STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SAMUEL THOMAS LUCERO,

Defendant-Appellant.

UNPUBLISHED
November 30, 2004

No. 231977
Macomb Circuit Court
LC No. 00-001089-FC

ON REMAND

Before: Kelly, P.J., and Murphy and Murray, JJ.

PER CURIAM.

I. Introduction

This case is before us on remand from the Supreme Court. After our decision affirming defendant's convictions,[1] the Supreme Court held in abeyance defendant's delayed application for leave to appeal pending its decision in *People v Boyd*, 470 Mich 363; 682 NW2d 459 (2004). *Boyd* having been decided, the Court, while retaining jurisdiction, remanded the case for us to consider the following two issues:

> Whether the Macomb Circuit Court abused its discretion in concluding that defendant's custodial statements were involuntary, and whether defendant was required to testify in order to preserve his challenge to the trial court ruling that his custodial statements, although inadmissible as substantive evidence, could be used for impeachment purposes. [*People v Lucero*, 471 Mich 883; __ NW2d __ (2004).]

II. Facts

As noted in our prior opinion, on January 1, 2000, defendant was arrested for the murder of his fiancée. According to the testimony at the *Walker*[2] hearing, when police arrived at the

[1] *People v Lucero*, unpublished opinion per curiam of the Court of Appeals issued June 28, 2002 (Docket No. 231977).

[2] *People v Walker* (*On Rehearing*), 374 Mich 331; 132 NW2d 87 (1965).

scene, they found defendant lying on top of the victim. By all appearances, defendant was upset and angry. It took several officers to place defendant into handcuffs. Upon taking him into custody, defendant was read his *Miranda*[3] rights, which he said he understood. Defendant continued to scream and kick while being transported to the police station, and while doing so made spontaneous statements about the incident. During the entire drive to the station, the officers never asked defendant any questions.

After arriving at the station at approximately 2:05 a.m., defendant was taken to the booking room. Defendant was once again read his *Miranda* rights, this time line-by-line from a department issued card, and he again confirmed that he understood them. After the rights were read, defendant was approached by a lieutenant, who asked defendant if he understood his rights and if he wanted to talk. Defendant answered affirmatively to both questions and provided an explanation regarding what occurred. This statement was made at approximately 2:56 a.m. At approximately 5:40 a.m., defendant asked if he could speak to an officer in order to tell him what happened. The officer told defendant to stop. The officer then proceeded to perform a gun residue test on defendant.[4] Immediately after, defendant again told the officer he wanted to tell him what had happened, and the officer told him he need not and could speak with a lawyer. Defendant proceeded to give several different explanations of what had occurred.[5]

Each of the police officers that were in contact with defendant testified that he appeared intoxicated, as they could smell alcohol emanating from him and his eyes were bloodshot. However, there was no evidence presented that defendant did not understand what was transpiring at the police station.

After hearing the evidence and considering the arguments of the parties, the trial court ruled that all of defendant's statements made after he was arrested were inadmissible as involuntary statements:

> *The Court*: All right. As far as the Court's decision concerning the motion to suppress the defendant's statements, the Court after going back over the testimony, as well as reviewing the case law that was submitted by both the prosecutor and the defense counsel, *does find that the statements were not voluntary based on Mr. Lucero's intoxication at the time*.
>
> There was some claim that the video, or the – yes, the videotape would have lent some assistance to the Court. I realize now that it didn't have an audio portion so I'm not sure it would have been helpful, but it is prosecutor's burden to establish to the court by a preponderance that it was a knowing, intelligent, voluntary waiver, and based on the fact that several of the witnesses testified that he was intoxicated, the first officer on the scene said he

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

[4] Defendant consented to the test.

[5] Throughout the time defendant was in custody, he never confessed to the crime. Instead, he gave several conflicting statements with respect to what occurred that night.

was not responsive to questions – he did have a blood alcohol level about – is it 6:30 or 5:30?

Mr. Jaffe [Defense counsel]: At 6:30, Your Honor.

The Court: 6:30 in the morning of .19, which leads the Court to conclude that earlier his blood alcohol was even higher. I can't say that he – that it was a voluntary, knowing and intelligent waiver of his Miranda rights and statements given while in custody would be suppressed. [Emphasis added.]

