[Cite as *State v. Fletcher*, 2015-Ohio-1624.]

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

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	Case No. 14CA14
v.	:	DECISION AND
ANTHONY D. FLETCHER,	:	JUDGMENT ENTRY
Defendant-Appellant.	:	RELEASED 04/23/2015

APPEARANCES:

Philip J. Heald, Ironton, Ohio, for Appellant.

Brigham M. Anderson, Lawrence County Prosecuting Attorney, and Robert C. Anderson, Lawrence County Assistant Prosecuting Attorney, Ironton, Ohio, for Appellee.

Hoover, P.J.

{¶ 1} Appellant, Anthony D. Fletcher, appeals his conviction in the Lawrence County Common Pleas Court after a jury found him guilty of one count of aggravated robbery. Fletcher contends that the prosecutor committed misconduct and violated his constitutional right against self-incrimination by commenting during closing arguments on Fletcher's failure to testify at trial. Because Fletcher failed to object at trial, he waived all but plain error. After reviewing the prosecutor's remarks, we find that plain error does not exist here because the prosecutor simply commented on the uncontroverted nature of the evidence and the lack of exculpatory evidence. The comments were not improper remarks regarding Fletcher's failure to testify. Thus, Fletcher's argument is meritless.

{¶ 2} Fletcher also contends that the verdict was against the manifest weight of the evidence because, in his view, the prevailing evidence tended to prove that he was not responsible for the theft of the victim's wallet – theft being an essential element of aggravated robbery. We disagree. The verdict was supported by circumstantial evidence, including the testimony of the victim and other witnesses, which a reasonable juror could rely upon to conclude that Fletcher was responsible for the theft of the wallet. Thus, we cannot say that the jury lost its way or created a manifest miscarriage of justice. Accordingly, we affirm the judgment of the trial court.

{¶ 3} This case arises out of an incident that occurred on September 12, 2013, in Ironton, Lawrence County, Ohio, between Fletcher and David Brooks. During that incident, Fletcher allegedly attacked Brooks while traveling as a passenger in a vehicle driven by Brooks. Following the incident, Brooks noticed that his wallet was missing from the vehicle.

{¶ 4} Fletcher was arrested on the night of the incident. Following arrest, the State filed a complaint against Fletcher in Ironton Municipal Court charging him with aggravated robbery, a first-degree felony in violation of R.C. 2911.01(A)(3). Fletcher waived his right to a preliminary hearing; and his case was bound over to the grand jury for review.

{¶ 5} On October 22, 2013, a Lawrence County grand jury indicted Fletcher on one count of aggravated robbery, a first-degree felony in violation of R.C. 2911.01(A)(3). Fletcher entered a plea of not guilty; and the case proceeded to a jury trial.

{¶ 6} At trial, Brooks testified about his encounter with Fletcher. Brooks indicated that on the night of the incident he had been driving his friend's pick-up truck in Ironton. While Brooks was travelling to McDonald's, he passed Fletcher, who was pushing a bicycle. According to Brooks, Fletcher asked for a ride to a service station to get air for his bicycle tires. Brooks

agreed to give Fletcher a ride; and Fletcher put the bicycle in the bed of the truck. Brooks then drove Fletcher to a Speedway station but the air pump was broken. Fletcher then asked Brooks to drive him to the Susan Court apartment complex in Ironton.

{¶ 7} When they arrived at the apartment complex Brooks put the truck in park. According to Brooks, it was when he placed the truck in park that Fletcher began striking him with his fist. Brooks also indicated that Fletcher had something silver-colored in or on his hand at the time of the attack. Brooks estimated that he was struck ten to fifteen times and he suffered facial lacerations, bruising, and a concussion as a result of the attack. Brooks also testified that at the time of the attack, his wallet containing $327 was sitting between the driver's and passenger's seats of the truck on the center console. After the assault, and after Fletcher exited the truck, Brooks noticed that his wallet was no longer in the vehicle.

