

**IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY**

STATE OF OHIO	:	
	:	Appellate Case No. 26028
Plaintiff-Appellee	:	
	:	Trial Court Case No. 13-CR-624
v.	:	
	:	(Criminal Appeal from
KEITH A. JOHNSON	:	Common Pleas Court)
	:	
Defendant-Appellant	:	
	:	

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OPINION

Rendered on the 18th day of December, 2015.

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FAIN, J.

{¶ 1} Defendant-appellant Keith Anthony Johnson was convicted of Felonious

Assault, with firearm specifications, and Having a Weapon While Under a Disability. He appealed; we affirmed. *State v. Johnson*, 2d Dist. Montgomery No. 26028, 2014-Ohio-5069. We granted Johnson's application to re-open this appeal for consideration of one or more assignments of error that arise out of the State's use in closing argument of a statement that a non-testifying witness made to the police. Johnson now argues that his conviction was wrongfully based on inadmissible hearsay, and his counsel was ineffective for having failed to challenge the hearsay evidence. Johnson also argues that his conviction was not supported by sufficient evidence. The State contends that the evidence was not hearsay, and that there was sufficient evidence for the jury to find Johnson guilty of both offenses.

{¶ 2} We conclude that Johnson was prejudiced by the State's characterization of testimony, during closing arguments, as probative of his guilt, rather than as an explanation for the steps taken by the police during their investigation, the limited purpose for which it was admitted. Trial counsel was ineffective for having failed to object or request a mistrial. Since the mischaracterization of the testimony had a reasonable probability of influencing the jury's verdict, the judgment of the trial court is Reversed, and this cause is Remanded for further proceedings.

I. Shots Fired at a Car, Wounding Passengers

{¶ 3} The facts leading to Johnson's conviction were recited in our first decision as follows:

One evening in February, 2013, between 10:00 and 10:30 in the evening, LaShanda Starks was driving a car owned by Kylie McComb.

McComb was in the front passenger seat. They were going to Starks's roommate's mother's home in the Hilltop Apartment complex to retrieve Starks's key and identification, on their way to Columbus.

Upon arriving at the apartment complex, Starks parked in the parking lot near her roommate's mother's apartment. Starks phoned her roommate, Telania Brown. When Brown came out of the apartment, Johnson, her boyfriend, was following her. Johnson and Brown appeared to be having an argument. Starks got out of the car and met with Brown on the sidewalk in front of the car. McComb remained in the car.

Brown decided that she wanted to go with Starks and McComb to Columbus. She got in the backseat, on the passenger's side, and slid over behind the driver's seat.

Johnson went to the passenger's side of the car, put his arm in the window, and began groping and talking to McComb, whom he had never previously met. McComb concluded that he was trying to make Brown jealous. The window control on the passenger door was broken, so McComb asked Starks to raise the passenger window, thinking that Johnson would remove his arm. Johnson did not remove his arm, which became stuck inside the partially closed window. McComb then asked Starks to lower the window just a little, so that she could push Johnson's arm outside the window. Starks complied, and McComb succeeded in pushing Johnson's arm outside the window.

At some point, Starks began driving the car out of the parking lot.

Also, after McComb pushed Johnson's arm out of the window, shots were fired. At one point, McComb testified that the shots were fired two seconds after she pushed Johnson's arm out of the window; at another point, McComb testified that: [the first shot] was right after [Johnson's] arm got off the window.

McComb testified that she did not see Johnson with a gun, but she saw flashing in the rear-view mirror on her side of the car when the first shot was fired. She also testified that we were moving forward when the shots were fired. McComb testified that she was certain that she was shot while they were still in the parking lot.

McComb was shot in her leg and in her back. Starks drove the car out of the parking lot, turned left on Blanch Street, and then turned left again on McCabe Street. McComb ducked down when the shooting started.

As soon as they left the parking lot, Brown received a phone call, which McComb described as follows:

A. I heard him say I heard him say, first it was blurry, something, something, something, B word, then he says, You going to just you leaving so you're leaving. And I don't think at this time this person on the car realized that anything I think he must just wanted to be dramatic, shoot the car up. But he shot me up instead.

