[Cite as *State v. Sharp*, 2010-Ohio-3470.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2009-09-236
	:	O P I N I O N
- vs -		7/26/2010
	:	
STACY J. SHARP,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR2009-04-0679

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POWELL, J.

{¶1} Defendant-appellant, Stacy Julian Sharp, appeals his conviction for felonious assault and kidnapping in the Butler County Court of Common Pleas. We affirm appellant's conviction.

{¶2} On the morning of April 10, 2009, Desi-Rae Nichole May was driving

appellant around the city of Middletown, Ohio when appellant asked May to stop the car. Appellant exited the car and approached Samantha Stevens, who was speaking with another man. Appellant and Stevens argued. Stevens subsequently got into the back seat of May's vehicle which appellant also reentered. The argument escalated and appellant struck Stevens in the face and abdomen. Stevens attempted to exit the vehicle, but May would not slow down or stop the car. May then drove to a house on Garfield Street where appellant and Stevens changed some of their clothes. The parties spent several more hours together before Stevens left and went to her grandmother's home. Upon reaching her grandmother's home, an ambulance was called. Stevens was taken to the hospital where she was treated for her injuries.

{¶3} Appellant was indicted for felonious assault, a violation of R.C. 2903.11(A)(1), and kidnapping, a violation of R.C. 2905.01(A)(3). After a two-day trial, a jury found appellant guilty of both offenses. The trial court sentenced appellant to seven years for the felonious assault charge and nine years for the kidnapping charge, for a total of 16 years. Appellant filed an appeal raising three assignments of error.

{¶4} For ease of discussion, we have elected to address the assignments of error out of order. In addition, because the second and third assignments of error both relate to arguments regarding the manifest weight of the evidence, we have chosen to set forth our standard of review before responding to those assignments of error.

{¶5} "An appellate court may only reverse a jury verdict as against the manifest weight of the evidence where there is a unanimous disagreement with the verdict of the jury." *State v. Harry*, Butler App. No. CA2008-01-0013, 2008-Ohio-

6380, ¶45, citing *State v. Gibbs* (1999), 134 Ohio App.3d 247, 255-56. "Under the manifest weight of the evidence standard, a reviewing court must examine the entire record, weigh all of the evidence and reasonable inferences, consider the credibility of witnesses and determine 'whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction.'" *Harry* at ¶45, citing *State v. Martin* (1993), 20 Ohio App.3d 172, 175; *Gibbs* at 256; *State v. Thompkins,* 78 Ohio St.3d 380, 387, 1997-Ohio-52.

{¶6} Assignment of Error No. 3:

{¶7} "THE TRIAL COURT ERRED IN CONVICTING SHARP OF FELONIOUS ASSAULT AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶8} In his third assignment of error, appellant argues that his conviction for felonious assault is against the manifest weight of the evidence. We do not agree.

{¶9} Pursuant to R.C. 2903.11(A)(1), felonious assault is defined as follows: "No person shall knowingly * * * cause serious physical harm to another or to another's unborn." R.C. 2901.01(A)(5) defines "serious physical harm," in pertinent part, as "[a]ny * * * condition of such gravity as would normally require hospitalization * * *; [a]ny physical harm that involves * * * some temporary, substantial incapacity; * * * [or] [a]ny physical harm that involves acute pain of such duration as to result in substantial suffering or that involves any degree of prolonged or intractable pain."

{¶10} Appellant maintains his conviction for felonious assault is against the

manifest weight of the evidence, because the state failed to prove he caused Stevens "serious physical harm." Appellant argues that Stevens only sustained minor injuries, in the form of a cut ear and a bloody nose, as a result of the altercation.

