

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UNPUBLISHED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.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of possession with intent to deliver less than fifty grams of a controlled substance. MCL 333.7401(2)(a)(iv). The trial court sentenced defendant as a third habitual offender, MCL 769.11, to two to forty years' imprisonment. We affirm.

I. FACTS AND PROCEDURAL HISTORY

At approximately 10:00 P.M., on July 2, 2001, police observed defendant driving in a residential area of Saginaw. After defendant allegedly made a turn without activating his turn signal, the police followed defendant's vehicle. Defendant parked his vehicle in a driveway, and the police parked their police van on the street in a manner as to partially block the driveway to prevent defendant's vehicle from leaving. Sheriff Steven Fresorger approached defendant's vehicle. When defendant failed to produce a valid driver's license, Fresorger asked defendant to exit his vehicle and arrested him for failing to possess a driver's license. During the course of a pat-down search, Fresorger discovered \$750 in cash in defendant's left front pocket. In addition, Fresorger also observed a plastic baggie, containing 5.94 grams of crack cocaine, fall from the area of defendant's right ankle.

Defendant's sole issue on appeal relates to the following questions posed by the prosecutor during Fresorger's direct examination testimony at trial regarding defendant's post-arrest silence:

- Q.* Okay. What was done with the defendant at that point?
- A.* At that point in time, he was taken back to our van, and Detective Doran and Detective Skabardis was [sic] watching over him.

Q. What was he doing while – were his hands behind his back or in front when he was handcuffed?

A. Behind.

Q. When this baggy fell out of his pant leg, did he say anything?

A. He didn't say anything at all. He made no comment to me whatsoever.

Q. When you found this baggy with this suspected crack cocaine in it, did you say anything to your partners?

A. I advised them what I found.

Q. And when you advised them what you found, was [defendant] standing right next to you?

A. Yes.

Q. Did he say anything at that point?

At this point, defense counsel objected, and the trial court sustained the objection. Nevertheless, after the trial court sustained the objection, Fresorger responded, "No he did not." Defense counsel then asked that the jury be excused and moved for a mistrial, arguing that defendant was denied his Fifth Amendment privilege against self-incrimination when the prosecutor asked a question regarding defendant's silence after Fresorger discovered the crack cocaine in defendant's possession. According to defendant, the jury should not have been permitted to hear testimony regarding defendant's silence. The trial court denied defendant's motion for a mistrial, stating: "The motion is denied, the point being that he was never asked any questions. He simply said nothing. To me, it was irrelevant"

Despite defendant's objection to the prosecutor's use of defendant's post-arrest silence as evidence of his consciousness of possession, defendant admitted possessing the cocaine at trial. During his opening statement, prior to any mention of defendant's post-arrest silence, defendant's attorney presented to the jury his theory that defendant was guilty only of simple possession because there was insufficient evidence of intent to deliver. Then, during closing argument, defendant's attorney renewed this theory, stating that there was "no question" that defendant possessed the cocaine.

Defendant argues on appeal that the trial court erred in denying his motion for mistrial. According to defendant, the prosecutor improperly elicited testimony from Fresorger regarding defendant's post-arrest silence. Specifically, defendant contends that he was deprived of due process of law because the prosecutor's questions to Fresorger regarding defendant's post-arrest silence violated his Fifth Amendment privilege against self-incrimination and deprived him of his constitutional right to remain silent. Defendant further asserts that his Fifth Amendment right to remain silent was violated when Fresorger responded to the prosecutor's question after the trial court sustained defense counsel's objection to the question.

II. ANALYSIS

With respect to a defendant's claim of a Fifth Amendment violation, we review constitutional issues de novo. *People v Hickman*, 470 Mich 602, 605; 684 NW2d 267 (2004). An officer's obligation to give a *Miranda*¹ warning to an accused attaches only when the person is subject to custodial interrogation. *People v Ish*, 252 Mich App 115, 118; 652 NW2d 257 (2002). In this case, officers never asked defendant any questions; therefore, defendant was not subject to custodial interrogation, and there was no duty to give *Miranda* warnings.

The dissent's presumption that "defendant's silence in the instant case constitutes 'post-*Miranda*' silence," *post* at ___, results from a misapplication of *People v Dennis*, 464 Mich 567; 628 NW2d 502 (2001). The dissent reads *Dennis* as presuming "that the defendant's silence constituted post-*Miranda* silence even though the trial court record did not include any express mention that defendant had been advised of his *Miranda* rights." *Post* at ___. Crucial to the holding in *Dennis*, however, was that the prosecution "effectively stipulated that defendant was in police custody at the time of the attempted questioning and had been advised of his *Miranda* rights before rejecting Detective Cooper's attempt to interview him." *Dennis*, *supra* at 570-571.