{¶ 8} During the ambush attack, the truck shifted into drive and struck a parked vehicle. It was when the truck collided with the parked vehicle that Fletcher finally exited the truck. Brooks then fled the scene, despite the fact that the truck had hit a parked vehicle, because he was unsure of whether Fletcher would continue his attack. While en route to the residence where he had been staying in Ironton, Brooks was stopped by a City of Ironton police officer. At that time, Brooks described what had just occurred to the officer. According to Brooks, the police then returned to the scene of the incident to try and locate his wallet, but the police did not find the wallet.

{¶ 9} Terza Webb, a neighbor of Fletcher's at the Susan Court apartments, also testified at trial. Webb indicated that she heard a car crash just outside of the apartment complex. She went to investigate the sound and saw a red pickup truck leaving the scene. She also observed Fletcher at the scene; and she heard Fletcher call her name. Fletcher indicated that the man in the

truck had assaulted him and attempted to rob him. Fletcher asked to use Webb's telephone to arrange a ride to the hospital. Fletcher used the phone and was out of Webb's eyesight for three to four minutes. He then returned indicating that he could not reach anyone. Webb then called her mother and asked if she could take Fletcher to the hospital. Webb's mother arranged to pick up Fletcher and Webb near the Save-A-Lot grocery store.

{¶ 10} While en route to the hospital, Webb spotted the red pick-up truck and police officers. Fletcher indicated that he did not wish to stop, but they stopped at Webb's request. The police officers on scene spoke with Fletcher and indicated to Webb that they would take him to the hospital. Webb testified that after leaving Fletcher with the police officers, she started to believe that Fletcher might have actually been the aggressor.

{¶ 11} Webb then returned to the location near Save-A-Lot where her mother had picked her and Fletcher up. While there, Webb located brass knuckles in a grassy area near where she and Fletcher had waited for her mother. Webb retrieved the brass knuckles and took them to the Ironton Police Department. Webb also testified that she had seen Fletcher with silver-colored brass knuckles a couple of days prior to the incident with Brooks, and that Fletcher told her that he had used the brass knuckles to assault a man.

{¶ 12} Captain Pam Wagner of the Ironton Police Department also testified for the State. Wagner indicated that she was involved in the investigation of the incident. Wagner testified that on the night of the incident Fletcher indicated to her that Brooks actually assaulted him. However, after evaluating the evidence, she made the decision to arrest Fletcher and not Brooks. Wagner also testified that she and other officers returned to the scene of the incident but never did locate Brooks's missing wallet.

{¶ 13} Sergeant Brian Pauley of the Ironton Police Department also spoke with Fletcher on the night of the incident. Pauley testified that Fletcher had told him that Brooks hit him with the truck while Fletcher was riding his bicycle. Pauley was skeptical of Fletcher's version of events, however, because the bicycle was in the bed of the truck when police stopped the vehicle.

{¶ 14} After the State rested its case, the defense presented Edmond E. Allbright as its sole witness. Allbright testified that he is a representative of Decatur Township and that he signed a check made payable to an Anthony Fletcher on September 12, 2013, for $112.48. The check notes that it represents payment for labor services. However, Allbright indicated that he did not know who Anthony Fletcher was and he could not verify whether the check was delivered to Fletcher on that date.

{¶ 15} Following the presentation of evidence, counsel presented their closing arguments; and the trial court gave instructions to the jury. After deliberating, the jury found Fletcher guilty of aggravated robbery. The trial court sentenced Fletcher to nine years in prison.

{¶ 16} Fletcher now appeals raising the following assignments of error:

First Assignment of Error:

> The State of Ohio committed prosecutorial misconduct, and therefore reversible error, by inferring in closing argument that Defendant was guilty because he failed to testify on his own behalf, in violation of Defendant's 5th Amendment right against self-incrimination.

