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Volume 21 | Issue 1 Article 16

1986

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Recommended Citation

Phillips, Gregory A. (1986) "Criminal Procedure - Improper Comment upon Post-Arrest Silence: Wyoming Returns to the Prejudicial Per Se Rule - Westmark v. State," *Land & Water Law Review*: Vol. 21 : Iss. 1 , pp. 231 - 239.
Available at: https://scholarship.law.uwyo.edu/land_water/vol21/iss1/16

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CRIMINAL PROCEDURE—Improper Comment Upon Post-Arrest Silence: Wyoming Returns to the Prejudicial Per Se Rule. *Westmark v. State,* 693 P.2d 220 (Wyo. 1984).

In June 1983, after allegedly threatening a man at a public park with a knife and hours later stabbing another man outside a restaurant, Michael Westmark was charged with attempted second-degree murder, aggravated assault and battery, and being a habitual criminal.[1] At his arraignment, Westmark pleaded not guilty to the three charges against him.[2] The state dismissed the habitual criminal count during the trial.[3]

At the trial, Westmark took the stand on his own behalf and testified that the stabbing had occurred in self defense.[4] During cross-examination, the prosecutor and Westmark engaged in the following colloquy:

> Q. Isn't it true, Mr. Westmark, that nobody has ever heard this self defense story prior to your actually relating it for the first time here in Court today?
>
> A. Mr. Mealey.
>
> Q. It's true that you never mentioned anything to the officers at the time you were arrested, isn't it, regarding that?
>
> A. That's true.
>
> Q. Okay. Isn't it true that you never told any officers that you stabbed anybody in self defense that night? True or false?
>
> A. My attorney had advised me not to talk to the police officers concerning this matter.
>
> Q. But, Mr. Westmark, you didn't have an attorney at the time you were pulled over on the highway, did you?
>
> A. No, sir, I didn't.
>
> Q. In fact, the first time that story has been related to anybody is right in this courtroom today; isn't it?
>
> A. No, sir.[5]

During the state's case-in-chief, an exchange between the prosecutor and police officer again brought Westmark's post-arrest silence to the jury's attention:

> Q. At that point, did the Defendant, or any time during the course of your conversation with the Defendant, raise the issue that he had been acting in self defense?
>
> A. No. He didn't.

1. Brief for Appellee at 4-8, Westmark v. State, 693 P.2d 220 (Wyo. 1984). For Westmark's account of the events leading to the charges, see Brief for Appellant at 3-6, Westmark v. State, 693 P.2d 220 (Wyo. 1984) [hereinafter Brief for Appellant].
2. Brief for Appellant, *supra* note 1, at 3.
3. *Id.* at 2.
4. *Id.* at 8.
5. Westmark v. State, 693 P.2d 220, 221 (Wyo. 1984).

Q. Did he ever mention self defense?

A. No. He didn't.[6]

During summation, the prosecutor for yet a third time brought to the jury's attention Westmark's failure to inform the officers of his self defense claim. He said, "If the defendant had, in fact, acted in self defense twice within the past hour, why didn't he say so? He could have said, 'Yes, there has been a stabbing and that guy attacked me.' "[7]

At trial, Westmark's counsel failed to object to either the prosecutor's questioning or summation.[8] After only one day's deliberation, the jury returned a verdict finding Westmark guilty of both attempted second-degree murder and assault and battery.[9]

On appeal, Westmark argued that the prosecutor's comments violated his right to remain silent,[10] as contained in the fifth amendment of the United States Constitution[11] and art. 1, § 11 of the Wyoming Constitution.[12] The Wyoming Supreme Court agreed, reversed the decision, and sent the case back for a new trial.[13] In so doing, the court held that "any comment upon the accused's exercise of his or her right to remain silent is prejudicial error which will entitle the accused to a reversal of the conviction."[14] This holding overruled the harmless error doctrine embraced by the court less than three years before in *Richter v. State*.[15]