Although the trial court ruled that all statements made by defendant once he was in custody were inadmissible as substantive evidence, it also ruled that the statements could be used for impeachment purposes.

In our prior opinion, we summarized the trial testimony regarding the general events that occurred that night:

> In the early morning hours of January 1, 2000, Natalie Lester, the victim, died of a gunshot wound to the face. The victim was defendant's girlfriend. The victim rang in this tragic New Year, celebrating with defendant, her brother Adam Lester, and Amanda Mitchell. On the evening of December 31, 1999, the two couples went out to dinner and returned to defendant's house to watch videos and start drinking alcohol. Defendant was observed drinking tequila and beer. After toasting the New Year at midnight, the couples went to bed. The victim and defendant went upstairs to defendant's room and Adam and Amanda went to a bedroom downstairs. Approximately one hour later, defendant came running into the downstairs bedroom covered in blood, screaming that he had killed the victim. Adam and Amanda ran upstairs, with Adam calling 911. The victim was found lying on the bed in the upstairs bedroom with a gunshot wound to her face. A shotgun was on the floor next to the bed. The police arrived almost immediately and took defendant into custody. [*Lucero*, *supra*, slip op at 1.]

After the prosecution completed its proofs during the trial, defendant and his counsel indicated that defendant would not be testifying. Defendant's counsel indicated that he had recommended to defendant "from the onset" that he not testify, and had more recently given that same advice because of his concern with defendant being impeached through use of the inconsistent statements he made while in custody:

Mr. Jaffe: Your Honor, may the record reflect that I have consulted with Mr. Lucero on this issue numerous times and that my recommendation to Mr. Lucero at all times was very succinct, that was it's his decision to make. My recommendation to my client *has been from the onset* that he should not take the stand and testify on his behalf.

I *further* advised him that even though you have suppressed the use of his statements -- his numerous statements, that that applied only to the ability of the prosecutor to use or not use those statements in this case in chief.

> I further explained to my client that if he decides to take the stand and testify, it's fair game and that every statement that he made had the potential to be used against him.
>
> *The Court*: For impeachment purposes?
>
> *Mr. Jaffe*: For impeachment purposes, and I thought the matter had been resolved prior to today, but nevertheless, from conferring with him at this moment and again strongly recommending that he does not – that he doesn't take the witness stand, I believe it is his decision to follow my recommendation and not take the witness stand. Is that true, Mr. Lucero?
>
> *The Defendant*: Yes, it is. [Emphasis added.]

No offer of proof was provided regarding what defendant's testimony would have been had he testified at trial. Defendant was thereafter convicted of second-degree murder, and sentenced to twenty-five to fifty years' imprisonment.

III. Analysis

As noted, the Supreme Court ordered us to decide two issues. First, we must determine whether the trial court abused its discretion in holding that defendant's custodial statements were involuntary. Second, we are to decide whether defendant had to testify at trial in order to preserve a challenge to the trial court's ruling that his custodial statements were admissible only for purposes of impeachment.

A. Voluntariness of Statement

For the reasons explained below, we conclude that the trial court abused its discretion[6] by determining that defendant's custodial statements were involuntary. First, we hold that the trial court erroneously relied upon defendant's intoxication as the sole justification for finding the statements to be involuntary. Second, we hold that defendant's statements cannot be involuntary without some finding of police misconduct or coercion, and the trial court made no such finding. As such, we conclude that the trial court's decision that the statements were involuntary was in error, and must be reversed.

[6] The Supreme Court order remanding this case requires us to determine whether the trial court "abused its discretion" in finding the statements to be involuntary. Because we are bound to follow the orders of our highest court, we will review the issue under that standard of review. *Werkhoven v Grandville*, 65 Mich App 741; 238 NW2d 392 (1975). However, case law indicates that we are to review de novo the ultimate decision on a motion to suppress, while leaving intact the trial court's factual findings unless they are clearly erroneous. *People v Daoud*, 462 Mich 621, 629; 614 NW2d 152 (2000); *People v Akins*, 259 Mich App 545, 563; 675 NW2d 863 (2004).

