

STATE OF MICHIGAN
IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS

Bill Schuette, PJ, Peter D. O'Connell and Alton T. Davis, JJ.

THE PEOPLE OF THE
STATE OF MICHIGAN,

Plaintiff-Appellee,

vs

HAROLD EMMETT SHAFIER, III,

Defendant-Appellant,
_____ /

Supreme Court No.: 135435

Court of Appeals No.: 267192

Circuit Court No.: 05-14062-FC

PLAINTIFF-APPELLEE'S BRIEF ON APPEAL
(Oral Argument Requested)

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STATEMENT OF JURISDICTION

On September 14, 2007, this Court granted Defendant's application for leave. The Plaintiff agrees that this Court has jurisdiction.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

I

DID THE TRIAL PROSECUTOR VIOLATE *DOYLE V OHIO* IN COMMENTING UPON THE DEFENDANT'S FAILURE TO SPEAK AT THE TIME OF ARREST?

Plaintiff-Appellee says:	"No"
Defendant-Appellant says:	"Yes"
Trial Court says:	Not Asked
Court of Appeals says:	"Yes"

II

IF THERE WAS ERROR UNDER THE *DOYLE* STANDARD, WAS A CLAIM OF ERROR PRESERVED?

Plaintiff-Appellee says:	"No"
Defendant-Appellant says:	"Yes"
Trial Court says:	Not Asked
Court of Appeals says:	"No"

III

THE APPROPRIATE STANDARD OF REVIEW ON APPEAL FOR AN UNPRESERVED ERROR EFFECTING CONSTITUTIONAL RIGHTS IS PLAIN ERROR.

Plaintiff-Appellee says:	"Yes"
Defendant-Appellant says:	"Yes"
Trial Court says:	Not Asked
Court of Appeals says:	"Yes"

IV

THE CORROBORATION OF THE COMPLAINANT'S TESTIMONY BY OTHER WITNESSES RESULTED IN A CONVICTION THAT WAS NOT PLAIN ERROR. THE DEFENDANT HAS FAILED TO SHOW THAT AN INNOCENT PERSON WAS CONVICTED OR THAT THE VERDICT IMPLICATED FAIRNESS OR INTEGRITY OR PUBLIC REPUTATION OF JUDICIAL PROCEEDINGS.

Plaintiff-Appellee says:	"Yes"
Defendant-Appellant says:	"No"
Trial Court says:	Not Asked
Court of Appeals says:	"Yes"

COUNTER-STATEMENT OF FACTS

The Appellee's Appendix provides complete versions of the testimony of family members and the Defendant, for this Court's convenience.

The Defendant was convicted of two counts of criminal sexual conduct in the second degree in violation of MCL 750.520c.

During the trial, the trial prosecutor made several references to the Defendant's silence at the time of arrest. It was first mentioned in the opening statement, without objection. 43A-44A. It was again developed on questioning the arresting police officer. 48A-50A. Again no objection occurred. The officer said the Defendant asked no questions about his arrest, nor made any statement. Defense counsel also asked the police officer on cross examination about the silence. 14b-15b. On redirect examination, the silence was again addressed by the trial prosecutor. 53A-54A.

At trial the Defendant testified. On direct examination, Defense counsel asked him about his silence at arrest. Defendant claimed he asked the police officer why he had been arrested. 232A. He went on to testify that the police officer did not share anything else with him. He indicated that it was a new experience for him, that he was scared and had watched a lot of T.V. and wanted to talk to somebody. 232A-233A.

When asked by his own counsel whether or not the police officer was cooperative, the Defendant indicated "he just told me what I had to -- what he told me, what he felt I had to know and that was it, yeah." 233A.

The Defendant went on to testify that at the time of the arrest that he had no idea what he was being charged with. 233A.

In response to this direct testimony the trial prosecutor inquired about his opportunity at later dates to express his theory of the case. 240A. At this point the only objection made at the trial was sustained on the basis of attorney-client privilege. 240A.

Before any testimony was taken the defense made its theory clear. The defense counsel indicated that the Defendant would take the stand, and that the allegations made against him were lies. 46A-47A

Both parties mentioned the Defendant's silence in their closing arguments, however defense counsel extensively related its subject and made the argument that it demonstrated that he had been rebuffed by the arresting officer and that the investigation was not thorough. 248b-250b. He also accused the complainant and other family members of lying. 254b, 264b.

