

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED  
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

STATE OF ARIZONA, ) No. 1 CA-CR 11-0873  
)  
Appellee, ) DEPARTMENT C  
)  
v. ) **MEMORANDUM DECISION**  
)  
JOHN HENRY WHITE, ) (Not for Publication -  
) Rule 111, Rules of the  
Appellant. ) Arizona Supreme Court)  
)  
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Appeal from the Superior Court in Maricopa County

Cause No. CR2010-161934-001

The Honorable Connie Contes, Judge

**AFFIRMED**

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Thomas C. Horne, Arizona Attorney General Phoenix  
By Kent E. Cattani, Chief Counsel,  
Criminal Appeals/Capital Litigation Division  
Jeffrey L. Sparks, Assistant Attorney General  
Attorneys for Appellee

Marty Lieberman, Maricopa County Legal Defender Phoenix  
By Colin F. Stearns, Deputy Legal Defender  
Attorneys for Appellant

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**T H U M M A**, Judge

¶1 Defendant John Henry White appeals his convictions and sentences imposed after a jury found him guilty of aggravated

assault and misconduct involving weapons resulting from his shooting an acquaintance in the neck. Finding no reversible error, White's convictions and sentences are affirmed.

#### **FACTS AND PROCEDURAL HISTORY<sup>1</sup>**

¶12 Early one autumn morning, White encountered the victim, an acquaintance, as the victim was returning home after purchasing methamphetamine. White followed the victim home and, when the victim locked White outside the victim's apartment, White began pounding on the windows. The victim came out of the apartment and shoved White. White drew a handgun and shot the victim in the neck. Phoenix Police arrested White later that morning but never recovered the handgun.

¶13 After the arrest, Detective Alberta interrogated White at the police station and video recorded the interview. The detective first read White his *Miranda*<sup>2</sup> warnings; White stated he understood his *Miranda* rights and proceeded to answer the detective's questions. During the interview, Detective Alberta asked White several times to explain what had happened leading up to the shooting. White's responses varied from an expression of surprise that the victim had been shot to a brief description

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<sup>1</sup> On review, this court considers the evidence in the light most favorable to sustaining the convictions and resolves all reasonable inferences against White. *State v. Manzanedo*, 210 Ariz. 292, 293, ¶ 3, 110 P.3d 1026, 1027 (App. 2005).

<sup>2</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

of a physical altercation with the victim to an indirect response claiming he had to "choose his words carefully." White neither affirmatively admitted nor denied shooting the victim, nor did he admit or deny possessing a handgun at the time of the shooting.

¶4 At the end of the interview, Detective Jenkins attempted to swab White's hands to test for gunshot residue (GSR). White refused the attempt, asking "Do I get a, like a attorney or something?" and "What kind of test is this here? Why am I taking it without advice from an attorney?" and further stating he would want an attorney "if I need some help." Although Detective Jenkins stated White was required to submit to the GSR test and was not entitled to an attorney at that time, Detective Alberta stopped the attempt to collect GSR and obtained a warrant for a GSR test. When Detective Jenkins returned with the GSR warrant, White wiped his hands on his clothing before presenting his hands for the test. The swab tested negative for GSR.

¶5 The State charged White with aggravated assault and misconduct involving weapons. Before trial, White moved to suppress his statements during the interview as involuntary due to intoxication. After an evidentiary hearing, the court found White had made the statements voluntarily. During that hearing, the State presented a redacted version of the interview video

that excluded White's refusal to cooperate with the GSR test and his comments about a lawyer. "[S]olely at the request of the defense," the State added back that portion of the video in the version prepared for trial.

¶16 At trial, the State played for the jury the video recording of White's interview, which at defense counsel's explicit request included Detective Jenkins' first attempt to take a GSR test and White's comments about counsel, up until the point where Detective Alberta decided to acquire a warrant. Detective Alberta testified to White's statements during the interview and confirmed that White neither affirmatively admitted nor denied shooting the victim, nor admitted or denied possessing a handgun at the time of the shooting. Detective Jenkins testified about White's refusal to submit voluntarily to GSR testing without consulting with a lawyer.

