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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

WOODY VAINQUEUR,

Defendant and Appellant.

B286772

(Los Angeles County
Super. Ct. No. BA458977)

APPEAL from a judgment of the Superior Court of Los Angeles County, Stephen A. Marcus, Judge. Affirmed with direction.

Michelle T. Livecchi-Raufi, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General of California, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and David W. Williams, Deputy Attorneys General for Plaintiff and Respondent.

INTRODUCTION

Defendant Woody Vainqueur appeals from his conviction for assault with a deadly weapon. Defendant contends the People infringed his due process rights established in *Doyle v. Ohio* (1976) 426 U.S. 610, 619 (*Doyle*) by eliciting testimony at his jury trial about his post-detention silence. We affirm the judgment because there was no *Doyle* error.

FACTS AND PROCEDURAL BACKGROUND

1. *Defendant's Attack*

On the morning of July 9, 2017, Michael Nava stood outside a church in the Hollywood area trying to contact his girlfriend on his cell phone. While standing on the sidewalk, Nava heard rustling coming from a fenced area across the street, near a freeway offramp. He then saw defendant jump down from a tree inside the fenced area. After exiting the tree, defendant approached the fence, and climbed over it. Once on the other side, defendant picked up a long wooden plank from the ground and walked towards Nava. Defendant closed the distance between him and Nava; the two men faced each other. Defendant pointed the plank threateningly towards Nava's face, and Nava held his hands up in the air to communicate he was going to leave. When Nava tried to back away, defendant hit Nava's shoulder and neck with the plank. The two engaged in a scuffle. Defendant repeatedly struck Nava on the head with the plank. Blood streaming down his face, Nava turned around, ran away, and called 911.

2. *Defendant's Detention and Arrest*

Soon thereafter, paramedics and police arrived on the scene. While paramedics were treating Nava's wounds, Nava observed defendant walking towards the fenced area where

defendant had earlier jumped from the tree. Nava was about 120 feet away and had an unobstructed view of defendant. Nava alerted Officer Campbell to defendant's location and provided the officer with defendant's physical description.

Officer Campbell discovered defendant sitting underneath a tree within the fenced area by the freeway offramp. Officer Campbell ordered defendant to climb over the fence and come towards him. Defendant complied and Officer Campbell detained defendant without incident. Defendant made no comments to Officer Campbell about the events that had just taken place. Upon inspection of the fenced area, police discovered the wooden plank, which defendant used to beat Nava. The plank was on the ground within three feet of where defendant had been sitting. Police arrested defendant.

3. Charges and Trial

On July 9, 2017, the People charged defendant with one count of assault with a deadly weapon against Nava. On November 7, 2017, defendant's jury trial commenced. In addition to Nava, the People called Officer Campbell to testify about the incident.

On direct examination, the prosecutor asked Officer Campbell questions about what defendant had said when he was detained at the scene. After three related questions where no objection was made, defense counsel interposed a *Doyle* objection when the prosecutor asked, "Did the defendant ever tell you that the victim was the initial aggressor?" The trial court sustained the objection, noting at sidebar that the prosecutor had not committed *Doyle* error but should abandon this line of questioning in light of *Doyle*. The People asked no further questions of Officer Campbell. We excerpt this colloquy in our

discussion section. Defendant did not put on any evidence of his own.

Prior to closing arguments, defense counsel moved for a mistrial asserting there had been *Doyle* error. The trial court denied the motion, stating: “I just don’t think it reaches the level that one could argue he was violating his right to remain silent.” Following the prosecutor’s statement that the People would not object to the court’s admonishment of the jury on this subject, the trial court asked defense counsel whether he wanted the court to admonish the jury. Defense counsel declined. Before opening statements and again before closing arguments, the court instructed the jury with CALJIC No. 0.50: “If an objection is sustained to a question, do not guess what the answer might have been. Do not speculate as to the reason for the objection.”

On November 8, 2017, the jury returned a guilty verdict. The trial court sentenced defendant to three years in state prison. Defendant filed a timely notice of appeal.

DISCUSSION

1. *General Doyle Principles*

Defendant argues that the questions regarding his silence amounted to *Doyle* error and violated his due process right to remain silent. In *Doyle v. Ohio*, the United States Supreme Court found that where a defendant exercises his or her right to remain silent after being advised under *Miranda*, “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. (*Doyle, supra*, 426 U.S. at p. 618.) This is because *Miranda* warnings may have encouraged defendant’s silence to begin with. (*Fletcher v. Weir* (1982) 455 U.S. 603, 605.)