The Defendant was sentenced on each count to a prison term of 71 months to a maximum of 180 months. 248A-249A

On appeal the Michigan Court of Appeals found that the Defendant's right to remain silent had been violated, but that since he had failed to preserve by objection that the error was not sufficient to cause reversal.¹

¹ *People v Shaffier*, 277 Mich App 137; 743 NW2d 742 (2007).

ARGUMENT I

DID THE TRIAL PROSECUTOR VIOLATE *DOYLE V OHIO* IN COMMENTING UPON THE DEFENDANT'S FAILURE TO SPEAK AT THE TIME OF ARREST?

The United States Constitution, 5th Amendment indicates that “no person...shall be compelled in any criminal case to be a witness against himself.” This right has been ruled to include custodial interrogation.²

After *Miranda* warnings are given, the prosecutor at trial is prevented from using any resulting silence against the defendant. This is due to the presumption that post *Miranda* silence is ambiguous, and may be a silence based upon a reliance of the right to remain silent.³

Doyle did not prevent the use of silence in all situations; rather it prevents the use of silence that could have been induced by a defendant's reliance on *Miranda*.⁴

A number of exceptions have been recognized under Michigan law. In, *People v Bobo*, the prosecutor could use the defendant's silence to rebut an assertion that he had observed the real criminals run past him just prior to being arrested.⁵ If that had been true, this Court opined that innocent people would quickly express this to the police, despite *Miranda* rights being read.

In *Bobo*, this Court recognized that not allowing the prosecutor to develop such testimony would seriously prejudice the truth seeking function of our court system. This Court was unwilling to allow a defendant to make an assertion that could be easily contradicted by the fact that he failed to bring that fact up immediately to police.

² *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 2240; 16 L Ed 2d 694 (1966)

³ *Doyle v Ohio*, 426 US 610, 618-619; 96 S Ct 2240; 49 L Ed 2d 91 (1976)

⁴ *Jenkins v Anderson*, 447 US 231; 100 S Ct 2124; 65 L Ed 2d 86 (1980)

⁵ *People v Bobo*, 390 Mich 355; 214 NW2d 190 (1973)

Thus it is clear, that pre-arrest or post arrest silence can sometimes be used at trial when a defendant testifies in contradiction of prior statements, or if he fails to speak. In those instances, he is not protected under *Doyle*.⁶

The Appellee in this case does not contest the application of *Doyle*. We concede that the police officer testified that silence followed his reading of the *Miranda* rights. However, the police officer was clear that no interrogation was undertaken at the time of arrest. The Defendant in his testimony indicated that he did ask the police officer why he was arrested. This was in variance to the testimony of the police officer. Under Michigan law, if the Defendant had first raised this claim, it is clear that Appellee could have developed this silence in redirect testimony by the police officer.⁷

It seems likely that the trial prosecutor knew that the Defendant intended to use this claim in his own defense, or otherwise argue his silence in defense of the charges. For instance, his claim that he was in shock and remembered his rights from T.V. would have appealed to the jury. Especially in a case where he was labeling his three daughters and wife as liars. This strategy largely worked, he avoided conviction on life offenses, and received much lesser imprisonment as a result.

On the initial appeal, the Michigan Court of Appeals found a *Doyle* violation. Nevertheless, it remains clear that Defendant developed an argument and testified in a way that should have allowed the use of his silence at trial. The Defense lawyer embraced the issue and decided to further develop and explain his silence. They used it to considerable advantage, and should not be allowed now to complain on appeal, when no objection was made at trial.

⁶ *People v Cetlinksi* (after remand), 435 Mich 742; 460 NW2d 534 (1990); *People v Hackett*, 460 Mich 202, 596 NW2d 107 (2003)

⁷ *People v Sutton*, 436 Mich 575; 464 NW2d 276 (1990)

Given the way in which this case was argued by both parties, it is the position of the Appellee that no *Doyle* violation occurred. We ask this Court to affirm the conviction on this basis.

ARGUMENT II

IF THERE WAS ERROR UNDER THE *DOYLE* STANDARD, WAS A CLAIM OF ERROR PRESERVED?

