

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
January 16, 2014

v

JERMAINE ANTONIO JACKSON,
Defendant-Appellant.

No. 312755
Wayne Circuit Court
LC No. 12-005935-01-FC

Before: STEPHENS, P.J., and M. J. KELLY and RIORDAN, JJ.

PER CURIAM.

Defendant Jermaine Antonio Jackson appeals of right his jury trial convictions of second-degree murder, MCL 750.317, felon in possession of a firearm, MCL 750.224f, and carrying or possessing a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced Jackson as a fourth habitual offender, MCL 769.12, to serve 60 to 90 years in prison for his second-degree murder conviction, two to five years in prison for his felon in possession of a firearm conviction, and two years in prison for his felony-firearm conviction. Because we conclude there were no errors warranting a new trial, we affirm his convictions. However, because the prosecutor concedes that Jackson's judgment of sentence inaccurately states the crime victim assessment, we remand for the ministerial task of correcting that assessment.

I. RIGHT TO REMAIN SILENT

A. STANDARD OF REVIEW

Jackson first argues that the prosecutor improperly used his silence as evidence of guilt; because this error unfairly prejudiced his trial, he maintains, this Court must reverse and remand for a new trial. This Court reviews de novo whether a defendant's constitutional rights were violated at trial. *People v Shafier*, 483 Mich 205, 211; 768 NW2d 305 (2009).

B. ANALYSIS

Generally, the credibility of a witness may be attacked by showing that he failed to speak or act when so speaking or acting would be a natural reaction if the facts were in accordance with his testimony. *People v Martinez*, 190 Mich App 442, 446; 476 NW2d 641 (1991). However, under the Fifth Amendment to the United States Constitution, a criminal defendant cannot be

compelled to be a witness against himself. *People v Clary*, 494 Mich 260, 264-265; 833 NW2d 308 (2013). This constitutional privilege has been interpreted to include certain limitations on the prosecutor's ability to use a defendant's silence as substantive evidence of guilt. *Id.* at 265. The privilege against the use of a defendant's silence applies after the defendant's arrest and after having been given the warnings required under *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966). See *People v Borgne*, 483 Mich 178, 185-187, 186; 768 NW2d 290 (2009). Nevertheless, there is an exception to this privilege; a prosecutor may use a defendant's post-arrest, post-*Miranda* silence to impeach a defendant who testifies to an exculpatory version of events and claims to have told an officer that same version of events on arrest. In such a case, the defendant's silence would not be used to impeach his or her exculpatory story, but rather to challenge the defendant's testimony as to his or her behavior following arrest. *Id.* at 192, quoting *Doyle v Ohio*, 426 US 610, 619 n 11; 96 S Ct 2240; 49 L Ed 2d 91 (1976). This exception also applies when a defendant claims that the trial was his first opportunity to tell his version of the events. *People v Allen*, 201 Mich App 98, 103; 505 NW2d 869 (1993).

The record here is limited and does not clearly show whether Jackson had been arrested or advised of his right to remain silent when he stated that he wanted a lawyer. However, he testified that the officers had already taken him away and begun to question him when he asked for a lawyer.¹ The prosecution has not disputed that these events were post-arrest and post-*Miranda*. Moreover, the decision in *Miranda* requires that a person taken into custody be advised immediately that he has the right to remain silent. *Doyle*, 426 US at 617. Also, at trial, the prosecutor's probe into Jackson's silence was general, not specifying either before or after *Miranda* warnings, and therefore, inclusive of both. Without any additional evidence to clarify the situation, we shall assume for purposes of this appeal that Jackson's silence was post-arrest and post-*Miranda*.

In this case, the prosecutor tried to impeach Jackson's exculpatory story by showing that he never took advantage of his prior opportunities to explain his innocence; instead, he remained silent and asked for a lawyer. The prosecutor was not trying to refute whether Jackson made a statement to his probation officer; in fact, the prosecutor is the one who brought up Jackson's prior statement at trial. Further, if the prosecutor wished to show that Jackson never claimed self-defense prior to trial, the prosecutor could have called the probation officer to the stand and asked her about his prior statement. There is no prohibition on questioning a witness regarding a defendant's pre-arrest, pre-*Miranda* silence. See *Borgne*, 483 Mich at 185, 186. Instead, the prosecutor tried to undermine Jackson's credibility by questioning him regarding his silence. This is the type of questioning that *Doyle* prohibits. In addition, we conclude that there is no support in the record for concluding that an exception to the privilege applied to this case. See

¹ Jackson stated that his probation officer called the police officers to "come get [him]" and they "took [him] somewhere." Because there is no evidence to contradict his version of events, we conclude that he was in custody under the totality of the circumstances. *People v Mendez*, 225 Mich App 381, 382-83; 571 NW2d 528, 529 (1997).

