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DOCUMENT TO THE COURT AND ALL PARTIES TO THE
ACTION.**

Supreme Court of Kentucky

2012-SC-000495-MR
AND
2013-SC-000496-MR

ROBERT KYLE

APPELLANT

V. ON APPEAL FROM WARREN CIRCUIT COURT
HONORABLE STEVE ALAN WILSON, JUDGE
NO. 10-CR-00064

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING, IN PART; REVERSING, IN PART; AND REMANDING

In two separate jury trials now consolidated for appeal, Robert Kyle was convicted on charges stemming from a total of three robberies occurring roughly two months apart.¹ In total, Kyle was convicted of three counts of first-degree robbery and three counts of theft by deception under \$500. Kyle was then sentenced to a total of 42 years' imprisonment.

¹ Throughout this opinion, we refer to Kyle's trial for two counts of first-degree robbery (2012-SC-000495-MR) as the *first trial*. Kyle's subsequent trial for only one count of first-degree robbery (2013-SC-000496-MR) is referred to as the *second trial*.

On appeal, as a matter of right,² Kyle now challenges his convictions on the basis that the confessions admitted in each trial were obtained in violation of his constitutional right to remain silent. We agree with Kyle and reverse the convictions in the first trial because we hold that the confession should have been suppressed as improperly obtained from Kyle after he attempted to end police interrogation. As to the conviction in the second trial, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND.

A. Case No. 2012-SC-000495-MR and the First Trial.

On New Year's Eve, an African-American man wielding a gun entered a Cash Advance store. The man, recognized by some employees from his past patronage, demanded all the money from the cash registers and threatened the employees with deadly harm if they did not comply. The man exited the Cash Advance with the money and escaped in a silver getaway car.

Five days later, another area Cash Advance was robbed by an African-American man armed with a gun. The man entered the store and demanded the cashier give him all the money. The man walked behind the counter, pointed the gun at the cashier, and repeated the demand for all the money. After receiving the money, the man fled on foot.

An employee of a nearby car dealership saw the robber leaving the Cash Advance with the cash in his hands. The employee got into a car, called the police, and pursued the man. Over the course of the chase, the employee was unable to maintain direct visual contact at all times. At one point, the man

² Ky. Const. § 110(2)(b).

went down a one-way street; and the employee was unable to follow him. The employee tracked the robber to the backyard of a house. When the police arrived on scene, the employee directed their attention to the house where the robber disappeared.

The police approached the house and attempted to engage a woman who was sitting on the front porch. The woman, Latoria Jaji, was Kyle's girlfriend. She was uncooperative and refused to allow police to search the house so police formed a perimeter around the residence. Jaji entered the house, remained inside for a brief time, and re-emerged to consent to a search of the house. The search did not produce the suspected robber thought to be hiding inside, but police did find men's gloves and coin rolls bearing the name of "Cash Express." During the search, the police encountered a locked bedroom door for which Jaji claimed to lack the key.

Jaji's grandmother, who had all the keys to the residence, arrived on the scene and granted consent for a full search. The police re-entered the house and noticed beneath several boxes of canned goods and an ironing board a metal handle attached to the floor in the utility room. Suspecting perhaps a trap door, officers moved the items to reveal a door. Behind the door, police found Kyle, an African-American man, tucked away in the crawlspace of the house.

The search also produced a black puffy jacket matching the description provided by various eyewitnesses to the robbery. Jaji directed police to a hidden stash of money in the bathroom. And in Jaji's vehicle, police found a

backpack with an ID card for “Quincy Loggins,” along with checks from an account in Loggins’s name. “Quincy Loggins” was the name employees of Cash Advance associated with Kyle because he had opened an account under that name.

Police arrested Kyle and took him in for questioning. During the interrogation, Kyle repeatedly attempted to end the questioning but his demands were ignored. After a relatively short period of questioning, Kyle confessed to the robberies.

Kyle was indicted for two counts of first-degree robbery and three counts of theft by deception under \$500.³ At trial, the Commonwealth presented a string of eyewitnesses, including the Cash Advance employees from both locations, the car dealership employee, a fast-food restaurant employee who saw Kyle escape, along with Jaji. The jury found Kyle guilty of all charges, and the trial court sentenced Kyle to thirty-two years’ imprisonment.

