STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 14, 2004
v	No. 248443 Oakland Circuit Court
DETOI DOUVIER MCKINNEY, Defendant-Appellant.	LC No. 2002-182184-FC

Before: Cavanagh, P.J., and Jansen and Saad, JJ.

PER CURIAM.

A jury convicted defendant Detoi Douvier McKinney of armed robbery.[1] The trial court sentenced defendant to five to fifteen years in prison. Defendant appeals his conviction and sentence, and we reverse and remand for a new trial because defendant was denied certain constitutional rights that may have affected the jury's verdict and his right to a fair trial.

I. FACTS AND PROCEDURAL HISTORY

At trial, the victim testified that on the night of November 30, 2001, he was robbed in his driveway when he returned home from buying dinner for his family. The victim also testified that he called the police immediately after the robber got into an SUV and drove away.

A police officer also testified at trial that, in response to the victim's call, he drove to the victim's house, and noticed an SUV driving in the opposite direction and that, as he passed the SUV with his patrol lights and siren activated, the driver of the SUV turned his head away as if to prevent the officer from seeing him. The officer immediately turned around to follow the SUV, which sped up and eventually turned into an elevated driveway and parked. By the time the officer reached the SUV, both the driver and passenger doors were open and the occupants were no longer inside. Subsequent investigation revealed that the SUV was registered to defendant.

At trial, defendant's alibi witness testified that defendant could not have been the robber because the witness was playing chess with defendant at defendant's apartment on the night and

[1] MCL 750.529.

at the time of the robbery. Unsurprisingly, defendant also testified that he had been playing chess with his alibi witness that night and, additionally, asserted that he had taken a nap after playing chess and, when he woke up, he realized that his SUV had been stolen. Defendant asserted at trial that he tried to report the SUV stolen the night of the robbery, on November 30, 2001, but that he was unable to do so because he did not have a copy of the registration or title with him at the time he went to the police station.

During its cross-examination of defendant, the prosecution obtained an admission from defendant that at the time of his December 20, 2001, arrest, he did not tell the police of his alibi (or of his alibi witness) or that his SUV had been stolen on the night of the robbery in issue.[2] Over defense counsel's objection, the prosecution also called, as a rebuttal witness, the officer who interrogated defendant, and who reaffirmed that, at the time of defendant's arrest and interrogation, defendant said nothing of his alibi or that his SUV had been stolen. Instead, the officer said that defendant, after having been read his *Miranda*[3] rights, signed a statement that said that he did not wish to make a statement until he had spoken with his attorney.

A police officer testified that after verifying that the SUV was registered to defendant, he obtained a picture of defendant, and took it, together with pictures of four other people, to the victim's house on December 4, 2001. Both the officer and the victim testified that the victim identified defendant's picture as being the picture of the robber, and that the victim had taken time to look at all of the pictures. At defendant's preliminary examination, the victim testified that, prior to showing him the photographs, the police told him that one of the five pictures was of a person suspected of robbing the victim. However, at trial, the victim denied that police had told him that one of the photographs was of a suspect. At trial, the victim testified that he was sure that defendant was the person who robbed him, though he also testified that it was dark and not very well lit, and that the entire robbery occurred over the span of perhaps forty-five seconds. At trial, the victim testified that his height is six feet, one inch, and that the robber was the same height. But, defendant testified, however, that his height is five feet, ten inches.

After the jury convicted defendant, he moved for a new trial and argued that the prosecution's introduction of the aforementioned testimony with respect to his post-*Miranda* silence denied him a fair trial. The trial court denied defendant's motion and reasoned that defendant had attempted to show that he had cooperated with the police investigation by attempting to report his SUV stolen, and therefore, the prosecution could challenge defendant's delay in raising his alibi defense.

II. STANDARD OF REVIEW

Defendant argues that the prosecutor denied defendant his right to a fair trial during his cross-examination of defendant when he elicited testimony from defendant that he asserted his

[2] While defendant was not told at the time of his arrest why he was being arrested and taken to the police station, he was informed that he was a suspect in this crime upon his arrival at the station.