BACKGROUND

Federal

In *Doyle v. Ohio*,[16] state narcotics agents arrested two alleged marijuana dealers shortly after a purported sale to a narcotics bureau informant.[17] After being advised of their rights, both defendants chose to remain silent.[18] The state tried the defendants separately,[19] and each defendant claimed at his trial that the narcotics bureau informant had framed them both.[20] Their explanation, which the Supreme Court deemed

6. *Id.*
7. *Id.*
8. *Id.* at 222.
9. Brief for Appellant, *supra* note 1, at 7.
10. *Westmark*, 693 P.2d at 221. For a discussion of the right to remain silent in general and the "right" not to have silence commented upon in particular, see Hackl, *Silence Is No Longer Golden: Destruction of the Right to Remain Silent*, 19 LAND & WATER L. REV. 629 (1984).
11. U.S. CONST. amend. V provides that "No person shall . . . be compelled in any criminal case to be a witness against himself. . . ."
12. WYO. CONST., art. 1, § 11 provides that "No person shall be compelled to testify against himself in any criminal case. . . ."
13. *Westmark*, 693 P.2d at 225.
14. *Id.* at 222.
15. 642 P.2d 1269 (Wyo. 1982).
16. 426 U.S. 610 (1976).
17. *Id.* at 611.
18. *Id.*
19. *Id.*
20. *Id.* at 613.

"not entirely implausible," presented problems for the prosecution, as no evidence existed to contradict it.[21]

Facing this troublesome testimony, the prosecutor commented on each defendant's exercise of his fifth amendment right to remain silent, asking each defendant why he had not told the arresting agent about the frame.[22] Defense counsels' timely objections to this questioning were overruled, and the jury found each defendant guilty as charged.[23] The appellate court affirmed the convictions, reasoning that the prosecutor had elicited the defendants' post-arrest silence only to inquire why they had not told the same story at their first opportunity, and not to imply their guilt. The Ohio Supreme Court denied further review.[24]

The United States Supreme Court granted certiorari to determine whether the use of a defendant's post-arrest silence to impeach his testimony violated any provision of the federal Constitution.[25] After finding an implicit assurance in the *Miranda*[26] warnings that silence would not carry a penalty,[27] the Court held that use of the defendants' post-arrest, post-*Miranda* warning silence to impeach their trial testimony was fundamentally unfair and deprived them of due process under the fourteenth amendment.[28] The Court then stated that it would not consider whether the error was harmless because the state had not asked that it do so. Yet the Court's apparent willingness to treat such error as harmless, if asked to do so, opened the door for other courts to do the same.[29]

State

The Wyoming Supreme Court adopted *Doyle* in *Irvin v. State.*[30] After *Irvin,* but prior to *Westmark v. State,* it twice decided cases in which a prosecutor commented on a defendant's post-arrest silence.

In *Clenin v. State,*[31] the accused was arrested for delivery of a controlled substance. He remained silent after the arrest and at trial asserted

21. *Id.*
22. The prosecutor asked defendant Wood, "Mr. Wood, if that is all you had to do with this and you are innocent, when Mr. Beamer arrived on the scene why didn't you tell him?" Defendant Doyle was asked, "Why didn't you tell the police that Bill Bonnell just set you up?" *Id.* at 614, 623.
23. *Id.* at 614.
24. *Id.* at 615-16.
25. *Id.*
26. Miranda v. Arizona, 384 U.S. 436 (1966).
27. *Doyle,* 426 U.S. at 618.
28. *Id.* at 619. Though post-arrest, pre-*Miranda* warning silence may be commented upon without violating the fifth amendment of the United States Constitution, Fletcher v. Weir, 455 U.S. 603 (1982), it may not be commented upon under WYO. CONST., art. 1, § 11. Clenin v. State, 573 P.2d 844, 846 (Wyo. 1978), dictates that the right to remain silent does not depend on the accused's being advised of that right, but exists by virtue of the constitutional language. Advice as to that right serves only to expand its protection by assuring that the accused person is aware of it.
29. *Doyle,* 426 U.S. at 619-20. Harmless error is error that is not prejudicial to the substantial rights of the party assigning it, and in no way affects the final outcome of the case. BLACK'S LAW DICTIONARY, 646 (5th ed. 1979).
30. 560 P.2d 372, 373 (Wyo. 1977).
31. 573 P.2d 844 (Wyo. 1978).