To constitute *Doyle* error, (1) the prosecution must make use of a defendant's postarrest silence and (2) the trial court must permit the prosecutor to use the silence against the defendant. (*People v. Clark* (2011) 52 Cal.4th 856, 959.) Use of defendant's silence by the prosecution can occur either by questioning the defendant about his silence or referring to the silence during trial. (*People v. Evans* (1994) 25 Cal.App.4th 358, 368.) Permission by a trial court to use the silence typically takes the form of overruling a defense objection to a question about the silence because the ruling essentially communicates to the jury that the prosecution's question was legitimate. (*Ibid.*)

2. Trial Court Proceedings

At trial, the People called Officer Campbell to testify about the incident. On direct examination, the People elicited the following testimony from Officer Campbell about defendant's post-detention silence:

“Q: Did the defendant mention any injuries to you?

A: Not that I recall.

Q: Did the defendant ever tell you he himself was attacked?

A: I don't remember.

Q: Did he make any statements regarding the incident whatsoever?

A: No.

Q: Did the defendant ever tell you that the victim was the initial aggressor?

Defense counsel: Objection, your Honor.

Trial court: Sustained.”

At sidebar, the trial court explained to counsel what *Doyle* error was, said that the prosecutor was getting close to committing

Doyle error, but concluded that no error had yet occurred. The trial court told defense counsel, “I don’t think he’s done anything yet, because he didn’t really ask him directly.”

3. *Defendant’s Doyle Error Claims are Partially Forfeited*

Defendant has not specified whether his claim of error is based on the single question to which his counsel objected, or on the entire exchange with Officer Campbell that preceded the objection. Respondent offers that any *Doyle* error was forfeited: As to the first three questions, defendant failed to object, and as to the fourth, the trial court sustained the objection but defendant expressly refused an admonition or instruction to the jury.

We agree that defendant forfeited any error attached to the first three questions by his failure to object. (*People v. Seumanu* (2015) 61 Cal.4th 1293, 1333 [objection required to preserve *Doyle* error for appellate review].)

We next turn to the question that prompted the objection: “Q: Did the defendant ever tell you that the victim was the initial aggressor?” Defendant timely objected and the trial court sustained the objection. Respondent points out that in response to defendant’s motion to mistrial, the prosecutor said he would not object if the defense requested an admonishment. After further discussion with the court, defense counsel rejected an admonishment, a tactic that respondent now says forfeits any *Doyle* error created by the fourth question.

Respondent relies on several cases in support of its forfeiture argument. *People v. Frye* (1998) 18 Cal.4th 894, 898, does not involve *Doyle*, although it does state the general rule that to preserve a claim of prosecutorial misconduct the defense

must object and ask for an admonition. In *People v. Carter* (2003) 30 Cal.4th 1166, 1207, the court found the forfeiture was the failure to object to the *Doyle* questions, and “the requirement of specific contemporaneous objection was not excused” because defendant failed to show an admonition would not have cured any harm. In another of respondent’s cited cases, *People v. Clark, supra*, 52 Cal.4th at p. 960, the trial court had given a *Doyle* admonition; the Supreme Court did not address forfeiture one way or the other. Finally, in *People v. Collins* (2010) 49 Cal.4th 175, 202-203, the People argued only that it was defendant’s failure to object that forfeited the *Doyle* error on appeal. Although the Supreme Court observed that an admonition might have cured any harm, the Court rested its forfeiture analysis on the lack of an objection. Nevertheless, the Supreme Court went on to address the *Doyle* claim on the merits.

We conclude that we need not decide whether any *Doyle* error as to the fourth question was forfeited for failure to seek an admonition. We take our lead from the Supreme Court’s decision in *Collins* and address defendant’s argument on the merits. As we discuss in the next section, we conclude there was no *Doyle* error.

4. *There was no Doyle error*

We observe initially that there was no *Doyle* error for a very fundamental reason: *Doyle* is not implicated where, as here, the question put to defendant was pre-arrest and pre-*Miranda*. We find *People v. Tom* (2014) 59 Cal.4th 1210 (*Tom*) instructive. In *Tom*, a jury convicted the defendant of vehicular manslaughter with gross negligence arising out a broadside collision that killed one person and injured another. During the time defendant was in custody but before he had been given *Miranda* warnings,

defendant apparently said nothing. Specifically, defendant did not inquire about the well-being of the occupants in the other car. In closing argument, the prosecutor commented on the defendant's silence, finding it "particularly offensive" that the defendant "never, ever asked, hey, how are the people in the other car doing. Not once" (*Id.* at p. 1221.) Defense counsel argued to the jury the insignificance of the silence but did not object to the prosecutor's comment about defendant's silence. (*Id.* at p. 1222.)