{¶11} "The degree of harm that rises to [the] level of 'serious' physical harm is not an exact science, particularly when the definition includes such terms as 'substantial,' 'temporary,' 'acute,' and 'prolonged.'" *State v. Irwin,* Mahoning App. No. 06 MA 20, 2007-Ohio-4996, ¶37. However, courts have found there was "serious physical harm" where the injuries caused the victim to seek medical treatment. See, e.g., *State v. Journey*, Scioto App. No. 09CA3270, 2010-Ohio-2555, ¶52; *State v. Lee*, Lucas App. No. L-06-1384, 2008-Ohio-253, ¶30; *In re Kristopher F.*, Stark App. No. 2006CA00312, 2007-Ohio-3259, ¶65; *State v. Davis*, Cuyahoga App. No. 81170, 2002-Ohio-7068, ¶20. Moreover, "[u]nder certain circumstances, [even] a bruise can constitute serious physical harm * * *." *State v. Jarrell*, Scioto App. No. 08CA3250, 2009-Ohio-3753, ¶14, citing *State v. Worrell,* Franklin App. No. 04AP-410, 2005-Ohio-1521, ¶47-51 (reversed on other grounds by *In re Ohio Criminal Sentencing Statutes Cases,* 109 Ohio St.3d 313, 2006-Ohio-2109). See, also, *State v. Krull,* 154 Ohio App.3d 219, 2003-Ohio-4611, ¶23; *State v. Burdine-Justice* (1998), 125 Ohio App.3d 707, 715; *State v. Barbee,* Cuyahoga App. No. 82868, 2004-Ohio-3126, ¶60.

{¶12} We find the weight of the evidence demonstrates that appellant caused Stevens serious physical harm. At trial, Stevens, May and Officer Dennis Jordan viewed pictures taken of Stevens at the hospital and indicated that the pictures accurately indicated the extent of Stevens' injuries on April 10, 2009. While these injuries included a bloody nose and a cut ear, the photographs also showed Stevens

sustained a swollen and cut lip, a black eye, and bruising on her right upper arm. Moreover, Stevens testified that appellant caused injury to her abdomen and/or ribs, and that she urinated on herself as a result of appellant's blow to her abdomen. In addition, according to Stevens, the attack and/or fight lasted between 30 to 45 minutes.

{¶13} May also testified that she witnessed appellant hit Stevens multiple times in the ribs and in the face. May stated that before she and appellant helped Stevens clean up, she saw "blood running down [Stevens'] face." In addition, May observed that "[Stevens'] lips were all bloody and her nose was bleeding and it wouldn't stop * * *." May further indicated that Stevens did not have a cut, swollen lip or a bruise on her arm until after the fight with appellant.

{¶14} In addition, the state's forensic evidence showed there was blood on the shirt Stevens was wearing and there was blood on the shirt appellant was wearing. Also, the police found Stevens' blood in a "blood spatter" on the inside of May's car, which Detective David D. Shortt stated was "caused by a forced projection of an object striking another object."

{¶15} Finally, Stevens stated that she went to the hospital that evening because she "was hurt" and her "nose was bleeding." Indeed, we note that Stevens' injuries necessitated her transport to the hospital via an ambulance. While the state did not offer a medical expert to testify regarding the exact nature of Stevens' injuries, Stevens testified that she received a CAT scan, x-rays, Vicodin, and an antibiotic for her injuries. Moreover, Stevens stated that after being discharged from the hospital she felt "pain in my head and my ribs," she "stayed in bed for a couple of days," and she experienced pain in her ribs for "several days."

{¶16} After examining the entire record and weighing all of the evidence and reasonable inferences, we cannot say that the jury clearly lost its way and created a manifest miscarriage of justice requiring reversal of appellant's conviction for felonious assault. Therefore, appellant's third assignment of error is overruled.

{¶17} Assignment of Error No. 2:

{¶18} "THE TRIAL COURT ERRED IN CONVICTING SHARP OF KIDNAPPING AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶19} In his second assignment of error, appellant maintains his conviction for kidnapping is against the manifest weight of the evidence. We do not agree.

{¶20} Pursuant to R.C. 2905.01(A)(3), kidnapping, in pertinent part, is defined as follows:

{¶21} "No person, by force, threat, or deception * * * shall remove another from the place where the other person is found or restrain the liberty of the other person, for any of the following purposes: * * * to terrorize, or to inflict serious physical harm on the victim or another."

{¶22} Appellant argues that the evidence does not support his conviction for kidnapping, because it failed to demonstrate appellant "held Stevens against her will." First, appellant contends that Stevens testified that she voluntarily entered May's vehicle. Second, appellant argues that Stevens also testified that she remained with appellant and May for the day "of her own free choice." Finally, appellant maintains that at one point in the day, Stevens left appellant and May, went off by herself, and subsequently returned absent any coercion.