Q. Okay. All right. And how long was she on the phone, Selena [sic] on the phone?

A. She got right off the phone with him. She says, Kendry[]

(phonetic) or, you know, and then she Man, we going to the hospital, she tells him where we're going. And to me, it was said to me from her, Are you going to tell f*ck it, excuse me, Go ahead.

They went straight to the hospital, arriving in about ten minutes. McComb and Brown were admitted and treated B McComb for her gunshot wounds, and Brown for injuries resulting from A glass all over her face and all shards in her chest, arms.

Theodore Trupp, a police officer responding to the scene, found four spent shell casings in McCabe Street, on the south side of the street, near the sidewalk. Ronald Christoffers, an evidence technician, collected the casings. He testified that it was about 120 feet from the apartment parking lot to where the casings were found. Two copper jackets and one lead core bullet were found in the car, but no effort was made to match them with the shell casings recovered in McCabe Street.

State v. Johnson, supra, ¶¶ 2-11.

{¶ 4} Additional facts relevant to this appeal are revealed in the testimony of the investigating officer and the State's comments during closing arguments about this testimony. Although Starks did not testify at trial, her statements made during the police investigation were presented through the testimony of the investigating officer. Officer Sarah Moody testified that she interviewed Starks shortly after the incident, in the emergency room at Miami Valley, and then she took Starks back to the parking lot where the incident occurred. Initially, while at the hospital, Starks told the officer that the shooter was a male, but she did not identify a specific person. Trial Transcript at pg. 165.

The officer also testified that when she took Starks to the parking lot, Starks showed her exactly where she had driven the car and where the shooting occurred. Trial Transcript at pg. 167. The officer testified that Starks stated that prior to the shooting Telania had been arguing with her boyfriend in the parking lot, and when the vehicle was shot, the male she saw was the same male. Trial Transcript at pg. 167. Prior to the officer's testimony, defense counsel objected and the trial court responded by giving the jury this cautionary instruction:

All right. Hold on. Ladies and gentlemen of the jury, with respect to the testimony you are about to hear, the Court is going to overrule Mr. Sullivan's objection, and I will allow you to hear the witness's answer, but only for a limited purpose.

The testimony of the witness in, at this time, is not being offered for the truth of the matter stated, but rather for the limited purpose of establishing the effect on this witness of the statement, if any, that was made by LaShanda, I believe that's who we're going to hear from at this point in time.

You may consider the witness's response here only for that limited purpose. It's also the Court's opinion that you can be allowed to hear this witness answer for the additional limited purpose that while it's not being offered for the truth of the matter it does establish verbal or operative facts upon which this witness was basing, perhaps her investigation that evening and her ongoing investigation. Therefore, you can consider it for that limited purpose, but for no other; and you cannot consider it for the truth of the

matter.

Trial Transcript at pgs. 163-164

{¶ 5} After the cautionary instruction was given, the direct examination of the officer proceeded. Twice the officer responded to questions by stating that Starks told her that at the time of the shooting she saw Telania's boyfriend [Johnson] in the parking lot, but she did not say that she saw Johnson with a gun or in the act of shooting. The testimony of Officer Moody was recorded as follows:

Q. Can you tell us, when you got in the car, what information LaShanda gave you when you were in the - - when you were in your cruiser?

A. LaShanda said, again, that she had - - her and Kylie had gone to pick her - - LaShanda's roommate, Telania from her mother's house in the Hilltop Homes area. She didn't have an exact address.

She said when they arrived there, Telania was already in the parking lot near her mother's apartment speaking with her boyfriend. At that time she didn't say his name; she said - - she - - Telania was (indiscernable) with her boyfriend, and they picked her up from that parking lot. When they had driven out, they had make a - - made a couple of turns, and that same male, she had seen very near the vehicle when it was shot at.

Q. That's what LaShanda indicated?

A. Yes.

Q. Okay. And at this point in time was she directing you to an actual location?

A. She was. We - - when we arrived over in the vicinity, she directed me

to where they had picked up Telania, the parking lot, and she began to show me the route they had taken, up and to the point where they - - the vehicle was shot.

