IN THE COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

JOSE JONATHAN RIVERA-CHAVEZ,	)	**NOT FOR PUBLICATION**
Appellant,	)	
	)	Case No. F-2017-1103
v.	)	
THE STATE OF OKLAHOMA,	)	
Appellee.	)	

OPINION

LEWIS, PRESIDING JUDGE:

Appellant, Jose Jonathan Rivera-Chavez, was tried by jury and convicted of first degree murder, in violation of 21 O.S.Supp.2012, § 701.7(A), in the District Court of Tulsa County, Case No. CF-2017-59. After a second-stage sentencing where the State introduced three (3) prior felony convictions, the jury sentenced Appellant to life imprisonment without the possibility of parole. The Honorable William Musseman, District Judge, pronounced judgment and sentence according to the verdict. Mr. Rivera-Chavez appeals.

FACTS

Appellant and Wanda Cooper were staying together at a Tulsa extended stay hotel in late December, 2016. Around 3:00 p.m., on

December 27, 2016, Cooper appeared in the doorway of the hotel office and said, "Help me" to a staff member at the front desk. Cooper gestured in the direction of a man, who was walking quickly away from the hotel down East 41st Street. The staff member recognized this person as the man who had paid the rent on Cooper's room a few days before, and identified the man at trial as the Appellant. Ms. Cooper, who was covered in blood, walked only a few feet from the hotel's front door and fell to the ground.

The hotel staff member called 911. She and other bystanders then tried to help Ms. Cooper, who later died from her wounds at the hospital. Down 41st Street, meanwhile, other witnesses at a local business saw a man, whom they also identified at trial as the Appellant, approach the driver's side doors of several parked cars and attempt to open them. Police later recovered a hoodie worn by the Appellant in this lot. The murder weapon was never recovered.

One of the hotel patrons had passed Appellant while driving to the lobby to renew his room key. Appellant had stepped in front of his car and caused him to stop. He then saw Appellant attempt to open the rear door of his car. This man had watched Appellant's getaway, and pursued him. When Appellant looked back and saw

him, the man told Appellant he knew what he had done. As the man approached, Appellant took a swing at him and they began to fight. The man would not let Appellant go, saying at some point that Appellant could either come back and face police or continue to get beaten.

Appellant relented and they began walking back toward the hotel. When the man asked Appellant why he did it, Appellant gave several reasons, stating he had "paperwork" on Ms. Cooper (a possible reference to her prior work as a police informant); that someone else had made him do it; and that he had no choice. Police soon reached Appellant's location on 41st Street and told him to stop. Appellant ignored these commands, briefly taunted the officer and "kind of danced" in the street, then began to run away. Police released a K-9, which caught and subdued the Appellant. Police arrested the Appellant, seized his bloody clothing, and continued their investigation.[1]

The hotel patron who had pursued and fought with the Appellant, as well as police officers who came in contact with

[1] Police recovered blood from Appellant's pants and shoes that matched a known profile of Ms. Cooper's DNA.

Appellant that afternoon, later testified at trial that from their observation and interactions with Appellant that day, he did not appear severely intoxicated or under the influence of drugs.

Ms. Cooper had suffered twenty-six sharp force injuries (cuts and stab wounds) from Appellant's knife: nine to her head and neck; four to her chest area; four to her back, and several apparent defensive wounds and blunt force injuries besides. Two of the wounds to her chest went three or four inches deep. One penetrated her heart and directly contributed to her death.

Appellant testified at trial, admitting that he and Ms. Cooper had been staying together and doing drugs in the hotel for five days. Appellant testified that he had gotten too high on methamphetamine, grown paranoid, and hallucinated. He said Ms. Cooper had become upset when he asked her to get money for more drugs. Thinking she had glanced toward a pair of scissors lying on the counter, Appellant stabbed her with his hunting knife. He claimed he only remembered stabbing the victim four times. Appellant denied intending to kill Cooper, and admitted his three prior felony convictions. Additional facts will be related in the discussion of Appellant's proposition of error.