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

right to remain silent at the time of his arrest. Defendant also alleges that the trial court compounded this error by allowing the prosecution to introduce testimony from the arresting officer that defendant had exercised his right to remain silent at the time of arrest, and by denying his motion for a new trial. We review claims of constitutional error de novo.[4] *People v McPherson*, ___ Mich App ___; ___ NW2d ___ (2004), citing *People v Rodriguez*, 251 Mich App 10, 25; 650 NW2d 96 (2002). When a trial court commits an error that denies a defendant his constitutional rights we will affirm only if the error is harmless beyond a reasonable doubt. *Id.*, citing *People v Smith*, 243 Mich App 657, 690; 625 NW2d 46 (2000), citing *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

III. ANALYSIS

A. Defendant's Constitutional Error Claim

Under Michigan law, the Due Process Clause of the Fourteenth Amendment prohibits the prosecutor from using a defendant's postarrest, post-*Miranda* silence to impeach a defendant's exculpatory story at trial. *People v Vanover*, 200 Mich App 498, 500; 505 NW2d 21 (1993), citing *Doyle v Ohio*, 426 US 610, 96 S Ct 2240, 49 L Ed 2d 91 (1976) and *People v Sutton (After Remand)*, 436 Mich 575, 592; 464 NW2d 276 (1990). The prosecution argues, as Justice Stevens did in his dissenting opinion in *Doyle*, *supra*, that it defies logic that a defendant who faces an erroneous criminal accusation would withhold exculpatory evidence from police at the time of arrest, assert his right to remain silent, and wait until trial to proffer his alibi. Because to permit this "waiting game" invites perjury and, according to the prosecutor, unfairly prejudices the presentation of the prosecution's case, the prosecutor says the use of post-*Miranda* silence should be admissible to impeach a defendant's exculpatory testimony at trial.[5] However, the majority in *Doyle* rejected this argument. The Court reasoned that:

> [*Miranda* warnings], as a prophylactic means of safeguarding Fifth Amendment rights, require that a person taken into custody be advised immediately that he has the right to remain silent, that anything he says may be used against him, and that he has a right to retained or appointed counsel before submitting to interrogation.

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[4] Although defendant objected to the prosecution's calling the arresting officer as a rebuttal witness, he did not object when the prosecution cross-examined defendant regarding his post-*Miranda* silence—that defendant failed to inform the police of his alibi defense or that his SUV had been stolen when the police interrogated him. However, because both the cross-examination of defendant and the rebuttal testimony involved defendant's post-*Miranda* silence, we will treat both as being the same for the purposes of our review.

[5] In Justice Stevens' dissent in *Doyle*, he wrote "there is irony in the fact that the *Miranda* warnings provide the only plausible explanation for their silence. If it were the true explanation, I should think that they would have responded to the question on cross-examination about why they had remained silent by stating that they relied on their understanding of the advice given by the arresting officers. Instead, however, they gave quite a different jumble of responses." We note that here, defendant did, at the very least, appear to remain silent in reliance on his *Miranda* warnings, and on the advice of his trial counsel, who also advised defendant that he would file an alibi notice with the trial court.

> Silence in the wake of these warnings may be nothing more than the arrestee's exercise of these *Miranda* rights. Thus, every post-arrest silence is insolubly ambiguous because of what the State is required to advise the person arrested. Moreover, while 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. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial. [*Doyle*, *supra* at 617-618 (citations omitted).]

Moreover, our Supreme Court has not failed to address the concerns of the prosecution that a defendant could unfairly engage in this "waiting game" and commit perjury. The Court stated that a

> [d]efendant cannot assert that the Fifth or the Fourteenth Amendment confers a right to create the impression, free from contradiction, that he cooperated with the police and made a statement after arrest. . . . [T]he bar to impeachment by silence of exculpatory trial testimony does not extend to impeachment with a refusal to speak during interrogation which is inconsistent with defendant's own statements at trial claiming that he made postarrest statements while in custody. [*Sutton (After Remand)*, *supra* at 591.]

Accordingly, a defendant may be asked about his post-*Miranda* silence if defendant (1) testifies at trial that he told the police the same exculpatory story upon arrest; (2), attempts to give the jury the impression that he cooperated with police; or (3) asserts that the trial was his first opportunity to tell his version of the events. *People v Solomonson*, 261 Mich App 657, 664; 683 NW2d 761 (2004).

