

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ROSS COUNTY

STATE OF OHIO, : Case No. 14CA3434
Plaintiff-Appellee, :
v. : DECISION AND
KIMBERLY L. BRYANT : JUDGMENT ENTRY
Defendant-Appellant. : **RELEASED: 12/10/2014**

APPEARANCES:

Matthew L. O'Leary, Circleville, Ohio, for appellant.

Matthew S. Schmidt, Ross County Prosecuting Attorney, and Jeffrey C. Marks, Ross County Assistant Prosecuting Attorney, Chillicothe, Ohio, for appellee.

Harsha, J.

{¶1} On appeal from her conviction for possession of heroin and cocaine, Kimberly L. Bryant argues in her first assignment of error that the state violated her Fifth Amendment privilege against self-incrimination and due process by using her silence as substantive evidence of her guilt. However, the trial court sustained an objection and instructed the jury to disregard most of the challenged testimony. For the remaining testimony, Bryant either agreed to or did not object to the introduction of evidence that established she did not answer pertinent questions by police and invoked her right to counsel. Because overwhelming independent evidence supports Bryant's conviction, we find no prejudicial error.

{¶2} In her second assignment of error Bryant contends that her felony drug-possession convictions were against the manifest weight of the evidence. We reject her contention because the state introduced evidence that Bryant had heroin and cocaine in

her coat and purse. Despite Bryant's contention that the drugs belonged to a passenger, the jury neither lost its way nor created a manifest miscarriage of justice by finding her guilty.

{¶3} Therefore, we overrule Bryant's assignments of error and affirm her convictions and sentence.

I. FACTS

{¶4} This case evolved from a controlled purchase of heroin at the home of Shonda Cremeans and subsequent search warrant for Cremeans's home. Prior to executing the search warrant Chillicothe Police Detectives Twyla Goble and Charles Campbell observed Bryant in her blue Hyundai Elantra automobile pull up to the front of the house. Shortly thereafter, Cremeans exited the house, entered the front passenger side of the vehicle, and Bryant drove the vehicle away. While following the vehicle the detectives observed Bryant make a left-hand turn without using her turn signal and fail to stop at a stop sign. The detectives initiated a stop of the car because of the traffic violations.

{¶5} The detectives approached the vehicle and asked Bryant for her license. As they approached the car, the detectives noticed that Cremeans was reaching around the floor in front of her where her white purse and address book were located. Bryant retrieved her license from a wallet in her black purse, which was located in the center console. After Bryant gave Detective Campbell her license, the detectives requested a police dog at the scene. The dog conducted a sniff of Bryant's vehicle and alerted to the presence of controlled substances in the car.

{¶6} The detectives removed both Cremeans and Bryant from the vehicle and, with their consent, searched their persons. They found no controlled substances on Cremeans, but Detective Goble found two baggies inside a larger bag in Bryant's left coat pocket. The first baggie contained over seven grams of heroin and the second baggie contained approximately a half gram of cocaine. Detective Goble handcuffed Bryant, gave her *Miranda* warnings, and placed her in a police cruiser.

{¶7} Detective Goble searched Cremeans's white purse, which was located at her feet in the front passenger seat of the car, and found heroin and \$296. Detective Campbell searched Bryant's black purse, which had been in the center console of the car, and he found a large Ziploc bag containing digital scales and over four grams of heroin. He also found over \$1,000 in cash in Bryant's purse.

{¶8} The state charged Bryant with one count of possession of heroin in violation of R.C. 2925.11, a second-degree felony, and one count of possession of cocaine in violation of R.C. 2925.11, a fifth-degree felony.

{¶9} At trial Bryant admitted that the black purse and the cash inside it was hers, but denied knowledge of the drugs or scales found inside her purse. Instead, she contended that Cremeans put the drugs in her purse during the traffic stop. Bryant also denied ownership of the coat and claimed that Cremeans left the coat in her car four days before the incident. Bryant further claimed that she put on Cremeans's coat after she got in her car because she forgot her jacket at home and had no idea there were drugs in the coat pocket. No evidence corroborated Bryant's claims.

{¶10} The jury returned guilty verdicts on both counts and the trial court sentenced her accordingly.

II. ASSIGNMENTS OF ERROR

{¶11} Bryant raises two assignments of error for our review:

1. THE STATE OF OHIO'S USE OF APPELLANT'S SILENCE AS SUBSTANTIVE EVIDENCE OF GUILT IN ITS CASE IN CHIEF VIOLATED HER FIFTH AMENDMENT PRIVILEGE AGAINST SELF INCRIMINATION AND THE DUE PROCESS GUARANTEES OF THE FOURTEENTH AMENDMENT WHICH RESULTED IN UNFAIR PREJUDICE.

