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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. MARK RAYMOND FRISBY, Defendant and Appellant.	B284198 (Los Angeles County Super. Ct. No. BA438972)

APPEAL from a judgment of the Superior Court of Los Angeles County, Leslie A. Swain, Judge. Affirmed.

Teresa Biagini, 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, Steven D. Matthews, Supervising Deputy Attorney General, Analee J. Brodie, Deputy Attorney General, for Plaintiff and Respondent.

At a trial on attempted murder and assault with a deadly weapon charges, the crime victim and an eyewitness both testified they saw defendant and appellant Mark Raymond Frisby (defendant) strike the victim with a hammer. Defendant testified he did not attack the victim or see who did. When cross-examining defendant, the prosecution asked if he had ever told anybody the version of events he recounted during his trial testimony. We consider whether the prosecution's question constitutes reversible error under *Doyle v. Ohio* (1976) 426 U.S. 610 (*Doyle*), which prohibits using a defendant's reliance on his or her constitutional right to remain silent as evidence of guilt.

I. BACKGROUND

On August 13, 2015, Vicente Ortiz (Ortiz), a repairman, was working in the crawl space beneath a Los Angeles apartment building. Ortiz had done work at the building for several years and knew the owner and some of its residents, including defendant. Around 3:00 p.m. that afternoon, Ortiz began to crawl out from under the building. When his body was halfway out of the crawl space, Ortiz saw someone attack him with a blunt force object. The blows fractured his skull and, when Ortiz raised his hands in defense, fractured his thumb as well. Before losing consciousness, Ortiz heard someone say, "'Leave him alone. You're going to kill him.'" Ortiz later regained consciousness in the hospital.

The day after the attack, Ortiz told a police detective that he saw defendant the day before "acting . . . 'crazy'" and "constantly walking in and out of the apartment building" without a shirt on while "drinking beer and tequila." Ortiz also

told the detective he heard defendant call out to him, "'friend, friend?'" before Ortiz crawled out from under the building.

The Los Angeles County District Attorney charged defendant with attempted murder (Pen. Code, §§ 187, subd. (a), 664)[1] and assault with a deadly weapon (§ 245, subd. (a)(1)). The district attorney alleged defendant struck Ortiz with a hammer, inflicting great bodily injury.

At defendant's trial, Ortiz testified he recalled seeing defendant strike him with the hammer. Ortiz said he and defendant had a few interactions with each other in the past and Ortiz spoke "hardly any" English while defendant spoke no Spanish. Ortiz said whenever he worked at the building, he saw defendant drinking alcohol.

Miguel Samano (Samano), who lived next to the apartment building, was also a trial witness. He testified that on the afternoon of the attack, he saw defendant standing above Ortiz with a hammer in his hand as Ortiz was emerging from the crawl space. Samano saw defendant "lunge[ ]" at Ortiz with the hammer and strike him twice. Samano said he yelled at defendant: "'What did you do? You killed him.'" According to Samano, defendant responded Ortiz was "'fine.'" Samano said defendant repeatedly asked Ortiz "'are you okay?'"—but Ortiz did not respond. Samano testified he called 911 but hung up after a few minutes because he was not connected with an operator. Samano then located a police officer nearby and told him someone had been injured at the apartment building.

Defendant testified in his own defense. He claimed he did not attack Ortiz and did not see who did. Rather, defendant

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[1] Statutory references that follow are to the Penal Code.

testified that on the morning of the attack, he and Ortiz talked "mostly" in English "for a few minutes . . . ." Defendant said he asked Ortiz if he wanted some beer, and when Ortiz said yes, defendant bought a six-pack of beer and left four outside for Ortiz around lunchtime. Defendant said he went back to his apartment and drank no more than one beer. According to defendant, when he came out of his apartment later that afternoon, he saw Ortiz on the ground, bleeding and unconscious.

Defendant testified he was still with Ortiz when the police arrived. According to defendant, another resident of the building (a woman named Rosa) told the police defendant was the person who attacked Ortiz and police officers arrested defendant and advised him of his *Miranda*[2] rights.

