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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. EUGENE PAK, Defendant and Appellant.	B277469 (Los Angeles County Super. Ct. No. BA440051)

APPEAL from a judgment of the Superior Court of Los Angeles County, James R. Dabney, Judge. Affirmed.

Renee Rich, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Margaret E. Maxwell, Supervising Deputy Attorney General, Peggy Z. Huang, Deputy Attorney General, for Plaintiff and Respondent.

A jury convicted Eugene Pak (defendant) of assault with a deadly weapon based on evidence he struck his erstwhile friend Lanisha Carter in the face with a liquor bottle, which broke her nose and caused a gash requiring stitches. At trial, the investigating police detective testified he called defendant after the incident and left a voicemail message asking defendant to call him back. Asked whether he ever heard from defendant, the detective answered, "I never have to this day." During closing argument the prosecution argued defendant's failure to return the detective's call was evidence of his consciousness of guilt. We consider whether to reverse defendant's conviction because the detective's answer and the prosecutor's argument violated defendant's constitutional right against self-incrimination.

I. BACKGROUND

A. The Offense Conduct

In July 2015, defendant visited his friend Lanisha Carter (Carter) at her apartment. They were "[s]trictly platonic" friends because Carter was attracted to women, as defendant knew.

Defendant and Carter drank Hennessy and smoked marijuana while watching television in Carter's bedroom. At some point, defendant began "act[ing] the way he never acted before" by tugging on Carter's clothes and "trying to have sex with [her]."

Carter reacted by hitting defendant in his body to signify he should "you know, chill out." That got defendant mad, and he grabbed Carter by her braids and hit her on the side of her face. A struggle ensued, and defendant subjected Carter to "some kind of choker hold type move." Feeling things were getting "too serious," Carter started yelling for her neighbors. Defendant

then let go of Carter, and she grabbed her phone and walked out of the apartment to call 911.

While standing outside her front door on the phone, Carter told defendant to get out of her apartment.[1] Defendant remained angry, and he was rummaging through her apartment claiming to be looking for his phone. Defendant eventually grabbed Carter's keys and told her that she was going to take him home.

Carter told defendant to give her back her keys and continued to order him to get out of her home. Defendant left the apartment with Carter's keys and the bottle of Hennessey they had been drinking; she pursued him while again calling 911.

Carter caught up to defendant at the front gate of her apartment complex, and he turned around and hit her in the face with the Hennessey bottle.[2] The bottle shattered when defendant hit Carter, and she fell to the ground bleeding.

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[1] A recording of Carter's short 911 call (the first of two she would make) was played at trial. It reflected Carter uttering two sentences: "Get out of my house. Get out of my house give me my keys."

[2] The assault took place while Carter was on the phone with the 911 operator. A recording of this second, longer 911 call was also played at trial, and it reflects the moment Carter was struck in the face with the bottle: "[Carter]: I'm waiting for uh a response. This man just put his hands on me and he won't get out my house. He stole my car keys. He got my stuff. ([I]naudible.) [¶] [Operator]: Okay ma'am. [¶] [Carter]: Get off me. [¶] [Operator]: Ma'am? Ma'am? [¶] [Carter]: Give me my keys to my car. Get out my nigga. Oh my God. [¶] [Operator]: Ma'am. [¶] [Carter]: Oh my God. [¶] [Operator]: Ma'am. [¶] [Carter]: Oh my God. He bust my face. Oh my God please send somebody."

Defendant, still in possession of Carter's keys, drove off in her car. Paramedics transported Carter to the hospital. Carter's nose was broken, and she received stiches to close a gash on the bridge of her nose.

B. The Challenged Evidence and Argument at Trial

Only two witnesses testified during trial: Carter and the investigating detective, Nicholas Gallego. During Detective Gallego's brief testimony, he testified Carter gave him defendant's phone number and he (the detective) called the number and left a message asking defendant to return the phone call. There was no testimony at trial concerning precisely when Detective Gallego placed this phone call to defendant, when defendant was arrested, or whether defendant was ever read his *Miranda*[3] rights. The prosecution asked Detective Gallego, "Did you ever hear from [defendant]?" Detective Gallego answered, "I never have to this day."[4]

The parties discussed jury instructions prior to closing argument. The defense requested instructions on self-defense and mutual combat based on the theory that the case was "kind

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[3] *Miranda v. Arizona* (1966) 384 U.S. 436.