As recently stated by the United States Supreme Court in *Missouri v Seibert*, __ US __, __; 124 S Ct 2601; 159 L Ed 2d 643 (2004), ""In criminal trials . . . wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the Fifth Amendment . . . commanding that no person shall be compelled in any criminal case to be a witness against himself."" *Id.* at ___, quoting *Bram v United States*, 168 US 532, 542; 18 S Ct 183; 42 L Ed 568 (1897). One of the "prophylactic rules"[7] created by the Supreme Court to protect certain Fifth Amendment rights was *Miranda*, which "created a presumption of coercion, in the absence of specific warnings, that is generally irrefutable for purposes of the prosecution's case in chief." *Patane*, *supra* at ___. As summarized by the *Missouri* Court:

> Accordingly, "to reduce the risk of a coerced confession and to implement the Self-Incrimination Clause," *Chavez v Martinez*, 538 US 760, 790; 155 L Ed 2d 984; 123 S Ct 1994 (2003) (Kennedy, J., concurring in part and dissenting in part), this Court in *Miranda* concluded that "the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored," 384 US, at 467; 16 L Ed 2d 694; 86 S Ct 1602. *Miranda* conditioned the admissibility at trial of any custodial confession on warning a suspect of his rights: failure to give the prescribed warnings and obtain a waiver of rights before custodial questioning generally requires exclusion of any statements obtained. Conversely, giving the warnings and getting a waiver has generally produced a virtual ticket of admissibility; maintaining that a statement is involuntary even though given after warnings and voluntary waiver of rights requires unusual stamina, and litigation over voluntariness tends to end with the finding of a valid waiver. See *Berkemer v McCarty*, 468 US 420, 433, n 20; 82 L Ed 2d 317; 104 S Ct 3138 (1984) ("[C]ases in which a defendant can make a colorable argument that a self-incriminating statement was 'compelled' despite the fact that the law enforcement authorities adhered to the dictates of *Miranda* are rare"). To point out the obvious, this common consequence would not be common at all were it not that *Miranda* warnings are customarily given under circumstances allowing for a real choice between talking and remaining silent. [*Id.* at __.]

To effectuate a valid waiver of a suspect's Fifth Amendment right against self-incrimination, the prosecution must prove by a preponderance of the evidence that the waiver is made "voluntarily, knowingly and intelligently." *People v Daoud*, 462 Mich 621, 633; 614 NW2d 152 (2000). As detailed in *Moran v Burbine*, 475 US 412, 421; 106 S Ct 1135; 89 L Ed 2d 410 (1986), courts must perform a two-part inquiry to determine whether a valid waiver has occurred:

> First, the relinquishment of the right "must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the

[7] *United States v Patane*, __ US __, __; 124 S Ct 2620; 159 L Ed 2d 667 (2004) (plurality opinion of Thomas, J.).

> consequences of the decision to abandon it. Only if the "totality of the circumstances surrounding the interrogation" reveals both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived.

The "totality of the circumstances" test sets forth an objective standard, *Daoud*, *supra* at 634, with courts evaluating such circumstances as the suspect's age, experience, education, background, and intelligence, and whether he has the capacity to understand the warnings given him, the nature of his rights, and the consequences of waiving those rights. *Id.* Importantly, no single factor is determinative. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998).

Because no single factor is determinative, the fact that a person is under the influence of intoxicants does not per se render a statement involuntary. *People v Lumley*, 154 Mich App 618, 624; 398 NW2d 474 (1986); *People v Crawford*, 89 Mich App 30, 33-34; 279 NW2d 560 (1979); *People v Dunlap*, 82 Mich App 171, 176; 266 NW2d 637 (1978). The federal courts have come to the same conclusion. See, e.g., *United States v Muniz*, 1 F3d 1018, 1022 (CA 10, 1993) ("The state of intoxication does not automatically render a statement involuntary."); *United States v Casal*, 915 F2d 1225, 1229 (CA 8, 1990); *United States v Hogan*, 933 F Supp 1008, 1017 (D Kan, 1996). Of course a suspect's level of intoxication is a factor to consider in reviewing the objective circumstances of a suspect's waiver, but it cannot be the sole factor in rendering a waiver involuntary. *People v Cheatham*, 453 Mich 1, 43; 551 NW2d 355 (1996).