{¶23} At trial, Stevens testified that appellant and she began arguing outside of May's car; at which point, appellant said to Stevens "why don't you get you're [sic]

a * * in the car." Stevens stated she got into the back seat of May's car, explaining later on cross-examination that she entered the vehicle voluntarily. Stevens testified that after appellant got into May's car, the fight escalated and turned physical. Stevens stated that she "tr[ied] to get out of the car once and Desi-Rae wouldn't stop the car so I couldn't get out." When questioned by the state if she was "pulled back into the car," Stevens responded that she was "not sure." Instead, Stevens stated that she only recalled "trying to get out" and that May "sped the car up and my shoe came off, and the door slammed shut." Stevens further testified that she was not able to leave May's car until they reached the house on Garfield Street.

{¶24} After this testimony, the state received permission from the trial court to impeach Stevens based on an earlier unsworn statement she wrote and signed for the police on April 10, 2009.

{¶25} "[MR. DENIER]: * * * Did you or did you not in your statement say that Stacy Sharp made you get into the car?

{¶26} "[STEVENS]: I may have. I don't remember exactly what I said in the statement. * * * I could have felt like I had to get in the car. * * * Because I didn't want to fight with him out on the street."

{¶27} "* * *

{¶28} "[MR. DENIER]: Did you or did you not write in your statement that you tried to climb out of the car at first, and he, being Mr. Sharp, pulled you back into the car?

{¶29} "[STEVENS]: I may have said that, yes, I may have. Like I said, I know the door slammed, I remember my foot going out of the car. * * * I d[o not] remember if anyone pulled me back in or not. I do remember the door slamming shut and my

shoe going out of the car.

{¶30} "* * *

{¶31} "[MR. DENIER]: You try to get out of the car, and you tell the officer that you get pulled back in?

{¶32} "[STEVENS]: I don't remember telling the officer that I got pulled back in, but I probably said that."

{¶33} When asked by the state at trial if she felt threatened at any time when entering May's car, Stevens stated she felt "a little afraid when we were fighting" but continued to maintain that she entered the vehicle willingly. The state questioned whether she was afraid of not getting in the car when appellant told her to get in, and Stevens responded "I was afraid that we would have to fight out in public, yes." The state then proceeded to question Stevens regarding the sworn testimony she gave at an April 22, 2009 preliminary hearing.

{¶34} "[MR. DENIER]: Do you recall testifying that Mr. Sharp got out and start[ed] cussing at me and told me to get the f*** in the car and asked me what I was doing down there, and I listened to him because I was so scared I got in the car. And then we got in the car and Desi-Rae started driving and Stacy started to beat the s*** out of me?

{¶35} "[STEVENS]: I don't recall what I said, but I may have said that."

{¶36} "* * *

{¶37} "[MR. DENIER]: You said that Stacy Sharp was not threatening you at the time?"

{¶38} "[STEVENS]: No, he was not."

{¶39} "[MR. DENIER]: Do you recall answering under oath, I mean – to a

question, was he threatening you at any way at this time? Your answer, I mean, he told me to get the f*** in the car. No he wasn't threatening me. If I don't get in the car, I am going to get my a** beat anyway."

{¶40} "[STEVENS]: Like I said, we would have fought right there if I didn't get in the car. Yes, I did say that.

{¶41} "* * *

{¶42} "[MR. DENIER]: At the time that you got in the car, on Eighth Avenue or in the area when Mr. Sharp and Ms. May first approached you, you said that he told you to get in the car?

{¶43} "[STEVENS]: Yes, sir.

{¶44} "[MR. DENIER]: At the time did you feel threatened?

{¶45} "[STEVENS]: Threatened, how? As in if not, I knew Stacy and I were going to become – in a physical fight then, yes, I did.

{¶46} "[MR. DENIER]: You did feel threatened?

{¶47} "[STEVENS]: Yes.

{¶48} The state's next witness, May, also testified at trial regarding her observations of the April 10, 2009 incident.

{¶49} "[MAY]: I was just driving in my vehicle and we made a right-hand turn on Eighth Street. I was told to stop the car. I stopped the car and from my knowledge, when I stopped the vehicle, Sam – Stacy had exited the car, Sam had gotten in the car.

{¶50} "[MR. DENIER]: Let me stop you there for a second. When you said you were told to stop the vehicle, who else was in the vehicle?

