

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA * **NO. 2000-KA-2521**
VERSUS * **COURT OF APPEAL**
MICHAEL NAVARRE * **FOURTH CIRCUIT**
* **STATE OF LOUISIANA**
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 386-622, SECTION "B"
Honorable Patrick G. Quinlan, Judge
* * * * *
Judge David S. Gorbaty
* * * * *

(Court composed of Judge Joan Bernard Armstrong, Judge Patricia Rivet Murray, Judge David S. Gorbaty)

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AFFIRMED

Michael Navarre appeals his conviction for first-degree murder claiming that the trial court erred in denying a motion for mistrial, and in improperly commenting on evidence during the trial. For the following reasons, we affirm the conviction and sentence.

STATEMENT OF CASE:

The defendant, Michael Navarre, was indicted for two counts of first-degree murder in violation of La. Rev. Stat. 14:30. After a three-day jury trial, a mistrial was declared as to count one due to a hung jury, and Navarre was found guilty as charged on count two. At the completion of the penalty phase of the trial, the jury recommended a life sentence. Navarre filed a motion for post verdict judgment of acquittal, which was denied. He was sentenced to life imprisonment at hard labor without benefit of probation, parole or suspension of sentence. The State subsequently amended count one of the indictment to manslaughter, to which Navarre pled guilty. He was sentenced to serve forty years at hard labor. An out of time appeal was

granted on May 24, 2000.

STATEMENT OF FACTS:

Bryon Doublet, Marion Jones' cousin, testified that he was visiting in the neighborhood on the evening of October 6, 1996. After he missed his bus to go home at about 1 a.m. on October 7, he decided to ask Jones if he could spend the night. Jones lived at 4205 Tonti Street. Michael Navarre, Reginald Collins and Brian Wright were also at the house. Mr. Doublet stated that they were all sitting in the living room when Navarre took cocaine out of his pocket, which they all snorted. Mr. Doublet described the atmosphere as cordial. He stated that Navarre and Collins decided to go buy beer. Navarre, Collins and Jones walked to the other side of the house, while the witness went to the kitchen to get a glass of water. As he walked to the bathroom, he heard gunshots. At first, he thought it was a drive-by shooting, but then heard bullets flying his way. He knelt down and crawled back to the living room. He heard Jones scream and more gunshots. Mr. Doublet attempted to get out the back door, but was unable to do so as it was locked. He then tried to push the air conditioner out of the window. As he did, he turned and saw Navarre standing behind him, with a nine-millimeter gun. Mr. Doublet was shot in the chin, head and arm. He said after being shot twice, he fell to the ground. Navarre then shot him two more times.

When the gun either jammed or ran out of bullets, Navarre hit him in the head with the gun. Mr. Doublet testified that he jumped up and grabbed the gun, and he and Navarre scuffled. After Navarre regained the gun, Mr. Doublet ran out of the house. On his way out, Mr. Doublet saw Navarre fooling with the gun in the bathroom. He also saw a baby in the bedroom, Reginald Collins dead on the floor, and Brian Wright by the bar as he left the house.

Mr. Doublet testified that he ran upstairs to his aunt's apartment. He knocked on the door, but no one answered. He then ran to his friend's house around the corner on Delachaise Street. He told his friend that he had been shot, and 911 was called. Shortly thereafter, the police and an E.M.S. unit arrived. Mr. Doublet stated that he told the police that "Red Mike" shot him, explaining that this was Michael Navarre's nickname. He was taken to Charity Hospital where he received treatment for his gunshot wounds. A police officer came to see him while he was in the hospital, but he was not able to give a statement because his jaw was wired. He was able to identify Navarre from a photographic line-up as the person who shot him. After he was released from the hospital, Mr. Doublet identified Navarre in a second photographic lineup, and also gave a statement to the police. He stated that he informed the police that Brian Wright was in the residence at the time of

the shooting. Mr. Doublet identified Wright in a photographic lineup. The witness acknowledged using Valium and heroin the day prior to the shooting. He also admitted to a prior conviction for possession with intent to distribute marijuana.

