

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 12, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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No. 00-2792-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANGEL LUIS RODRIGUEZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: PETER NAZE, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Angel Rodriguez appeals, following a jury trial, from a judgment convicting him of attempted first-degree intentional homicide and burglary, both while armed with a dangerous weapon, and from an order

denying his motion for postconviction relief. Rodriguez claims he was denied effective assistance of counsel when his trial attorney failed to object to the prosecutor's statements and questions concerning Rodriguez's post-arrest, post-*Miranda*¹ silence. He also seeks a new trial on grounds that the alleged prosecutorial misconduct constitutes plain error, and that the real controversy has not been fully tried. We reject these arguments and affirm.

STATEMENT OF FACTS

¶2 The background facts are undisputed. On February 13, 1999, Rodriguez and his friend, Michael Guyette, had a disagreement that resulted in a physical altercation. The next day, Rodriguez went to Guyette's girlfriend's house, where Guyette was located. Another fight ensued and Rodriguez stabbed Guyette eleven times. Rodriguez and another man who was with him fled the home.

¶3 Twelve days later, Rodriguez turned himself in at the police station. After the officers read Rodriguez his *Miranda* rights, he declined to make a statement or answer any questions. Rodriguez was charged with attempted first-degree intentional homicide and burglary (for entering a home with the intent to commit a felony).

¶4 At trial, Rodriguez's theory of defense was self-defense. During cross-examination, the prosecutor on two occasions asked Rodriguez a series of questions concerning his post-*Miranda* silence. In both cases, Rodriguez's counsel did not object on grounds that the State had improperly referred to

¹ *Miranda v. Arizona*, 384 U.S. 436 (1966).

Rodriguez's post-*Miranda* silence.² The first questions occurred when the prosecutor asked Rodriguez about his claim that he turned himself in to clear his name:

[RODRIGUEZ]: When I turned myself in, I told the police I was trying to straighten up my name. I have been falsely charged.

[PROSECUTOR]: You told the police you were falsely charged?

[RODRIGUEZ]: Yes.

[PROSECUTOR]: You didn't tell the police anything, Mr. Rodriguez, did you?

[RODRIGUEZ]: Yes, I did, sir.

[PROSECUTOR]: Is it not true, Mr. Rodriguez, that you refused to give a statement to the police?

[RODRIGUEZ]: That is also true.

[PROSECUTOR]: So you didn't tell the police anything, Mr. Rodriguez?

[RODRIGUEZ]: Well, I did tell them.

[PROSECUTOR]: How can you tell us that you told them, and at the same time say you told them nothing? Which is it, Mr. Rodriguez?

[RODRIGUEZ]: I didn't tell them anything about what happened at the scene because just by me telling them I've been falsely charged doesn't got nothing to do with this thing exactly. I'm not giving them a story or saying, so I did tell them that.

[PROSECUTOR]: I'm really curious, Mr. Rodriguez. If it happened the way you said it did, why didn't you tell the police that?

[RODRIGUEZ]: At the time, because when he met me – when he read me my Fifth Amendment, he told me that

² Counsel did make unrelated objections, such as to the form of the questions. At the postconviction hearing, counsel indicated that he did not remember any comments by the prosecutor about Rodriguez's post-*Miranda* silence. Consistent with this testimony, no one argues that counsel's failure to object was based on trial strategy. See *State v. Felton*, 110 Wis. 2d 485, 502, 329 N.W.2d 161 (1983) (counsel's performance is not deficient when attorney makes reasonable strategic decision).

everything I say will be used against me in a court of law. In other words, by me giving the story, it ain't going to benefit in any way. That's not going to be for my good. It's going to be all for my bad.

[PROSECUTOR]: If what you told us here today would be the truth, it would be for your good, wouldn't it?

[RODRIGUEZ]: Well, yes.

[PROSECUTOR]: If you expected this jury to believe the truth?

[RODRIGUEZ]: That is the truth.

[PROSECUTOR]: Well, I don't understand why you didn't tell the police that. I really don't.

[Rodriguez's attorney objects to the form of the question.]

[PROSECUTOR]: If that was the truth then, Mr. Rodriguez, then why didn't you tell the police that when you turned yourself in on the 26th of February?

[RODRIGUEZ]: Because I used my Fifth Amendment because everything you say can be used against you. It won't favor me in any way.

[PROSECUTOR]: So your testimony doesn't favor you in any way?

[RODRIGUEZ]: To the jury it does because I tell the jury exactly what happened, and I tell them everything that happened, and it comes from my heart and that favors me because they make their decision. The cop doesn't make my decision. The jury does.