[4] Defense counsel objected on relevance and "*Griffin*" (i.e., *Griffin v. California* (1965) 380 U.S. 609) grounds. The trial court called the parties to sidebar and the prosecutor represented the phone call contact was made "right after this incident." The trial court stated, "If you want to ask did he [i.e., defendant] contact [Detective Gallego], you could leave it there." The prosecutor responded, "That's where I left it," and the trial court said "[a]ll right" and resumed the proceedings in open court.

of a continuous act where there is fighting within the apartment" that the jury could infer continued until Carter was hit with the bottle. The trial court rejected the request for self-defense and mutual combat instructions. The court acknowledged it is not always necessary for a defendant to testify to warrant giving a self-defense instruction, but the court found "the evidence . . . of what transpired inside the apartment is [not] sufficient to be substantial evidence of what—to establish his intent at the time of hitting—if he did hit her—with the bottle, was because he was in fear of imminent harm of serious bodily injury."

The court then broached the issue of giving a flight as consciousness of guilt instruction and noted in passing that "the D.A. is free to argue if [defendant] were a victim in this, when the detective left messages for him, he should have responded and . . . that's consciousness of guilt." The prosecutor stated she was inclined to "err on the side of caution" because she wanted "to make sure that [she was] not doing a *Griffin* error . . . ." The trial court responded, "Prearrest silence is not *Griffin* error."

Later during summation, the prosecutor argued the point the trial court articulated when discussing consciousness of guilt:

> Just a couple more things I want to go over is, as far as consciousness of guilt, the defendant[ ]—when Ms. Lanisha Carter spoke to the officers in this case and spoke to the detective, Lanisha Carter gave Detective Gallego his cell phone number and said call him. This is his information. This is my friend's information who got the keys from me. So they can investigate what happened. They can investigate what she said had happened.
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> The defendant never called, never returned any voicemails or any phone calls to detective Gallego. And he did that because he knew what he did. He

> knew that this was not self-defense. He knew that that was not a mutual combat and he had a right to do anything. This is not this case.
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> [¶] . . . [¶] You have nothing that says [defendant] called 911. You have nothing that says he ever went to a police station to say what happened. You have no evidence to show he ever sustained any—supposedly any injuries, nothing to say—nothing that he did—
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> [Defense Counsel]: Objection. Burden shifting and the Fifth Amendment.
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> The Court: Overruled.
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> Go ahead.
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> This is argument. But I remind you that the defendant himself does [not have] to say anything. He can rely on the state of the evidence.
>
> Go ahead.
>
> [The Prosecutor]: He never called Detective Gallego. We have no evidence of any 911 calls. There's no evidence of any police reports. Nothing. The reason I bring this up to you is because, once again, this is not a self-defense case.

C. The Defense and the Jury's Verdict

Without a jury instruction on self-defense (because there was no substantial evidence to support it), the defense was relegated to attacking Carter's credibility and emphasizing the beyond a reasonable doubt standard of proof during closing argument. Defense counsel discussed the 911 recording and argued: "You hear [Carter] say, 'Get out of my house,' and then run up and you hear sounds of scuffling. That's within the house. That's what she said on the tape. And you could hear that. [¶]

And then after that, there's some scuffling. You hear her say, 'Oh, my God. I've been hit.' It's not a matter of her just walking up behind and then, crack, as she said. [¶] How did this happen? How did it happen? It's not my job to present to you this is exactly what happened. I'm not the one accusing someone of committing a felony. The prosecution is. Their job is to convince you beyond a reasonable doubt that that's what happened."

After deliberating for one hour, the jury convicted defendant on the sole charge against him, assault with a deadly weapon in violation of Penal Code section 245, subdivision (a)(1). The jury further found true the Penal Code section 12022.7, subdivision (a) allegation that the assault caused Carter great bodily injury. The trial court sentenced defendant to six years in prison.

II. DISCUSSION

Defendant contends we must reverse his conviction because Detective Gallego's testimony and the prosecutor's argument concerning his failure to return the detective's phone message violated his privilege against self-incrimination under the Fifth and Fourteenth Amendments to the federal Constitution. Specifically, defendant argues that "[b]y stating he 'never' heard from [defendant] 'to this day,' the detective's testimony addressed [defendant's] silence from shortly after the incident in July 2015 through the trial in August 2016, encompassing both his pre- and postarrest silence, his pre- and post-*Miranda* silence, and his silence at trial." The defense construes the prosecutor's summation in similar fashion.

