

IN THE UTAH COURT OF APPEALS

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State of Utah,)	MEMORANDUM DECISION
)	(Not For Official Publication)
Plaintiff and Appellee,)	
)	Case No. 20070457-CA
v.)	
)	F I L E D
Stanley Louis Demartinis,)	(July 3, 2008)
)	
Defendant and Appellant.)	2008 UT App 261

Second District, Farmington Department, 061701140
The Honorable Thomas L. Kay

Attorneys: Scott L. Wiggins, Salt Lake City, for Appellant
Mark L. Shurtleff and Jeanne B. Inouye, Salt Lake
City, for Appellee

Before Judges Greenwood, Thorne, and Orme.

PER CURIAM:

Stanley Louis Demartinis appeals his convictions after a jury trial. We affirm.

Demartinis first argues that the trial court committed plain error by failing to perform an adequate inquiry into why Demartinis did not appear at trial and by conducting the trial in absentia. "[D]efendants have the right to be present at all stages of the criminal proceeding against them." State v. Wanosik, 2003 UT 46, ¶ 12, 79 P.3d 937. The prosecution bears the burden of showing that an absent defendant has voluntarily waived that right before proceedings may move forward in absentia. See id. Generally, the trial should be "continued to permit both the prosecution and defense counsel to seek additional information" where there is no direct evidence regarding a defendant's absence. Id. The trial court must make some inquiry appropriate to the facts of the case regarding a defendant's absence before proceeding. See id. ¶ 14. "[O]nce inquiry appropriate to the case has been made, and a compelling reason for the defendant's absence remains unknown, voluntariness, while not guaranteed, may then be properly inferred." Id. ¶ 13.

"Trial courts are well-positioned to assess what questions need to be asked and answered before voluntariness can be properly inferred." Id. ¶ 15. Generally, the trial court may have defense counsel attempt to contact the defendant to see if there is a reason for the absence, and may have the prosecutor determine if a defendant is incarcerated. See id. If these basic inquiries reveal no evidence of involuntary absence, voluntariness may be inferred. See id.

The trial court conducted an appropriate inquiry into Demartinis's absence. The court verified that Demartinis had not contacted defense counsel, nor could he be reached at the number counsel had for him. The court also verified that Demartinis was not incarcerated in three counties and that he had not contacted the court regarding his absence. The court also noted that it had cautioned Demartinis about appearing at trial. Furthermore, Demartinis had failed to appear twice before in the course of these proceedings, including being absent at the first scheduled trial. This inquiry was sufficient to infer that Demartinis's absence was voluntary.

Demartinis argues that the trial court should have taken into account its prior admonition to him that if he failed to appear again, he would be jailed until trial. He argues that the court committed plain error in overlooking the possible effects of this warning. However, even if Demartinis's asserted "reasonable expectation" regarding the consequences of his failure to appear was relevant to the trial court's inquiry into voluntariness, he has not shown that such an error was obvious to the court.

To establish plain error, Demartinis must show that, among other things, the alleged error should have been obvious to the trial court. See State v. Dean, 2004 UT 63, ¶ 15, 95 P.3d 276. Here, as a factual matter, the "reasonable expectation" Demartinis alleges is not supported in the record and does not support plain error. At a scheduling hearing, the trial court cautioned Demartinis that if he failed to appear again, he would be jailed until a trial date was set. After that hearing, at the final pretrial hearing, the court told Demartinis that he had to show up on time for trial and that if he did not, the court would not wait for him. The trial court clearly put Demartinis on notice that the trial would continue in his absence. Indeed, the trial court referred to the final pretrial conversation when determining to proceed with trial, noting that the court had "a lengthy conversation" with Demartinis and that the court told him clearly that he had to be at trial on time.

Accordingly, even if Demartinis was mistaken about the consequences, assuming only that he would be jailed until a new

trial was set, the trial court did not commit plain error because the error, if any, was not obvious to the court. The court focused on the most recent hearing and warning to determine that Demartinis was fully informed. It was not obvious to the court that a prior representation would be relied upon by Demartinis. As a result, Demartinis has not shown plain error.

Demartinis also argues that the trial court should have granted a motion for mistrial because he did not receive a fair trial. He asserts that his constitutional rights were violated because the prosecution elicited testimony that Demartinis invoked his Miranda rights. However, the circumstances here do not rise to a violation of Demartinis's due process rights.

A trial court's denial of a motion for mistrial is reviewed for abuse of discretion. See State v. Butterfield, 2001 UT 59, ¶ 46, 27 P.3d 1133. "In exercising its discretion, . . . 'a trial court should not grant a mistrial except where the circumstances are such as to reasonably indicate . . . that a fair trial cannot be had' and that a mistrial is necessary to avoid injustice." Id. (second omission in original)(quoting Burton v. Zions Coop. Mercantile Inst., 122 Utah 360, 249 P.2d 514, 517 (1952)). On review, "[u]nless the record clearly shows that the trial court's decision is plainly wrong in that the incident so likely influenced the jury that the defendant cannot be said to have had a fair trial, we will not find that the court's decision was an abuse of discretion." Id. (citation and internal quotation marks omitted).

Demartinis argues that his rights were violated under Doyle v. Ohio, 426 U.S. 610 (1976), when the prosecution elicited testimony indicating that Demartinis had invoked his Miranda rights. However, "'the mere mention that a defendant invoked his constitutional rights does not prima facie establish a due process violation.'" State v. Maas, 1999 UT App 325, ¶ 21, 991 P.2d 1108 (quoting State v. Harmon, 956 P.2d 262, 268 (Utah 1998)). "[A] Doyle violation involves more than simply referring to a defendant's post-Miranda silence. A prosecutor must specifically inquire about or argue using a defendant's exercise of his rights in a context that would impeach a defendant's exculpatory explanation of his conduct." Id. ¶ 20. Furthermore, in evaluating whether the disclosure of a defendant's exercise of his Miranda rights is a Doyle violation, "a court must look at the particular use to which the disclosure is put, and the context of the disclosure." Id. ¶ 21 (citing Harmon, 956 P.2d at 268). "'The State must, in some way, use the defendant's silence to undermine the exercise of those rights guaranteed . . . before it can be said that such rights have been violated.'" Id. (omission in original) (quoting Harmon, 956 P.2d at 268).

Here, the prosecution erroneously elicited testimony revealing that Demartinis had invoked his Miranda rights after arrest. Defense counsel objected and the prosecution acknowledged the error and withdrew the question. No further mention was made of Demartinis's invocation of rights. Nothing was implied or argued regarding any inference to be drawn. The prosecution did not "use defendant's silence to undermine the exercise of those rights guaranteed." Id. Rather, it was a mere mention of the invocation of Demartinis's rights. Accordingly, no Doyle violation occurred, and the trial court properly denied Demartinis's motion for mistrial.

Affirmed.

Pamela T. Greenwood,
Presiding Judge

William A. Thorne Jr.,
Associate Presiding Judge

Gregory K. Orme, Judge