Judgment rendered August 17, 2011.
Application for rehearing may be filed
within the delay allowed by Art. 922,
La. C.Cr.P.

No. 46,265-KA

COURT OF APPEAL
SECOND CIRCUIT
STATE OF LOUISIANA

* * * * *

STATE OF LOUISIANA Appellee

versus

SAMUEL WASHINGTON Appellant

* * * * *

Appealed from the
Fifth Judicial District Court for the
Parish of Richland, Louisiana
Trial Court No. F2007203

Honorable James M. Stephens, Judge

* * * * *

LOUISIANA APPELLATE PROJECT
By: James E. Beal — Counsel for Appellant

SAMUEL WASHINGTON — Pro se

WILLIAM R. COENEN, JR.
District Attorney
PENNY W. DOUCIERE
KENNETH D. WHEELER
Assistant District Attorneys — Counsel for Appellee

* * * * *

Before BROWN, STEWART and GASKINS, JJ.

BROWN, CHIEF JUDGE, dissents with written reasons.

STEWART, J.

The defendant, Samuel Washington, was charged with possession of cocaine with intent to distribute and possession of marijuana with intent to distribute. He was convicted of possession of cocaine with intent to distribute and of the responsive verdict of possession of marijuana. He was sentenced to serve 20 years' imprisonment at hard labor for the cocaine conviction and a concurrent six-month term for the marijuana conviction. He now appeals, urging one counseled assignment of error and five pro se assignments. The defendant's counseled assignment of error, which alleges ineffective assistance of counsel, is substantial. For reasons discussed below, we set aside the defendant's conviction and sentence, and remand the case for a new trial.

FACTS

In 2007, the Richland Parish Sheriff's Office ("RPSO") received a tip that the defendant, Samuel Washington, was selling narcotics from a home on Edgar Street in Delhi, Louisiana. On July 24, 2007, investigators employed a confidential informant who allegedly bought cocaine from the defendant.[1] Based upon that purchase and other information gathered through surveillance, the agents sought a search warrant for the home. Investigator Brandon Fleming prepared an affidavit in support of the warrant, which alleged that the occupants of the residence were a Samuel Boston[2] and a Kimberly Criss. A district judge signed the warrant, and a tactical team executed the warrant that same evening.

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[1]The jury did not hear evidence about the informant or this sale.

[2]Boston is a family name, but the defendant now goes by Samuel Washington.

Three RPSO agents, Brandon Fleming, Joel Williams and Perry Fleming, followed the tactical team into the defendant's home. They discovered that he was not present. Four young adult males, Devon Williams, Samuel Boston, Jr., Lee Arthur Jones, and Devaun Jones, were present in the home. The agents detained and searched the young men, but found no narcotics. The agents then searched the home.

Brandon Fleming conducted the search. In plain view on top of a television, he located a baggie containing about six grams of powder cocaine (worth about $600) and a small paper bag containing marijuana. In the back bedroom, Fleming found a small pile of loose marijuana atop the dresser. The total weight of marijuana from the bag on top of the television and the pile on the dresser was 3.2 grams. In a drawer in that same dresser, he found a baggie containing about ten rocks of crack cocaine, worth about $20 each. In addition, the agents found a set of digital scales in the kitchen, some rolling papers and tobacco cigars, a paper bag containing what one agent described as "cigar guts tobacco," and some sandwich bags.

The agents also found recent utility bills for the house addressed to the defendant, and a document and a prescription pill bottle containing antibiotics bearing the name Lashanna Humes.

The agents arrested the four young men who were at the house.[3] Later that evening, the defendant learned that his house had been raided, so he turned himself in to RPSO. He was arrested and charged with possession of

[3]Based upon subsequent interviews, the prosecutor did not pursue drug charges against these men.

cocaine and marijuana with intent to distribute, as well as conspiracy to distribute those substances.[4]

The defendant was appointed an attorney, but in 2009, he retained a new attorney. New counsel engaged in substantial pretrial motion practice, including filing a motion for discovery, a motion for a preliminary examination, a motion to identify the confidential informant, a motion to suppress the drug evidence, an opposition to other crimes evidence, a motion for the criminal records and pending charges against all state's witnesses, and a motion to quash for untimely prosecution.

The court conducted a hearing on the motion to produce the identity of the informant and the motion to suppress the drug evidence. At this hearing, the court denied the motion to produce the identity of the informant, and further ordered that the state would not be allowed to make any reference at trial to the purchase by the informant.