an alibi.[32] While cross-examining Clenin, the prosecutor commented upon his failure to inform either the arresting officer or the prosecutor's office of the alibi.[33] After an objection, the court halted this line of questioning, but did not grant a mistrial. The jury found Clenin guilty as charged.[34]

Facing a possible reversal on appeal for prejudicial comment, the state argued that the Supreme Court's construction of the fifth amendment in *Doyle* permitted the Wyoming Supreme Court to find that the prosecutor's remarks constituted harmless error under the federal standard.[35] The court agreed, but determined that Wyoming's strong tradition of jealously guarding the right to remain silent from encroachments required a different construction of art. 1, § 11 of the Wyoming Constitution.[36] Accordingly, the court held that any comment upon an accused's silence was both plain error and prejudicial per se, and entitled an accused to a reversal of his conviction.[37]

Less than five years later, in *Richter v. State,* the court overruled *Clenin* and its prejudicial per se rule. The defendant in *Richter* was charged with first-degree sexual assault. After being arrested, he remained silent. At trial, he raised a defense of sexual inability, and on cross-examination the prosecutor responded by commenting upon his post-arrest silence.[38] Again the court considered applying the harmless error doctrine, and this time did so, reasoning that *Clenin's* prejudicial per se rule swept too broadly.[39]

The court abandoned *Clenin* because, in its view, the reversal of criminal convictions due to clearly harmless error exacted an unsustainable toll on the legal system.[40] This unsustainable toll was said to arise from both the expenses to counties from new trials and the loss of public confidence in the legal system's ability to do justice and protect law-abiding citizens.[41]

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32. *Id.*
33. *Id.* at 845. The prosecutor asked the defendant, "Well, when you were arrested though, didn't you say, look it [sic], this couldn't be me, I was at a party?"
34. *Id.* at 844.
35. *Id.* at 846.
36. *Id.* The Wyoming Supreme Court may interpret the Wyoming Constitution more favorably to a defendant than the United States Supreme Court has done under the United States Constitution. *See, e.g.,* Oregon v. Hass, 420 U.S. 714 (1975); State v. Santiago, 53 Haw. 254, 492 P.2d 657 (1971).
37. *Clenin,* 573 P.2d at 846. *See* Jones v. State, 200 So. 2d 574 (Fla. Dist. Ct. App. 1967); Commonwealth v. Easley, 483 Pa. 337, 396 A.2d 1198 (1979).
38. *Id.* at 1272. The prosecutor asked Richter, "Did you volunteer this version to the deputies at the time you walked behind the truck?" Justice Thomas argued that this question referred to pre-arrest silence as in Jenkins v. Anderson, 447 U.S. 231 (1980), and thus did not constitute error. Even assuming the question did refer to pre-arrest silence, Justice Thomas is mistaken that there would not be error. The reason there was no error in *Jenkins* was that such comment was not protected under the fifth amendment of the United States Constitution, and the comment was not fundamentally unfair since the accused had not been governmentally induced to remain silent through *Miranda* warnings. In Wyoming, such comment is prohibited not as a violation of due process, but as a violation of his right not to be compelled to testify against himself. Consequently, the *Jenkins* analysis does not apply.
39. *Richter,* 642 P.2d at 1273.
40. *Id.*
41. *Id.* at 1275.

