

*Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.*

**ENTRY ORDER**

SUPREME COURT DOCKET NO. 2004-129

JANUARY TERM, 2005

	}	APPEALED FROM:
	}	
State of Vermont	}	District Court of Vermont, Unit No. 2,
	}	Bennington Circuit
v.	}	
	}	
Anthony LaFlamme	}	DOCKET NO. 1123-9-03 Bncr
	}	
	}	Trial Judge: David T. Suntag
	}	

In the above-entitled cause, the Clerk will enter:

Defendant appeals from his conviction for aggravated domestic assault, violation of an abuse prevention order, felony unlawful trespass, and disorderly conduct by telephone. Defendant claims that he was unduly prejudiced by a reference to his silence following his arrest. We affirm.

The charges against defendant arose after he slapped the back of his girlfriend's head in early September 2003. During his trial, one of the arresting officers testified that after reading defendant his Miranda rights, he offered defendant an opportunity to give a statement. The officer testified that defendant said " he did not want to give a statement and that [the officer] was not on his side." The defense objected to the officer's statement immediately, urging the court to find that the reference to defendant's silence amounted to a violation of due process and necessitated a mistrial. The court found no prejudice, determined that it was better to move on with the case rather than issue a curative instruction, but stated that it would revisit the issue upon motion by the defense.

The trial continued and defendant eventually took the stand to testify in his defense. Defendant admitted that he touched the victim's head twice, but disputed that the contact caused the victim pain. Defendant's testimony also disagreed generally with the way the prosecution witnesses characterized the events leading to his arrest. Before defendant took the stand, the jury heard evidence from the arresting officers that throughout their encounter with him, defendant professed his innocence repeatedly and questioned the officers about their proof that he hurt the victim. Apparently unpersuaded by defendant's testimony, the jury convicted him. Defendant then filed this appeal.

The only issue before us is whether the trial court erred by denying defendant's motion for mistrial. Defendant claims a mistrial was required because he was denied a fair trial by the reference to his post-arrest silence, a reference that unduly prejudiced him. We review a trial court's decision on a motion for mistrial for an abuse of discretion. State v. Voorheis, 2004 VT 10, ¶ 20, 176 Vt. 265. To reverse the court's decision on the motion, the party seeking the mistrial has the burden to demonstrate prejudice. Id. Whether prejudice exists in any case depends on the facts and circumstances, so we examine the question in light of the entire record. Id.

Once a suspect is in police custody and warned of his rights under Miranda, the suspect's silence may not be used against him at trial. Id. ¶ 15. To do so gives rise to a violation of due process because it is fundamentally unfair to impeach the defendant with his constitutional right to silence. Id. In Voorheis, the Court upheld the district court's denial of a motion for mistrial because the prosecution did not exploit the oblique references to the defendant's silence, and no prejudice to defendant was apparent from the references. Id. ¶¶ 16-19.

We conclude that this case fits within the Voorheis parameters. The statement at issue here was an isolated and brief

reference to a single statement defendant gave to one of the arresting officers. Although the statement indicated that defendant would not speak to the officer, the record shows that defendant did not, in fact, remain silent. The arresting officers both testified that defendant repeatedly denied harming his girlfriend and that he challenged the officers to prove their case with evidence of marks on her body. Thus, even if the jury noticed the isolated reference, it could not reasonably be construed as referring to defendant's silence because defendant discussed the charges with the officers. Moreover, the isolated reference was never exploited by the prosecution because the reference was not mentioned again at trial.

Further, defendant has not sustained his burden to prove prejudice. The record contains overwhelming evidence of defendant's guilt. Defendant himself admitted at trial that he struck his girlfriend twice; he only disputed the nature of those strikes and whether they caused her pain. Under the circumstances, we find no basis to overturn the conviction on grounds that the trial court erroneously denied defendant's motion for mistrial.

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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Denise R. Johnson, Associate Justice

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Frederic W. Allen, Chief Justice (Ret.),

Specially Assigned