Second Assignment of Error:

> The conviction of Defendant for Aggravated Robbery was against the manifest weight of the evidence, as the jury clearly lost its way in determining that Defendant committed a theft offense.

{¶ 17} In his first assignment of error, Fletcher contends that the prosecutor engaged in misconduct by improperly commenting in closing argument that Fletcher did not testify in his

own defense. He asserts that the prosecutor's alleged misconduct violated his Fifth Amendment right against self-incrimination.

{¶ 18} Fletcher specifically contends that the following comment constituted improper remarks regarding his failure to testify:

> One thing that makes it easier for you. You don't have any evidence other than from the defense, other than a man got a check. We think it's him and I'll assume it was for a hundred and twelve dollars that day. That's the only thing you've heard from the defense as far as any evidence in the case. You still have to believe our evidence though because I've got the burden of proof.

[Tr. Transcript at 225-226.] Fletcher asserts that "[w]hile it was not stated directly that [his] failure to testify was evidence of his guilt, it can be readily inferred from the [above] statement." He claims that the remarks were "a direct implication of [his] failure to present a defense, and by extension his failure to testify."

{¶ 19} This Court previously set forth in *Wellston v. Horsley*, 4th Dist. Jackson No. 05CA18, 2006-Ohio-4386, the standard that applies when evaluating claims that the prosecutor engaged in misconduct by improperly commenting in closing argument on a defendant's failure to testify. In that case we stated the following:

> The Supreme Court of Ohio has admonished us that prosecutorial misconduct constitutes reversible error only in " 'rare instances.' " *State v. Keenan* (1993), 66 Ohio St.3d 402, 405, 613 N.E.2d 203, quoting *State v. DePew* (1988), 38 Ohio St.3d 275, 288, 528 N.E.2d. 542. "The test for prosecutorial misconduct is whether the conduct complained of deprived the defendant of a fair trial." *State v. Jackson* (2001), 92 Ohio St.3d 436, 441, 751 N.E.2d 946. "The test

for prejudice regarding prosecutorial misconduct * * * is ' "whether the remarks were improper and, if so, whether they prejudicially affected substantial rights of the defendant." ' " *State v. Hartman* (2001), 93 Ohio St.3d 274, 295, 754 N.E.2d 1150 (quoting *State v. Hessler* (2000), 90 Ohio St.3d 108, 125, 734 N.E.2d 1237 and *State v. Smith* (1984), 14 Ohio St.3d 13, 14, 470 N.E.2d 883). To establish prejudice, an accused must show that a reasonable probability exists that, but for the prosecutor's improper remarks, the result of the proceeding would have been different. *State v. Loza* (1994), 71 Ohio St.3d 61, 83, 641 N.E.2d 1082. An appellate court must examine the prosecution's closing argument in its entirety to determine whether the remarks prejudiced the defendant. *State v. Treesh* (2001), 90 Ohio St.3d 460, 466, 739 N.E.2d 749; *State v. Keenan* (1993), 66 Ohio St.3d 402, 410, 613 N.E.2d 203. It amounts to a de novo independent review.

During closing arguments, the prosecution is given wide latitude to convincingly advance its strongest arguments and positions. See *State v. Phillips* (1995), 74 Ohio St.3d 72, 90, 656 N.E.2d 643; *Treesh*, 90 Ohio St.3d at 466. Nevertheless, the prosecutor must avoid going beyond the evidence presented to the jury in order to obtain a conviction. See, e.g., *State v. Smith* (1984), 14 Ohio St.3d 13, 14, 470 N.E.2d 883. "[P]rosecutors must be diligent in their efforts to stay within the boundaries of acceptable argument and must refrain from the desire to make outlandish remarks, misstate evidence, or confuse legal concepts." *State v. Fears* (1999), 86 Ohio St.3d 329, 332, 715 N.E.2d 136.

