

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EUGENE CARL REID,

Defendant-Appellant.

UNPUBLISHED
November 1, 2005

No. 256236
Saginaw Circuit Court
LC No. 03-023341-FH

Before: Sawyer, P.J., and Talbot and Borrello, JJ.

BORRELLO, J. (*dissenting*).

I respectfully dissent from the opinion of my brother jurists because the assistant prosecutor who tried this case intentionally elicited improper testimony regarding defendant's post-arrest and post-*Miranda*¹ silence, and this evidence was submitted to the jury as substantive evidence from which the jury could draw an inference of guilt. Because the prosecutor's elicitation and use of this evidence substantially violated defendant's due process rights, I would reverse defendant's conviction and remand for a new trial.

In *People v Dennis*, 464 Mich 567; 628 NW2d 502 (2001), our Supreme Court held that the prosecutor's single, inadvertent reference to the defendant's exercise of his right to remain silent after he was arrested was inappropriate. *Dennis, supra* at 583. However, the Supreme Court ruled that the testimony did not violate the defendant's constitutional right to due process because the prosecutor did not use the testimony about the defendant's post-*Miranda* silence against the defendant. *Id.* at 579-580. The defendant in *Dennis* was tried for various drug offenses. At issue in *Dennis* was the following testimony of a police detective which concerned the defendant's conduct after he had been arrested:

Q. What type of investigation follow-up did you do with regard to this?

A. I went out and attempted to interview [defendant], and at that time it was refused. He wished to speak to an attorney prior to me asking him any questions. [*Id.* at 570.]

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

In rendering its decision in *Dennis*, our Supreme Court relied on the United States Supreme Court's decision in *Doyle v Ohio*, 426 US 610; 96 S Ct 2240; 49 L Ed 2d 91 (1976). The *Doyle* Court "held that the use of a criminal defendant's silence 'at the time of arrest and after receiving *Miranda* warnings' for impeachment purposes violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution." *Dennis*, *supra* at 573, quoting *Doyle*, *supra* at 619.

Although there is no indication from the record that defendant was advised of his rights under *Miranda* when he was arrested, I disagree with the majority's conclusion that there was no duty to give *Miranda* warnings in this case. The facts of the case reveal that defendant was in police custody after he was arrested and that he remained in police custody at the time in which he was exercised his constitutional right to remain silent. In *Dennis*, under similar circumstances, our Supreme Court presumed that the defendant's silence constituted post-*Miranda* silence even though the trial court record did not include any express mention that the defendant had been advised of his *Miranda* rights. *Id.* at 570-571. I would similarly conclude that defendant's silence in the instant case constitutes "post-*Miranda*" silence, notwithstanding the fact that the trial court record did not expressly mention whether defendant had been advised of his *Miranda* rights. I dispute the majority's assertion that I have somehow misapplied *Dennis*, and I would note that our Supreme Court's conclusion that the prosecutor in *Dennis* "effectively stipulated" that the defendant in that case was in police custody and had been advised of his *Miranda* rights was based not on an express and specific stipulation by the prosecutor at trial, but on a statement in the prosecutor's brief on appeal to the Supreme Court which, in my opinion, was ambiguous and did not amount to an explicit stipulation. Therefore, I would conclude that the absence of such a statement in the prosecutor's brief in this case does not render improper my reliance on *Dennis*.

I also disagree with the majority's conclusion that the claimed error in this case was merely evidentiary, and not constitutional. The prosecutor, in asking Fresorger not only once, but twice, whether defendant said anything when Fresorger discovered the crack cocaine on defendant's person, improperly used defendant's post-*Miranda* silence against him. Because defendant did not testify at trial, the prosecutor elicited the testimony regarding defendant's silence not merely to impeach defendant, but for use as substantive evidence of defendant's guilt. While *Doyle* held that a defendant's due process rights are violated when a prosecutor *impeaches* a defendant with evidence of his post-*Miranda* silence, I would hold "that it is also fundamentally unfair, and therefore, a deprivation of due process, for the prosecution to use a defendant's post-*Miranda* silence as affirmative proof at trial." *Id.* at 585 (Kelly, J., dissenting).

