[Cite as *State v. Wiley*, 2011-Ohio-3595.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 10AP-679
v.	:	(C.P.C. No. 09CR-12-7271)
Shawn L. Wiley,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on July 21, 2011

Ron O'Brien, Prosecuting Attorney, and *Laura R. Swisher*, for appellee.

Scott & Nemann, *Co. LPA*, and *Joseph E. Scott*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

FRENCH, J.

{¶1} Defendant-appellant, Shawn L. Wiley ("appellant"), appeals the judgment of the Franklin County Court of Common Pleas, which convicted him of trafficking in drugs with a major drug offender specification. For the following reasons, we affirm.

{¶2} Appellant was indicted on the drug trafficking charge after selling 129 grams of crack cocaine during a drug bust in which co-defendants Ronda

Westmoreland and George Latham also participated. Appellant pleaded not guilty, and a jury trial ensued. On the day of trial, appellant's defense counsel asked for a continuance because of discovery the prosecution had provided a few hours earlier. The discovery consisted of a copy of Westmoreland's agreement to cooperate with the prosecution in exchange for a plea bargain. Westmoreland entered into the agreement five months before the trial date, and defense counsel claimed that he needed to change his trial strategy due to the newly discovered information. The prosecutor objected to the continuance, noting that Westmoreland was identified as a witness months earlier in the discovery process. The trial court denied the request for a continuance because the prosecution had disclosed Westmoreland as a witness previously; therefore, defense counsel had an opportunity to explore issues involving that witness.

{¶3} On another matter, the prosecutor stated that he had previously disclosed statements made by the co-defendants, but defense counsel said "there were no statements made by any of the parties." (Tr. 8.) Defense counsel acknowledged, however, that the prosecution gave him other discovery materials, including a copy of the surveillance video that recorded the drug bust leading to appellant's arrest.

{¶4} During opening statements, defense counsel told the jury about Westmoreland's plea bargain with the prosecution. He asserted that she was not a credible witness because of that agreement. He also noted that appellant did not "talk to any detectives, so there's no * * * statements made by [appellant] regarding any type

of transaction or sale." (Tr. 32.) He also said there were "no admissions by [appellant]. There's no confessions." (Tr. 33.)

{¶5} Columbus Police Detective David Allen testified that he worked as an undercover detective during the drug bust that led to appellant's arrest. Allen set up the drug bust by arranging to purchase crack cocaine from Latham, an individual who had previously sold him drugs. They agreed to meet at a restaurant, but when Allen drove to the restaurant, he received a call from Westmoreland, who instructed him to go to a clothing store instead. Allen went to the clothing store, and Westmoreland and Latham approached. Latham told Allen to give Westmoreland the money for the drugs and Allen complied. Latham told Allen, " '[e]verything was all right. We're not going to rip you off. The dope's in the store.' " (Tr. 67.) Westmoreland went into the store. About a minute later, she returned and gave Allen the crack cocaine. Latham and Westmoreland walked away, and, at that moment, Allen gave a signal for other officers monitoring the scene to make arrests. The officers arrested Latham, Westmoreland, and appellant.

{¶6} Allen obtained a copy of the clothing store's surveillance video, and the prosecutor played it for the jury. At the start of the video, the prosecutor asked Allen to identify who was in a vehicle parked outside the store, but Allen said he did not know, and he noted that he had not yet arrived at that time. Next, the prosecutor asked if Allen knew what kind of car appellant drove, and Allen said he did, and he identified it in the video. The prosecutor also asked Allen to identify some other people at the scene, but Allen, noting that he had not yet arrived at that time either, said he could not identify

them. The trial court interrupted the testimony and told the prosecutor, "I want questions based on when he was there." (Tr. 82.) But the prosecutor again asked Allen about those miscellaneous people in the video, and the trial court stated, "I'm sorry. I think I just instructed counsel that I don't want to hear about that. I want to hear based on relevant information, and this witness's knowledge of what took place when he got there." (Tr. 83.) Next, the prosecutor asked Allen to identify two people in the video. Allen identified one as Latham, but he indicated that he did not know the other person standing nearby, and he noted that he had still not arrived yet. The prosecutor asked Allen to identify Latham again, and he asked about another miscellaneous car. Finally, after the video continued, Allen noted when he arrived, and he identified portions of the video where he was talking with Westmoreland and Latham and where Westmoreland went into the store to purchase the cocaine.

