

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEVEN BLAINE MICHAELS,

Defendant-Appellant.

UNPUBLISHED

October 21, 2010

No. 292763

Allegan Circuit Court

LC No. 07-015528-FH

Before: GLEICHER, P.J., and ZAHRA and K.F. KELLY, JJ.

PER CURIAM.

A jury convicted defendant of receiving or concealing a stolen firearm, MCL 750.535b(2), being a felon in possession of a firearm, MCL 750.224f, and two counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to concurrent terms of 36 to 240 months' imprisonment for the receiving or concealing and felon in possession convictions, and a consecutive two-year term for the felony firearm convictions. Defendant appeals as of right. We affirm.

An Allegan resident testified at defendant's trial that in October 2007, someone broke into and stole from a trailer owned by the resident five shotguns and a pistol, along with other items of personal property. Scott Gorbics, a friend of defendant and his family, recounted at trial that on November 1, 2007, he directed the police to the location where the weapons were hidden in the woods behind defendant's house. Gorbics described that in mid-October 2007, he had seen defendant retrieve the guns from woods behind Jimmy Payne's trailer, and had seen defendant transport the guns by car to a wooded location behind defendant's own house. Gorbics averred that over the next couple weeks, both defendant and his wife periodically asked if he would sell the guns. According to Gorbics, defendant expressed his desire to move the guns on October 31, 2007, and Gorbics and defendant retrieved the guns from their buried location in the woods. The next day, Gorbics showed the police the general area where he and defendant had unearthed the guns the previous evening. The police found the guns nearby, partially concealed under some leaves. Defendant denied that he had possessed, concealed, buried, or otherwise touched the guns.

Defendant first complains on appeal that the prosecutor impermissibly commented on his post-arrest, post-*Miranda*¹ silence. During the prosecutor's rebuttal closing argument, the court sustained an objection to the prosecutor's comment that defendant "didn't say anything." However,

[b]ecause the alleged error was not preserved by a contemporaneous objection and a request for a curative instruction, appellate review is for plain (outcome-determinative) error. Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. . . . [W]e cannot find error requiring reversal where a curative instruction could have alleviated any prejudicial effect. [*People v Callon*, 256 Mich App 312, 329-330; 662 NW2d 501 (2003) (emphasis added).]

In *Doyle v Ohio*, 426 US 610; 96 S Ct 2240; 49 L Ed 2d 91 (1976), the United States Supreme Court held that a prosecutor could not impeach an exculpatory story by cross-examining the defendant about the failure to have told it after receiving *Miranda* warnings at the time of arrest. *Id.* at 611. Recently, our Supreme Court in *People v Borgne*, 483 Mich 178, 187-188; 768 NW2d 290, aff'd on reh 485 Mich 868 (2009), explained as follows:

Since *Doyle*, the United States Supreme Court has articulated exactly when the general rule from that case applies. It has held that *Doyle*'s rule does not apply—i.e., a defendant's silence may be used to impeach his exculpatory testimony—if the silence occurred either (1) before arrest or (2) after arrest and before *Miranda* warnings were given. See *Fletcher v Weir*, 455 US 603, 605-607; 102 S Ct 1309; 71 L Ed 2d 490 (1982); *Jenkins v Anderson*, 447 US 231, 239-240; 100 S Ct 2124; 65 L Ed 2d 86 (1980). This is because, under the United States Constitution, use of a defendant's silence only deprives a defendant of due process when the government has given the defendant a reason to believe both that he has a right to remain silent and that his invocation of that right will not be used against him, which typically only occurs post-arrest and post-*Miranda*. See *Fletcher*, 455 US at 605-607. This Court has also adopted this structure: “*Doyle* bars the use against a criminal defendant of silence maintained after receipt of governmental assurances.” *People v Cole*, 411 Mich 483, 488; 307 NW2d 687 (1981), quoting *Anderson v Charles*, 447 US 404, 408; 100 S Ct 2180; 65 L Ed 2d 222 (1980).

This rule thus would bar prosecutorial references to defendant's post-arrest, post-*Miranda* silence after he had invoked his right to remain silent. *People v McGhee*, 268 Mich App 600, 634-635; 709 NW2d 595 (2005).