The motion to suppress the drug evidence alleged that the information in the affidavit supporting the warrant was inaccurate. The court heard testimony from Fleming, who reported that the RPSO received numerous complaints from the defendant's neighbors regarding traffic in and out of the defendant's house, and that the RPSO had also obtained information from the Delhi Police Department. Fleming said that he and other agents met with an informant that the RPSO had used before, searched him to ensure he had no drugs, gave him money, and followed him to the defendant's house. The informant then went into the house, came back out, and then met the agents at

[4]The conspiracy charges were dismissed at trial.

another location about five minutes later. The informant produced powder cocaine that he had purchased and advised that he made the purchase from the defendant. Fleming then prepared an affidavit in support of a search warrant, which stated, in part:

> This residence is occupied by Samuel Boston and Kimberly Criss.
> ...
> This affiant has received information from informants, complainants in the area and other police officer of illegal narcotics sell's [*sic*] from this house located at 115 Edger St Delhi, La, 71232. On 7-24-2007 at approx. 2:35 P.M. a Reliable Confidential Informant was given money to purchase Powder Cocaine from Samuel Boston at his house located 115 Edgar St. Reliable Confidential Informant went to that residence and purchased One Hundred Dollars ($100.00) worth of Powder Cocaine from Samuel Boston. This buy was made at approx. 2:46 P.M. and was controlled through surveillance. A short time later the R.C.I. turned the evidence over to me and advised that Boston went to a back room and returned with the powder Cocaine. R.C.I. Advised that he / she saw a bag of marijuana on the pool table.

The court denied the motion to suppress, finding the information in the affidavit sufficiently correct. The trial court also denied the motion to quash, citing the defendant's choice in changing counsel as the justification for the delay.

At the opening of the trial on May 25, 2010, the jury heard, by stipulation, that the defendant had a prior conviction in Richland Parish for possession of cocaine under the name Samuel Tyronne Boston. This conviction occurred on October 15, 2002.

The jury heard testimony from all three of the agents from the Richland Parish Sheriff's Office who participated in the search. During cross-examination, the jury was made aware of the discrepancies between the

information in the search warrant and the facts as discovered after the search, including the fact that no evidence was found to show that Kimberly Criss was a resident of the home and that no marijuana was found on the pool table. Defendant's counsel offered the search warrant into evidence; the court admitted the document as Exhibit D-2 and it was published to the jury.

Devaun Jones, who was one of the four young men at the defendant's house when the warrant was executed, testified that he and the defendant had cleaned the home's carpet earlier that day. Although he admitted that he had previously smoked marijuana, he denied possession of any drugs or having any knowledge of the drugs in the defendant's home on the day in question. He also said that he had never been to the back bedroom. He further testified that he did not see any of the three other men in possession of any drugs in the defendant's home.

Dustin Dykes, who was with the defendant away from the home at the time the warrant was executed, testified that he had been in the house earlier that day and had seen no drugs there.

Tamarcus Jones testified that during the day of July 24, 2007, he, Devaun Jones and the defendant cleaned the floor of the home. He explained that they had taken all of the furniture out of the living room and moved it outside before cleaning the floor. He related that they did not move the television. Jones said that he did not see any drugs in the home while he was there, nor had he seen the defendant sell any drugs to anyone. After finishing the cleaning, he, the defendant and Dustin Dykes left the home to get food and to go to the store. They were not there at the time the police arrived.

Samuel Lee Boston, Jr., who is the defendant's cousin, testified that while he was at the house that day, he had seen marijuana sitting on the couch between Devaun Jones and Lee Arthur Jones. On cross-examination, Boston, Jr. admitted that he had previously told the prosecutor that he had not seen any marijuana in the house prior to the raid.

In the jury instructions, the court advised the jury that the accused may choose not testify in his own behalf, and if he does not, that fact cannot be construed against him. However, they were not instructed that the defendant's silence after his arrest was not substantive evidence of his guilt.

The jury returned verdicts of guilty of possession of cocaine with intent to distribute and possession of marijuana. The vote was 10-2 on the cocaine charge and 11-1 on the marijuana charge.

At sentencing, the judge reviewed the defendant's presentence investigation report and six letters from friends attesting to his character. The judge recognized that the defendant had an employment history, but also noted that he had a prior drug conviction and had subsequently been arrested on another drug-related matter. As mentioned earlier in the opinion, the judge sentenced Washington to serve 20 years' imprisonment at hard labor for the cocaine conviction and, concurrently and with credit for time served, six months in the parish jail for the marijuana conviction. The defendant did not object to the sentences and this record does not contain a motion to reconsider sentence. The defendant now appeals.

LAW AND DISCUSSION

Ineffective Assistance of Counsel

In the first assignment of error, the defendant contends that the defense counsel's ineffectiveness at trial resulted in the denial of a fair trial to him.