{¶7} Lastly, Allen testified that Westmoreland spoke with him after the drug bust and that she agreed to cooperate with the prosecution in exchange for a plea bargain. The agreement stated that Westmoreland was charged with first-degree felony drug trafficking with a major drug offender specification. It also noted that the prosecution would reduce that charge to a third-degree felony and recommend a one-year prison sentence in exchange for Westmoreland testifying truthfully against appellant and assisting in other drug busts. A copy of the agreement was admitted into evidence, but Westmoreland's proffer letter to the prosecution, which was referenced in the agreement, was not admitted into evidence or disclosed to the defense.

{¶8} Detective Mark Johnson was observing the drug bust at the store. He testified that he attempted to talk to appellant after his arrest, but appellant invoked his Fifth Amendment rights and declined to make any statements. Johnson repeated three other times that he attempted to interview appellant. Officer Brent Planck also indicated twice that appellant declined to make any statements after his arrest. Planck noted, however, that Westmoreland spoke with him and Allen after the drug bust.

{¶9} Westmoreland testified and confirmed that she agreed to cooperate with the prosecution in exchange for a plea bargain. As part of the agreement, she was required to assist in five major drug busts, but she did not complete that requirement. Nevertheless, she still hoped to get the benefit of the plea bargain by testifying against appellant.

{¶10} Westmoreland admitted to being involved in the drug sale at the clothing store. She said that after she took Allen's money, she went into the store to obtain crack cocaine from appellant, and she went back outside and gave Allen the drugs. In addition, she noted the part of the surveillance video where she obtained the drugs from appellant.

{¶11} On cross-examination, Westmoreland testified that she agreed to cooperate with the prosecution after learning that she faced up to 20 years imprisonment for her involvement in the drug trafficking at the clothing store. She acknowledged that she was motivated to cooperate as much as she could in order to obtain favor from the prosecution.

{¶12} The prosecution rested its case, and appellant exercised his right not to testify. During closing argument, defense counsel challenged Westmoreland's credibility based on her plea agreement. In particular, he claimed that Westmoreland was "going to do what she can do to get what she can for herself." (Tr. 207.) After deliberations, the jury found appellant guilty of trafficking in drugs with the major drug offender specification.

{¶13} Appellant appeals, raising the following assignments of error:

> [I.] THE COURT ERRED BY FAILING TO ALLOW FOR A CONTINUANCE WHEN, JUST HOURS BEFORE TRIAL STARTED, THE PROSECUTION DISCLOSED THE CO-DEFENDANT'S AGREEMENT AND INDUCEMENT TO TESTIFY, WHICH HAD BEEN SIGNED ALMOST FIVE (5) MONTHS PRIOR TO TRIAL.
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> [II.] THE COURT ERRED BY PERMITTING THE REPEATED PREJUDICIAL REFERENCES, DURING THE PROSECUTION'S CASE-IN-CHIEF, REGARDING MR. WILEY ASSERTING HIS FIFTH AMENDMENT RIGHT TO REMAIN SILENT AFTER BEING ARRESTED.
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> [III.] THE DEFENDANT-APPELLANT, MR. WILEY, WAS PREJUDICED BECAUSE THE PROSECUTION FAILED TO DISCLOSE ANY STATEMENTS MADE BY THE CO-DEFENDANT, MS. [RONDA] WESTMORELAND, WHO COOPERATED WITH THE GOVERNMENT AND TESTIFIED AGAINST MR. WILEY AT TRIAL.
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> [IV.] MR. WILEY WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE SIXTH AMENDMENT OF THE UNITED [STATES] CONSTITUTION.

{¶14} In his first assignment of error, appellant asserts that we must reverse his conviction because the trial court did not grant the continuance he requested after the

prosecution failed to timely disclose information about Westmoreland's plea bargain. We disagree.

