

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA * **NO. 2011-KA-0977**
VERSUS *
COREY JOHNSON * **COURT OF APPEAL**
* **FOURTH CIRCUIT**
* **STATE OF LOUISIANA**
* * * * *

APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 497-338, SECTION "I"
Honorable Karen K. Herman, Judge
* * * * *

Judge Rosemary Ledet
* * * * *

(Court composed of Judge Terri F. Love, Judge Daniel L. Dysart, Judge Rosemary Ledet)

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AFFIRMED
MAY 16, 2012

This is a criminal case. The defendant, Corey Johnson, appeals his conviction and sentence for possession of cocaine, a violation of La. R.S. 40:967(C)(2). Mr. Johnson's sole assignment of error relates to the trial court's denial of his motion for a mistrial. For the reasons that follow, we affirm.

STATEMENT OF THE CASE

In June 2010, Mr. Johnson was charged by bill of information with one count of possession of cocaine. He was arraigned and pled not guilty. In January 2011, a jury trial was held; the jury found him guilty as charged. The trial court denied Mr. Johnson's motion for new trial. In February 2011, the trial court sentenced Mr. Johnson to serve forty months at hard labor. The trial court denied a motion for post-verdict judgment of acquittal and a motion to reconsider sentence. Mr. Johnson pled guilty to being a third multiple offender and waived sentencing delays. The trial court vacated the original sentence and resentenced Mr. Johnson to forty months at hard labor. This appeal followed.

STATEMENT OF THE FACTS

On May 31, 2010, New Orleans Police Department Officers Kori Keaton and Damond Harris arrested Mr. Johnson in the 2700 block of Dryades Street. The

officers were driving on Dryades Street in an unmarked vehicle when they observed Mr. Johnson on the curb. According to Officer Harris's trial testimony, as they approached Mr. Johnson, Officer Keaton—who was driving—shone a spotlight on Mr. Johnson.¹ Recognizing the officers, Mr. Johnson removed something from his mouth with his right hand, dropped his hand to his waist, and let the object fall to the ground. Mr. Johnson then turned and walked toward the house that was located directly behind him. (The officers subsequently discovered that the house was Mr. Johnson's home.) The officers exited their vehicle. Officer Keaton retrieved the discarded object while Officer Harris stopped Mr. Johnson before he could reach the house.

Officer Keaton testified that he did not lose sight of the discarded object before retrieving it. The object was an off white, rock-like substance wrapped in plastic, which Officer Keaton believed to be crack cocaine. Officer Keaton conducted a field test, and the object tested positive for cocaine. The retrieved substance was subsequently submitted to the crime lab for testing. The parties stipulated that the criminalist who tested the retrieved substance would testify that it tested positive for cocaine. The contraband and the criminalist's report were introduced into the record.

ERRORS PATENT

A review of the record for errors patent reveals none.

¹ Mr. Johnson emphasizes in his brief that during the motions hearing, Officer Keaton did not mention that he shone the spotlight. Although this assertion is correct, Mr. Johnson fails to point to any specific contradiction in Officer Keaton's testimony.

DISCUSSION

In his sole assignment of error, Mr. Johnson contends that the trial court erred when it denied his request for a mistrial during the State's closing argument based on the prosecutor's reference to his failure to testify. The prosecutor's comment that prompted the motion for mistrial was as follows:

I take this justice system seriously, I take this process seriously, so I will tell you if, for one second, any of you believe that either Officer Keaton or Officer Harris came in here, took the stand and deliberately looked you in your eyes and lied to you because of some conspiracy or something against Corey Johnson, Corey Johnson, the man who hasn't looked in you-all's direction once since you-all have been in this courtroom.

Mr. Johnson argues that this statement was either a direct or an indirect reference to his failure to testify in his own defense, mandating a mistrial pursuant to La. C.Cr.P. art. 770(3).

Article 770(3) provides that the trial court "shall" declare a mistrial when the prosecutor "refers directly or indirectly to . . . the failure of the defendant to testify in his own defense." The purpose behind this prohibition against such comments by the prosecutor is to protect the defendant's Fifth Amendment right against self-incrimination by preventing attention being drawn directly or indirectly to the defendant's failure to testify. *See State v. Fullilove*, 389 So.2d 1282, 1283 (La. 1980); *Griffin v. California*, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965)(finding the prosecution's comment on defendant's failure to testify violates the Fifth Amendment).