For error to be deemed harmless under the rule enunciated in *Richter*, three conditions must be met: (1) there cannot be more than one comment on the defendant's silence at trial, (2) the comment must be ambiguous, and (3) the evidence of guilt must be overwhelming."[42] Although the court did not give a definitive test for ambiguity, it mentioned such contributing factors as whether an objection was immediately made and sustained, whether the jury heard the response to the improper question, whether the court directed the jurors to disregard the question, whether the question was mentioned again, and whether the state exploited the silence.[43]

Westmark thus came before a court that had long required automatic reversal for comment on post-arrest silence, but had recently departed from that practice by adopting the harmless error rule to such comment. *Westmark* gave the Wyoming Supreme Court its first opportunity to evaluate the harmless error rule since it was adopted in *Richter v. State.*

THE PRINCIPAL CASE

Because Westmark did not object to the prosecutor's comments upon his post-arrest silence, his appeal came before the Wyoming Supreme Court under the plain error doctrine.[44] The plain error doctrine provides that the court may recognize error not objected to at trial when the error is obvious and affects substantial rights of the accused.[45] Under this assignment of error, the court must first determine whether the questioning and summation constitute error. If the court finds error, it must then determine whether the error rises to the level of plain error.[46] If plain error is found, the court must then determine whether it was prejudicial or harmless.

Error

To show how powerful and deeply rooted the right to remain silent has been regarded in Wyoming, the court cited its previous decisions in *Gabrielson v. State*[47] and *Jerskey v. State.*[48] In *Gabrielson*, the court stated that no constitutional right of an accused is more sacred than his right to remain silent and branded any comment upon silence "highly improper."[49] The *Westmark* court then extracted from *Jerskey* the principle that it is error to use an accused's silence against him at trial unless he clearly, unmistakably, and knowledgeably waives his constitutional right to remain silent.[50]

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42. *Id.*
43. *Id.*
44. *Westmark*, 693 P.2d at 222.
45. *Id.* WYO. R. CRIM. P. 49(b) and WYO. R. APP. P. 7.05 read: "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."
46. *Westmark*, 693 P.2d at 222.
47. 510 P.2d 534 (Wyo. 1973).
48. 546 P.2d 173 (Wyo. 1976).
49. *Gabrielson*, 510 P.2d at 538.
50. *Westmark*, 693 P.2d at 223.

The court also relied on *Gabrielson* and *Jerskey* to explain Wyoming's pre-*Richter* tradition of automatically reversing convictions blemished by prosecutorial comment upon post-arrest silence. Reasoning that such comment penalized a constitutional right under the fifth amendment,[51] the *Gabrielson* court warned that a constitutional guarantee becomes barren and valueless when its exercise is used to the accused's detriment. The unacceptable result of such a penalty, one justice concluded, is an undeniable chilling effect on the use of constitutional guarantees.[52]

The *Jerskey* court also explained its refusal to tolerate dilution of constitutional rights such as the right to remain silent. Its objection rested on ancient tendencies whereby those with the power of government seek to impose their will upon the governed.[53] Less than strict adherence to constitutional rights, the court proclaimed, allows "[t]he fragile cobwebs of human rights [to] become misty visions which tend to blend with the ghosts of some public official's private opinion of what is 'good,' 'fair,' 'right,' and 'just' until they become imperceptible and — at last — are no rights at all."[54]

The *Westmark* court was persuaded by the strong tradition against comment upon post-arrest silence and the reasons for that tradition. As a result, it found such comment to be error. This finding was consistent with every other Wyoming decision that had considered the question, including *Richter v. State.*

Plain Error

Having found that the prosecutor's questioning and summation constituted error, the court then needed to determine if the plain error doctrine applied. When an appellant seeks review under the plain error doctrine, he must establish: (1) that the record clearly and unequivocally reflects the fact complained of; (2) that the facts prove a transgression of a clear rule of law; (3) that the error affects a substantial right of the accused; and (4) that the defendant has been materially prejudiced by that violation.[55]

In *Westmark,* the fact complained of was comment upon Westmark's post-arrest silence. The court found this in the record. The court also found that the comment transgressed both the fifth amendment to the United States Constitution and art. 1, § 11, of the Wyoming Constitution, and