B. The Dunlavy Robbery and the Second Trial.

One night about two months before the Cash Advance robberies, Andrew Dunlavy, a university student, was moving items from his car to his apartment. A dimly lit alley separated Dunlavy from his car and his apartment. As Dunlavy walked through this alley toward his apartment, an African-American male brandishing what appeared to be a knife suddenly emerged out of the darkness and shoved Dunlavy against a nearby fence. The man demanded all

³ Although this case presents separate trials, there was only one indictment. So Kyle’s full indictment included three counts of first-degree robbery rather than just the two mentioned here.

of Dunlavy's money. Dunlavy handed over his wallet, which contained \$25.00, as well as Dunlavy's debit and credit cards. The robber retreated into the darkness.

Dunlavy called 911. The police issued an alert for a suspect matching the description Dunlavy gave, but they found no suspect until Kyle was arrested for the Cash Advance robberies. The detective on the Cash Advance robberies received information that Kyle was the perpetrator of the Dunlavy robbery. So ten days after interrogating Kyle for the store robberies, the detective visited with Kyle in jail to question him about the Dunlavy robbery.

Initially, Kyle denied any involvement in the Dunlavy robbery. But he eventually confessed to robbing a college student. During his confession, Kyle provided the police with details generally consistent with Dunlavy's description of the incident, although he did claim the knife was actually a screwdriver.

Kyle was charged with and convicted of first-degree robbery of Dunlavy. The trial court sentenced Kyle to ten years' imprisonment, to run consecutively with the thirty-two year sentence for the Cash Advance robberies.

II. ANALYSIS.

A. Kyle's Right to Silence was Violated, and His Confession Should Have Been Suppressed.

Police must cease interrogation "[i]f the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent[.]"⁴ This principle has become engrained in our law and popular culture

⁴ *Miranda v. Arizona*, 384 U.S. 436, 473-74 (1967).

since the Supreme Court's famous pronouncement in *Miranda* nearly fifty years ago. Kyle challenges his interrogation on the basis that despite his repeated attempt to end interrogation, the police continued questioning him, thereby obtaining a confession at the expense of his constitutional right to silence. Before trial, Kyle sought to have the confession suppressed; but the trial court denied the motion following a hearing. Because Kyle's invocation of his right to silence was unequivocal, we hold that the trial court erred by denying Kyle's motion to suppress the confession.

Kyle's interrogation began with the police engaging in polite chatter. The detective read Kyle his *Miranda* rights, which Kyle waived. After this comfortable opening, the questioning quickly intensified, resulting in the following exchange:

Detective: I've already caught you in, I know it's been several lies, because what you're telling me is not true. I know you didn't go in that crawlspace.

Kyle: *I'm through talking. I'm through talking.*

Detective: Well listen to me, then.

Kyle: I don't even want to listen.

Detective: Okay, well listen anyway.

.....

Kyle: OK, whatever, *I'm through talking, man.* I told you what I did. Go fucking do what you're going to do.

Detective: I can make things easier for you.

[Kyle continues to explain he was in the crawlspace because he had been fighting with Jaji and was cooling off.]

Detective: Do you love your girlfriend?

Kyle: Man, I love her to death. That's my wife.

Detective: You know she's going to jail for you.

Kyle: She ain't going to jail for me.

Detective: For hiding you.

Kyle: C'mon man.

Detective: She's going to jail for hiding you.

Kyle: C'mon man. Whatever man. *I'm through talking.*

Detective: Are you a stand up guy or a sit down guy, cause

Kyle: *I'm through talking.*

Detective: Well don't talk, just

Kyle: I don't even wanna fucking listen to be honest with you.

Detective: Well don't listen, but I'm telling you.

[Questioning continues for another 15 minutes. The detective continues to tell Kyle that it is all over and he should deal with it the best way he can. The detective also assures Kyle that he will put in a good word for Kyle if Kyle will confess.]

