

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellee

v.

CUONG PHAM

Appellant

No. 2853 EDA 2012

Appeal from the Judgment of Sentence July 17, 2012
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0014307-2011

BEFORE: BOWES, J., OTT, J., and JENKINS, J.

MEMORANDUM BY OTT, J.:

FILED APRIL 22, 2014

Cuong Pham appeals from the judgment of sentence imposed on July 17, 2012, in the Court of Common Pleas of Philadelphia County. Following a two-day trial, a jury found Pham guilty of patronizing prostitutes.¹ The trial court sentenced Pham to a term of six to 12 months of imprisonment. In this appeal, Pham claims: (1) The trial court abused its discretion in denying the defense motion for mistrial after the prosecutor and trial judge referenced Pham's post-arrest silence in violation of his right to remain silent pursuant to Article 1, Section 9 of the Pennsylvania Constitution and the Due Process Clause of the Fourteenth Amendment of the United States Constitution; (2) The trial court committed reversible error in permitting,

¹ 18 Pa.C.S. § 5902(e).

over defense counsel's objection, reference to Pham's post-arrest silence in violation of his constitutional rights and the prohibitions of **Doyle/Turner**²; (3) The trial court's cautionary instruction did not cure the prejudice of the impermissible referencing to Pham's post-arrest silence; and (4) The impermissible referencing to Pham's post-arrest silence was not harmless error.³ **See** Pham's Brief at 3. Based on our review of the record, we vacate the judgment of sentence and remand for a new trial.⁴

The trial court summarized the facts giving rise to Pham's arrest and conviction, as follows:

At trial, the Commonwealth presented the testimony of Philadelphia Police Officers Stephanie Rosenbaum and James Kearney. The defense presented the testimony of Sung Truong

² **Doyle v. Ohio**, 426 U.S. 610 (1976); **Commonwealth v. Turner**, 454 A.2d 537 (Pa. 1982).

³ Pham timely complied with the trial court's order to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b).

⁴ The Commonwealth, in its brief, indicated that it did not oppose the grant of a new trial. Thereafter, the trial court, having received the Commonwealth's Letter Brief, authored a supplemental opinion, reemphasizing its rationale in support its decision to deny Pham's request for a mistrial. **See** Trial Court Supplemental Opinion, 12/20/2013.

We note that the trial court's supplemental opinion did not cause the Commonwealth to change its position. At oral argument before this Court, the Commonwealth restated that it did not oppose remand for a new trial. As will be more fully discussed below, we find merit in Pham's argument, and we commend the Philadelphia Office of the District Attorney for its candor.

[Pham's handyman], Jane Huynh [Pham's wife], and Defendant, Cuong Pham.

On December 9, 2010, Officer Rosenbaum was on duty at 1800 East Sergeant Street in the City and County of Philadelphia. Officer Rosenbaum, as a member of the City Wide Vice Unit was posing as a decoy prostitute in the Kensington neighborhood of the City. Officer Rosenbaum testified that at approximately 12:30 AM, she observed [Pham] pull up to the curb she was on. [Pham] then said to Officer Rosenbaum that he would give her twenty dollars for a blowjob. At that time, Officer Rosenbaum signaled her back up officer who w[as] in the area. Officer Kearney arrived on the scene and assisted in the arrest of [Pham]. Officer Kearney then drove [Pham's] car to the staging area nearby.

[Pham] testified at trial that he was wrongfully arrested. He was then asked by the Assistant District Attorney if he ever made a claim with the Philadelphia Police Department Internal Affairs Division for wrongful arrest, to which he stated that he had not. He was then asked if he gave a statement to the police at any time following his arrest. At that time, this court instructed the jury as follows[:] "I want to make it clear to the panel you have a Constitutional right not to speak. You can't hold it against him. He is under no obligation to say anything." Defense counsel then made a motion for a mistrial, which was denied.

Trial Court Opinion, 6/25/2013, at 2-3. The jury found Pham guilty of the patronizing prostitutes, and, after the denial of Pham's motion for reconsideration of sentence, this appeal timely followed.

The review of a trial court's denial of a motion for a mistrial is limited to determining whether the trial court abused its discretion. ***Commonwealth v. Wright***, 961 A.2d 119, 142 (Pa. 2008). Here, we conclude that Pham is entitled to a new trial because, after he testified that

he had been wrongfully arrested, the prosecutor repeatedly asked him on cross examination whether he made a post-arrest statement to police.

