup> The assistant prosecutor was clarifying the detective's testimony to rebut defense counsel's claim in opening that the defendant had denied the allegations. V I at 17; 4b, 82b. Under the doctrine of fair response, there would be no error in such clarification because a party is entitled to fairly respond to issues raised by the other party. *People v Jones*, 468 Mich 345, 352 n 6; 662 NW2d 376 (2003). Even under the doctrine of "invited error" appellate review would be precluded because "when a party invites the error, he waives his right to seek appellate review, and any error is extinguished." *Id.*

- A. Never denied any allegations about sexual conduct.
- Q. Okay. He talked to you about the car, correct? He offered you that information.
- A. He only offered about that he never touched the victim, Mary Newman.
- Q. In the car?
- A. In the car.
- Q. Then you advised him of the allegations of what occurred on the kitchen floor, correct?
- A. That's correct.
- Q. And he never denied that to you?
- A. Never denied it.<sup>86</sup>

Defense counsel then objected and the court gave the following limiting instruction:

THE COURT: Ladies and Gentleman, it is a correct statement that any person who's interviewed by a police officer has an absolute right to get up and leave an interview. There's nothing illegal about that at all. So you should note that, and what—*what do you wish to have done, Mr. Hall?*

DEFENSE COUNSEL: I—I think the Court just gave a curative instruction. *That's the only instruction that I could have asked for, and the Court responded to it immediately. So there's nothing else to—to say.* (emphasis supplied)<sup>87</sup>

At the conclusion of the testimony, defense counsel requested another curative instruction:

DEFENSE COUNSEL: Now, there's one other thing that I—I forgot to do. When we talked about the instructions briefly yesterday, I—I forgot to ask the Court—and I'll ask

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<sup>86</sup> V I at 190-194, 200-201; 36a-37a, 38a.

<sup>87</sup> V I at 201-202; 38a.

the Court to give a—a cautionary in-instruction about the fact that I’m concerned about the issue of Mr. Redd going to the –to the police station and—and, ultimately, getting up and—and leaving. Okay. So I—I’m trying to, in my mind’s eye to come – *the-the one that I gave the Court*, I was more concerned about the jail situation that’s why this one—

THE COURT: Well, I—I can address that again, but I mean, it—I—I should indicate, it shouldn’t even have come up. But aside from that, if a-the-the detectives in—inform a person of their right not—sit and speak, and they may leave at any time, and the fact that it’s done should not be held against them in any way.

DEFENSE COUNSEL: *That’s all I want to do your Honor—*  
(emphasis supplied)<sup>88</sup>

Before closing arguments, the court instructed the jury in the following manner:

THE COURT: Remember what I told you at the beginning of this case, you are not permitted at all to go into the jury room arguing or thinking that if—if you would have just heard Defendant’s side of the story. He chooses to have you decide based on the evidence only presented by the People. That is your responsibility. Keep that in mind.<sup>89</sup>

During jury instructions, the court gave the curative instruction crafted by defense counsel:

You heard—you may have heard testimony or comments that Mr. Redd was arrested and/or in jail. That fact has not been proven. You must not consider it—such evidence, as it is not relevant to the elements of the this [sic] offense. You must not decide that the statement shows Mr. Redd is a bad person or that he’s likely to commit crimes. In other words, you must not convict him because you think he’s guilty of bad conduct or other bad conduct.

You also heard testimony regarding Mr. Redd’s leaving the interview with detectives during this matter. Any defendant has an absolute right to choose not to

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<sup>88</sup> V II at 52-53; 16a.

<sup>89</sup> V II at 57; 17a.

be interviewed, and in so choosing, you may—you are not permitted to hold that against him in any way.<sup>90</sup>

At the conclusion of instructions, the Court asked defense counsel on two occasions whether he was satisfied with the jury instructions and, on both occasions, defense counsel stated he was satisfied.<sup>91</sup>

A defense counsel's choice not to request a mistrial but instead to request a curative instruction and proceed to verdict represents counsel's decision that this course is in the best interest of the defendant. Counsel may well believe that the jury is favorable to defendant and the risk of a second trial and potentially a more unfavorable jury is too high. Counsel may also believe that the case is going well for his client, or that the prosecution's witnesses will have learned from defense counsel's cross-examination or that he does not wish to subject his client to the stress and continued uncertainty that a second trial entails.<sup>92</sup>

Here, defense counsel did not request a mistrial but instead accepted a curative instruction and specifically indicated that he did not want anything further done.<sup>93</sup> Furthermore, at the conclusion of the case, defense counsel specifically drafted a curative instruction which the court gave and counsel also expressed satisfaction with the jury instructions. Defense counsel clearly realized that he had the option of moving for a mistrial during the course of trial, but chose to forego that option and instead specifically indicated that all defense wanted was a curative instruction. No explicit statement waiving an appellate claim is required in order to find

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<sup>90</sup> V II at 52, 98-100; 13a-14a, 16a, 83b.

<sup>91</sup> V II at 102, 104; 14a; 15a.

<sup>92</sup> See: *Watkins v Kassulke*, 90 F3d 138, 142 (CA 6, 1996) citing *Galowski v Murphy*, 891 F2d 629, 639 (CA 7, 1989)("[t]he decision whether to move for a mistrial or instead to proceed to judgment with the expectation that the client will be acquitted is one of trial strategy.").

<sup>93</sup> Also the prosecution's clarification for the jury that the defendant had not denied the allegations was certainly responsive to an issue defendant himself raised in opening.

waiver.<sup>94</sup> In the lower court when responding to the People’s argument that defense counsel waived his claim, defense counsel essentially indicated that there are times that defense counsel would not ask for a mistrial and that if the jury had acquitted, the issue would be moot, “But as a practical matter, your Honor, I think that it was my thought and—and, hopefully, the Court that, okay, if I ask for a new trial, the Court grants it, we’re going to start all over. The jury might have saw through it and done the—the right thing. . .”<sup>95</sup> Defense counsel essentially conceded that in this case he believed it was in his client’s best interest to continue the trial. Had defense counsel believed defendant was irreversibly prejudiced, he would have asked for a mistrial; instead he affirmatively requested a curative instruction. Defense counsel’s comment reveals that he weighed his options and specifically decided not to move for a mistrial and was content with the limiting instructions given until the jury convicted.

## **2. The finding of waiver is supported by decisions from other states.**

A number of other state courts have found, as did the Court of Appeals here, that defense counsel’s choice of a curative instruction as an adequate remedy for a possible underlying violation is a waiver of any claim on appeal that the correct remedy is a new trial, that is, the choice amounted to an intentional relinquishment of a known right.<sup>96</sup>

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<sup>94</sup> See: *People v Carter*, 462 Mich 206, 212; 612 NW2d 144 (2000); *People v Tate*, 244 Mich App 553, 559; 624 NW2d 524 (2001) *lv den* 465 Mich 920; 638 NW2d 749 (2001); *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002).

<sup>95</sup> 11/7/07 MT at 6; 4a.

<sup>96</sup> See: *Hudson v State*, 296 Ga App 692, 693-694; 675 SE2d 578 (2009)(the court indicating that when, after counsel objected to improper testimony, the court gave a curative instruction and defense counsel responded “Thank you Judge,” counsel could not raise the claim that a mistrial should have been declared since he waived this claim by his statement.); *Bell v State*, 294 Ga App 779, 781-782; 670 SE2d 476 (2008)(the Court also indicating that after counsel objected to improper impeachment and the court gave a curative instruction and asked counsel if there was anything further to which counsel responded there was not, counsel waived any further claim on appeal regarding the impeachment.); *State v Holness*, 289 Conn 535, 543-545; 958 A2d (footnote continued on next page)

### 3. The waiver met all procedural requirements.

“When a court proceeds in a manner acceptable to all parties, it is not resolving a disputed point and thus does not ordinarily render a ruling susceptible to reversal.”<sup>97</sup> Defense counsel’s conduct in this case showed not passive acquiescence, but intentional relinquishment of a known right which constituted waiver.<sup>98</sup>

Both the United States Supreme Court and this Court have indicated that certain questions have to be answered to find waiver:

(1) Whether a particular right is waivable; (2) whether the defendant must participate personally in the waiver; (3) whether certain procedures are required for waiver; and (4) whether the defendant’s choice must be particularly informed or voluntary.<sup>99</sup>

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754 (2008)(finding that when defense counsel agreed to the limiting instruction, he was barred from challenging the ability of the limiting instruction to cure the Sixth Amendment error on appeal.); *People v Moore*, 233 AD2d 670, 671-672; 650 NYS2d 332 (1996)(holding that when defense counsel refused to request a mistrial but instead formulated and accepted the curative procedures implemented by the court, he waived any claim regarding the underlying jury sequestration error.); *People v Cruz*, 177 AD2d 363, 363-364; 576 NYS2d 109 (1991)(indicating that the court’s submission of a curative instruction with counsel’s consent waived the claim.); *Flanagan v State*, 680 NW2d 241, 247 (ND, 2004)(finding that the defense counsel’s acquiescence to a curative instruction would waive his right to complain on appeal regarding improper mention of defendant’s post-arrest silence.) See also: *People v Dobek*, 274 Mich App 58, 65; 732 NW2d 546 (2007)(indicating that defendant’s claims concerning prosecutorial misconduct were waived when, after defendant’s request for a mistrial on some claims was denied, defense counsel agreed that he had no further objections); *People v Bernaiche*, (*On Remand*), unpublished per curiam decision of the Court of Appeals dec’d July 3, 2008 (Docket No. 261498)(rejecting defendant’s claim that his decision not to move for a mistrial after the prosecutor’s comment on his decision not to testify but instead request a curative instruction was reviewable indicating, “The defense clearly realized that it had the option of moving for a mistrial but affirmatively chose to forego that option. The defendant waived the right to seek a mistrial. . .”); 88b-95b.

<sup>97</sup> *People v Riley*, 465 Mich 442, 449; 636 NW2d 514 (2001).

<sup>98</sup> *Olano*, *supra*.

<sup>99</sup> *Olano*, *supra*; *Carter*, *supra* at 215-216.

a. The objections were subject to waiver.

Claims of constitutional and evidentiary error such as alleged in this case are clearly waivable. There is a “presumption of waivability” with regard to most rights especially concerning the evidentiary rules.<sup>100</sup> In fact, the United States Supreme Court has noted that waivers as to evidentiary matters are a routine part of trial practice and held that “although hearsay is inadmissible except under certain specific exceptions, we have held that agreements to waive hearsay objections are enforceable.”<sup>101</sup> As in the federal system, Michigan allows waiver of virtually all rights afforded to litigants. “Criminal defendants can waive their fundamental rights, including the right to remain silent, to trial by jury, and, indeed, to a trial at all. They may also consent to searches and seizures that would otherwise be illegal.”<sup>102</sup> The same is true in the context of evidentiary rules.<sup>103</sup> Defendant claims in this case that a violation of *People v Bigge*, 288 Mich 417; 285 NW 3 (1939) is unwaivable. But a “*Bigge*” error would only be evidentiary in nature and therefore would fall into the category of presumptively waivable errors.<sup>104</sup>

b. Only counsel’s statement was necessary to waive defendant’s claims.

In this case not only were the evidentiary issues concerning MRE 401, 403, 801 as well as the constitutional claims alleged by defendant waivable,<sup>105</sup> but they could be waived by

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<sup>100</sup> *United States v Mezzanatto*, 513 US 196, 200-201, 203; 115 S Ct 797; 130 L Ed 2d 697 (1995); See also: *New York v Hill*, 528 US 110, 114; 120 S Ct 659; 145 L Ed 2d 560 (2000); *People v Stevens*, 461 Mich 655, 664; 610 NW2d 881 (2000); *United States v Krilich*, 163 F Supp 2d 943, 948 (ND Ill, 2001)[vacated on other grounds 53 Fed Appx 787 (CA 7, 2002)](indicating that Fifth Amendment rights are also presumptively waivable).

