

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LINSEY SMITH,

Defendant-Appellant.

UNPUBLISHED

October 1, 1996

No. 156491

LC No. 91-2803-FC

Before: McDonald, P.J., and O’Connell and M. J. Talbot*, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of first-degree murder, MCL 750.316; MSA 28.548, and resulting sentence of mandatory life in prison with no parole. We reverse and remand for retrial.

On appeal defendant raises numerous allegations of trial error, one of which we find meritorious. Defendant claims he was denied his right to a fair trial and effective assistance of counsel because both his defense counsel and the prosecutor elicited testimony that defendant remained silent after receiving his *Miranda*¹ warnings. We agree.

During cross-examination of the arresting officer, defense counsel elicited testimony that defendant voluntarily turned himself in to the police the day after the murder, that defendant was accompanied by his sister and brother when he arrived at the police station, that defendant showed no signs of resistance, and that defendant was quiet and peaceful and “never said a word” when read his *Miranda* warnings. Counsel then asked the officer, “So after you got [defendant] back in the office, did you question [him]?” The prosecutor asked to approach the bench, a conference was held off the record and questioning resumed without counsel revisiting the issue of police questioning. However, before the officer was excused a juror submitted a question inquiring whether the officer had interrogated defendant, a second sidebar conference was held, and defense counsel continued as follows:

* Circuit judge, sitting on the Court of Appeals by assignment.

Q: You had [defendant] back in your office. Remember that discussion just prior to going off the record?

A: Yes

Q: And did [defendant] indicate to you that he wished to remain silent until such time as he talked to an attorney?

A: Yes, sir.

Following this line of questions, the prosecutor questioned the officer at great length about each and every *Miranda* warning given to defendant. Defense counsel subsequently raised an objection to the detail elicited by the prosecution and explained he believed the prosecutor had exceeded the scope agreed upon during the in-chambers conference. The prosecutor responded defendant had “opened the door,” and that he wanted to make certain the jury knew the police acted appropriately with respect to administering defendant’s *Miranda* warnings. The court noted for the record that after the juror’s question was received, defense counsel was given the choice as to how to proceed on the issue.

On remand, when asked why he raised the issue of defendant’s silence during trial, defense counsel explained he did not necessarily intend to expose defendant’s silence, but only emphasize the fact defendant voluntarily turned himself in, that he cooperated, and offered no resistance. Counsel admitted it may have been “inappropriate” to specifically inquire whether defendant invoked his right to remain silent, but further explained he did not want the jury to be left with the impression the defense was hiding something.

On appeal defendant contends the prosecutor and defense counsel violated his constitutional right to remain silent. While defendant is correct in asserting evidence of his silence should have been strictly precluded and was raised in violation of his constitutional rights, see *Doyle v Ohio*, 426 US 610; 96 S Ct 2240; 49 L Ed 2d 91 (1976), such an error does not automatically require reversal. *People v Gilbert*, 183 Mich App 741; 455 NW2d 731 (1990). This Court must also consider the fact counsel is afforded great deference with respect to matters of trial strategy, *People v Barnett*, 163 Mich App 331; 414 NW2d 378 (1987), a prosecutor’s comments and actions are to be reviewed in context and in light of issues raised by the defense, *People v Simon*, 174 Mich App 649; 436 NW2d 695 (1989), and whether the erroneous admission of evidence of defendant’s silence was prejudicial or constituted harmless error. *Gilbert, supra*.

First, to establish a claim of ineffective assistance of counsel, defendant must show counsel’s performance fell below an objective standard of reasonableness, and that the representation so prejudiced defendant as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994). We believe defendant met this burden. Although counsel is afforded great deference in formulating and pursuing a trial strategy, *Barnett, supra*, here we find no sound strategy in counsel’s trek into the forbidden territory surrounding defendant’s silence.

On remand, counsel explained he had hoped to emphasize defendant went to the police station voluntarily, did not resist, and was cooperative. However, prior to the contested questioning, the officer had already noted defendant turned himself in and offered no resistance. Additionally, counsel knew before questioning the officer defendant had not cooperated with the police, refusing to answer any questions concerning the murder. Moreover, even after being cut short by the prosecutor's concern about defendant's constitutional rights, counsel chose to specifically inquire whether defendant invoked his right to remain silent. Counsel could have easily protected defendant's right to remain silent and the integrity of his accident defense by merely asking the officer whether defendant was questioned and then moving away from the issue. Having raised the defense of accident, and knowing defendant offered no information to the police, it is unreasonable to presume one would expose the fact defendant refused the opportunity to "explain his side of the story," as a legitimate strategic move.

Finally we conclude defendant was prejudiced by this error. Having been precluded from raising an insanity defense, the only defense presented at trial was that of accident. As already noted one would generally expect a person who harms another by accident to explain how the accident occurred or explain his side of the story. Having focused on defendant's failure to speak with the police counsel severely undermined defendant's only defense.

We also note defendant's right to a fair trial was further compromised by the actions of the prosecutor. Although the prosecutor's conduct is to be taken in context, and a certain amount of leeway is afforded when faced with having to address prejudicial issues first raised by the defense, *Simon, supra*, the prosecutor in this case exceeded those bounds and prejudicially violated defendant's right to remain silent by continuing to focus his questions on defendant's assertion of his right to remain silent.

Given our resolution of the above issue discussion of defendant's remaining allegations of error is unnecessary.

Defendant's conviction is reversed and the matter remanded for retrial.

/s/ Gary R. McDonald

/s/ Michael J. Talbot

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