In alleging ineffective assistance of counsel, a defendant must satisfy a two-pronged test by showing, first, his attorney's performance to be so deficient as to deny him the "counsel" guaranteed by the Sixth Amendment, and second, that those errors are so serious as to deprive the accused of a fair proceeding, i.e., one with a reliable result. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 674 (1984); *State v. Washington*, 491 So.2d 1337 (La. 1986). In order to prevail under the *Strickland* test, the defendant must demonstrate a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. *State v. Gibson*, 28,113 (La. App. 2 Cir. 6/26/96), 677 So.2d 544, *writ denied*, 96-2303 (La. 1/31/97), 687 So.2d 402.

As a general rule, a claim of ineffective assistance of counsel is more properly raised in an application for post-conviction relief ("PCR") in the trial court rather than by appeal. This is because PCR creates the opportunity for a full evidentiary hearing under La. C. Cr. P. art. 930. *State ex rel. Bailey v. City of West Monroe*, 418 So. 2d 570 (La. 1982); *State v. Ellis*, 42,520 (La. App. 2d Cir. 9/26/07), 966 So. 2d 139, *writ denied*, 07–2190 (La. 4/4/08), 978 So. 2d 325.

In some instances, defense counsel may be ineffective for "opening the door" to allow the prosecutor to take advantage of the defendant's post-arrest,

post-*Miranda* silence. When the record is sufficient, this issue may be resolved on direct appeal in the interest of judicial economy. *State v. Ratcliff*, 416 So. 2d 528 (La. 1982); *State v. Willars*, 27,394 (La. App. 2d Cir. 9/27/95), 661 So. 2d 673. In the instant case, the record is sufficient to review the defendant's claim of ineffective assistance of counsel.

In *Doyle v. Ohio*, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976), the United States Supreme Court held that a state may not impeach a defendant's testimony at trial with evidence that he remained silent immediately after his arrest and after receiving the warnings required by *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). In a case like this one, where the defendant does not take the stand, "there is even less justification here for the State to call attention to his silence at the time of arrest than there was in *Doyle*, because the argument cannot be made that he was under cross-examination and thus fair game for impeachment by use of his silence at the time of his arrest." *State v. Montoya*, 340 So. 2d 557, 560 (La. 1976).

The contemporaneous objection rule is that an irregularity or error cannot be availed of after verdict unless it was objected to at the time of the occurrence. La. C. Cr. P. 841; *State v. McGee*, 39,336 (La. App. 2 Cir. 3/04/05), 895 So.2d 780. *Doyle* errors are subject to the contemporaneous objection rule unless the error casts substantial doubt on the reliability of the fact-finding process. *State v. Langston*, 43,923 (La. App. 2d Cir. 2/25/09), 3 So. 3d 707, *writ denied*, 2009-0696 (La. 12/11/09), 23 So. 3d 912. Likewise, such errors are subject to harmless error analysis. *Langston*, *supra*; *State v.*

Bradley, 43,593 (La. App. 2d Cir. 10/29/08), 997 So. 2d 694, *writ denied*, 2008-2997 (La. 9/18/09), 17 So. 3d 384, *certiorari denied*, *Bradley v. Louisiana*, ___ U.S. ___, 130 S. Ct. 2093, 176 L. Ed. 2d 723 (2010).

Under some circumstances, the state may permissibly make a limited reference to a defendant's post-arrest, post-*Miranda* silence. As the court explained in *U.S. v. Martinez-Larraga*, 517 F.3d 258 (5th Cir. 2008):

> However, *Doyle* also expressly recognizes that a prosecutor's reference to a defendant's post-*Miranda* silence may properly be made where it is not "used to impeach" the defendant's "exculpatory story," or as substantive evidence of guilt, but rather to respond to some contention of the defendant concerning his post-arrest behavior. See 96 S.Ct. at 2245 p. 11 (citing *United States v. Fairchild*, 505 F.2d 1378, 1383 (5th Cir.1975)). In *Fairchild* we stated that where the defendant had "opened the door" respecting his post-arrest interaction with the authorities "he discarded the shield which the law had created to protect him" from comment on his post-arrest silence, although the prosecution still could not go beyond a proper response so as to use the silence "as direct evidence" of guilt. *Id*., 505 F.2d at 1383. We, and other circuits, have continued to recognize this "open the door" or "reply" exception to *Doyle*, see, e.g., *United States v. Allston*, 613 F.2d 609, 611 (5th Cir.1980); *United States v. Shue*, 766 F.2d 1122, 1129 (7th Cir.1985), while likewise recognizing that it does not permit the prosecution to argue "that the jury should infer ... [the defendant's] guilt directly from his post-arrest silence." *United States v. Rodriguez*, 260 F.3d 416, 421 (5th Cir. 2001).