Marvin Hartford testified that on October 7, 1996, he went to Marion Jones' house to see his cousin, Reginald Collins. Mr. Hartford explained that he had been sleeping earlier on the evening of October 6, 1996 when Collins came to see him. When he arrived at Jones' house, she opened the door. He could see Collins standing behind Jones, and Navarre nearby. As he came through the door, Navarre shot him in the face. Mr. Hartford testified that Navarre then shot Collins, who fell. Navarre stood over Collins and shot him again. Navarre then walked into the next room and found Jones. The witness heard Jones scream and a gunshot. Mr. Hartford testified that Brian Wright was standing in the living room, armed with a gun, watching Navarre shoot everyone. Mr. Hartford stated that he was able to escape, and ran home. He saw his cousin, Tamika Butler, and told her that Navarre had shot him. By that time, his tongue was swelling up and it was getting difficult to talk. An ambulance was called, and Mr. Hartford's father accompanied him to the hospital. After his release from the hospital, he gave the officers a statement. Mr. Hartford identified Navarre as the

person who shot him and Reginald Collins. He also identified a photograph of Brian Wright.

Detective Daniel Jewel testified that he and his partner, Officer Ricky Bonin, responded to a call of a homicide at 4205 Tonti Street at 1:50 a.m. on October 7, 1996. Detective Jewel testified that when he and his partner arrived on the scene, they observed two blood trails coming out of the front door and going opposite ways. Upon opening the door enough to see into the front room, they heard a small child crying. They turned on the light and saw splatters of blood on different parts of the furniture and wall. They observed a black male lying in the threshold between the living room and the bedroom. There was a small child kneeling on the ground next to the body of a black woman. Detective Jewel picked up the child while Officer Bonin checked the rest of the house. As Detective Jewel exited the house, the child's aunt approached him, and he gave the child to the woman, telling her to get out of the house. The officers secured the building, notified E.M.S., and requested a homicide unit.

Officer Pete Cuadrado testified that he was one of the crime lab technicians called to the crime scene. He participated in the processing of the crime scene at 4205 Tonti Street, including taking pictures there and at 3623 Delachaise Street and 1711 South Dupre Street. A pair of khaki pants,

a bloody t-shirt and a belt was retrieved from the front porch of 3623 Delachaise Street. Eleven casings, a black metal magazine, one bullet, one copper fragment and two lead fragments were located about the house. All of the casings were nine-millimeter Luger casings. Narcotics and narcotics paraphernalia were found on the table in the living room, which included a brown plate, a razor blade, one white pen tube, one black pen tube, and a glassine envelope.

Officer Timothy Szeuzeneau was in charge of the Crime Lab's forensic light unit in November of 1996. The unit processed evidence for possible latent fingerprints. The officer testified that he processed the black metal magazine clip, found on the crime scene, but it was negative for identifiable latent fingerprints.

Detective Gary Marchese received a dispatch concerning the shooting at approximately 1:50 a.m. on October 7, 1996. When he arrived on the scene, the uniformed officers had already cordoned off the area. He entered the residence, which was set up similar to a horseshoe shape. The first room was the living room. The detective observed blood on the doorknob and along the door, and a blood splatter on the wall. A black male, with several gunshot wounds to his chest, was lying in the doorway to the bedroom. His feet were in the living room and his upper torso was in the bedroom. A

bloody five dollar bill was crumpled up between the victim's head and hand. The detective observed several spent casings in the living room and bedroom, and a bullet hole in the living room wall. The second victim, a black female, was found in the bedroom closet. She had been shot in the head and the pelvic area. Detective Marchese testified that there were blood swipes on the wall of the hallway leading to the kitchen. After the kitchen, there was another room furnished with only a table and chair that was at the front of the house. The detective observed blood along a window where it appeared that someone had been trying to pull the air conditioner out. On the table, there was a plate with a white powder that he believed to be cocaine. A magazine for an automatic weapon was on the floor near the table, along with three spent casings. There were two bullet holes in the wall near the air conditioner unit.

Detective Marchese testified that he later learned that two other persons had been shot and fled the residence. He went to the hospital on October 8, 1996, to meet with Marvin Hartford and Bryon Doublet. Both men were in the intensive care unit. Detective Marchese attempted to conduct photographic lineups with the two men. Neither man could speak; however, both were able to identify by pointing or nodding Michael Navarre as the man who shot them. Detective Marchese interviewed Doublet after

Doublet was released from the hospital, and conducted another photographic lineup. Doublet again identified Navarre as the person who shot him.

