

ARIZONA SUPREME COURT

STATE OF ARIZONA,

Appellee,

v.

GIOVANI FUSTER MELENDEZ,

Appellant.

CR-23-0215-PR

Court of Appeals
No. 1 CA-CR 20-0066

Maricopa County Superior Court
No. CR2019-104831-001

STATE OF ARIZONA'S RESPONSE TO BRIEF OF AMICUS CURIAE ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE

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ARGUMENT

The brief of amicus curiae Arizona Attorneys for Criminal Justice (“AACJ”) is unpersuasive for several reasons. First, when contending that Melendez’s silence was not an inconsistent statement, AACJ simply ignores the authority cited in the State’s Supplemental Brief, as well as the circumstances in which Melendez chose not to tell Detective Ovalle his self-defense story. Second, the brief also improperly raises new evidentiary arguments for the first time. Third, the brief asserts that the State is proposing an “all-or-nothing” approach to silence, but in fact the State is merely requesting that this Court apply long-standing *Miranda* precedent. Fourth, the brief makes unfounded claims that the State’s position will lead to law enforcement overreach, concerns that the U.S. Supreme Court has already rejected and that are unsupported by the record.

I. AACJ’s contention that Melendez’s silence was not an inconsistent statement ignores the case law and the circumstances surrounding his omission.

AACJ contends that Melendez’s silence was not an inconsistent statement and offered no probative value. Amicus Br. at 4–7. But “[c]ommon law traditionally has allowed witnesses to be impeached by their previous failure to state a fact in circumstances in which that fact naturally would have been asserted.” *Jenkins v. Anderson*, 447 U.S. 231, 239 (1980); *see also State v. Hines*, 130 Ariz. 68, 70 (1981); *Ball v. State*, 43 Ariz. 556, 559 (1934); 3A J. Wigmore,

Evidence § 1040 (J. Chadbourn rev. 1970); State’s Supplemental Br. at 3, 7–8, 10. The State made this point clearly in its Supplemental Brief, yet AACJ makes no effort to rebut or meaningfully engage with this basic principle. In Melendez’s case, his omission was inconsistent with his self-defense story given the fact that he voluntarily answered extensive questioning from Detective Ovalle on several other areas of the investigation but refused to provide the reason he shot at the victim until he heard what the other witnesses were telling police.

In a similar scenario, this Court has concluded that, “[w]hen one who has voluntarily made statements to police officers after his arrest makes new exculpatory statements at trial, the fact that he failed to make these statements earlier may be used for impeachment.” *State v. Tuzon*, 118 Ariz. 205, 207 (1978); *see also State v. Guerra*, 161 Ariz. 289, 296 (1989) (recognizing that when a defendant testifies to something different than what he or she told police, “the prosecution may properly inquire into the prior inconsistent statements, even though the prior statements involve ‘silence’ insofar as they omit fact contained in the later story”). This logic should apply here, where the prosecutor’s reference to the silence was based on the inconsistency of the omission rather than a comment on the fact Melendez remained silent. *See Anderson v. Charles*, 447 U.S. 404, 409 (1980) (concluding prosecutor’s questions to defendant on cross-examination proper when “[t]he questions were not designed to draw meaning from silence, but

to elicit an explanation for a prior inconsistent statement” involving the defendant’s testimony of facts omitted from police interview); *State v. Stuck*, 154 Ariz. 16, 21–22 (App. 1987) (concluding no error arose from prosecutor’s references to defendant’s silence because the prosecutor was not attacking his silence but was instead “commenting on how his fourth story attempted to include all the facts which emerged during the discovery process,” including the victim’s tape recorded interview and everyone’s trial testimony). Melendez’s decision to purposefully wait to tell his self-defense theory until he heard what other witnesses were telling police was probative of his story’s credibility.

The AACJ brief also misses the mark by incorrectly claiming that the State used these omissions as substantive evidence against Melendez by “arguing that an innocent man who truly acted in self-defense would have immediately told that story to the detective in the interview.” Amicus Br. at 9–10. In fact, these statements were admitted as impeachment evidence during Melendez’s cross-examination—and not in the State’s case-in-chief as evidence of Melendez’s guilt. *See* R.T. 12/10/19, at 94–99.