Because this case does not come within any of the three recognized exceptions, the trial court erred when it denied defendant's motion for a new trial. Here, defendant did not say at trial that he told the police the same exculpatory story upon being arrested. Rather, defendant testified unequivocally that he chose to invoke his constitutional right to remain silent and refrain entirely from speaking to the police until after he had consulted his lawyer. Moreover, the officer who attempted to interrogate defendant after his arrest testified that defendant did not make any statement after being informed of his rights, but instead provided a written statement that stated that he did not wish to speak to the police until he had spoken with his attorney. Therefore, because defendant did not say he told his exculpatory story to the police, there was nothing for the prosecutor to impeach. Nor did defendant attempt to testify at trial that the trial was his first opportunity to tell his version of the events.

Furthermore, the trial court erred in finding that defendant had attempted to give the jury the misimpression that he had cooperated with the police investigation into the robbery by testifying that he had attempted to report his car stolen nearly a month before his arrest.

At trial, defendant said that he realized that his car was stolen *on the night of the robbery* and attempted to report it stolen *at that time*. The trial court ruled, incorrectly, that this was equivalent to defendant testifying that he had cooperated with the police *after his arrest*. Moreover, defendant stated that, after telling the police that he wished to remain silent, and speak

to his attorney, he thereafter informed his lawyer of his alibi and was later advised by his lawyer that an alibi notice was filed.[6]

Accordingly, we hold that the trial court erred when it denied defendant's motion for a new trial.

B. Harmless Error Analysis

The trial court's error requires reversal unless the prosecution proves beyond a reasonable doubt that the error is harmless. *McPherson*, *supra*; *People v Cunningham*, 215 Mich App 652, 657; 546 NW2d 715 (1996). Though the burden is generally on a defendant to show that an error requires reversal, where, as here, the error affects a defendant's constitutional rights, the prosecution bears the burden of proving beyond a reasonable doubt that the error is harmless. *Cunningham*, *supra* at 657. Therefore, we must reverse unless we conclude, beyond a reasonable doubt, that the erroneous introduction of the evidence of defendant's post-*Miranda* silence did not affect the outcome of the trial.[7]

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[6] The trial court also relied, in part, upon our Supreme Court's holding in *People v Gray*, 466 Mich 44; 642 NW2d 660 (2002), when it denied defendant's motion for new trial. On appeal, the prosecution again relies upon *Gray* for the proposition that it may cross-examine a defendant concerning his delay in making an alibi claim. Specifically, the prosecution relies upon the following language from our Supreme Court's holding in *Gray*, *supra* at 48: "A defendant in a criminal case has a right to present a defense, but that right is not cloaked with protection from vigorous cross-examination. A tardily raised or incredible claim of alibi may be challenged as part of the truth-seeking process that is a criminal trial. *People v Hepner*, 285 Mich 631; 281 NW 384 (1938). Where a defendant puts forth an alibi defense, that defense can be challenged by cross-examination concerning unexplained delays in its assertion or untruths in its substance." However, both the prosecution's and trial court's reliance upon *Gray*, *supra*, is misplaced. In *Gray*, the issue reviewed by our Supreme Court was not whether the prosecution can cross-examine a *defendant* about failure to tell police of an alibi, the issue was whether the prosecution could cross-examine an *alibi witness* about unexplained delays in coming forward without first being required to lay a foundation by presenting evidence that it would have been natural for the alibi witness to come forward sooner and relate his story to the police. *Id*. at 45-46. Our Supreme Court held that the prosecution is not required to lay such a foundation, and reasoned that if such an alibi witness has a good reason for failing to come forward before trial, such a reason will be brought out during direct or redirect examination at trial. *Id*. at 47-48. Thus, our Supreme Court's decision in *Gray* applies only to a prosecutor's ability to explore an alibi witness' delay in telling the police a story that exculpates a defendant. Contrary to the prosecution's position, our Supreme Court in *Gray* did not hold that a prosecutor may use a defendant's post-*Miranda* silence to impeach the *defendant's* presentation of an alibi defense. Indeed, our Supreme Court's decision in *Gray* did not relate at all to a defendant's post-*Miranda* silence.