¶5 Later, at the close of the cross-examination, the prosecutor again asked Rodriguez about his post-*Miranda* silence:

[PROSECUTOR]: Now, just one other question, Mr. Rodriguez. Would you agree that today here in this courtroom is the first time that anyone other than yourself and perhaps your lawyer have ever heard this story; isn't that right?

[RODRIGUEZ]: This is not a story. This is the truth. It's fact.

[PROSECUTOR]: You've never bothered to tell this to anybody else? No police officer? Nobody?

[RODRIGUEZ]: I told this. Yes, I did.

[PROSECUTOR]: Who? Tell me who?

[RODRIGUEZ]: My attorney.

[PROSECUTOR]: Other than yourself and your attorney ... has anyone else ever heard this story?

[RODRIGUEZ]: Who else is there to tell?

[PROSECUTOR]: Well, how about the police? How about the District Attorney? How about somebody who could avoid this prosecution?

[RODRIGUEZ]: I don't ... think you're here to help me.

¶6 The third series of comments arose during closing argument. The prosecutor argued that Rodriguez's testimony was "not worthy of any belief" on the jury's part:

There are several factors that cause me to say that and argue that to you. The first, quite frankly, is the timing of the testimony. The reality is that this morning is the first time anyone other than Mr. Rodriguez or his attorney had any idea what his version of the facts may be. Now that may not be all so significant except for the nature of this testimony. Now, the reality is that if he's right, and if he was attacked by Michael Guyette and forced to defend himself as he described on the witness stand, a reasonable person would have run right to the police immediately. And when we rely upon our common experiences in life, that tells us what a person would do. You wouldn't stand around and wait. Quite frankly, you would report the fact that you were the victim of a crime ... from the same individual the second day in a row. You wouldn't sit around for 12 days before ultimately turning yourself into the police. *And then when you turn yourself into the police, you don't even tell them what happened? You refuse to give a statement. ...*

... Six months, over six months before he told anyone about the fact that he was the one who was attacked.

Now, during that period of time, Mr. Rodriguez has a lot of time to reflect upon the facts in this case. He had a lot of time to put together a story that exonerates him. (Emphasis added.)

¶7 The jury found Rodriguez guilty of both offenses. The trial court sentenced Rodriguez to a ten-year prison term for the armed burglary and to a consecutive twenty-five-year prison term for the attempted homicide. Rodriguez filed a postconviction motion seeking a new trial on multiple grounds, including ineffective assistance of counsel.³ The court conducted two evidentiary hearings and ultimately denied Rodriguez’s motion. This appeal followed.

DISCUSSION

¶8 Rodriguez argues that he is entitled to a new trial because (1) he was denied effective assistance of counsel; (2) the prosecutor’s statements constitute plain error; and (3) the real controversy has not been fully tried. We examine each of these arguments in turn.

A. Ineffective assistance of counsel

¶9 It is well established that it is fundamentally unfair and a violation of a defendant’s constitutional right to due process to use a defendant’s silence after receipt of *Miranda* warnings for impeachment purposes at trial. *Doyle v. Ohio*, 426 U.S. 610, 619 (1976) (constitutional error to impeach a defendant with his post-arrest, post-*Miranda* silence); *State v. Brecht*, 143 Wis. 2d 297, 316, 421 N.W.2d 96 (1988). Not all constitutional errors, however, require reversal. *See Brecht*, 143 Wis. 2d at 317.

¶10 A constitutional error is considered harmless if the court is “able to declare a belief that it was harmless beyond a reasonable doubt.” *Chapman v.*

³ Rodriguez chose not to renew all of his postconviction motion arguments on appeal. He now requests a new trial based on only one alleged error: counsel’s failure to object to the prosecutor’s comments on his post-*Miranda* silence.

California, 386 U.S. 18, 24 (1967). This requires that the court find there is no reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different. See *State v. Sanchez*, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996). The relevant factors considered when determining harmless error include: (1) the frequency of the error, (2) the nature of the State's evidence against the defendant, and (3) the nature of the defense. *Brecht*, 143 Wis. 2d at 317.

¶11 Moreover, constitutional errors that are not preserved at the trial court generally will not be considered on appeal. *State v. Huebner*, 2000 WI 59, ¶10, 235 Wis. 2d 486, 611 N.W.2d 727. A defendant may, however, raise the errors in the context of an ineffective assistance of counsel claim. See *Sanchez*, 201 Wis. 2d at 232. Where, as here, a defendant argues that trial counsel was ineffective for failing to object to a prosecutor's statements about the defendant's post-*Miranda* silence, the defendant bears the burden of proving that counsel's performance was deficient and that the deficient performance prejudiced the defense. See *Sanchez*, 201 Wis. 2d at 232;⁴ see also *Strickland v. Washington*, 466 U.S. 668, 690 (1984).