{¶51} "[MAY]: Just me and Stacy at the present moment.

{¶52} "* * *

{¶53} "[MR. DENIER]: And he told you to stop the vehicle?

{¶54} "[MAY]: Yes.

{¶55} "[MR. DENIER]: All right. Then what happened?

{¶56} "[MAY]: He exited the car, Sam had gotten in behind me on the driver's side, and maybe a couple seconds later after she entered the vehicle, Stacy had entered the vehicle.

{¶57} "* * *

{¶58} "[MR. DENIER]: Did the two of them argue?

{¶59} "[MAY]: Yes.

{¶60} "[MR. DENIER]: Okay. At any point – what happened after that, did you sit there in the car? Did you go?

{¶61} "[MAY]: I sat there in the car and they had started arguing and it went from arguing to physical – he had ended up in the backseat on top of her hitting her multiple times. Other than that, it ended up in the front seat afterwards the incident had happened, and I was told to drive off.

{¶62} "* * *

{¶63} "[MR. DENIER]: You were told to drive. Who told you to drive?

{¶64} "[MAY]: Stacy.

{¶65} "* * *

{¶66} "[MR. DENIER]: During the time where she is getting hit by Mr. Sharp or immediately after that, while the car is moving or anything, is she trying to get out of the car?

{¶67} "[MAY]: Yes.

{¶68} "[MR. DENIER]: Okay. And is she able to get out of the car?

{¶69} "[MAY]: No, not at one point because I was driving. I couldn't stop my vehicle.

{¶70} "[MR. DENIER]: Did you see Mr. Sharp pull her back in?

{¶71} "[MAY]: No.

{¶72} "[MR. DENIER]: Okay. Was she crying asking to get out of the car?

{¶73} "[MAY]: Yes, she was crying."

{¶74} Upon being asked why she stayed with appellant and Stevens for the remainder of the day, May responded by saying "I [had] just seen somebody get a brutal beating, I don't think anybody is going to leave after that. I myself was scared."

{¶75} Essentially, appellant's argument is that Stevens was not kidnapped because she consented to enter May's car and to remain in his company for the day. We agree that consent may be a defense to kidnapping. See, generally, *State v. Avery* (1998), 126 Ohio App.3d 26, 44, 50. However, consent is not a defense where a victim who initially agrees to accompany an offender wishes to depart, but is later prevented from leaving. Cf. *State v. Flannery*, Richland App. No. 03-CA-24, 2005-Ohio-1614, ¶120 (finding sufficient evidence of kidnapping where victim(s) initially entered vehicle willingly, but were later prevented from leaving); *State v. Williams,* Ashtabula App. No.2001-A-0044, 2002-Ohio-6919, ¶28-29, 32 (finding sufficient evidence of kidnapping where victim voluntarily entered truck, but was subsequently prevented from leaving when the appellant failed to stop the vehicle or let the victim out). When Stevens attempted to leave May's car, but was prevented from so doing, she no longer consented to be in the vehicle.

{¶76} Although we recognize that there is conflicting evidence between the

trial testimonies and other testimony and/or statements made regarding the events of April 10, 2009, we must be mindful that "the choice between credible witnesses and their conflicting testimony rests solely with the finder of fact and an appellate court may not substitute its own judgment for that of the finder of fact." *State v. Awan* (1986), 22 Ohio St.3d 120, 123, citing *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77 and *Henkle v. Salem Mfg. Co.* (1883), 39 Ohio St. 547. See, also, *State v. DeHass* (1967), 20 Ohio St.2d 230, paragraph one of the syllabus. Moreover, even if there are inconsistencies in the testimony offered at trial, appellant is not necessarily entitled to reversal based on manifest weight of the evidence grounds as the trier of fact may believe or disbelieve any or all of the evidence presented. *State v. Pilgrim*, 184 Ohio App.3d 675, 2009-Ohio-5357, ¶34. See, also, *State v. Nivens* (May 28, 1996), Franklin App. No. 95APA09-1236, 1996 WL 284714, at *3 (stating "jur[ies] may take note of the inconsistencies and resolve or discount them accordingly * * * such inconsistencies do not render defendant's conviction against the manifest weight * * * of the evidence").

