DIVISION IV

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
JOSEPHINE LINKER HART, Judge

CACR06-007

May 3, 2006

JAMES JENNINGS
APPELLANT

V.

STATE OF ARKANSAS
APPELLEE

APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT
[NO. CR 04-4500]

HONORABLE WILLARD PROCTOR, JR., CIRCUIT JUDGE

AFFIRMED

A jury found appellant, James Jennings, guilty of possession of cocaine, a felony, and two misdemeanors, possession of marijuana and resisting arrest, and he was sentenced as a habitual offender to a total of thirty years' imprisonment, with the misdemeanors merging with the felony. On appeal, appellant seeks reversal of his convictions, arguing that a witness for the State impermissibly commented on appellant's post-arrest silence. We affirm.

Michael Miller, a patrolman with the Little Rock Police Department, was working off-duty at an apartment complex when he and another officer responded to a complaint at an apartment. Miller, along with the other officer, drove to the apartment and saw two persons outside the apartment, one of whom was appellant. Miller told appellant to approach and place his hands on the officers' police vehicle. Appellant started to place his hands on the vehicle but then pulled away. Miller grabbed appellant's belt, and appellant attempted to strike Miller. Miller took appellant to the ground, and as appellant fell, Miller saw him throw an object underneath the car. After the officers handcuffed appellant and placed him in the back of the patrol unit, Miller retrieved the object, which was a plastic bag containing a

white, rock-like substance. Miller also found a bag of marijuana on appellant's person.

Miller testified that he released the evidence to a narcotics detective, Ken Blankenship, who later testified that he received a baggie of off-white rocks and a baggie of green matter. An employee of the Arkansas State Crime Laboratory testified that after testing, she determined that the substance identified by Miller as white rocks was 5.8531 grams of cocaine base and the other was 1.7 grams of marijuana.

Prior to Blankenship testifying that he received the narcotics, the State asked Blankenship if he had contact with appellant, and Blankenship replied that he did. The State then asked, "Can you tell me what happened when you responded to the northwest detective division?" Blankenship replied:

> Yes. On that date I responded to the northwest detective division. Mr. Jennings was in custody. I obtained information from the officers about what happened at the scene. At that point I advised Mr. Jennings of his rights, which he stated he understood his rights, signed his rights. However, he did not wish to make a statement. I also did personal history. I conducted a —

At that point, the State interrupted Blankenship and approached the bench, telling the court, "I just wanted to stop him before he started saying things that he is not supposed to say. We don't want any of that in. It's not relevant. .... I just didn't want him to say anything more." The State then asked if Blankenship took possession of any drugs, and Blankenship testified that he took possession of a baggie of off-white rocks and a baggie of green matter.

Citing, among other cases, *Doyle v. Ohio*, 426 U.S. 610 (1975), appellant argues that Blankenship impermissibly commented on appellant's silence. Appellant further asserts that because the State brought the issue to the court's attention, the court had an opportunity to take curative action, so this court should address the merits of appellant's claim.

Only an issue stated clearly and specifically before circuit court will be reviewed on appeal, as the circuit court must be given an opportunity to consider the issue. *Whitson v.*

State, 314 Ark. 458, 863 S.W.2d 794 (1993). Appellant did not bring this issue to the circuit court's attention, and we cannot say that the State did so, as the State's comment that it "wanted to stop him before he started saying things that he is not supposed to say" was too ambiguous to tell what the State was referring to. Furthermore, in *Whitson*, the defendant argued that his due-process rights were violated because the court allowed interrogation that alluded to his post-*Miranda* silence, in contravention of *Doyle*. The supreme court held that it would not consider the argument because it was raised for the first time on appeal and consequently was not preserved for appellate review. *Id*. Similarly, appellant raises his *Doyle* argument for the first time on appeal, and consequently, the argument was not preserved for appellate review.[1]

Nevertheless, in addressing appellant's argument, he asserts that Blankenship impermissibly commented on appellant's post-arrest silence. He contends that Blankenship's comments were not inadvertent, because "[o]ne would assume" that Blankenship, with his eight years of experience as a narcotics detective, knew about the prohibition on testifying about a defendant's post-arrest silence. Further, appellant notes that he testified at trial and told a version of the events that was different from the version told by the State's witnesses. He asserts that "[i]t is fair to infer that the jury was influenced by the knowledge that appellant did not tell his contradictory and exculpatory story to the detective on the night of his arrest."

As our supreme court has noted, the Due Process Clause prohibits the use for

[1]In *Anderson v. State*, 357 Ark. 180, 163 S.W.3d 333 (2004), our supreme court held that a defendant may challenge for the first time on appeal a reference during the State's closing argument to a defendant's failure to testify, which we observe is a reference prohibited by *Griffin v. California*, 380 U.S. 609 (1965). *Anderson*, however, is inapplicable, as here appellant is not making a *Griffin* argument challenging the State's reference to a failure to testify, but instead a *Doyle* argument asserting that a witness's comment on appellant's post-arrest silence impeached appellant's trial testimony.

impeachment purposes of a defendant's post-arrest silence. *Tarkington v. State*, 313 Ark. 399, 855 S.W.2d 306 (1993) (citing *Doyle* and *Greer v. Miller*, 483 U.S. 756 (1987)). In *McIntosh v. State*, 296 Ark. 167, 753 S.W.2d 273 (1988), *cert. denied*, 489 U.S. 1065 (1989), our supreme court found no *Doyle* violation where it was not the prosecutor who referred to the defendants' silence but a police officer who gave an unsolicited response, and the prosecutor did not attempt to use the defendants' silence for impeachment purposes or call attention to their silence. Similarly, Blankenship's comments were not the result of a question by the State designed to elicit testimony about appellant's post-arrest silence, and the State did not call attention to appellant's post-arrest silence or use it to impeach his testimony. *See also Tarkington*, *supra* (holding that there was no *Doyle* violation under facts similar to *McIntosh* and citing *McIntosh*). Accordingly, we conclude that Blankenship's statement did not result in reversible error.

Affirmed.

VAUGHT and ROAF, JJ., agree.