IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-7216
(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ELIAZAR MATA-YANEZ,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
(CR-B92-258)

(November 15, 1993)

Before JOLLY, WIENER and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:[*]

In appealing his jury trial conviction on five drug-related offenses, Defendant-Appellant Eliazar Mata-Yanez's (Mata) sole assignment of error is that his due process rights were violated when the prosecutor referred to Mata's post-arrest silence,

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[*]Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

purportedly in contravention of Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976). Finding no reversible error, we affirm.

Mata argues that the prosecutor improperly commented on his post-arrest silence on three separate occasions: during her closing argument; during her attempt to withdraw the remark when the defense counsel moved for a mistrial; and, impliedly, during the government's case-in-chief. The contention is that the prosecutor's attempt to discredit Mata's exculpatory story was an improper comment on his post-arrest, post-Miranda silence.

In Doyle v. Ohio, the Supreme Court held that the use, for impeachment purposes, of a defendant's silence at the time of arrest and after receiving Miranda warnings violated the Due Process Clause of the Fourteenth Amendment. 426 U.S. at 619. The prosecutor in Doyle had asked the defendant on cross-examination why when he was arrested he had not told the agent the story which Doyle related at trial. Id. at 613. The Supreme Court in Doyle clarified that the Due Process Clause embraces the right not to have one's post-arrest, post-Miranda-warning silence used for impeachment at trial. Id. at 619.

In Chapman v. United States we classified Doyle violations as falling into three categories of cases: (1) those in which the prosecution directly links the implausibility of a defendant's exculpatory story to his remaining silent, (2) those in which the prosecutor does not directly tie the defendant's silence to his exculpatory story, and (3) those in which there is a single

reference to a defendant's silence. 547 F.2d 1240, 1249-50 (5th Cir.), cert. denied, 431 U.S. 908 (1977). In cases falling into the first category, reversible error results even if the defendant's exculpatory story is transparently frivolous. In cases of the second category, reversible error results if the exculpatory story is not totally implausible or the indicia of guilt is not overwhelming. In those of the third category, the reference to the defendant's silence is harmless error if the exculpatory story is transparently frivolous and evidence of guilt is overwhelming. Id.

An attempt to comment on a defendant's post-arrest silence or on a defendant's failure to come forward with his alibi immediately following his arrest is not permissible under Doyle; an attempt to impeach a defendant by bringing out inconsistencies between statements made following his arrest and those made subsequently, whether before or during trial, is permissible. See United States v. Laury, 985 F.2d at 1302; Doyle, 426 U.S. at 617-18. Virtually any description of a defendant's silence following arrest and Miranda warning will constitute a Doyle violation. Laury, 985 F.2d at 1303.

1.

Case-In-Chief

The first challenged reference to Mata's silence came during the following colloquy while the government was presenting its case-in-chief:

> Q: [By the prosecutor] And would you please tell the jury, who was the one who actually read that [the Miranda warnings]?

A: [By Agent Stolinski] Agent Rosario.

Q: And you are the witness, is that correct?

A: Yes, ma'am.

Q: Does the defendant's signature also appear on that document?

A: Yes, ma'am.

Q: Basically indicating what?

A: That it was read to him and he comprehends it. He understands it. Also Agent Rosario asked Mr. Mata, "Do you understand this?" And he replied, "Yes," or "Si," in Spanish.

Q: Out there at the scene, were any statements made to you by the defendant?

A: Other than he understood his Miranda rights, no.

Q: When you were back at the Border Patrol Station, were any statements --

DEFENSE COUNSEL: Your Honor, I am again going to object to relevance. I am concerned that she is going into the Fifth Amendment privilege that is not relevant at all in this trial. Unless she has some purpose for asking these questions, I would object.

THE COURT: Were there statements?

PROSECUTOR: Just booking statements, Your Honor.

THE COURT: I am sorry.

PROSECUTOR: Just booking statements.

THE COURT: Okay. Come up here. You mean personal data?

PROSECUTOR: Yes.

THE COURT: Confine yourself to that.

PROSECUTOR: Yes.

Mata's counsel did object to the question to Agent Stolinski regarding statements made at the scene, based on relevance and invasion of Mata's Fifth Amendment privilege; and the court partially sustained the objection to the extent that it directed the prosecutor to limit her inquiry to the "booking statements" that were made. For purposes of Chapman categorization, this first comment should be classified as an instance in which the prosecutor does not directly tie the defendant's silence to his exculpatory story. Chapman, 547 F.2d at 1249-50. The exculpatory story was not implicated by the comments solicited from Stolinski, and both counsel's objection and the court's ruling were interposed and complied with before any improper questioning constituting reversible error could occur. See United States v. Carter, 953 F.2d 1449, 1466 (5th Cir. 1992) (objection interposed before answer to improper question regarding post-arrest silence prevented Doyle violation) (internal citation omitted).

The prosecutor's line of questioning to Agent Stolinski ensured that the jury was aware that Mata had his rights read to him in Spanish and that he understood them. Agent Stolinski indicated that no other statements were made to her at the scene. And, upon the court's directionsQfollowing objection by Mata's counselsQto limit the questioning, the inquiry immediately ceased. Thus, the inquiry during the government's case-in-chief was harmless and did not constitute a Doyle violation. See Laury, 985 F.2d at 1304.

2.