51. *Gabrielson,* 510 P.2d at 538.
52. *Id.* at 539-40 (Guthrie, J., concurring).
53. *Jerskey,* 546 P.2d at 177.
54. *Id.*
55. *Westmark,* 693 P.2d at 224. *See, e.g.,* Britton v. State, 643 P.2d 935, 937 (Wyo. 1982); Bradley v. State, 635 P.2d 1161, 1164 (Wyo. 1981). The court was incorrect in concluding that the prosecutor's comments violated the fifth amendment of the federal Constitution. *See* Doyle v. Ohio, 426 U.S. 610, 619. *Cf.* Jenkins v. Anderson, 447 U.S. 231 (1980) (The Fifth Amendment, as applied to the States through the Fourteenth Amendment, is not violated by the use of pre-arrest silence to impeach a criminal defendant's credibility); Fletcher v. Weir, 455 U.S. 603 (1982) (The use of post-arrest, pre-Miranda warning silence when a defendant chooses to take the stand does not violate either the fifth or fourteenth amendments of the United States Constitution).

thereby affected Westmark's right to remain silent.[56] Thus, to apply the plain error rule, the court needed only to establish that the comment materially prejudiced Westmark.

Prejudicial Versus Harmless Error

The error in *Westmark* was not harmless. More than one comment was made at trial regarding post-arrest silence. The comments made were not ambiguous, and to at least one justice the evidence of guilt was not overwhelming.[57] Thus, the court could have found prejudicial error without overruling *Richter v. State* and its harmless error rule.

Yet in determining whether the prosecutor's comments were prejudicial, the court did not even consider whether they qualified as harmless error. Instead, it found prejudicial error by embracing its previous holding in *Clenin.* In that case, the court held that any comment upon the accused's exercise of his right to remain silent is both plain error and prejudicial per se, and entitles an accused to reversal of his conviction.[58]

The court abandoned *Richter's* harmless error rule because of prosecutorial abuse. It stated that it had become aware of far too many instances in which prosecutors were knowingly violating an accused's constitutional rights by commenting upon his post-arrest silence, believing that the court would hold the resulting error harmless.[59] The court returned to *Clenin's* prejudicial per se rule to stop such flagrant violations of constitutional rights.[60]

ANALYSIS

Abuse of the Harmless Error Rule and the Consequences

The purpose of *Clenin's* prejudicial per se rule was to deter prosecutors from commenting upon an accused's post-arrest silence. When *Richter* abandoned the prejudicial per se rule in favor of the harmless error rule, it did away not only with automatic reversal, but also with deterrence. This created an overwhelming and continuing temptation for prosecutors to test the court's limits of harmless error.[61] Such a system is ripe for abuse, and *Westmark* found that prosecutors were yielding to the temptation.[62]

The harmless error rule is also susceptible to abuse because of its subjective nature. The rule is subjective in its entirety in that overwhelming evidence turns out to be whatever three members of the court believe it to be in any given instance.[63] To demonstrate the inherent uncertainty

56. *Id.*
57. *Westmark,* 693 P.2d at 226 (Brown, J., concurring).
58. *Clenin,* 573 P.2d at 846.
59. *Westmark,* 693 P.2d at 221-22.
60. *Id.* at 222.
61. *Richter,* 642 P.2d at 1286.
62. *Westmark,* 693 P.2d at 221-22.
63. Richter v. State, 642 P.2d 1269, 1279 (Wyo. 1976) (Thomas, J., specially concurring).

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of what constituted harmless error, Justice Thomas confessed that he could not identify the differentiating factors between *Browder v. State,*[64] a close case, and *Richter v. State,* an overwhelming case.[65] When Justice Thomas is this uncertain about what makes error harmless, it is understandable that prosecutors will also be uncertain. It is not surprising that in the heat of a trial a prosecutor will give himself the benefit of the doubt and conclude that the error will be harmless.