In this case, we note that Fleming briefly testified about the defendant's booking at the detention center, but the exact timing and circumstances of the arrest are not made clear, and no mention is made of any *Miranda* warning.

During cross-examination, the defense counsel questioned Investigator Fleming about the items in the house that belonged to other people and whether those people had been charged in connection with the narcotics.

Fleming related that he had spoken with Ms. Criss in the course of the investigation and learned that she was not living there at the time. Counsel then asked Fleming about the drugs found on top of the television, whether the drugs could have been in the possession of the four young men in the house, and the statements made by these men. He related that each of the young men said that they had not seen the drugs sitting on top of the television set. Next, they had this exchange:

Defense: Could anyone have been able to see what's on top of the TV that they were watching and playing games on?

Fleming: I have no idea.

Defense: You have no idea? And I assume this goes for all the people that were playing that game, correct? They all told you they did not see it, they didn't know it was there? Correct?

Fleming: Right. Yes, sir.

Defense: Did Samuel Boston, did - the junior cousin of Mr. Washington told you the same thing?

Fleming: Yes, sir.

Defense: That he didn't see anything there? *Did Mr. Washington here told* [*sic*] *you he saw anything there or he knew those things were there? Yes or no?*

Fleming: Sir?

Defense: *Did Mr. Washington tell you that he knows* [*sic*] *those drugs were there? Yes or no?*

Fleming: Did he tell me that ...

Defense: Yes.

Fleming: ... that he knew it?

Defense: Right.

Fleming: They didn't give us an interview, sir.

Defense: Correct. But did tell [*sic*] you if he knew anything was there, correct?

Fleming: He did or didn't? I can't understand.

Defense: Did he or did he not?

Fleming: He did not tell us nothing.

(Emphasis added.) In the emphasized remarks, Washington's attorney asked the agent whether the defendant made any statements to the agents about the drugs. We note that the jury had never heard any substantial details about Mr. Washington's arrest, nor did they hear anything regarding whether the defendant was provided his *Miranda* rights.

On redirect examination, the prosecutor engaged the investigator in this colloquy:

Prosecutor: Investigator Fleming, you were asked ... I believe the question was "What did Mr. Washington tell you about the drugs?" Do you remember that response?

Fleming: Yes, sir. He didn't respond, didn't say nothing.

Prosecutor: Okay. Defense counsel asked you that question, correct?

Fleming: Yes, sir.

Prosecutor: He didn't say anything to you about them?

Fleming: No, sir.

Prosecutor: Did you give him the opportunity?

Fleming: Yes, sir.

Prosecutor: Did you ask him about them?

Fleming: Yes, sir.

Prosecutor: Did he deny that they were his?

Fleming: No, sir.

Prosecutor: Did he say they were Mr. Jones'?

Fleming: No, sir.

Prosecutor: Did he say they were Ms. Humes', they weren't mine?

Fleming: No, sir.

Prosecutor: Did he say they were Ms. Criss', they're not mine?

Fleming: No, sir.

Prosecutor: Did he say they were Mr. Williams' who was there?

Fleming: No, sir.

Prosecutor: Did he point to any other person and say, "Those belonged to them, not me?"

Fleming: No, sir.

Prosecutor: Did he cooperate with you in any way?

Fleming: No, sir.

Prosecutor: Did the four young men who were there when you got there cooperate with you?

Fleming: Yes, sir.

Prosecutor: Did they deny it?

Fleming: No, sir, they said they had no idea the dope was in the house.

Counsel for the defendant did not object to the prosecutor's questions to the investigator about whether the defendant had made any statements denying knowledge of the drugs.

Both parties questioned the investigator extensively about his investigation, because a key issue in the case was the ownership, or at least the control of, the narcotics. At the time the search warrant was executed, the defendant was not present, yet the biggest quantity of cocaine discovered was in plain view of the four people sitting nearby.

The state argues that the defendant's choice to question Investigator Fleming about the defendant's "post-arrest" statements, and silence, opened the door to further questions and comment by the prosecutor about that silence. On redirect examination, the prosecutor emphasized the point that no party had confessed to owning the drugs and that the four young men nearest the drugs had cooperated in the investigation. The prosecutor was within the "opened door" of relevancy to ask whether the investigator gave the defendant the opportunity to make a statement, and perhaps whether the defendant attempted to blame any other person.

Counsel's decision to ask the investigator if the defendant had made any statements to him is arguably a strategic move on his part, and not an act of ineffective assistance. Since the defense counsel opened the door to that line of questioning, the prosecutor's questions were proper.