⁴ Justice Abrahamson's concurrence recognized that the court's holding in *Sanchez* created a paradox with respect to burdens of proof:

If, on appeal, a defendant alleges error, the state must prove that the defendant was not prejudiced thereby and that the error was therefore harmless. But if a defendant alleges ineffective assistance of counsel because trial counsel failed to object to the same error, the rule we announce today requires that defendant to prove that the error was prejudicial and therefore harmful.

State v. Sanchez, 201 Wis. 2d 219, 241-42, 548 N.W.2d 69 (1996) (Abrahamson, J., concurring).

(continued)

¶12 Rodriguez alleges that his counsel was ineffective for failing to object to the prosecutor's questions and closing argument statements relating to Rodriguez's post-*Miranda* silence. For purposes of this appeal, we will assume that the prosecutor's statements constituted constitutional error and that Rodriguez's trial counsel's performance was deficient for failing to object. *See State v. Erickson*, 227 Wis. 2d 758, 777-78, 596 N.W.2d 749 (1999) (courts need not address both *Strickland* prongs if the defendant fails to make a sufficient showing on either one). The remaining issue, therefore, is whether Rodriguez can show that there was a reasonable probability that, but for counsel's failure to object, the result of the proceedings would have been different. *See Sanchez*, 201 Wis. 2d at 236.

¶13 In examining whether Rodriguez was prejudiced by counsel's performance, we are to consider the totality of the circumstances before the trier of fact. *See id.* at 236. Whether a lawyer provides ineffective assistance is a mixed question of law and fact. *See State v. Johnson*, 133 Wis. 2d 207, 216, 395 N.W.2d 176 (1986). The trial court's findings of fact will be upheld unless they are clearly erroneous. *State v. Pitsch*, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985). Whether the proof satisfies the prejudice prong is a question of law that this court reviews de novo. *See id.*

¶14 Having examined the trial transcript, we conclude that, under the totality of the circumstances, Rodriguez's defense was not prejudiced. Even if

We are, however, bound by the precedent of the supreme court. *State v. Clark*, 179 Wis. 2d 484, 493, 507 N.W.2d 172 (Ct. App. 1993). Accordingly, because Rodriguez alleges ineffective assistance of counsel for counsel's alleged failure to object to the prosecutor's statements, he bears the burden of proving that his counsel was deficient and that the deficiency was prejudicial. *See Sanchez*, 201 Wis. 2d at 232.

Rodriguez's counsel was ineffective for failing to object to the prosecutor's questions and statements, the evidence against Rodriguez was overwhelmingly probative of his guilt. See *Sanchez*, 201 Wis. 2d at 237.

¶15 The evidence may be summarized as follows. Guyette testified that on February 13, he and Rodriguez had a "physical altercation." Guyette said that after the two fought, Rodriguez jumped in his car, said, "I'm going to kill you," and twice tried to run Guyette over with the car. Guyette did not see Rodriguez again that day.

¶16 Although Rodriguez denied threatening Guyette and trying to run him over with a car, he agreed the two had fought. He testified that Guyette had repeatedly struck Rodriguez in the face until Rodriguez's face was bleeding and swollen. When asked why Rodriguez had not pressed charges against Guyette, Rodriguez replied, "Because he's on probation, and I didn't want to get him revoke[d], and then he might get more upset at me." Rodriguez added that he was afraid of Guyette, who outweighed Rodriguez by at least forty pounds.

¶17 The next day, Guyette was at his girlfriend Charlotte's house. Guyette's cousin Nola, cousin Dan and several children were also present. Guyette said he was lying on a loveseat in the living room while watching television and fell asleep. He recalled waking up when he felt a "burning and stinging sensation" in his right arm. He saw a dark shadow standing over him and tried to push the person away. Eventually, he and the person struggled on the carpet next to the loveseat. Then, the person ran out the front door, along with another man.

¶18 Guyette testified that although he was able to see the man who accompanied his attacker, he did not have an opportunity to identify the person who attacked him. Charlotte, however, recognized the attacker as Rodriguez.

¶19 Charlotte testified that she was walking into the living room from the kitchen just as Rodriguez was entering the front door on the other side of the living room. She said that Rodriguez came running through the door, said, “This is what you get, mother fucker,” and “went right after [Guyette].” Charlotte said she saw that Rodriguez had a knife in his hand that looked like a small butcher knife with a pink handle. She said she saw Rodriguez stab Guyette in the armpit as Guyette lay sleeping on the loveseat.

