2020 IL App (1st) 181468-U

FIRST DISTRICT
FIRST DIVISION
December 14, 2020

No. 1-18-1468

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	No. 16 CR 17593 01
	)	
SEAN SAVAGE,	)	The Honorable
	)	Neil J. Linehan,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE COGHLAN delivered the judgment of the court.
Presiding Justice Walker and Justice Hyman concurred in the judgment.

ORDER

¶1 *Held*: The prosecutor's use of defendant's post-arrest silence and failure to perfect impeachment concerning defendant's address on the night of the offense did not deny him a fair trial.

¶ 2 Following a bench trial, defendant Sean Savage (defendant) was found guilty of burglary and sentenced to 10 years' imprisonment with 3 years of mandatory supervised release (MSR).[1]

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[1] Defendant was subject to mandatory Class X sentencing because of his prior convictions, which include: (1) 2004 burglary reduced to criminal trespass (04 CR 1672501); (2) 1998 residential burglary (98 CR 0994301); (3) 1998 theft (98 CR 149051); (4) 1996 burglary (96 CR 2176101); (5) 1994 retail theft (94 13495201); and (6) 1989 possession of stolen vehicle and burglary (89 CR 1788201).

On appeal, defendant argues he was denied a fair trial because the prosecutor (1) improperly commented on his right to remain silent and (2) failed to perfect impeachment on whether he lied to the police about where he lived on the night of the burglary. In the alternative, defendant claims that the cumulative errors resulted in an unfair trial. We affirm.

¶ 3 BACKGROUND

¶ 4 Walter Brown (Brown) testified that on November 1, 2016, he drove his Chevy Tahoe to his friend's house located at 423 East 113th Street and parked it in front of the building. Shortly before 4 a.m., Brown started his car using his remote start, but the car "shut off" and the alarm sounded. Brown went downstairs, looked outside, and saw someone, whom he later identified as defendant, sitting in the front seat of his car. He did not know defendant and did not give him permission to be inside his car.

¶ 5 Brown ran to his car and noticed that the rear passenger window (the side facing the sidewalk) was broken. Defendant poked his head out the broken window and "took a swing" at Brown. In response, Brown pulled defendant out of the car through the window, brought him to the ground, and they "got into a fight." Brown got on top of defendant and restrained him for about 10 minutes until the police arrived. He believes his friend called 911 while he was running towards his car.

¶ 6 After the police arrived, Brown observed them handcuff and search defendant, and retrieve a diamond pinkie ring, an e-cigarette, and ear buds from his pocket. Brown identified those items as his but admitted that there was "nothing special" about the items indicating they belonged to him. The police returned that property to Brown.

¶ 7 Defendant recounted a different version of events, claiming to be the victim of both a beating and theft of $20 and denying entering or removing items from Brown's car. He testified

that on November 1, 2016, between 3:30 and 4 a.m., he walked out of his apartment located at 11255 South King Drive to go to another friend's house to continue drinking. While walking by himself in the middle of the street, he heard a loud noise, turned, and saw a "guy," whom he identified as Brown, and "a girl" approaching him. Brown walked up to defendant and said, "Hey, hey, you broke in my car." Brown "took a swing" at defendant and they started fighting in the middle of the street. Defendant backed up, tripped over the curb, and Brown fell on top of him. Defendant's "arm popped" and he "started blacking out." As he was "coming in and out," he saw Brown "going through [his] front [pants] pockets" and remove $20.

¶ 8 After the police arrived, defendant "told the officer that this guy went in my pockets *** and took my money." The officer searched him, but he did not recall that the officer removed anything from his pockets. During the search, "they bumped [his] arm," "[he] yelled," and "said, I think my arm is broke." An ambulance arrived and transported him to the hospital.

¶ 9 On cross-examination, over defense counsel's objections, defendant denied giving a different home address to police at the station, admitted his past use of various aliases, and stated that he "did not tell the detectives anything" when he was interviewed at the hospital the next day.

¶ 10 On November 1, 2016, Chicago Police Officer Samuel Annor (Annor) was on patrol with his partner, Officer Reggie Smith. Shortly before 4 a.m., the officers received a radio call of "a citizen holding down offender" at 423 East 113th Street. When Annor and his partner arrived at the scene, he saw "a citizen holding defendant down and then there were other people standing by." They apprehended defendant, turned him over, saw blood on his mouth, and called for medical attention. Before the ambulance arrived, his partner searched defendant's pocket and retrieved "an earphone, an e-cigarette, and cigar lighter." "[T]he victim *** said those items were the items that were in the vehicle. So those items belonged to him."

¶ 11 On cross-examination, Annor testified that "an earphone, an e-cigarette, and cigar lighter" were "some of the things I remember" that were retrieved as evidence. Annor prepared an inventory sheet and listed the three items retrieved from defendant's pocket. He did not "recall a diamond ring." The inventoried items remained in police custody. Although Annor testified that the rear passenger window of the vehicle was broken, his incident report indicated that the rear driver's side window was broken. Annor did not call an evidence technician to the scene that night and no photographs of the vehicle were taken.

¶ 12 Defendant was found guilty of burglary and sentenced to 10 years' in the Illinois Department of Corrections.