Kyle: C'mon man, I didn't rob shit. If you're gonna charge me, charge me with it, *quit talking to me, man.*

[Roughly three minutes later, as the detective continued to talk, Kyle confessed to the robberies.]⁵

To be sure, the interrogation was a heated exchange. Kyle seemed prone to emotional outbursts, and the detective also seemed agitated. After reviewing the confession, the trial court denied Kyle's suppression motion because—

⁵ (Emphasis added.)

despite Kyle's repeated declaration to the detective that he was through talking—Kyle never stopped answering the detective's persistent questions. The trial court made no acknowledgement of the fact that Kyle continued to talk in response to continued questioning from the detective. So in the trial court's view, Kyle did not assert his right to silence in a manner that a reasonable police officer would be able to ascertain that Kyle no longer wished to talk.

The right to silence is crucial during the interrogation setting. In *Michigan v. Mosley*, the Court made clear how important a suspect's right to silence is in this context: "Through the exercise of his option to terminate questioning[, the suspect] can control the time at which questioning occurs, the subjects discussed, and the duration of the interrogation."⁶ Of course, any suspect who "desires the protection of the privilege . . . must claim it[.]"⁷ This invocation of the right to silence must be unambiguous.⁸ And any incriminating statements made in response to police questioning following an unambiguous invocation should be suppressed.⁹

The Supreme Court has repeatedly recognized that "no ritualistic formula or talismanic phrase is essential in order to invoke the privilege against self-

⁶ 423 U.S. 96, 103-04 (1975).

⁷ *Bartley v. Commonwealth*, 445 S.W.3d 1, 5 (Ky. 2014) (quoting *United States v. Monia*, 317 U.S. 424, 427 (1943)).

⁸ *Berghuis v. Thompkins*, 560 U.S. 370, 381 (2010).

⁹ *Bartley*, 445 S.W.3d at 5.

incrimination.”¹⁰ The words used by a suspect in invoking his rights are to be “understood as ordinary people would understand them[.]”¹¹ We are unable to imagine how “I’m through talking” could be construed as meaning anything other than exactly what it says: I no longer wish to talk.¹² And even were we to conclude “I’m through talking” was ambiguous, the statement “Quit talking to me, man” is unequivocal. The detective could have asked questions designed to clarify Kyle’s intent with his repeated assertions of “I’m through talking” as a number of jurisdictions¹³ have required and the Supreme Court has labeled “good police practice[.]”¹⁴ But here the detective chose to push forward with the interrogation. In no way was Kyle’s right to silence “scrupulously honored[.]”¹⁵

The trial court’s reasoning that Kyle continued talking is unavailing. A suspect who continues talking after invoking his right to silence could perhaps be considered acting inconsistently with that invocation; therefore, a court could find he “made a deliberate choice to relinquish the protection those rights

¹⁰ *Emspak v. United States*, 349 U.S. 190, 194 (1955); see also *Davis v. United States*, 512 U.S. 452, 459 (1994) (“[A] suspect need not speak with the discrimination of an Oxford don[.]”) (internal quotation marks omitted).

¹¹ *Connecticut v. Barrett*, 479 U.S. 523, 529 (1987).

¹² Though unpublished, in *Walker v. Commonwealth*, 2006 WL 1360279 at *4 (2004-SC-000815-MR May 18, 2006), we noted that a statement like “I don’t want to do this anymore” would be sufficient “because [it] expresses the suspect’s desire to terminate the interview.” We mention this here because “I’m through talking” did express Kyle’s desire to terminate the interrogation.

¹³ *Smith v. Illinois*, 469 U.S. 91, 96 n.3 (1984) (compiling the different methods adopted by jurisdictions to deal with ambiguous invocations of rights).

¹⁴ *Davis*, 512 U.S. at 461.