2. APPELLANT'S CONVICTION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

III. LAW AND ANALYSIS

A. Use of Silence as Substantive Evidence of Guilt

{¶12} In her first assignment of error Bryant argues that the state improperly used her silence as substantive evidence of her guilt in violation of her Fifth Amendment and due process rights. We use a de novo standard of review to assess errors based upon violations of constitutional law. *State v. Burgette*, 4th Dist. Athens No. 13CA50, 2014-Ohio-3483, ¶ 10.

{¶13} The Fifth Amendment to the United States Constitution, which is applicable to the states through the Fourteenth Amendment, provides that no person "shall be compelled in any criminal case to be a witness against himself." *State v. Leach*, 102 Ohio St.3d 135, 2004-Ohio-2147, 807 N.E.2d 335, ¶ 11. "The Fifth Amendment guarantees a criminal defendant's right against self-incrimination, which includes the right to silence during police interrogation. * * * Additionally, a defendant can invoke his rights 'at any time prior to or during questioning[.]'" *State v. Harper*, 4th Dist. Vinton No. 11CA684, 2012-Ohio-4527, ¶ 14, quoting *Miranda v. Arizona*, 384 U.S. 436, 474, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). "[W]hen a person is subject to

custodial interrogation, he or she must be informed of certain rights, including his or her rights to remain silent and to an attorney.” *State v. Bennett*, 9th Dist. Lorain No. 12CA010286, 2014-Ohio-160, ¶ 62, citing *Miranda*. “ ‘A suspect’s right to an attorney during questioning * * * is derivative of his [or her] right to remain silent.’ ” *Leach* at ¶ 13, quoting *Wainwright v. Greenfield*, 474 U.S. 284, 298-299, 106 S.Ct. 634, 88 L.Ed.2d 623 (Rehnquist, J., concurring).

{¶14} “Once a person invokes his or her Fifth Amendment right to remain silent, the State cannot use the person’s silence [either in pre-arrest or post-arrest circumstances] as substantive evidence of guilt in its case-in-chief.” *Bennett* at ¶ 63, citing *Wainwright*, 474 U.S. at 295 (post-arrest, post-*Miranda* silence is inadmissible as substantive evidence of guilt in the state’s case-in-chief), and *Leach* at syllabus (“Use of a defendant’s pre-arrest silence as substantive evidence of guilt violates the Fifth Amendment privilege against self-incrimination”); see also *State v. Perkins*, 3d Dist. Hancock No. 5-13-01, 2014-Ohio-752, ¶ 49, citing *Doyle v. Ohio*, 426 U.S. 610, 618, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976), and *Leach* at ¶ 18 (“Evidence submitted by the State regarding a defendant’s exercise of his right to remain silent during an interrogation violates the Due Process Clause of both the state and federal constitutions”). To allow the “[u]se of * * * silence in the state’s case-in-chief would force defendants either to permit the jury to infer guilt from their silence or surrender their right not to testify and take the stand to explain their prior silence.” *Leach* at ¶ 31.

{¶15} In her first assignment of error Bryant specifically challenges only three instances of Detective Goble’s direct examination. First she points to this testimony:

STATE: Did that conclude your search of the vehicle and the contents thereof?

GOBLE: Yes.

STATE: What was done with Ms. Bryant?

GOBLE: Ms. Bryant, I attempted to interview her. She just wouldn't, she just wouldn't talk to me, and [she] ended up invoking her right to an attorney.

Bryant's trial counsel did not specifically object to this testimony.

{¶16} In the next two contested responses from Detective Goble, the state asked the detective about whether Bryant ever indicated to her that neither the coat nor the purse was hers:

STATE: Did [Bryant] ever tell you this is not my coat?

GOBLE: No.

STATE: Did [Bryant] ever give you any indication that the black purse was not hers?

GOBLE: No.

STATE: Nothing further at this time your honor.

{¶17} After Detective Goble's testimony on direct examination, defense counsel asked to approach the bench. Although defense counsel's initial remarks were inaudible and therefore not transcribed, it is clear from the court's statements that counsel made an objection to the state's questions about whether Bryant ever denied ownership of the purse and coat, and he requested a mistrial.