Indeed, a crucial element of finding a waiver involuntary is the need for a determination that police coercion was utilized against the suspect to obtain the waiver. As we concluded in *Fike*, *supra* at 182, "a deficiency in the defendant that is not exploited by the police cannot annul the voluntariness of a confession unless there is evidence of police coercion." See also *United States v Chrismon*, 965 F2d 1465 (CA 7, 1992); *LaRette v Delo*, 44 F3d 681, 688-689 (CA 8, 1995).

In this case, the trial court erroneously concluded that defendant's level of intoxication rendered both of his *Miranda* waivers involuntary. First, the fact that defendant was intoxicated does not per se render his waivers involuntary and subsequent statements inadmissible. *Lumley*, *supra.* The trial court made no further evaluation of the objective circumstances in existence at the time defendant waived his rights and made his statements. *Daoud*, *supra*. Second, the trial court made no findings regarding police coercion, or that the police took advantage of defendant's intoxication in order to obtain defendant's statements. *Fike*, *supra*. Absent those critical findings, the trial court erred in excluding evidence of defendant's statements made while in custody.[8] See, also, *Boggs v Bair*, 892 F2d 1193, 1198-119 (CA 4, 1989) (concluding

[8] We also note that except for the statement made at approximately 2:56 a.m., at no time did the police approach defendant and ask for a statement. Each time defendant spoke to the police (except at 2:56 a.m.) it was because defendant either requested to do so or spontaneously made statements in front of the police. Volunteered statements made in the absence of police interrogation are not subject to *Miranda*. *Rhode Island v Innis*, 446 US 291, 300; 100 S Ct 1682; 64 L Ed 2d 297 (1980); *United States v Cole*, 315 F3d 633, 636 (CA 6, 2003).

defendant's statement was not involuntary even though testimony revealed he smelled of alcohol and had bloodshot, glazed eyes and blood test revealed a blood alcohol level of .22 and .145).

B. Preservation

The second issue on remand is whether defendant was required, consistent with *Boyd*, to testify in order to preserve his objection to the trial court's in limine ruling that his involuntary statements could be used against him for purposes of impeachment. In the ordinary course, we would not reach that issue because of our conclusion that the trial court erred in excluding defendant's statements. This is so because, as defendant's voluntary statements were admissible as substantive evidence, his objection to the more limited in limine ruling based upon an involuntary statement is irrelevant. Since defendant's statements were fully admissible, defendant was faced with the same choice regarding whether to testify as are all other defendants. Nonetheless, because our Supreme Court ordered us to consider both issues, and because the Court could disagree with our conclusion on the voluntariness of defendant's statements, we will now address the preservation issue.[9]

In *Boyd*, the Supreme Court undertook the task of deciding "whether a defendant must testify in order to preserve for appellate review a challenge to a trial court's ruling in limine allowing evidence that the defendant exercised his *Miranda* right to remain silent." *Boyd, supra* at 365 (citation omitted). The Court held that a defendant was required to testify at trial in order to preserve his challenge to the trial court's in limine ruling, for in the absence of the defendant's trial testimony, the Court could not "determine whether the trial court's ruling was erroneous and, if so, whether the error requires reversal." *Id.* The *Boyd* Court's holding was the natural extension of the holdings in *Luce v United States*, 469 US 38; 105 S Ct 460; 83 L Ed 2d 443 (1984) and *People v Finley*, 431 Mich 506; 431 NW2d 19 (1988). *Boyd, supra* at 370-371, 377-378.

In *Boyd*, the trial court ruled that the defendant's invocation of his *Miranda* right to remain silent was admissible at trial. However, the defendant never testified at trial (and gave no reason for not testifying), and the prosecutor never sought to admit the statement into evidence and never otherwise made reference to the statement. *Id.* at 367. On appeal to this Court, the defendant argued that he did not testify at trial because of the trial court's erroneous ruling. This Court affirmed the convictions.