[7] This is no easy hurdle to overcome:

> The "harmless beyond a reasonable doubt" standard for non-structural constitutional errors is a demanding one, requiring that the party seeking to affirm

(continued…)

Here, the primary, and most damaging, evidence against defendant was the victim's positive identification of defendant and the fact that defendant's SUV was used in the robbery. But, if believed by the jury, defendant's alibi would negate the former, and his testimony that his SUV had been stolen[8] before the robbery would rebut the latter implication that defendant had committed the robbery. The prosecution's improper use of defendant's post-*Miranda* silence, may have severely undermined defendant's defense, and certainly created the impression that defendant's true reason for remaining silent was that he was guilty. This violation of defendant's constitutional right may have destroyed both defendant's credibility with the jury and his alibi.

Nonetheless, the issue of whether this error is harmless is a very close question. On the one hand, the prosecution argues, not unreasonably, that the victim's unequivocal identification of defendant as the robber is sufficient to render the improper evidence of his post-*Miranda* silence harmless beyond a reasonable doubt. An unequivocal eyewitness identification by the witness is certainly sufficient, standing alone, to sustain a robbery conviction. Indeed, we do not question here the validity or the weight of the victim's eyewitness testimony. On the other hand, as discussed previously, at trial, defendant raised questions regarding the reliability of the victim's identification of defendant. Yet, any doubts a jury may have had regarding the victim's memory of the robbery and his identification of defendant as the robber would likely have been eliminated by the implication of guilt created by the prosecution's use of defendant's post-*Miranda* silence.

Moreover, here, the prosecution went the additional step of presenting rebuttal testimony from the police detective who attempted to interrogate defendant after his arrest that reinforced the fact that defendant failed to tell his exculpatory story to police after his arrest. Further, during his rebuttal closing argument, the prosecutor characterized defendant's testimony as "ridiculous," and stated that defendant "has had since last November 30th to come up with a story."[9] The prosecutor's skillful yet improper use of defendant's post-*Miranda* silence may very well have had its intended effect on the jury—to discredit defendant's alibi and destroy his credibility.[10]

(…continued)

> the trial verdict convince the appellate court that the error did not affect the verdict beyond a reasonable doubt. The presumption, therefore, is that non-structural constitutional errors are prejudicial, and the prosecutor bears a heavy burden of convincing the appellate court otherwise. [Foley and Filiatrault, *The Riddle of Harmless Error in Michigan*, 46 Wayne L Rev 423, 435 (2000).]

[8] However implausible that story may seem.

[9] This Court has previously held that a prosecutor's repeated reference to a defendant's post-*Miranda* silence constituted an attempt to show "guilty knowledge on the part of defendant," and accordingly that the use of the post-*Miranda* silence against the defendant could not be found harmless beyond a reasonable doubt. See *People v Westbrook*, 175 Mich App 435, 440-441; 438 NW2d 300 (1989).

[10] Also, the jury here was not instructed that defendant's request to speak with his attorney before being interviewed by the police could not be viewed as evidence of guilt. *People v Dennis*, 464 Mich 567, 582-583; 628 NW2d 502 (2001).

We cannot conclude, beyond a reasonable doubt, that this error is harmless. Therefore, we hold that the admission of defendant's post-*Miranda* silence requires reversal.

IV. CONCLUSION

We hold that the trial court erred when it allowed the admission of evidence of defendant's post-*Miranda* silence, and therefore, also erred when it denied defendant's motion for a new trial. We further hold that this error is not harmless beyond a reasonable doubt.[11] Accordingly, we reverse defendant's conviction and sentence[12] and remand for a new trial. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Henry William Saad

[11] Because of our holding, we need not address defendant's other issues on appeal.

[12] We note that this Court has earlier stated that "the prosecution risks reversal when using a defendant's post-arrest silence at trial . . . [W]e do not encourage such trial tactics." *People v Crump*, 216 Mich App 210, 215; 549 NW2d 36 (1996).