Q. Okay. And at this point in time had she given you any information concerning a possible suspect?

A. Nothing more than saying that it was - - Telania had been arguing with her boyfriend in the parking lot, and when the vehicle was shot - - the male she saw was the same male.

Trial Transcript at pg. 166-167.

{¶ 6} No cautionary instruction regarding the officer's testimony was given during the jury charge prior to deliberation. During the defense closing argument, defense counsel accurately stated, "Absolutely not one person has testified that they saw Johnson fire a gun." Trial Transcript at pg. 324. In rebuttal, the prosecutor responded during her final statements to the jury:

And the defense has said that not one person saw this Defendant with a gun. Ladies and gentlemen, I beg to differ.

Someone did see this individual with a gun. Kylie McComb saw this man, who was within inches of her face in that car with a gun.¹ LaShanda, who went out with Officer Moody, she identified Telania's boyfriend as the shooter.

¹ Although not alleged as a prosecutorial error, we note that this statement is also not supported in the record, as the record reveals that McComb testified during cross-examination that she did not see Johnson with a gun. Trial Transcript at pg.140.

II. The Course of Proceedings

{¶ 7} Johnson was arrested and charged with one count of Felonious Assault (serious physical harm), in violation of R.C. 2903.11(A)(1), and three counts of Felonious Assault (deadly weapon), in violation of R.C. 2903.11(A)(2), and one count of Having a Weapon While Under a Disability, in violation of R.C. 2923.13(A)(2). Two of the Felonious Assault counts alleged McComb as the victim; the other two alleged Starks and Brown as the victim, respectively. All of the Felonious Assault counts were accompanied by firearm specifications.

{¶ 8} The two Felonious Assault counts with McComb as the victim, and the Having a Weapon While Under a Disability count were tried to a jury. Johnson was convicted on all these counts and the firearm specifications. Later, the other two Felonious Assault counts were dismissed. The trial court merged the Felonious Assault (deadly weapon) conviction into the Felonious Assault (serious physical harm) conviction, and also merged the two firearm specifications. Johnson was sentenced to eight years in prison for Felonious Assault, to three years for Having a Weapon While Under a Disability, and to three years for the firearm specification, with all sentences to be served consecutively, for a total of fourteen years.

{¶ 9} Johnson appealed, and we affirmed the convictions. Johnson moved to re-open this appeal on the basis that his counsel was ineffective for having failed to raise three assignments of error. All three alleged errors focus on a statement made by the State during closing arguments asserting that a non-testifying witness had identified

Johnson as the shooter. We agreed that appellant's counsel should have argued on appeal that trial counsel was ineffective for having failed to object, or move for a mistrial, when this statement was made in closing argument.

III. Counsel's Ineffective Defense Was Prejudicial

{¶ 10} For his First Assignment of Error, Johnson alleges as follows:

THE TRIAL COURT ERRED IN CONVICTING JOHNSON BASED ON INADMISSIBLE HIGHLY PREJUDICIAL IDENTIFICATION HEARSAY, IN VIOLATION OF JOHNSON'S RIGHT TO CONFRONTATION UNDER THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES AND OHIO CONSTITUTIONS.

{¶ 11} As part of his First Assignment of Error, Johnson argues that introduction of the hearsay identification by Starks violated his due process rights, and that counsel was ineffective by failing to challenge the State's introduction of the inadmissible hearsay. As we noted in our initial opinion, defense counsel did object to the hearsay statement during the testimony given by the police officer, and the court gave an appropriate limiting instruction to caution the jury that the statement should only be considered for the purpose of describing the officer's investigation. However, defense counsel did not object during the State's closing arguments when the State referred to the statement made to the officer as probative evidence of Johnson's guilt.