On further appeal, the Supreme Court affirmed, holding that the defendant's failure to testify precluded appellate review. Citing to both *Luce* and *Finley*, the Court recognized three concrete reasons for requiring a defendant to testify at trial in order to preserve an objection to the in limine ruling. First, the Court noted that in *Luce* and *Finley*, both involving the decision to admit prior convictions for impeachment purposes, the trial courts had the discretion to subsequently modify an in limine ruling if a defendant's actual testimony varied at trial. *Boyd, supra* at 369. Second, the Court concluded that without a defendant's actual testimony (and the

[9] We recognize that our discussion on this issue is dictum, as it is unnecessary to our resolution of this appeal. *Dessart v Burak*, 252 Mich App 490, 496 n 5; 652 NW2d 669 (2002).

admission of the impeachment evidence) it would be entirely speculative for a reviewing court to conclude that any harm may have occurred from the in limine ruling. *Id.* Additionally, courts cannot assume that an adverse ruling motivated a defendant's decision not to testify, particularly when numerous factors are involved in such a decision. *Id.* Third, the Court noted that, as in *Luce* and *Finley*, the defendant's statement in *Boyd* invoking his *Miranda* rights was admissible for the limited purpose of impeachment, *id.* at 375, and thus the Court was not dealing with a situation where the defendant's statement was inadmissible under all circumstances. *Id.* at n 9.

The analysis and holding of *Luce*, *Finley*, and *Boyd* are logical and practical. After all, in each of those cases the trial court made an initial discretionary evidentiary ruling before trial, yet the actual effect of the ruling was subject to future events. For example, even if the defendant actually testified, the evidence still might not be submitted because the prosecutor may ultimately elect not to utilize the evidence. See *Boyd*, *supra* at 369; *Finley*, *supra* at 519. Additionally, if the defendant testifies, the trial court has an opportunity to modify the in limine ruling if the actual testimony differs from what was anticipated at the time the in limine motion was decided. *Luce*, *supra* at 41-41. Finally, without the defendant's testimony and the admission of the impeachment evidence, a reviewing court is significantly hampered in determining what harm, if any, the erroneous admission caused. *Boyd*, *supra* at 377; *Finley*, *supra* at 519.

As the remand order in this case implicitly suggested, this case contains a different twist. Specifically, rather than involving a discretionary decision that is subject to change during trial, in this case, the use of defendant's "involuntary" statement would be inadmissible for any purpose. As we noted in our prior opinion, it "is well-established that a defendant's involuntary statements 'may not be used for any purposes at trial, either for substantive evidence or for impeachment purposes.'" *Lucero*, *supra*, slip op at 2, quoting *People v Tyson*, 423 Mich 357, 377; 377 NW2d 738 (1985), citing *People v Reed*, 393 Mich 342; 224 NW2d 867 (1975). Thus, in this case, we are dealing with the precise issue raised in footnote 9 in *Boyd*, i.e., whether a defendant must testify to preserve the trial court's ruling when the evidence is not admissible for any purpose.

We do not believe that this difference is significant enough to remove it from the principles set forth in *Boyd* and *Luce*. Our conclusion is supported by the Court's decision in *Finley*. In that case, the trial court ruled prior to trial that the defendant's prior convictions could be used to impeach the defendant if he testified at trial. *Finley*, *supra* at 511. The defendant chose not to testify, and he did not inform the court of the expected nature of his testimony had he testified. *Id.* The defendant's convictions were affirmed by this Court.

Affirming this Court's decision, the Supreme Court adopted the *Luce* holding. *Id.* at 521. One of the defendant's arguments was that there were certain "bright line" categories that only required a legal analysis to decide on appeal, as opposed to needing a factual predicate for a decision as in *Luce*. *Id.* at 518. The defendant therefore argued that the preservation-by-testimony rationale in *Luce* did not apply to "bright line" legal issues. *Id.* The Court rejected that view, holding that most of the *Luce* preservation principles still applied to in limine decisions that needed little, if any, factual basis to rule upon:

> It is true that the question whether a conviction falls within a "bright line" category does not require a defendant's testimony in order to be properly

> reviewed. However, for the most part, the rationales underlying the *Luce* rule are applicable even where the prior conviction falls within one of the "bright line" categories. Any hardship to the defendant arising out of an incorrect decision is purely speculative in the absence of his testimony. As noted by the *Luce* Court, a defendant's decision not to testify is rarely premised solely on whether prior convictions will be used for impeachment. *Luce*, *supra* at 42. Further, the prosecutor may have decided to use other means to impeach the defendant. *Id.* Finally, without defendant's testimony, a reviewing court is limited in determining the harmless error question.
>
> It should also be noted that the Federal Rules of Evidence, under which *Luce* was decided, contain a "bright line" component similar to one category of the revised Michigan rule. Under FRE 609(a), any conviction, be it felony or misdemeanor, *shall* be admitted if the crime involved dishonesty or false statement. However, despite this "bright line" component of the federal rule, the Supreme Court determined that defendant's testimony is necessary to facilitate review. Further, a number of states with limited judicial discretion on the issue of admission of prior convictions have adopted the *Luce* rule. Accordingly, we disagree with defendant that the "bright line" aspects of the new Michigan rule render the *Luce* rule necessary. [*Finley*, *supra* at 519-520.]

