STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0833

State of Minnesota,
Respondent,

vs.

Michael Allen Haukoos,
Appellant.

Filed April 23, 2018
Affirmed
Reilly, Judge

Freeborn County District Court
File No. A17-0833

Lori Swanson, Attorney General, St. Paul, Minnesota; and

David J. Walker, Freeborn County Attorney, Albert Lea, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Rochelle R. Winn, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Reilly, Presiding Judge; Halbrooks, Judge; and Connolly, Judge.

U N P U B L I S H E D O P I N I O N

REILLY, Judge

Appellant Michael Allen Haukoos appeals his conviction and sentence for possession of burglary tools. Haukoos argues that we should reverse his conviction and remand his case for a new trial because the prosecutor committed prejudicial misconduct

by eliciting evidence of his post-arrest, post-*Miranda* silence during the state's case-in-chief, cross-examination of Haukoos, and closing argument. Although the state's use of Haukoos's post-arrest, post-*Miranda* silence during its cross-examination of Haukoos and closing argument violated the rule enunciated in *Doyle v. Ohio*, 426 U.S. 610, 619, 96 S. Ct. 2240, 2245 (1976), we conclude under the plain-error standard that the error did not affect Haukoos's substantial rights, we affirm.

FACTS

On January 8, 2016, Haukoos was charged with one count of possession of burglary tools in violation of Minn. Stat. § 609.59 (2014), for an incident occurring the night before in the Indian Hills neighborhood outside of Albert Lee when law enforcement discovered him under a deck near a residence with a bag of tools. Haukoos pleaded not guilty, and he took his case to a jury trial.

At trial, the defense's theme presented to the jury was that law enforcement jumped to conclusions about Haukoos's intent and that they failed to consider alternative explanations to his behavior, mainly that Haukoos was looking for his dog.

The state's case-in-chief contained the following testimony. On the evening of January 7, 2016, at around 9:00 p.m., R.H., a resident of the Indian Hills neighborhood, noticed an unfamiliar vehicle driving slowly by his house four times every 10 to 15 minutes. R.H. then saw an unfamiliar man walking alone past his home while it was snowing. The man did not have a dog. R.H. called police about what he observed.

Deputies Joshua Partlow and Christina Boardman and Officer Deming responded. On arrival, Partlow noticed footprints in the freshly fallen snow. He followed the footprints

to a vacant Indian Hills residence and then up the unplowed driveway of that property. Before Partlow and Boardman followed the tracks behind the residence, a vehicle pulled up to them.

The woman in the vehicle, later identified as Brianna Jergens, asked law enforcement what was going on. She told them that she was looking for a friend's house in the area but did not know the address. Law enforcement noticed tools in the back of Jergens's vehicle, and a walkie-talkie. After law enforcement asked why there were two wet spots on the passenger-side floor and two drinks in the cup holder, Jergens denied having a recent passenger. Jergens was detained while law enforcement investigated.

Law enforcement then followed the footprints, which showed no tread marks in the snow, up to a residence's patio door, back door, and garage door. They followed the footprints to a small shed on a hill that was up on stilts with a deck around it. The footprints tracked up onto the deck and then off the edge of the deck. Law enforcement did not observe animal prints in the area or anything related to a dog.

Law enforcement then found Haukoos under the deck in a fetal position, wearing shoes with duct tape around the soles. Haukoos had a bag with a crowbar, pry bar, screwdriver, and pliers. After he was arrested, Haukoos told law enforcement that he was looking for his dog. Partlow found two pocketknives, a flashlight, a black ski mask, and some spare batteries on Haukoos after he was searched.

Deputy Partlow testified at trial. On cross-examination defense counsel asked Partlow, "Did you ask Mr. Haukoos what the duct tape was about?" Partlow stated, "I don't believe so." On cross-examination Partlow agreed that he did not follow other sets

of footprints that did not lead to residences. Deputy Boardman also testified at trial. On cross-examination, defense counsel asked Boardman: "Did you ask Mr. Haukoos, after the arrest, what kind of dog it was?" Boardman replied, "I did not." Boardman agreed on cross-examination that he was not able to follow every set of footprints and he was focused on the footprints around the residence.

On the state's redirect of Boardman, the following exchange occurred:

> PROSECUTOR: The defense attorney asked you whether or not you asked defendant some questions. Did you ask the defendant to speak with you?
> BOARDMAN: I did, in the jail.
> PROSECUTOR: And did he agree to speak with you?
> BOARDMAN: No. After I read *Miranda*, he refused—
> PROSECUTOR: He did not agree to speak with you, then?
> BOARDMAN: No.