{¶77} After examining the record and weighing the evidence and all reasonable inferences, we believe the jury did not lose its way in finding appellant guilty of kidnapping Stevens. Arguably there is some evidence that appellant threatened Stevens to get into May's car, which could constitute the kidnapping. However, there is also evidence from Stevens and May that Stevens entered the vehicle without any coercion. Nevertheless, the evidence is uncontroverted that Stevens attempted to leave May's car, but was unable to escape. Stevens was prevented from leaving either because appellant pulled her back into the car, causing her to lose her shoe in the process, or because appellant ordered May to "drive"

when Stevens attempted to get out of the car. Because there is credible evidence that Stevens' liberty was restrained, by force, in order to allow appellant to inflict serious physical harm upon her, we cannot find that the jury clearly lost its way in rendering a guilty verdict for the kidnapping. Thus, appellant's second assignment of error is overruled.

{¶78} Assignment of Error No. 1:

{¶79} "THE TRIAL COURT ERRED IN FAILING TO GRANT DEFENDANT'S MOTION FOR A MISTRIAL AFTER THE PROSECUTOR ENGAGED IN MISCONDUCT BY ASKING A QUESTION REVEALING TO [sic] DEFENDANT'S INCARCERATION PENDING TRIAL."

{¶80} In his first assignment of error, appellant raises three separate issues. First, appellant maintains the state engaged in prosecutorial misconduct when it referred to appellant's incarceration before the trial. Second, appellant contends the trial court erred by failing to grant a mistrial based on the state's incarceration reference. Lastly, appellant argues the trial judge engaged in misconduct based on the substance of his "curative instruction" to the jury. We do not agree.

{¶81} Appellant called his brother-in-law and friend, Terry Lawrence Shields, as a witness to testify that he saw and spoke to appellant, Stevens and May on the afternoon of April 10, 2009. Shields testified that appellant, Stevens and May, "got out of the car and they w[ere] talking and everything was fine." Although he noticed Stevens had some blood near her nose, Shields stated he received assurances from appellant, Stevens and May that they were all "fine." During the state's cross-examination of Shields the prosecution asked the following question:

{¶82} "You are aware that Mr. Sharp has been in jail for quite some time?"

{¶83} Appellant's attorney immediately objected to the question and asked permission to approach the bench. Once there, appellant's attorney stated that he objected to the prosecution's reference to appellant's incarceration. The trial court responded:

{¶84} "I think its axiomatic here. We don't bring people out here in their orange jumpsuits, and we don't bring them out in handcuffs and we don't bring them out in shackles and there's a reason for that and that is that we don't want the jurors to know that a person has been incarcerated. We don't want them to have that appearance of being a jailbird, which they are in this room and that really is an improper question, it seems to me, Mr. Denier."

{¶85} After hearing both parties' arguments, the trial court decided that it would sustain the objection and not allow the prosecution to continue that particular line of questioning. Appellant's attorney moved for a mistrial arguing the damage was done and the jury could perceive appellant as a public threat. The trial court denied the motion for a mistrial and instead decided to give the jury a "curative instruction." The trial court then addressed the jury stating:

{¶86} "All right. Let me go over a few things with the jury and lay a little groundwork for what I'm going to instruct you. There was a question, the most recent question for Mr. Denier, maybe not in those precise words was, do you remember that or do you know that Mr. Sharp was in jail?

{¶87} "In any criminal case, a defendant may be in jail, may not be in jail, there is no significance whatsoever in the trial as to whether a defendant has been in jail or whether a defendant has been out. When a criminal case – we are in a felony court setting, the Court of Common Pleas is a court whether more serious criminal

cases are handled.

{¶88} "Municipal courts are – and what we call area courts and county courts under Ohio law, those courts handle less serious crimes and Common Pleas handles more serious crimes.

{¶89} "When a person is indicted for a fairly serious crime or various crimes, felonies, there is always a bond that is designated.

{¶90} "A person has a right to be out of – basically, usually generally, a defendant has a right to be out of jail while the case is pending. But there are counter-balancing interests there and that is where the bond comes in. Some defendants would flee if they didn't have something that held them, that bound them, if you will, to the court and to the jurisdiction and money, very often helps to bind people to not go away. It gives them a vested interest in staying put and staying around.

{¶91} "So consequently part of our system is that when a charge is filed, and when a case gets started, there is a bond that is given. Sometimes defendants are able to make the bond, post the bond. If they post the bond, they are out of jail. They are just on the streets like anybody else.