{¶18} Both parties addressed the court, defense counsel arguing that it was prejudicial error for the state to comment on Bryant's decision to invoke her right to

remain silent. The state countered that the parties would introduce a video recording¹ of Bryant's interrogation, which would reveal that Bryant did not invoke her right to an attorney until after she had been arrested and placed in the police cruiser; and defense counsel had already agreed to the admissibility of the recording. In addition, the state pointed out that defense counsel conceded that Bryant would testify and would admit that the black purse was hers.

{¶19} After reviewing the video the court found a mistrial was not the appropriate remedy. Instead the court allowed the entire video into evidence, as the defense requested, "so that the jury had the entire context in which [Bryant's] questioning occurred and her answering or her failing to answer those question[s] occurred."

{¶20} Nevertheless, the court did sustain Bryant's objection to Detective Goble's testimony concerning whether Bryant ever told the detective that the coat or the black purse were not hers. The court instructed the jury to disregard Detective Goble's answers to the state's questions.

1. Plain Error

{¶21} Bryant did not object at trial to the initial testimony of Detective Goble about Bryant not talking to her and invoking her right to counsel, so our review is limited to whether this testimony constituted plain error. *See, e.g., State v. Lang*, 129 Ohio St.3d 512, 2011-Ohio-4215, 954 N.E.2d 596, ¶ 123 (failure to object to testimony at trial forfeits all but plain error on appeal). Appellate courts take notice of plain error "with the utmost caution, under exceptional circumstances and only to prevent a manifest

¹ This exhibit is included in the record on appeal, but the video portion of the recording is unviewable. (Def't. Ex. D) Nevertheless, the audio portion of the recording works.

miscarriage of justice.” *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978), paragraph three of the syllabus; *State v. Bethel*, 4th Dist. Jackson No. 13CA11, 2014-Ohio-3861, ¶ 7. To prevail, Bryant “must show that an error occurred, that the error was plain, and that but for the error, the outcome of the trial clearly would have been otherwise.” *State v. Mammone*, 139 Ohio St.3d 467, 2014-Ohio-1942, 13 N.E.3d 1051, ¶ 69. The defendant bears the burden of proof on the issue. *See, State v. Cooper*, 170 Ohio App.3d. 418, 2007-Ohio-1156, 867 N.E.2d 493, 9131 (4th Dist.) (“The defendant carries the burden to establish the existence of plain error, unlike the situation in a claim of harmless error, where the burden lies with the state”).

{¶22} We conclude that Bryant did not establish plain error regarding Detective Goble’s initial testimony. First, other evidence established that Bryant did not answer pertinent questions by the police detective and invoked her right to counsel. Bryant agreed to the admission of the videotape, which showed her in the police cruiser after being arrested and receiving *Miranda* warnings. In this tape, she refused to answer questions by Detective Goble about whether either of the purses found in her car or the coat she was wearing were hers, she ultimately invoked her right to talk to an attorney, and remained silent thereafter. In addition, Detective Goble testified without objection that Bryant did not make any statements to her at the time Goble pulled out baggies containing heroin and cocaine from Bryant’s jacket pocket.

{¶23} Second, Bryant’s claim that the improper testimony “forced [her] to take the stand and provide comparatively less credible testimony regarding the ownership of the coat and purse” is not supported by the record. Instead, her trial counsel indicated in his opening statement that although Bryant did not have to testify, she would. Thus,

Bryant's decision to testify was not caused by the improper testimony of Detective Goble.

{¶24} Finally, there was overwhelming independent evidence to establish Bryant's guilt. The detectives found heroin and cocaine in the left pocket of the coat she was wearing and heroin in her purse; but no evidence corroborated her contention that the drugs belonged to Cremeans. Thus, Bryant cannot establish that the outcome of her trial clearly would have been otherwise without the testimony contested on appeal.

{¶25} Therefore, any error in the admission of this part of Detective Goble's testimony did not constitute plain error.

2. Harmless Error

{¶26} We look now to the testimony of Detective Goble about whether Bryant had ever denied ownership of the coat or the black purse. Initially, we assume *arguendo* that the admission of the testimony violated Bryant's Fifth Amendment rights. Next, we must determine whether any error was harmless beyond a reasonable doubt because Bryant objected to this testimony at trial. *See State v. Powell*, 132 Ohio St.3d 233, 261, 2012-Ohio-2577, 971 N.E.2d 865, ¶ 162, citing *State v. Thompson*, 33 Ohio St.3d 1, 4-5, 514 N.E.2d 407 (1987) (holding that a violation of a defendant's constitutional right against self-incrimination is subject to harmless-error review); *Perkins*, 2014-Ohio-752, at ¶ 50 ("the introduction of evidence regarding a defendant's decision to remain silent does not constitute reversible error if, based on the whole record, the evidence was harmless beyond any reasonable doubt"). Here, the burden is upon the state to show any error was harmless beyond a reasonable doubt. *See Cooper*, 170 Ohio App.3d.