<sup>101</sup> *Mezzanatto*, 513 US at 202, 203, 208 fn 5.

<sup>102</sup> *Stevens*, *supra* at 666.

<sup>103</sup> *Id.* at 665.

<sup>104</sup> *Mezzanatto*, *supra*. This Court has also determined that due process violations concerning post-*Miranda* silence do not require automatic reversal (*People v Borgne*, 483 Mich 178, 196; 768 NW2d 290 (2009)) and therefore would also be presumptively waivable.

<sup>105</sup> *Mezzanatto*, 513 US at 202; *Krilich*, *supra*.

counsel rather than defendant personally. Though there may be certain fundamental rights which the defendant must personally waive,<sup>106</sup> for most other rights waiver may be effected by action of counsel.<sup>107</sup> “The lawyer has-and must have-full authority to manage the conduct of the trial” since the adversary process could not function effectively if every tactical decision required client approval. Also “[t]he presentation of a criminal defense can be a mystifying process even for well-informed laypersons”.<sup>108</sup> As to many decisions pertaining to the conduct of the trial, the defendant is “deemed bound by the acts of his lawyer-agent and is considered to have ‘notice of all facts, notice of which can be charged upon the attorney.’”<sup>109</sup>

Courts have also determined that the decision regarding the ultimate remedy for purported error, whether to request or consent to a mistrial is also counsel’s to make.<sup>110</sup> The decision to move for a mistrial often must be made in a split-second and it involves numerous alternative strategies such as remaining silent, interposing an objection, requesting a curative instruction, or requesting an end to the proceeding.<sup>111</sup> Therefore, common sense dictates the

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<sup>106</sup> See: *Florida v Nixon*, 543 US 175, 187; 125 S Ct 551; 160 L Ed 2d 565 (2004) (right to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal). Compare: *Gonzalez v United States*, \_\_\_US \_\_\_; 128 S Ct 1765, 1773, 1774; 170 L Ed 2d 616 (2008)(Scalia, J., concurring)(indicating that though in passing the Supreme Court had found certain fundamental or basic rights cannot be waived unless a defendant personally participates in the waiver, the Court had never so found where the suggestion governed the disposition of the case).

<sup>107</sup> *New York v Hill*, 528 US at 114-115; 2 W. LaFave & J. Isreal, N. King, and O. Kerr, Criminal Procedure §11.6 (2007-2008). See also: MRPC 1.2(a).

<sup>108</sup> *Gonzalez v United States*, 128 S Ct at 1770 citing *Taylor v Illinois*, 484 US 400, 417-418; 108 S Ct 646; 98 L Ed 2d 798 (1988).

<sup>109</sup> *New York v Hill*, *supra* citing *Link v Wabash R. Co.*, 370 US 626, 634; 82 S Ct 1386; 8 L Ed 2d 734 (1962).

<sup>110</sup> *People v Rosen*, 136 Mich App 745, 757-758; 358 NW2d 584 (1984); *Watkins v Kassulke*, *supra* at 141-143; *Galowski v Murphy*, *supra* at 639; *Walker v Lockhart*, 852 F2d 379, 382 (CA 8, 1988); *United States v Smith*, 621 F 2d 350, 352, n 3 (CA 9, 1980); *United States v Bobo*, 586 F2d 355, 363-365, 366 (CA 5, 1976); *People v Ferguson*, 67 NY2d 383, 390-391; 502 NYS2d 972; 494 NE2d 77 (1986).

<sup>111</sup> *Watkins v Kassulke*, *supra* at 143.

decision should be made by counsel.<sup>112</sup> Furthermore, counsel is generally in a better position than a lay person to judge the impact of a potentially prejudicial incident in the context of the entire trial.<sup>113</sup>

Therefore, in like manner in this case the attorney's decision regarding how to handle purported error and whether to accept a curative instruction for these claimed errors rather than move for a mistrial was binding on his client.

c. The knowing and voluntary nature of counsel's waiver is presumed.

Furthermore, because counsel, who is presumed to be aware of the consequences of his strategy, made the decision on waiver, there was no requirement for a colloquy on the record to determine whether counsel's waiver was knowing and voluntary.<sup>114</sup> "To conclude otherwise would require the trial court to canvass defense counsel with respect to counsel's understanding of the relevant [] principles before accepting counsel's agreement on how to proceed. For good reason, there is nothing in our criminal law that supports such a requirement."<sup>115</sup> Attorneys are presumed to effectively represent their clients by the strategical decisions that they make throughout the course of trial.<sup>116</sup> In this case, defense counsel essentially acknowledged he could have asked for a mistrial but elected not to do so.<sup>117</sup>

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<sup>112</sup> *United States v Washington*, 198 F3d 721, 727 (CA 8, 1999).

<sup>113</sup> *Ferguson, supra*.

<sup>114</sup> *State v Holness*, 289 Conn 535 at 958 (indicating that the trial court was entitled to presume that defense counsel was familiar with the controlling law and acted competently in determining that the limiting instruction was sufficient to safeguard the defendant's rights.); See generally: *New York v Hill*, 528 US at 118.

<sup>115</sup> *Holness, supra* at 545.

<sup>116</sup> *Strickland v Washington*, 466 US 668, 689; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

<sup>117</sup> 11/7/07 MT at 6; 4a.

#### 4. Waiver by choice of remedies is supported by public policy.

The reversal of a conviction entails substantial social costs.<sup>118</sup> Therefore, this Court and the United States Supreme Court have found that rules which govern trial practice “need to encourage all trial participants to seek a fair and accurate trial the first time around . . .”<sup>119</sup> and to prevent parties from purposely holding errors in reserve for later appellate proceedings.<sup>120</sup>

The United States Supreme Court has found for example that a “criminal defendant [is] not entitled ‘to evade the consequences of an unsuccessful tactical decision.’”<sup>121</sup> This Court has also disapproved of the procedure whereby counsel may “harbor error to be used as an appellate parachute in the event of jury failure.”<sup>122</sup> In like manner, “[w]aiver is not excused simply because the defendant was faced with a difficult decision and regrets the strategic choice that he made.”<sup>123</sup> Decisions on evidentiary issues, such as in this case, are a “valuable and integral part of everyday trial practice” and during the course of trial, “parties frequently decide to waive

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<sup>118</sup> *People v Grant*, 445 Mich 535, 551; 520 NW2d 123 (1994).

<sup>119</sup> *Id.* quoting *United States v Young*, 470 US 1, 15; 105 S Ct 1038; 84 L Ed 2d 1 (1985).

<sup>120</sup> *Wainwright v Sykes*, 433 US 72, 89-90; 97 S Ct 2497; 53 L Ed 2d 594 (1977); *Puckett v United States*, \_\_\_ US \_\_\_; 129 S Ct 1423, 1428; 173 L Ed 2d 266 (2009).

<sup>121</sup> *Mezzanatto*, 513 US at 203 citing *United States v Coonan*, 938 F2d 1553, 1561 (CA 2, 1991).

<sup>122</sup> *People v Shahideh*, 482 Mich 1156; 758 NW2d 536, 537 (2009); *Carter, supra* at 214; *People v Pollick*, 448 Mich 376, 387; 531 NW2d 159 (1995); *People v Hardin*, 421 Mich 296, 322; 365 NW2d 101 (1984). See also: *Henry v Mississippi*, 379 US 443, 451; 85 S Ct 564; 13 L Ed 2d 408 (1965); *Holness, supra* at 543.

<sup>123</sup> *Shahideh, supra* at 553 (Young, J., concurring); *Florida v Nixon*, 543 US at 192; *New York v Hill*, 528 US at 115 (“Absent a demonstration of ineffectiveness, counsel’s word on such matters is the last.”) See also: *District Attorney’s Office for the Third Judicial District et al v Osborne*, 129 S Ct at 2330 (Alito, J., concurring)(“[I]t is a well accepted principle that, except in a few carefully defined circumstances, a criminal defendant is bound by his attorney’s tactical decisions unless the attorney provided constitutionally ineffective assistance.”)

evidentiary objections, and such tactics are routinely honored by trial judges”<sup>124</sup> as are the choice of remedies when counsel claims there has been error.<sup>125</sup>

The Court of Appeals, when finding that defense counsel had waived any claims in this case, noted that defense counsel rejected any further remedies when offered by the trial court, specifically requested a curative instruction which was given by the trial court, again rejected any further remedies, and expressed satisfaction with the jury instructions.<sup>126</sup> Because any issue was explicitly waived by defense counsel, the defendant has failed to show that the Court of Appeals clearly erred when it found that the trial court abused its discretion when granting a new trial. The inquiry should end here.

**B. Constitutionally protected silence is silence which is the product of official compulsion, custodial interrogation, or silence in reliance on *Miranda* warnings; it does not include omissions from a voluntary uncompelled statement before reading of *Miranda* warnings nor does it include the nontestimonial conduct during the interview.**

*“This Court is forever adding new stories to the temples of constitutional law, and the temples have a way of collapsing when one story too many is added.”*<sup>127</sup>

But even if defendant had not waived his claims, the trial court incorrectly found that omissions from defendant’s pre-arrest, pre-*Miranda* statement which were used substantively at trial along with defendant’s eventual leaving the interview violated the Constitution. Resolution of this constitutional question requires determining when the Fourteenth Amendment and Fifth Amendment protections are triggered.

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<sup>124</sup> *Mezzanatto*, 513 US at 203.

<sup>125</sup> See n 110 *supra*.

<sup>126</sup> *Redd, supra*; 51a-52a.

<sup>127</sup> *McNeil v Wisconsin*, 501 US 171, 182; 111 S Ct 2204; 115 L Ed 2d 158 (1991) citing *Douglas v Jeanette*, 319 US 157, 181; 63 S Ct 877; 87 L 1324 (1943)(opinion of Jackson, J.).

**1. There was no constitutionally protected silence in this case.**

a. The Fifth Amendment was not violated.

The trial court appeared to find that not only was silence involved, but that the Fifth Amendment should attach before custodial interrogation, and apparently posited the existence of a free-floating right to silence. But there was no silence involved. The defendant's conduct was non-testimonial in nature. And the Fifth Amendment right against compelled self-incrimination was not implicated because the omissions and defendant's leaving the interview were not the product of pre-*Miranda* custodial interrogation or official coercion.

**i. There was no silence.**

In this case the trial court apparently found that even though defendant's statements could be used against him, any omissions from his statements and his leaving the interview could not. Apparently the court believed that these omissions and conduct amounted to "silence" and that the defendant had a constitutional right to silence. However, as will be discussed *infra*, "the Fifth Amendment confers not a right of silence per se, but a right not to be compelled to answer questions."<sup>128</sup> If defendant's statements were not compelled, in like manner any omissions were also not compelled. However, even assuming that a defendant's "silence" would be protected independently from his statements, there was no silence in this case. The constitutional inquiry should end here.

This case involves omissions from defendant's statement--the fact that though he spoke about and in fact denied the incident in the car he did not speak of, much less deny the incident in the kitchen. Silence has routinely been defined as either silence itself or an articulated desire

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<sup>128</sup> *People v Daoud*, 462 Mich 621, 636 n 12; 614 NW2d 152 (2000).

to remain silent or to remain silent until an attorney has been consulted.<sup>129</sup> The Supreme Court in *Anderson v Charles*, 447 US 404, 408; 100 S Ct 2180; 65 L Ed 222 (1980) found that when a defendant elected to speak there was no silence involved at all and omissions from the statement were not considered silence, for “as to the subject matter of his statements, the defendant has not remained silent at all.”

