DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee, v. TRAVIS RAY WATSON, Appellant.	)	1 CA-CR 09-0263 DEPARTMENT E **MEMORANDUM DECISION** (Not for Publication – Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR 2008-166940-001 DT

The Honorable Lisa M. Roberts, Judge Pro Tempore

AFFIRMED

Terry Goddard, Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel,
Criminal Appeals/
Capital Litigation Section
and Joseph T. Maziarz, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender — Phoenix
By Margaret M. Green, Deputy Public Defender
Attorneys for Appellant

H A L L, Judge

¶1 Travis Ray Watson (defendant) appeals from his conviction for one count of possession of marijuana, a class six felony, and the sentence imposed. For the reasons set forth below, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 We view the facts in the light most favorable to sustaining defendant's conviction and sentence. *State v. Haight-Gyuro*, 218 Ariz. 356, 357, ¶ 2, 186 P.3d 33, 34 (App. 2008). At approximately ten o'clock the evening of October 24, 2008, a Phoenix police officer was conducting routine patrol of a Phoenix neighborhood. As he was driving in his patrol car, he observed defendant standing in the middle of the road. The officer rolled down his car's window and yelled at defendant, ordering him "to get out of the roadway." Defendant looked back at the officer, made eye contact, and then started walking down the middle of the road. The officer then activated his overhead lights and spotlight and "again advised [defendant] to get out of the roadway." Defendant responded by again looking back at the officer and then continuing to walk in the road. At that point, the officer parked and exited the patrol car and approached defendant. The officer ordered defendant to stop and defendant did not comply. The officer then grabbed defendant by the arm and informed him that he was under arrest.

¶3 After placing defendant under arrest, the officer conducted a pat-down search of defendant's person. The officer

retrieved a small black bag from defendant's pant pocket. When asked what was in the black bag, defendant stated "a little bit of weed." The officer then informed defendant of his *Miranda*[1] rights and began questioning him without first seeking an explicit waiver. The officer asked defendant why he did not follow his orders to exit the roadway. Defendant responded by stating that he did not know the officer was talking to him. The officer then asked defendant if the marijuana found on his person belonged to him. Defendant remained silent and did not answer that question. The officer did not further question defendant.

¶4 Defendant was charged by information with one count of possession of marijuana, a class six felony. Defendant did not file a pretrial suppression motion. At trial, the State elicited testimony from the officer regarding his post-*Miranda* questioning of defendant. The officer testified that defendant answered the initial questions regarding his failure to follow orders and exit the road, but he was silent when the officer asked about the marijuana. The prosecutor then asked the officer: "So he was just silent after you asked him whose marijuana that was?" The officer responded: "That's correct." Defense counsel objected and moved for a mistrial on the basis that the exchange between the prosecutor and the officer constituted a comment on defendant's right to remain silent in violation of *Doyle v. Ohio*, 426 U.S. 610

[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

(1976). The prosecutor contended that the defendant's silence in response to the question was a "sign of guilt—that's a conscious [sic] of guilt." The trial court found that defendant's refusal to answer the question was not an invocation of his right to remain silent and denied the mistrial motion. Other than through cross-examination of the State's witnesses, defendant did not present any evidence.

¶5 During closing argument, the prosecutor argued that defendant's silence when questioned about the marijuana was an admission of guilt. Defense counsel renewed his request for a mistrial, which the trial court again denied. Defense counsel then argued that there was no evidence that defendant was under the influence of any drug at the time of his arrest, that there was no drug paraphernalia found on defendant's person to indicate his intent to use the marijuana, and that there were no fingerprints on the small black bag to demonstrate defendant had placed the bag in his pocket.

¶6 The jury found defendant guilty as charged. Defense counsel requested a new trial, which was denied. After finding defendant had been convicted of two felony convictions, the trial court then sentenced defendant to the presumptive term of 3.75 years imprisonment.