Haukoos and his fiancée, Brianna Jergens, testified at trial. Haukoos stated that on January 7, 2016, he was cleaning up rabbit waste in his rabbit hutch and that he had duct tape around his shoes to make it easier to clean rabbit waste off the bottom of his shoes. He stated that there was some tension and fighting between him and Jergens that day so the two decided to get out of the house and visit Haukoos's father around 8:30 or 9:00 p.m. Haukoos said that he brought his dog Rosie on the trip because she has "abandonment issues" and cannot stay in the house alone. While in the car, Haukoos and Jergens continued arguing. The argument got heated, and Jergens wanted to return home. She stopped the car near the Indian Hills neighborhood and told Haukoos she was going to sit in the back seat. When Jergens opened up the back car door, Rosie darted out and ran away.

Jergens testified that at this point she drove the car around the Indian Hills area three times to find the dog. She said Haukoos exited the vehicle and the two argued about whether to pursue the dog on foot. Haukoos asked Jergens, "What if the dog gets trapped . . . entangled or something?" In response, Jergens threw tools out of the car window at Haukoos. Jergens said that as she was driving away Haukoos yelled "How [am I] supposed to carry the tools?", and then she threw a recyclable grocery bag out the window and drove away. Twenty to thirty minutes later Jergens changed her mind about leaving and returned to the area to look for Haukoos. She then encountered law enforcement.

Haukoos testified that he walked around for two hours looking for his dog and that he knocked on one residence's door but no one answered. He said he ended up in a wooded area near a lake. Because he was cold and tired, he sought shelter. Haukoos said that he went under the deck and fell asleep, and he was woken up by law enforcement.

During the state's cross-examination of Haukoos the following exchange occurred:

> PROSECUTOR: Clearly, in your line of work, and with the education you have, and the experiences you had, you developed some communication skills; right?
> HAUKOOS: Yes.
> PROSECUTOR: Do you know how to talk to law enforcement officers?
> HAUKOOS: Definitely.
> PROSECUTOR: Not afraid of law enforcement officers, are you?
> HAUKOOS: Not whatsoever.

During his closing argument the prosecutor argued that Haukoos's behavior was inconsistent with someone looking for their dog:

> You know, [Haukoos] could – he could, theoretically, I guess, go to a house and ask for help by knocking on a door. And

> then when the officers approached him, as well, he didn't ask for help. He made one comment that he was looking for his dog, and that's all he said. *And when Deputy Boardman went further to ask him questions, he did not answer her questions.* This was not a person who was looking for a dog. Because when you think of it, if you are looking for a dog, what is the first thing you do when you have contact with somebody else? . . . 'Have you seen my dog?' That's what you would do if you saw another person.

(Emphasis added.)

The jury found Haukoos guilty. The district court sentenced Haukoos to 12 months and one day in prison, but stayed the sentence for three years.

Haukoos now appeals.

D E C I S I O N

Haukoos argues that his Fifth Amendment right to remain silent was violated, and that reversible plain-error occurred, when the prosecutor: (1) asked Deputy Boardman questions on redirect that elicited answers about Haukoos's post-arrest, post-*Miranda* silence; (2) implicitly referenced Haukoos's silence when he asked Haukoos on cross-examination whether he knew how to talk to law enforcement; and (3) argued in his closing argument that Haukoos would not answer Boardman's questions.

Appellate courts review alleged prosecutorial misconduct under a modified plain-error standard when a defendant fails to object at trial. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). Haukoos did not object at trial and his claim involves prosecutorial misconduct, so we apply the modified plain-error standard. Under this test, Haukoos has the burden to show that the prosecutor's actions constituted (1) error (2) that is plain. *Id*. An error is "plain" if it is "clear or obvious." *State v. Jones*, 753 N.W.2d 677, 686 (Minn.

2008). A clear or obvious prosecutorial error occurs when the prosecutor's conduct "contravenes case law, a rule, or a standard of conduct." *Id*. If plain error is established, the burden then shifts to the state to demonstrate that the error did not affect the defendant's substantial rights. *Id*. If the defendant demonstrates plain error and the state fails to carry its burden on the substantial-rights prong, then appellate courts will assess whether reversal is required to ensure "the fairness, integrity, or public reputation of judicial proceedings." *State v. Peltier*, 874 N.W.2d 792, 799 (Minn. 2016) (quotation omitted).