The argument for reversal is meritless. Although precedent in this area of the law continues to develop, the law in

California is that the prosecution may not use a defendant's post-arrest, post-*Miranda* silence against him; but both post-arrest, *pre-Miranda* silence and *pre*-arrest silence are frequently fair game (unless the defendant has expressly invoked his Fifth Amendment privilege). The prosecutor's argument in this case cannot reasonably be construed as a comment on defendant's post-arrest silence. Detective Gallego's testimony did include an unnecessary rhetorical flourish ("to this day"), but it too was not an improper comment on defendant's right to remain silent. And in any event, reversal is not warranted because we are confident the testimony and argument did not contribute to the verdict obtained: There was essentially no defense to the charges and the (second) 911 recording was strong corroboration of Carter's testimony.

A. Use of a Defendant's Silence at Trial

In a 2014 case, our Supreme Court succinctly summarized the state of the law on the use of a defendant's silence as evidence of guilt: "[T]he Fifth Amendment privilege against self-incrimination does not categorically bar the prosecution from relying on a defendant's pretrial silence. The prosecution may use a defendant's pretrial silence as impeachment, provided the defendant has not yet been *Mirandized*. (*Fletcher v. Weir* (1982) 455 U.S. 603[ ] [postarrest silence]; *Jenkins v. Anderson* (1980) 447 U.S. 231[ ] [prearrest silence]; cf. *Doyle v. Ohio* (1976) 426 U.S. 610[ ] [postarrest, post-*Miranda* silence is not admissible as impeachment] [(*Doyle*)].) The prosecution may also use a defendant's prearrest silence in response to an officer's question as substantive evidence of guilt, provided the defendant has not expressly invoked the privilege. (*Salinas*[*v. Texas* (2013) 570

U.S. 178, 181] (plur. opn. of Alito, J.).) Whether postarrest, pre-*Miranda* silence in the absence of custodial interrogation may likewise be admitted as substantive evidence of guilt—and thus render a defendant's uncompelled silence admissible as substantive evidence of guilt or impeachment—has not yet been resolved by this court or the United States Supreme Court." (*People v. Tom* (2014) 59 Cal.4th 1210, 1223 (*Tom*); see also *People v. Bowman* (2011) 202 Cal.App.4th 353, 363 [*Doyle* prohibits use of post-*Miranda* silence as evidence of guilt during the prosecution's case-in-chief, but the "*Doyle* rule . . . . does not prohibit the prosecution's use of a defendant's prearrest silence"].)

In *Tom*, our Supreme Court answered the as-then unanswered question of whether prosecutors could use post-arrest, pre-*Miranda* silence (in the absence of custodial interrogation) as substantive evidence of guilt by holding such use is often permissible. (*Tom*, *supra*, 59 Cal.4th at p. 1215.) Specifically, the *Tom* court held a defendant who is arrested but has not yet received *Miranda* warnings must make "a timely and unambiguous assertion of the privilege in order to benefit from it." (*Ibid*.) Without such an affirmative assertion, the defendant's post-arrest, pre-*Miranda* silence can be used against him. (*Id.* at pp. 1235-1236.)

B. The Prosecutor's Argument Did Not Comment on Defendant's Post-Arrest Silence, and Detective Gallego's Testimony Does Not Run Afoul of Tom

The prosecution's summation did not comment on defendant's post-arrest, post-*Miranda* silence, and certainly not his decision to refrain from testifying at trial. The prosecution

told the jury that Carter gave defendant's phone number to the police so they could "investigate what happened" and noted "defendant never called, never returned any voicemails or any phone calls to detective Gallego." The context of the prosecution's argument—specifically, the reference to defendant's phone number being used to permit the police to *investigate* what happened, which obviously occurs before a suspect is arrested and usually occurs before anyone is Mirandized—defeats any suggestion that the prosecution's argument would have been understood by the jury as an impermissible comment on defendant's post-arrest silence or his silence during trial.[5] (See *People v. Champion* (2005) 134 Cal.App.4th 1440, 1448 ["An assessment of whether the prosecutor made inappropriate use of [a] defendant's postarrest silence requires consideration of the context of the prosecutor's inquiry or argument"].) Under the principles discussed in *Tom*, the prosecution's argument was not improper.[6]

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[5] The prosecution also stated: "[Defendant] never called Detective Gallego. We have no evidence of any 911 calls. There's no evidence of any police reports. Nothing. The reason I bring this up to you is because, once again, this is not a self-defense case." This again indicates the prosecution's remarks would have been understood to refer only to pre-arrest silence; there would have been no need for defendant to call 911 or report the incident to the police after he had been arrested.