¶20 Charlotte started screaming and grabbed Rodriguez’s jacket to pull him off Guyette. Guyette and Rodriguez started wrestling on the ground. Next, a man later identified as Lupe who had accompanied Rodriguez to the home entered the living room carrying a shovel.⁵ Charlotte said that Lupe “held a shovel to my chest” and told her she “wasn’t going anywhere.” Soon afterward, Charlotte saw Rodriguez run out the front door, still holding the knife.

¶21 Nola was also present at the time of the altercation, in a bathroom located next to the living room. She said that when she entered the bathroom, Guyette was sleeping on the living room loveseat. Shortly thereafter, she heard a commotion in the living room. She recognized Rodriguez’s voice (the two used to date) saying, “Take this, mother fucker; take this, mother fucker.” She exited the bathroom and heard and saw Charlotte screaming. She saw Rodriguez, as well as another man who was holding a shovel.

⁵ Lupe did not give any statements to police and was unavailable to testify at trial.

¶22 Nola testified that she saw the man raise the shovel as if he was going to strike Guyette. Nola said she went behind the man and grabbed the shovel so that he would not hit Guyette. Nola then threatened to hit the man with the shovel and he ran out the front door. Nola said she briefly ran out the front door after him and then returned to the living room, where Guyette and Rodriguez were still fighting on the floor. She said she told Rodriguez that he was going to go to jail. Rodriguez jumped up, looked at Nola and ran out the front door.

¶23 After Rodriguez and Lupe left, Guyette noted that he was bleeding profusely and called the police. A rescue squad and the police arrived within minutes and Guyette was taken to the hospital for treatment. He testified that he had eleven stab wounds, located mostly on his right torso, and one wound that went completely through his right bicep.

¶24 Rodriguez's version of events was different. He testified that he went to Guyette's house to make peace with Guyette. He said he knocked on the screen door and saw Guyette sitting on the loveseat, watching television. He told Guyette he wanted to discuss their problems and Guyette responded, "Well, you might as well come all the way in since you [are] already on my front porch." Rodriguez denied yelling any obscenities and testified that he started talking to Guyette about their fight.

¶25 Rodriguez said Guyette became angry, got up from the loveseat, walked toward Rodriguez and pushed him. The two pushed each other several times and then Guyette fell onto the loveseat. When Guyette stood up, he had a knife in his hand that he had apparently gotten from either the loveseat or the floor. Rodriguez testified that Guyette "was trying to either stab me or coming at me with it like Zor[r]o-type moves towards me."

¶26 Rodriguez stated that as Guyette waived the knife, Rodriguez was cut twice on his right hand and once on his left. Rodriguez knocked the knife from Guyette's hand "to block him from stabbing me." The knife flew out of Guyette's hand and Rodriguez tried to run from the house. Guyette grabbed Rodriguez and "body slapped" him. Guyette fell on Rodriguez's chest with his knee, which Rodriguez said caused a fracture to his "body cage." Guyette started punching Rodriguez so mercilessly that Rodriguez said he felt that Guyette was trying to kill him.

¶27 Rodriguez said he twisted from side to side trying to get away and saw the knife on the floor. With Guyette still straddling Rodriguez, Rodriguez picked up the knife with his left hand (he is right-handed) and "started poking [Guyette] with the knife so ... he can feel some type of little pain so he can let me go. ... I was trying to jab him to a point where he can let me go." He denied that he was trying to kill Guyette, testifying that while he was jabbing Guyette, "I had the knife with my finger on it, because I didn't want the knife ... to go all the way in."

¶28 Rodriguez said he called out for help from his friend, Lupe, who then entered the home with a shovel. When Guyette shifted his weight to look at Lupe, Rodriguez was able to get to his feet. He kicked Guyette in the chest, which caused Guyette to fall backward. Rodriguez said he threw the knife down and then ran out of the door.

¶29 We conclude that the evidence in this case leaves no reasonable doubt of Rodriguez's guilt. It is undisputed that Rodriguez stabbed Guyette. Rodriguez's theory of defense was that he went to Guyette's home to make peace,

and that Guyette attacked him, forcing Rodriguez to defend himself. Rodriguez's legal defense was extremely weak in light of the undisputed physical facts.

¶30 Rodriguez's own testimony established that he is significantly smaller than Guyette and that Guyette had beaten him the day before the stabbing. Rodriguez testified that he was pinned to the ground with Guyette hitting him when Rodriguez finally grabbed the knife with his left hand. The jury would have to believe that Rodriguez could have overpowered Guyette and stabbed Guyette eleven times, with Rodriguez suffering only minor cuts on his hands. Also, the evidence shows that Rodriguez stabbed Guyette so hard that the blade actually went all the way through Guyette's right bicep. The jury could reasonably conclude that this would not have happened unless Guyette was, as he testified, asleep or waking from sleep at the time of the stabbing, which contradicts Rodriguez's testimony.

