

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL J. BORGNE,

Defendant-Appellant.

UNPUBLISHED

August 9, 2007

No. 269572

Wayne Circuit Court

LC No. 05-000173-01

Before: Meter, P.J., and Talbot and Owens, JJ.

TALBOT, J. (*dissenting*).

I respectfully dissent. Specifically, I believe defendant has failed to demonstrate a violation of *Doyle v Ohio*, 426 US 610, 619; 96 S Ct 2240; 49 L Ed 2d 91 (1976) and that, even if the prosecutor's trial questioning constituted an improper use or comment on defendant's post-*Miranda*¹ silence, any such error was harmless and does not require reversal.

Although I do not dispute the factual recitation provided by the majority, I believe further context for the cited verbal exchanges is necessary in order to properly evaluate the prosecutor's behavior in light of *Doyle* and its progeny. Notably, defendant made two important assertions. First, defendant indicated that at the time of his arrest he told police he fled the area and was found hiding in an abandoned building because "I was being shot at," but was precluded from providing further information because the police "put me in the back seat of the police car." Second, defendant stated at trial that he never, throughout any previous proceedings, was afforded the opportunity "to talk." In fact, defendant asserted on cross-examination that the first time he was able to provide his version of the events was at trial.

Initially it is necessary to address defendant's assertion he told police his flight at the crime scene was the result of being shot at and, when located in the abandoned building and arrested, that he completely cooperated with police. Arguably, this assertion of full cooperation with the police, which was raised during direct examination of defendant, opened the door to further development, *People v Sutton*, 436 Mich 575, 591 n 16; 464 NW2d 276 (1990), permitting the prosecutor to question and explore the extent of defendant's cooperative behavior

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

and to identify inconsistencies in the testimony. “[T]he bar to impeachment by silence of exculpatory trial testimony does not extend to impeachment with a refusal to speak during interrogation which is inconsistent with defendant’s own statements at trial claiming that he made postarrest statements while in custody.” *Id.* at 591. It has been recognized that *Doyle* distinguished cases “in which a defendant claims to have told the police the same version upon arrest.” *Id.* at 593. Specifically:

It goes almost without saying that the fact of post-arrest silence could be used by the prosecution to contradict a defendant who testifies to an exculpatory version of events and claims to have told the police the same version upon arrest. In that situation the fact of earlier silence would not be used to impeach the exculpatory story, but rather to challenge the defendant’s testimony as to his behavior following arrest. [*Id.*, citing *Doyle, supra* at 619-620 n 11.]

Hence, the prosecutor’s questioning of defendant’s verbal indications to police immediately following his arrest were both necessary and proper, especially given the testimony of the arresting officer that defendant did not provide an explanation for his presence in the building. In general, a “witness may be cross-examined on any matter relevant to any issue in the case, including credibility.” MRE 611(b). The circumstances of this case comports with the exception, which permits “impeachment of a defendant’s version of his postarrest behavior.” *People v Allen*, 201 Mich App 98, 103; 505 NW2d 869 (1993).

Further, defendant indicated he did not have the opportunity before trial to provide his version of the events. “Although defendant’s testimony would not have permitted the prosecutor to argue that his postarrest silence was inconsistent with his claim of innocence, it did permit the prosecutor to attempt to discredit defendant’s testimony by showing that defendant did have an opportunity before the trial to tell his side of the story. Having raised the issue of his opportunity to explain his version of the events, he ‘opened the door to a full and not just a selective development of that subject.’” *Allen, supra* at 103 (citations omitted). The majority of the challenged exchange between the prosecutor and defendant comprises merely an attempt by the prosecutor to demonstrate that defendant was afforded an opportunity to present his version of events and that the police did not preclude his provision of a statement.

Further, I believe the prosecutor’s cited comments during closing argument were not improper. A prosecutor “is entitled to fairly contest evidence presented by a defendant.” *People v Reid*, 233 Mich App 457, 477; 592 NW2d 767 (1999). Viewed contextually, the prosecutor’s comments on defendant’s postarrest silence were not used as direct evidence of defendant’s guilt. “Rather, the remarks were aimed at rebutting the impression that defendant did not have an opportunity to tell his version of the events,” *Allen, supra* at 104, and merely comprised an argument that defendant’s explanation of events was neither credible nor consistent with the testimony of other witnesses. A prosecutor is free to comment on the weakness of a defendant’s defense and to challenge the credibility of a defendant’s testimony based on the evidence. *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995); *Reid, supra* at 478.

Finally, even if we were to construe the comments by the prosecutor as comprising a violation of defendant’s post-*Miranda* silence, I would assert that any such error was harmless and does not require reversal. *People v Gilbert*, 183 Mich App 741, 747; 455 NW2d 731 (1990). “Two inquiries must be made to determine whether an error was harmless: first, whether the

error was so offensive to the maintenance of a sound judicial system that it can never be regarded as harmless and, second, whether the error was harmless beyond a reasonable doubt.” *Id.* at 747 (citations omitted). Even if we assume the prosecutor’s inquiries had constitutional implications, the questions were not so offensive or prolonged to be deemed intolerable. Further, the verbal exchange between the prosecutor and defendant did not impact the verdict given the evidence of defendant’s guilt. There was substantial evidence presented at trial, which included witness testimony and identification of defendant and his clothing, in addition to defendant’s arrest within blocks of the crime scene cowering in an abandoned building. Given the substantive amount of evidence supporting the jury’s determination of guilt, merely having revealed that defendant did not make a statement to police or exercised his right to silence following arrest had a negligible impact on the verdict.

Accordingly, I would affirm defendant’s convictions.

/s/ Michael J. Talbot