During cross-examination, the prosecution asked defendant whether he told the police anything after being given the *Miranda* advisement. Defendant responded: "They didn't ask me anything other than the front door of my house was locked and I told them I don't think it really mattered if the front door of my house was locked. I honestly couldn't remember if it was locked. I told them I couldn't remember if it was locked and I don't think it really matters. I never ever had anything stolen out of that apartment." The next question by the prosecution came with a long preface: "So I don't want to get into any statements or any conversations that you may have had with your attorneys, so go ahead—the next question I'm going to ask, take all of those conversations out. But aside from those conversations that you may or may not have had with your attorneys, have you ever told anybody else the story that you told us today?"

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[2] *Miranda v. Arizona* (1966) 384 U.S. 436, 467-473.

Defense counsel objected before defendant responded. At a sidebar conference, defense counsel asserted the prosecution's question violated *Doyle* because it "comment[ed] on [defendant's] failure to tell the police [what] he's now telling on the stand." Defense counsel said he "believe[d] that [defendant] actually didn't respond to [the police officer's] advisement, that he didn't say anything" and it was *Doyle* error "to bring that out." The court responded: "I also think there's an additional issue which he said he may have talked about with one of the psychiatrists who examined him, so I'm going to ask you [i.e., the prosecutor] to move on." The prosecution asked defendant no further questions, and the issue of whether defendant had previously told anyone else the story he related during his testimony was not mentioned during closing argument.

The jury found defendant guilty of assault with a deadly weapon but not guilty of attempted murder. The jury found true the allegation that defendant caused Ortiz great bodily injury. The trial court sentenced defendant to seven years in prison.

II. DISCUSSION

Defendant contends the prosecution's question ("[H]ave you ever told anybody else the story that you told us today?") infringed his constitutionally protected post-*Miranda* right to remain silent. As we shall explain, the argument is meritless for multiple reasons. First, insofar as the prosecution's question is understood to encompass defendant's post-*Miranda* statements to police, defendant's own testimony indicates he did not invoke his right to remain silent—rather, he responded to the officers' only question and "told them [he didn't] think it really mattered if the front door of [his] house was locked." Without an invocation of

the right to remain silent, there can be no *Doyle* violation. In addition, even assuming defendant had invoked his right to remain silent, the trial court did not permit the prosecution to rely on defendant's silence as evidence of guilt.

In *Doyle*, the United States Supreme Court considered "whether a state prosecutor may seek to impeach a defendant's exculpatory story, told for the first time at trial, by cross-examining the defendant about his failure to have told the story after receiving *Miranda* warnings at the time of his arrest." (*Doyle*, *supra*, 426 U.S. at p. 611, fn. omitted.) *Doyle* involved two defendants who were arrested for selling marijuana to an informant and advised of their *Miranda* rights. (*Id.* at pp. 611-612.) At trial, both defendants testified they had been seeking to buy, not sell, marijuana from the informant and the informant had framed them. (*Id.* at p. 613.) The prosecution asked the defendants why they had not informed the police of their innocence at the time of arrest. (*Id.* at pp. 613-614 & fn. 5.) Both defendants admitted they had not said anything about being "set up" or their lack of culpability at that time. (*Ibid.*)

The United States 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." (*Doyle*, *supra*, 426 U.S. at p. 619, fn. omitted.) The high court reasoned a *Miranda* advisement that a suspect has "the right to remain silent" provides an implicit "assurance that silence will carry no penalty" and, as such, "[s]ilence in the wake of these warnings may be nothing more than the arrestee's exercise of these *Miranda* rights." (*Id.* at pp. 617-618; see also *Wainwright v. Greenfield* (1986) 474 U.S. 284, 292 ["The point of the *Doyle*

holding is that it is fundamentally unfair to promise an arrested person that his silence will not be used against him and thereafter to breach that promise by using the silence to impeach his trial testimony"].) A violation of *Doyle* does not require reversal if the error was harmless beyond a reasonable doubt. (*Brecht v. Abrahamson* (1993) 507 U.S. 619, 630; *People v. Thomas* (2012) 54 Cal.4th 908, 936-937.)