Simply because a defendant answers questions selectively does not implicate constitutionally protected silence. “It would not serve the criminal justice system to allow defendants to use the Fifth Amendment both as a shield and a sword, answering questions selectively and preventing the prosecution from mentioning such selectiveness at trial.”<sup>130</sup> Furthermore, “fair comment does not violate the Fifth Amendment, even where the defendant does not take the stand.”<sup>131</sup>

This Court has held that a defendant’s decision to selectively answer questions does not involve “silence” in cases concerning custodial interrogation after the defendant had waived his *Miranda* warnings. This Court has found that after initially waiving his rights in a custodial post-*Miranda* situation, admission of testimony concerning his demeanor, omissions from his statements, and decisions to answer only select questions did not violate the Fifth Amendment. In *People v McReavy*, 436 Mich 197, 204; 462 NW2d 1 (1990), the People introduced evidence that after the defendant waived his *Miranda* rights, during the course of his conversation with the

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<sup>129</sup> *Wainwright v Greenfield*, 474 US 284, 295 n 13; 106 S Ct 634; 88 L Ed 2d 623 (1986).

<sup>130</sup> *United States v Bonner*, 302 F3d 776, 783-784 (CA 7, 2002); See also: *United States v Davenport*, 929 F2d 1169, 1174-1175 (CA 7, 1991)(indicating, “Once [the defendants] started down this path of self-exculpation, any statement they made-including ‘I won’t tell you’-was fair game.”)

<sup>131</sup> *United States v Robinson*, 485 US 25, 30; 108 S Ct 864; 99 L Ed 2d 23 (1988); *People v Fields*, 450 Mich 94, 110; 538 NW2d 356 (1995). In this case the prosecutor indicated she  
(footnote continued on next page)

police, at times the defendant did not respond to questioning:

The Fifth Amendment does not preclude substantive use of testimony concerning a defendant's behavior and demeanor during a custodial interrogation after a valid waiver of his Fifth Amendment right against compelled self-incrimination. When a defendant speaks after receiving *Miranda* warnings, a momentary pause or even a failure to answer a question will not be construed as an affirmative invocation by the defendant of the right to remain silent. Moreover, a defendant's nonverbal conduct cannot be characterized as "silence" that is inadmissible per se under the Michigan Constitution. When constitutional obligations are fulfilled, use of a party opponent's statements and conduct are to be evaluated pursuant to MRE 801. . . .What defendant did, that is his lack of responsiveness during the interview was not evidence of silence.<sup>132</sup>

This Court also found that it was permissible to elicit testimony concerning how the interview had ended, notably defendant's statement that he did not wish to answer any further questions about the robbery, that he wanted time to think, and that he would clear everything up in the morning.<sup>133</sup>

In *People v Sholl*, 453 Mich 730; 556 NW2d 851 (1996), the police officer was investigating a sexual assault and, after reading the defendant his *Miranda* warnings, he asked the defendant a number of questions. The defendant answered a number of questions but when the officer asked the defendant whether he had had intercourse with the complainant, the defendant "denied to answer that." The defendant further stated that it was up to the complainant to prove it.<sup>134</sup> This Court found that because the defendant was generally prepared to talk to the police, "his statements, the manner in which he phrased those statements, and his varying

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emphasized that the defendant did not deny the allegations because defense counsel in opening indicated that defendant had denied the claims. 4b, 82b.

<sup>132</sup> *Id.* at 203, 221-222.

<sup>133</sup> *Id.* at 206, 215 citing *Rowen v Owens*, 752 F2d 1186 (CA 7, 1984).

<sup>134</sup> *People v Sholl*, 453 Mich 730, 733; 556 NW2d 851 (1996).

degrees of candor all were fit matters for the jury to consider” and there was no constitutional error.<sup>135</sup>

Though the conversations in *McReavy* and *Sholl* occurred in a post-*Miranda* setting, similar reasoning can be used in a non-custodial pre-*Miranda* setting in which a defendant elects to speak to the police. If the defendant’s omissions from his statement and momentary pauses do not implicate “silence” in a situation where a defendant could assert his *Miranda* rights, in a situation where a defendant cannot assert his *Miranda* rights, the conclusion should be no different. In this case the defendant elected to speak and therefore did not remain silent. The prosecution was therefore entitled to elicit omissions from his statement.

**ii. The evidence was nontestimonial.**

Furthermore, concerning the defendant’s evasive conduct during the course of the interview and act of leaving the interview, the United States Supreme Court has distinguished “physical” and “demeanor” evidence from “testimonial” evidence, holding that evidence of the former does not engender Fifth Amendment protection.<sup>136</sup> “[I]n order to be testimonial, an accused’s communication must itself, explicitly or implicitly, relate a factual assertion or disclose information. Only then is a person compelled to be a ‘witness’ against himself.”<sup>137</sup> Nonverbal conduct “contains a testimonial component whenever the conduct reflects the actor’s communication of his thoughts to another”.<sup>138</sup> Therefore demeanor evidence including physical gestures, behaviors, and conduct is nontestimonial and does not implicate the Fifth

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<sup>135</sup> *Id.* at 738.

<sup>136</sup> *Pennsylvania v Muniz*, 496 US 582, 591-592; 110 S Ct 2638; 110 L Ed 2d 528 (1990). See also: *Oregon v Elstad*, 470 US 298, 304; 105 S Ct 1285; 84 L Ed 2d 222 (1985).

<sup>137</sup> *Pennsylvania v Muniz*, 496 US at 588-589 (citations omitted) .

<sup>138</sup> *Pennsylvania v Muniz*, 496 US at 591-606.

Amendment.<sup>139</sup> Not only then was there no silence in this case but the defendant's demeanor at the interview, including evasive conduct and leaving the interview, was non-testimonial in nature.

**iii. The defendant's omissions and leaving the interview were not products of official coercion or custodial interrogation.**

a. The status of pre-arrest silence in Michigan.

But even if omissions from defendant's statement and his leaving the interview could be categorized as "silence", the Fifth Amendment right against compelled self-incrimination only applies where the silence is in fact compelled or in circumstances equating to compulsion. Because these omissions and his conduct were not compelled nor were they the result of custodial interrogation, the Fifth Amendment was not violated.

In 1939, this Court decided the case of *People v Bigge, supra* which concerned the admissibility of a defendant's silence after one of his co-conspirators mentioned his involvement in a crime. In opening arguments the prosecution recounted to the jury the conversation between third parties in the presence of the defendant:

On the first day of May, 1937, in Detroit where a conference was held with Mr. Bigge with one of his very close friends and a relative, the matter of his embezzlement was talked over at length by another witness who will testify in this case. They were going over various items of this embezzlement and the amount, and what Charles had done with the money, and this person, his brother-in-law in fact, said to this witness who will testify. "What's the use of going over this matter again. Charles is guilty as hell".<sup>140</sup>

The trial court sustained defense counsel's objection and this Court, when reversing defendant's

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<sup>139</sup> *Pennsylvania v Muniz, supra*; *Schmerber v California*, 384 US 757, 763-64; 86 S Ct 1826; 16 L Ed 2d 908 (1966); *United States v Wade*, 388 US 218, 223; 87 S Ct 1926; 18 L Ed 2d 1149 (1967); *United States v Dionisio*, 410 US 1, 7; 93 S Ct 764; 35 L Ed 2d 67 (1973); *Gilbert v California*, 388 US 263, 266-267; 87 SCt 1951; 18 L Ed 2d 1178 (1967).

<sup>140</sup> *People v Bigge*, 288 Mich 417, 419; 285 NW 5 (1939).

conviction due to the reference to defendant's silence in opening, found that the defendant "was not morally or legally called upon to make denial or suffer his failure to do so to stand as evidence of his guilt. He said nothing, and what was said in his presence by another was inadmissible . . ."<sup>141</sup> This Court found that the prosecution's comments violated due process and reversed defendant's conviction.<sup>142</sup>

Though *Bigge* had rested on due process (presumably Fourteenth Amendment) grounds, early Court of Appeals panels found that the *Bigge* opinion was essentially geared to protect the *Fifth Amendment* privilege against compelled self-incrimination.<sup>143</sup> This conclusion was furthered by the later opinion of *People v Bobo*, 390 Mich 355; 212 NW2d 190 (1973). In *Bobo*, when the defendant was arrested by the police, "he exercised his constitutional right to remain silent and made no statement" and at trial the prosecution impeached defendant by his failure to give the account that he gave at trial to the police at the time of his arrest.<sup>144</sup> This Court reversed the defendant's conviction holding that, "whenever a person is stopped for interrogation by the police, whether technically under arrest or not, the Fifth Amendment guarantees that his silence

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<sup>141</sup> *Id.* at 419-420.

<sup>142</sup> *Id.* at 421.

<sup>143</sup> The Fifth Amendment's right against compelled self-incrimination applies to a defendant in state court proceedings under the Fourteenth Amendment. See: *Malloy v Hogan*, 378 US 1, 3; 84 S Ct 1489; 12 L Ed 2d 653 (1964). The Fourteenth Amendment right to due process specifically applies to the states. US Const, Am V indicates in pertinent part:

[N]or shall [any person] be compelled in any criminal case to be a witness against himself. . .

US Const, Am XIV states in pertinent part:

. . .nor shall any State deprive any person of life, liberty, or property, without due process of law. . .

Const 1963, art 1, § 17 states in pertinent part:

No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law. . .

<sup>144</sup> *People v Bobo*, 390 Mich 355, 357-358; 212 NW2d 190 (1973).

may not be used against him.” This Court stated that Michigan had been committed to this doctrine long before *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966) citing the case of *Bigge, supra*.<sup>145</sup>

This Court reiterated the holding of *Bobo* in *People v Sain*, 407 Mich 412; 5 NW2d 772 (1979) and found that admission of the defendant’s total silence when confronted and questioned by the police at the time of arrest violated the rule set forth in *Bobo*.<sup>146</sup> But this is no longer the law.

Since *Bobo* and *Bigge*, both the United States Supreme Court and Michigan courts have defined the scope of Fifth Amendment protection more narrowly. The United States Supreme Court found that the Fifth Amendment does not preclude impeachment of a defendant by his silence occurring either before or after arrest, so long as the silence did not follow *Miranda* warnings.<sup>147</sup> The Court found that it was up to the states’ evidentiary laws to determine the admissibility of such impeachment.<sup>148</sup> Furthermore, the United States Supreme Court found that a prosecutor can refer to a defendant’s silence if doing so would be a fair reply to a defense theory or argument.<sup>149</sup> This Court has concluded in light of both pre- and post-*Bobo* decisions of the United States Supreme Court that it was clear that the Fifth Amendment no longer supported the rationale of *Bobo* and that the protections in *Bobo, supra* could be construed as co-extensive

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<sup>145</sup> *Id.* at 361.

<sup>146</sup> *People v Sain*, 407 Mich 412, 415; 285 NW2d 772 (1979).

<sup>147</sup> *Jenkins v Anderson*, 447 US 231, 240; 100 S Ct 2124; 65 L Ed 2d 86 (1980); *Fletcher v Weir*, 455 US 603, 606-607; 102 S Ct 1309; 71 L Ed 2d 490 (1982); *Wainwright v Greenfield*, 474 US at 291 n 6.

<sup>148</sup> *Jenkins*, 447 US at 238-239, 240; *Fletcher*, 455 US at 605-606.