As in *Finley*, although review of the trial court's decision to allow impeachment with an involuntary statement required only a legal "bright line" determination,[10] several of the *Luce/Boyd* factors are still in play. For, without defendant testifying, we are left to speculate on whether the prosecutor would have utilized the evidence for impeachment purposes, and whether the trial court would have altered its ruling during trial. Additionally, because defendant never testified and the statements were never offered into evidence, we have no way of knowing the substance of defendant's testimony and how the impeaching evidence would have impacted defendant's case.[11] It is impossible to determine whether admission of the involuntary statement was harmless error, see *Arizona v Fulminante*, 499 US 279, 310-311; 111 S Ct 1246; 113 L Ed 2d 302 (1991) and *People v McRunels*, 237 Mich App 168, 184; 603 NW2d 95 (1999), when the statement was never introduced at trial. As a result, we conclude that, under *Boyd*, defendant failed to preserve his objections to the trial court's ruling that his involuntary statements were available for impeachment purpose.[12]

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[10] In other words, no facts are necessary to resolve the legal issue provided.

[11] Defendant also provided no offer of proof outlining what his testimony would have been had he taken the stand.

[12] Another slight difference between *Boyd*, *Luce*, and this case is that here, defendant agreed on the record with his counsel's statement that defendant refused to testify based on his counsel's advice not to do so "from the onset" and based on the trial court's in limine decision. So, unlike *Luce* and *Boyd*, where there was no record explanation about why those defendants did not testify, here defendant relied on his attorney's two-fold advice. This factor, however, does not assist this Court in determining the potential prejudice or harm from the trial court's ruling. It

(continued…)

State and federal courts have split on whether a defendant must testify to preserve an objection to an evidentiary ruling that affects a defendant's constitutional rights. Most of the federal decisions have held that a defendant need not testify in order to preserve the issue, distinguishing *Luce* on the ground that *Luce* did not involve a constitutional issue. See, e.g., *United States v Chischilly*, 30 F3d 1144, 1151 (CA 9, 1994) ("Because use of an involuntary confession would violate the Constitution, *Luce* does not apply."); *United States v Greer*, 791 F2d 590, 594 (CA 7, 1986) (distinguishing *Luce* on grounds that it did not involve a constitutional issue and whether use of a confession obtained in violation of Fifth Amendment raised legal, not factual, issue.).[13] See, also, *People v Brown*, 42 Cap App 4th 461, 469-471 and n 4; 49 Cal Rptr 2d 652 (1996) for a good discussion of the relevant case law on this issue.

As noted in *Brown*, several state courts have ruled that a defendant still must testify to preserve a challenge to an in limine ruling, even though it impacts a defendant's constitutional right. In *Jordan v State*, 323 Md 151; 591 A2d 875 (1991), the trial court ruled that the defendant had been advised of his *Miranda* rights, and had made voluntary statements. The trial court also ruled, however, that the defendant had not knowingly and intelligently waived his right to counsel. *Jordan*, *supra* at 154. The defendant was convicted of several felonies, and the Court of Special Appeals affirmed. *Id.* at 154-155.

On further appeal, the Maryland Court of Appeals[14] considered whether the defendant preserved for appeal the trial court's ruling that his statement was voluntary when he did not testify, but stated that he would have had the court ruled the statement involuntary. *Id.* at 155. After noting the constitutional magnitude of the defendant's right to testify in support of his own defense, the court noted that traditionally courts will not review evidentiary issues unless the evidence was actually used at trial:

> It is axiomatic that courts have traditionally reviewed decisions that permit the admission of evidence in criminal trials only where the evidence is *used* to convict. We are not inclined to review a trial court's decision authorizing the State to use particular evidence when, as a result of a tactical decision by the defendant, the State ultimately was precluded from utilizing that same evidence. [*Id.* at 156 (emphasis in original).]