A. Plain Error

The Fifth Amendment to the United States Constitution prohibits the government from compelling defendants in any criminal case to be a witness against themselves. U.S. Const. amend. V; *accord* Minn. Const. art. I, sec. 7. The United States and the Minnesota Supreme Courts, and this court, have analyzed the multitude of ways a defendant's silence may or may not be used by the state. For example, the state's use of a defendant's pre-arrest silence for impeachment of that defendant's credibility is permissible under the Fifth Amendment. *Jenkins v. Anderson*, 447 U.S. 231, 238-39, 100 S. Ct. 2124, 2129 (1980). The state may also use a defendant's pre-arrest silence in its case-in-chief. *State v. Borg*, 806 N.W.2d 535, 543 (Minn. 2011). The state's use of a defendant's post-arrest, but pre-*Miranda*, silence in its case-in-chief is permissible when the defendant was under no government-imposed compulsion to speak. *State v. Johnson*, 811 N.W.2d 136, 148 (Minn. App. 2012), *review denied* (Minn. Mar. 28, 2012). The use of a defendant's post-arrest, pre-*Miranda* silence is not a due-process violation if used as impeachment to cross-examine a defendant. *Fletcher v. Weir*, 455 U.S. 603, 607, 102 S. Ct. 1309, 1312 (1982).

Generally, the state's use of a defendant's post-arrest, post-*Miranda* silence for impeachment of a defendant's exculpatory version of events told at trial violates due process. *Doyle v. Ohio*, 426 U.S. 610, 619, 96 S. Ct. 2240, 2245 (1976). The state also may not use a defendant's post-arrest, post-*Miranda* silence as substantive evidence in its case-in-chief. *Wainwright v. Greenfield*, 474 U.S. 284, 293, 106 S. Ct. 634, 639 (1986). Because Haukoos challenges three separate instances of the state's use of his silence, we examine each in turn.

i. *Redirect of Boardman – "Did he agree to speak with you?"*

The first use of Haukoos's silence came during the state's case-in-chief after the defense asked Boardman on cross-examination whether she had asked Haukoos what kind of dog he owned, and she replied she had not. On redirect, the prosecutor elicited testimony from Boardman that she asked to speak with Haukoos in jail, but that Haukoos refused to speak with her after he was informed of his rights under *Miranda*. Therefore, the state elicited evidence of Haukoos's post-arrest, post-*Miranda* silence during its case-in-chief.

The general rule from *Doyle* is that a prosecutor's use of a defendant's post-arrest, post-*Miranda* silence in order to impeach his or her exculpatory story told at trial is impermissible. 426 U.S. at 619, 96 S. Ct. at 2245; *accord State v. Billups*, 264 N.W.2d 137, 139 (Minn. 1978) (holding that it was error to permit the state to impeach a defendant by cross-examination on his failure to offer alibi evidence at any time prior to the trial). This is true as well for substantive evidence during the state's case-in-chief. *Greenfield*, 474 U.S. at 293, 106 S. Ct. at 639. The theory behind *Doyle* is that a "*Miranda* warning is a governmental inducement which often causes defendants to exercise their right to silence

and that it would be improper and unfair to then turn around and allow the government to use the resulting silence as a weapon against the defendant at trial." *State v. Goar*, 295 N.W.2d 633, 634 (Minn. 1980).

The *Doyle* rule, though, is not ironclad, and the Supreme Court noted that post-arrest, post-*Miranda* silence could be used to impeach a defendant who testified at trial as to an exculpatory version of events, if the defendant falsely claimed they told police the same version on arrest. 426 U.S. at 619 n.11, 96 S. Ct. at 2245 n.11.

Additionally, the Minnesota Supreme Court examined the exception to the *Doyle* rule in *State v. McCullum*, 289 N.W.2d 89, 93 (Minn. 1979), and *State v. Hjerstrom*, 287 N.W.2d 625, 628 (Minn. 1979). *See also Goar*, 295 N.W.2d at 634 (concluding state's use of defendant's post-*Miranda* refusal to give a written statement was permissible after defense attorney cross-examined officer about whether that defendant had denied his guilt and had been fully cooperative). In *McCullum*, during the state's case-in-chief, defense counsel elicited from police officers on cross-examination that the defendant had been courteous and cooperative. 289 N.W.2d at 93. Relying on the exception in *Doyle*, the supreme court ruled that it was not error for the state to elicit testimony from another officer that the defendant refused to give a written statement post-*Miranda* and asked to speak with an attorney because the information was used to rebut the defense's theory that the defendant had cooperated with police. *Id*. at 92-93.