<sup>149</sup> *United States v Robinson*, 485 US at 34; *Lockett v Ohio*, 438 US 586, 595; 98 S Ct 2954; 57 L Ed 2d 973 (1978).

with the Fifth Amendment protections in the United States Constitution.<sup>150</sup>

The United States Supreme Court has not dealt with the admission of pre-*Miranda* silence substantively. In Michigan the *Bobo* case was first limited by this Court to silence at the time of the arrest,<sup>151</sup> and then the rationale of *Bobo* was disavowed in light of decisions of the United States Supreme Court. This Court's decision in *Sain, supra* rested solely on the disavowed reasoning of *Bobo*; therefore the case is no longer binding precedent.<sup>152</sup> (And even if *Bobo* had not been disavowed, this Court had previously limited *Bobo* to silence at the time of arrest and not pre-*Miranda*, pre-arrest silence, and therefore would not govern this case.)

The Michigan Court of Appeals found that pre-*Miranda*, pre-arrest silence could be used substantively without violating the Fifth Amendment in *People v Schollaert*, 194 Mich App 158, 164; 486 NW2d 312 (1992). The Court of Appeals found that admission as substantive evidence of testimony concerning a defendant's silence during contact with the police but before custodial interrogation and before *Miranda* warnings had been given was not a violation of the defendant's constitutional rights.<sup>153</sup> The Court noted that defendant was not in a custodial interrogation situation or a setting in which he was compelled to speak or remain silent.<sup>154</sup> And in *People v Solmonson*, 261 Mich App 657; 683 NW2d 761 (2004) the Court of Appeals found that police

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<sup>150</sup> *People v Cetlinski*, 435 Mich 742, 759-760; 460 NW2d 534 (1990).

<sup>151</sup> *People v Collier*, 426 Mich 23, 39; 353 NW2d 324 (1986)(indicating "to the extent *Bobo* is viable, it is confined to impeachment for comment on silence at the time of arrest in the face of accusation.") See also: *Cetlinski, supra* at 757.

<sup>152</sup> If *Sain* were construed as co-extensive with the United States Supreme Court precedent, its holding would probably remain the same, however. The evidence in *Sain* would likely have been barred by *Miranda* and its progeny since it concerned silence during what would most likely be construed as custodial interrogation.

<sup>153</sup> *People v Schollaert*, 194 Mich App 158, 164-167; 486 NW2d 312 (1992) *lv den* 441 Mich 872; 494 NW2d 750 (1992).

<sup>154</sup> *Id.* at 165.

testimony that the defendant had failed to deny being the driver of a vehicle when he was speaking to them both before and after arrest but before *Miranda* warnings did not violate the constitution:

Thus, where a defendant has received no *Miranda* warnings, no constitutional difficulties arise from using the defendant's silence before or after his arrest as substantive evidence unless there is reason to conclude that his silence was attributable to the invocation of the defendant's Fifth Amendment privilege. (citations omitted)<sup>155</sup>

The conclusion from existing Michigan jurisprudence, thus, is that constitutionally protected silence under the Fifth Amendment is the product of pre-*Miranda* custodial interrogation or other official compulsion.

b. The split among the circuits.

Though the United States Supreme Court has not yet spoken on the issue of whether pre-arrest pre-*Mirandized* silence (or post-arrest pre-*Mirandized* silence) can be used substantively, the circuits as well as the state courts remain split on the issue.<sup>156</sup> A majority of the circuits that

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<sup>155</sup> *People v Solmonson*, 261 Mich App 657, 664-665; 683 NW2d 761 (2004) *lv den* 471 Mich 873; 685 NW2d 672 (2004). (Though the Court primarily dealt with Fourteenth Amendment claims, the Court also noted that “no constitutional difficulties” arose from use of defendant’s silence as substantive evidence in that case. *Id.* at 665.)

<sup>156</sup> See: *United States v Love*, 767 F2d 1052, 1063 (CA 4, 1985)(holding testimony of defendant’s pre-arrest, pre-*Miranda* silence permissible as substantive evidence); *United States v Oplinger*, 150 F3d 1061, 1066 (CA 9, 1998)(same); *United States v Zanabria*, 74 F3d 590, 593 (CA 5, 1996)(same); *State v Kinder*, 942 SW2d 313, 326 (Mo, 1996)(same); *State v Helgeson*, 303 NW2d 342, 348 (ND, 1981)(same); *United States v Frazier*, 408 F3d 1102, 1111 (CA 8, 2005)(comment on defendant’s post-arrest, pre-*Miranda* silence permissible as substantive evidence); *United States v Rivera*, 944 F2d 1563, 1568 (CA 11, 1991)(dicta indicating that government may reference defendant’s post-arrest, pre-*Miranda* silence without raising constitutional questions);

Compare: *Combs v Coyle*, 205 F3d 269, 282-283 (CA 6, 2000)(holding that use of pre-*Miranda*, pre-arrest silence as substantive evidence of guilt violates the Fifth Amendment); *United States ex rel. Savory v Lane*, 832 F2d 1011, 1017 (CA 7, 1987)(same); *United States v Burson*, 952 F2d 1196, 1200-1201 (CA 10, 1991)(same); *State v Dunkel*, 466 NW2d 425, 428-29 (Minn App, 1991)(same); *State v Rowland*, 234 Neb 846, 851; 452 NW2d 758 (1990)(same);

(footnote continued on next page)

have considered the issue have found that pre-arrest, pre-*Miranda* silence is admissible substantively<sup>157</sup> often citing the concurrence written by Justice Stevens in *Jenkins v Anderson*, *supra*:

When a citizen is under no official compulsion whatever, either to speak or to remain silent, I see no reason why his voluntary decision to do one or the other should raise any issue under the Fifth Amendment. For in determining whether the privilege is applicable, the question is whether petitioner was in a position to have his testimony compelled and then asserted his privilege, not simply whether he was silent. A different view ignores the clear words of the Fifth Amendment.<sup>158</sup>

These circuits, then, have primarily noted the lack of governmental coercion or compulsion to speak.<sup>159</sup>

#### **i. Tools to Resolve the Conflict.**

##### **a. The Text of the Fifth Amendment.**

The text of the Fifth Amendment supports the rationale of those circuits and state courts which have found that pre-*Miranda* silence is substantively admissible (and again, this case does not involve silence, as defendant did not remain silent). The amendment concerns a privilege

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*State v Leach*, 102 Ohio St 3d 135, 141-143; 807 NE2d 335 (2004)(same); *State v Easter*, 130 Wash 2d 228, 241; 922 P2d 1285 (1996)(same); *State v Fencil*, 109 Wis 2d 224, 236; 325 NW2d 703 (1982)(same); *State v Moore*, 131 Idaho 814, 820-821; 965 P2d 174 (1998)(indicating that the Fifth Amendment applies to pre-arrest, pre-*Miranda* silence but not when used for a purpose such as to show defendant fled)

*United States v Velarde-Gomez*, 269 F3d 1023, 1033 (CA 9, 2001)(holding that use of defendant's post-arrest, pre-*Miranda* silence inadmissible substantively); *United States v Moore*, 322 US App DC 334; 104 F3d 377, 385 (1997) (same); *Hartigan v Commonwealth*, 31 Va App 243, 252; 522 SE2d 406 (1999), *aff'd en banc* 32 Va App 873; 531 SE2d 63 (2000)(same).

<sup>157</sup> The Fourth Circuit (*United States v Love, supra*), the Fifth Circuit (*United States v Zanabria, supra*), the Eighth Circuit (*United States v Frazier, supra*), the Ninth Circuit (*United States v Oplinger, supra*), the Eleventh Circuit (*United States v Rivera, supra; United States v Suarez*, 162 Fed Appx 897 (CA 1, 2006)); and the DC Circuit (*United States v Moore, supra*) allow admission of pre-arrest, pre-*Miranda* silence substantively.

<sup>158</sup> *Jenkins*, 447 US at 243-244 (Stevens, J., concurring in judgment).

<sup>159</sup> *Zanabria, supra* at 593; *Frazier, supra* at 1111; *Oplinger, supra* at 1066.

against compulsion, and silence before custodial interrogation (much less in this case before arrest) is not compelled. US Const, Am V indicates in pertinent part, “[N]or shall [any person] be *compelled* in any criminal case to be a witness against himself”. (emphasis provided) Likewise, Const 1963, art 1, § 17 states in pertinent part, “No person shall be *compelled* in any criminal case to be a witness against himself . . .” (emphasis provided). Reviewing the text of the Fifth Amendment, in the absence of coercive governmental conduct, whether an individual chooses to speak or not to speak has no constitutional significance.<sup>160</sup>

b. Historical Background of the Fifth Amendment

The origins of the privilege also support the view that the Fifth Amendment is concerned with compulsion. “It is consistent with the history of and the policies underlying the Self-Incrimination Clause to hold that the privilege may be asserted only to resist compelled explicit or implicit disclosures of incriminating information. Historically, the privilege was intended to prevent the use of legal compulsion to extract from the accused a sworn communication of facts which would incriminate him. Such was the process of the ecclesiastical courts and the Star Chamber. . .”<sup>161</sup>

The legal climate in both England and America at the time of the drafting of the Bill of Rights reveals that the drafters would have been concerned, not about the questioning of suspects by governmental agents, but instead how they were questioned and specifically whether their

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<sup>160</sup> See: Grano, *Selling the Idea to Tell the Truth: The Professional Interrogator and Modern Confessions Law*, 84 Mich L Rev 662, 683 (1986)([T]he fifth amendment protects not against self-incrimination but against the state *compelling* a person to be a witness against himself.” (emphasis original)).

<sup>161</sup> *United States v Hubbell*, 530 US 27, 35 n 8; 120 SCt 2037; 147 L Ed 2d 24 (2000). See also: Grano, *supra* at 684, 686.

answers were compelled by improper means.<sup>162</sup> In pre-Bill of Rights America, governmental agents routinely questioned defendants who were not under oath and not required to respond and it was viewed as a benefit for the defendant to speak because a defendant was not allowed to testify at trial.<sup>163</sup> At the preliminary examination, the defendants were to be questioned unsworn, their statements were to be made a matter of formal written record, and their inculpatory or exculpatory statements or silence could be used at trial.<sup>164</sup>

But unlike the routine questioning of unsworn suspects by the Justices of the Peace, in the past there had been egregious methods used by the government to compel suspects to confess. As indicated by the Supreme Court in *Hubbell* as well as many legal scholars, it was these practices from which the drafters would have wished to protect the citizens.<sup>165</sup> “American criminal procedure in the colonial period, like the English model it closely followed, assumed the testimonial availability of the defendant at the crucial pretrial stage of the prosecution and freely made use of the defendant’s admissions at trial. Americans, like Englishmen, understood the common law to prohibit torture in the search for evidence, and at least some Americans exceeded

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<sup>162</sup> *Mitchell v United States*, 526 US 314, 332-336; 119 S Ct 1307; 143 L Ed 2d 424 (1991)(Scalia, J., dissenting).

<sup>163</sup> *Id.*; Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 Mich L Rev 2625, 2631-2632 (1996).

<sup>164</sup> Moglen, *Taking the Fifth: Reconsidering the Origins of the Constitutional Privilege Against Self-Incrimination*, 92 Mich L Rev 1086, 1098 (1994); Berger, *Defining the Scope of the Privilege Against Self-Incrimination: Should Pre-Arrest Silence Be Admissible As Substantive Evidence*, 1999 U Ill L Rev 1015, 1031 (1999); Langbein, *The Historical Origins of the Privilege Against Self-Incrimination at Common Law*, 92 Mich L Rev 1047, 1060-1061 (1994); *Mitchell v United States*, *supra*, (Scalia, J., dissenting).