¶31 Rodriguez's defense was further weakened by his testimony that the body slam that knocked him to the ground initially was so fierce that he suffered permanent damage to his "body cage." At trial, Rodriguez said that the injury created a little bubble in the middle of his rib cage that he can feel cracking as he sleeps at night. He even removed his shirt and showed the jury his alleged injury. However, he also stated that his doctor had told him his chest was "pretty much normal."

¶32 Finally, Rodriguez's testimony that he consciously placed his finger on the blade of the knife to avoid hurting Guyette too badly is inconsistent with his contention that he was being held down and beaten so mercilessly that he feared for his life. These internal inconsistencies make Rodriguez's defense theory weak in light of the undisputed physical facts.

¶33 On the other hand, Guyette, Nola and Charlotte's testimony provides strong evidence of Rodriguez's guilt and is consistent with the physical evidence. Guyette readily admitted that he fought with Rodriguez on both occasions, and explained how it was possible for the smaller Rodriguez to have inflicted so much damage on the larger Guyette (i.e., Guyette was asleep). Nola and Charlotte both testified that Guyette had been sleeping on the loveseat, and that they heard Rodriguez screaming specific obscenities at Guyette. Their testimony was consistent with the physical evidence and provides strong evidence of guilt.

¶34 In sum, we conclude that even assuming Rodriguez's counsel was deficient by allowing the disputed testimony into evidence, the evidence was so overwhelming that Rodriguez would have been convicted regardless of the prosecutor's questions and statements. We therefore hold that Rodriguez has not met his burden of showing that he was prejudiced by his counsel's representation.

B. Plain error

¶35 Next, Rodriguez argues he is entitled to a new trial because the alleged prosecutorial conduct constitutes plain error. As noted, Rodriguez waived his objections to the prosecutor's statements when he failed to object at trial. *See State v. Goodrum*, 152 Wis. 2d 540, 549, 449 N.W.2d 41 (Ct. App. 1989) (failure to object at the time of the alleged improprieties waives review). However, we may overlook waiver where the error is so plain or fundamental as to affect the defendant's substantial rights. *See State v. Neuser*, 191 Wis. 2d 131, 140, 528 N.W.2d 49 (Ct. App. 1995). A plain error is one that is both obvious and substantial, or grave, and the rule is reserved for cases where there is a likelihood that the error has denied a defendant a basic constitutional right. *State v. Vinson*, 183 Wis. 2d 297, 303, 515 N.W.2d 314 (Ct. App. 1994).

¶36 Rodriguez alleges that the prosecutor's comments violated his constitutional right to remain silent and to have a fair trial. He argues: "It is fundamentally unfair and a violation of due process to allow the prosecutor to comment on the defendant's pre-trial [and post-*Miranda*] silence." While this may be true, see *Doyle*, 426 U.S. 619, it is likewise true that such comments do not result in automatic reversal. See *Brecht*, 143 Wis. 2d at 317 (not all constitutional errors require reversal). As *Sanchez* illustrates, even when a prosecutor erroneously elicits testimony about a defendant's post-*Miranda* silence, the conviction will be upheld if the court concludes the result of the trial would have been the same even without the alleged prosecutorial misconduct. *Sanchez*, 201 Wis. 2d at 236.

¶37 Although we have assumed that the statements in question were improper, we cannot conclude that the prosecutor's conduct in this case was so egregious as to constitute plain error. We have already concluded that the evidence against Rodriguez was so overwhelming that he would have been convicted regardless of the prosecutor's statements. We see nothing so obvious and substantial, or grave, that would warrant the application of the plain-error rule. See *Vinson*, 183 Wis. 2d at 303.

C. Discretionary reversal

¶38 Under WIS. STAT. § 752.35,⁶ this court has the discretionary power to reverse the trial court when we conclude that the real controversy has not been tried. Rodriguez argues that the prosecutor's questions and comments during cross-examination and closing argument prevented a trial of the real controversy

⁶ All references to the statutes are to the 1999-2000 version.

and, therefore, he argues that this court should exercise its discretionary power of reversal to grant him a new trial in the interest of justice. We disagree. We are satisfied that none of the alleged errors argued above, either separately or in concert, prevented a trial of the real controversy in this case. Therefore, we decline Rodriguez's request to exercise our discretionary powers of reversal under § 752.35.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