Closing Argument

The prosecutor made two references to Mata's silence during her rebuttal of the defense counsel's closing argument. Those two references are the instances challenged by Mata as (1) the comment made during the prosecutor's closing argument, and (2) the comment made during her attempt to withdraw the remark when defense counsel moved for a mistrial. The following argument was made:

> [By the Prosecutor] He got on the stand and he said,
>
> "Are you nervous?"
>
> "No, I am not nervous."
>
> You know what? I don't think he was. This is amazing. **He gets arrested and doesn't say a word.**
>
> DEFENSE COUNSEL: I am going to object, Your Honor. That is improper argument, commenting on the invocation of the right of silence.
>
> THE COURT: Ladies and gentlemen, remember my instructions. What the attorneys are saying to you now is not evidence.
>
> PROSECUTOR: I will withdraw [sic] remark, Your Honor.
>
> . . . .
>
> When he was immediately confronted by the officers, stopped by them, **he never said anything.** When the officers --
>
> DEFENSE COUNSEL: Objection. Same --
>
> THE COURT: I cannot hear a word you are saying. I don't even know what he objected to. Stand over here and speak in the microphone.
>
> PROSECUTOR: I am sorry, Your Honor.

> DEFENSE COUNSEL: I would object, Your Honor, to another improper --
>
> THE COURT: I did not hear it. I did not hear the other one, either, for that matter.
>
> What is it that you said?
>
> PROSECUTOR: I withdraw both statements, Your Honor. I will proceed with other argument.
>
> . . . .
>
> DEFENSE COUNSEL: Excuse me, Your Honor. I would respectfully move for a mistrial as to the second statement.
>
> THE COURT: Denied.

Mata challenges these references to his post-arrest silence as attempts by the prosecutor to focus intentionally on Mata's post-arrest silence in an effort to discredit his story of crossing the river to find work. Mata also argues that the court's curative instruction to the jury following his objection to these arguments was merely an "off-the-mark" admonishment to counsel about speaking louder, and did not cure the injury. After Mata's attorney objected to the prosecutor's mention that Mata had not said anything after he was confronted by the officers, the court reminded the jurors that statements by the attorneys were not to be considered evidence.

After the jury retired to deliberate, the following discussion transpired regarding the prosecutor's reference to Mata's post-arrest silence and to the defense counsel's objection during the prosecutor's closing argument.

> THE COURT: What were you objecting to? What is it you were objecting to, now?

> DEFENSE COUNSEL: At the closing, Your Honor?
>
> THE COURT: Closing I will get to in just a minute. I didn't hear it.
>
> . . . .
>
> THE COURT: What is it you were objecting to in her argument?
>
> PROSECUTOR: I think he was objecting, Your Honor -- I think he was intimating that I made some sort of post arrest statement on the defendant's right to remain silent. I don't think it was, but I withdrew it just in case I had clumsily worded it. What I was trying to indicate, when he was first confronted, he didn't say, "Oh great."
>
> THE COURT: I have another question for you. Counsel for the defendant continually during the course of this trial objected to relevance of Miranda. In view of the fact you didn't elicit anything that was done after Miranda, my question is why go through that if you are not going to elicit any evidence in that regard?
>
> PROSECUTOR: Well, I wondered if some of the booking evidence might be apropos.
>
> THE COURT: You didn't bring it out.
>
> PROSECUTOR: Right, I didn't. I thought I might meet you on rebuttal.
>
> THE COURT: . . . .
>
> But if you are not going to elicit anything, why go through the process? I think it is surplusage. I don't think it is error.

The district court indicated that it had not followed the prosecutor's argument and that it was unsure of what comments were being objected to by Mata's counsel. The government argues that because counsel did not ensure that the instruction to the jury regarding any post-arrest silence was adequate, the plain error

standard was not violated. We agree.

Mata's counsel objected to these statements made by the prosecutor during her closing argument. The court reminded the jury that counsel's statements were not evidence. Following the prosecutor's subsequent comment that Mata did not comment when confronted by the officers, Mata's counsel again objected and the court indicated that it could not hear and thus could not follow the remarks. The prosecutor agreed to withdraw her statements and there were no further curative instructions requested by counsel or given by the court.

As defense counsel failed to object to the trial court's handling of the alleged impropriety—and despite his earlier objection to the statements—the plain error standard applies. Carter, 953 F.2d at 1466. Plain error did not occur in this instance. When viewed in light of the overall merits of the case, the prosecutor's remarks played no significant role in Mata's conviction. Given the evidence of guilt highlighted below, and the court's instruction that counsels' statements should not be considered as evidence, there was simply no plain error.

Moreover, if we were to review the alleged Doyle violations under the harmless error analysis, we would be convinced that Mata's conviction should not be reversed. "A conviction should not be set aside if the prosecutor's conduct . . . did not in fact contribute to the guilty verdict and was, therefore, legally harmless." United States v. Lowenberg, 853 F.2d 295, 302 (5th Cir. 1988), cert. denied, 489 U.S. 1032 (1989) (internal quotations and

citation omitted). The evidence of Mata's guilt is overwhelming. Also, his exculpatory story of seeking work is implausible when viewed in light of the facts that he was carrying a loaded firearm during his trek across the border and that his three cohorts were following closely behind, carrying bundles of marijuana. Border Patrol Agent Coburn testified that after Mata was apprehended, the other three individuals ran back towards the river along the same trail they had used to get there. Also, the agents who work the border patrol stations testified that the type of "look-out" behavior exhibited by Mata is common among those persons who engage in smuggling drugs into the United States from Mexico.

Considered in context with all of the evidence presented at trial, the prosecutor's conduct, although probably inappropriate under Doyle, did not in fact contribute to the guilty verdict and was, therefore, neither plain error nor legally harmful. Carter, 953 F.2d at 1466; Lowenberg, 853 F.2d at 302.

AFFIRMED.