At trial, Pham presented the testimony of his wife, Jane Huynh, and Sung Truong, a handyman, and he also testified in his own defense. Pham testified that on the evening of December 8, 2010, he finished work in West Chester at 10:30 p.m. He stated he headed to the Vietnamese Community in Kensington for a meeting with Sung Truong, about some home repairs, and dinner with his wife, who was meeting him in Kensington at 12 a.m. He testified he met his wife, and was parking his car, with his wife sitting in the back seat of the car because a bag of tools was on the front passenger seat, when a woman came up to him and asked him "what do you want?" He told the woman to go away, and she then asked him for money, at which point he drove away. He testified he parked on Hazzard Street, told his wife to start walking, and remained behind to cover up some tools in his car. Within minutes, he was arrested. Pham denied that he was attempting to hire a prostitute that night. **See** N.T., 6/5/2012, at 107-119.

During cross-examination of Pham, the following exchange took place:

[PROSECUTOR]:

Q. When the police arrested you that happened on Hazzard Street?

A. Yes.

Q. So, if the police officer said it happened on Sergeant Street they are incorrect?

A. That's right. They arrested me wrongly.

Q. And did you ever go to Internal Affairs and file a report that you had been wrongfully arrested?

A. I forgive the police.

Q. Did you ever give a statement to the police?

[PHAM'S COUNSEL]: Objection.

THE COURT: Overruled.

[PHAM'S COUNSEL]: He has a right to remain silent.

THE COURT: He either did or didn't. That is not a Constitutional right.

[BY THE PROSECUTOR]:

Q. Did you ever give a statement to the police?

A. On that night or a few days later?

Q. At anytime.

A. I already did tell you I forgive the police.

THE COURT: It is yes or no. Did you give a statement to the police, yes or no?

[PHAM]: I am sorry, I don't understand the question.

THE COURT: Did you talk to the police at anytime after the arrest, yes or no?

[PHAM]: Your Honor, because I am a worker, a normal person, citizen I don't know how to work the police system.

THE COURT: They want to know and she [the prosecutor] asked three times you either talked to the police or did not? Did you or did you not?

[PHAM]: No.

THE COURT: I want to make it clear to the panel you have a Constitutional right not to speak. You can't hold it against him. He is under no obligation to say anything.

[BY THE PROSECUTOR]:

Q. The first time you are telling the story to anyone is in Court?

[PHAM'S COUNSEL]: Objection.

THE COURT: Sustained.

Id. at 119–121.

After finishing the cross-examination and dismissing the jury, the court permitted the Commonwealth and defense counsel to put their positions on the record with regard to the above line of cross-examination. Pham's counsel moved for a mistrial, and the trial court denied the motion. **Id.** at 124–125. This was error.

As a general rule, any reference to a defendant's post-arrest and post-**Miranda** silence, even for impeachment purposes, violates due process. **Doyle v. Ohio**, 426 U.S. 610, 619 (1976). In **Commonwealth v. Turner**, 454 A.2d 537 (Pa. 1982), the Pennsylvania Supreme Court adopted a more restrictive approach. The **Turner** Court held that the prosecution could not impeach a testifying criminal defendant with his post-arrest, pre-**Miranda** silence, reasoning that under Article I, Section 9 of the Pennsylvania Constitution, "the existence of **Miranda** warnings, or their absence, [does not] affect ... a person's legitimate expectation not to be penalized for exercising the right to remain silent." **Id.** at 540. **See also Commonwealth v. Johnson**, 788 A.2d 985, 991 (Pa. Super. 2001)

("[C]aselaw makes clear that the Commonwealth is not permitted to point out a defendant's post-arrest failure to exculpate himself to impeach the defense offered at trial."), *appeal denied*, 798 A.2d 1288 (Pa. 2002). Here, Pham was repeatedly questioned whether he made a statement to police "[a]t anytime." **See** N.T., *supra* at 120. Therefore, on this record, we find the trial court erred in overruling trial counsel's objection to the prosecutor's questions.

The next issue is whether the trial court's cautionary instruction cured the prejudice caused by the improper reference. There are four factors to be considered in determining whether cautionary instructions can cure a reference to the accused's silence, namely: 1) the nature of the reference to the defendant's silence; 2) how it was elicited; 3) whether the district attorney exploited it; and 4) the promptness and adequacy of the cautionary instruction. ***Commonwealth v. Gbur***, 474 A.2d 1151, 1154 (Pa. Super. 1984).

Here, the above-quoted excerpt from the record plainly shows that the impermissible references were explicit and repetitive, elicited by the prosecutor on cross-examination to challenge Pham's credibility, and followed by an exploitive attempt on the part of the prosecutor — "The first time you are telling the story to anyone is in Court?" — to which the court sustained trial counsel's objection. **See** N.T., *supra*, at 121.

