DIVISION ONE
FILED: 07-20-2010
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee, v. JULIAN OLIBARRIA, Appellant.	)	1 CA-CR 09-0350 DEPARTMENT E **MEMORANDUM DECISION** (Not for Publication – Rule 111, Rules of the Arizona Supreme Court)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 2008-048937-001 DT

The Honorable James T. Blomo, Judge *Pro Tempore*

REVERSED AND REMANDED

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J O H N S E N, Judge

¶1 Julian Olibarria appeals his convictions and sentences on two counts of armed robbery. We reverse and remand.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 An 88-year-old man and his 89-year-old female friend were robbed at gunpoint at about 6:30 p.m. while they sat in a car in the garage of their Sun City residence. A month after the robbery, a detective identified a suspect who, on the day of the robbery, used the female victim's credit card to purchase pizza and to withdraw money from an ATM. Neither of the victims could identify anyone based on a photographic lineup that included the suspect. After additional inquiry, the detective returned to the victims a month later with a second photo lineup that included a photo of Olibarria, and the male victim identified him as the robber.

¶3 The person who had named the original suspect subsequently testified at trial on a grant of immunity. She testified Olibarria had given her a credit card and that she had pled guilty to fraudulent use of a credit card, along with four other felony charges, in a deal to avoid prison time. Asked whether she pled guilty to use of the female victim's credit card, she said, "There was no name involved. But if that's what it was, then yes."[1] At trial, the male victim testified Olibarria was the person who "looks the closest to me of the man

[1] The prosecutor conceded in closing argument that the witness was not the most credible of witnesses, but argued that she was important as the "link" that allowed the male victim to identify Olibarria.

that was there." The female victim did not testify at trial.

¶4 After the jury convicted Olibarria, the court sentenced him to two concurrent presumptive terms of 10.5 years. Olibarria timely appealed. We have jurisdiction pursuant to Article 6, Section 9 of the Arizona Constitution and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031 (2001), and -4033(A)(1) (Supp. 2009).

DISCUSSION

A. Reference to Olibarria's Silence.

¶5 During the State's case-in-chief, the investigating detective testified he had read Olibarria his *Miranda*[2] rights before interrogating him. He testified Olibarria stated he understood his rights. He further testified that he "assume[]d" Olibarria agreed to speak with him. He related that when Olibarria learned from glancing at the detective's notes that he was investigating an armed robbery, Olibarria "chuckled." As the detective explained to the jury, "I believe he chuckled and – well, he – he told me – he referenced the armed robbery. He referenced that I was investigating an armed robbery and chuckled." The detective acknowledged that the "chuckle" occurred without the detective informing Olibarria when the robbery under investigation had occurred or who it involved.

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

The only questions the detective testified he asked Olibarria during his interrogation concerned whether Olibarria knew any of four persons who might have been associated with the crime.

¶6 Olibarria argues the prosecutor impermissibly commented on his exercise of his right to remain silent in the interview by arguing twice in rebuttal that Olibarria "did not deny it." The first comment Olibarria complains about was the following:

> We know that the detective spoke with the defendant. We know that the defendant found out that he was investigating an armed robbery. *We know that he didn't deny it.*

Olibarria also argues the prosecutor again improperly referred to his silence in making the following analogy:

> Let's say a father comes into a kitchen. He is in the kitchen. No one else is in there and he comes out with some milk on his mustache. His son asks his father, "Dad, did you have a glass of milk?" *The dad doesn't deny that he had a glass of milk. When the son asks him this, the dad merely laughs. He chuckles.*

¶7 At a bench conference on Olibarria's objection to the initial comment during rebuttal, the court agreed with the prosecutor that the remark was a reference to Olibarria's chuckle. The court concluded the bench conference without ruling on Olibarria's objection that the remark must be viewed as a comment on his constitutionally protected silence, noting that "we will make more of a record after the fact." Before

leaving the bench, defense counsel asked that the comment be stricken, and the prosecutor responded, "We'll withdraw it." Neither the prosecutor nor the court, however, informed the jury that the comment had been withdrawn.

¶8 At a bench conference on Olibarria's objection to the second comment, the court admonished the prosecutor, "Okay. Now, I don't think you can use an analogy with the same facts in the trial. And try to phrase it as--." At that point, defense counsel interrupted. The court concluded the bench conference without ruling, but admonished the prosecutor, "You need to stop. You just need to finish and you need to be done."