Article 770(3) prohibits both "direct" and "indirect" references to the defendant's failure to testify. *State v. Johnson*, 541 So.2d 818, 822 (La. 1989). "When the prosecutor makes a direct reference to the defendant's failure to take the stand, a mistrial should be declared, and 'it is irrelevant whether the prosecutor

intended for the jury to draw unfavorable inferences from defendant's silence.”
Johnson, 541 So.2d at 822 (quoting *Fullilove*, 389 So.2d at 1284); *see also State v. Mitchell*, 00-1399, p. 4 (La. 2/21/01), 779 So.2d 698, 700. In contrast, an indirect reference requires the court to inquire into the remark’s intended effect on the jury; a mistrial is warranted only when the inference is “plain that the remark was intended to bring to the jury's attention the failure of the defendant to testify.”
State v. Stephenson, 412 So.2d 553, 557 (La. 1982).

In this case, the prosecutor’s comment was in no way a direct reference to Mr. Johnson’s failure to testify. The prosecutor made no mention of Mr. Johnson’s failure to testify in his own defense. A determination thus must be made as to whether the prosecutor’s comment indirectly referred to Mr. Johnson’s failure to testify, as contemplated by La. C.Cr.P. art. 770(3).

When the prosecutor makes an indirect reference, “a reviewing court must ‘inquire into the remark's ‘intended effect on the jury’ in order to distinguish indirect references to the defendant's failure to testify (which are impermissible) from general statements that the prosecution's case is unrebutted (which are permissible).” *State v. Clay*, 612 So.2d 266, 269 (La. App. 4th Cir. 1992)(quoting *Johnson, supra*). When determining the permissibility of the statement, the context of the statement is crucial. “For the prosecutor to argue the evidence of guilt is uncontroverted is usually permissible since it encompasses the entire case, but if the evidence was such that the defendant was the only person who could refute it, such a comment does improperly focus on the defendant's failure to testify.”
Schlosser, La. Crim. Trial Prac. (4th ed.) § 20:55.

Another example of a permissible indirect reference—one not intended to focus on the defendant’s failure to testify—is provided in *State v. Lai*, 04-1053

(La. App. 5 Cir. 4/26/05), 902 So.2d 550. In *Lai*, the defendant argued that the prosecutor's reference in closing argument to his failure to display his teeth to the jury was an improper reference to his failure to testify mandating the grant of a mistrial under La. C.Cr.P. art. 770(3). Affirming the trial court's decision overruling the objection, the appellate court reasoned that the comment was a permissible general comment on the strength of the State's case; "[t]he prosecutor's remark was intended to emphasize the strength of the identification evidence, as opposed to a reference intended to draw the jury's attention to the defendant's failure to testify." *Lai*, 04-1053 at p. 16, 902 So.2d at 561.

By analogy, the prosecutor's comment in this case regarding Mr. Johnson's failure to look at the jury was intended to emphasize the strength of the testifying officers' testimony. The prosecutor was comparing the testifying officers' looking in the eyes of the jurors while testifying with Mr. Johnson's failure to look in the direction of the jurors during the entire trial. This comparison alludes to Mr. Johnson's lack of credibility and arguably is an indirect reference to his failure to testify. However, it is equally plausible that the prosecutor's focus was on the officers' credibility, not Mr. Johnson's failure to testify. In order to support a mistrial, it must be plain that the remark was intended to focus the jury on the defendant's failure to testify. *See Mitchell*, 00-1399 at p. 5, 779 So.2d at 701. Such is not the case here.

Furthermore, "violation of the statute requiring a mistrial when the prosecutor directly or indirectly refers to the failure of the defendant to testify in his own defense is subject to the harmless error analysis." *State v. Bowman*, 95-0667, p. 5 (La. App. 4 Cir. 7/10/96), 677 So.2d 1094, 1098. Given that the prosecutor's comment was not a direct reference to Mr. Johnson's failure to testify,

“the court must be thoroughly convinced that the jury was influenced by the complained of remarks and that they contributed to the verdict in order for there to be reversible error.” *Bowman*, 95-0667 at p. 6, 677 So.2d at 1098. In making that determination “the reviewing court should accord credit to good sense and fair mindedness of jurors who have heard the evidence.” *Id.*

Based on our review of the record and the relevant jurisprudence, we find the prosecutor’s comment during closing argument did not constitute an impermissible indirect reference; it was not intended to focus on Mr. Johnson’s failure to testify. The trial court therefore did not err in denying Mr. Johnson’s motion for a mistrial. Accordingly, this assignment of error lacks merit.

DECREE

For the forgoing reasons, the defendant’s conviction and sentence are affirmed.

AFFIRMED