As the Court of Appeal explained in *People v. Evans* (1994) 25 Cal.App.4th 358 (*Evans*), the United States Supreme Court has since described a *Doyle* violation as having two necessary components: "The first element is that the prosecution makes *use* of a defendant's postarrest silence for impeachment purposes. . . . The second essential element is that the trial court *permits* that use." (*Id.* at p. 368, citing *Greer v. Miller* (1987) 483 U.S. 756, 761-764 (*Greer*).) *Evans* elaborates that "[t]he type of permission specified in *Greer* will usually take the form of overruling a defense objection, thus conveying to the jury the unmistakable impression that what the prosecution is doing is legitimate." (*Evans*, *supra*, at p. 368.) Courts have held there is no *Doyle* error where the trial court sustains a timely defense objection upon the prosecution's initial reference to the defendant's silence, the prosecution does not refer to the issue again, and the court provides an admonishment or curative instruction to the jury. (*Greer*, *supra*, at p. 764; *People v. Clark* (2011) 52 Cal.4th 856, 958-959.) And there is of course no violation of *Doyle* where a defendant does not invoke his *Miranda*-given right to remain silent and instead answers questions posed by the police. (See, e.g., *Salinas v. Texas* (2013) 570 U.S. 178, 186 (plur. opn. of Alito, J.) [prosecution's use of the defendant's noncustodial silence did not violate the Fifth

Amendment where the defendant did not invoke right to remain silent]; *Anderson v. Charles* (1980) 447 U.S. 404, 408-409 [*Doyle* inapplicable where the defendant did not remain silent when questioned following *Miranda* warnings]; *United States v. Buljubasic* (7th Cir. 1987) 808 F.2d 1260, 1268 ["Because [the defendant] did not invoke his right to remain silent, the principle of *Doyle* is inapplicable"]; see also *United States v. Lorenzo* (9th Cir. 1978) 570 F.2d 294, 297-298.)

Defendant has not established a *Doyle* violation occurred here. Most fundamentally, defendant's own trial testimony indicates he answered the question the police asked him after being given a *Miranda* advisement: defendant testified "[t]hey didn't ask me anything other than the front door of my house was locked . . . . [and] I told them I couldn't remember if it was locked and I don't think it really matters." Defendant's admitted willingness to answer that question demonstrates he did not invoke his post-*Miranda* right to remain silent, and the prosecution cannot be said to have erred by impliedly commenting on a non-asserted constitutional right.

Furthermore, akin to *Greer*, defense counsel objected to the prosecution's question before defendant tendered a response, the trial court asked the prosecution to move on, and the prosecution did not thereafter again inquire about or refer to statements defendant did not make to the police after being Mirandized. (Compare *People v. Galloway* (1979) 100 Cal.App.3d 551, 558 & fn. 2 [twice during closing argument, prosecution referred to the defendant's admission on cross-examination that he failed to tell anyone prior to trial about an alibi].) Thus, even if it were possible to argue the prosecution "attempted to violate the rule of *Doyle* by asking an improper question in the presence of the jury"

(*Greer*, *supra*, 483 U.S. at p. 765), the trial court did not permit the attempted use.[3] Reversal is therefore unwarranted. (*People v. Tate* (2010) 49 Cal.4th 635, 692 ["If incipient *Doyle* misconduct lurked in this question, it was thus nipped in the bud"].)

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[3] The only difference between this case and *Greer* is that the trial court here did not explicitly say defendant's objection was "sustained," nor did it admonish the jury. But defendant cannot have it both ways. If defendant believes a jury admonition was required, his *Doyle* argument would be entirely forfeited because he did not ask for an admonition. (*People v. Riggs* (2008) 44 Cal.4th 248, 299.) If, on the other hand, defendant seeks to avoid forfeiture by arguing that requesting an admonition would have been futile, then his sole potential basis for attempting to distinguish *Greer* disappears.

DISPOSITION

The judgment is affirmed.

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BAKER, Acting P. J.

We concur:

MOOR, J.

KIN, J.*

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