The court then concluded, similar to the *Luce* and *Boyd* Courts, that absent the defendant's testimony and the introduction of his statement into evidence, the defendant's injury was remote and speculative and review for harmless error was difficult:

(…continued)

therefore is not a major factor in deciding this issue.

[13] *Greer* was a habeas corpus case, and thus the federal court distinguished *Luce*, but relied upon *New Jersey v Portash*, 440 US 450; 99 S Ct 1292; 59 L Ed 2d 501 (1979), in which the Court held that federal law does not prohibit state courts from considering such evidentiary issues without the defendant first testifying. *Greer*, *supra* at 593-594.

[14] In Maryland, the highest appellate court is the Court of Appeals.

> Jordan's alleged injury is rather remote and speculative. If Jordan had testified, it is possible, depending on how he testified, that the State might have elected not to use his statement to impeach him and thus not open the door to the issue of voluntariness. It is also possible that Jordan might have taken the stand and given testimony consistent with his statement to the police, thus precluding use of the statement since it would have no "impeachment" value; or Jordan might have taken the stand and given testimony so similar to his statement to the police that use of the statement to impeach, even if improper, would be harmless error. [*Id.*]

Finally, the *Jordan* Court concluded that the defendant's constitutional right to testify, and his right against self-incrimination, would be protected by requiring him to testify in order to preserve the issue for appeal:

> Just as Jordan's potential injury is speculative, the right he is asserting is also speculative. If we assume Jordan is correct and the trial judge erroneously ruled that the confession was voluntary, then it is not clear how Jordan's constitutional rights were violated. His right against self-incrimination was not infringed upon, as he elected not to testify. His right to take the witness stand could ultimately be preserved since, if he testified and was improperly impeached with an involuntary statement, any conviction would be reversed on appeal. What Jordan really seems to be asking for is that, when a trial judge improperly rules that an involuntary confession can be used to impeach, the defendant ought to be able to avoid the effect of the ruling by not taking the stand, but still have his conviction reversed because evidence that ultimately was *never* introduced should not even have been *available* for introduction. [*Id.* at 156-157 (emphasis in original).]

The Arizona Court of Appeals came to a similar conclusion in *State v Conde*, 174 Ariz 30; 846 P2d 843 (1992). In that murder case, the trial court held that the defendant's second statement to police was involuntary but could still be used for impeachment. *Conde*, *supra* at 32. The defendant did not testify at trial, and was convicted. The defendant challenged the trial court's ruling that his statement could be used for impeachment, and the state challenged that on the basis that it was unpreserved. In considering this issue, the court noted that some Sister State courts had distinguished *Luce* because it did not deal with constitutional issues, yet recognized that an earlier Arizona Supreme Court decision applied *Luce* in deciding a constitutional issue.[15] *Id.* at 35. It then held that the policies underlying *Luce* and *Conner* applied to Conde because of his failure to testify:

> While the issue in *Conner* was a constitutional one, Arizona adopted the *Luce* rule: Although a defendant's statements were obtained in violation of *Miranda*, his election to forego testifying obviates any challenge to the ruling on use of the impeachment evidence. Conde's claim that his second statement was

[15] *State v Conner*, 163 Ariz 97; 786 P2d 948 (1990).

> the product of the allegedly coercive first interrogation involves the same analysis and result. All of the policy reasons for declining to consider his claim in the absence of his testimony apply whether the statement was coerced or, as in *Conner*, obtained in violation of *Miranda*. In either situation, Conde's alleged prejudice is hypothetical because his testimony could not be impeached because it did not occur. [*Id.*]

We agree with the rationale of both the *Jordan* and *Conde* courts, as they reflect a sound and principled application of *Luce*. Additionally, we conclude that these holdings are more consistent with our Supreme Court's decision in *Boyd*. After all, the *Boyd* Court considered the issue before it to be of constitutional magnitude, see *Boyd*, *supra* at 373-374, and still opined that the rationale underlying *Luce* applied. *Id.* at 376. By requiring defendant to testify, his right to testify and to not incriminate himself are preserved, as are traditional appellate preservation principles. After all, "'error does not occur until error occurs; that is, until the evidence is admitted.'" *Boyd*, *supra* at 370, quoting *Finley*, *supra* at 512 (opinion of Riley, C.J.).

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Christopher M. Murray