{¶92} "Sometimes defendants are not able to post a bond. If the defendants cannot post a bond, they can't get out of jail, they, by default, they wind up being in jail when the case is pending.

{¶93} "That does not mean that the defendant that has not been able to post bond is more guilty than a defendant who was able to post bond. It doesn't mean that there is any likelihood necessarily that the defendant that was not able to post bond is guilty. There is no significance as to the guilt or innocence of any defendant

based on whether that defendant was able to post bond. And on the flip side of that is whether that person was in jail or not.

{¶94} "A person's being in jail pending a felony criminal matter does not have anything to do with that person's guilt or innocence. The question from the prosecution was an improper question. It throws into your mind a fact of the background of our case here, which is totally irrelevant. I am instructing the jury to disregard the reference to Mr. Sharp's being in jail. That has absolutely nothing to do with any other charge. It has nothing to do with any other conviction, and has nothing to do with his guilt or innocence in this case. So jurors disregard that, please. You may proceed, Mr. Denier."

{¶95} Appellant first argues the state's attorney committed prosecutorial misconduct when he asked Sharp about appellant's pretrial custodial status. Appellant maintains that the reference to his incarceration before trial deprived him of a fair trial because it "completely undermine[d] the presumption of innocence." Appellant contends that the prosecution's comment was akin to being forced to wear prison garb at trial, a practice which has been held to be a violation of due process by the United States Supreme Court in *Estelle v. Williams* (1976), 425 U.S. 501, 503-04, 512, 96 S.Ct. 1691.

{¶96} "The conduct of a prosecuting attorney during trial cannot be made a ground of error unless the conduct deprives defendant of a fair trial." *State v. Apanovitch* (1987), 33 Ohio St.3d 19, 24, citing *State v. Maurer* (1984), 15 Ohio St.3d 239, 266. "Whether improper remarks constitute prosecutorial misconduct requires analysis as to (1) whether the remarks were improper and, (2) if so, whether the remarks prejudicially affected the accused's substantial rights." *State v. Jackson*,

107 Ohio St.3d 300, 2006-Ohio-1, ¶142, citing *State v. Smith* (1984), 14 Ohio St.3d 13, 14. "Not every intemperate remark by counsel can be a basis for reversal." *State v. Landrum* (1990), 53 Ohio St.3d 107, 112, citing *Maurer* at 267. "The touchstone of analysis 'is the fairness of the trial, not the culpability of the prosecutor.'" *Jackson* at ¶142, quoting *Smith v. Phillips* (1982), 455 U.S. 209, 219, 102 S.Ct. 940.

{¶97} On review, a "court will not deem a trial unfair if, in the context of the entire trial, it appears clear beyond a reasonable doubt that the jury would have found the defendant guilty even without the improper comments." *Jackson* at ¶142, citing *State v. Treesh,* 90 Ohio St.3d at 464, 739, 2001-Ohio-4. See, also, *State v. Lester* (1998), 126 Ohio App.3d 1, 8 (holding appellants bear the burden of demonstrating prejudice on a claim of prosecutorial misconduct by showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different").

{¶98} In *State v. Watters,* Cuyahoga App. No. 82451, 2004-Ohio-2405, the Eighth District Court of Appeals was faced with a very similar situation. Id. at ¶13. In *Watters*, the following exchange took place during the trial:

{¶99} "[Prosecutor]: Okay, Now, are you aware if the defendant, Sam Watters, was taken into custody at the time of the incident?

{¶100} "A. Yes.

{¶101} "[Prosecutor]: And if you know, has he been in custody since that time?

{¶102} "A. Yes, he has." Id.

{¶103} Watters argued "that he had an inviolate right to be at the trial table without any mention that he was in jail while his trial was progressing." The Eighth

District found that Watters' argument was premised on "the practice of permitting inmates to wearing civilian clothing * * * during jury trials" so the "presumption of innocence" [wa]s not eroded by seeing a defendant in prison garb. Id. at ¶14, citing *State v. Hecker* (July 15, 1994), Pickaway App. No. 93CA10, 1994 WL 386086, at *3.