¹⁵ *Miranda*, 384 U.S. at 479.

afford.”¹⁶ But the problem here is that while Kyle did keep talking, it was only in response to the detective’s comments. The Supreme Court cast serious doubt on this analysis in *Smith v. Illinois*: “[U]nder the clear logical force of settled precedent, an accused’s *postrequest* responses to further interrogation may not be used to cast retrospective doubt on the clarity of the initial request itself.”¹⁷

The trial court’s instant error is of constitutional magnitude, and the error is not harmless beyond a reasonable doubt.¹⁸ The Commonwealth’s case against Kyle no doubt involved strong direct and circumstantial evidence, but inconsistent eyewitness testimony was also shown. In any event, we cannot overestimate the contribution Kyle’s confession may have played in his guilty verdict. After all, “[a] confession is like no other evidence. Indeed, the defendant’s own confession is probably the most . . . damaging evidence that can be admitted against him.”¹⁹ We cannot say with any confidence—certainly not beyond a reasonable doubt—erroneously admitting Kyle’s confession did not contribute to his conviction.²⁰ So the convictions in the first trial and the

¹⁶ *Bartley*, 445 S.W.3d at 13.

¹⁷ 469 U.S. at 100.

¹⁸ See, e.g., *Heard v. Commonwealth*, 217 S.W.3d 240, 244 (Ky. 2007).

¹⁹ *Arizona v. Fulminate*, 499 U.S. 279, 296 (1991) (internal quotation marks omitted).

²⁰ See *Chapman v. California*, 386 U.S. 18, 23-24 (1967). In *Kotteakos v. United States*, 328 U.S. 750 (1946), the Court also noted that with regard to “forced confessions,” a reversal is appropriate “although on other evidence guilt might be taken to be clear.” *Id.* at 765 n.19. This rejects the Commonwealth’s argument that there was sufficient evidence even without Kyle’s confession.

resulting judgment must be reversed, and the case remanded to the trial court for further proceedings.

In reversing Kyle's convictions because of the improper admission of Kyle's confession, we need not reach the issue of whether Kyle's expert witness regarding false confessions should have been allowed to testify. And it does not warrant our review as an issue likely to recur on retrial²¹ because a false-confession expert may not be relevant on retrial with Kyle's confession suppressed.

B. Shackling Kyle During the Second Trial was not Palpable Error.

At the beginning of the second trial, the trial judge informed the parties that Kyle would remain in leg shackles throughout the trial. On the record, the trial judge stated:

For the record, Mr. Kyle is shackled. I have put underpinning around, the court personnel have put underpinning around so that it's not noticeable by the jury as to the fact that he is manacled. The court's doing that for the reason that the defendant already has a 32-year sentence over his head and the fact that this is a serious violent crime. The court is taking these necessary precautions in order to protect against any potential of this defendant acting out in any way. For the record, Mr. Kyle has never acted out in court. I acknowledge that. I just think weighing these things, I am taking precautions.

Kyle never objected to this decision. So this issue is not preserved for appellate review. Nevertheless, Kyle requests palpable-error review under Kentucky Rules of Criminal Procedure (RCr) 10.26. Countering Kyle's palpable-error

²¹ See, e.g., *Bell v. Commonwealth*, 245 S.W.3d 738, 743 (Ky. 2008) ("Because the judgment has been reversed for the foregoing reasons, we will address only those additional assignments of error that are likely to recur upon retrial."); *Terry v. Commonwealth*, 153 S.W.3d 794, 797 (Ky. 2005) ("We will also address other issues that are likely to recur upon retrial.").

argument, the Commonwealth argues the shackles were not visible to the jury during the trial so no palpable error resulted.

Our stance on shackling defendants during trial is clear and long-standing: only when confronted with extraordinary circumstances is the practice allowed.²² Before a trial court may allow shackles or other restraints to remain on a defendant at trial, the trial court must first “encounter[] some good grounds for believing such defendants might attempt to do violence or to escape during their trials.”²³ In the past, we have approved of such “good grounds” when trial courts were faced with defendants who previously had fled the courtroom, were belligerent in proceedings before trial, or were skilled in martial arts and had a history of flight.²⁴

The record before us presents no such basis for shackling Kyle. As we pointed out in *Barbour v. Commonwealth*, if the grounds here were held to be sufficient, “a trial court would be free to predict a defendant’s behavior solely from his status as a convicted felon, without making any specific findings that

²² See *Barbour v. Commonwealth*, 204 S.W.3d 606, 612 (Ky. 2006). The pall of disfavor cast over the practice of shackling has constitutional foundation, as well. In *Deck v. Missouri*, 544 U.S. 622 (2005), the Supreme Court acknowledged the Fifth and Fourteenth Amendments prohibit the use of physical restraints visible to the jury absent a trial determination the restraints are justified. In addition, our rules of criminal procedure prohibit the practice. See RCr 8.28(5) (“Except for good cause shown the judge shall not permit the defendant to be seen by the jury in shackles or other devices for physical restraint.”).