Detective Marchese met with Marvin Hartford on October 19, 1996.

Hartford identified Navarre from a photographic lineup as the person who shot Reginald Collins and himself. A search warrant was obtained for Navarre's, but no evidence was recovered.

Officer Kenneth Leary, a firearms examiner with the New Orleans Police Department Crime Lab, testified that he examined the bullet and spent casings found on the crime scene and the bullets retrieved during the victims' autopsies. The witness stated that, upon examining the casings found on the scene, he was able to determine that all the casings were fired by one common weapon, a nine-millimeter gun. Officer Leary was also able to determine that the bullets were fired from the same weapon.

Dr. Xie, a resident physician at Louisiana State University Medical School, was working in Charity Hospital's emergency room on October 7, 1996. Dr. Xie testified that she treated Bryon Doublet in the emergency room that morning. She stated that he sustained a gunshot wound to the mandible on the right side, which resulted in a fracture of his jaw. Doublet also had three other gunshot wounds. Dr. Xie testified that she fixated the jaw fracture. Blood and urine tests performed on Bryon Doublet reported

positive for benzodiazepine, heroin, marijuana and cocaine.

Dr. Kumar Amaraveni, an emergency room physician at Charity Hospital, testified as to the medical records of Marvin Hartford, Reginald Collins' cousin. Dr. Lee treated Hartford at the emergency room on October 7, 1996. Hartford sustained a gunshot wound to the left cheek and tongue. There were notations in the record that the patient could not talk for at least three days after surgery.

Dr. William P. Newman, a forensic pathologist, performed autopsies on Marion Jones and Reginald Collins on October 7, 1996. Marion Jones sustained four gunshot wounds. One gunshot wound was to the face and caused damage to the skull and brain. Another gunshot wound was to the lower pelvic area and caused damage to the left iliac artery. One graze-type wound was found on the interior left thigh. The last gunshot wound was on the left lower leg approximately ten inches above the bottom of the foot. Dr. Newman recovered a bullet from the abdomen wound during the autopsy. Blood and urine samples were taken from the victim. Cocaine was detected in the urine sample.

Reginald Collins also sustained four gunshot wounds. He had a gunshot wound to the abdomen, with extensive damage to the liver, diaphragm, lungs, thoracic vertebrae and spinal cord. Dr. Newman

recovered a bullet in the spinal cord at the level of T-5. The victim also had three additional gunshot wounds that damaged his lungs, ribs, vascular system, aorta and clavicle. Blood and urine samples were taken from the victim. Cocaine was found in the urine sample.

Dr. Newman testified that both victims died from the gunshot wounds they sustained. Marion Jones had two fatal gunshot wounds. Reginald Collins had four potentially fatal wounds, and when put together, were certainly fatal.

Brenda Collins, Reginald Collins' mother, testified that her brother telephoned her with news of her son's death. She immediately went to 4205 South Tonti Street, but did not enter the premises. Mrs. Collins stated that her son and Michael Navarre were like brothers. The two had grown up together, with Navarre often eating and sleeping at her house. Mrs. Collins testified that Reginald was disabled and unemployed. He lived with her, but would sometimes stay at his aunt's house. Mrs. Collins admitted that she did not know Marion Jones, but knew that her son did not live with her. The witness acknowledged that she had been to Navarre's grocery store on a few occasions when she was looking for her son. She identified photographs of Navarre and her son together.

Martoria Jones, Marion Jones' daughter, testified that her mother had

two children and one grandchild, Rashanda Jones, who was two years old at the time of the victim's death. Ms. Jones identified a photograph of her mother. Ms. Jones testified that she did not know Michael Navarre. She had met Reginald Collins a few months before her mother's death.