<sup>165</sup> Alschuler, *supra* at 2632; Berger, *supra* at 1027; Rybniak, *Damned if You Do, Damned if you Don’t; The Absence of a Constitutional Protection Prohibiting the Admission of Post-Arrest, Pre-Miranda Silence*, 19 Geo Mason U Civ Rts L J 405, 408-410 (2009); *Mitchell v United States*, *supra*.(Scalia, J., dissenting).

the English concern with the coercive power of oaths.”<sup>166</sup> Compulsory self-incrimination was what happened in Star Chamber or in France, not what occurred every time the Justices of the Peace examined an unsworn suspect.<sup>167</sup>

A particular type of compulsion mentioned in *Hubbell* was the administration of an “oath ex officio” which began during the Ecclesiastical Courts as a means of rooting out heretics and was later adopted by the secular courts in England.<sup>168</sup> If the witness were placed under oath, he or she faced a cruel “trilemma”:

Once a witness was placed on oath, her refusal to answer constituted contempt and was subject to criminal punishment. Her false answers constituted perjury. The witness could avoid punishment only by telling the truth, and when the truth was incriminating, she was therefore threatened with criminal punishment unless she condemned herself.<sup>169</sup>

“For the early Americans, the heart of this privilege was protection against coercion and torture. The privilege protected against the oath ex officio, which was considered a means of torture.”<sup>170</sup> As later stated by the United States Supreme Court, “[A]ny compulsory discovery by extorting the party’s oath. . .to convict him of crime . . .is contrary to the principles of a free government.”<sup>171</sup>

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<sup>166</sup> Moglen, *supra* at 1128. *Mitchell v United States, supra*, (Scalia, J., dissenting).

<sup>167</sup> Moglen, *supra* at 1121.

<sup>168</sup> Berger, *supra* at 1027; Helmholz, *Origins of the Privilege Against Self-Incrimination: The Role of the European Ius Commune*, 65 NYU L Rev 962, 968-969 (1990).

<sup>169</sup> Alschuler, *supra* at 2638; Langbein, *supra* at 1074.

<sup>170</sup> Berger, *supra* at 1027; *Pennsylvania v Muniz*, 496 US at 595-596; Rybniak, *supra*; Moglen, *supra* at 1100-1101; Allen, *Theorizing About Self-Incrimination: The Fifth Amendment, Confessions, & Guilty Pleas*, 30 Cardozo L Rev 729, 730 -731 (2008).

<sup>171</sup> *Boyd v United States*, 116 US 616, 631-632; 6 S Ct 524; 29 L Ed 746 (1886).

The original meaning of compulsion, then, is the use of a threat of criminal sanctions to obtain testimony.<sup>172</sup> Therefore there is significant support in the historical origins of the Fifth Amendment for construction of the amendment to protect only silence which is compelled by the government, not to silence in response to any questions by law enforcement.<sup>173</sup>

c. Discussion of the Fifth Amendment by the United States Supreme Court

The United States Supreme Court on numerous occasions has stressed compulsion as a prerequisite for a Fifth Amendment violation: “The Court has held repeatedly that the Fifth Amendment is limited to prohibiting the use of ‘physical or moral compulsion’ exerted on the person asserting the privilege.”<sup>174</sup> Later the United States Supreme Court stated:

[I]t is also axiomatic that the [Fifth] Amendment does not automatically preclude self-incrimination, whether spontaneous or in response to questions put by government officials. . . . Indeed, far from being prohibited by the Constitution, admissions of guilt by wrongdoers, if not coerced, are inherently desirable. . . . Absent some officially coerced self-accusation, the Fifth Amendment privilege is not violated by even the most damning admissions. (citations omitted)<sup>175</sup>

The circuits and states which find that pre-*Miranda* silence may not be used substantively, most often cite to the United States Supreme Court decision in *Griffin v California*, 380 US 609; 85 S Ct 1229; 14 L Ed 2d 106 (1965). In *Griffin*, the Court found that

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<sup>172</sup> Rosenthal, *Against Orthodoxy: Miranda is not Prophylactic and the Constitution is Not Perfect*, 10 Chap L Rev 579 (2007).

<sup>173</sup> Alschuler, *supra* at 2626, 2631, 2652-2653; Moglen, *supra* at 1116, 1121, 1129.

<sup>174</sup> *Fisher v United States* 425 US 391, 397; 96 S Ct 1569; 48 L Ed 2d 39 (1976) citing *Perlman v United States*, 247 US 7, 15; 38 S Ct 417; 62 L Ed 950 (1918); *Johnson v United States*, 228 US 457, 458; 33 S Ct 572; 57 L Ed 919 (1913); *Couch v United States*, 409 US 322, 328, 336; 93 S Ct 611; 34 L Ed 2d 548 (1973); *Holt v United States*, 218 US 245, 252-253; 31 S Ct 2, 6; 54 L Ed 1021 (1910); *United States v Dionisio*, 410 US at 5-6; *Schmerber v California*, 384 US at 765. See also: *Colorado v Connelly*, 479 US 157, 170; 107 SCt 515; 93 L Ed 2d 473 (1986)(indicating, “The sole concern of the Fifth Amendment, on which *Miranda* was based, is governmental coercion.”)

<sup>175</sup> *United States v Washington*, 431 US 181, 187-188; 97 S Ct 1814; 52 L Ed 2d 238 (1977). See also: Rybniak, *supra* at 428-429.

the prosecution could not refer to the defendant's failure to testify at trial. There was no indication, however, why the Court believed that by commenting on a defendant's failure to testify, there had been impermissible compulsion involved, and as Justice Scalia later noted, the Court seemed to stray from the language of the text requiring "compelled testimony" as well as the historical roots of the Amendment.<sup>176</sup>

Justice Thomas in a later opinion noted that at times during its Fifth Amendment jurisprudence, the Court had announced prophylactic rules including the *Miranda* opinion itself, which strayed beyond the language of the Amendment, but noted that "any further extension of the rules must be justified by its necessity for the protections of the actual right against compelled self-incrimination".<sup>177</sup> Justice Souter agreed stating that he would require a "powerful showing" before "expand[ing] the privilege against compelled self-incrimination."<sup>178</sup> The United States Supreme Court later cautioned that the "broad dicta" of *Griffin* must be taken in light of the facts of the case.<sup>179</sup>

In *Miranda v Arizona*, *supra* the Court explained that its reasoning for its prophylactic rule was its concern about the compulsion inherent in custodial interrogation.<sup>180</sup> After *Griffin*, however, the Supreme Court rejected the opportunity to extend the prophylactic rule of *Miranda* beyond the setting of custodial interrogations to pre-custodial traffic stops and noncustodial

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<sup>176</sup> Justice Scalia observed that *Griffin* did not concern the compulsion necessary to invoke the textual concerns of the Fifth Amendment, "Our hardy forebears, who thought of compulsion in terms of the rack and oaths forced by powers of law, would not have viewed the drawing of a commonsense inference as equivalent pressure." *Mitchell v United States*, 525 US at 335 (Scalia, J., dissenting).

<sup>177</sup> *United States v Patane*, 542 US 630, 639; 124 S Ct 2620; 159 L Ed 2d 667 (2004).

<sup>178</sup> *Chavez v Martinez*, 538 US 760, 778; 123 S Ct 1994; 155 L Ed 2d 984 (2003)(Souter, J., concurring).

<sup>179</sup> *United States v Robinson*, 485 US at 33-34.

<sup>180</sup> *Miranda v Arizona*, 384 US at 445-446, 447.

interviews, because the Court found the atmosphere was “noncoercive.”<sup>181</sup> Therefore the circuits and states which have found pre-arrest pre-*Miranda* silence is protected by the Fifth Amendment, apply a prophylactic rule to an arena which the United States Supreme Court itself has rejected application of prophylactic measures.<sup>182</sup> This Court has also rejected the invitation to read the Michigan Constitution as allowing application of the prophylactic rule in situations other than custodial interrogation.<sup>183</sup> Furthermore, especially in the case of pre-arrest, pre-*Miranda* silence, there is no reason to expand Fifth Amendment protections.<sup>184</sup> This setting does not possess the inherent risk of compulsion which would justify application of a prophylactic rule in place of evidence of actual compulsion as is required by the language of the Fifth Amendment or Article 1, Section 17 of the Michigan Constitution.

b. The Fourteenth Amendment was not violated.

Though *Bigge, supra* had found that reference to a defendant’s silence violated due process, since *Bigge* the United States Supreme Court determined that due process violations

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<sup>181</sup> *Beckwith v United States*, 425 US 341; 96 S Ct 1612; 48 L Ed 2d 1 (1976); *Berkemer v McCarty*, 468 US 420, 439-440; 103 S Ct 3138; 82 L Ed 2d 317 (1984); *Pennsylvania v Bruder*, 488 US 9, 11; 109 S Ct 205; 102 L Ed 2d 172 (1988); *McNeil v Wisconsin*, 501 US at 182 n 3 (“We have in fact never held that a person can invoke his *Miranda* rights anticipatorily, in a context other than ‘custodial interrogation’ . . .”)

<sup>182</sup> The Supreme Court in *Pennsylvania v Muniz*, 496 US 603-605 found that even a defendant’s post-arrest pre-*Mirandized* statements were admissible when they were voluntary and not the product of custodial interrogation.

<sup>183</sup> *People v Hill*, 429 Mich 382, 391-392; 415 NW2d 193 (1987).

<sup>184</sup> The defendant claims if defendant’s pre-arrest silence during a voluntary encounter with the police could be used against him, then individuals will not speak to the police. In like manner then, none of a defendant’s non-custodial statements should ever be used against him, but both the United States Supreme Court and this Court have rejected this assertion. Furthermore, individuals elect to speak to the police because they feel it is to their benefit. It is only if the state does not comply with its assurances to a defendant that his silence will *not* be used against him, that both this Court and the United States Supreme Court found it unfair. See: *Doyle v Ohio*, 426 US 610; 9 S Ct 2240; 49 L Ed 2d 91 (1976); *Borgne, supra*. There were no such assurances in this case.

occur only when post-*Miranda* silence is involved. The Court found that through the *Miranda* warnings, law enforcement is implicitly guaranteeing that the defendant's silence will not be used against him. If silence is used against him at trial in contravention to this "promise", the fundamental fairness guarantees of due process are implicated.<sup>185</sup> And this Court also found that any Fourteenth Amendment due process protections (such as that provided by *Bobo*) should be construed as co-extensive with the due process analysis of the United States Supreme Court.<sup>186</sup> In this case no *Miranda* warnings were required nor given so there was no silence based on reliance of the implicit assurances of the *Miranda* warnings and the Fourteenth Amendment is not implicated.

## **2. Where the trial court went wrong.**

To support its conclusion that there had been a constitutional violation in this case, the trial court cited the case of *People v Scobey*, 153 Mich App 82; 395 NW2d 247 (1986). Not only did *Scobey* concern post-*Miranda* silence, but in this case because the defendant did not remain silent but instead made statements, defendant's silence would have fit within the exception mentioned by the *Scobey* Court. In *Scobey*, the Court stated [akin to *Anderson v Charles, supra*] that "evidence of a defendant's silence on certain matters may be presented to elicit the full extent of a defendant's statement made to the arresting officer."<sup>187</sup>

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<sup>185</sup> *Doyle v Ohio*, 426 US at 618; *South Dakota v Neville*, 459 US 553, 565; 103 S Ct 916; 4 L Ed 2d 748 (1983); *Wainwright v Greenfield*, 474 US at 291, n 6; *Greer v Miller*, 483 US 756, 762-763; 107 S Ct 3102; 97 L Ed 2d 618 (1987).

<sup>186</sup> *Cetlinski, supra* at 759-760; *People v Sutton*, 436 Mich 575, 599; 464 NW2d 276 (1990); *McReavy, supra* at 203-204. Cf: *People v Sierb*, 456 Mich 519, 523, 527-528; 581 NW2d 219 (1998)(observing no real differences between the two constitutional provisions which would signify a different interpretation of the Michigan due process provision).

<sup>187</sup> *People v Scobey*, 153 Mich App 82, 86-87; 395 NW2d 247 (1986).