²³ *Barbour*, 204 S.W.3d at 612 (quoting *Tunget v. Commonwealth*, 198 S.W.2d 785, 786 (Ky. 1947)).

²⁴ See *Barbour*, 204 S.W.3d at 612-14 (citing *Commonwealth v. Conley*, 959 S.W.2d 77, 78 (Ky. 1997); *Peterson v. Commonwealth*, 160 S.W.3d 730, 734 (Ky. 2005); *Hill v. Commonwealth*, 125 S.W.3d 221, 235-35 (Ky. 2004)).

he posed a risk of violence in or escape from the courtroom.”²⁵ There can be no doubt that the record is devoid of a sufficient articulation by the trial court of findings to justify shackling Kyle.

All that said, the trial court took precautions to conceal Kyle’s shackles from being visible to the jury—specifically, the trial court had black cloth skirting draped underneath counsel table. We have previously noted that our disfavor of shackles on defendants is primarily limited to *visible* shackles, *i.e.*, shackles visible to the jury that may negatively impact a defendant’s presumption of innocence. Our rule of criminal procedure governing restraints on defendants, RCr 8.28(5), is limited to visible restraints: “Except for good cause shown the judge shall not permit the defendant to be seen by the jury in shackles or other devices for physical restraint.” In *Grady v. Commonwealth*,²⁶ we concluded, “RCr 8.28(5) is not implicated where the jury cannot see the restraining device. . . . [W]here a restraint cannot be *seen* (or otherwise detected by the jury), the trial court may use the restraint at its discretion provided there is good reason for doing so.”²⁷

We can agree with Kyle that the trial court expressed no “good cause” or “good reason” for keeping him in shackles during trial. Perhaps even that could be viewed as an abuse of discretion. But because Kyle failed to object,

²⁵ *Id.* at 614. Going further, “[t]he nature of the charges against a particular defendant cannot themselves provide the entire justification for shackling; rather, all of the relevant factors must be considered[.]”

²⁶ 325 S.W.3d 333, 359 (Ky. 2010).

²⁷ *Id.* This is consistent with the Supreme Court’s discussion of shackling within the context of constitutional rights in *Deck*, 544 U.S. 622.

the question becomes whether the trial court's decision was palpably erroneous resulting in manifest injustice or affecting Kyle's substantial rights.²⁸ Simply put, to receive relief under our palpable-error review, Kyle must show a different result was probable or the "error [was] so fundamental as to threaten [his] entitlement to due process of law."²⁹

Taking into account the evidence implicating Kyle's guilt and the fact that the shackles were not visible to the jury, we see no palpable error in Kyle's trial. There is little, if any, probability that without the shackles—more accurately, without the black-cloth draping—the result at Kyle's trial would have been different. And Kyle's due-process rights are implicated with *visible* shackles. This analysis should not be read as an endorsement for trial courts to shackle defendants as long as the shackles are hidden. Instead, we merely conclude there was no palpable error in this case given the facts as presented.

C. The Trial Court Should Have Conducted an Evidentiary Hearing Regarding Kyle's Confession in the Second Trial, but the Error was Harmless.

Ten days after Kyle confessed to the Cash Advance robberies, the same detective interviewed Kyle regarding the Dunlavy robbery. During that conversation, Kyle eventually confessed to committing the crime. At trial, Kyle objected to the playing of his confession before the jury and requested the trial judge suppress the evidence based on the proposition that because the detective had disregarded his attempts to cease interrogation ten days before

²⁸ See RCr 10.26; *Martin v. Commonwealth*, 207 S.W.3d 1, 3-4 (Ky. 2006).

²⁹ *Martin*, 207 S.W.3d at 3.

Kyle felt any attempt at stopping the interrogation at issue would likewise be disregarded. After a discussion at the bench with the Commonwealth and Kyle's counsel, the trial court denied Kyle's attempt to suppress the confession. During the discussion, which it is important to point out took place approximately a year after the first trial, the trial court admitted to being somewhat hazy on the details of Kyle's confession.