Allen, 201 Mich App at 103. Consequently, we agree that it was error for the prosecutor to use Jackson's silence at trial.

Lastly, the recent United States Supreme Court opinion in *Salinas v Texas*, 570 US ___; 133 S Ct 2174; 186 L Ed 2d 376 (2013), is distinguishable. In *Salinas*, the defendant was interviewed by police, in his own home, regarding a murder for which he was the primary suspect. *Id.* at 2178. The defendant answered all of the questions until asked whether the defendant's shotgun would match the shells found at the murder scene. *Id.* At that point, the defendant "[l]ooked down at the floor, shuffled his feet, bit his bottom lip, cl[e]nched his hands in his lap, [and] began to tighten up" for a few moments. *Id.* The prosecution used the defendant's reaction to the police officer's questioning as evidence of guilt at trial. *Id.* The Supreme Court held that a defendant must affirmatively invoke his Fifth Amendment right to silence, otherwise the prosecution may use his silence against him at trial. *Id.* at 2180.

The *Salinas* defendant was being questioned in a noncustodial setting and was free to leave at any time. *Id.* Here, Jackson claims he was taken somewhere before the officers spoke to him, and there is no evidence to show that he was free to leave. Unlike *Salinas*, Jackson did assert his Fifth Amendment rights; he requested a lawyer and remained silent. By specifically asserting his Fifth Amendment right to counsel and remaining silent, Jackson plainly invoked his right to remain silent as well.

Having determined that it was error to allow the prosecutor to impeach Jackson with his silence, we nevertheless conclude that the error does not warrant relief. The erroneous admission of evidence does not constitute a structural error; accordingly, such an error can be harmless. See MCL 769.26; *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). In order to avoid reversal for an error of constitutional magnitude, "the beneficiary of the error [must] prove, and the court [must] determine, beyond a reasonable doubt that there is no reasonable possibility that the evidence complained of might have contributed to the conviction." *People v Anderson (After Remand)*, 446 Mich 392, 406; 521 NW2d 538 (1994) (quotation marks and citation omitted).

At trial, two eyewitnesses—neighbors living near the home where the shooting occurred—independently testified that they saw Jackson carrying a handgun prior to the shooting. Further, one stated that Jackson was the only person he saw with a weapon and that he looked agitated or upset. The other neighbor testified that he saw the entire exchange between Jackson and the decedent; he stated that Jackson threw the decedent to the ground before shooting him in the head. Jackson then shot the prone decedent four more times. That same neighbor testified that, before shooting the decedent, Jackson also fired a shotgun at a porch where others had gathered.

The testimony was consistent with evidence that six 9-millimeter shell casings and two other shell casings were found near the porch. It was also consistent with the medical examiner's testimony. The medical examiner testified that the decedent could have died from any of the seven gunshot injuries to his body. Further, the different angles of entry support the eyewitness neighbor's testimony that Jackson stood over the decedent and shot him all over. The additional bullet wounds did not show evidence of soot or gunpowder stippling, which indicated that they had been shot from at least two feet away. The overwhelming evidence supports the

prosecutor's version of events—namely, that Jackson became angry, shot the decedent, and then proceeded to stand over him and shoot him several more times. None of the testimony or evidence corroborates Jackson's claims that the decedent was shot during a close-range struggle for the gun. Therefore, we conclude that any error in the use of Jackson's silence at trial was harmless beyond a reasonable doubt. *Anderson (After Remand)*, 446 Mich at 406.

II. CRIME VICTIM'S RIGHTS ASSESSMENT

Jackson next argues that the trial court erred when it assessed a \$136 fee under the crime victim's assessment rather than the statutory \$130 assessment. See MCL 780.905(1)(a). Although Jackson did not preserve this claim of error, the prosecutor has conceded that the trial court plainly erred. See *Carines*, 460 Mich at 774. Therefore, we remand this case to the trial court for the ministerial task of amending the judgment of sentence to reflect an assessment of \$130.

Affirmed, but remanded for correction of the judgment of sentence. We do not retain jurisdiction.

/s/ Cynthia Diane Stephens

/s/ Michael J. Kelly

/s/ Michael J. Riordan