There was no constitutionally protected silence involved in this case, merely omissions from a voluntary un compelled statement before reading *Miranda* warnings, as well as nontestimonial conduct during the interview. Therefore defendant has not shown error much less plain error affecting substantial rights i.e. that he was actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings.<sup>188</sup>

**C. The rule established in *Bigge* was not violated by admission of omissions from defendant's statement to the police or his leaving the interview as nonassertive nonverbal conduct showing consciousness of guilt.**

*"No one doubts that the state of mind which we call 'guilty consciousness' is perhaps the strongest evidence. . .that the person is indeed the guilty doer."*<sup>189</sup>

Having shown no constitutional barrier to the admission of the omissions in defendant's statement to the police or his leaving the interview, the question that remains is whether there was any evidentiary error in admission of this evidence. At issue are two pieces of evidence: 1) omissions from his statement to the police that is, that nowhere in his statements to the police did the defendant speak about the kitchen incident at all much less deny it, though he specifically would discuss the incident in the car and in fact denied that allegation, and 2) testimony that he left the interview. Though the People contend that defendant waived any claims, defendant has failed to show that even if the claim were merely forfeited, that plain error effecting substantial rights occurred.<sup>190</sup> This is a heavy burden<sup>191</sup> reserved for only "particularly egregious errors."<sup>192</sup>

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<sup>188</sup> *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *Puckett*, 129 S Ct at 1429. (Defendant concedes that if this Court does not consider his error as automatically reversible, it would be considered forfeited. Appellant's Brief at 25, 35)

<sup>189</sup> 2 Wigmore, Evidence (Chadbourn Rev.) § 273, p 115.

<sup>190</sup> *Carines*, *supra*. (See: Appellant's Brief at 25, 35)

<sup>191</sup> *United States v Miller*, 531 F3d 340, 346 (CA 6, 2008)

<sup>192</sup> *United States v Davis*, 514 F3d 596, 615 (CA 6, 2008).

This Court’s decision in *People v Bigge, supra* is inapplicable to the facts of this case. Again this case does not involve silence because the defendant met with and spoke to the police. The People did not introduce or argue tacit admissions but instead introduced nonverbal nonassertive conduct during the course of defendant’s admissions as a party opponent. Furthermore, this evidence was relevant because, in conjunction with the totality of the defendant’s conduct throughout the course of the interview, it showed consciousness of guilt.

**1. The People did not introduce silence as an admission.**

a. The Adoption of the Rules of Evidence

After *Bigge*, on March 1, 1978 this Court adopted the Rules of Evidence, requiring that before a third party’s statement could be admitted as an admission of a party-opponent, the party must manifest an adoption or belief in its truth.<sup>193</sup> This Court has indicated that the *Bigge* prohibition, like MRE 801(d)(2)(B), concerned the admission of adoptive or tacit admissions.<sup>194</sup>

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<sup>193</sup> The original MRE 801 stated as follows in pertinent part:

**(a) Statement.** A “statement” is (1) an oral or written assertion or (2) nonverbal conduct of a person if it is intended by a person as an assertion.

\* \* \*

**(d) Statements Which Are Not Hearsay.** A statement is not hearsay if-

\* \* \*

(2) *Admissions of a Party-Opponent.* The statement is offered against a party and is (A) the party’s own statement, in either an individual or representative capacity, except statements made in connection with a guilty plea to a misdemeanor motor vehicle violation or an admission of responsibility for a civil infraction under laws pertaining to motor vehicles, or (B) a statement of which the party has manifested an adoption or belief in its truth subject to the rule announced in *People v Bobo*, 390 Mich 355 (1973) . . .

(Later in 1991, this Court deleted the reference to *Bobo, supra*.)

<sup>194</sup> This Court stated in *McReavy*, [*supra* at 213], “*Bigge*. . .precludes admissibility of a defendant’s failure to say anything in the face of an accusation *as an adoptive or tacit admission under MRE 801(d)(2)(B)* unless the defendant manifested his adoption or belief in its truth. . .” (emphasis provided) In *People v Hackett*, 460 Mich 202, 213; 596 NW2d 107 (1999), this Court

*(footnote continued on next page)*

b. Recent Cases distinguishing People v Bigge.

In *McReavy*, the prosecution elicited the fact that after the defendant had waived his *Miranda* warnings, at one point after being asked a question, “the defendant did not respond to direct questions regarding the robbery *or deny his involvement*, but simply put his head in his hands and looked down, that he did not respond yes or no to those questions.”<sup>195</sup> (emphasis provided) The prosecution also elicited that at the end of the first interview the defendant said that “he did not want to answer any more questions about the robbery and wanted time to think.”<sup>196</sup> The detective testified that during the interview the defendant appeared very nervous and it appeared that he was tearful at times. In closing, the prosecution mentioned that there was “[n]ot one denial, not one suggestion that it wasn’t me”.<sup>197</sup>

This Court stated that the omissions from the defendant’s statements constituted nonverbal, nonassertive conduct not silence as a tacit or adoptive admission:

There being no question in the instant case of compliance with the procedural requirements of *Miranda*, anything defendant said thereafter is admissible as the statement of a party opponent, so long as it is relevant. MRE 801(d)(2)(A). ***What defendant did, that is, his lack of responsiveness during the interview was not evidence of silence.*** Rather, it was nonverbal nonassertive conduct evidence that was admissible along with the defendant’s express statements indicating consciousness of guilt so as to allow the factfinder to more fully determine the probative significance of the defendant’s complete statements to the police. (emphasis provided)<sup>198</sup>

This Court specifically distinguished *Bigge*:

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stated, “[a]lthough *Bigge* preceded the enactment of the Michigan Rules of Evidence, the rule of *Bigge*, like MRE 801(d)(2)(B), concerns tacit admissions. . .”

<sup>195</sup> *McReavy*, *supra* at 205.

<sup>196</sup> *Id.* at 206.

<sup>197</sup> *Id.* at 206, 208.

<sup>198</sup> *Id.* at 203.

*Bigge*. . . precludes admissibility of a defendant’s *failure to say anything* in the face of an accusation as an adoptive or tacit admission under MRE 801(d)(2)(B) unless the defendant manifested his adoption or belief in its truth. . .

\* \* \*

Unlike the *Bigge* adoptive admission preclusion, the relevancy of defendant’s behavior in the instant case in neither denying nor admitting the direct inquiry rests not on a third party’s assertion but on the admissions the defendant himself made, answers which circumstantially indicated defendant’s knowledge of and involvement in the robbery.

\* \* \*

Under the rule of completeness, all is admissible. The premise of the rule is that a thought or act cannot be accurately understood without considering the entire context and content in which the thought was expressed. (emphasis provided)<sup>199</sup>

This Court stated that if the contrary approach were accepted, the trial court would be obligated to excise from the interview the defendant’s failure to say “yes” or “no” and evidence of his demeanor, holding his head in his hands. But this Court rejected such “artificial parsing of testimony . . . .A defendant cannot have it both ways. If he talks, what he says or omits is to be judged on its merits or demerits, and not on some artificial standard that only the part that helps him can be later referred to.”<sup>200</sup>

In *People v Hackett*, 460 Mich 202; 596 NW2d 107 (1999) the prosecution impeached the defendant with his failure to confront the individual who had implicated him when they were both incarcerated, and the prosecution emphasized this failure in closing.<sup>201</sup> This Court distinguished *Bigge* and found that the silence involved in *Hackett, supra* did not occur in the face of an accusation and that there was “simply no statement that defendant’s silence can be construed as tacitly adopting”.<sup>202</sup> This Court found that the defendant’s failure to confront his accuser was conduct evidence which impeached his claim that he was an innocent bystander

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<sup>199</sup> *Id.* at 213-215.  
<sup>200</sup> *Id.* at 214, n 18, 216 citing *United States v Goldman*, 563 F2d 501, 503 (CA 1, 1977).  
<sup>201</sup> *Hackett, supra* at 208-209.  
<sup>202</sup> *Id.* at 215.

finding, “It would have been natural for defendant, under such circumstances, to confront [the individual who had implicated him] regarding the reason for his arrest when they were incarcerated together. . . .” and therefore the evidence was relevant.<sup>203</sup>

In *Schollaert, supra*, the Court of Appeals also distinguished *Bigge, supra* and found that the defendant’s omissions from his statements were admissible as substantive evidence.<sup>204</sup> In *Schollaert*, police officers testified that they went to the defendant’s home at 3:30 a.m. shortly after some murders had been reported in order to take the defendant in for questioning. He did not immediately ask why they were at his residence. In the prosecutor’s closing argument, the prosecutor commented on this failure.<sup>205</sup> The Court of Appeals, relying on this Court’s decision in *McReavy*, found that “[d]efendant’s failure to question the presence of the deputies was relevant as evidence of his consciousness of guilt”. The Court found that the testimony was not contrary to *Bigge*:

In the present case, defendant’s failure to question the presence of the deputies at his home at 3:30 a.m. was not allowed into evidence as a tacit admission of any accusation. Rather, defendant’s demeanor was admitted as substantive evidence that was relevant to a determination of a defendant’s guilty knowledge.<sup>206</sup>

In *Solmonson, supra*, the prosecution elicited evidence of the defendant’s failure to deny the fact that he was the driver when initially confronted by the police. The prosecution argued in closing:

Didn’t you find it interesting that the defendant is told, when he has his chemical tests rights read, that he’s being arrested for operating under the influence of intoxicating liquor, and the defendant has sufficient wherewithal to acknowledge this and says, “Just take me to F-ing jail.” But he never says, “Hey, I wasn’t driving.”

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<sup>203</sup> *Id.* at 215-216.

<sup>204</sup> *Schollaert, supra* at 167.

<sup>205</sup> *Id.* at 160-161.

<sup>206</sup> *Id.* at 167.

Isn't that the first thing you're going to say, if you're arresting me for OUIL, for operating under the influence, is, "Hey, I wasn't driving?" He never says it. He has sufficient comprehension of this to know he's going to jail, but *he doesn't complain about it because he's guilty*. This isn't too complicated. (emphasis original)<sup>207</sup>

The Court of Appeals found that *Bigge* was not implicated. The Court first stated that though *Bigge* indicated that the defendant's due process rights had been infringed, since *Bigge* the contours of the due process protection had been clarified. "[A] defendant's right to due process guaranteed by the Fourteenth Amendment is violated where the prosecutor uses his post-arrest, post-*Miranda* warning silence for impeachment or as substantive evidence. . ." The Court of Appeals indicated that because there was no indication that *Miranda* had ever been read, defendant's due process rights were not implicated.<sup>208</sup> The Court stated that if the defendant's constitutional rights were not implicated, the question is an evidentiary one and the Court found no evidentiary error. The Court stated that the prosecution was not arguing that the defendant tacitly adopted an assertion of the police as his own statement, but instead was arguing that what defendant said together with what he did not say was evidence that the defendant was conscious of his own guilt.<sup>209</sup> The Court found it was important to distinguish between introduction of a tacit admission requiring adoption of a statement and nonresponsive conduct as evidence of consciousness of guilt. The Court found that the defendant's statements together with his non-responsive conduct were properly admitted as evidence of defendant's consciousness of guilt.<sup>210</sup>

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<sup>207</sup> *Solmonson, supra* at 666.

<sup>208</sup> *Id.* at 664.

<sup>209</sup> *Id.* at 665.

<sup>210</sup> *Id.* at 667.

c. This Case.

There was no violation of the hearsay rules in this case. The danger that both *Bigge* and MRE 801(d)(2)(B) address is the improper admission *of a statement of a third party*, not the admission of a defendant's admissions and omissions from his own statement.<sup>211</sup> Though, on a proper foundation, silence may, under the rules of evidence constitute an adoptive admission,<sup>212</sup> there was no silence involved in this case. The People were also not attempting to admit the statement of a third party that the defendant adopted by his silence under MRE 801(d)(2)(B), but instead introducing his own nonverbal, nonassertive conduct which occurred during the course of admissions of a party (which were admissible under MRE 801(d)(2)(A)).