Charles Johnson testified that he lived above Marion Jones' apartment at 4205 Tonti Street. He stated that he, Bryon Doublet and Marion Jones were cousins. Mr. Johnson testified that he knew Navarre as a regular visitor at Jones' apartment. On October 6, 1996, he and Doublet spent the day together. Doublet left the witness' apartment at approximately 11:50 p.m. to go home, but apparently missed his bus and went to Jones' apartment. Johnson further testified that while he was fixing himself something to eat later that night, he heard gunshots and noises coming from Jones' apartment. Doublet knocked on the door a few minutes later. Doublet told Mr. Johnson that he had been shot. Mr. Johnson did not open the door, but did call the police. He waited until the police had arrived to go downstairs.

Tamika Butler, Marvin Hartford's cousin, testified that she was at home on October 7, 1996, when Hartford came home. The door banged against the wall when he entered, and she went to see what was happening. Hartford's face was full of blood. He had been shot. Hartford told her that

Michael Navarre, “Red Mike,” had shot him. She said she could barely hear what Hartford was saying, but she could understand him.

Naja Jacques, Navarre’s sister, testified that in 1996, her brother owned a grocery store on South Galvez Street. At approximately 8 a.m. on October 6, 1996, Navarre picked her up and they went to open the grocery store. Navarre left the grocery around 9:30 a.m., and returned at approximately 6 p.m. She left to go home at about 6:30 p.m., but Navarre and her nephew, Tory, stayed at the grocery. She did not see Navarre any more that day, but spoke to him by phone at about 1 a.m. on October 7, at his girlfriend’s house. She explained that Navarre had been staying at his girlfriend’s house because their newborn baby had been sick. She testified on cross-examination that she remembered eating Popeye’s Fried Chicken with Navarre for lunch that day.

Toryan Henry, the defendant’s nephew, worked at Navarre’s grocery store in October of 1996, and worked the evening prior to this incident. At approximately 6 p.m., Navarre came into the store. Navarre and the witness worked together until about 12:30 a.m., when they closed the store. Navarre took the witness home where he lived with his aunt, Danette Henry.

Danette Henry, the defendant’s sister, testified that Toryan Henry lived with her and her son at 3406 Momus Court. Danette stated that she

saw Navarre at approximately 12:30 a.m. on October 7, 1996, when the defendant dropped Toryan off at her house.

Lineta Dixon, Navarre's girlfriend and the mother of two of his children, testified that Navarre arrived at her house at approximately 12:45 a.m. on October 7, 1996. He was staying at her house because the baby had been sick. The witness testified that she and Navarre stayed up late that night because the baby could not sleep. She recalled that Navarre's sister, Naja, called their house at approximately 1 a.m. Navarre remained at her house until the next morning.

Michael Navarre, the defendant, testified that he spoke with his brother on the morning of October 7, 1996, and learned that he was wanted for murder. He stated that he knew Marion Jones, Reginald Collins, Marvin Hartford and Bryon Doublet, but denied killing Jones and Collins and shooting Hartford and Doublet. Navarre testified that he did not have any reason to kill them. They were his friends. Navarre stated that on the morning of October 6, 1996, he picked up his sister, Naja, from her house and went to the grocery store. After opening, he left the store and returned later in the day. He worked at the store that night with his nephew, Tory. They closed the store at about midnight. He took Tory home and then went to Lineta's house because the baby, Monet, was sick. He stayed at Lineta's

house that night. Navarre acknowledged that he was frequent visitor to Marion Jones' house.

DISCUSSION:

ASSIGNMENT OF ERROR NO. 1:

In his first assignment of error, Navarre contends that the trial court erred when it denied his motion for mistrial. He alleges that he was entitled to a mistrial when the state improperly used his post arrest silence to impeach his testimony at trial. The testimony of which Navarre complains occurred during the state's cross-examination of the defendant.

MS. EIKEL (Assistant District Attorney):

Q. You turned yourself in because it didn't make sense to run, but you know you didn't do it, right?

A. Yes.

Q. Did you tell the police that?

MR. WAINWRIGHT (Defense Counsel):

Objection, mistrial.

THE COURT:

Objection overruled.

MR. WAINWRIGHT:

Please note our exception and the right to put further statements on the record.

MR. DESALVO (Defense Counsel):

The District Attorney needs to be cautioned - -

MR. WAINWRIGHT:

And we'd like an admonishment - -

MR. DESALVO:

And reprimanded.

