

ARKANSAS COURT OF APPEALS

DIVISION II
No. CACR11-592

RANDY KIRK COOPER

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered JANUARY 18, 2012

APPEAL FROM THE WASHINGTON
COUNTY CIRCUIT COURT
[NOS. CR 2010-461-1 and CR 2010-
1488-1]

HONORABLE WILLIAM A. STOREY
JUDGE

AFFIRMED

JOSEPHINE LINKER HART, Judge

The judgment and commitment order shows that a jury found Randy Kirk Cooper guilty of one count of manufacturing methamphetamine and two counts of possession of methamphetamine.¹ On appeal, Cooper asserts that the circuit court erred by refusing to grant a mistrial when counsel for the State elicited testimony from a detective, who testified that he asked Cooper if he wanted to make a statement and Cooper replied, “No.” We affirm.

On February 18, 2010, the police executed a search warrant at Cooper’s residence. Among other items, police found four firearms in the residence, and in a shed they found methamphetamine and the components for a methamphetamine laboratory.² Cooper was not

¹Cooper also was convicted of four counts of being a felon in possession of a firearm, but those counts do not appear on the order.

²There was also testimony that Cooper possessed methamphetamine in a separate incident on August 26, 2010.



present during the search. During the State's case, counsel for the State asked Detective Anthony Murphy if he had ever talked to Cooper. Murphy replied that he "spoke to him the next morning. He actually called my phone." Counsel asked, "Did you ask him if he wanted to make a statement?" Murphy replied, "Yes, sir." Counsel asked, "And what did he say?" Murphy replied, "He said, 'No.'" At this point Cooper's counsel objected and moved for a mistrial, arguing that Murphy had impermissibly commented on Cooper's right to remain silent. The court sustained the objection but denied the motion for mistrial and instructed the jury to disregard Murphy's statement. Murphy further testified that Cooper was arrested the day of the call. At the close of the evidence, Cooper's counsel renewed his motion for mistrial based on "*Doyle* violations."

On appeal, Cooper contends that Murphy's testimony that he spoke to Cooper and asked if Cooper "wanted to make a statement is highly prejudicial" in that the jury would "give weight to a respected member of the police force and form opinions" about Cooper based on Murphy's testimony. Cooper asserts that the circuit court should have granted a mistrial and that the court's admonishment to the jury did not cure the error. Considering Cooper's arguments at trial, he appears to be arguing on appeal that the State committed a *Doyle* violation by eliciting the above-quoted testimony from Murphy.

The Arkansas Supreme Court has recently noted that in accordance with *Doyle v. Ohio*, 426 U.S. 610 (1976), the State may not elicit evidence regarding a defendant's post-arrest, post-*Miranda*-warning invocation of the right to silence or the right to counsel. *Montgomery v. State*, 2011 Ark. 462, 385 S.W.3d 189. Here, however, the record does not demonstrate



Cite as 2012 Ark. App. 59

that Cooper was under arrest at the time he declined to make a statement.³ *See Brecht v. Abrahamson*, 507 U.S. 619 (1993) (noting the inapplicability of *Doyle* where pre-arrest and pre-*Miranda* silence is at issue). It is the appellant's burden to bring up a record sufficient to demonstrate that the circuit court erred, and where the appellant fails to meet his burden, we affirm the circuit court. *See, e.g., Tarkington v. State*, 2010 Ark. App. 548, 376 S.W.3d 537. Given that the record does not demonstrate that error occurred, we affirm.

Affirmed.

GLADWIN and WYNNE, JJ., agree.

Jones Law Firm, PLLC, by: *Leon Jones, Jr.*, for appellant.

Dustin McDaniel, Att'y Gen., by: *Kathryn Henry*, Ass't Att'y Gen., for appellee.

³In fact, Cooper's motion for an appeal bond states that one of the issues he intended to raise on appeal was "whether the prosecution's questioning of the lead detective in the case resulting in the jury learning of defendant's pre-arrest, pre-*Miranda* assertion of his right to remain silent warranted granting of a mistrial, an issue that under the particular facts of this case appears to be a close question under Arkansas Law."