Clearly the People were not attempting to admit defendant's conduct of leaving the interview as an adoptive admission. The testimony revealed that when the detective attempted to clarify the time that the defendant was in the State of Michigan, the defendant gave confusing information and then left.<sup>213</sup> There was no statement made by the detective that the People were asserting that the defendant was adopting.<sup>214</sup> The detective specifically indicated that the

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<sup>211</sup> McCormick states that an adoptive admission applies to evidence of other conduct of a party manifesting circumstantially the party's assent to the truth of a statement *made by another*. (emphasis provided) 2 McCormick, Evidence (6<sup>th</sup> ed.) § 261 p 208-209.

<sup>212</sup> See: *United States v Duval*, 496 F3d 64, 76 (CA 1, 2008)(indicating, "We have long recognized 'so-called adoptive admissions, including admissions by silence or acquiescence,' as admissible against a party-opponent pursuant to the Federal Rule of Evidence 801(d)(2)(B). *United States v Fortes*, 619 F2d 108, 115 (CA 1, 1980). In *United States v Miller*, [478 F3d 48 (CA 1, 2007)] we elaborated, stating that 'a party's agreement with a fact stated by another may be inferred from (or 'adopted' by) silence. . .when (i) a statement is made in a party's presence, (ii) the nature of the statement is such that is normally would induce the party to respond, and (iii) the party nonetheless fails to take exception.' [*Id.* at 51] Alleged admissions by silence may be properly submitted to the jury only if 'a reasonable jury could properly find the ultimate fact in favor of the proponent of the evidence.' *United States v Barletta*, 652 F2d 218, 219 (CA 1, 1981).")

<sup>213</sup> V I at 194; 37a;

<sup>214</sup> See: *Redd, supra*, 53a.

defendant did not get up and leave upon being accused of a crime. (Q: “So when Mr. Redd says, he’s going to get up and leave, that’s in response to you telling him, you committed this crime?” A: “No, sir, that’s not when he left.”)<sup>215</sup> Also, the People introduced the information that during the course of the interview the defendant denied one allegation and not the other. The People were not asserting that the defendant adopted an assertion made by the detective but instead that when the defendant responded to the allegation, he would talk about the incident in the car and in fact denied the incident but did not speak about much less deny the incident in the kitchen.<sup>216</sup> Therefore the People were introducing the defendant’s own statement and omissions therein.

Neither piece of evidence violated the hearsay rule but were admissible as nonhearsay. They did not qualify as hearsay, a statement “offered in evidence to prove the truth of the matter asserted”<sup>217</sup> (MRE 801(c)) and did not qualify as statements, or nonverbal conduct of a person intended by the person as an assertion (MRE 801(a)).<sup>218</sup> (Even if defendant could demonstrate

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<sup>215</sup> V II at 49; 50b.

<sup>216</sup> V I at 193; 37a; See also: *Redd, supra.*; 53a.

<sup>217</sup> See also: *People v Rogers*, 209 Cal Rptr 3d 977; 95 Cal Rptr 3d 652, 676-677 (2009)(testimony that upon questioning, defendant “got real bug-eyed and got real nervous” and “started pacing” merely described nonverbal, nonassertive, emotional behavior.); *People v Zamudio*, 43 Cal 4th 327, 350-351; 181 P3d 105; 75 Cal Rptr 3d 289, 313 (2008)(indicating, “Because nothing suggests [the victim] intended her failure to say anything about the loss or theft of her wallet, checks, or credit cards, to be “a substitute for oral or written verbal expression” , [] testimony to that effect was not hearsay.); *People v Snow*, 44 Cal 3d 216, 227; 242 Cal Rptr 477; 746 P2d 452 (1987) (defendant's silence and unemotional reaction upon learning of the victim's death was not a statement under the hearsay rules.); *United States v Brock*, 667 F2d 1311, 1316 n 2 (CA 9, 1982)(indicating that evasive conduct by the defendant cannot be said to have been intended as “communicative” acts; instead, they were merely nonassertive conduct, which is not hearsay.).

<sup>218</sup> Cf: *People v Jones*, 228 Mich App 191, 217; 579 NW2d 82 (1998); McCormick, § 250. See also: *McReavy, supra* at 203 indicating, that defendant’s lack of responsiveness was “nonverbal nonassertive conduct evidence”.

that his conduct was intended as assertions, the evidence would alternatively be admissible as nonhearsay admissions of a party-opponent pursuant to MRE 801(d)(2)(A).<sup>219</sup>

## **2. The totality of the defendant's conduct showed consciousness of guilt.**

The remaining question, then is one of relevancy. The defendant did not object on relevancy grounds and therefore this claim is forfeited. If the item of evidence even slightly increases the probability of the existence of any material fact in issue and affects the balance of probabilities to any degree, it is admissible.<sup>220</sup> Probative evidence tending to show the defendant's guilt is always prejudicial from defendant's viewpoint. But the key questions are whether the evidence is unfairly prejudicial,<sup>221</sup> and whether that unfair prejudice substantially outweighs the probative value of the evidence.<sup>222</sup>

Professor Wigmore wrote that "guilty consciousness" is perhaps the strongest evidence showing guilt and that the kinds of behavior that can signify consciousness of guilt are beyond enumeration:

Any indications of a consciousness of guilt by a person suspected of or charged with a crime . . . are admissible evidence against him. The number of such indications it is impossible to limit, nor can their nature or character be defined. Presumptions or inferences may be, and often are founded on circumstances which, of themselves, independent of the accusation, would not be ground of crimination. It is largely a question of fact, rather than a question of law, for the determination of the jury, whether particular conduct or particular expressions of the accused refer to a criminal offense, and spring from his consciousness of guilt. . . . [h]owever minute or insignificant they may be, shedding but a dim light upon the transaction, if they have a tendency to elucidate it they must be admitted.<sup>223</sup>

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<sup>219</sup> As stated by McCormick, "Often such conduct should not be classified as an admission since it is not hearsay at all because the actor exhibited no intent to assert anything. . . it does no harm to consider the conduct as an admission, however because under either theory it meets the hearsay objection." McCormick, § 263. In accord: Wigmore, § 268.

<sup>220</sup> MRE 401; *People v VanderVliet*, 444 Mich 52, 60 n 8; 508 NW2d 114 (1993).

<sup>221</sup> *People v Mills*, 450 Mich 61, 75; 537 NW2d 909 (1995).

<sup>222</sup> MRE 403.

<sup>223</sup> Wigmore, §273 citing *McAdory v State*, 62 Ala 154, 159 (1878).

This Court as well has long recognized the rationale for allowing such testimony.

[A]ttempts to avoid a trial, to evade conviction by frauds upon the law, or to lead suspicion and investigation in some other direction by false or covert suggestions or insinuations, are so unlike the conduct of innocent men that they are justly regarded as giving some evidence of a consciousness of guilt. They do not prove it, but the jury are entitled to consider and weigh them in connection with the more direct evidence.<sup>224</sup>

There is no common law prohibition against such evidence. “Concealment of crime has been condemned throughout our history. The citizen’s duty to raise the hue and cry and report felonies to the authorities was an established tenet of Anglo-Saxon law as early as the 13<sup>th</sup> Century . . . This deeply rooted social obligation is not diminished when the witness to crime is involved in illicit activities himself.”<sup>225</sup>

In this case, the prosecution’s theory of admissibility of the now-contested evidence was that the totality of the interview including defendant’s deception, prescient knowledge of the circumstances surrounding the crime, and evasiveness, showed the defendant’s consciousness of guilt. This theory was discussed by the prosecution in both opening and closing arguments. In opening, when discussing the evidence the prosecution intended to introduce, the assistant prosecutor argued:

And what you will hear from Detective Betts in the investigation that he conducted, the interviews that took place, and the runaround that the Defendant gave him—the runaround with witnesses, the runaround with time frames, the runaround that this Defendant told this detective who’s trying to investigate this case.<sup>226</sup>

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<sup>224</sup> *People v Arnold*, 43 Mich 303, 305-306; 5 NW 385 (1880).

<sup>225</sup> *Jenkins v Anderson*, 447 US at 243 n 5 (Stevens, J., concurring in judgment)(citations omitted).

<sup>226</sup> V I at 7; 2b.

In rebuttal, the prosecution mentioned that the defendant when accused, *although not having been informed of the specific allegations*, said, “I didn’t touch her when we were in the car, there was somebody else there.”<sup>227</sup> The prosecution also argued that the defendant’s response when discussing when he was in the State of Michigan was not reasonable:

The Detective asked the Defendant where he was. The Defendant gave him a list of dates which confused or was confusing. He was jumping around with the dates. So the detective, in trying to do his job, says, whoa, whoa, whoa, I’m confused, let’s pin this down.

\* \* \*

The Defendant says, it’s not my fault you’re confused. Is that a reasonable response to a detective trying to pin down what dates you’re saying you’re where.<sup>228</sup>

The prosecution also discussed that [when the detective was trying to find out individuals who could verify defendant’s whereabouts at the time of the crime since he lived out of state] the defendant did not correct the detective’s misunderstanding about his wife’s name and contact number and that “its further evidence of the runaround that he was giving the detective that day.”<sup>229</sup>

A jury may infer consciousness of guilt from evidence of lying or deception or conflicting, inconsistent, or false statements.<sup>230</sup> Likewise the jury may infer consciousness of guilt by evidence that the defendant knew too much about the crime.<sup>231</sup> A defendant’s demeanor

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<sup>227</sup> V II at 91-92; 58b.

<sup>228</sup> V II at 90-91; 58b-59b.

<sup>229</sup> V II at 91-92; 59b.

<sup>230</sup> See: *United States v Kahan*, 415 US 239, 243 n 3; 94 S Ct 1179; 39 L Ed 2d 297 (1974); *People v Pitcher*, 15 Mich 397 (opinion by Christiancy, J.); *People v Yost*, 278 Mich App 341, 410; 749 NW2d 753 (2008); *People v Unger*, 278 Mich App 210, 226, 227; 749 NW2d 272 (2008); *People v Cowell*, 44 Mich App 623, 625-626; 205 NW2d 600(1973). See generally: *In Re Forfeiture of \$180,957*, 478 Mich 444, 468-471; 734 NW2d 489 (2007).