MS. EIKEL:

And Judge, if I could explain, I was trying to say, did you, did, was there any mention - -

MR. DESALVO:

No, no. The more she talks, the bigger hole she digs, Your Honor.

THE COURT:

Objection overruled.

MS. EIKEL:

Judge, may I approach for just a moment?

A CONFERENCE WAS HELD AT THE BENCH OUT OF THE HEARING OF THE JURY.

THE SHERIFF:

Order in Court.

THE COURT:

Alright, with regard to the last, the beginning of the question that the defense had objected to, the Court's impression is that the State had not completed the question when the defense objected and moved for a mistrial. But the way the question began was legally improper. So the Court is going to sustain

the objection and instruct you, ladies and gentlemen, just disregard the way the question began. And don't take any inference from it one way or another. Just totally disregard it. Is the State ready to proceed?

MR. DESALVO:

We want to just renew our motion for mistrial in connection with that at this time.

THE COURT:

Alright, it will be denied.

Louisiana Code of Criminal Procedure art. 770(3) provides that if the judge, district attorney or a court official, either directly or indirectly, makes an impermissible reference to the failure of the defendant to testify, a motion for mistrial must be granted, if requested by the defense. In *State v. Smith*, 336 So.2d 867 (La. 1976), the Louisiana Supreme Court pointed out that Article 770 does not apply to references to a defendant's post-arrest silence by the prosecutor or by witnesses, but only applies to references to the defendant's failure to testify at trial. Rather, La. Code Crim. Proc. art. 771 is the applicable provision concerning the proper remedy where reference is made to a defendant's post-arrest silence. Under that codal article, the trial court has the discretion of granting a mistrial or simply admonishing the jury, upon the request of the defendant, where the prosecutor or a witness makes a reference to a defendant's post-arrest silence. A mistrial is a drastic

remedy, authorized only when the defendant has suffered substantial prejudice. *Smith*, 418 So.2d at 522.

In *State v. George*, 95-0110, Pp.8-9 (La. 10/16/95), 661 So.2d 975, 979-980, the Louisiana Supreme Court discussed references to a defendant's post-arrest silence:

This court has expressed its disapproval of placing before the jury evidence that the police advised the defendant of his *Miranda* rights at the time of his arrest when the testimony does not establish a predicate for admitting a subsequent oral or written inculpatory statement and thereby invites jurors to consider the defendant's post-arrest silence as an impeachment of an exculpatory account later offered at trial. *State v. Mosley*, 390 So.2d 1302 (La.1980); *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976). Nevertheless, not every reference to the defendant's post-arrest silence requires reversal. See *State v. Bell*, 446 So.2d 1191 (La.1984); *State v. Middlebrook*, 409 So.2d 588 (La.1981). In *Mosley*, the court found that prosecutor's single "oblique and obscure" reference to *Miranda* warnings during the testimony of the two arresting officers, without explicit mention of the defendant's post-arrest silence, did not prejudice the defendant. *State v. Mosley*, 390 So.2d at 1305-1306.

* * * * *

Although this case, unlike *Mosley*, involves an explicit mention of the defendant's post-arrest silence, *Doyle* condemns only "the use for impeachment purposes of [the defendant's] silence at the time of arrest, and after receiving *Miranda* warnings...." *Doyle v. Ohio*, 426 U.S. at 619, 96 S.Ct at 2245, 49 L.Ed.2d 91 [emphasis supplied]; see *State v. Arvie*, 505 So.2d 44, 46 (La.1987), wherein we stated "... the prosecutor may not use the fact of an accused's exercise of his constitutional right to remain silent, after he has been advised of this right, solely to ascribe a guilty meaning to the silence or to undermine by inference an exculpatory version related by the

accused for the first time at trial." In this case, the trial judge's admonition made the prosecutor's remarks too obvious to miss, and invited the jurors to wonder why the defendant did not offer his alibi defense to the police at the time of his arrest.

Nevertheless, in brief, counsel does not dispute the state's claim that it did not affirmatively exploit the testimony to impeach the defendant's exculpatory account offered at trial. In the absence of that affirmative misconduct by the state, reasonable jurors may have understood the testimony in the way that the first circuit took the remarks, as a description of how the police investigation culminated in the formal arrest of the defendant with the routine incidents of custody, e.g., the reading of *Miranda* warnings to the person arrested.