When in a case like this, a defendant fails to object to the prosecutor's

> alleged misconduct, he waives all but plain error.[1] See Crim.R. 52; *State v. Hartman* (2001), 93 Ohio St.3d 274, 294, 754 N.E.2d 1150; *State v. Ballew* (1996), 76 Ohio St.3d 244, 254, 667 N.E.2d 369. Notice of plain error under Crim.R. 52(B) is to be taken with the utmost of caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice. See, e.g., *State v. Barnes* (2002), 94 Ohio St.3d 21, 27, 759 N.E.2d 1240; *State v. Hill* (2001), 92 Ohio St.3d 191, 196, 749 N .E.2d 274. Plain error should not be invoked unless it can be said that, but for the error, the outcome of the trial would clearly have been otherwise. See, e.g., *State v. Jackson* (2001), 92 Ohio St.3d 436, 438, 751 N.E.2d 946; *State v. Sanders* (2001), 92 Ohio St.3d 245, 263, 750 N.E.2d 90.

Horsley at ¶¶ 20-22.

{¶ 20} Besides setting forth the standard of review, *Horsley* also expounded upon the law that requires a prosecutor to refrain from commenting upon a defendant's failure to testify. Specifically, in *Horsley* we stated the following:

> A prosecutor may not comment on a defendant's failure to testify. *Griffin v. California* (1965), 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106; *State v. Fears* (1999), 86 Ohio St .3d 329, 336, 715 N.E.2d 136. However, "the prosecution is entitled to comment on [a defendant's] failure to offer evidence or to call witnesses other than the defendant." *State v. Simpson*, Montgomery App. No. 19797, 2004-Ohio-669, at ¶ 65; see, also, *State v. D'Ambrosio* (1993), 67 Ohio St.3d 185, 193, ("Defendant further argues that the prosecutor had no right to draw an unfavorable inference from the defense's failure to call [a particular

[1] Fletcher, like the defendant in *Horsley*, did not object at trial to the alleged misconduct.

witness], because the prosecutor had an equal chance to call her if he thought her testimony would aid the state. However, defendant could have easily pointed that out to the trier of fact."). The test for prosecutorial misconduct in referring to a defendant's failure to testify is "whether the language used was manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify." *State v. Webb* (1994), 70 Ohio St.3d 325, 328, 638 N.E.2d 1023, quoting *Knowles v. United States* (C.A .10, 1955), 224 F.2d 168, 170.

A prosecutor's comment that the evidence is uncontradicted or uncontroverted does not constitute misconduct. See *State v. Madsen,* Cuyahoga App. No. 82399, 2004-Ohio-4895, citing *State v. Wade* (1978), 53 Ohio St.2d 182, 373 N.E.2d 1244. " 'The prosecution is not prevented from commenting upon the failure of the defense to offer evidence in support of its case.' " *State v. Watson,* 61 Ohio St.3d at 9, 572 N.E.2d at 106, quoting *State v. Williams* (1986), 23 Ohio St.3d 16, 20, 490 N.E.2d 906; see, also, *Lockett v. Ohio* (1978), 438 U.S. 586, 595, 98 S.Ct. 2954, 57 L.Ed.2d 973. A jury would not "naturally and necessarily" interpret such comments as comments on an accused's failure to testify. *Watson;* see, also, *State v. Elliott* (1993), 91 Ohio App.3d 763, 774, 633 N.E.2d 1144. As the court explained in *State v. Collins* (2000), 89 Ohio St.3d 524, 527-528, 733 N.E.2d 1118:

> "It is long-standing precedent that the state may comment upon a defendant's failure to offer evidence in support of its case. *State v. D'Ambrosio* (1993), 67 Ohio St.3d 185, 193, 616 N.E.2d 909, 916; *State*