At the close of the evidence, the prosecutor gave a closing argument, as did defense counsel. On rebuttal argument, the prosecutor stated:

> ...I want to ask you this question. Have you heard one piece of evidence in this case that these drugs belonged to anybody else other than this defendant? Have you heard anybody else in this case say "Well, I saw so and so with the cocaine, I saw so and so with the crack, I saw so and so with the powder?" No. All his friends and family that have come and testified about who these drugs belonged to, not one single one of them said it belonged to somebody else.

> Defense counsel opened the door for this and he asked Investigator Fleming sitting right here, he said, "Investigator Fleming, what did my client Mr. Washington tell you about those drugs?" He didn't tell him anything about those drugs. He didn't say anything. He never once when given the opportunity denied they were his drugs, he never once when given the opportunity said "Those aren't my drugs, Investigator Fleming, I can tell you who they are, they belong to so and so." He didn't do that. He didn't say "I don't know anything about the drugs. I don't know why they're there." He didn't say that opportunity [*sic*]. Ladies and gentlemen if - if any one of you here today had got accused of drugs you would yell from the rooftops "Officer, I have no idea how those drugs got in my house! I don't know why they're there. I didn't see them, they're not mine, I'm telling you the truth." When given that opportunity there was deafening silence. That tells more about this than anything. He marches all these friends and family in here to say this and that but not one single one of them said that cocaine belonged to anybody else but this defendant. We would all be screaming our innocence, "It doesn't belong to me" when given that...
>
> Defense: Objection, your honor.
>
> Court: Thank you.
>
> Defense: That's ...
>
> Court: Objection sustained.
>
> Defense: And I will - I will request that I be able to rebut that too, Judge.
>
> Prosecutor: No, there's no rebuttal.
>
> Court: There's no rebuttal.
>
> Defense: Well...

Though counsel objected to the prosecutor's use of the defendant's silence as evidence of his guilt during his closing argument, he should have immediately moved for a mistrial pursuant to La. C. Cr. P. art. 770, which states:

> Upon motion of a defendant, a mistrial shall be ordered when a remark or comment, made within the hearing of the jury by the judge, district attorney, or a court official, during the trial or in argument, refers directly or indirectly to:
>
> (1) Race, religion, color or national origin, if the remark or comment is not material and relevant and might create prejudice against the defendant in the mind of the jury;
>
> (2) Another crime committed or alleged to have been committed by the defendant as to which evidence is not admissible;
>
> (3) The failure of the defendant to testify in his own defense; or
>
> (4) The refusal of the judge to direct a verdict.
>
> An admonition to the jury to disregard the remark or comment shall not be sufficient to prevent a mistrial. If the defendant, however, requests that only an admonition be given, the court shall admonish the jury to disregard the remark or comment but shall not declare a mistrial.

Under La. C. Cr. P. art. 771, where the prosecutor or a witness makes a reference to a defendant's post-arrest silence, the trial judge is required, upon the request of the defendant or the state, promptly to admonish the jury. In cases where the trial judge is satisfied that an admonition is not sufficient to assure the defendant a fair trial, upon motion of the defendant, the trial judge may grant a mistrial. *State v. Kersey*, 406 So. 2d 555 (La. 1981).

In this case, the defense counsel should have requested a mistrial. Based on the trial court's act of quickly sustaining counsel's objection, it is clear that it recognized the negative impact that the prosecutor's comments could have on the jury. At the very least, counsel should have requested that the trial court admonish the jury to disregard the prosecutor's comments regarding the defendant's failure to talk to Fleming.

Although counsel objected to the prosecutor's argument, and that objection was sustained, counsel did not move for a mistrial, nor did counsel request an admonition. If an objection is sustained, the defendant cannot on appeal complain of the alleged error unless at the trial level he had requested and had been denied either admonition to disregard or a mistrial. *State v. Robertson*, 97-0177, p. 40 (La. 3/4/98), 712 So. 2d 8, 42, *cert. denied*, 525 U.S. 882, 119 S. Ct. 190, 142 L. Ed. 2d 155 (1998).

The prosecutor's comments are not harmless in this case. The prosecutor's closing argument clearly overreached the "open door" doctrine by asking the jurors to speculate what they would have done if wrongly accused of possessing drugs. With these remarks, the prosecutor was openly using the defendant's silence as substantive evidence of the defendant's guilt, saying: "When given that opportunity, there was deafening silence. That tells more about this than anything." The prosecutor exploited all of the leeway allowed by the questions asked by defense counsel during Fleming's cross- examination, and then invited the jury to consider Washington's silence as proof that he possessed the drugs. "[T]he prosecution still could not go beyond a proper response so as to use the silence 'as direct evidence' of guilt." *Martinez-Larraga, supra.*