Significantly, the testimony shows the trial court forced Pham to answer the prosecutor's improper question whether he talked to police

following his arrest. After Pham finally answered, "No," the trial court gave a brief instruction to the jury. **See** N.T., *supra* at 121. However, given the court's involvement in the questioning, which must be viewed in the light of the court's inherent authority, the court's subsequent cautionary instruction could only amount to a mixed signal to the jury. As such, the instruction was inadequate to cure the prejudice resulting from the prosecutor's reference to Pham's post-arrest silence during Pham's cross-examination. **See Commonwealth v. Singletary**, 387 A.2d 656 (Pa. 1978) (finding cautionary instruction did not cure prosecutor's prejudicial reference to appellant's post-arrest silence during cross-examination questioning); **see also Commonwealth v. Williams**, 442 A.2d 314 (Pa. Super. 1982) (finding prejudicial effect of trial judge's question to appellant about his post-arrest silence and its timing outweighed the curative impact of judge's cautionary instruction).

Nor do we find that the reference to Pham's post-arrest silence was harmless error. In **Commonwealth v. Mitchell**, 839 A.2d 202 (Pa. 2003), the Pennsylvania Supreme Court explained:

An error will be deemed harmless where the appellate court concludes beyond a reasonable doubt that the error could not have contributed to the verdict. If there is a reasonable possibility that the error may have contributed to the verdict, it is not harmless.

Id. at 214 (citing **Commonwealth v. Story**, 383 A.2d 155, 166 (Pa. 1978) (factors to consider in determining whether error is harmless include: whether error was prejudicial, and if prejudicial, whether prejudice was *de*

minimis; whether erroneously admitted evidence was merely cumulative of other untainted, substantially similar evidence; or whether evidence of guilt was so overwhelming, as established by properly admitted and uncontradicted evidence, that prejudicial effect of error was insignificant)).

Here, applying the **Story** factors, we find the prejudice was not *de minimus* as the reference to Pham's post arrest silence was not a single comment or a passing reference, but rather was repeated questioning to create doubt as to his exculpatory account. Nor was the prejudicial reference cumulative of other untainted evidence. Furthermore, the prejudicial effect was not insignificant in comparison to the uncontradicted evidence of guilt.

In this case, the testimony of Officer Rosenbaum — that Pham pulled up in his car and solicited her on Sergeant Street, that back up officers then placed him under arrest, and that no one else was in his car⁵ — was directly contradicted by Pham's own testimony that his wife was in the backseat of the car during the exchange, that no solicitation took place, and that he was arrested on Hazzard Street.⁶ The Commonwealth offered no proof of Pham's alleged solicitation other than Officer Rosenbaum's testimony. There was no exchange of money, no audio recording, or any other witness who testified

⁵ **See** N.T., 6/5/2012, at 25–28.

⁶ **See id.** at 116–118.

as to what transpired between Rosenbaum and Pham.⁷ As such, there was no overwhelming uncontradicted evidence of guilt, and the outcome in this case necessarily turned on the jury's credibility determinations.

In such instances, our Pennsylvania Supreme Court has held that the error is not harmless as it is possible that the impermissible reference bolstered the Commonwealth's case. **See Commonwealth v. Costa**, 742 A.2d 1076, 1078 (Pa. 1999) ("It cannot be said as a matter of law that this improperly elicited testimony could not have affected the verdict of the jury[.]"); **Commonwealth v. Turner, supra**, 454 A.2d at 540 ("The jury may have decided that the Commonwealth's case was significantly bolstered by the reference to appellant's post-arrest silence and that it would be appropriate to impose a verdict more severe than acquittal but less severe than murder.").⁸ Accordingly, we conclude the error in this case was not

⁷ Officer James Kearney, the arresting officer, also testified at trial, but his interaction with Pham was subsequent to Officer Rosenbaum's interaction.

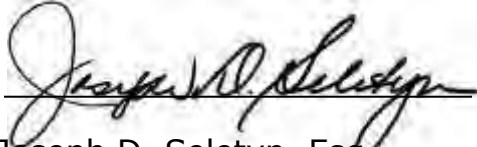
⁸ While the trial court opines that Pham's testimony was "completely unbelievable and incredible," **see** Trial Court Supplemental Opinion, **supra**, at 2, this Court cannot make credibility determinations to demonstrate harmless error. **See Commonwealth v. Young**, 748 A.2d 166, 194 (Pa. 1999) (concluding that where the defendant has testified and contradicted the Commonwealth's evidence, credibility determinations cannot be used to demonstrate harmless error as fact finding functions are not within the province of this Court).

harmless. Therefore, we vacate the judgment of sentence and remand for a new trial.

Judgment of sentence vacated. Case remanded for a new trial.

Jurisdiction relinquished.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 4/22/2014