{¶15} In deciding whether to reverse the trial court's decision not to grant appellant a continuance for the prosecutor's discovery violation, we consider "whether there was a willful violation of the discovery rules, if foreknowledge would have benefited the accused in the preparation of his * * * defense and whether the accused was unfairly prejudiced." *State v. Cochrane*, 10th Dist. No. 01AP-1440, 2002-Ohio-4733, ¶21, citing *State v. Jones* (Mar. 16, 1999), 10th Dist. No. 98AP-544. In spite of *Cochrane*, appellant asks us to apply the three-pronged test in the disjunctive—meaning that it is satisfied if any one element is met—because other courts have done so. See, e.g., *State v. Bowshier*, 2d Dist. No. 06-CA-41, 2007-Ohio-5364, ¶16-24; *State v. Stevens*, 4th Dist. No. 09CA3, 2009-Ohio-6143, ¶12; *State v. Hall*, 8th Dist. No. 83361, 2004-Ohio-5963, ¶20. But in *State v. Davis*, 10th Dist. No. 08AP-443, 2009-Ohio-1375, ¶25-27, this court concluded that the test is to be applied in the conjunctive—meaning that all three prongs of the test must be satisfied—because the Supreme Court of Ohio had done so in *State v. Jackson*, 107 Ohio St.3d 53, 2005-Ohio-5981.

{¶16} Applying the test in the conjunctive, we conclude that even if appellant could show that the prosecution committed a willful discovery violation by not timely disclosing its agreement with Westmoreland and that the timely disclosure would have aided his defense, he still cannot show prejudice on this record. The prosecution was timely in informing appellant that Westmoreland would be a witness at trial; therefore,

he had sufficient opportunity to explore issues concerning that witness, including the reasonably-foreseen fact that she entered into a plea bargain with the prosecution in exchange for her testimony. Additionally, appellant's defense counsel was able to cross-examine Westmoreland about the plea bargain and to impeach her credibility with it during opening and closing statements.

{¶17} Consequently, we need not disturb the trial court's decision to deny appellant's motion for a continuance. Thus, we overrule appellant's first assignment of error.

{¶18} In his second assignment of error, appellant argues that we must reverse his conviction because the trial court allowed the prosecution to elicit testimony from Johnson and Planck indicating that he invoked his Fifth Amendment rights by declining to make any statements during a custodial interview after his arrest. We disagree.

{¶19} The prosecution is not permitted to use a defendant's post-arrest silence as substantive evidence of guilt. *State v. Caldwell*, 10th Dist. No. 02AP-576, 2003-Ohio-271, ¶39. Here, however, *defense* counsel first raised the issue of appellant's post-arrest silence during opening statements, and this court has previously declined to disturb a defendant's conviction when the defense was the first to bring up the topic of post-arrest silence. See *State v. Thompson*, 10th Dist. No. 08AP-956, 2009-Ohio-3552, ¶21-23. In any event, even if it was improper for the prosecutor to elicit testimony about appellant's post-arrest silence, appellant failed to object to that testimony, and therefore, he forfeited all but plain error. *Caldwell* at ¶44. Plain error exists when there is error, the error is an obvious defect in the trial proceedings, and the error affects the outcome

of the trial. *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68. A court recognizes plain error with the utmost caution, under exceptional circumstances, and only to prevent a manifest miscarriage of justice. Id.

{¶20} In *State v. Foth* (Aug. 15, 1996), 10th Dist. No. 95APA12-1621, this court reversed a defendant's burglary conviction because the prosecutor suggested during closing argument that the defendant was guilty, given that he did not talk to police after the crime, but instead consulted an attorney. *Foth* is distinguishable, however. In *Foth*, the prosecutor emphasized repeatedly during closing argument that the defendant would have spoken with the police if he were innocent. Conversely, here, appellant's post-arrest silence was not an issue that permeated the trial. Instead, Johnson and Planck made only a few fleeting references to appellant's post-arrest silence, and the prosecutor did not assert during opening or closing statements that the jury should use that silence to infer guilt. In fact, the prosecutor made no mention of it during opening or closing statements. Furthermore, during opening statements, the defense actually relied on the post-arrest silence to assert that appellant was not guilty.

{¶21} Lastly, in *Foth*, this court concluded that the prosecutor's misconduct affected the trial, given the weak evidence against the defendant. Here, we conclude that testimony about appellant's post-arrest silence did not affect the outcome of the trial because the jury had other ample evidence to convict appellant of drug trafficking. Specifically, Westmoreland testified that appellant gave her crack cocaine for the drug sale at the clothing store. Appellant asserts that Westmoreland was not credible because she entered into a plea bargain with the prosecution. But Westmoreland was

required to testify truthfully as part of that plea bargain, and therefore, it was within the jury's province to conclude that her plea bargain did not diminish her credibility. See *State v. Cameron*, 10th Dist. No. 10AP-240, 2010-Ohio-6042, ¶38. In addition, the surveillance video corroborates Westmoreland's testimony.

