

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

OSBORN BROADNAX, JR.,

Defendant-Appellant.

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UNPUBLISHED

March 11, 2008

No. 272783

Wayne Circuit Court

LC No. 06-004235-01

Before: Murray, P.J., and Bandstra and Fort Hood, JJ.  
PER CURIAM.

Following a jury trial, defendant was convicted of arson of a dwelling house, MCL 750.72, and felony murder, MCL 750.316(b). He was sentenced to 95 months to 20 years' imprisonment for the arson conviction and life imprisonment without parole for the felony murder conviction. Defendant appeals his convictions as of right. We affirm.

Defendant's sole claim on appeal is that the trial court erred by denying his motion for a mistrial after the prosecutor elicited testimony about his post-*Miranda*<sup>1</sup> warning silence. We review a trial court's decision to deny a motion for a mistrial for an abuse of discretion. *People v Dennis*, 464 Mich 567, 572; 628 NW2d 502 (2001). To warrant reversal, "[t]he trial court's ruling must be so grossly in error as to deprive the defendant of a fair trial or amount to a miscarriage of justice." *People v Wells*, 238 Mich App 383, 390; 605 NW2d 374 (1999). Further, "[a] mistrial should be granted only where the error complained of is so egregious that the prejudicial effect can be removed in no other way." *People v Gonzales*, 193 Mich App 263, 266; 483 NW2d 458 (1992), citing *People v Lumsden*, 168 Mich App 286, 299; 423 NW2d 645 (1988). "[A]n unresponsive, volunteered answer to a proper question is not cause for granting a mistrial." *Lumsden, supra*.

During the prosecutor's direct examination of an investigating officer, the following colloquy occurred:

*Q.* Okay. Now in this particular case, you heard, did you not, Sergeant Jack Hooker testify about his interview with the Defendant?

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

A. Yes.

Q. Okay. And during the course of that interview did you re-interview the Defendant at any time after Sergeant Hooker spoke with him?

A. Not after Sergeant Hooker spoke with the Defendant. I went back and asked him did he want to make another statement to clarify anything that he had said to Sergeant Hooker and at this time he invoked his Miranda rights.

“In *Doyle v Ohio*, 426 US 610, 619; 96 S Ct 2240; 49 L Ed 2d 91 (1976), the United States Supreme Court held that the use of a criminal defendant’s silence ‘at the time of the arrest and after receiving *Miranda* warnings’ for impeachment purposes violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution.” *Dennis, supra* at 573. However, such evidence may be admitted to rebut an implication that the police did not afford a defendant an opportunity to present his side of the story or was treated unfairly by the police, *People v Crump*, 216 Mich App 210, 214-215; 549 NW2d 36 (1996), or to contradict a defendant’s testimony that he cooperated fully with the police, *People v Solmonson*, 261 Mich App 657, 664; 683 NW2d 761 (2004). Further, “a single mention does not automatically suffice to violate defendant’s rights when the government does not specifically and expressly attempt to use . . . the improper comment to impeach the defendant.” *Dennis, supra* at 579-580 (emphasis in original). Instead, whether an inquiry revealing a defendant’s post-*Miranda* warning silence constitutes a constitutional violation is dependent on the circumstances of the case, including “(1) the limited nature of the improper testimony, (2) the lack of any effort by the prosecution to improperly use defendant’s invocation of the *Miranda* rights against him, (3) the strong curative instruction used by the trial court, and (4) that defendant did not testify so there is no concern of his post-*Miranda* silence having been used for impeachment purposes. . . .” *Dennis, supra* at 583.

Although the testimony at issue implicated defendant’s right to due process because the officer attributed defendant’s silence to his invocation of his right to remain silent or the *Miranda* warnings, *People v Schollaert*, 194 Mich App 158, 163; 486 NW2d 312 (1992), on the facts of this case, the testimony did not rise to the level of a constitutional error. *Dennis, supra*. The prosecutor inadvertently elicited only a single reference to defendant’s invocation of his *Miranda* rights and made no further effort to improperly use defendant’s post-*Miranda* silence against him. *Dennis, supra* at 575-578, 583. Immediately following defendant’s motion for a mistrial, the prosecutor explained that she pursued the line of questioning to show that the officer gave defendant an opportunity to explain the presence of the gasoline in the victim’s car, which was reasonable considering defense counsel’s previous implication during cross-examination of another officer that defendant was not given the opportunity to do so. Because defense counsel clearly placed at issue the investigative efforts of the police, or lack thereof, the prosecutor could properly ask the officer whether he re-interviewed defendant to show that defendant was given the opportunity to explain himself. See *Crump, supra* at 215-216. It is noteworthy that throughout the case defense counsel advanced the theory that the officers’ investigative efforts were lacking, they wrongly focused solely on defendant to the exclusion of other potential suspects, and the officers treated defendant unfairly. On this record, it is evident that the prosecutor’s inquiry was properly aimed at eliciting testimony to contradict defense counsel’s attack on the investigative efforts of the police and not at eliciting defendant’s post-*Miranda*

warning silence for the purpose of improperly using his silence against him. *Dennis, supra* at 575, 577, 583.

Moreover, defendant's invocation of his *Miranda* rights was not submitted to the jury as evidence because the court struck the officer's testimony from the record and gave a strong curative instruction to the jurors to disregard the testimony. Specifically, the trial court advised the jury that the exercise of defendant's constitutional right to remain silent cannot and should not be used against him, and that his exercise of that right must not affect their verdict in any way. See *Dennis, supra* at 576. In its final instructions, the court further instructed the jury not to consider stricken testimony. Jurors are presumed to follow the trial court's instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Accordingly, it was reasonable for the court to conclude that any possible prejudice from the officer's testimony could be cured with a cautionary instruction. *Dennis, supra* at 582.

Under these circumstances, we conclude that the officer's testimony revealing that defendant invoked his *Miranda* rights did not rise to the level of a constitutional violation. *Dennis, supra* at 583. Viewing the testimony in context, it is apparent that the prosecutor did not make an effort to "directly inject" defendant's invocation of his *Miranda* rights into the trial or to improperly use defendant's post-*Miranda* silence to contradict his assertion of innocence. *Dennis, supra* at 577; *Crump, supra* at 214-215. Accordingly, the court did not abuse its discretion in denying defendant's motion for a mistrial. *Dennis, supra* at 572.

Affirmed.

/s/ Christopher M. Murray  
/s/ Richard A. Bandstra  
/s/ Karen M. Fort Hood