In *Hjerstrom*, during the state's case-in-chief, defense counsel cross-examined an officer who arrested the defendant close to the scene of a burglary. 287 N.W.2d at 626-27. Defense counsel asked a "series of questions for the purpose of showing that the arresting

officer had not questioned the defendant in any detail about what he had been doing" when arrested. *Id*. at 628. In an effort to refute the impression that the police had not shown any real interest in hearing defendant's explanation of why he was near the scene of the burglary, the prosecutor next elicited testimony from an officer that law enforcement attempted to speak with the defendant, but was unsuccessful. *Id*. The prosecutor did not elicit any specific testimony about the defendant having received a *Miranda* warning and refusing to talk. *Id*. The supreme court held the state's questioning was proper under the *Doyle* exception because it was used to rebut the impression created on cross-examination that the police were not interested in the defendant's version of what occurred. *Id*.

Here, the state's redirect of Boardman is similar to *Hjerstrom* and *McCullum* and falls within the exception to the general rule in *Doyle*. Defense counsel "opened the door" when he asked the deputies whether they questioned Haukoos about the duct tape on his shoes or the type of dog he owned. *See State v. Guzman*, 892 N.W.2d 801, 814 (Minn. 2017) (explaining that "[t]he opening-the-door doctrine is essentially one of fairness and common sense, based on the proposition that one party should not have an unfair advantage . . . and that the factfinder should not be presented with a misleading or distorted representation of reality"). Defense counsel also argued in opening statements that the case was about law enforcement "jumping to conclusions," and that they did not consider alternative explanations for Haukoos's behavior. Defense counsel's questions and the answers on cross-examination implied that law enforcement did not do their due diligence in pursuing questioning of Haukoos. While Boardman mentioned that Haukoos invoked

silence after being read his *Miranda* rights, the prosecutor cut Boardman off midsentence, asked whether Haukoos agreed to speak and then moved away from the topic.

We conclude that the prosecutor's questions of Boardman on re-direct about whether she sought out Haukoos for questioning fell within the *Doyle* exception because it was used to rebut defense counsel's implication that law enforcement had "jumped to conclusions" and did not fully investigate Haukoos's claim that he was looking for his dog.

ii. *Cross-examination of Haukoos – "Do you know how to talk to law enforcement officers?"*

The prosecutor also referenced Haukoos's post-arrest, post-*Miranda* silence when he asked Haukoos about his communication skills and whether he knew "how to speak to law enforcement officers." Haukoos argues this line of questioning was improper.

The state's cross-examination of Haukoos on his exculpatory version of events by referencing his post-arrest, post-*Miranda* silence violated the general rule in *Doyle*. The question, though, is whether the *Doyle* exception also applies here.

The prosecutor's questioning of Haukoos here might be considered a continuation of the state's rebuttal to the implication made earlier by the defense that deputies ignored Haukoos's explanation about his lost dog and had therefore jumped to conclusions. The state's line of questioning here is unlike its earlier redirect of Deputy Boardman, however, because it did not concern law enforcement's investigation efforts and was therefore not used to rebut the defense's earlier implication that law enforcement "jumped to conclusions." To rebut the defense's theory, the prosecutor could have simply asked Haukoos on cross-examination whether law enforcement attempted to speak with him,

without referencing his silence. Additionally, Haukoos never claimed on direct examination that he attempted to, but was unable to, give a statement to police. While the prosecutor's questions about Haukoos's communication skills was an indirect way of making the point that Haukoos chose not to speak with law enforcement, the state is not permitted to make "insinuations and innuendos which plant in the minds of the jury a prejudicial belief in the existence of evidence which is otherwise inadmissible." *State v. Currie*, 267 Minn. 294, 301, 126 N.W.2d 389, 395 (1964).

In sum, the prosecutor's cross-examination of Haukoos regarding his post-arrest, post-*Miranda* silence to impeach his exculpatory version of events was improper under *Doyle*. Because the error contravened caselaw, it was plain.

iii. *Closing argument – "And when Deputy Boardman went further to ask him questions, he did not answer her questions."*

Haukoos next argues that the prosecutor improperly referenced Haukoos's post-arrest, post-*Miranda* silence in the state's closing argument. We agree.