The United States Supreme Court decisions on which our Supreme Court relied in *Dennis* are consistent with its holding. In *Doyle v Ohio*, 426 US 610, 612; 96 S Ct 2240; 49 L Ed 2d 94 (1976), the defendants were promptly arrested and given *Miranda* warnings. The Court held that "[s]ilence in the wake of these warnings may be nothing more than the arrestee's exercise of these *Miranda* rights." *Id.* at 617 (emphasis added). In *Greer v Miller*, 483 US 756, 760; 107 S Ct 3102; 97 L Ed 2d 618 (1987), Miller had also received *Miranda* warnings at the time of his arrest. The present case lacks any *Miranda* warnings or attempts to interrogate defendant. Without issuing *Miranda* warnings, there can be no "post-*Miranda*" silence, and neither *Dennis* nor *Doyle* holds otherwise.

Because no *Miranda* warnings were ever given in this case, defendant's claim of error on appeal must be evidentiary in nature, not constitutional. *People v Alexander*, 188 Mich App 96, 104; 469 NW2d 10 (1991) ("[I]f the prosecutor's questioning and commentary concerned silence which occurred after *Miranda* warnings were given, the issue is a constitutional one. If not, the issue is strictly an evidentiary matter."). As defendant raises an evidentiary matter on appeal, we review a trial court's decision to admit or exclude evidence for an abuse of discretion, *People v Manser*, 250 Mich App 21, 31; 645 NW2d 65 (2002), as well as a trial court's denial of a motion for a new trial, *People v Abraham*, 256 Mich App 265, 269; 662 NW2d 836 (2003). "An appellate court will find an abuse of discretion only where the denial of the motion was manifestly against the clear weight of the evidence." *Id.* (citation omitted). "The test is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *People v McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001).

As an evidentiary matter, the issue becomes one of relevance. Our Supreme Court has long precluded "admissibility of a defendant's failure to say anything in the face of an accusation as an adoptive or tacit admission under MRE 801(d)(2)(B) unless the defendant 'manifested his

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

adoption or belief in its truth” *People v McReavy*, 436 Mich 197, 213; 462 NW2d 1 (1990), referencing *People v Bigge*, 288 Mich 417; 285 NW 5 (1939). “The *Bigge* rule denies admissibility [of tacit admissions] because the inference of relevancy rests solely on the defendant's failure to deny.” *People v Hackett*, 460 Mich 202, 213; 596 NW2d 107 (1999), quoting *McReavy*, *supra*. Although a defendant’s “silence in the face of an accusation of criminal conduct cannot be used as evidence,” *People v Scobey*, 153 Mich App 82, 87; 395 NW2d 247 (1986), this rule is “limited to tacit admissions, in the form of a defendant’s failure to deny an accusation.” *Hackett*, *supra* at 214-215. Because the police in the present case never accused defendant of anything, the use of his post-arrest silence to infer consciousness of guilt does not run afoul of our Supreme Court precedent. *Id.* at 215 (“The silence referenced by the prosecutor did not occur in the face of an accusation. There is simply no statement that defendant’s silence can be construed as tacitly adopting. Thus, the rule of *Bigge* is not violated by the admission of the evidence.”).

The trial court in the present case correctly recognized that defendant’s objection to the prosecutor’s question was properly evidentiary, and not constitutional. The trial court sustained defendant’s objection on the grounds of relevance but denied defendant’s motion for a new trial. Defendant may have asked the court to strike Sheriff Fresorger’s response to the prosecutor’s question and read a curative instruction to the jury, but he failed to do so. The trial court, however, did not abuse its discretion in denying defendants’ motion for a mistrial. *McCray*, *supra*.

Moreover, even if the trial court had erred, the error was rendered harmless beyond a reasonable doubt when defense counsel admitted during closing argument that defendant possessed the cocaine. *People v Shepherd*, 472 Mich 343, 347-348; 697 NW2d 144 (2005); MRE 103(a). Reversal is not warranted by a denial of a motion for mistrial unless the defendant makes an affirmative showing of prejudice resulting from an abuse of discretion. *People v Vettese*, 195 Mich App 235, 245-246; 489 NW2d 514 (1992).

During opening statements, defense counsel stated, “The issue in this case is whether the prosecutor can prove beyond a reasonable doubt of intent to deliver, or, as this case is, simple possession. I suggest to you it’s the latter” Defense counsel later argued during closing, “Ladies and Gentlemen, [defendant] possessed cocaine. Did he? There’s no question about that.” Defendant’s argument on appeal is, therefore, that he is entitled to a new trial because the prosecution improperly used defendant’s silence as evidence to establish his possession of the cocaine—an element that defense counsel readily and emphatically admitted. Because the jury would have reached the same result without Fresorger’s testimony of defendant’s silence, any alleged error in admitting it into evidence was harmless beyond a reasonable doubt. *Shepherd*, *supra*; MRE 103(a).

Because defendant was at no point being interrogated by police, no duty to give *Miranda* warnings ever attached, and thus, no constitutional violation occurred. Any resulting evidentiary

error was then rendered harmless when defense counsel admitted during closing argument that defendant possessed the cocaine.

Affirmed.

/s/ David H. Sawyer

/s/ Michael J. Talbot