In *Dennis*, although the Supreme Court ultimately held that the evidence elicited by the prosecutor's improper question did not violate the defendant's due process rights because there was no improper "use" of the defendant's post-*Miranda* silence against him, it did deem "inappropriate" the prosecutor's question regarding the defendant's silence. The prosecutor's conduct in the instant case was substantially more egregious than the prosecutor's conduct in *Dennis* and therefore was not only "inappropriate," but also resulted in the violation of defendant's due process rights. In the instant case, the prosecutor, who was a veteran assistant prosecutor, asked Fresorger two direct and specific questions regarding defendant's silence. First, the prosecutor asked whether defendant said anything when the plastic baggie containing crack cocaine fell from his pant leg. Second, the prosecutor asked whether defendant said

anything when Fresorger told his partners that he had just discovered crack cocaine on defendant's person. The prosecutor's questions in this case were designed to elicit and could have only elicited a specific response implicating defendant's silence or lack thereof. In contrast, the prosecutor's conduct in *Dennis* involved only a single, open-ended question. *Id.* at 575. I would hold that the prosecutor, by asking such pointed and direct questions regarding defendant's silence, must have intended to elicit testimony regarding defendant's silence or lack thereof. In contrast, the Supreme Court characterized the prosecutor's statement in *Dennis* as "inadvertent." *Id.* at 577. Given the direct and specific nature of the prosecutor's questions in the instant case, and the inevitable responses the questions were designed to elicit, it is clear that the prosecutor's references to defendant's post-*Miranda* silence in this case were not of the same character as those in *Dennis*. Rather, the prosecutor's questions in the instant case were intentionally designed to elicit improper testimony.

Moreover, I reject any contention that the prosecutor did not use defendant's silence against him merely because he did not argue it during closing argument. Even though the prosecutor made no direct reference to defendant's silence during closing argument, the prosecutor's questions, and the testimony elicited by those questions, "enabled the jury to infer guilt from defendant's silence, thereby violating his due process rights." *Id.* at 588 (Kelly, J., dissenting). The prosecutor intentionally presented the improper evidence to the jury as substantive evidence from which the jury could infer defendant's guilt. Under these circumstances, one can only conclude that the prosecutor used the improper evidence against defendant.

I also disagree with the majority's conclusion that any error in this case was harmless. Violations of the constitution that occur during presentation of a case to the jury are subject to a harmless error analysis. *People v Solomon (Amended Opinion)*, 220 Mich App 527, 536; 560 NW2d 651 (1996). Such violations may be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt. *Id.* I would conclude that the error in this case was not harmless for two reasons. First, Fresorger was the only witness to testify that he observed defendant in possession of crack cocaine. Although Fresorger's testimony was not contradicted, the testimony of one witness, while sufficient to support a conviction, can hardly be deemed overwhelming. Therefore, in my view, it cannot be said that the jury's exposure to improper testimony concerning defendant's silence did not contribute to the guilty verdict. *Id.* Second, the trial court did not issue a specific curative instruction. In *Dennis*, the trial court, in its final instructions to the jury, issued a "strong curative instruction"² that specifically addressed the

² The trial court's curative instruction in *Dennis* was as follows:

'Also, at one time Detective Cooper made mention of the fact that when we [sic] went out to the jail to talk to [defendant], [defendant] did not want to talk to him and [defendant] said that he wanted a lawyer.