This case is based on circumstantial evidence. The rule as to circumstantial evidence is: assuming every fact to be proved that the evidence tends to be proved, in order to convict, it must exclude every reasonable hypothesis of innocence. La. R.S. 15:438. The circumstantial evidence provision set forth in La. R.S. 15:438 does not establish a stricter standard of

review than the more general *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L.Ed.2d 560 (1979), formula, but a hypothesis of innocence that is sufficiently reasonable and strong must necessarily lead a rational finder to entertain a reasonable doubt as to guilt. *State v. Moore,* 46,252 (La. App. 2 Cir. 5/18/11) --- So.3d --- , 2011 WL 1879040; *State v. Charleston*, 33,393 (La. App. 2 Cir. 6/23/00), 764 So.2d 322, *writ denied*, 00-2603 (La. 9/14/01), 796 So.2d 672. Circumstantial evidence consists of collateral facts and circumstances from which the existence of the main fact may be inferred according to reason and common experience. *State v. Moore, supra; State v. Major*, 604 So.2d 137 (La. App. 2 Cir. 1992), *writ denied*, 609 So.2d 255 (La. 1992).

The photos show that the bulk of the cocaine, which was approximately six grams, was in a clear plastic bag on top of the television that was being used by the four young men playing a video game. A brown paper sack containing marijuana was also found on top of the television. Tamarcus Jones testified that Devaun Jones smoked marijuana, and that he saw Devaun with "something in a brown paper bag" in his pocket that day. Tamarcus related that Devaun did not want anybody to see the contents of this brown paper bag. Samuel Boston, Jr., testified that he too was aware that Devaun smoked marijuana. Boston, Jr. stated that he saw marijuana on the couch between Devaun Jones and Lee Jones that day. Each of these young men had a strong motive to lie and deny knowledge of the drugs, which were not hidden in any way.

After a careful review of the record, we note that it is absent of any indication that the bedroom where a portion of the drugs were found belonged to the defendant. The state failed to present any evidence that the defendant's belongings were located in the bedroom, or in the chest of drawers containing the drugs. The defendant's brother, William Washington, testified that the bedroom in question was a spare bedroom, and that no one stayed in there. While the state tendered electricity and gas bills in the defendant's name, they did not show that they were located in the bedroom with the drugs.

There was evidence that the defendant was not the sole resident of the house. William testified that he stayed at the house approximately three times a week, including the night before the execution of the warrant, and that Humes also stayed there. William also stated that his mother rented the house. The police also failed to collect any fingerprints on the drugs seized that would link the defendant to the drugs.

Considering the fact that the felony conviction is for possession with intent to distribute, and the bulk of the cocaine was in the living room with the guests, we cannot say that the error of allowing the jury to consider the defendant's silence as evidence of guilt had no effect on the verdict. Given that this case is based on circumstantial evidence, the prejudicial inference raised by the prosecution's argument clearly was detrimental to the defendant's defense. There is a strong likelihood that the jury concluded that the defendant's failure to speak up meant that he was admitting to possession of all of the drugs. The jury obviously did not believe the theory that the defendant intended to distribute the small amount of marijuana seized. This

is a strong indication that counsel's failure to move for a mistrial significantly impacted the outcome of the case. Had counsel moved for and been granted a mistrial, the prosecutor's extremely prejudicial remarks would not have been considered by the jury. An admonishment would have lessened the impact on the jury at the least.

The defendant has made a good showing that his trial counsel made serious errors during the trial, and the reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. Counsel should have moved for a mistrial, or in the alternative, asked for the court to admonish the jury. His failure to do so indicates that the defendant received ineffective assistance of counsel. This assignment of error alleging ineffective assistance of counsel warrants reversal of the defendant's convictions and sentences and a new trial.

Pro Se Assignments of Error

Since we are setting aside the defendant's convictions and sentences and remanding the case for a new trial, the defendant's pro se assignments of error are pretermitted.

CONCLUSION

The defendant's trial counsel erred by opening the door to questioning about the defendant's post-arrest silence, and that error was compounded by the questions and argument of the prosecutor that went far beyond the matters put at issue by defense counsel. For the foregoing reasons, the defendant's conviction and sentence are set aside, and the case remanded for a new trial.

CONVICTIONS AND SENTENCES SET ASIDE; CASE REMANDED FOR NEW TRIAL.