Finally, AACJ’s argument that the trial court erred by not precluding these statements under Arizona evidentiary rules or providing a limiting instruction is not before this Court. Amicus Br. at 6–9. Thus, the Court should not address these issues raised by amicus because it “would expand the issues on appeal and address

an argument not made by either party.” *Brionna v. Dep’t of Child Safety*, 533 P.3d 202, 210, ¶ 37 (2023). As a general matter, the State has acknowledged that not all references to a defendant’s silence during interrogation would be admissible to impeach a defendant because “[t]he trial court still has a duty to preclude objectionable evidence that is not relevant or is unduly prejudicial.” See State’s Supplemental Br. at 10–11. But Melendez has not argued in this Court that the cross-examination regarding his statements and references to them violated any evidentiary rule or required a limiting instruction, and his trial counsel did not object to the questions at issue or request a limiting instruction.

II. AACJ’s arguments are at odds with Supreme Court precedent.

AACJ contends that, as soon as a defendant is given *Miranda* warnings, any response resembling silence is no longer admissible at trial. Amicus Br. at 3. Thus, AACJ incorrectly assumes—as did the court of appeals—that any right to self-incrimination post-*Miranda* is self-executing and requires no affirmative communication. But the triggering event in a *Doyle* analysis is not the giving of the *Miranda* advisement itself, but a defendant’s affirmative *reliance* on the implied promise contained in that advisement by his invocation of the right to remain silent.

The Supreme Court has found that a witness who “desires the protection of the [Fifth Amendment] privilege ... *must* claim it or he will not be considered to

have been ‘compelled’ within the meaning of the Amendment.” *Minnesota v. Murphy*, 465 U.S. 420, 427 (1984) (quoting *United States v. Monia*, 317 U.S. 424, 427 (1943)); *see also* *Salinas v. Texas*, 570 U.S. 178, 181 (2013). A defendant can affirmatively claim this right either by choosing to remain silent after receiving a *Miranda* warning or, after waiving his rights post-*Miranda* advisement, by unequivocally and unambiguously invoking his right to remain silent. *Berghuis v. Thompkins*, 560 U.S. 370, 381–82 (2010); *Davis v. United States*, 512 U.S. 452, 462 (1994); *see also* *State v. Payne*, 233 Ariz. 484, 501, ¶ 40 (2013). This affirmative and clear standard avoids any doubt or confusion and overcomes the presumption “that an individual who, with a full understanding of his or her rights, acts in a manner inconsistent with their exercise has made a deliberate choice to relinquish the protection those rights afford.” *Berghuis*, 560 U.S. at 385. It also “results in an objective inquiry that ‘avoid[s] difficulties of proof and ... provide[s] guidance to officers on how to proceed in the face of ambiguity.” *Id.* at 381 (quoting *Davis*, 512 U.S. at 458–59).

AACJ complains that by asserting this proposition, the State is “chipping away at a defendant’s fundamental right to silence and non-incrimination by suggesting the Arizona courts take an all-or-nothing approach to the right.” Amicus Br. at 3. But the State has declined to take an “all or nothing” position, *see, e.g.*, State’s Supplemental Br. at n.1, and has requested only that this Court

apply the existing *Miranda* precedent highlighted above, *id.* at 2. Certainly, if Melendez had chosen to not waive his right to silence or unequivocally and unambiguously invoked that right after waiving it, the State could not have used that silence at trial. *See Doyle v. Ohio*, 426 U.S. 610, 619–20 (1976) . But because Melendez waived his right to silence by answering questions and never unequivocally and unambiguously invoked the right during Detective Ovalle’s questioning—unlike his initial invocation, *see* Docket 6; *see also* State’s Supplemental Br. at 12—the State was permitted to impeach his self-defense testimony during cross-examination with those statements.

As an example of how Fifth Amendment rights are not an all-or-nothing proposition, AACJ notes that a testifying witness seeking to invoke his Fifth Amendment rights on the stand must assert it on a “question-by-question basis,” stating that he “cannot invoke [his] rights wholesale or stand on generalities, [he] must invoke the right, and show [he] actually [has] a valid right as to every question posed.” Amicus Br. at 11. It is not clear precisely what AACJ is arguing. As noted above, the State does not take an all-or-nothing approach to the right against self-incrimination, and merely hews to governing precedent. A defendant who unambiguously invoked the right to remain silent as to some questions while answering others may be entitled to the protections of *Doyle*, but that is simply not this case. And in any event, a testifying *witness* is different from a testifying

defendant because a defendant cannot selectively testify. Indeed, a defendant has no “immunity from cross-examination on the matters he has himself put in dispute.” *Brown v. United States*, 356 U.S. 148, 156 (1958).