Here, the prosecutor told the jury, in an effort to discredit Haukoos's exculpatory version of events told at trial, that when Boardman attempted to speak with Haukoos—which occurred post-arrest, post-*Miranda*—that Haukoos refused to speak. This portion of the state's closing argument went beyond arguing that law enforcement was diligent and had attempted to speak with Haukoos. Instead, the prosecutor used Haukoos's post-arrest, post-*Miranda* silence in his argument as evidence of Haukoos's intent to use the tools to commit burglary and to show his exculpatory version of events was not a reasonable explanation. *Doyle* expressly forbids the state's use of silence in this manner because it

was not used for the limited purpose of rebutting defense counsel's earlier assertion that law enforcement did not fully investigate the case. The prosecutor's error is plain because it contravenes the rule in *Doyle*.

The state argues that this line of argument was permissible because (1) the prosecutor did not explicitly argue that the jury should infer guilt from Haukoos's silence, (2) Haukoos did not remain silent at trial, and (3) the state was rebutting Haukoos's "ridiculous" version of events at trial that he was looking for his dog. We disagree that the prosecutor did not use Haukoos's silence as evidence of guilt in his closing argument. But even assuming all three of the state's points here are true, the *Doyle* rule prohibited the prosecutor from discussing Haukoos's "failure to offer alibi evidence [to law enforcement] at any time prior to trial," unless such evidence was used to rebut a false claim of cooperativeness or that law enforcement failed to investigate. *Billups*, 264 N.W.2d at 139. The prosecutor's reference to Haukoos's silence in this case was not limited to rebutting Haukoos's assertion that law enforcement failed to investigate his claims.

B. Substantial Rights

Having determined that plain error occurred during the state's cross-examination of Haukoos and in its closing argument, we next examine whether the improper use of Haukoos's silence affected his substantial rights. A criminal defendant's substantial rights are affected when "there is a reasonable likelihood that the absence of misconduct would have had a significant effect on the jury's verdict." *State v. Davis*, 735 N.W.2d 674, 681-82 (Minn. 2007). The state has the burden to show Haukoos's substantial rights were not affected. *Id*. at 681. Appellate court's consider "[1] the strength of the evidence against

the defendant, [2] the pervasiveness of the improper suggestions, and [3] whether the defendant had an opportunity to (or made efforts to) rebut the improper suggestions." *Id*. at 682.

We agree with the state that Haukoos's substantial rights were not affected in this case. First, the evidence against Haukoos is overwhelming. Haukoos and his fiancée were observed casing the Indian Hills neighborhood in a vehicle. Law enforcement discovered Haukoos under the deck with a black ski mask; a flashlight with spare batteries; and a bag containing a crowbar, a pry bar, pliers, and a screwdriver. He had duct tape covering the treads of his shoes. None of the state's witnesses observed any signs of a missing dog. The defense's explanation at trial as to why Haukoos ended up under the deck with a bag of tools, a black ski mask, and with duct tape on his shoes is far-fetched and fanciful. The first factor weighs heavily against Haukoos.

Second, on review of the entire record, the prosecutor's improper use of Haukoos's silence is not pervasive. The suggestion of silence in the cross-examination of Haukoos is limited to six lines in the trial transcript within 49 pages of cross-examination. The portion of the state's closing argument that led up to the mention of Haukoos's silence is about one half of a page in a 20-page closing argument discussing multiple topics such as (1) whether the tools were burglary tools, (2) the definition of possession, (3) circumstances showing intent, and (4) the believability and credibility of Haukoos's testimony. The prosecutor's mention of Haukoos's silence in his closing argument is one small point within a larger argument about the many circumstances demonstrating Haukoos's intent to use the tools to commit burglary. The second factor weighs in the state's favor.

Third, Haukoos had the opportunity to object during trial and to request an instruction that the jury disregard the statements, but he did not do so. This factor also weighs in the state's favor.

Balancing these factors demonstrates that the state met its burden in showing that there is not a reasonable likelihood that the absence of the prosecutor's improper use of Haukoos's silence would have had a significant effect on the jury's verdict. Because the state met its burden on the third plain-error prong, Haukoos's substantial rights were not affected by the plain error and so we affirm his conviction and sentence.

Affirmed.