BROWN, CHIEF JUDGE, dissents

The majority opinion reverses defendant's convictions because of ineffective assistance of counsel. Although recognizing that defense counsel objected to certain remarks made by the prosecutor in closing argument and that the objection was sustained by the trial court, the majority concludes that defense counsel should have requested a mistrial and not doing so was "substantial" error. In his rebuttal closing argument, the prosecutor started to get into defendant's post- or possibly pre-arrest silence stating "We would be screaming our innocence, it doesn't belong to me, when given that . . ." At this point the objection was made and sustained.[1]

The majority opinion is silent as to the critical facts underlying this issue. Prior to trial, the defense effectively suppressed all evidence related to defendant's sale of cocaine at his house just four hours before the search. In his opening and closing statements, defense counsel repeatedly asked, "Why (charge) Mr. Washington?" Defense counsel continued to argue that the four teenagers in the house at the time of the search, as well as defendant, denied possession of the drugs but the police let the four boys off and focused only on defendant. Defense counsel continued to argue that the police did not investigate throughly.

In *United States v. Fairchild*, 505 F. 2d 1378 (5th Cir. 1975), as part of his defense to charges of receiving and concealing two stolen automobiles in violation of the Dyer Act, 18 U.S.C. § 2313, counsel had alluded to Fairchild's active cooperation with the police, as the court found,

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[1]Defendant learned of the search at his house and voluntarily went to the Sheriff's office. There was no testimony presented concerning his arrest and the reading of his *Miranda* rights.

"in order to build up his client in the eyes of the jury." *Id*. at 1383. In examining the reasons for not permitting prosecutorial comment on a defendant's post-arrest, post-*Miranda* silence, the court stated,

> *Miranda* establishes that the prosecution may not use as a part of its case in chief a criminal defendant's silence following his arrest and warning. This evidence, even though it might be relevant and probative, is normally excluded. ***But it is important to note that it is excluded for the purpose of protecting certain rights of the defendant. It is not excluded so that the defendant may freely and falsely create the impression that he has cooperated with the police when, in fact, he has not***. . . . Assuming the law would have excluded from evidence Fairchild's silence had he not broached the subject of cooperation, once he did broach it the bar was lowered and he discarded the shield which the law had created to protect him. . . . Here the evidence of Fairchild's *Miranda* silence was admissible for the purpose of rebutting the impression which he attempted to create: that he cooperated fully with the law enforcement authorities. (Emphasis added) (Citations omitted). *Id*.

As to post-arrest silence, the Louisiana Supreme Court in *State v. Bell*, 446 So. 2d 1191 (La. 1984), found an applicable exception. Bell was accused of forging his grandmother's name to three checks made out in his favor. Defense counsel's opening statement disclosed his client's defense–that the grandmother had authorized defendant's action and that defendant would take the stand to so testify; that defense counsel could not say why defendant was being prosecuted; that "people make mistakes. They don't investigate thoroughly. Possibly that's the situation here." The supreme court in *Bell,* 446 So. 2d at 1194, stated:

> In this case since defense counsel suggested to the jury that the state had failed to investigate the matter, and implied that, had it been investigated properly, the forgery charges would not have been brought against the defendant, the state was allowed to respond by asking the defendant and the investigating officers whether or not they tried to determine the defendant's involvement by questioning

> him at the time of his arrest. The defendant may not tell the jury that the state's case is the result of improper investigation without allowing the state to try to show the jury that the investigation was indeed thorough, or at least sufficiently thorough as to include inquiries of the defendant in order to get leads which might verify, or dispute, defendant's noninvolvement.

Additionally, in *State v. Brown*, 395 So. 2d 1301 (La. 1981), the Louisiana Supreme Court refused to reverse a conviction because a prosecutor referred to defendant's failure to sign the rights form in order to counter suggestions that defendant's attitude at the time of his arrest was one of nonchalance.

In the present case, the suppression of critical evidence and the opening and closing argument of defendant's retained attorney are significant.

In July 2007, the Richland Parish Sheriff's Office ("RPSO") received a tip that defendant, Samuel Washington, was selling cocaine from his home on Edgar Street in Delhi, Louisiana. On July 24, 2007, investigators used a confidential informant who, under surveillance, bought "powder" cocaine from defendant at defendant's Edgar Street residence. This sale occurred at 2:46 p.m. Immediately following the sale, the agents obtained a search warrant for defendant's house. They returned to defendant's home at 7:24 p.m. and executed the search warrant. The drugs seized during that search resulted in the present charges. The witnesses for both the state and defendant testified that defendant was at his Edgar Street residence that afternoon and, particularly, at the time of the sale to the informant. Just before the arrival of the search team, defendant had left the house to run some errands. At the time of the search, four teenagers, Devon Williams,

Samuel Boston, Jr., Lee Arthur Jones, and Devaun Jones, were present in the home.[2] Powder cocaine and marijuana were found on top of the TV in the living room. The teenagers were playing video games in the living room. In a back bedroom rocks of cocaine and more marijuana were found. In the kitchen were digital scales, baggies, rolling paper, and cigars. Utility bills in defendant's name and testimony clearly showed that defendant resided at this address.