This is an absolute right that every citizen of this country has. In fact, if Officer Cooper had talked to [defendant], he would have had to tell [defendant] before he even started talking that [defendant] had a right to

(continued...)

improper testimony referencing the defendant's silence. *Dennis, supra* at 583. In contrast, in the instant case, the trial court's final jury instructions included only general instructions³ that did not specifically address the prosecutor's improper questions to Fresorger. In my view, the trial court's final instructions were not sufficient to cure any error from the improperly admitted evidence because they were too general and did not specifically address the prosecutor's improper questions which resulted in Fresorger's improper testimony. I find the trial court's failure to give a strong and specific final cautionary instruction particularly troublesome because not only did the trial court fail to strike the improper testimony or issue a cautionary instruction immediately after the prosecutor elicited the improper testimony and defense counsel objected and subsequently moved for a mistrial, but after denying defendant's motion for a mistrial, the trial resumed, and the prosecutor continued to question Fresorger. The trial court never ordered the improper testimony stricken and never advised the jury to disregard the improper testimony that had just been elicited.

Generally, a trial court is not required to sua sponte give a limiting or cautionary instruction to a jury absent a request for such an instruction or a proper objection. *People v Shepherd*, 63 Mich App 316, 321; 234 NW2d 502 (1975). Furthermore, when a defendant does not request an instruction or object to its omission, reversal is generally not warranted unless necessary to redress a miscarriage of justice. *People v Tucker*, 181 Mich App 246, 256; 448 NW2d 811 (1989). The goal of a defense objection to improper remarks by the prosecutor is a curative instruction. *People v Fuqua*, 146 Mich App 250, 254; 379 NW2d 442 (1985), overruled on other grounds in *People v Gray*, 466 Mich 44 (2002). In this case, while defendant moved for a mistrial based on the prosecutor's improper questions, defense counsel failed to request a cautionary instruction either at the time the prosecutor asked the improper questions or when the trial court gave its final instructions to the jury. Moreover, the trial court specifically asked the parties if they had any corrections or additions to the instructions as given, and defense counsel responded in the negative.⁴ Nevertheless, I would hold that reversal is warranted in this case even absent a request for such a cautionary instruction because under the specific facts of this

(...continued)

refuse to talk, and [defendant] had a right to have a lawyer present when he was talking to the officer.

So the fact that [defendant] said he wanted a lawyer and didn't want to talk to the officer cannot be used by you in any way and is not any indication of anything. It's a constitutional right that every citizen of this country has.' [Dennis, *supra* at 571.]

³ The trial court instructed the jury that it could only consider evidence that was properly admitted, that it could not consider evidence that the trial court ruled should be excluded or stricken, that defendant had a right not to testify and that the jury could not consider the fact that defendant did not testify or let the fact that he did not testify affect the verdict.

⁴ Defense counsel's failure to ask for a curative instruction or to request a cautionary statement be read to the jury regarding the improper questions and responses raises serious doubts as to the effectiveness of trial counsel and whether this case should be remanded for a new trial based on the United States Supreme Court's ruling in *United States v Cronin*, 466 US 648; 104 S Ct 2039; 80 L Ed 2d 657 (1984).

case, the trial court's failure to issue a cautionary instruction did result in a miscarriage of justice. In this case, the prosecutor, a veteran assistant prosecutor, questioned a witness, not once, but twice, regarding defendant's silence when the police discovered crack cocaine on his person. Furthermore, the prosecutor's questions were not innocuous, open-ended, and inadvertent; rather, they were direct and specific and could only have been intended to elicit a specific response implicating defendant's silence or lack thereof. It is also significant that the witness responded to the prosecutor's second improper question even after the trial court sustained defendant's objection to that question. Finally, defendant called the prosecutor's improper conduct to the trial court's attention by objecting to the prosecutor's second question and then moving for a mistrial on the grounds that the prosecutor's questions improperly brought the issue of defendant's silence to the attention of the jury. Under these specific circumstances, I would find that the trial court should have issued a cautionary instruction or stricken the improper testimony. Specifically, the trial court had a duty to issue a specific cautionary instruction, if not immediately after the elicitation of the improper testimony, then in its final instructions to the jury. The trial court's failure to do so in the instant case resulted in a miscarriage of justice because the prosecutor's improper questions elicited testimony from which the jury was permitted to infer guilt from defendant's silence, thereby violating defendant's due process rights.

For all these reasons, I would reverse defendant's conviction and remand for a new trial.

/s/ Stephen L. Borrello