And, while AACJ generally concludes that Melendez was silent during the interview, it argues that, even if his statements were ambiguous, the Detective should have asked clarifying questions “about what he meant and whether he intended to cut off questioning.” Amicus Br. at 13–14. But that is exactly what Detective Ovalle did during the interview. Specifically, when Melendez indicated that he wanted to “hold” and “pass” certain questions “for now” because he felt blindsided, *see* Exh. 174 at 5:10, 11:05, 12:55, 13:05, Detective Ovalle sought to clarify why he felt blindsided and asked whether he was “comfortable talking to [her],” to which he informed her that “he did not mind talking to [her],” *id.* at 14:55–16:15, 17:10–18; *see also* Melendez’s Appendix at 13.

III. AACJ’s arguments regarding law enforcement overreach ignore the Supreme Court’s rejection of these concerns and mischaracterizes the record in this case.

At several points in its brief, AACJ asserts that allowing the State to comment on selective silence creates a “built-in incentive for law enforcement to not scrupulously honor the right to cut off questioning but to charge ahead, continue questioning, and then argue later the defendant had a chance to answer, deny, explain, and did not.” Amicus Br. at 3, 12–15. But the Supreme Court has

rejected similar concerns about law enforcement overreach in the past. *See Berghuis*, 560 U.S. at 381–82.

In *Berghuis*, the defendant complained that “he ‘invoke[d] his privilege’ to remain silent by not saying anything for a sufficient period of time.” 560 U.S. at 381. In determining that a defendant must unambiguously assert his right to silence, the Court rejected concerns about law enforcement overreach:

Treating an ambiguous or equivocal act, omission, or statement as an invocation of *Miranda* rights might add marginally to *Miranda*’s goal of dispelling the compulsion inherent in custodial interrogation, ... [b]ut as *Miranda* holds, full comprehension of the rights to remain silent and request an attorney are sufficient to dispel whatever coercion is inherent in the interrogation process.

Id. at 382 (internal quotations and citations omitted). Thus, these other safeguards—including that any statement or waiver of the right to remain silent be voluntary and not the product of “intimidation, coercion, or deception”—protect against law enforcement overreach. *Id.* at 382–83; *see also Colorado v. Connelly*, 479 U.S. 157, 168 (1986) (finding that “the voluntariness determination ... is designed to determine the presence of police coercion”).

AACJ also suggests that Melendez may not have fully understood how to invoke his right to remain silent because of an alleged language barrier. Amicus Br. at 7–8. First, to the extent AACJ is suggesting the waiver was involuntary, it cannot raise a new claim or expand the issues as an amicus. *See Brionna*, 533 P.3d at 210, ¶ 37. More importantly, the record shows that Melendez clearly understood

his rights because he previously invoked his right to remain silent, officers immediately ended questioning and scrupulously honored that invocation, and Melendez began answering extensive questioning after receiving his *Miranda* warnings a second time and never unambiguously indicated a desire to remain silent.

The amicus brief mischaracterizes the record in attempting to demonstrate that law enforcement overreach occurred in this case. Specifically, AACJ suggests that Detective Ovalle knew Melendez was invoking his rights but “forge[d] ahead with more questioning on the same topics Melendez had refused to answer.” Amicus Br. at 14. In doing so, AACJ points to Detective Ovalle’s comment to Melendez that holding on certain questions “[was his] right.” *Id.* at 3. But the record shows that this comment came towards the end of the interview, immediately before the detective left to get Melendez more water. Exh. 174 at 20:00–24:00; *see also* Appendix at 15–16. When she returned, Melendez indicated to the detective that he wanted to tell his side of the story. Exh. 174 at 24:30; Appendix, at 17–18. In any case, Detective Ovalle’s statement simply confirmed the fact that Melendez was not legally required to answer any of her questions.

In sum, the record shows that Melendez was fully aware of his right to remain silent but freely chose to waive that right by answering questions and thereafter never unambiguously invoked.

CONCLUSION

This Court should not consider AACJ's new arguments not raised by Melendez. Instead, this Court should vacate the court of appeals' opinion and affirm Melendez's convictions.

Respectfully submitted,

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