<sup>231</sup> *People v Cutchall*, 200 Mich App 396, 401; 504 NW2d 666 (1993); *Snow*, *supra*.

as well as evasive statements are also pertinent evidence for the jury to consider when determining whether the defendant had a guilty mind.<sup>232</sup> A defendant's decision when he speaks about the incident to decide to speak about and in fact deny only one incident but not speak about, including not denying the other, i.e. "his statements, the manner in which he phrased those statements, and his varying degrees of candor all were fit matters for the jury to consider."<sup>233</sup> As this Court has held, "Under the rule of completeness, all is admissible . . . a thought or act cannot be accurately understood without considering the entire context and content in which the thought was expressed."<sup>234</sup> For these reasons numerous courts have found that the prosecution

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<sup>232</sup> *United States v Salgado*, 250 F3d 428, 447 (CA 6, 2001)(indicating that one factor the jury could use when determining the defendant's guilt was his evasive statements to the police); *United States v Schlesinger*, 372 F Supp 2d 711, 724 (EDNY, 2005)(indicating that "[a]lthough flight has been described as the 'consummate act of evasion,' nervous or evasive behavior is also relevant suspicious conduct from which a juror could draw a reasonable inference of consciousness of guilt. See *Illinois v Wardlow*, 528 US 119, 124-25; 120 SCt 673; 145 L Ed 2d 570 (2000) (discussing flight in the context of reasonable suspicion)."); *Pinkney v Keane*, 737 F Supp 187, 197-98 (EDNY, 1990) (finding that evasive responses to police questions after the crime demonstrated consciousness of guilt); *Covil v Commonwealth*, 268 Va 692, 696; 604 SE2d 79, 82 (2004) ("A false or evasive account is a circumstance, similar to flight from a crime scene, that a fact-finder may properly consider as evidence of guilty knowledge."); *Commonwealth v Platt*, 440 Mass 396, 402-403; 798 NE2d 1005 (2003)(indicating that the jury could have reasonably interpreted the defendant's equivocal and conflicting accounts of the alleged theft as attempts to mislead the police and escape responsibility); *Player v State*, 568 So 2d 370, 373 (Ala App, 1990)(approving of a jury instruction which states that "intentionally false, contradictory, evasive or misleading statements made by the defendant to the investigating officer may be introduced into evidence as showing a consciousness of guilt"); *State v Green*, 639 SW2d 128, 130 (Mo App, 1982)(indicating that a false, improbable or an evasive statement to the investigating officers may be introduced to show consciousness of guilt); *Commonwealth v Doyle*, 12 Mass App 786, 789; 429 NE2d 346 (1981) (defendant's conflicting and evasive statements constitute one factor in establishing guilt); *Commonwealth v Wentzel*, 360 Pa 137, 145-146; 61 A2d 309 (1948)(evidence of evasive and contradictory statements admissible to show consciousness of guilt); *State v Erwin*, 101 Utah 365; 120 P2d 285, 308 (1941)(defendant's evasive conversation and attempts to change the subject admissible to show consciousness of guilt)

<sup>233</sup> *Sholl*, *supra* at 738.

<sup>234</sup> *McReavy*, *supra* at 214-215.

was entitled to comment on omissions from a defendant's statements as well as inferences that may be drawn from the omissions.<sup>235</sup> To parse defendant's statement by omitting portions unfavorable to him would place his entire interview in a false light. Furthermore, when defense counsel had indicated in opening that the defendant had denied the allegations, it was certainly permissible for the prosecution to clarify that the defendant had not denied the charged allegation.<sup>236</sup>

The totality of the circumstances of the interview, including omissions from defendant's statement and his eventual leaving the interview, showed consciousness of guilt. The defendant was evasive when he discussed the incident and skirted the primary topic of the inquiry. This was not a circumstance in which the defendant remained totally silent about the entire subject of the criminal sexual conduct allegations, but a defendant who elected to speak only about one incident. It would have been natural for the defendant who decided to speak about one incident

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<sup>235</sup> *Goldman, supra* at 504 (indicating that the defendant's choosing not to respond to questions during interrogation, was relevant since it provided a context for the interview); *Commonwealth v Robidoux*, 450 Mass 144, 161; 877 NE2d 232 (2007)(indicating, "[The defendant's] refusal to talk about his family, when compared to his willingness to talk about other topics, was relevant evidence of his state of mind."); *Commonwealth v Thompson*, 431 Mass 108, 118; 725 NE2d 556 (2000)(the court indicating that where the defendant gave a statement it was proper for the prosecutor to comment on the fact that the defendant did not ask appropriate questions.); *Commonwealth v Snell*, 428 Mass 766, 772-773; 705 NE2d 236 (1999) (the Court finding that the defendant's statements, "in which the defendant sought to deflect attention from himself, and perhaps establish an alibi" and his "failure to inquire about his wife[ ] were appropriate matters for comment and exploration."); *Commonwealth v Martino*, 412 Mass 267, 283-284 & n 12; 588 NE2d 651 (1992) (holding that his omissions in his voluntary statement were significant, and could be considered indicative of consciousness of guilt); *State v Gillard*, 40 Ohio St 3d 226, 231-232; 533 NE2d 272 (1988)(indicating that during the interview when defendant refused to elaborate further on his alibi, it was proper to inform the jury that the defendant refused to give details to corroborate his alibi); *State v Johnson*, 102 NM 110, 114-115; 692 P2d 35 (1984)(indicating that when a defendant gives a statement but refuses to answer specific questions, comment on those silent responses is not prohibited.)

<sup>236</sup> V I at 17; 4b.

and then to deny it, in like manner to deny the other incident; instead, he was evasive about what had transpired in the kitchen.<sup>237</sup> The detective later, upon questioning by defense counsel, implied that he had wanted to get to the topic of the charged incident but couldn't because the defendant left before he was able to get to it.<sup>238</sup> The pertinence of the "failure to deny" in this case was to show defendant's evasiveness, his unwillingness during the interview to really discuss the reason the officer had summoned him while willing to talk about the incident in the car.

The pertinence of the defendant's leaving the interview midway through was also to show his evasiveness. When the detective asked the defendant for his whereabouts, the defendant gave a confusing litany of where he had been for the last ten years.<sup>239</sup> When the detective asked him for clarification, indicating that he was confused, defendant's response was, "well, it's not my fault you were confused", became upset and walked out.<sup>240</sup> The entirety of the interview including omissions from his statement and leaving the interview in the midst of questioning was admissible to show consciousness of guilt and to permit the jury to hear the defendant's statements in context.

Furthermore, when the court gave a curative instruction directing the jury that a defendant's act of not discussing/leaving the interview is legitimate<sup>241</sup> rather than that this conduct could be used to show consciousness of guilt (as well as clearly made the court's displeasure regarding the detective's testimony known),<sup>242</sup> defendant could not meet his burden

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<sup>237</sup> V I at 192-193; 37a.

<sup>238</sup> V I at 211; 41a.

<sup>239</sup> V I at 193; 37a.

<sup>240</sup> V I at 194, 200-201; 37a, 38a.

<sup>241</sup> V I at 200-201, V II at 98-100; 16a; 38a.

<sup>242</sup> V I at 211-212; 41a.

to show undue prejudice under MRE 403, much less plain error affecting substantial rights.<sup>243</sup> “It is well established that jurors are *presumed* to follow their instructions.”<sup>244</sup> (emphasis provided)

The rule established in *Bigge* was not violated by admission of omissions from a defendant’s statement to the police as well as his leaving the interview as nonassertive nonverbal conduct showing consciousness of guilt.

**D. Defendant failed to demonstrate plain error by the admission of defendant’s reference that he had briefly been in jail, while he was being purposely vague about his whereabouts at the time of the crime, when the evidence was relevant to show consciousness of guilt. In any event any prejudice would have been cured by the instruction given by the court.**

The court, when granting a new trial, mentioned the detective’s reference to defendant’s previous incarceration. This was not a case where a police officer due to his own independent knowledge testified at trial regarding a defendant’s previous record, but instead a case where the defendant in his own statement referenced past time spent in jail. The police officer was merely reiterating what the defendant had told him.

A defendant’s statement, even when it references other misconduct, is an admission of a party-opponent and, “[a]s the statement of a party opponent, the admissibility analysis involves [] first determining whether the statement was relevant, and second whether its probative value outweighed its possible prejudicial effect.”<sup>245</sup> In this case the People’s theory was that the defendant, when asked for his whereabouts during June of 2005, was intentionally vague and

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<sup>243</sup> *Carines, supra.*

<sup>244</sup> *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Though defendant cites *Bruton v United States*, 391 US 123; 88 S Ct 1620; 20 L Ed 2d 476 (1968) for the proposition that jurors could not follow a curative instruction, the situation in *Bruton* is an exception to the ordinary rule that jurors will obey the instruction to disregard incriminating information. See: *Richardson v Marsh*, 481 US 200, 208-211; 107 S Ct 1702; 95 L Ed 2d 176 (1987)(declining to extend *Bruton* further)

<sup>245</sup> *People v Goddard*, 429 Mich 505, 515; 418 NW2d 881 (1988).

misleading. A reasonable deduction from defendant's statements was that, not only did defendant wish to delay or frustrate the officer's future investigation but did not want to be locked into a specific time period. It was the People's theory that to further this goal, defendant started mentioning different places he had been at different times. He first said he was living in Tennessee and returned to Michigan in 2006. He then stated he returned to Michigan in 2004. He then said that he moved back to Michigan in 1999. He then said that he was released from jail in 2006 but was unclear in which state he was serving his two-month sentence. He also, when it was clear that the detective wanted to call the defendant's wife to verify certain dates, did not correct the detective when he wrote down the phone number of the defendant's mother instead.<sup>246</sup>

As stated *supra*, the defendant's statements showed his consciousness of guilt<sup>247</sup> and therefore had a tendency to make the existence of a fact of consequence to the determination of the action more probable than without the evidence.<sup>248</sup> Furthermore, his mention of a very brief incarceration period would not be evidence to which the jury would give pre-emptive weight.<sup>249</sup>

But even if the mention of defendant's own reference that he had served two months in jail did not pass the prerequisites of MRE 403, defendant's claim was unpreserved by a timely objection. Defense counsel did not mention the jail reference on the record until the next day when he crafted a curative instruction.<sup>250</sup>

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<sup>246</sup> V I at 192-195; 37a, 31b. (Defendant had filed a notice of alibi. 53b)

<sup>247</sup> *Arnold, supra*.

<sup>248</sup> MRE 401.

<sup>249</sup> MRE 403; *Mills, supra* at 75.

<sup>250</sup> V II at 52; 16a.

Therefore, even if defendant had not waived any error, the defendant failed to meet the plain error standard.<sup>251</sup> In this case when the defendant mentioned that he had served two months in jail, this reference would not have been unduly prejudicial. Juries are presumed to follow curative instructions to disregard inadmissible statements in the absence of an “overwhelming probability” that the jury will be unable to do so.<sup>252</sup> In this case, no evidence suggested that the jury would not have been able to follow the curative instruction given.

The defendant’s reference constituted relevant evidence which was not unduly prejudicial. Furthermore, any prejudice due to this unpreserved claim of error would have been cured by the later instruction given by the court.

#### **E. Conclusion**

Though there is a split among federal circuits, the better view is that pre-arrest silence raises no constitutional issue—but this case is not about pre-arrest silence, defendant having met and spoken with the police. Also, on a proper foundation, silence, may, under the rules of evidence, be an adoptive admission—but again this case is not about silence, defendant having met with and talked to the police. This case is about omissions from a discussion, and conduct, both relevant to consciousness of guilt. More fundamentally, this case is about those issues in the context of instructions concerning them given by the trial court to the satisfaction of defense counsel, who wished no other action taken. While on the substance of the issues presented, no error exists, this is not a case where the substance of those issues needs to be discussed. This Court should find the issues waived, and end the matter there, or dismiss this appeal as improvidently granted. But certainly nothing that should cause reversal occurred here and

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<sup>251</sup> *Carines, supra; Puckett, supra.*

<sup>252</sup> *People v Dennis*, 464 Mich 567, 581; 628 NW2d 502 (2001).

therefore Court of Appeals correctly found that the trial court abused its discretion when granting a new trial.

RELIEF

WHEREFORE, Jessica R. Cooper, Prosecuting Attorney in and for the County of Oakland, by Danielle Walton, Assistant Prosecuting Attorney, respectfully requests that this Honorable Court affirm the Court of Appeals' decision or dismiss defendant's appeal as improvidently granted.

Respectfully submitted,

JESSICA R. COOPER  
PROSECUTING ATTORNEY  
OAKLAND COUNTY

JOHN S. PALLAS  
CHIEF, APPELLATE DIVISION

BY: /s/ Danielle Walton  
(P52042)  
Assistant Prosecuting Attorney  
Oakland County Prosecutor's Office  
1200 North Telegraph Rd.  
Pontiac, MI 48341  
(248) 858-0656

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