

V. Appellant was denied his Sixth and Fourteenth Amendment Right to effective assistance of counsel.

After a thorough consideration of these propositions and the entire record before us, including the original record, transcripts, and briefs of the parties, we find reversal is required.

With respect to propositions one, four, and five, we find the prosecutor asked a series of improper impeachment questions during cross-examination and made improper closing arguments concerning Appellant's post-arrest silence in violation of *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 48 L.Ed.2d 91 (1976). It is a violation for a state prosecutor to 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. 426 U.S. at 611, 96 S.Ct. at 2241. In such circumstances, it is 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. 426 U.S. at 618, 96 S.Ct. at 2245.

Furthermore, the prosecutor asked improper questions to a police officer during the State's case-in-chief regarding Appellant's pre-arrest silence, when he was being investigated for the instant crime. These questions—which concerned Appellant's refusal to speak to police, his hiring of an attorney, his attorney's instruction to not speak to police, and Appellant's failure to bring forth evidence when facing accusations—cannot fairly be considered impeachment, despite the fact Appellant had declared his intention to later testify. While the improper

questions may or may not amount to Fifth Amendment violations, the evidence sought was not relevant. *See Farley v. State*, 717 P.2d 111, 113 (Okl.Cr.1986) (finding evidence of pre-arrest silence does not increase the probability that a defendant's testimony is false and is thus irrelevant).

Doyle errors can be harmless. *Brecht v. Abrahamson*, 507 U.S. 619, 627-32, 113 S.Ct. 1710, 1716-19, 123 L.Ed.2d 353 (1993); *Jenkins v. Anderson*, 447 U.S. 231, 239, 100 S.Ct. 2124, 2129, 65 L.Ed.2d 86 (1980). But here the evidence came down to a swearing match between Appellant and the victim, both of whom had credibility issues. The jury struggled with its decision, sending back no less than seven notes concerning its difficulty reaching a decision. Reviewing the evidence in its entirety, we cannot say the *Doyle* errors and other improper questions addressed above were harmless. *Simpson v. State*, 876 P.2d 690, 701-02 (Okl.Cr.1994). The violation of Appellant's right to remain silent and questions concerning his pre-arrest and post-arrest silence may have impacted the jury by suggesting Appellant was trying to hide something or had some sort of duty to come forward with evidence.

Defense counsel failed to lodge any objections to these improper questions and arguments, however, including the following closing argument by the Assistant District Attorney:

Do you think you're going to spend two years with that secret, protecting a stranger when all you had to do was tell your lawyer, hey, this other guy did it? Little Man. You're not going to do that. That's again where common sense comes into play. People who are innocent tell you so. They protest loudly. They protest longly (sic) and they don't give up. They don't patiently wait til they're facing jury trial to say, hey, I want to come clean. I want to tell you the truth about this. This doesn't happen, ladies and gentlemen.

Failure to object, of course, waives all but plain error. *Simpson*, 876 P.2d at 693. While plain error arguably exists, we find defense counsel's complete failure to object to any of these incidents amounted to ineffective assistance. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984).

Propositions two and three, however, are without merit. *Young v. State*, 12 P.3d 20, 34 (Okla.Cr.2000); *Loman v. State*, 806 P.2d 663, 668 (Okla.Cr.1991).

DECISION

The judgment and sentence are hereby **REVERSED** and the matter is **REMANDED** for a new trial consistent with this Opinion.

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY
THE HONORABLE SUSAN W. BRAGG, DISTRICT JUDGE

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OPINION BY: LUMPKIN, J.
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LILE, V.P.J.: CONCUR
CHAPEL, J.: CONCUR
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