By allowing convictions to stand when the error was clearly harmless, *Richter's* harmless error rule promised both to save counties money from new trials and to increase public confidence in the legal system's ability to do justice and protect law-abiding citizens.[66] These noble aims collapse when prosecutors abuse the harmless error rule. Such abuse forces the court to choose between two undesirable alternatives. The court can allow the comment as harmless error. But if the court does this, prosecutors will become more bold with their comments, and eventually the resulting error will become too grievous to be sustained. The court will then have to exercise the second alternative and reverse the decision. At this point the harmless error rule becomes responsible for creating the problems it was designed to eliminate—the county is burdened with the expense of a new trial, and the public loses confidence in the legal system.

Apart from creating the problems it was designed to eliminate, the harmless error rule, when combined with prosecutorial abuse, potentially produces two undesirable results. First, a defendant who would not have been convicted in a fair trial may be convicted solely on the basis of improper prosecutorial comment. A reversal of his conviction on appeal does not completely exonerate him. Second, convictions that could have been obtained and upheld without the improper prosecutorial comment might properly be reversed because of the comment. Such a result does not serve the interest of judicial economy. To minimize these dangers, it is necessary to make it clear to prosecutors that such comments are prejudicial per se. Only then will prosecutors be deterred from obtaining convictions by improper comment.

Comment and the Probative Value—Prejudicial Impact Test

Before any comment upon an accused's post-arrest silence may be allowed into evidence, the court must find that the probative value of the comment is not substantially outweighed by the danger of unfair prejudicial impact.[67] For an accused's post-arrest silence to be deemed probative of the untruthfulness of his exculpatory testimony at trial, the prosecution must establish an inconsistency between the post-arrest silence

64. 639 P.2d 889 (Wyo. 1982).
65. *Richter,* 642 P.2d at 1279-80 (Thomas, J., specially concurring).
66. *Id.* at 1275.
67. WYO. R. EVID. 403 reads: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

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and the exculpatory testimony at trial.[68] Westmark's testimony presented neither inconsistency nor significant probative value. An arrestee — whether innocent or guilty — may remain silent for many reasons that are unrelated to culpability, including the intimidating situation at the time of arrest, the emotional and confusing circumstances at the time of arrest, the hostile and perhaps unfamiliar atmosphere surrounding his detention, fear or unwillingness to incriminate another, or an exercise of his right to remain silent.[69]

Even if a court finds some degree of probative value in post-arrest silence, that value is dwarfed by the significant potential for unfair prejudice. Unfair prejudicial impact arises from the jury's inclination to assign too much weight to the defendant's post-arrest silence. Even if an accused is allowed to explain his reasons for remaining silent, it is unlikely that he will overcome the strong negative inference the jury draws from this silence.[70]

Clenin's Truly Harmless Error Rule

To come within *Clenin's* rule of prejudice per se, the prosecutor's reference to silence must rise to the level of comment.[71] For reference to silence to be classified as comment, prejudice must first be shown.[72] When the mention of silence does not compel the defendant to testify against himself, and when it does not contain even an innuendo that the defendant was making any claim of right to silence, no element of coercion exists and no inference of guilt can be drawn from the defendant's response.[73] In these circumstances of truly harmless error, a decision will not be reversed in Wyoming.

CONCLUSION

In *Westmark,* the Wyoming Supreme Court returned to its long tradition of holding that comment upon an accused's post-arrest silence at trial requires a reversal. Prosecutorial abuse, arising from both the lack of deterrence and the subjective nature of harmless error, caused the harmless error rule to create the problems it was designed to correct. To avoid this anomalous result, the court acted wisely in reinstating the prejudicial per se rule to comment upon post-arrest silence.

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68. UNITED STATES V. HALE, 422 U.S. 171, 176 (1975).
69. *Id.* at 177.
70. *Id.* at 180.
71. Parkhurst v. State, 628 P.2d 1369, 1381-82 (Wyo. 1981). *See* Hughes v. State, 658 P.2d 1294 (Wyo. 1983).
72. *Parkhurst,* 628 P.2d at 1382.
73. *Id.* at 1381.