¶17 During closing arguments, the prosecutor once referred to White's behavior in attempting to avoid the GSR test, stating:

[T]here is something important about the gunshot residue swabs, and that's the defendant's demeanor when he's told that the gunshot residue swabs are going to be taken. You heard and you saw on the video that when the detectives come in to tell the defendant that they want to take a gunshot residue swab, the defendant's reaction "I'm not taking a gunshot residue swab. Why do you need to do that?" Well, if the defendant really was a person who had done nothing

wrong and had nothing to hide, why not just put those hands out there, let the detectives take the gunshot swab?

And then you heard once the search warrant was obtained, they came back in and the defendant was rubbing his hands on his pants, and you heard that's not something that's supposed to happen. That's not something that's asked for.

¶18 The prosecutor also referred in closing to several of White's statements to Detective Alberta during the interrogation. The State particularly highlighted White's expression of surprise at the beginning of the interview when the detective said the victim was accusing White of the shooting and the detective's "many opportunities of asking the defendant what had happened." The prosecutor also recounted Detective Alberta's question

"are you saying that you didn't shoot [the victim], that you had nothing to do with [the victim] being shot," and the defendant's response, "I just don't want to do too much because this is a lot. I mean, you gotta be careful. This is serious. I gotta be real careful."

The State argued that "[a]ny reasonable person who did not do it would say, 'No, I didn't shoot [the victim]. He tried to attack me,' but you heard that throughout the interview that was never mentioned by the defendant."

¶19 After deliberating for parts of two days, the jury returned a guilty verdict on each count. White timely appealed from these convictions and the resulting sentences. This court

has jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes (A.R.S.) sections 12-120.21, 13-4031 and -4033.<sup>3</sup>

#### DISCUSSION

¶10 White argues the court erred by allowing the prosecutor, through testimony and in closing argument, to comment on what White did not say after receiving *Miranda* warnings and White's refusal to submit to the GSR test without consulting an attorney. White did not object on these grounds at trial, limiting review on appeal to fundamental error. See *State v. Henderson*, 210 Ariz. 561, 568, ¶ 22, 115 P.3d 601, 608 (2005). White accordingly bears the burden of establishing that the court erred, that the error was fundamental and that the error caused him prejudice. *Id.*

¶11 White first argues the court fundamentally erred in permitting the prosecutor to comment on what White did not say after receiving *Miranda* warnings when examining the interrogating detective as a witness and in closing argument. Specifically, White objects to (1) the prosecutor's questions to Detective Alberta on redirect whether the detective had given White multiple opportunities to tell his side of the story, and, as a follow-up to a jury question, whether White had at any time

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<sup>3</sup> Absent material revisions after the relevant dates, statutes cited refer to the current version unless otherwise indicated.

expressly denied he had a gun and (2) the State's argument in closing that White had failed to give a fully exculpatory statement to the detective despite multiple opportunities to do so.

¶12 It is well-settled that the prosecutor may not comment at trial on a defendant's invocation of his right to remain silent. See *Doyle v. Ohio*, 426 U.S. 610, 619 (1976). *Doyle* does not permit comment on matters about which a defendant "had not made any comment or given any information." *State v. Routhier*, 137 Ariz. 90, 96, 669 P.2d 68, 74 (1983). *Doyle* does, however, permit comment on matters that a defendant volunteers after a *Miranda* warning but before formally invoking his *Miranda* rights. *Id.*

¶13 On the unique record in this case, there was no error, much less fundamental error, in the prosecutor's questions about White's statements to Detective Alberta. White did not invoke his right to remain silent, but rather waived that right by proceeding to speak with the detective after acknowledging he understood the *Miranda* warnings. See *State v. Henry*, 176 Ariz. 569, 580, 863 P.2d 861, 872 (1993) ("When a defendant is not induced into silence by *Miranda* warnings, however, or waives his rights by answering questions after such warnings are given, due process is not implicated.").