Defendant was initially appointed an attorney, but later retained counsel. Defendant's attorney engaged in substantial pre-trial motion practice. The most damning evidence against defendant on the charges of possession with intent was the actual sale of the cocaine the same afternoon as the search. In effect, defense counsel was successful in suppressing this evidence. The court denied defendant's motion to produce the identity of the informant, but ordered that the state would not be allowed to make any reference at trial to the purchase by the informant.

In his opening statement to the jury, defense counsel stated that the police failed to thoroughly investigate the case, and that the police and prosecutor accepted the denials of the four teenagers who were in the house, while rejecting defendant's denials. Defense counsel repeatedly asked, "Why Mr. Washington?" Of course, the primary answer could not be revealed, that is, that Mr. Washington sold cocaine to a confidential informant under police surveillance just four hours prior to the search.

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[2]Devaun Jones testified that he was 18 years old and that the others were high school classmates. The other boys were not asked their age.

Both parties questioned Deputy Brandon Fleming extensively about his investigation. It was during cross-examination by defense counsel that Deputy Fleming revealed that defendant had not said anything. Defense counsel particularly emphasized that defendant was not present at the house when it was searched, that the powder cocaine was discovered in plain view of the four teenagers, and that the officers focused on defendant even though all, including defendant, denied possession of the drugs. This is also what defense counsel said in his opening and closing statements.

The majority opinion states that, "Counsel's decision to ask the investigator if the defendant had made any statements to him is arguably a strategic move on his part, and not an act of ineffective assistance. Since the defense counsel opened the door to that line of questioning, the prosecutor's questions were proper." I agree with this statement.

At the close of the evidence, the prosecutor made a closing argument, as did defense counsel. In his closing argument, defense counsel repeatedly commented on the prejudicial police investigation. Some of his remarks were: "They (the deputies) were told whose marijuana it was. But that's not acceptable, they want who they want and that's Mr. Washington;" "Why did they dismiss these charges (against the four teenagers)? Don't ask me, I don't know. But one thing I do know is that this law should not be about who you know (Lee and Devaun Jones' uncle was a detective with the RPSO); and, repeatedly, "I wonder why Mr. Washington was charged?"

On ***rebuttal*** argument, the prosecutor stated:

> When given that opportunity there was deafening silence. That tells more about this than anything. He marches all these

> friends and family in here to say this and that but not one single one of them said that cocaine belonged to anybody else but this defendant. We would all be screaming our innocence, "It doesn't belong to me" when given that...

At this point defense counsel objected and the court sustained the objection. Defense counsel did not request a mistrial. Without exploring all possible reasons for counsel's strategy in not asking for or even wanting a mistrial, the majority concludes that a mistrial should have been asked for and that, if it had been, the trial court would have granted it. With this I disagree.

Defense counsel presented a defense. Devaun Jones, one of the four young men at defendant's house when the warrant was executed, testified for the state that he and defendant had cleaned the home's carpet earlier that day. Although Jones admitted that he had previously smoked marijuana, he denied possession of any drugs or having any knowledge of the drugs in defendant's home on the day in question. Jones also said that he had never been to the back bedroom. Jones further testified that he did not see any of the three other boys in possession of any drugs in defendant's home. He admitted, however, to "underage" drinking by the teenagers. Defendant was 30 years old.

Defense witness, Samuel Boston, Jr., who is defendant's cousin, testified that while he was at the house that day, he had seen marijuana sitting on the couch between Devaun Jones and Lee Arthur Jones. On cross-examination, Boston admitted that he had previously told the prosecutor that he had not seen any marijuana in the house prior to the raid.

Photographs show that the bulk of the cocaine, which was approximately six grams, was in a clear plastic bag on top of the television that was being used by the four young men who were playing a video game. A brown paper sack containing marijuana was also found on top of the television. Tamarcus Jones testified that Devaun Jones smoked marijuana, and that he saw Devaun with "something in a brown paper bag" in his pocket that day. Tamarcus related that Devaun did not want anybody to see the contents of this brown paper bag. Samuel Boston, Jr., testified that he too was aware that Devaun smoked marijuana. Boston stated that he saw marijuana on the couch between Devaun Jones and Lee Jones that day. Each of these young men had a strong motive to lie and deny knowledge of the drugs, which were not hidden in any way.

Defense counsel had presented a strong case for acquittal. A second trial obviously would not have been better than what he already had. Even if the remarks by the prosecutor were error, it was harmless as he simply repeated testimony that the majority found to be admissible. I do agree that the prosecutor was starting to become repetitive and that the trial court properly put a stop to it.

For the foregoing reasons, I respectfully dissent.