¶ 13 ANALYSIS

¶ 14 Defendant first claims that he was denied a fair trial where the prosecutor attacked his credibility by improperly questioning him on cross-examination about his post-arrest silence and commenting on that silence in rebuttal closing. Defendant argues that use of his "failure to tell the detective his exculpatory account after his arrest" was prejudicial because his conviction "was based nearly entirely upon inferences and credibility findings."

¶ 15 Under *Doyle v. Ohio*, 426 U.S. 610, 619 (1976), the prosecution may not impeach a defendant using his post-arrest, post-*Miranda* silence. *People v. Miller*, 96 Ill. 2d 385, 393 (1983); *People v. Quinonez*, 2011 IL App (1st) 092333, ¶ 25. The *Doyle* "prohibition applies only to a defendant's silence after being advised of his *Miranda* rights." *Quinonez*, 2011 IL App (1st) 092333, ¶ 25 (citing *Fletcher v. Weir*, 455 U.S. 603, 607 (1982)). States may formulate their own rules regarding a defendant's silence before arrest and before receiving *Miranda* rights. *Id.* (citing *Fletcher*, 455 U.S. at 607). Whether a *Doyle* violation occurred is a legal issue reviewed *de novo*. *People v. Dameron*, 196 Ill. 2d 156, 162 (2001).

¶ 16 Here, defendant acknowledges that the "record does not specifically state when [he] was given his *Miranda* rights," but presumes that *Miranda* rights were administered. See *Quinonez*, 2011 IL App (1st) 092333, ¶ 26 (no constitutional violation where there was no evidence in the record that defendant received *Miranda* rights during the incident). In any case, "Illinois evidence law prohibits impeachment of a criminal 'defendant with his or her post-arrest silence, regardless of whether the silence occurred before or after the defendant was given *Miranda* warnings.' " *Id.* (quoting *People v. Clark*, 335 Ill. App. 3d 758, 762-63 (2002)); see *People v. Jones*, 240 Ill. App. 3d 213, 220-21 (1992) ("Illinois courts have closely followed *Doyle* and explicitly held that the rule is applicable even if it appears that defendant has not been advised of his *Miranda* rights."). Under those circumstances, that "silence is not considered relevant or material." *Quinonez*, 2011 IL App (1st) 092333, ¶ 27.

¶ 17 We agree with defendant that the prosecutor impermissibly addressed his post-arrest silence. On cross-examination, over defense counsel's objections,[2] the prosecutor elicited defendant's testimony that he did not tell the detective at the hospital that Brown took $20 from his pocket. He revisited defendant's post-arrest silence[3] during rebuttal closing, arguing that "when [defendant] has an opportunity to tell the detective, hey, this guy beat me up and robbed me, he doesn't say it." Since the prosecutor never called the detective to testify as to any conversation he had with defendant and did not ask Annor any questions about whether defendant gave an exculpatory statement at the scene, use of defendant's post-arrest silence as evidence of his guilt was not permissible. See *contra Quinonez*, 2011 IL App (1st) 092333, ¶ 27 ("a defendant's post-

[2] The trial court sustained defense counsel's objections presumably anticipating that the State would call the detective in rebuttal.

[3] Defendant testified on redirect that he told the detective "[t]hat I had just come out of surgery, I was high and I didn't want to talk and I wanted an attorney present." Defendant did not say anything else to the detective.

arrest silence may be used to impeach his trial testimony: (1) when defendant testifies at trial that he made an exculpatory statement to the police at the time of his arrest; and (2) when he makes a post-arrest statement that is inconsistent with his exculpatory trial testimony").

¶ 18 Our supreme court has held that improper use of a defendant's post-arrest silence is "subject to a harmless error analysis." *People v. Hart*, 214 Ill. 2d 490, 517 (2005); *People v. Miller*, 96 Ill. 2d 385, 395 (1983); see *People v. Herrett*, 137 Ill. 2d 195, 215 (1990) ("a comment upon a defendant's post-arrest silence, while improper, is not an error of such magnitude as to clearly deprive the defendant of a fair trial"). Here, the error was harmless beyond reasonable doubt.

¶ 19 In this bench trial, the judge determined the credibility of witnesses.[4] See *People v. Siguenza–Brito*, 235 Ill. 2d 213, 228 (2009) ("in a bench trial, it is for the trial judge, sitting as the trier of fact, to determine the credibility of witnesses, to weigh evidence and draw reasonable inferences therefrom, and to resolve conflicts in the evidence"). In particular, the judge stated that "I had an opportunity to observe the demeanor of all the witnesses in this case, who had an opportunity to tell the truth, who had a motive to lie, and I find that the victim's testimony was absolutely credible." In contrast, the judge found "the defendant's story to be incredible." See *People v. Gray*, 2017 IL 120958, ¶ 35 (a court of review is not permitted to substitute its "judgment for that of the trier of fact on questions involving the weight of the evidence or the credibility of the witnesses"). Defendant argues that Brown's testimony lacked credibility because there were inconsistencies between his and Annor's testimony, but any inconsistency addressed collateral matters and was for the trial judge to resolve.[5] See *id.* Moreover, Brown's testimony was

[4] Because this was a bench trial, there was no risk that a jury would have been persuaded by the prosecutor's improper use of defendant's post-arrest silence.