In the case at bar, the trial court recognized that the prosecutor had not completed her question when Navarre's attorney objected. After a bench conference, the trial court determined that while the prosecutor did not intend to impeach the defendant's post-arrest silence, the beginning of the prosecutor's question was improper. The trial court admonished the jury to disregard the question and denied the motion for mistrial. As the trial court determined that there was no intent to impeach Navarre's post-arrest silence, it was within its discretion when it chose to admonish the jury and deny the motion for mistrial.

ASSIGNMENT OF ERROR NO. 2:

Navarre further argues that the trial court committed reversible error by commenting on the evidence in such a way as to bolster the credibility of the state's case. The alleged comment occurred during the defendant's

cross-examination of Detective Marchese concerning the statement Bryon Doublet gave to the police officer.

MR. WAINWRIGHT:

Q. And do you recall that in Mr. Doublet's statement, he told you that he was trying to push an air conditioner out of the wall to get out?

A. I recall him saying he was trying to get out where the air conditioner, whether it was push or pull. I recall him saying something about the air conditioner.

Q. Okay. And do you have an exact copy of that statement somewhere that you can put there in front of you so you can refresh your recollection as to what it is you actually wrote down, or are we just going to go - -

A. There should be a transcript.

Q. Of his statement?

A. Yes.

Q. Do you have a copy of his transcript here with you today?

A. No.

MR. WAINWRIGHT:

Your Honor, we make a motion that the transcript - -

THE COURT:

Mr. Wainwright, it's only, it's only relevant if it contradicts what that witness testified in court. What you've asked him is exactly the same thing that witness testified to here in court.

MR. WAINWRIGHT:

But we don't know what's in the thing if we haven't read it, Your Honor.

THE COURT:

Let's - -

MR. WAINWRIGHT:

Do we?

THE COURT:

Mr. Wainwright - -

MR. WAINWRIGHT:

We would ask that we be provided with - -

THE COURT:

You are only, - - this witness can only testify about any inconsistencies in the other witness' testimony.

Louisiana Code of Criminal Procedure art. 772 provides that a judge shall not in the presence of the jury “comment upon the facts of the case, either by commenting upon or recapitulating the evidence, repeating the testimony of any witness, or giving an opinion as to what has been proved, not proved or refuted.” The no-judge-comment rule is designed to safeguard the role of the jury as the sole judge of the facts on the issue of guilt or innocence. *State v. Hodgeson*, 305 So.2d 421 (La.1974). Thus, if the effect of a comment is to permit a reasonable inference that it expresses or implies the judge's opinion as to the defendant's innocence or guilt, this constitutes a violation of the defendant's statutory right to no-comment and thus requires reversal. *State v. Green*, 231 La. 1058, 93 So.2d 657 (1957); also see *State*

v. Varnado, 97-2825 (La.App. 4 Cir. 9/22/99), 753 So.2d 850. However, La. Code Crim. Proc. art. 772 does not apply to statements of the trial judge's reasons for rulings on objections relating to the admissibility of evidence or to explain the purpose for which evidence is offered or admitted, provided the remarks are not unfair or prejudicial to the defendant. *State v. Johnson*, 559 So.2d 911 (La. App. 4 Cir. 1990).

In the present case, the record does not reflect that defense counsel objected to the alleged improper comment. Instead, defense counsel's remarks went to the issue of whether he would be allowed to obtain a transcript of Doublet's statement. Therefore, this issue has not been preserved for review on appeal. La. Code Crim. Proc. art. 841.

Additionally, this argument lacks merit because the trial court's statement went to the issue of whether the defendant was entitled to receive a transcript of Doublet's statement. The trial court decided that because the witnesses themselves were available to testify at trial, the statement was not relevant. Such statements are not improper comments on the evidence.

ERRORS PATENT:

A review of the record for errors patent reveals none.

CONCLUSION

Accordingly, for the reasons assigned above, Michael Navarre's

conviction and sentence are affirmed.

AFFIRMED