{¶104} The *Watters* court further stated:

{¶105} "The actual impact of a particular practice on the judgment of jurors cannot always be fully determined. [* * *] But [* * *] the probability of deleterious effects on fundamental rights calls for close judicial scrutiny. Courts must do the best they can to evaluate the likely effects of a particular procedure, based on reason, principle, and common human experience. The potential effects of presenting an accused before the jury in prison attire need not, however, be measured in the abstract. Courts have, with few exceptions, [* * *] determined that an accused should not be compelled to go to trial in prison or jail clothing because of the possible impairment of the presumption so basic to the adversary system. [* * *] This is a recognition that the constant reminder of the accused's condition implicit in such distinctive, identifiable attire may affect a juror's judgment. The defendant's clothing is so likely to be a continuing influence throughout the trial that, not unlike placing a jury in the custody of deputy sheriffs who were also witnesses for the prosecution, an unacceptable risk is presented of impermissible factors coming into play [* * *]." (Internal citations, quotations and footnotes omitted.) *Watters* at ¶14, quoting *Hecker* at *3, quoting *Estelle v. Harris* (1976), 425 U.S. 501, 504, 96 S.Ct. 1691.

{¶106} The Eighth District found that the "logic" espoused by the Supreme Court in *Estelle* "should be equally applied to verbal references concerning the jail status of an accused." Id. at ¶15. The court further noted "[w]hether the reference is

visual or verbal, the potential for prejudice is the same." Id. Although the Eight District found the prosecution's question was improper, the court ultimately held, in light of the overwhelming evidence against Watters, there was no prejudice that resulted, because the question did not affect the outcome of the case. Id. at ¶16.

{¶107} We do not believe that one isolated comment rises to the level of an *Estelle* violation, as a singe reference to appellant's custodial status does not have the same impact as wearing prison clothing throughout a trial. See *United States. v. Washington* (C.A.9, 2006), 462 F.3d 1124, 1136-37 (finding "the impact of referring to a defendant's incarceration is not [as] constant as it is with prison garb"). Nevertheless, this does not excuse the clear impropriety of the state's reference to appellant's pretrial incarceration. Despite the imprudent question, we do not find that the state's query prejudiced appellant's substantial rights. As we have already determined that appellant's convictions are supported by the manifest weight of the evidence, we do not believe, beyond a reasonable doubt, that the jury would have rendered a different verdict had the question not been asked. See *Jackson*, 107 Ohio St.3d at ¶142; *Lester*, 126 Ohio App.3d at 8. Thus, appellant was not deprived of a fair trial based on prosecutorial misconduct. See *Apanovitch*, 33 Ohio St.3d at 24.

{¶108} Appellant also argues the trial court erred in failing to grant his motion for a new trial. Appellant states the trial court abused its discretion when the court chose to issue a curative instruction instead of granting a mistrial. We must note that the basis for appellant's argument is more focused on the trial court's instruction, rather than the misconduct by the state.

{¶109} "The granting or denial of a motion for mistrial rests in the sound

discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion." *Treesh*, 90 Ohio at 480, citing Crim.R. 33 and *State v. Sage* (1987), 31 Ohio St.3d 173, 182. "A mistrial should not be ordered in a criminal case merely because some error or irregularity has intervened * * *." *Treesh* at 480, quoting *State v. Reynolds* (1988), 49 Ohio App.3d 27, 33. "The granting of a mistrial is necessary only when a fair trial is no longer possible." *Treesh* at 480, citing *State v. Franklin* (1991), 62 Ohio St.3d 118, 127.

{¶110} We first observe that appellant's motion for a mistrial was made in response to the prosecution's improper question, regarding appellant's pretrial incarceration, despite his assertions otherwise. As such, we view the trial court's decision to deny appellant's motion in light of the alleged prosecutorial misconduct. Because we have already found that appellant was not denied a fair trial based on the prosecutor's improper question, we cannot say the trial court abused its discretion in denying appellant's motion for a mistrial. See *State v. Brentlinger*, Seneca App. No. 13-04-10, 2004-Ohio-4529, ¶30-34 (finding no error in a trial court's denial of a motion for a mistrial where the prosecution improperly questioned a witness on how often she visited her brother in jail). See, also, *State v. Freeman*, Stark App. No. 2006CA00388, 2007-Ohio-6270, ¶17-30 (finding no merit to appellant's claim he was denied a fair trial where a witness described him to the jury as wearing "a pair of jail shoes").