[5] Defendant claims inconsistencies in the witnesses' testimony as to whether (1) a diamond pinky ring was retrieved from his pocket, (2) the items retrieved from his pocket were returned to Brown or remain in police inventory, and (3) the rear passenger's or driver's window was broken.

corroborated by the physical evidence retrieved from defendant's pocket.

¶ 20 Here, when the trial judge explained his basis for finding defendant guilty of burglary, he did not reference defendant's post-arrest silence and there is nothing in the record to suggest that he relied on the post-arrest silence in any way. See *People v. Titone*, 115 Ill. 2d 413, 423-24 (1986) (quoting *People v. Edmmonds*, 101 Ill. 2d 44, 66 (1984)) (court did not consider whether a *Doyle* violation occurred in a bench trial because the trial court " 'is presumed to have considered only properly admitted evidence and defendant was not prejudiced.' "). Indeed, defendant's conviction was based on the trial court's credibility determinations and supported by the evidence. On this record, there was no reasonable probability that the outcome of defendant's trial would have been different absent the prosecutor's remarks on his post-arrest silence. Therefore, defendant was not entitled to a new trial because any error in the prosecutor's use of his post-arrest silence was harmless.

¶ 21 Defendant also claims that he was denied a fair trial because the prosecutor failed to "prove up crucial impeachment evidence" about whether he gave the police a false address of where he lived "on the night in question."

¶ 22 A prosecutor may not "ask a witness questions for purposes of impeachment unless the prosecutor is prepared to offer proof of the impeaching information." *People v. Olinger*, 112 Ill. 2d 324, 341 (1986). The prosecutor's "incomplete impeachment of a witness is reversible error only when the unfounded insinuation is substantial, repeated, and definitely prejudicial." *People v. McCoy*, 2016 IL App (1st) 130988, ¶ 59.

¶ 23 Defendant concedes that he has forfeited review of this claim by failing to raise it at trial and in a post-trial motion, but urges review under the plain error doctrine, or, alternatively, as a matter of ineffective assistance of counsel for failing to properly preserve this issue. Specifically,

defendant argues that the alleged "clear or obvious error" is reviewable because the evidence was closely balanced. *People v. Belknap*, 2014 IL 117094, ¶ 48. The initial step in a plain error analysis is to determine "whether the claim presented on review actually amounts to a 'clear or obvious error' at all." *People v. Harvey*, 2018 IL 122325, ¶ 15. The defendant bears the burden of establishing a "clear or obvious error." *People v. McDonald*, 2016 IL 118882, ¶ 48.

¶ 24 Here, no "clear or obvious error" occurred. On cross-examination, defendant denied telling the police that he lived at 44 West 112th Place, which was different from the address he testified to on direct examination (11255 S. King Drive). The prosecutor did not ask defendant any further questions on that subject. On redirect, defendant testified as follows:

> "Q. Did you ever tell the officer that you lived there?
> A. Yes.
> Q. At 44 W 112th Place?
> A. Yes.
> Q. Did you tell him that you lived there on the night in question?
> A. No."

Defendant also clarified that "on the night in question," he came from around the corner to the location of the incident, which was "maybe about a hundred feet" from "where [he] live[d]."[6]

¶ 25 Although the prosecutor did not perfect this impeachment evidence, defendant's address was a collateral matter and any discrepancy in his address was fully explained in the manner set forth herein.[7] See *People v. Williams*, 204 Ill. 2d 191, 219-20 (2003) (incomplete impeachment deprives "defendant of a fair trial only when it constitutes a material factor in the defendant's conviction"). Therefore, defendant failed to carry his burden of demonstrating a "clear or obvious" error. *People v. Harvey*, 2018 IL 122325, ¶ 23. Because there was no "clear or obvious" error, the

[6] Defendant's arrest report and the complaint listed the arrest location as "423 E 113th Street."

[7] Defendant's motion to reduce or modify bail filed a week after his arrest listed his current residence as "11255 S. King Dr. #2F" and "his residence address for the past 10 years" listed "44 W. 112th Place."

plain error doctrine is inapplicable. For these same reasons, we decline to consider defendant's ineffective assistance of counsel claim. *People v. Carr-McKnight*, 2020 IL App (1st) 163245, ¶ 93; *People v. Moon*, 2019 IL App (1st) 161573, ¶ 47.

¶ 26 Finally, defendant argues that the cumulative effect of the two asserted claims of error denied him a fair trial. As discussed above, defendant's claims of error did not result in any prejudice. Therefore, the cumulative effect of the alleged errors did not deprive him of a fair trial. *People v. Hall*, 194 Ill. 2d 305, 351 (2000); see *People v. Green*, 2017 IL App (1st) 152513, ¶ 118 ("[t]here generally is no cumulative error where the alleged errors do not amount to reversible error on any individual issue.").

¶ 27 CONCLUSION

¶ 28 Defendant received a fair trial and his burglary conviction is affirmed.

¶ 29 Affirmed.