[6] Defendant's reliance on a pre-*Tom* Court of Appeal decision, *People v. Waldie* (2009) 173 Cal.App.4th 358 (*Waldie*), to urge reversal is unavailing. Assuming *Waldie* reflects the current state of the law in California, it is still factually dissimilar to this case (as defendant concedes). In *Waldie*, the investigating detective testified he contacted the defendant by

The analysis, of course, differs marginally when assessing Detective Gallego's testimony. He not only denied he ever received a return phone call from defendant, he went further and said he had not received such a call "to this day." Thus, at least in theory, Detective Gallego's answer implicated the period of time after defendant's arrest (although, as a practical matter, we doubt the jury would have understood his answer in that fashion). There was no testimony at trial, however, about when or even whether defendant was Mirandized, so at most, the detective's answer can be construed to refer to defendant's post-arrest, pre-*Miranda* silence.[7] *Tom* holds post-arrest, pre-*Miranda* silence can be used as substantive evidence of guilt

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phone about a dozen times before his arrest, and the prosecution used the defendant's failure to call the detective back as evidence tending to prove consciousness of guilt. (*Id*. at p. 364.) The Court of Appeal held that was improper. (*Ibid*.) Specifically, the *Waldie* court believed that "[i]f the police are allowed to call a suspect persistently and then offer his unwillingness to respond as evidence of guilt, a defendant would never be able to claim the protection of freedom from incrimination." (*Id*. at p. 366.) There is no evidence in this case of persistent, multiple calls by Detective Gallego to defendant that would have prevented him from claiming his privilege against self-incrimination, and that renders *Waldie* inapposite. (*Id.* at p. 366 ["A different result might be indicated if the detective had called defendant only one time or a few times"].)

[7] We do not believe Detective Gallego's answer can be construed as a comment on defendant's silence at trial. At the time the detective testified, it was not clear whether defendant would testify in his own defense.

absent custodial interrogation or an unambiguous assertion of the right against self-incrimination—neither of which is present here. (*Tom*, *supra*, 59 Cal.4th at p. 1215; see also *Salinas v. Texas*, *supra*, 570 U.S. at p. 186 (plur. opn. of Alito, J.) ["Our cases establish that a defendant normally does not invoke the privilege by remaining silent"].)

C. The Evidence and Argument Concerning Defendant's Silence Did Not Contribute to the Verdict Obtained

Even if Detective Gallego's testimony or the prosecution's argument were construed to implicate defendant's privilege against self-incrimination, reversal still would not be warranted. Under well-established law, reversal of defendant's conviction would be appropriate only if the testimony and argument concerning the unreturned phone call contributed to the verdict obtained. (*Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*); *People v. Hollinquest* (2010) 190 Cal.App.4th 1534, 1558 [applying *Chapman* standard to error in using a defendant's silence as consciousness of guilt evidence] (*Hollinquest*).)

The issue of the unreturned phone call was of negligible impact in this case. At trial, there was no dispute (indeed, no disputing) Carter had been grievously wounded. There was no dispute defendant was visiting Carter at her apartment when she was injured. There was also no substantial evidence on which the jury could have relied to find defendant was legally justified in striking Carter on the nose with the Hennessey bottle. Thus, the only question was whether defendant actually did strike Carter with the bottle, and on that issue, there was essentially no defense. The 911 call was strong corroboration of Carter's

account, such that the defense could muster only a weak, mostly generalized attack on her credibility.

In light of the strength of the evidence on the only disputed issue at trial, defendant's failure to return Detective Gallego's phone call was an unimportant collateral point. The relative unimportance of the unreturned phone call, combined with the trial court's instruction during summation that "the defendant himself does [not have] to say anything," demonstrates beyond a reasonable doubt that the phone call evidence and argument did not contribute to the verdict obtained. (*Hollinquest*, *supra*, 190 Cal.App.4th at p. 1560 [holding error harmless in light of the strength of the evidence and an instruction given by the trial court].)

DISPOSITION

The judgment is affirmed.

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BAKER, J.

We concur:

KRIEGLER, Acting P.J.

DUNNING, J.*

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* Judge of the Orange Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.