¶7 Defendant timely appealed. This court has jurisdiction pursuant to the Arizona Constitution, Article 6, Section 9, and

Arizona Revised Statutes (A.R.S.) sections 12-120.21(A)(1) (2003), 13-4031 (2001), and -4033 (2010).

DISCUSSION

¶8 As his sole issue on appeal, defendant contends that the trial court erred by denying his motions for mistrial and a new trial. Specifically, defendant argues that the State violated his right to due process when the prosecutor commented on his post-*Miranda* silence. *See Doyle*, 426 U.S. at 618 (holding that prosecutor violated defendant's due process right to fundamental fairness by impeaching testifying defendant with his post-*Miranda* silence).

¶9 We review a trial court's denial of motions for mistrial and a new trial for an abuse of discretion. *State v. Jones*, 197 Ariz. 290, 304, ¶ 32, 4 P.3d 345, 359 (2000); *State v. Rankovich*, 159 Ariz. 116, 121, 765 P.2d 518, 523 (1988). We review de novo, however, the ultimate legal question whether a defendant's constitutional rights were violated. *State v. Beasley*, 205 Ariz. 334, 336, ¶ 9, 70 P.3d 463, 465 (App. 2003). Most constitutional errors are subject to harmless error review. *United States v. Hasting*, 461 U.S. 499, 509 (1983); *see also Doyle*, 426 U.S. at 619-20; *State v. Hickman*, 205 Ariz. 192, 198, ¶ 28, 68 P.3d 418, 424 (2003).

¶10 Here, the officer did not obtain an explicit waiver from defendant of his *Miranda* rights. As the State notes, however, a

waiver of *Miranda* rights may be implied by conduct when an individual chooses to answer questions after being advised of his *Miranda* rights. *See State v. Trostle*, 191 Ariz. 4, 14, 951 P.2d 869, 879 (1997) ("Answering questions after police properly give the *Miranda* warnings constitutes waiver by conduct.") (citations omitted). Moreover, defendant did not invoke his right to remain silent by unambiguously refusing to answer the officer's question regarding whether the marijuana belonged to him. *See Berghuis v. Thompkins*, 130 S.Ct. 2250, 2259-60 (2010) (determining that defendant's silence in response to police questioning for nearly three hours before responding to questions was not an invocation of his right to remain silent). Therefore, according to the State, the prosecutor's comment on defendant's silence was permissible because defendant initially waived his protections under *Miranda* by answering the officer's first question and did not thereafter invoke his right to remain silent. *See State v. Corrales*, 161 Ariz. 171, 172, 777 P.2d 234, 235 (App. 1989) (holding that State's witness did not impermissibly comment on defendant's right to remain silent when he testified that defendant answered some questions and refused to answer other questions after being given his *Miranda* rights); *see also United States v. Harris*, 956 F.2d 177, 181 (8th Cir. 1992) (finding no error when defendant waived his right to remain silent and the prosecutor noted the defendant concluded the interview after initially answering some questions

because the refusal "now constitutes part of an otherwise admissible conversation between the police and the accused"); *People v. Hurd*, 73 Cal.Rptr.2d 203, 209 (App. 1998) ("Once a defendant elects to speak after receiving a *Miranda* warning, his or her refusal to answer questions may be used for impeachment purposes absent any indication that such refusal is an invocation of *Miranda* rights.").

¶11 Defendant, however, contends that the prosecutor's argument that his silence when questioned about his ownership of the marijuana was evidence of guilt violates *Miranda*'s guarantee that a defendant's silence will not be used against him. 384 U.S. at 468, n.37 ("The prosecution may not, therefore, use at trial the fact that he *stood mute* or claimed his privilege in the face of accusation.") (emphasis added); *see also Doyle*, 426 U.S. at 618 ("[W]hile it is true that the *Miranda* warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings."); *State v. Keeley*, 178 Ariz. 233, 235, 871 P.2d 1169, 1171 (App. 1994) (finding *Doyle* error when "the jury was advised by the State in opening statement that [defendant's] invocation of his right to remain silent was 'significant' evidence of [defendant's] guilty state of mind").

