STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 9, 2007
v	No. 269572 Wayne Circuit Court
MICHAEL J. BORGNE, Defendant-Appellant.	LC No. 05-000173-01

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

PER CURIAM.

Defendant appeals as of right from his convictions by a jury of armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to 27 to 84 months in prison for the armed robbery conviction and to two years in prison for the felony-firearm conviction. We reverse and remand.

Defendant argues that the prosecutor's cross-examination of him on the subject of his post-arrest, post-*Miranda*[1] silence, and the prosecutor's closing arguments regarding that silence, violated defendant's constitutional rights. Defendant contends that he is entitled to a new trial, and we agree.

"To preserve an evidentiary issue for a review, a party opposing the admission of evidence must object at trial and specify the same ground for objection that it asserts on appeal." *People v Aldrich*, 246 Mich App 101; 631 NW2d 67 (2001). Because defendant failed to object to the prosecutor's use of his post-*Miranda* silence at trial, this issue is unpreserved. "[A]n unpreserved claim of constitutional error is reviewed for plain error affecting substantial rights. To avoid forfeiture under the plain error rule, a defendant must show actual prejudice." *People v Pipes*, 475 Mich 267, 274; 715 NW2d 290 (2006). The defendant bears the burden with respect to establishing prejudice and must show that the error "affected the outcome of the lower court proceedings." *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Additionally, reversal is only warranted if the error resulted in the conviction of an actually innocent defendant

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

or if the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Id*. at 763-764.

The prosecutor's conduct in this case violated *Doyle v Ohio*, 426 US 610, 619; 96 S Ct 2240; 49 L Ed 2d 91 (1976), in which the Supreme Court held that the "use for impeachment purposes" of the defendants' silence, "at the time of arrest and after receiving Miranda warnings, violated the Due Process Clause of the Fourteenth Amendment." As in *Doyle*, the prosecutor here extensively cross-examined defendant on his post-arrest, post-*Miranda* silence and deliberately drew the jury's attention to the subject.

The following exchanges took place at trial:

Q. And then you had the opportunity to sit down with Sargent [sic] Dunbeck here when you were under arrest?

A. Yes.

Q. That was at the precinct, correct?

A. Yes.

Q. Okay.

You never told Sargent [sic] Dunbeck any of this,[2] did you?

A. I believe I may have said I was being shot at.

Q. You were advised of your constitutional rights, correct?

A. Yes, sir.

Q. No question that you were under arrest and you didn't have to give a statement?

A. Yes, sir.

Q. You could have a lawyer there if you wanted to?

A. Yes, sir.

Q. You had the opportunity to give your version of the event?

A. Yes, sir.

[2] Defendant claimed at trial that, when the police found him in an abandoned building near the robbery location, he was hiding because someone had been shooting at him.

Q. You could stop answering questions at any time?

A. Yes, sir.

Q. That was no surprise to you?

A. Yes, sir.

Q. She was polite to you, she wasn't beating you over the head with a phone book or anything like that?

A. No.

Q. No problems with Sargent [sic] Dunbeck?

A. No.

Q. But you never made a statement did you?

A. No, I did not want to make a statement without an attorney present.

Q. Okay.

If you were arrested and knew you were being arrested for armed robbery, somebody was accusing you of robbing them at gunpoint.

A. I was going to wait for an attorney to help me address the matter.

Q. You never gave a statement after the fact though, did you?

A. No, I did not. I was advised not to.

Q. This is the first time you're giving a statement?

A. Yes, sir.

Q. First time anyone has heard this version of events from you?

A. Yes, sir.

Q. Were you concerned about finding the person that was shooting at you that night?

A. Yes, I was.

* * *

Q. And then when you had the chance to sit down with Sargent [sic] Dunbeck you didn't say anything that [sic]?

A. I wanted a lawyer present for any statement given.

Q. You never gave a statement ever in this case?

A. No, I did not. After that I retained a lawyer and was advised not to give a statement.

Q. Well, you didn't retain a lawyer until after the preliminary examination in this case, right?

A. Yes, sir.

Q. So when you were arrested that night on the early morning hours of now December 15, 2004[,] you didn't have a specific lawyer in mind, did you?

A. No.

Q. And it wasn't like you were in the process of consulting with the attorney, correct?

A. No, I wasn't.

Q. And then about two weeks later or so you go to the preliminary examination you still haven't retained an attorney.

A. I had a State appointed attorney.

Q. Correct. And you never gave a statement at that point with the State appointed attorney did you?

A. Never had a chance to.

Q. You didn't do it in court, did you?

A. Never had a chance to. I was never allowed to talk while I was in the courtroom. The lawyer advised me not to. That's when we fired the lawyer and retained Jonathan Jones.