On appeal, Kyle urges reversal because the trial court failed to hold an evidentiary hearing as required by RCr 9.78.³⁰ There can be no doubt that RCr 9.78, by its plain language and our case law, mandates a trial court hold an evidentiary hearing when a defendant moves to suppress evidence. The rule states in no uncertain terms: "If at any time before trial a defendant moves to suppress, or *during trial makes timely objection* to the admission of evidence consisting of . . . a confession[,] . . . the trial court *shall* conduct an evidentiary hearing" ³¹

Over time, this Court has likewise insisted that a trial court *must* hold a hearing on a defendant's motion to suppress. But the error associated with the

³⁰ At the time of Kyle's trial, RCr 9.78 existed and governed motions to suppress. Effective January 1, 2015, RCr 9.78 was replaced by RCr 8.27 via an order of this Court. We highlight this discrepancy in an attempt to alleviate confusion among practitioners. Of note, RCr 8.27 is equally as clear as RCr 9.78 was on an evidentiary hearing's mandate: "The court *shall* conduct a hearing on the record and before trial on issues raised by a motion to suppress evidence." RCr 8.27(2) (emphasis added).

³¹ (Emphasis added.) It is worthwhile to point out that RCr 8.27 does not mandate an evidentiary hearing when a defendant objects to evidence at trial, rather than filing a pretrial motion. First of all, RCr 8.18(1)(f), in its current form, requires a "Rule 8.27 motion to suppress evidence" to be "raised before trial" except for good cause shown. And the terms of RCr 8.27(1)-(2) limit their application to the period "before trial."

failure to hold an evidentiary hearing has been routinely subject to harmless-error review.³² If the error is not harmless, the proper remedy is “to remand to the trial court for a post-trial hearing on the issue of voluntariness: if the confession is found voluntary, the conviction stands; if the confession is found to be involuntary[,] the accused is entitled to a new trial without the confession[] being admitted in evidence.”³³ But this remedy is not automatic. In order for this remedy to be available, a defendant “must allege facts which would, if proven true, indicate the involuntariness of his confession.”³⁴

Kyle’s argument is similar to the argument presented in *Clewis v. Texas*.³⁵ Marvin Clewis was convicted of murdering his wife, and the jury recommended twenty-five years’ imprisonment. At trial, Clewis sought to exclude three separate incriminating statements he made to police, claiming the statements were not voluntarily made. The third statement, a written confession, was the central point of the case.³⁶ After reviewing the totality of the circumstances surrounding Clewis’s other statements, the Court was unable to find Clewis’s third statement voluntary. Instead, the Court noted the third statement should be suppressed because it could not be “separated from the circumstances surrounding the two earlier ‘confessions.’ There [was] no

³² See, e.g., *Mills v. Commonwealth*, 996 S.W.2d 473, 481 (Ky. 1999), *overruled on other grounds by Padgett v. Commonwealth*, 312 S.W.3d 336 (Ky. 2010).

³³ *Lewis v. Commonwealth*, 42 S.W.3d 605, 611 (Ky. 2001) (quoting *United States v. Davidson*, 768 F.2d 1266, 1270 (11th Cir. 1985)).

³⁴ *Lewis*, 42 S.W.3d at 611.

³⁵ 386 U.S. 707 (1967).

³⁶ The first and second statements were confessions, as well.

break in the stream of events from the time . . . when [Clewis] was taken to the police station to the time . . . some nine days later that he signed the statement in issue, sufficient to insulate the statement from the effect of all that went before.”³⁷ Clewis’s interrogation before giving the third statement showed evidence of coercive tactics, which the Court summed up in three parts:

- 1) Clewis was never fully advised of his rights;
- 2) Clewis’s initial arrest was not supported by probable cause, he was interrogated initially for thirty-eight hours, he was interrogated by several different officers in several different buildings, he was taken on a trip to another town and the gravesite, and the police subjected Clewis to multiple polygraph tests; and
- 3) the record provided reason for concern over the impairment of Clewis’s mental faculties as a result of “inadequate sleep and food, sickness, and long subjection to police custody with little or no contact with anyone other than police.”³⁸

Much like Kyle, Clewis’s argument, simply put, was that the impropriety associated with the first two statements was so pervasive that the third statement should have been excluded. But unlike Clewis’s statement, Kyle’s interrogation *does* contain a break in the stream of events leading up to the second confession. As we previously acknowledged, the police violated Kyle’s right to silence, but ten days elapsed with little or no police contact before Kyle

³⁷ *Clewis*, 366 U.S. at 710.