¶12 We need not determine whether the prosecutor's closing argument regarding defendant's post-*Miranda* silence in response to

the officer's question constituted *Miranda/Doyle* error here because we deem any error harmless beyond a reasonable doubt. *See Hickman,* 205 Ariz. at 198, ¶ 28, 68 P.3d at 424 ("[M]ost trial error, and even most constitutional error, is reviewed for harmless error."); *see also Brecht v. Abrahamson*, 507 U.S. 619, 629-30 (1993) (finding *Doyle* error harmless on collateral review). Citing *State v. Sorrell*, 132 Ariz. 328, 330, 645 P.2d 1242, 1244 (1982), and *Keeley*, 178 Ariz. at 236, 871 P.2d at 1172, defendant contends that we should set aside his conviction and sentence without applying harmless error review. The courts in those cases elected not to review for harmless error after concluding that the State's error in commenting on those defendants' post-*Miranda* silence was willful and deliberate. *Sorrell*, 132 Ariz. 330, 645 P.2d at 1244; *Keeley*, 178 Ariz. at 236, 871 P.2d at 1172 ("To find this deliberate error harmless would just encourage similar constitutional error in the future.").

¶13 We do not perceive that either of these cases established an iron-clad rule that *Doyle* error should never be subject to harmless-error analysis. Indeed, as we recognized in *Keeley*, 178 Ariz. at 235, 871 P.2d at 1172, *Doyle* error may be reviewed for harmlessness. As a general principle, absent prosecutorial misconduct not present here, "[w]e do not . . . reverse convictions merely to punish a prosecutor's misdeeds nor to deter future conduct." *State v. Cornell*, 179 Ariz. 314, 328, 878 P.2d 1352,

1366 (1994). Moreover, unlike the defendants in *Sorrell*, 132 Ariz. at 329, 645 P.2d at 1243, and *Keeley*, 178 Ariz. at 235, 871 P.2d at 1171, defendant here did not unambiguously invoke his right to remain silent.

¶14 In determining whether any error was harmless, "[t]he inquiry . . . is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error." *State v. Bible,* 175 Ariz. 549, 588, 858 P.2d 1152, 1191 (1993) (quoting *Sullivan v. Louisiana,* 508 U.S. 275, 279 (1993)). Under the circumstances of this case, we conclude that any error was indeed harmless. When the arresting officer seized the small black bag from defendant's pants pocket during the search of his person incident to his arrest and before he was provided the *Miranda* warnings, defendant stated that the bag contained a "little bit of weed." Thus, the properly admitted evidence was overwhelming that defendant knowingly possessed marijuana. *See* A.R.S. § 13-3405(A)(1) (2010). Moreover, defendant did not present any plausible explanation at trial for the existence of the marijuana bag in his pocket that would undermine the credibility of the evidence. *See United States v. Gant*, 17 F.3d 935, 944 (7th Cir. 1994) ("[T]he less believable the defense, . . . the more likely the conclusion that the constitutional error did not contribute to the conviction.")

(internal quotation omitted). Because the jury's guilty verdict was surely unattributable to any *Doyle* error, we uphold defendant's conviction and sentence. *See Harrington v. California*, 395 U.S. 250, 256 (1969) ("[C]onstitutional error in the trial of a criminal offense may be held harmless if there is 'overwhelming' untainted evidence to support the conviction."); *see also Doyle*, 426 U.S. at 619-20 (vacating the defendant's convictions after noting the State did not claim its comments on defendant's post-*Miranda* silence may have been harmless error).

CONCLUSION

¶15 For the foregoing reasons, we affirm defendant's conviction and sentence.

/s/
PHILIP HALL, Judge

CONCURRING:

/s/
SHELDON H. WEISBERG, Presiding Judge

/s/
JOHN C. GEMMILL, Judge