¶9 After the jury retired to deliberate, Olibarria renewed his objections to the comments and requested a mistrial, arguing the prosecutor's statements were impermissible comments on his right to remain silent. The court denied the motion for mistrial, reasoning as follows:

> I think the statements that were made by Mr. Leiter [the prosecutor], while they misstated the evidence as far as he didn't deny it in reference to the statements made by Detective Ghinga about the interview with Mr. Olibarria, I think he misstated what the evidence was, but I don't find that it was a comment on Mr. Olibarria invoking his Fifth Amendment right not to talk with the detective, and I find that it did not comment on his right not to testify at trial, as we instruct the jury that what is said in closing arguments is not evidence, and the only evidence is that which is produced on the witness stand.

The court subsequently denied a motion for a new trial in which Olibarria renewed his argument that the remarks were improper comments on his right to remain silent.

¶10 We review *de novo* Olibarria's contention that the prosecutor violated his due process rights by improperly commenting on his exercise of his *Miranda* rights. *See State v. Rosengren*, 199 Ariz. 112, 116, ¶ 9, 14 P.3d 303, 307 (App. 2000) (due process claims reviewed *de novo*); *State v. Newell,* 212 Ariz. 389, 397, ¶¶ 27-28, 132 P.3d 833, 841 (2006) (application of *Miranda* is reviewed *de novo*), *cert. denied*, 549 U.S. 1056 (2006).

¶11 We conclude the court erred in determining the remarks were not impermissible comments on Olibarria's post-*Miranda* silence and denying a mistrial. A prosecutor may not use a defendant's post-*Miranda* exercise of his right to remain silent to imply his guilt, because to do so violates the defendant's due process rights. *Doyle v. Ohio,* 426 U.S. 610, 619 (1976); *State v. Mauro*, 159 Ariz. 186, 197, 766 P.2d 59, 70 (1988). *"Doyle* rests on the fundamental unfairness of implicitly assuring a suspect that his silence will not be used against him and then using his silence to impeach an explanation subsequently offered at trial." *Wainwright v. Greenfield*, 474 U.S. 284, 291 (1986) (internal punctuation and citations

omitted); *see also Doyle,* 426 U.S. at 617 ("Silence in the wake of these warnings may be nothing more than the arrestee's exercise of these Miranda rights").

¶12 The State argues broadly that the prosecutor is permitted to comment on a defendant's post-*Miranda* silence. *Doyle* does not bar cross-examination inquiring into a defendant's post-*Miranda* statements that are inconsistent with his trial testimony. *Anderson v. Charles,* 447 U.S. 404, 409 (1980) (prosecutor's cross-examination of defendant did not violate *Doyle* because "[t]he questions were not designed to draw meaning from silence, but to elicit an explanation for a prior inconsistent statement"); *State v. Henry*, 176 Ariz. 569, 579-80, 863 P.2d 861, 871-72 (1993) (permissible to impeach defendant's testimony at trial with vastly different story he initially told police); *State v. Tuzon*, 118 Ariz. 205, 207, 575 P.2d 1231, 1233 (1978) ("When one who has voluntarily made statements to police officers after his arrest makes new exculpatory statements at trial, the fact that he failed to make these statements earlier may be used for impeachment."). Although *Doyle* permits comment on matters a defendant volunteers before invoking his rights, our supreme court has reasoned that it does not permit comment on matters about which a defendant "had not made any comment or given any information." *See State v. Routhier*, 137 Ariz. 90, 96, 669 P.2d 68, 74 (1983) (reversal required when prosecutor

made repeated references in cross-examination of defendant and direct examination of detective to what defendant had failed to mention during interrogation).

¶13 The State cites *Baxter v. Palmigiano*, 425 U.S. 308 (1976), for the proposition that "in proper circumstances silence in the face of accusation is a relevant fact not barred from evidence by the Due Process Clause." *See id.* at 319. In this passage, taken from a case addressing the constitutionality of procedures followed in prison disciplinary proceedings, the Supreme Court relied on precedent involving circumstances different from those that prompted its holding in *Doyle* later that term. *See id.* (and cases cited therein). It is *Doyle* and its progeny, not *Baxter* and the precedents on which it relied, that control the issue on appeal in this case.

¶14 We hold that the prosecutor's repeated assertions that Olibarria "didn't deny it" were impermissible comments on Olibarria's exercise of his right under *Miranda* to remain silent during police interrogation. We first reject the State's argument that the remarks in context referred only to Olibarria's "chuckle." The prosecutor's blanket statement that Olibarria "did not deny it" was far broader than simply a reference to the chuckle and conveyed to the jury that Olibarria's failure to deny the crime raised an inference that he was guilty.