³⁸ *Id.* at 711-12.

was interrogated for the Dunlavy robbery, a separate crime.³⁹ And perhaps more importantly, Kyle’s interrogation contains no record of such coercive tactics as experienced by Clewis. Kyle was informed of his *Miranda* rights before both the first and second interrogations and was not subject to tactics even remotely classified as overtly coercive.

Kyle, of course, alleges that he did not believe he had the right to silence in the second interrogation because the detective had ignored his efforts to stop the first interrogation. Essentially then, in Kyle’s view, the detective violated his right to silence in both interrogations. But neither our case law nor that of the Supreme Court supports this argument.⁴⁰ At bottom, “[i]t is difficult to tell with certainty what motivates a suspect to speak.”⁴¹ The trial court’s error was harmless because Kyle simply presented no evidence or reasonable argument that the second confession was involuntary—even if we assume Kyle’s version of events to be true. And, as we noted previously, we require a defendant to show not only that the trial court failed to hold a hearing, but also “that his version of events, if true, would require the conclusion that his confession was

³⁹ The Supreme Court has previously acknowledged interrogation on a separate crime after a defendant exercises his right to silence is permissible. See *Mosley*, 423 U.S. at 103-07. While *Mosley* dealt with an interrogation mere hours after the initial interrogation was ceased by Mosley’s invocation of his right to silence, a different detective performed the subsequent interrogation. As we have noted, Kyle was interrogated by the same detective so *Mosley*’s application is not as apparent as may seem at first glance. More importantly, *Mosley* dealt with a situation where police *did* scrupulously honor the defendant’s right to silence, unlike this case.

⁴⁰ Kyle’s counsel acknowledged as much to the trial court during the discussion following the motion to suppress at issue.

⁴¹ *Oregon v. Elstad*, 470 U.S. 298, 313 (1985).

involuntary”⁴² before we entertain the remedy of remanding for a retrospective hearing.

RCr 9.78 mandates an evidentiary hearing; and, in some ways, this case illustrates why that mandate is critical. In light of the time between trials, the evidence sought to be suppressed, and the fog of memory, an evidentiary hearing perhaps could have been useful to all parties in distilling the issues and accurately understanding the facts. But the trial court’s error in failing to hold such evidentiary hearing was harmless.

III. CONCLUSION.

“I’m through talking.” A clearer invocation of a suspect’s right to silence would be difficult to imagine. Kyle’s words were unambiguous as he stated *repeatedly* his desire to end his interrogation, but the detective disregarded Kyle’s request and continued interrogating him until he finally made a full confession. This interrogation violated Kyle’s constitutional right to remain silent so it must be suppressed because we are unwilling to consider this error harmless beyond a reasonable doubt. Accordingly, Kyle’s convictions in the first trial must be reversed and the case returned to the trial court for further proceedings consistent with this Opinion. To that extent, the judgment is reversed and the case returned to the trial court for further proceedings.

⁴² *Lewis*, 42 S.W.3d at 611; *see also Grady*, 325 S.W.3d at 350 (holding that a defendant will be “entitled to reversal or remand only after he is, first, denied an opportunity to put forward evidence at a hearing addressing a *Miranda* violation and, second, where he alleges facts on appeal, that if believed to be true, would merit a finding that his confession was obtained in violation of *Miranda*.”).

As for Kyle's second trial, we do not find the trial court's decision to leave Kyle shackled during trial to be a palpable error. With regard to Kyle's confession admitted into evidence in the second trial, the trial court erred in failing to conduct an evidentiary hearing regarding Kyle's confession but that error was harmless. The conviction and sentence from the second trial stand; and, to that extent, the judgment is affirmed.

All sitting. All concur.

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