> *v. Williams* (1986), 23 Ohio St.3d 16, 20, 23 OBR 13, 17, 490 N.E.2d 906, 911; *State v. Petro* (1948), 148 Ohio St. 473, 498, 36 O.O. 152, 162, 76 N.E.2d 355, 367; and *State v. Champion* (1924), 109 Ohio St. 281, 289-290, 142 N.E. 141, 143-144. Such comments do not imply that the burden of proof has shifted to the defense, nor do they necessarily constitute a penalty on the defendant's exercise of his Fifth Amendment right to remain silent. A prosecutor may jeopardize the integrity of a trial by commenting on a criminal defendant's decision not to testify. *State v. Thompson* (1987), 33 Ohio St.3d 1, 4, 514 N.E.2d 407, 411, citing *Griffin v. California* (1965), 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106, 32 O.O.2d 437. Nevertheless, the prosecutor is not precluded from challenging the weight of the evidence offered in support of an exculpatory theory presented by the defense. See *State v. Watson* (1991), 61 Ohio St.3d 1, 9, 572 N.E.2d 97, 105-106. Neither must the state, in order to satisfy its own burden of proof, disprove every speculative set of possibly exculpatory circumstances a defendant can suggest, nor refrain from arguing the defendant's failure to provide evidence to support proffered theories of excuse or innocence."

Id. at ¶¶ 24-25.

{¶ 21} Here, the language used by the prosecutor in closing argument was not manifestly intended to be a comment on Fletcher's failure to testify at trial, nor were the remarks of such a character that the jury would naturally and necessarily take it to be a comment on his failure to testify. Rather, the prosecutor merely commented on the absence of evidence to dispute the

State's version of the events and the uncontroverted nature of the case. Such comments are not improper and do not constitute misconduct. Moreover, the comments at issue do not constitute a penalty on Fletcher's decision to exercise his Fifth Amendment right to remain silent. Accordingly, Fletcher's first assignment of error is overruled.

{¶ 22} In his second assignment of error, Fletcher contends that his conviction for aggravated robbery is against the manifest weight of the evidence. Fletcher was charged with aggravated robbery under R.C. 2911.01(A)(3), which states: "No person, in attempting or committing a theft offense, as defined in section 2913.01 of the Revised Code, or in fleeing immediately after the attempt or offense, shall * * * [i]nflict, or attempt to inflict, serious physical harm on another." Fletcher argues that the jury clearly lost its way in determining that he committed a theft offense; he does not challenge the serious physical harm element.

{¶ 23} "When an appellate court considers a claim that a conviction is against the manifest weight of the evidence, the court must dutifully examine the entire record, weigh the evidence, and consider the credibility of witnesses." *State v. Topping*, 4th Dist. Lawrence No. 11CA6, 2012-Ohio-5617, ¶ 60. "The reviewing court must bear in mind, however, that credibility generally is an issue for the trier of fact to resolve." *Id.*, citing *State v. Issa*, 93 Ohio St.3d 49, 67, 752 N.E.2d 904 (2001), and *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus. "The trier of fact 'is best able to view the witnesses and observe their demeanor, gestures, and voice inflections, and use these observations in weighing the credibility of the proffered testimony.' " *State v. Pippen*, 4th Dist. Scioto No. 11CA3412, 2012–Ohio–4692, ¶ 31, quoting *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984).

{¶ 24} "Once the reviewing court finishes its examination, the court may reverse the judgment of conviction only if it appears that the fact-finder, when resolving the conflicts in evidence, clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." (Quotations omitted.) *State v. Davis*, 4th Dist. Ross No. 12CA3336, 2013-Ohio-1504, ¶ 14.

{¶ 25} If the prosecution presented substantial evidence upon which the trier of fact reasonably could conclude, beyond a reasonable doubt, that the essential elements of the offense had been established, the judgment of conviction is not against the manifest weight of the evidence. *State v. Cooper*, 170 Ohio App.3d 418, 2007-Ohio-1186, 867 N.E.2d 493, ¶ 16 (4th Dist.). A reviewing court should find a conviction against the manifest weight of the evidence only in the " 'exceptional case in which the evidence weighs heavily against the conviction.' " *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997), quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983); *see also State v. Lindsey*, 87 Ohio St.3d 479, 483, 721 N.E.2d 995 (2000).