The Supreme Court held that "the use of a defendant's postarrest, pre-*Miranda* silence is not barred by the Fifth Amendment in the absence of custodial interrogation or a clear invocation of the privilege" against self-incrimination. (*Tom, supra*, 59 Cal.4th at p. 1236.)¹ The *Tom* defendant was in custody but he had not been given his *Miranda* rights, and had not invoked his right against self-incrimination. That was insufficient for a comment about defendant's silence to constitute *Doyle* error.

Our case presents a weaker situation: Defendant was neither in custody nor was he given *Miranda* warnings, nor did he invoke his right against self-incrimination. Applying *Tom*, we conclude the prosecutor's single, unanswered question to which an objection was sustained does not create *Doyle* error. Defendant was not under arrest, he was at most detained as the officer investigated an incident that the officer did not see. The

¹ The *Tom* court left opened whether the evidence of this nature might be inadmissible under the Evidence Code. (*Tom, supra*, 59 Cal.4th at p. 1236.) Defendant picks up on this point in his reply brief but makes no argument that the evidence was inadmissible under the Evidence Code.

prosecutor's brief inquiry as to whether defendant had said anything about any injuries he might have suffered or that he was attacked or anything else did not implicate defendant's due process rights.

Defendant's argument fails for another reason. For *Doyle* error the prosecutor must make some use of defendant's silence and be permitted to do so by the trial court. (*People v. Clark, supra*, 52 Cal.4th at p. 959.) Here, the prosecutor did not attempt to use defendant's silence against defendant.² The prosecutor asked no further questions of the witness after defense counsel's objection was sustained. In fact, the prosecutor did not mention defendant's silence at all during the trial. The objected to question inquired only whether the defendant said victim Nava was the aggressor. The court sustained the objection, the prosecutor offered to accept an admonishment, defense counsel declined, and that was it. The prosecutor did not invite the jury to draw negative inferences from the silence. (*People v. Thomas* (2012) 54 Cal.4th 908, 936 [prosecutor did not attempt and was not permitted to use defendant's silence, despite the fact that no objection was made and the witness answered the improper question, because the prosecutor asked no further questions about defendant's silence and did not invite the jury to draw adverse inferences from it].) The prosecutor's unanswered question did not invite the jury to do so. Nor did the trial court

² Although the People argued in their respondent's brief that the prosecutor did not use defendant's silence, defendant failed to respond to this point in his reply brief and never addressed this element of *Doyle* error in his opening brief. (*People v. Stanley* (1995) 10 Cal.4th 764, 793 [the court may treat issue as waived where defendant fails to brief it].)

permit defense counsel to use defendant's silence in any way. As we have just said, the opposite was true.

In *Greer v. Miller* (1987) 483 U.S. 756, 764 (*Greer*), the United State Supreme Court concluded that there was no *Doyle* violation under similar circumstances. When the *Greer* prosecutor asked the defendant about his silence, the trial court explicitly sustained an objection to the prosecutor's question and instructed the jury to ignore the question. (*Ibid.*) The prosecutor asked no further questions on the issue of defendant's silence. (*Ibid.*) The Supreme Court concluded the trial court's actions eliminated the potential error posed by the improper question. (*Id.* at p. 765; see *People v. Clark, supra*, 52 Cal.4th at p. 959 [holding that because the jury was instructed to ignore the improper question, there was little risk the jury made improper inferences from defendant's silence].)

Likewise here, the trial court sustained a timely objection, the jury was instructed to not make inferences from the unanswered question, and the People made no further mention of defendant's silence.

5. *The Abstract of Judgment Must be Corrected*

The People assert that the "abstract of judgment incorrectly indicates that the conviction was the result of a plea." We have reviewed the abstract of judgment and agree that the wrong box was checked. We order the abstract to be corrected to reflect the conviction was the result of a jury trial. (See *People v. Mitchell* (2001) 26 Cal.4th 181, 185.)

DISPOSITION

We affirm the judgment. The trial court is directed to correct the abstract of judgment to reflect that defendant's conviction resulted from a jury trial. The trial court is to send

certified copies of the amended abstracts of judgment to the Department of Corrections and Rehabilitation and to appellate counsel.

RUBIN, ACTING P. J.

WE CONCUR:

GRIMES, J.

DUNNING, J.*

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