{¶111} Finally, appellant maintains the trial court engaged in misconduct when it instructed the jury to disregard the prosecution's question regarding appellant's pretrial custodial status. Appellant argues the trial court should have instructed the jury to simply ignore the question and response, rather than

"exacerbat[ing] the situation by * * * attempting to explain to the jury *why* defendant was in jail." (Emphasis sic.) In particular, appellant takes issue with the trial court's statement regarding bonds preventing a defendant from fleeing the jurisdiction. Appellant maintains that this statement creates an inference that he was being held in jail because he was a flight risk, and that he was guilty of the crimes for which he was charged. Appellant cites *State v. Collins*, Cuyahoga App. No. 89808, 2008-Ohio-3016, in support of his contention, where the Eighth District found an appellant's due process rights were violated, after a trial court commented on the appellant's incarceration and the fact he was a security risk. Id. at ¶18.

{¶112} Initially, we observe that appellant did not object to the trial court's curative instruction. Thus, our review of the claimed error in the trial court's instruction is subject to a plain error analysis. *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, ¶51, citing Crim.R. 52(B) and *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68. Under a plain error analysis, a reviewing court will not reverse a conviction based on a trial court's instruction "unless, but for the error, the outcome of the trial clearly would have been otherwise." *State v. Long* (1978), 53 Ohio St.2d 91, 97. "Notice of plain error under Crim.R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." Id.

{¶113} In exercising its duty to control criminal proceedings, a trial court must always be aware of the effect of its comments or remarks upon the jury. *State v. Wade* (1978), 53 Ohio St.2d 182, 187, vacated and remanded on other grounds (1978), 438 U.S. 911, 98 S.Ct. 3138, citing *State v. Thomas* (1973), 36 Ohio St.2d 68, 71. This is because "[i]t is well known * * * that juries are highly sensitive to every

utterance by the trial judge." *Wade* at 187, quoting *Thomas* at 72, quoting *Bursten v. United States* (C.A.5, 1968), 395 F.2d 976, 983. We find this same rationale applies equally to curative instructions given to a jury.

{¶114} First, we find appellant's reliance on *Collins* is misplaced, as it is easily distinguishable from the case at bar. In *Collins*, the trial court told the jury about Collins' "incarceration" for "security purposes." *Collins*, 2008-Ohio-3016 at ¶11, 16. In addition, although the *Collins* trial court offered to give a curative instruction, at two separate times, no instruction was ever made. Id. at ¶12-13. It was for these two reasons that the Eighth District found that Collins' due process rights were violated. Id. at 17-18. Cf. *State v. Totarella*, Lake App. No. 2002-L-147, 2004-Ohio-1175, ¶48-51 (no prejudice found where jurors saw Totarella with sheriff's deputies and trial court instructed jury that he was in jail because of a bond and not meeting bail).

{¶115} In this case, the state rather than the trial court, referenced appellant's pretrial incarceration. Moreover, the trial court clearly gave a correct curative instruction to the jury when it stated:

{¶116} "A person's being in jail pending a felony criminal matter does not have anything to do with that person's guilt or innocence. The question from the prosecution was an improper question. It throws into your mind a fact of the background of our case here, which is totally irrelevant. I am instructing the jury to disregard the reference to Mr. Sharp's being in jail. That has absolutely nothing to do with any other conviction, and has nothing to do with his guilt or innocence in this case. So jurors disregard that, please."

{¶117} While we believe that the trial court's instruction was far from

desirable, we are unable to say the instruction so prejudiced appellant as to warrant reversal of his conviction. It was unnecessary for the trial court to go in to such inordinate detail regarding bonds and the reasons a defendant might be incarcerated prior to trial, but it was far from causing the requisite manifest injustice required for finding plain error. As we have previously found that appellant's convictions were supported by the manifest weight of the evidence, we cannot say appellant has demonstrated prejudice as a result of the trial court's instruction.

{¶118} Because there was no prosecutorial misconduct, the trial court did not abuse its discretion in denying appellant's motion for a mistrial, and because no plain error is evident based on the trial court's instruction, appellant's first assignment of error is overruled.

{¶119} Judgment affirmed.

YOUNG, P.J. and RINGLAND, J., concur.