

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

DEANGELO DIXON,

Defendant-Appellee.

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UNPUBLISHED

April 15, 2008

No. 277301

Wayne Circuit Court

LC No. 06-000364

Before: Jansen, P.J., and Donofrio and Davis, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to commit great bodily harm, MCL 750.84, two counts of armed robbery, MCL 750.529, felonious assault, MCL 750.82, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to five to ten years' imprisonment for the assault with intent to commit great bodily harm conviction, 12 to 24 years' imprisonment for each armed robbery conviction, one to four years' imprisonment for the felonious assault conviction, and two years' imprisonment for the felony-firearm conviction. Thereafter, defendant filed a motion for a new trial, which the trial court granted. The prosecution appeals by delayed leave granted the trial court's order granting defendant a new trial. Because defendant has not demonstrated that individual or cumulative errors entitle him to a new trial, we reverse the trial court's order granting defendant a new trial.

The prosecutor's sole argument on appeal is that the trial court abused its discretion in granting defendant a new trial. This Court reviews a trial court's decision regarding a new trial for an abuse of discretion. *People v Lemmon*, 456 Mich 625, 648 n 27; 576 NW2d 129 (1998). An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). Defendant moved for a new trial on the three grounds: (1) the prosecutor erred by eliciting testimony from a police officer that defendant did not give a post-arrest, post-*Miranda*<sup>1</sup> statement, (2) defendant was denied due process where the prosecutor elicited testimony that

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<sup>1</sup> *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

defendant was incarcerated while awaiting trial, and (3) the cumulative effect of the errors deprived defendant his right to a fair trial.

At trial, during the examination of Officer Kenneth Emerson of the Detroit Police Department, the prosecutor sought to elicit testimony regarding the address that defendant provided to the police. The following exchange occurred:

*Q.* Did you have an opportunity to speak to the Defendant in this case?

*A.* Yes, I did.

*Q.* Is it true that he did not give a statement regarding the incident; is that correct?

*A.* That's correct.

*Q.* Did you take information from the Defendant such as like his vitals, such as, his height, weight, et cetera?

*A.* Yes. [Emphasis added.]

A prosecutor's use of a defendant's post-arrest, post-*Miranda* warning silence for impeachment purposes or as substantive evidence of guilt violates a defendant's due process rights. *People v Dennis*, 464 Mich 567, 573-574; 628 NW2d 502 (2001), citing *Doyle v Ohio*, 426 US 610; 96 S Ct 2240; 49 L Ed 2d 91 (1976) (stating that "*Miranda* warnings carry an implicit assurance that silence in reliance on those warnings will not be penalized"). While a single comment alone may constitute a *Doyle* violation, a single mention does not automatically suffice to violate a defendant's rights when the prosecution does not specifically and expressly attempt to use the improper comment to impeach the defendant. *Id.*, at 579.

As an initial matter, the record is unclear regarding whether police gave defendant *Miranda* warnings before Officer Emerson spoke with him. Even assuming that police had given defendant *Miranda* warnings, the record does not support a finding of plain error. Although the prosecutor's remark was not inadvertent, there is nothing to suggest that it was a calculated attempt to interject defendant's post-*Miranda* silence into the trial to taint the jury against defendant. Moreover, it is significant that (1) neither the questioning nor the testimony insinuated that defendant's silence implied guilt and (2) the prosecutor did not attempt to use the comment to impeach defendant. There was no further questioning or argument regarding defendant's silence. The fleeting nature of the remark, coupled with the fact that the prosecutor did nothing to suggest that defendant's silence was improper, supports a conclusion that the remark did not deprive defendant of a fair trial. *Dennis, supra* at 575-577 (relying on the fleeting nature of the improper remark concerning silence to find no due process violation).

In any event, even assuming that defendant's due process rights were violated by the impermissible reference to his post-*Miranda* silence, defendant fails to show prejudice. The evidence against defendant was considerable and decisive. Two witnesses testified that defendant robbed and shot at them. When police arrested defendant he was in possession of a

portion of the stolen goods. On these facts it is not reasonably likely that the outcome of the trial would have been different had the error not occurred. Defendant fails to establish prejudice.

Next, defendant argues that he was denied due process as a result of the prosecutor's elicitation of testimony that defendant was incarcerated while awaiting trial. During the cross-examination of defendant's girlfriend and alibi witness, Annette Treadwell, the prosecutor sought to challenge her credibility by asking whether she had regularly spoken to defendant after the date of the crime. The following exchange occurred:

*Q.* And you also have a number, don't you, that is 313 499-5019?

*A.* Yeah, was my aunt's number.

*Q.* And the number that you provided Mr. Glenn [defense counsel], correct?

*A.* Yes.

*Q.* You've actually used that number to call Mr. Dixon while he is been [sic] incarcerated; is that correct?

*A.* Yes. [Emphasis added.]

After defendant objected and moved for a mistrial, the prosecutor explained that her sole purpose in raising the issue was to show that Treadwell was of questionable credibility because she had not come forward with the alibi information sooner, even though she regularly spoke to defendant in the months between the offense and his trial. After extensive discussion, the trial court instructed counsel to brief the issue and provide case law regarding whether a curative instruction could remedy the improper reference to defendant's incarceration. The next day, the trial court rendered its conclusion that the prosecutor did err, but that the error could be cured with an instruction.<sup>2</sup> The trial court determined that the prosecutor's reference to defendant's incarceration did not deny defendant a fair and impartial trial.

References to a defendant's incarceration are generally inadmissible. *People v Spencer*, 130 Mich App 527, 537; 343 NW2d 607 (1983). Preserved claims of prosecutorial misconduct are evaluated on a case-by-case basis to determine whether the defendant was denied a fair and impartial trial, i.e., whether prejudice resulted. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Here, the trial court found, and we agree, that the prosecutor erred by eliciting testimony concerning defendant's incarceration. However, the brief and singular mention of defendant's incarceration did not prejudice his ability to receive a fair trial. The

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<sup>2</sup> The trial court gave the following curative instruction:

[T]here has been some testimony that the Defendant may have been in jail or in custody at some point during these proceedings. As a Defendant under arrest means in custody, this comment is . . . of no consequence in this case and you should disregard it during your deliberations.

reference to defendant's incarceration was transient, the prosecutor did not expand on the matter with further questioning, and she did not bring it up in her closing argument. The trial court's curative instruction directly addressed the prosecutor's remark and alleviated any prejudice that may have resulted. In light of the substantial evidence against defendant, and the relatively minor effect of the prosecutor's error, the error did not prevent defendant from receiving a fair and impartial trial.

Finally, defendant argues he is entitled to a new trial due to cumulative error. The cumulative effect of several minor errors may warrant reversal where the individual errors would not. *People v Knapp*, 244 Mich App 361, 387; 624 NW2d 227 (2001). But, in order to reverse on the basis of cumulative error, "the effect of the errors must [be] seriously prejudicial in order to warrant a finding that defendant was denied a fair trial." *Id.*, at 388. Considering that the two errors were not seriously prejudicial, and the evidence against defendant was strong, defendant's cumulative error argument is without merit.

Reversed.

/s/ Kathleen Jansen  
/s/ Pat M. Donofrio  
/s/ Alton T. Davis