{¶22} For all these reasons, we conclude that the trial court did not commit plain error by allowing the prosecution to elicit testimony from Johnson and Planck regarding appellant's post-arrest silence. Thus, we overrule appellant's second assignment of error.

{¶23} In his third assignment of error, appellant argues that the prosecution committed reversible error by not timely disclosing to the defense Westmoreland's statements to the police and prosecution. We disagree.

{¶24} Crim.R. 16(B) requires the prosecution to disclose during discovery the written or recorded statements made by a defendant or co-defendant as well as police summaries of their statements. Appellant contends that Westmoreland's proffer letter to the prosecution and statements to Allen and Planck were discoverable and should have been disclosed. Plaintiff-appellee, the state of Ohio, disputes whether those statements were discoverable, however. According to the state, the statements could have pertained to other drug trafficking incidents Westmoreland knew about. But even if we were to conclude that the prosecution should have provided Westmoreland's statements during discovery, the prosecution's failure to disclose them does not constitute reversible error unless there is a showing that (1) the violation was willful, (2) disclosure

would have aided appellant's defense, and (3) appellant suffered prejudice. See *Jackson* at ¶131.

{¶25} Appellant is unable to satisfy all three prongs of that test. The record does not establish that the prosecutor willfully failed to disclose Westmoreland's statements. Instead, the prosecutor indicated at the beginning of trial that he believed he had disclosed statements from the co-defendants. Furthermore, because Westmoreland's statements are not in the record, we cannot determine whether their disclosure would have aided appellant's defense or if appellant suffered prejudice from the non-disclosure. See *State v. Simpson*, 10th Dist. No. 01AP-757, 2002-Ohio-3717, ¶103 (noting that a claim on direct appeal cannot be determined on evidence outside the record).

{¶26} Because appellant cannot satisfy all three *Jackson* prongs, we discern no reversible error from the prosecution's failure to disclose Westmoreland's statements to the police and prosecution. Accordingly, we overrule appellant's third assignment of error.

{¶27} In his fourth assignment of error, appellant asserts that his defense counsel rendered ineffective assistance. We disagree.

{¶28} The United States Supreme Court established a two-pronged test for ineffective assistance of counsel. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052. First, the defendant must show that counsel's performance was outside the range of professionally competent assistance and, therefore, deficient. Id., 466 U.S. at 687, 104 S.Ct. at 2064. Second, the defendant must show that counsel's deficient

performance prejudiced the defense and deprived the defendant of a fair trial. Id. A defendant establishes prejudice if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id., 466 U.S. at 694, 104 S.Ct. at 2068.

{¶29} Appellant first contends that his defense counsel was ineffective for not objecting to testimony about his post-arrest silence. We have already concluded that the testimony did not prejudice appellant's trial, however.

{¶30} Appellant next contends that defense counsel failed to object to Allen's testimony about portions of the store video depicting events occurring before he had arrived. The bulk of the testimony pertained to background information about the drug bust, however, such as whether individuals seen in the video were arrested and whether they were bystanders. To be sure, Allen also indicated that appellant's car was seen in the video at a time before his own arrival, but Westmoreland later provided corroborating evidence that appellant was at the clothing store to participate in the drug sale. Thus, there was no prejudice from Allen's testimony about portions of the clothing store video depicting events occurring before he had arrived.

{¶31} Lastly, appellant argues that he was denied the effective assistance of counsel due to the cumulative effect of his counsel's failure to object to testimony about his post-arrest silence and to Allen's testimony about portions of the video depicting events occurring before the detective's arrival. We reject this argument given that, based on the reasons we have already recognized, neither testimony was of the type to

inject prejudice that permeated the entire atmosphere of the trial and because the jury nevertheless had sufficient grounds to convict appellant on Westmoreland's testimony and the corroborating video.

{¶32} In the final analysis, appellant's defense counsel did not render ineffective assistance. Thus, we overrule appellant's fourth assignment of error.

{¶33} To conclude, we overrule appellant's four assignments of error. Accordingly, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

TYACK and CONNOR, JJ., concur.