{¶ 12} Ineffective assistance of counsel affects a substantial right afforded by the United States and Ohio Constitutions. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St. 3d 136, 538 N.E. 2d 373

(1989). The Sixth Amendment's Confrontation clause, guaranteeing the accused a right to confront witnesses against him, is violated when an out-of-court statement that is testimonial in nature is used as evidence without giving the defendant the opportunity to cross-examine the declarant. *State v. Syx*, 190 Ohio App. 3d 845, 2010-Ohio-5880, 944 N.E. 2d 722, ¶22 (2d Dist.), citing *Crawford v. Washington*, 541 U.S. 36, 68, 124 S. Ct. 1354, 158 L.Ed. 177 (2004). A statement given to a police officer, not related to an ongoing emergency, with the primary purpose to prove past events that relate to a potential criminal prosecution is testimonial in nature. *State v. Siler*, 116 Ohio St. 3d 39, 2007-Ohio-5637, 876 N.E. 2d 534, ¶ 1 of syllabus.

{¶ 13} To establish a claim for ineffective assistance of counsel, the defendant has the burden of demonstrating that: 1) the performance of defense counsel was seriously flawed and deficient; and 2) there is a reasonable probability that the result of the defendant's trial or legal proceeding would have been different had defense counsel provided proper representation. *State v. LeGrant*, 2d Dist. Miami No. 2013-CA-44, 2014-Ohio-5803, ¶ 26, citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Therefore, to reverse a conviction based on ineffective assistance of counsel, it must be demonstrated that trial counsel's conduct fell below an objective standard of reasonableness, and that counsel's deficiencies were serious enough to create a reasonable probability that, but for the deficiencies, the result of the trial would have been different.

{¶ 14} In the case before us, the alleged deficiency of trial counsel was the failure to object during closing arguments and to ask for a mistrial. Because trial counsel raised no objection during closing arguments, the issue was not preserved for appeal, unless it

presents a “plain error.” “We have found plain error when three elements are met: 1) there must be an error or deviation from a legal rule, 2) that error must be plain, defined as ‘an obvious defect in the trial proceedings,’ and 3) the error must have affected a ‘substantial right,’ meaning the error must have affected the ultimate outcome, and a correction is needed to ‘prevent a manifest miscarriage of justice.’ ” *State v. LeGrant*, *supra* at ¶ 9, citing *State v. Barnes*, 94 Ohio St.3d 21, 759 N.E.2d 1240 (2002).

{¶ 15} The sole issue before us is centered on improper statements made by the State during closing arguments, and whether it constitutes prosecutorial misconduct. The test for prosecutorial misconduct was established by the Supreme Court of Ohio in *State v. Hanna*, 95 Ohio St.3d 285, 2002-Ohio-2221, 767 N.E.2d 678, ¶ 61, as follows:

The test for prosecutorial misconduct is whether remarks were improper and, if so, whether they prejudicially affected substantial rights of the accused. *State v. Jones* (2000), 90 Ohio St.3d 403, 420, 739 N.E.2d 300, citing *State v. Smith* (1984), 14 Ohio St.3d 13, 14, 14 OBR 317, 470 N.E.2d 883. However, the touchstone of analysis “is the fairness of the trial, not the culpability of the prosecutor.” *Smith v. Phillips* (1982), 455 U.S. 209, 219, 102 S.Ct. 940, 71 L.Ed.2d 78.

{¶ 16} We have recognized that prosecutors are given wide latitude in their closing statements to draw inferences from the testimony heard and the evidence presented but prosecutors are not given complete and total freedom. *State v. Lillicrap*, 2d Dist. Montgomery No. 23958, 2011-Ohio-3505, ¶ 6. To determine whether the prosecutor’s remarks to the jury were prejudicial, affecting substantial rights, the court must focus on the fairness of the trial, not the culpability of the prosecutor. *State v.*

Apanovitch, 33 Ohio St. 3d 19, 24, 514 N.E. 2d 394 (1987). “In reviewing allegations of prosecutorial misconduct, we review the alleged wrongful conduct in the context of the entire trial,” and if “it is clear beyond a reasonable doubt that a jury would have found the defendant guilty even absent the alleged misconduct, the defendant has not been prejudiced and his conviction will not be reversed.” *State v. Underwood*, 2d Dist. Montgomery No. 24186, 2011-Ohio-5418, ¶ 21. See also, *State v. Hall*, 2d Dist. Montgomery No. 25794, 2014-Ohio-2094, ¶ 19.