The prosecutor's challenged comment appears ambiguous with regard to whether he intended to reference silence by defendant on October 30, 2007, a date shortly before defendant's

¹ *Miranda v Arizona*, 384 US 436, 444-445; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

arrest, or on November 1, 2007, after the police had arrested defendant and advised him of his rights pursuant to *Miranda*. Because the comment lends itself to interpretation either way, we shall assume the prosecutor's comment was improper. But not every improper prosecutorial comment requires reversal. In *People v Shafier*, 483 Mich 205, 214-215; 768 NW2d 305 (2009), quoting *Greer v Miller*, 483 US 756, 764-765; 107 S Ct 3102; 97 L Ed 2d 618 (1987), our Supreme Court observed that "a single reference to a defendant's silence may not amount to a violation of *Doyle* if the reference is so minimal that 'silence was not submitted to the jury as evidence from which it was allowed to draw any permissible inference'" In *Greer*, the United States Supreme Court found no *Doyle* violation where the defense counsel had immediately objected to the prosecutor's question of the defendant about his post-arrest, post-*Miranda* silence, and the trial court sustained the objection and twice repeated a curative instruction. *Greer*, 483 US at 759, 764-765.

In this case, the prosecutor made one fleeting reference to defendant's silence during his rebuttal closing argument, defense counsel immediately objected, and the trial court sustained the defense objection. Moreover, the trial court instructed the jury that the arguments of counsel did not qualify as evidence. Because the prosecutor did not through his single and isolated reference submit defendant's silence "'to the jury as evidence from which it was allowed to draw any permissible inference,'" we conclude that the prosecutor's fleeting and ambiguous reference did not violate defendant's constitutional rights. *Shafier*, 483 Mich at 214-215, quoting *Greer*, 483 US at 765.

Defendant next contends that the trial court erred in scoring 10 points for Offense Variable (OV) 14 on the basis that he "was a leader in a multiple offender situation." MCL 777.44(1)(a). In scoring OV 14, "[t]he entire criminal transaction should be considered." MCL 777.44(2)(a). When calculating sentencing guidelines, a trial court has the discretion to determine the number of points to be scored for the relevant OVs and prior record variables, "provided that evidence of record adequately supports a particular score." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). A reviewing court should uphold a scoring decision "for which there is any evidence in support." *Id.* (internal quotation omitted).

Gorbics's testimony reflected that defendant's wife was the person likely responsible for the firearms, and other evidence substantiated that defendant's wife had at least some knowledge of or participation in defendant's charged conduct of receiving and concealing the guns. Defendant therefore theorizes that the evidence proved that his wife occupied the leadership role in the commission of this crime. As a premise, defendant posits that the entire criminal transaction in this case included the theft and the subsequent receiving and concealing of the stolen property. Although no stolen goods would have existed for defendant to receive and conceal absent the initial theft of the property, the record reveals that defendant played no part in the theft, which consequently did not amount to a part of defendant's "entire criminal transaction." Because the record reflects that defendant's involvement commenced only after the firearms were stolen, the "entire criminal transaction" for purposes of scoring OV 14 in this case encompassed only the conduct of defendant related to the receiving or concealing of the guns.

And evidence of record supported the trial court's determination that defendant occupied a leadership position over stolen guns after he had received them. As previously noted, Gorbics testified that he saw defendant retrieve the guns from behind Payne's trailer and transport the guns to a hiding place in the woods behind defendant's house. Gorbics later went with defendant

to retrieve the guns intending to relocate them. Also, while the presentence investigation report (PSIR) suggests that defendant, his wife, and Payne presented the guns to Gorbics for a potential sale, the report also establishes that defendant alone carried the guns outside, and defendant informed Cory Brunelle that the guns were stolen and that defendant had to get rid of them. The PSIR further reflects that Brunelle saw the guns in the trunk of defendant's car and knew that defendant had participated in burying the firearms behind defendant's residence. In conclusion, ample evidence supports the trial court's finding that defendant was a leader in relationship to the receiving and concealing of the stolen guns, and the court properly scored 10 points for OV 14.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Brian K. Zahra
/s/ Kirsten Frank Kelly