¶14 Similarly, the prosecutor's questions and subsequent

comments in closing were directed not to White's *silence*, but rather to White's *statements* made after hearing and waiving his *Miranda* rights. See *State v. Tuzon*, 118 Ariz. 205, 207, 575 P.2d 1231, 1233 (1978) (holding prosecutor did not impermissibly comment on defendant's post-arrest silence by impeaching defendant with what he had not said during his police interrogation where defendant "did not keep silent after arrest," but rather voluntarily answered questions). The prosecutor's argument in closing that a reasonable, innocent person would, unlike White, have firmly denied shooting the victim does not amount to comment on constitutionally protected *Miranda*-induced silence; White waived his *Miranda* rights and continued to speak with police. Moreover, the clear focus of the State's argument was White's evasive answer, not any invocation of the Fifth Amendment right to remain silent (which White did not invoke). *Henry*, 176 Ariz. at 580, 863 P.2d at 872. ("[E]ach of two inconsistent descriptions of events may be said to involve 'silence' insofar as it omits facts included in the other version. But *Doyle* [] does not require any such formalistic understanding of 'silence,' and we find no reason to adopt such a view in this case." (quoting *Anderson v. Charles*, 447 U.S. 404, 409 (1980))). Accordingly, the prosecutor did not impermissibly elicit testimony or comment on White's post-*Miranda* silence.

¶15 White also argues the court fundamentally erred by permitting the prosecutor to ask the police witnesses whether White had refused to submit to a GSR test, and to argue that his refusal to submit to the test before consulting with an attorney was evidence of his guilt. As a general matter, due process bars a prosecutor's use of a defendant's invocation of his constitutional rights as evidence of his guilt. *State v. Palenkas*, 188 Ariz. 201, 212, 933 P.2d 1269, 1280 (App. 1996) ("[A] defendant's invocation of constitutional rights is probative of nothing except the defendant's awareness of his or her constitutional rights.").

¶16 On the unique record in this case, however, White invited any alleged error regarding this evidence. The prosecutor had prepared a redacted version of the video-recorded interrogation excluding the discussion of White's refusal to submit to the GSR test and his mentions of an attorney. In response, White's counsel expressly asked -- apparently for strategic reasons, although not contained in the record -- that the videotaped interrogation shown to the jury *include* the GSR test refusal and counsel discussion. As requested by White, the video including the GSR test refusal and counsel discussion was received in evidence and played for the jury. The prosecutor's questions simply reiterated or clarified what the jury had already witnessed and heard at White's request. In addition,

White did not ask for any jury instruction limiting the use of this evidence. By specifically requesting that this portion of the interview be shown to the jury, White invited any error with respect to introduction of this evidence and cannot now complain on appeal. See *State v. Logan*, 200 Ariz. 564, 566-67, ¶ 15, 30 P.3d 631, 633-34 (2001).

¶17 To the extent the prosecutor's reference to this evidence in closing argument was not similarly invited, White has failed to establish error, much less fundamental error, in the prosecutor's argument that White's refusal to submit voluntarily to the GSR test indicated consciousness of guilt given the unique context of this case. The prosecutor's comment drew the jury's attention to evidence admitted expressly and solely at defense counsel's request. Similarly, the GSR test eventually procured by warrant failed to show the presence of gunshot residue.

¶18 The prosecutor's argument focused on White's demeanor rather than any attempted assertion of legal rights. The State correctly did not argue that White's comment about counsel and unwillingness to voluntarily submit to a GSR test were evidence that White was hiding something. Rather, the prosecutor focused on White's "demeanor when he's told that the gunshot residue swabs are going to be taken" and his action in rubbing his hands on his pants after the police obtained a search warrant,

potentially destroying evidence. Moreover, the portion of the videotape showing White's reactions was shown to the jury at White's insistence, and because White did not request a limiting instruction, the jury remained free to reach its own conclusions on the significance of White's conduct under the circumstances. Given these circumstances, the admission and use of evidence related to White's refusal to voluntarily submit to GSR testing before consulting an attorney does not constitute error.

**CONCLUSION**

¶19 White's convictions and sentences are affirmed.

/S/\_\_\_\_\_  
SAMUEL A. THUMMA, Judge

CONCURRING:

/S/\_\_\_\_\_  
PHILIP HALL, Presiding Judge

/S/\_\_\_\_\_  
PETER B. SWANN, Judge