ANALYSIS

In Proposition One, Appellant argues that the admission of a one-minute, seventeen second (1:17) recording showing a detective's administration of the *Miranda*[2] warnings and Appellant's subsequent invocation of *Miranda* rights, offered to rebut his defense of voluntary intoxication,[3] abridged his Fourteenth Amendment rights under *Doyle v. Ohio,* 426 U.S. 610, 619, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976) and *Wainwright v. Greenfield,* 474 U.S. 284, 286-87, 295, 106 S.Ct. 634, 88 L.Ed.2d 623 (1986)(holding State's use of post-*Miranda* silence for impeachment purposes violated Due Process Clause of Fourteenth Amendment). Defense counsel preserved this claim with a timely objection to the proposed evidence at trial.

The trial court admitted this evidence on the State's cross-examination[4] after the defense called the investigating detective in its case-in-chief. The court found the recording's depiction of

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[2] *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

[3] The trial court instructed the jury on the defense of voluntary intoxication and the lesser crime of second degree depraved mind murder.

[4] To save trial time, the State was allowed to open its case in rebuttal during cross-examination of this defense witness, and offer the recording in rebuttal.

Appellant's demeanor, close in time to the crime, had tremendous probative value on the issue of voluntary intoxication. Recognizing the danger of admitting evidence involving the right to remain silent, the trial court first instructed the jury that a defendant "is not compelled to talk to the police and the fact that a defendant does not talk to police cannot be used as an inference of guilt and should not prejudice him in any way." The trial court then told jurors the recording was a "snippet" of a discussion giving them:

> an opportunity for you to review his responses and demeanor. It is not to be considered as proof of guilt or innocence. It's not the answers that are given that is [sic] to be evaluated. It is his demeanor and evidence that *you can evaluate for the intoxication element. That is all it will be used for* (emphasis added).

The admission of evidence lies within the sound discretion of the trial court and, when properly preserved for appellate review, we will not disturb the trial court's decision absent an abuse of discretion. *Pavatt v. State*, 2007 OK CR 19, ¶ 42, 159 P.3d 272, 286. An abuse of discretion is a clearly erroneous conclusion and judgment, contrary to the logic and effect of the facts. *Neloms v. State*, 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170.

In *Wainwright v. Greenfield*, 474 U.S. 284 (1986), the defendant asserted the defense of insanity at trial on a charge of sexual battery. After the conclusion of the evidence, the prosecutor argued to the jury that the defendant's silence after receiving *Miranda* warnings was evidence of his sanity. Relying on *Doyle v. Ohio*, 426 U. S. 610 (1976) and subsequent cases, the Supreme Court held that this argument imposed an unfair penalty for the exercise of *Miranda* rights after an implied promise (in the *Miranda* warning) that silence carried no penalty. The Court found this use of post-*Miranda* silence fundamentally unfair under the Due Process Clause of the Fourteenth Amendment. *Greenfield*, 474 U.S. at 292.

In *Royal v. State*, 1988 OK CR 203, 761 P. 2d 497, a prosecution for larceny, the appellant alleged that the prosecutor's references to his post-*Miranda* silence to rebut his defense of voluntary intoxication had violated the *Doyle* rule. The State had called a store detective in rebuttal, who testified that he spent about twenty minutes with the appellant in the back office after his arrest for shoplifting, and that appellant did not appear to be intoxicated. The witness, also testified, over a relevancy objection, that appellant

had repeatedly asked to talk to a Charlie Milor. Over objection, the trial court, finding that it "might be relevant on the state of his sobriety," allowed further questioning about these statements that ultimately revealed that defendant had "wanted to talk to his lawyer" [i.e., Charlie Milor]. *Royal*, 1988 OK CR 203, ¶ 11, 761 P. 2d at 499-500.

Unlike the present case, the record in *Royal* was unclear whether the appellant had received a *Miranda* warning at the time of the statements requesting to see his attorney. *Royal*, 1988 OK CR 203, ¶ 14, 761 P. 2d at 500. The Court in *Royal* nevertheless held, assuming the appellant had exercised his right to remain silent, the evidence of his demeanor at the time was "highly probative" on the disputed fact of intoxication, as it tended to show his "awareness of his situation" and "control of his mental faculties." The Court found any prejudice from the witness's additional disclosure that Appellant wanted to talk to his lawyer was too slight to warrant reversal; and any error was harmless in light of ample independent evidence of appellant's sobriety. *Royal*, 1988 OK CR 203, ¶ ¶ 17-18, 761 P. 2d at 501.