Q. And up until today you still have [sic] given a statement in this case, not until the 11th hour of the trial, correct?

A. No, sir.

Q. This is basically the end of the trial right here.

A. Yes, sir. I wanted everyone to hear my side.

Defense counsel raised no objection to this line of questioning, and the trial court allowed it to continue. Therefore, unlike in *Greer v Miller*, 483 US 756, 764-765; 107 S Ct 3102; 97 L Ed 2d

618 (1987), in which the Supreme Court distinguished *Doyle*, this testimony was "submitted to the jury as evidence from which it was allowed to draw [a] permissible inference."

The prosecutor also used defendant's silence during closing arguments. He stated:

> Mr. Borgne out that night [sic] and he sits down with Sargent [sic] Dunbeck in the police station, you're under arrest for Armed Robbery, someone's saying you robbed 'em. What's your side of the story? Well, nothing. Let me think about it. A year goes by there's no statement ever given. If somebody was trying to kill Mr. Borgne he never mentions it. No concern over who's trying to kill him. There's no statement at all. Is that going to make sense, ladies and gentlemen? It defies logic.
>
> Forget whether he robbed somebody. If someone's trying to kill you and the police were there and had you in custody, you might want to at least mention it. You might want to say I'm gonna put it down and sign my name and here, for all eternity I said it. Somebody tried to kill me. Nothing like that. Nothing like that until today, a year and a day later. It defies logic. It doesn't make any sense.

The prosecutor suggested that the jury infer, based on defendant's silence, that his account was fabricated long after the incident for purposes of the trial. Thus, the prosecutor called attention to defendant's silence and used it to impeach defendant's credibility. See *id*. at 764-765.

We conclude that the prosecutor's improper use of defendant's silence during cross-examination and closing arguments was both "clear" and "obvious"; therefore, it constituted plain error. See *People v Russell*, 266 Mich App 307, 314; 703 NW2d 107 (2005). Moreover, the actions of the prosecutor seriously undermined the fairness and integrity of defendant's trial. *Pipes*, *supra* at 274.

We also conclude that defendant has met his burden of establishing prejudice. In addition to emphasizing the flagrancy of the *Doyle* violation, defendant cites weaknesses in the prosecutor's case. For example, the victim described the robber as "clean-shaven" and five feet, five inches tall, but defendant wore both a mustache and goatee and is five feet, nine inches tall. Additionally, a police officer testified that the victim described defendant as wearing a "medium light blue jacket with red strips or red lettering," whereas the lettering on the jacket defendant was wearing was white.

The victim and defendant were the only witnesses to the actual crime, and therefore the trial essentially came down to a credibility contest. It is not a stretch to conclude that, in the absence of the tainted evidence and arguments, the jurors might have considered defendant's version of events plausible and might have found the discrepancies in the case sufficient to raise a reasonable doubt regarding defendant's guilt.

The cross-examination regarding defendant's silence was extensive and repetitive and constituted a clear violation of defendant's constitutionally protected rights. The prosecutor's sole purpose was to denigrate defendant's credibility through his invocation of these rights, and the prosecutor emphasized this tactic during closing arguments. As noted in *Doyle*, *supra* at 618, "it would be fundamentally unfair and a deprivation of due process to allow the arrested person's

silence to be used to impeach an explanation subsequently offered at trial." The prosecutor clearly violated this precept, and we simply cannot conclude, given the facts of this case, that the flagrant and repeated violation did not affect the outcome of the lower court proceedings. *Carines*, *supra* at 763.

We disagree with the prosecutor's arguments on appeal that his questioning and arguments were proper under *People v Boyd*, 470 Mich 363; 682 NW2d 459 (2004), or *People v Allen*, 201 Mich App 98; 505 NW2d 869 (1993). Unlike the situation mentioned in *Boyd*, *supra* at 375, the prosecutor here did not offer the evidence of defendant's silence merely to rebut defendant's claim that he told his exculpatory story earlier to the police. While defendant did testify at trial that he told the police "as they pulled me out of the building that somebody has been shooting at me," and while defendant made other references to having mentioned the shooting, the totality of the prosecutor's questioning and arguments make clear that the prosecutor was *not* trying merely to rebut defendant's claim of having told the police his exculpatory story. Instead, the prosecutor was trying to denigrate the credibility of defendant's story in general by emphasizing his silence after his arrest. See *Allen*, *supra* at 102. Moreover, unlike the situation in *Allen*, *supra* at 103, the prosecutor's questioning and arguments here clearly did not constitute an attempt to rebut a claim by defendant that he did not have an opportunity after his arrest to provide his version of the events. The prosecutor's arguments on appeal are unavailing.

Reversed and remanded for a new trial. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Donald S. Owens