¶15 We also reject the State's argument that, in light of the absence of any testimony at trial that Olibarria ultimately invoked his right to remain silent, the remarks "simply could not have constituted an improper comment on Appellant's post-*Miranda* silence." The unique nature of the constitutional right to remain silent is that it may be exercised without saying anything. *Cf. Berghuis v. Thompkins*, 130 S. Ct. 2250, 2260 (2010) (suspect who wishes to "invoke" right to remain silent under *Miranda*, thus barring further questions from police, must do so unambiguously). Olibarria's failure to spontaneously deny the crime during the police's limited interrogation of him by itself constituted an exercise of his right to remain silent.

¶16 Finally, we reject the State's argument that because Olibarria waived his right to remain silent by responding to limited questioning about the identity of other suspects, the prosecutor was allowed to comment on his failure to deny the crime before the detective asked him about it. *See id.* ("Even absent the accused's invocation of the right to remain silent, the accused's statement during a custodial interrogation is inadmissible at trial unless the prosecution can establish that the accused 'in fact knowingly and voluntarily waived [*Miranda*] rights' when making the statement.") (citation omitted). Even assuming *arguendo* that Olibarria's responses to the handful of non-substantive questions the detective asked him at the outset

of the interview constituted a waiver of his right to remain silent, *see id.* at 2262, the detective did not ask Olibarria whether he committed the crime at issue. Under these circumstances, the State may not argue to the jury that Olibarria "didn't deny it."

¶17 We are not persuaded that the error was harmless under the circumstances. To demonstrate that an error was harmless, the State must prove beyond a reasonable doubt that it "did not contribute to or affect the verdict or sentence." *State v. Henderson*, 210 Ariz. 561, 567, ¶ 18, 115 P.3d 601, 607 (2005) (citing *State v. Bible,* 175 Ariz. 549, 588, 858 P.2d 1152, 1191 (1993)). The State has failed to meet its burden in this case, in which the evidence consisted primarily of a single identification by an elderly eyewitness. *Cf. State v. Keeley*, 178 Ariz. 233, 235-36, 871 P.2d 1169, 1171-72 (App. 1994) (prosecutor's deliberate strategy of eliciting evidence that defendant had invoked his right to consult with an attorney precluded finding it harmless error). Because the error was not harmless, we must reverse the convictions and remand for a new trial.

B. Other Issues on Remand.

¶18 For the benefit of the court and the parties on remand, we will address Olibarria's argument that the prosecutor violated the rule against hearsay and his rights under the

confrontation clause by intentionally eliciting false testimony that the elderly female victim had positively identified Olibarria in a photo lineup.

¶19 During direct examination of the investigating detective at trial, the following exchange occurred:

> **Q:** Did [the female victim] pick anybody out of that photo lineup?
>
> **MR. REINHARDT [defense counsel]:** Objection, your Honor.
>
> **THE COURT:** Overruled.
>
> **BY MS. PRICHARD [the prosecutor]:** Did she pick anybody out of that photo lineup?
>
> **A:** She did.
>
> **Q:** Who did she pick out?
>
> **A:** She picked Julian [Olibarria]'s photo out.
>
> **Q:** Now did she pick out a number or did she say: This is Julian?
>
> **A:** She actually pointed to the photo.
>
> **Q:** What photo?
>
> **A:** Julian's photo.
>
> **Q:** And what photo was that?
>
> **A:** Photo No. 6.
>
> **Q:** Now, did she sign her name below?
>
> **A:** She did not.

¶20 After the jury had been sent home for the day, Olibarria argued the testimony that the female victim had

identified him was inadmissible hearsay and its admission violated his confrontation rights. Olibarria moved for a mistrial on those grounds the following day. Accepting that the identification was impermissible hearsay, the court denied the motion for mistrial, reasoning that an instruction to the jury to disregard the testimony cured any prejudice. The court denied a later motion for new trial made in part on the same basis.