{¶ 26} Fletcher argues that because no one, including the victim, witnessed him taking the wallet, and because the wallet was not in his possession at the time of his arrest, there was not enough credible evidence to establish the element of theft. Furthermore, Fletcher argues that he did not have a motive to commit theft because he received a paycheck on the day of the incident. Finally, Fletcher contends "there are other equally likely explanations for the wallet's disappearance" – noting that the wallet could have been accidently kicked out of the truck during his tussle with Brooks. We disagree.

{¶ 27} Brooks testified that the wallet was present inside of the truck - on the center console between the driver's and passenger's seats - prior to Fletcher entering the vehicle.

Furthermore, Brooks testified that after the incident with Fletcher the wallet was missing. Thus, if Brooks is to be believed[2], enough evidence existed to establish the element of theft. *See State v. Simon,* 6th Dist. Huron No. H–04–026, 2005–Ohio–3208, ¶ 13 ("[D]irect evidence is not required to support a conviction; a fact may be proved by circumstantial evidence as well as by direct evidence."), and *State v. Nevius,* 147 Ohio St. 263, 71 N.E.2d 258 (1947), paragraph five of the syllabus ("In a criminal prosecution the corpus delicti may be established by circumstantial evidence where the inference of the happening of the criminal act complained of is the only probable or natural explanation of the proven facts and circumstances."). In other words, as the trier of fact, the jury could properly conclude that even though Brooks did not see Fletcher take the wallet from the truck, it does not mean that the theft did not in fact happen.

{¶ 28} Next, Fletcher contends that because the wallet was not found on his person when he was arrested by law enforcement on the night of the incident, the State failed to establish the theft element. However, Fletcher ignores the testimony of Webb, who indicated that Fletcher was alone for three to four minutes following the incident. Certainly, the jury could have concluded that Fletcher stashed the wallet in a hiding place or otherwise disposed of the wallet during this time period. We are also not persuaded by Fletcher's argument that he did not have a motive to steal the wallet because he may have received a paycheck on the date of the incident. Motive is not an element of aggravated robbery. And we note that " '[w]hen conflicting evidence is presented at trial, a conviction is not against the manifest weight of the evidence simply because the jury believed the prosecution testimony.' " *Cooper,* 170 Ohio App.3d 418, 2007–Ohio–1186, 867 N.E.2d 493, at ¶ 17, quoting *State v. Mason,* 9th Dist. Summit No. 21397, 2003–Ohio–5785, ¶ 17.

[2] Such a credibility determination is best left to the trier of fact, which actually observed Brooks's testimony.

{¶ 29} Finally, Fletcher contends that the trial evidence could equally support the conclusion that the wallet was simply lost during the course of events. However, both Brooks and Captain Wagner testified that law enforcement officers searched the area near the incident for the missing wallet and could not locate it. Thus, the jury could have reasonably rejected or discounted the notion that the wallet was simply missing.

{¶ 30} This court may reverse a conviction and order a new trial only in the exceptional case where the evidence weighs heavily in favor of the defendant and where it is clear that the jury lost its way or created a manifest miscarriage of justice. This is not such a case. Rather, when viewing the record in its totality, there was substantial, competent, and credible evidence upon which the jury could base its verdict. Accordingly, the verdict was not against the manifest weight of the evidence; and Fletcher's second assignment of error is overruled.

{¶ 31} Based on the foregoing, we overrule both of Fletcher's assignments of error and affirm the judgment of the trial court.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

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

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Lawrence County Common Pleas Court 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 the proceedings in that court. If a stay is continued by this entry, it will terminate at the earliest 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 the 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.

Harsha, J., and Abele, J.: Concur in Judgment and Opinion.

For the Court

By:_____
Marie Hoover, Presiding 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.