

*Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.*

**ENTRY ORDER**

SUPREME COURT DOCKET NO. 2002-232

APRIL TERM, 2003

	}	APPEALED FROM:
	}	
State of Vermont	}	District Court of Vermont, Unit No. 2,
	}	Bennington Circuit
v.	}	
	}	
Scott Galusha	}	DOCKET No. 1175-9-00 Bncr
	}	
	}	Trial Judge: David A. Howard
	}	

In the above-entitled cause, the Clerk will enter:

Defendant appeals his conviction on two counts of engaging in lewd and lascivious conduct. He argues for the first time on appeal that his due process rights were violated when the prosecutor improperly commented on his failure to inform police of an eyewitness who could provide exculpatory information. We affirm.

Defendant was accused of groping two female occupants of a car. When he was brought to the police station for questioning, he waived his Miranda rights and told the investigating officers his version of what had happened. At trial, defendant produced the testimony of an acquaintance who claimed that she had witnessed defendant get into the complainants' car on the night of the alleged offense. The witness offered testimony that corroborated defendant's version of what had happened. The prosecutor cross-examined defendant as to why he did not mention to police that a witness had seen him enter the complainants' car. The prosecutor also commented during closing argument on defendant's failure to mention the witness to police on the night in question. Defendant did not object either to the questions on cross-examination or the comments during closing argument. On appeal, he argues for the first time that the prosecutor's questions and comments regarding his failure to mention the eyewitness to investigating officers violated his constitutional guarantees to due process and against self-incrimination and amounted to plain error that required reversal of his convictions.

We find no plain error, if any error at all. This case is similar to State v. Hunt, 150 Vt. 483 (1988). There, a psychiatrist testified that the defendant may have been in a trance-like state at the time of the crime. Id. at 499-500. During cross-examination and closing argument, the prosecutor pointed out that evidence of the trance originated from statements made by the defendant three months after the crime and during preparation for trial. Id. The defendant claimed that the prosecutor's reference to his failure to provide the exculpatory explanation earlier violated his due process rights. Like defendant here, the defendant in Hunt relied principally on Doyle v. Ohio, 426 U.S. 610, 618 (1976), in which the United States Supreme Court held that it violates due process to allow a detained person's silence following Miranda warnings to be used to impeach an exculpatory explanation later offered by the defendant at trial. In Hunt, we found the reliance on Doyle unavailing, insofar as the defendant in that case had elected to speak to police and thus had never asserted his right to remain silent. Hunt, 150 Vt. at 500. We stated that when a defendant "has chosen not to remain silent, the prosecutor may comment to the jury, and use for impeachment, inferences from the statements which he made of his own volition." Id. We held that the prosecutor's comments on the timing of the defendant's claim to have been in a trance during the commission of the crime were properly allowed as an attack on defendant's credibility rather than an impermissible comment on post-arrest silence. Id. at 501.

Similarly, in this case, defendant spoke to investigating officers after waiving his Miranda rights and later testified at trial. Given these circumstances, we find no plain error, if any error at all, in the trial court's not stepping in sua sponte and preventing the prosecutor from commenting on defendant's failure to mention to police the existence of the alleged eyewitness. See State v. Kinney, 171 Vt. 239, 253 (2000) (" Plain error exists only in exceptional circumstances where the failure to recognize it would result in a miscarriage of justice or where the error is so grave and serious that it strikes at the heart of defendant's constitutional rights." ). Defendant cites a single case from another jurisdiction to support his argument that Doyle should be applied even when a defendant waives Miranda rights and speaks to police, so long as what the defendant said to police is not inconsistent with later trial testimony. See People v. Chriswell, 478 N.E.2d 1176, 1182 (Ill. App. Ct. 1985) (defendant may not be cross-examined regarding post-arrest silence unless his trial testimony is inconsistent with pretrial statements made to police). In so holding, the Illinois intermediate appellate court acknowledged that the case law, at least in that state, was conflicting as to whether Doyle should be extended to situations where the defendant gave a statement to police, but the statement was not inconsistent with the defendant's later trial testimony. Id. at 1181. That single case does not suggest that there was plain error in the instant case.

Affirmed.

BY THE COURT:

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John A. Dooley, Associate Justice

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Denise R. Johnson, Associate Justice

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Ernest W. Gibson III, Associate Justice (Ret.)

Specially Assigned