The Defendant in his brief at page 29 concedes that the trial attorney failed to preserve the *Doyle* issue. As admitted by the Defendant, no proper objection was made at any time. This is required by case law. For instance, it has been held by the United State Supreme Court that a single question, followed by an objection and curative instruction does not amount to a *Doyle* violation.⁸

Even if objection is made, federal courts generally use the plain error standard⁹. Reversal is required only if the prosecutorial conduct is especially flagrant.¹⁰

Since no objection was made under *Doyle*, and both parties mentioned the silence in proofs and argument, it is clear no preservation of a *Doyle* violation occurred.

This Court should find that this is an instance where error was not preserved.

⁸ *Greer v Miller*, 483 US 756, 764-765; 107 S Ct 3102; 97 L Ed 2d 618 (1987)

⁹ *Girts v Yanai*, 501 F3d 743, 758 (2007)

¹⁰ *United States v Gonzalez*, 512 F3d 285, 292, cert den US ; 129 S Ct ; L Ed 2d (2008)

ARGUMENT III

THE APPROPRIATE STANDARD OF REVIEW ON APPEAL FOR AN UNPRESERVED ERROR AFFECTING CONSTITUTIONAL RIGHTS IS PLAIN ERROR.

The Defendant in his brief, also correctly states the standard of review. Since the claim of error was unpreserved, review is for plain error. The defendant must establish and show that that error affected the outcome of the trial.¹¹ Again, it appears that federal courts use a similar standard as Michigan, allowing reversal only to avoid a miscarriage of justice.¹²

Thus, in *Carines*, this Court has already correctly identified the appropriate standard of review for a *Doyle* violation. In *Greer v Miller*, the United State Supreme Court indicated that a violation must be judged in the context of the trial.¹³ The United State Supreme Court gave deference to the Illinois Supreme Court's factual determinations in *Greer v Miller*.¹⁴ The concurring opinion of Justice Stevens made clear that *Doyle* violations typically fall within a class of constitutional violations that allow a review of the individual facts of the case in determining whether or not a reversal is the appropriate remedy.¹⁵ *Doyle* violations do not and should not lead to automatic reversal.

Using the standard of review, the Defendant argues that the prosecutor's extensive and deliberate use of his post *Miranda* silence constitutes plain error. However, this ignores the trial strategy of his own trial attorney, who deliberately and effectively used his silence to advantage at trial. When both parties put the issue into play, it is not a situation where he can now argue prejudice. In fact because he embraced this testimony, and in his own opening statement

¹¹ *People v Pipes*, 475 Mich 267, 274; 715 NW2d 290 (2006); *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999)

¹² *Girts v Yanai*, supra

¹³ *Greer v Miller*, supra 765-766

¹⁴ 768-767

¹⁵ 767-768

indicated that the complaining witness and her two sisters were lying, this is not a situation that affects the fairness and integrity or public reputation of the trial.

It is also helpful to remember that the expressed policy of Michigan by statute and court rule is to uphold trial verdicts.

For instance in MCL 769.26; that statute provides:

No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice.

A similar standard is found in MCR 2.613(A) which provides:

An error in the admission or the exclusion of evidence, an error in a ruling or order, or an error or defect in anything done or omitted by the court or by the parties is not ground for granting a new trial, for the setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take the action appears to the court inconsistent with substantial justice.

The evidence rules also recognize the same standard. MRE 103 states in relevant part:

(a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right to the party is affected, and

(1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or...

....

(d) Plain Error. Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court

The policy of this State indicates the importance of the preservation of error, before appellate review. The case of *Greer v Miller* recognizes that *Doyle* violations are the types of constitutional issues that are subject to such a standard of review.

This Court in the review of pre-*Miranda* silence found the same standard to apply.¹⁶ There is no reason not to apply the same standard to post *Miranda*, *Doyle* violations.

The only argument that is made by the Defendant in support of reversal of conviction is the claim that the trial prosecutor engaged in extensive violation of *Doyle*. This argument ignores that the Defendant also engaged in extensive argument and testimony on the exact same issue. He attempted to explain his silence, bolster his credibility, and brand the other witnesses as not credible. This was a deliberate trial strategy, and a strategy that met with a considerable amount of success. The Defendant evaded conviction of three more serious charges of criminal sexual conduct in the first degree. Since he used this strategy to avoid conviction for three potential life offenses, it is not now appropriate for him to complain of a *Doyle* violation in attacking the remaining two convictions.

