STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ERIC SHERROD DENNIS,

Defendant-Appellant.

UNPUBLISHED
April 18, 2000

No. 215244
Kent Circuit Court
LC No. 97-009964 FH

Before: Gage, P.J., and Meter and Owens, JJ.

PER CURIAM.

After a jury trial, defendant was convicted of (1) possession with intent to deliver more than 50 grams but less than 225 grams of cocaine, MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii), (2) possession of marijuana, MCL 333.7403(2)(d); MSA 14.15(7403)(2)(d), (3) carrying a concealed weapon in an automobile, MCL 750.227; MSA 28.424, (4) malicious destruction of police property, MCL 750.377b; MSA 28.609(2), (5) possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), and (6) being a felon in possession of a firearm, MCL 750.224f; MSA 28.421(6). The trial court sentenced defendant to concurrent terms of two to ten years for the concealed weapon charge, two to ten years for the felon-in-possession conviction, and two to eight years for malicious destruction of police property. The trial court also imposed a consecutive, enhanced term, as a third felony offender, MCL 769.11; MSA 1083, of ten to thirty-nine years' imprisonment for the possession with intent to deliver cocaine conviction, another consecutive term of two years' imprisonment for the felony-firearm conviction, and a $100 fine for possession of marijuana. Defendant appeals as of right, and we reverse and remand for a new trial.

Defendant contends that the trial court improperly denied his motion for a mistrial, which motion defendant made after a police detective had testified with respect to defendant's post arrest, custodial invocation of his rights against self-incrimination. US Const, Am V; Const 1963, art 1, § 17. The parties do not dispute the impropriety of the detective's testimony that defendant refused an attempted interview and instead requested the assistance of counsel. See *People v Bobo*, 390 Mich 355, 359; 212 NW2d 190 (1973); *People v Schollaert*, 194 Mich App 158, 162-165; 486 NW2d 312 (1992). Thus, we are faced only with the question whether defendant's preserved claim of constitutional error

requires reversal of defendant's convictions. Violations of the constitution that occur during presentation of a case to the jury are subject to a harmless error analysis, which requires a quantitative assessment of the error in the context of the other evidence presented. The existence of the constitutional error requires reversal unless it can be shown beyond a reasonable doubt that the error did not contribute to the guilty verdict. *People v Solomon (Amended Opinion)*, 220 Mich App 527, 536; 560 NW2d 651 (1996).

In this case the trial testimony established that during a traffic stop of a van in which defendant was one of three passengers, defendant was observed seated in an uncomfortable position straddling a safe that at least one officer initially perceived to be a cooler. Defendant was placed in the rear of a police vehicle while the officers conducted a consent search of the van. After hearing that a police drug detection dog was being summoned to the scene, defendant became upset and kicked out the police vehicle's rear window. No physical evidence of a crime was recovered from defendant's person, and no incriminating fingerprints were obtained from the drugs, weapon or cash found inside the safe. Testimony established that many individuals routinely used the van.

Given this factual background, we find that the jury reasonably could have found defendant guilty beyond a reasonable doubt of the possession with intent to deliver cocaine, possession of marijuana, carrying a concealed weapon in an automobile, felony-firearm, and felon-in-possession charges. Contrary to defendant's argument on appeal, these circumstances and the reasonable inferences arising therefrom, when viewed in the light most favorable to the prosecutor, adequately supported the jury's verdicts. *People v Konrad*, 449 Mich 263, 271-272; 536 NW2d 517 (1995); *People v Wolfe*, 440 Mich 508, 515, 519-526; 489 NW2d 748, amended on other grounds 441 Mich 1201 (1992).

While the jury's verdicts were adequately supported by the evidence, this evidence was not overwhelming. The introduction of improper testimony concerning defendant's invocation of his rights against self-incrimination renders suspect the basis for the jury's verdict. See *People v Swan*, 56 Mich App 22, 31; 223 NW2d 346 (1974) ("To allow the prosecution to use the silence of an accused against him would place an impermissible penalty upon the exercise of his privilege against self-incrimination."). We acknowledge that the prosecutor did not deliberately introduce the statement concerning defendant's refusal to submit to an interview and request for an attorney, and did not continue questioning the officer regarding defendant's refusal to speak or highlight the improper testimony in closing argument.

The proper inquiry, however, is to what extent the jury's exposure to the improper testimony prejudiced defendant. The trial court opined that, given the brevity and inadvertence of the improper statement and the fact that testimony concerning defendant's and another van passenger's refusals to submit to police searches had been admitted without objection, the court did not "think the jury picked it up or caught it in any way."

> Generally, a volunteered and unresponsive answer to a proper question is not cause for granting a motion for mistrial. However, when an unresponsive remark is made by a police officer, this Court will scrutinize that statement to make sure the officer

> has not ventured into forbidden areas which may prejudice the defense. Police witnesses have a special obligation not to venture into such forbidden areas. [*People v Holly*, 129 Mich App 405, 415-416; 341 NW2d 823 (1983).]
>
> In order to hold that the error in this case [the prosecutor's improper use of the defendant's silence against him] does not require reversal, however, we must . . . be able to say that it was "harmless beyond a reasonable doubt". The purpose of this requirement is to safeguard the defendant's right to be convicted only by a jury and only upon their finding of his guilt beyond a reasonable doubt. In applying this standard, therefore, we may not substitute our independent judgment of the defendant's guilt or innocence for the judgment of the jury. Instead, we must assess only "what effect the error had or reasonably may be taken to have had upon the jury's decision". We must determine "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction", that is, whether it might have aided in convincing an otherwise undecided juror of the defendant's guilt beyond a reasonable doubt. If it is reasonably possible that, in a trial free of the error complained of, even one such jury member might have voted to acquit the defendant, then the error was not harmless, and the defendant must be retried. If, on the other hand, "the proof was so overwhelming, aside from the taint of the error, that all reasonable jurors would find guilt beyond a reasonable doubt", then the conviction must stand. [*Swan*, *supra* at 33.]

After carefully scrutinizing the officer's improper remark in the context of the other evidence presented at defendant's trial, we cannot conclude beyond a reasonable doubt that the officer's statement did not contribute to defendant's convictions. *Solomon*, *supra*; *Swan*, *supra*. While we recognize the parties' and the trial court's efforts to minimize the potential harmful effects of the improper testimony, which included the court's curative instruction of the jury after closing arguments, the presence of the impropriety, the lack of overwhelming evidence, and the resultant reasonable possibility of the jury's reliance on the impropriety require our conclusion that the court abused its discretion in denying defendant's motion for a mistrial. Cf. *Holly*, *supra* at 414-416; *Swan*, *supra* at 32-35. The nonresponsive nature of the officer's improper testimony did not diminish its potential prejudicial effect under the circumstances of this case.[1] *Holly*, *supra* at 416.

We reverse defendant's convictions and remand for a new trial. We do not retain jurisdiction.

/s/ Hilda R. Gage
/s/ Patrick M. Meter
/s/ Donald S. Owens

[1] We cannot help but observe that the detective "should have known better than to volunteer" the improper testimony, *Holly*, *supra* at 416, and that this case represents "the loss of a perfectly good case for no reason." *Swan*, *supra* at 35. While we are certain that the statement was inadvertently made, we remind the testifying officers, in the event of a new trial, of their "special obligation not to venture into such forbidden areas." *Holly*, *supra* at 415-416.