418, 2007-Ohio-1186, 867 N.E.2d. 493, at ¶ 31. We conclude the state has satisfied this burden.

{¶27} First, the trial court sustained Bryant's objection to Detective Goble's testimony that Bryant had never denied ownership of the coat and black purse in which the drugs were found, and ordered the jury to disregard it. *Powell* at ¶ 162, citing *State v. Garner*, 74 Ohio St.3d 49, 59, 656 N.E.2d 623 (1995) (jury is presumed to follow the trial court's curative instructions so that the prosecutor's improper comments on the defendant's exercise of his right to remain silent were harmless beyond a reasonable doubt).

{¶28} Second, as noted previously, other evidence - including the videotape - established that she did not answer pertinent questions by the police detectives and invoked her right to counsel.

{¶29} Third, as we discussed, Bryant's claim that the improper testimony "forced [her] to take the stand and provide comparatively less credible testimony regarding the ownership of the coat and purse" is not supported by the record.

{¶30} Finally, there was overwhelming independent evidence to establish Bryant's guilt. There is thus little chance that the contested testimony impacted the verdict or sentence in this case. See *Powell*, 132 Ohio St.3d 233, 2012-Ohio-2577, 971 N.E.2d 865, at ¶ 162 (concluding that prosecutor's improper argument commenting on defendant's prearrest silence was harmless beyond a reasonable doubt because, inter alia, overwhelming evidence of guilt was presented so that there was "little chance" that the remarks "affected the verdict or sentence").

{¶31} Consequently, any error in the admission of the challenged testimony of Detective Goble was harmless beyond a reasonable doubt. We overrule Bryant's first assignment of error.

B. Manifest Weight of the Evidence

{¶32} In her second assignment of error, Bryant asserts that her convictions are against the manifest weight of the evidence. When considering whether a conviction is against the manifest weight of the evidence, we must review the entire record, weigh the evidence and all reasonable inferences, and consider the credibility of witnesses, to 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. *State v. Hunter*, 131 Ohio St.3d 67, 2011-Ohio-6524, 960 N.E.2d 955, ¶ 119; *State v. Adkins*, 4th Dist. Lawrence No. 13CA17, 2014-Ohio-3389, ¶ 11. "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." *State v. Johnson*, 4th Dist. Scioto No. 13CA3580, 2014-Ohio-4443, ¶ 10, quoting *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997).

{¶33} The evidence here supports the jury's verdicts finding Bryant guilty of possession of heroin and cocaine. The evidence is uncontroverted that the police detectives found heroin and cocaine in the left pocket of the coat that Bryant was wearing when they stopped her car and also found heroin and digital scales in Bryant's black purse.

{¶34} Bryant claims that her testimony that Cremeans must have put the heroin and scales in her black purse during the traffic stop was corroborated by Detective

Goble's testimony that Cremeans was reaching around the area of Bryant's purse at the time of the stop. But Goble's testimony fails to corroborate Bryant's contention.

Detective Goble merely testified that when she approached the vehicle, Cremeans was "messaging around the floor board of the vehicle" and that this was in the area of Cremeans's white purse and address book, which were on the floor in front of her. Bryant's purse was in the center console.

{¶35} In effect, no evidence corroborated Bryant's claims that the jacket was Cremeans's and that she did not know that there were drugs in it or that Cremeans had placed drugs and digital scales in her purse. In fact, the tape that Bryant argued to introduce indicates that while she was being questioned in the police cruiser, she once referred to the jacket in which the drugs were found as "my" jacket.

{¶36} Therefore, the weight of the evidence supports Bryant's convictions for drug possession. The jury neither lost its way nor created a manifest miscarriage of justice. After viewing the evidence in its totality and deferring to the jury's credibility determinations, we cannot conclude that this is an exceptional case in which the evidence weighs heavily against the convictions. We overrule Bryant's second assignment of error.

IV. CONCLUSION

{¶37} Having overruled her assignments of error, we affirm the judgment of the trial court.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED and that Appellant shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Ross County Court of Common Pleas to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

McFarland, J. & Hoover, J.: Concur in Judgment and Opinion.

For the Court

BY: _____
William H. Harsha, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.