Therefore this Court should not find plain error in the instant case.

¹⁶ *People v McNally*, 470 Mich 1; 679 NW2d 301 (2004)

ARGUMENT IV

THE CORROBORATION OF THE COMPLAINANT'S TESTIMONY BY OTHER WITNESSES RESULTED IN A CONVICTION THAT WAS NOT PLAIN ERROR. THE DEFENDANT HAS FAILED TO SHOW THAT AN INNOCENT PERSON WAS CONVICTED OR THAT THE VERDICT IMPLICATED FAIRNESS OR INTEGRITY OR PUBLIC REPUTATION OF JUDICIAL PROCEEDINGS.

As indicated above unpreserved claims of constitutional error are reviewed for plain error.¹⁷

In this case the jury found the Defendant guilty of two counts of criminal sexual conduct in the second degree. This is in violation of MCL 750.520(c). The statute requires the finding of four elements. First, that the Defendant touched the complainant on her genitals, groin, inner thigh, or buttocks. Second, that it was done for sexual purpose as required by case law and statute.¹⁸ Third, that the complainant was either 13,14, or 15 years of age at the time of the touching. And fourth, that the Defendant and complainant were living in the same household, were related as father and daughter, or that the Defendant used his authority to coerce her compliance.

Age and relationship (father/daughter) were never at issue. That left the issues of touching and whether the touching, if it occurred, was for a sexual purpose.

As noted above, the Defendant was successful in fending off the most serious charges of criminal sexual conduct in the first degree. First degree would have required penetration.

The Defendant says that the resulting conviction was a compromise, and solely due to the *Doyle* violation. However an examination of the other evidence in the case shows that the *Doyle* violation played no role in the conviction.

¹⁷ *People v Carines, supra; People v McNally, supra*

¹⁸ *People v Lemons*, 454 Mich 234, 253; 562 NW2d 447 (1997)

It is true that the complainant testified to both penetration and touching. Of course the penetration would have led to the more serious conviction, and the sexual touching, if believed, would lead to the conviction that was actually imposed. Moreover, her testimony was corroborated on the sexual touching element. For instance, it is uncontested that her sister, April, saw the Defendant with his face in her crotch. This occurred atop a table in the basement of the family home. 133A-134A and 80b-81b. Another sister, Samantha, testified that she came upon the complainant and the Defendant shortly after it appeared that they either kissed or were about to kiss. 123A and 94b-98b. Both of these witnesses testified to facts that show sexual touching between the complainant and the Defendant. This testimony would not be affected by a *Doyle* violation. Rather it was direct testimony, if believed, that established or tended to support the establishment of the type of touching outlawed by MCL 750.520c.

Further, this testimony would tend to make less significant the two experts that testified in the instant case. One expert for the Appellee explained delayed reporting and an expert for the defense suggested that the complainant suffered from a mental disorder that would tend to cause her to fabricate the charge against her father. But, the two sisters would not be subject to discrediting on the same basis. Their testimony indicates indirectly in the instance of Samantha, and quite directly in the testimony of April, that the type of sexual touching occurred on the complainant's body to support the charge of criminal sexual conduct in the second degree.

It is clear that the jury concentrated on the court's instructions, and found the Defendant guilty of the two crimes that were corroborated by witnesses other than the complainant. These convictions had nothing to do with the Defendant's silence at arrest. The jury did not find penetration, but in relying on the testimony of the two other witnesses found the next most likely sexual act to be established beyond a reasonable doubt. This was logical and reasonable.

The post arrest silence did not affect the outcome of the trial. The Defendant was not prejudiced.

A violation of *Doyle* simply played no role in this determination by the jury. Instead, it shows that the jury examined the evidence and rendered a verdict consistent with justice. This is not plain error and this Court should affirm that conviction on appeal.

RELIEF REQUESTED

The Plaintiff-Appellee asks that this Court affirm the Defendant's conviction for criminal sexual conduct in the second degree.

Dated: *October 20, 2008*

Respectfully submitted,



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DEK:plc