

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TIMOTHY JERROLD ROBERTS,

Defendant-Appellant.

UNPUBLISHED

October 4, 1996

No. 183808

LC No. 94-002147-FH

Before: Doctoroff, C.J., and Hood and Bandstra, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of receiving or concealing stolen property valued at over \$100, MCL 750.535; MSA 28.803. He was sentenced to three to ten years' imprisonment, consecutive to the sentence he was currently serving. Defendant appeals as of right. We affirm.

The stolen property was a 1978 CJ-7 Jeep. The public vehicle identification numbers on the vehicle had been obliterated or removed. The license plate on the vehicle and the registration were in defendant's name. Defendant used the vehicle to drive while incarcerated at a halfway house in conjunction with parole. Driving any vehicle was a violation of defendant's restrictions.

Defendant first argues that the trial court erred in denying his motion for a mistrial after a police witness was allowed to testify that he had exercised his rights to remain silent and to counsel. The trial court's grant or denial of a mistrial will not be reversed on appeal in the absence of an abuse of discretion. *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995). A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to obtain a fair trial. *Id.*

During the direct examination of the police officer witness, the prosecutor made certain inquiries about possible admissions defendant made while in custody. It was established that defendant received his *Miranda* warnings. The officer then interviewed defendant about whether he owned a jeep and the color of the jeep. The interview occurred before the officer had seen the vehicle. The officer then asked defendant where or from whom he had purchased the vehicle. Defendant responded that he

would like to speak with an attorney before answering that question. The questioning then ceased. The police officer did, however, mention twice, in front of the jury, that defendant had requested an attorney.

There was no immediate objection by defense counsel. In fact, direct examination and cross-examination of the officer were concluded with no objection from defense counsel. The prosecutor asked no further questions on the subject. The jury was then excused for a recess, at which point the trial court *sua sponte* suggested that an error may have occurred. At the court's urging, the police officer was asked questions to clarify the precise sequence of questions and answers. Once it was clarified that when defendant exercised his right to counsel, questioning ceased, the court asked whether defendant wished to move for a mistrial.

Defense counsel indicated that defendant did not desire to move for a mistrial. After a few minutes, defense counsel objected and moved for a mistrial. The trial court denied the motion, noting that it did not believe, and defense counsel had conceded, that the prosecutor had not deliberately elicited the testimony. The court offered to issue a curative instruction, but defense counsel declined such an instruction. Defense counsel expressed no objections to the instructions.

Defendant relies on *People v Bobo*, 390 Mich 355, 360-361; 212 NW2d 190 (1973), and its progeny, which recognize that the Fifth Amendment guarantees that an accused's silence may not be used against him. However, the issue in this case does not actually concern an invocation of defendant's right to remain silent, but an exercise of his Sixth Amendment right to counsel. The cases construing *Bobo* reveal that the typical case involves a prosecutor improperly cross-examining a defendant regarding his silence or improperly questioning a third person, often a police officer, about the defendant's silence. See, e.g., *People v Alexander*, 188 Mich App 96; 469 NW2d 10 (1991), *People v Gilbert*, 183 Mich App 741, 747; 455 NW2d 731 (1990).

In any event, *Bobo* reflects the rule later recognized in *Doyle v Ohio*, 426 US 610; 96 S Ct 2240; 49 L Ed 2d 91 (1976), where the Court held that it is unconstitutional, and therefore, a violation of the right to a fair trial under the due process clause of the Fourteenth Amendment, for the government, through the prosecutor or a witness, in a criminal trial to use post-*Miranda* silence for impeachment purposes:

We hold that the use for impeachment purposes of petitioner's silence, at the time of arrest and after receiving *Miranda* warnings, violated the due process clause of the 14th Amendment. The State has not claimed that such use in the circumstances of this case might have been harmless error. Accordingly, petitioner's convictions are reversed"
." [Id., 619-620.]

In this case, the use of defendant's silence or the invocation of his right to counsel were not used for impeachment purposes. There was no suggestion that defendant's invocation of his right to counsel was indicative of guilt. Defendant had initially waived his right to silence, and the statement regarding his subsequent invocation of his right to counsel was necessary to explain why the officer's interview of defendant had terminated.

Even if this issue constitutes error, it may be deemed harmless. *Id.*; *People v Vanover*, 200 Mich App 498, 504; 505 NW2d 21 (1993); *People v Gilbert*, 183 Mich App 741, 747-748; 455 NW2d 731 (1990). The harmless error analysis involves two inquiries: first, whether the error was so offensive to the maintenance of a sound judicial system that it never can be regarded as harmless and, second, whether the error was harmless beyond a reasonable doubt. *Gilbert, supra*.

Here, no attempt was made by the prosecutor or the police officer witness to use defendant's silence or the invocation of his right to counsel for an improper purpose. The defendant conceded that the prosecutor did not deliberately elicit such testimony or intend to comment on defendant's silence or his invocation of his right to counsel. The defense rejected the trial court's offer to admonish the jury and provide a curative instruction. Furthermore, the evidence against defendant was compelling. Additionally, there was no effort by the prosecution to misapply the evidence for impeachment purposes. We therefore conclude that any error was harmless, and find no abuse of discretion in the denial of mistrial.

Defendant also argues that the trial court erred in allowing an unendorsed prosecution witness to testify at trial. Because defendant did not specifically challenge the calling of the witness and did not request a continuance to prepare for cross-examination, this issue is not preserved. This Court, however, will review this issue because, even though defense counsel noted that the witness was not endorsed, the trial court allowed the witness to testify. The trial court's decision to allow a late endorsement of a witness is reviewed for an abuse of discretion. *People v Lino (After Remand)*, 213 Mich App 89, 92; 539 NW2d 545 (1995).

We find no error in the trial court's decision to allow the witness to testify. The witness was defendant's parole officer. Although the defense claims that it was surprised by the late endorsement of the witness, defense counsel did an admirable job of cross-examining the witness. In fact, defense counsel was apparently fully aware of the expected testimony of the witness, given that he cross-examined and recross-examined the witness without any request for a continuance. Defense counsel even interrupted the witness's direct testimony and correctly anticipated what the prosecutor intended to prove and challenged the evidence. Furthermore, defendant failed to articulate on appeal how he was prejudiced by the parole officer's testimony. Moreover, as previously noted, defendant never asked for a continuance, and there is nothing in the record to indicate that the trial court would have denied such a request. We therefore conclude that the trial court did not abuse its discretion in allowing the prosecution to add the unendorsed witness.

Affirmed.

/s/ Martin M. Doctoroff
/s/ Harold Hood
/s/ Richard A. Bandstra