{¶ 17} Although we previously agreed that the trial court properly admitted the officer’s testimony concerning Stark’s identification of Johnson, it was admitted only for the limited purpose of explaining subsequent police conduct. It was not proper to admit or to use the statement for purposes of proving Johnson’s guilt. In fact, the State was at pains to disclaim that Stark’s statement was being offered for the purpose of proving Johnson’s guilt:

And again – well, I can do that, but again, Your Honor, this is the responding officer who’s out on the scene developing an investigation of the suspect. Again, *this is not for the truth of the matter, this is the guy that actually committed this crime*, but the effect on the listener because she’s going to testify the many more steps that she took in this investigation and what information led her to do what. *It’s not for the purposes of the fact that this is the guy that actually shot*. And the fact that she continued on, Telania’s mom doesn’t know that this is guy [sic] who shot, she just¹ knows

¹ Telania Brown’s mother did not testify at the trial, either.

that this is Telania's boyfriend. But she's just getting information throughout, but I think it's important to establish where they started from Point A in their investigation and ended up in that (indiscernible). (Emphasis added.)

State v. Johnson, supra, ¶ 18.

{¶ 18} Since Starks did not testify, using her statement as probative evidence of guilt violates Johnson's constitutional right to confrontation, and therefore affects a substantial right. The prosecutor's statements during the rebuttal closing arguments deliberately urged the jury to consider Starks' out-of-court statements as probative evidence of Johnson's guilt, which was not within the limited purpose for which the statements were offered and admitted. Without evidence identifying Johnson as the shooter, the State's case was weak, based entirely on an inference that since he was in the area immediately prior to the shooting, and that he was expressing anger, that he must have been the person who shot the gun. The gun was not recovered. The copper jackets and the lead bullet found in the car were not matched to the shell casings found in the street. The shell casings were not found in the parking lot, where all of the victims agreed that the shots were fired. No witness saw Johnson with a gun. It is not clear beyond a reasonable doubt that a jury would have found the defendant guilty without the prosecutor's improper use of Starks' out-of-court statements during closing arguments. The seriousness of the misconduct is heightened by the fact that it occurred during the State's final remarks rebutting the defense closing argument, so that the defense had no opportunity to respond. As the last argument heard by the jury prior to deliberations, there is a substantial likelihood that its impact was persuasive. The likelihood of having mislead

the jury toward a conviction based on improper and inaccurate characterization of the evidence is sufficient to consider the misconduct prejudicial. Counsel's failure to object or to seek a mistrial based on the prejudicial remarks during closing arguments created a reasonable probability that the result of the defendant's trial or legal proceeding would have been different, had that failure not occurred.

{¶ 19} Johnson's First Assignment of Error is sustained.

IV. The First Appeal Addresses the Sufficiency of the Evidence Issue

{¶ 20} In his Second Assignment of Error, Johnson alleges:

THE TRIAL COURT ERRED IN FINDING THAT JOHNSON'S
RIGHT TO DUE PROCESS OF LAW WAS NOT VIOLATED WHEN HE
WAS CONVICTED UPON INSUFFICIENT EVIDENCE

{¶ 21} The sole assignment of error in Johnson's first appeal challenged whether his convictions were supported by sufficient evidence. We have already determined that the evidence was sufficient to support a reasonable inference that Johnson was the shooter, even without considering the out-of-court statements made to the police officer by a non-testifying witness. In our decision agreeing to reopen the appeal, we specifically identified the only new issue to be considered as being related to statements made during closing arguments, which are addressed above. Therefore, Johnson's Second Assignment of Error is overruled.

V. Conclusion

{¶ 22} Johnson's First Assignment of Error having been sustained, and his

Second Assignment of Error having been overruled, the judgment of the trial court is Reversed, and this cause is Remanded for further proceedings consistent with this opinion. Our prior judgment of November 14, 2014 in this appeal is hereby vacated.

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FROELICH, P.J., and HALL, J., concur.

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