Whether a prosecutor's use of post-*Miranda* silence to impeach or rebut defense testimony is reversible error under *Doyle* depends on the particular facts and circumstances of each case. *Dungan v. State*, 1982 OK CR 152, ¶ 6, 651 P.2d 1064, 1065. Here, we find that the admission of this brief recording of Appellant, showing the administration of *Miranda* warnings and his invocation of the right to remain silent, was not an unfair "use for impeachment purposes of petitioners' silence, at the time of arrest and after receiving *Miranda* warnings," as prohibited by *Doyle* and *Greenfield*. *See, e.g., Doyle,* 426 U.S. at 620, 96 S.Ct. at 2245.

Just as this Court had found in *Royal*, the trial court rationally concluded that Appellant's demeanor and behavior at the time of the recording was itself probative of whether Appellant was, or recently had been, in the state of extreme intoxication necessary to deprive him of the capacity to form the intent to kill. The court also limited any *unfairly* prejudicial use of the evidence by limiting it strictly to the issue of voluntary intoxication. Significantly, Appellant's brief indication that he desired to remain silent was neither initially offered, nor later emphasized by the State, as evidence of guilt *in itself*; as it had been in *Doyle, Greenfield,* and

cases in which this Court has found *Doyle* violations. *E.g., Parks v. State*, 1988 OK CR 275, ¶¶ 8-12, 765 P. 2d 790, 792-93 (noting prosecutor emphasized, and asked the jury to consider, post-arrest silence as evidence of guilt); *Wood v. State*, 1987 OK CR 281, ¶ 16, 748 P.2d 523, 525 (finding impeachment with silence on cross-examination of defendant, and later reference to defendant's silence in closing argument, violated *Doyle); Dungan*, 1982 OK CR 152, ¶ 4, 651 P. 2d 1064, 1065 (finding reversible error where evidence of post-*Miranda* silence was offered in case-in-chief and was "totally irrelevant" to issues in case).

The State's subsequent closing argument about the evidence did not unfairly emphasize Appellant's invocation of silence, but rather focused on how Appellant's behavior and demeanor showed that he was not severely intoxicated at or near the time of the crime. *See also, Battenfield v. Gibson*, 236 F.3d 1215, 1225 (10th Cir. 2001) (finding *Doyle* violation turned on whether prosecutor's use of the evidence was "manifestly intended" as a comment on the defendant's right to remain silent). We conclude from the relevant facts and circumstances that the recording showing Appellant's

invocation of his *Miranda* rights was not unfairly used against him in violation of due process.

Even assuming that error occurred, it was harmless beyond a reasonable doubt. Properly admissible aspects of the recording were clearly probative of voluntary intoxication. The evidence came in only on rebuttal, after Appellant had offered evidence of voluntary intoxication. The contemporaneous limiting instruction likely prevented any prejudicial use of this evidence by the jury. The State's arguments focused on the purposes for which the evidence was admitted, and avoided the excesses associated with past *Doyle* violations. See *Wood*, 748 P.2d at 526 (finding *Doyle* error harmful where State emphasized silence in both questioning and argument, and case for guilt was largely circumstantial); *Dungan*, 1982 OK CR 152, ¶ 7, 651 P. 2d 1064, 1065-66 (finding *Doyle* error harmful where evidence of silence lacked probative value, carried significant prejudicial effect, and remaining evidence of intent was circumstantial). The remaining evidence shows, beyond a reasonable doubt, that Appellant killed with malice aforethought, and was not so intoxicated as to obviate the *mens rea* of the crime. We find no reasonable doubt that error unfairly

prejudiced the verdict or resulted in a miscarriage of justice. 20 O.S.2011, § 3001.1. Proposition One is therefore denied.

DECISION

The Judgment and Sentence is **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2019), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY
THE HONORABLE WILLIAM MUSSEMAN, DISTRICT JUDGE

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LUMPKIN, J.: Concur
HUDSON, J: Concur
ROWLAND, J.: Concur