¶21 On appeal, the State does not dispute that the absent witness's tentative identification of Olibarria in the photo lineup should not have been admitted at trial, and we agree. *See Crawford v. Washington*, 541 U.S. 36, 68 (2004) (confrontation clause prohibits admission of testimonial hearsay statement in a criminal trial against a defendant unless the proponent can show that the declarant is unavailable to testify and the defendant had a prior opportunity to cross-examine the declarant); *see also* Ariz. R. Evid. 801, 802. Because we remand the convictions on another ground, however, we need not address Olibarria's contentions that the prosecutor engaged in misconduct by eliciting the testimony or that the court abused its discretion by denying a mistrial on that ground.

¶22 Olibarria also argues the prosecutor engaged in misconduct by eliciting testimony that the female victim had told the robber that he was a "child of God," over Olibarria's

objection that it was inadmissible hearsay, irrelevant, and unfairly prejudicial. The male victim testified that the female victim had told the armed robber that "he was a child of God," causing the robber to hesitate, and "nearly stopped the robbery."

¶23 Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Ariz. R. Evid. 401. Relevant evidence may be excluded, however, "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury," among other factors. Ariz. R. Evid. 403. "The threshold for relevance is a low one." *State v. Roque*, 213 Ariz. 193, 221, ¶ 109, 141 P.3d 368, 396 (2006).

¶24 Rule 610 of the Arizona Rules of Evidence and article 2, § 12 of the Arizona Constitution expressly prohibit evidence of a witness's religious beliefs to enhance or impair the witness's testimony. *See State v. Thomas*, 130 Ariz. 432, 436-37, 636 P.2d 1214, 1218-19 (1981) (repeated references to religious beliefs to bolster credibility of victim and her grandmother required reversal). Religious references may be admitted, however, for purposes other than enhancing or impeaching a witness's credibility. *State v. Crum*, 150 Ariz.

244, 246, 722 P.2d 971, 973 (App. 1986) (references to appellant's position in church were not improper because they were a means of identifying appellant and relevant to his modus operandi). "The trial court has considerable discretion in determining the relevance and admissibility of evidence." *State v. Amaya-Ruiz,* 166 Ariz. 152, 167, 800 P.2d 1260, 1275 (1990). Absent a clear abuse of its discretion, we will not disturb its ruling. *Id.*

¶25 We decline to hold that the court abused its discretion in admitting this evidence under the circumstances. The female victim's reference to God was not offered to enhance her credibility as a witness, because she did not testify. Her remark that Olibarria was a "child of God" arguably was relevant to show that the male victim had sufficient time in the presence of the robber to be able to accurately identify him.[3]

[3] Because we reverse the conviction on another ground, we need not address Olibarria's contention that cumulative acts of misconduct by the prosecution require reversal.

CONCLUSION

¶26 Because the prosecutor violated Olibarria's rights under *Miranda* by improperly asserting he had failed during his police interview to deny the crime, we reverse the convictions and remand for a new trial consistent with this decision.

/s/_____
DIANE M. JOHNSEN, Presiding Judge

CONCURRING:

/s/_____
PATRICK IRVINE, Judge

H A L L, Judge, dissenting.

¶27 Olibarria was informed of his *Miranda* rights, stated he understood them, and responded to several questions. Under these circumstances, it is clear that Olibarria impliedly waived his right to remain silent. *See Berghuis v. Thompson*, 130 S.Ct. 2250, 2262-63 (2010) (holding that defendant waived his Fifth Amendment right to remain silent by answering a question posed by detective). Further, it is also undisputed that Olibarria neither invoked his right to remain silent nor requested an attorney until *after* Olibarria made a comment regarding the armed robbery and chuckled. Indeed, defense counsel did not object to the introduction of this evidence at trial. Thus,

based on the record before us, it is clear that defendant had not invoked his right to remain silent when he giggled. In short, I do not perceive that the prosecutor's characterization of Olibarria's reaction constituted an impermissible comment on a right that he had waived and not yet invoked. Rather, as the trial court initially found, the prosecutor's remarks during rebuttal argument could be viewed as misstating the evidence, i.e., Olibarria's chuckling could not reasonably be construed as a denial that he was involved in the armed robbery. Or, as the court later commented in denying Olibarria's motion for new trial, it was "equally plausible" that the prosecutor's remarks were a proper comment on Olibarria's demeanor and his response when he realized that the detective was investigating an armed robbery.

¶28 Even assuming that the prosecutor's argument was not a fair comment on the evidence, the question we should be reviewing is whether Olibarria was thereby denied a fair trial. On this record, I cannot conclude that the trial court abused its discretion by denying a new trial. Therefore, I respectfully dissent.

/s/_____
PHILIP HALL, Judge