

COURT OF APPEALS  
STARK COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

|                     |   |                          |
|---------------------|---|--------------------------|
| STATE OF OHIO       | : | JUDGES:                  |
|                     | : | Hon. W. Scott Gwin, P.J. |
|                     | : | Hon. Sheila Farmer, J.   |
| Plaintiff-Appellee  | : | Hon. Julie Edwards, J.   |
|                     | : |                          |
| -vs-                | : |                          |
|                     | : | Case No. 2001CA00322     |
| KEITH HOSCHAR       | : |                          |
|                     | : |                          |
| Defendant-Appellant | : | <u>OPINION</u>           |

CHARACTER OF PROCEEDING: Criminal Appeal from Stark County Court of  
Common Pleas Case 2001CR0196(B)

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: August 26, 2002

APPEARANCES:

For Plaintiff-Appellee

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For Defendant-Appellant

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*Edwards, J.*

{¶1} Defendant-appellant Keith Hoschar appeals his September 21, 2001, conviction and sentence from the Stark County Court of Common Pleas on one count of assault. Plaintiff-appellee is the State of Ohio.

#### STATEMENT OF THE FACTS AND CASE

{¶2} Defendant-appellant Keith Hoschar [hereinafter appellant] was indicted on one count of felonious assault, in violation of R. C. 2903.11(A)(1). The indictment alleged that appellant and Jeremy Scott Riley knowingly caused serious physical harm to Matthew Balala [hereinafter victim], and/or did aide or abet each other in committing the offense.

{¶3} The indictment arose from an assault which took place in the early morning hours of July 1, 2001. At about 2:45 a.m. on July 1, 2001, Edwin Knotts [hereinafter Knotts] was in the bar he owned, known as The Village Tavern. The bar had closed at 2:30 a.m. Knotts was cleaning up the bar with his friend, Jeffrey Miller [hereinafter Miller], when they each heard a loud bang near the front door.

{¶4} Knotts and Miller went to a window and saw two assailants standing over the victim and kicking him. Miller described the victim as laying in a fetal position while one assailant kicked the victim in the face and the other assailant kicked the victim in the back. Both Knotts and Miller described the victim as bleeding heavily and lying in a pool of his own blood.

{¶5} Knotts and Miller went outside to stop the attack and made sure that the assailants did not leave the scene. Knotts held the larger assailant and Miller kept the smaller assailant, appellant, from leaving.

{¶6} Massillon Police Sergeant Kevin Smith and Massillon Police Officer Thomas Solinger arrived at the scene. The victim was transported from the scene by ambulance to

a hospital.

{¶7} The matter proceeded to a jury trial conducted September 17, 2001. At trial, Miller identified appellant as the smaller assailant he had kept at the scene. On September 18, 2001, the jury returned a verdict of guilty on one count of assault, in violation of R. C. 2903.13.

{¶8} On September 21, 2001, the trial court issued a judgment entry which found appellant guilty of the lesser offense of assault and sentenced appellant to six months in the Stark County Jail.

{¶9} It is from the September 21, 2001, conviction and sentence that appellant prosecutes this appeal, raising the following assignments of error:

{¶10} “I. THE JURY VERDICT FINDING APPELLANT GUILTY OF ASSAULT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

{¶11} “II. THE TRIAL COURT ERRED IN FAILING TO PROPERLY SANCTION THE PROSECUTOR FOR VIOLATING CRIMINAL PROCEDURE RULE 16 THEREBY DENYING APPELLANT A FAIR TRIAL.

{¶12} “III. THE TRIAL COURT ERRED IN NOT ORDERING A MISTRIAL FOLLOWING IMPROPER CLOSING ARGUMENT BY PROSECUTION.”

I

{¶13} In the first assignment of error, appellant argues that his conviction for assault was against the manifest weight of the evidence. We disagree.

{¶14} In reviewing whether a conviction is against the manifest weight of the evidence, our standard of review is as follows: The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses

and determines whether in resolving conflicts in the evidence, the trier of fact 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. Martin* (1983), 20 Ohio App.3d 172, 485 N.E.2d 717. The discretionary power to grant a new hearing should be exercised only in the exceptional case in which the evidence weighs heavily against the judgment. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541 (quoting *State v. Martin*, supra at 175); see, also, *State v. Otten* (1986), 33 Ohio App.3d 339, 340, 515 N.E.2d 1009. Because the trier of fact is in a better position to observe the witnesses' demeanor and weigh their credibility, the weight of the evidence and the credibility of the witnesses are primarily for the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, paragraph one of the syllabus.

{¶15} Appellant was convicted of assault, in violation of R.C. 2903.13(A). Revised Code 2903.13(A) states the following, in relevant part: "No person shall knowingly cause or attempt to cause physical harm to another. . . ."

{¶16} Appellant's argument is based primarily on the lack of physical evidence that appellant was one of the assailants. Appellant points out that the victim was drunk that night and then failed to appear to testify at trial. Appellant claims that the only witness that identified appellant as an assailant had been drinking that night. Appellant also argues that the witnesses testified that the assailants were kicking the victim and there was a lot of blood. Appellant contends that the conviction was against the manifest weight of the evidence because appellant did not have blood on his shoes or clothes.

{¶17} We find that appellant's conviction was not against the manifest weight of the evidence. Although the victim did not appear to testify, Miller identified appellant as one of the assailants that was kicking the victim while the victim lay on the ground in a pool of blood. The victim was unconscious after the attack and was taken to a hospital for

treatment. Although appellant challenges Miller's testimony because Miller admitted he had consumed six drinks earlier that evening, the testimony also showed that Miller had consumed the drinks at dinner. By the time the assault occurred, over eight hours had passed since the time Miller had consumed the drinks.

{¶18} As to the lack of blood on appellant's shoes or clothes, the investigating officers did not photograph the shoes or clothes. The Officer testified that if he had seen blood on appellant's clothing or shoes, he would have secured the objects. However, Miller, the eyewitness, saw one of the assailants kicking the victim in the head while the other assailant kicked the victim in the back. The victim was lying in a fetal position. Miller testified that the other assailant, not appellant, was standing on the victim's face side. That would place appellant on the back side of the victim. Appellant would have been the assailant kicking the victim in the back, rather than in the head. Medical records showed that the victim's significant injuries were to the victim's head and that his face was bleeding. Therefore, since appellant was not the assailant kicking the victim in the head and face, it was less likely that appellant would get blood on his shoes.

{¶19} In conclusion, we find that the conviction was not against the manifest weight of the evidence. A witness saw appellant kicking the victim. The victim was injured and taken to the hospital for treatment. We find that the jury did not lose its way or create a manifest miscarriage of justice.

{¶20} Appellant's first assignment of error is overruled.

## II

{¶21} In the second assignment of error, appellant contends that the trial court abused its discretion when it failed to grant appellant's motion for a mistrial based upon a discovery violation. We disagree.

{¶22} At trial, a witness for the State, Sergeant Smith, testified about statements

appellant made immediately after the assault. Although the State had previously provided statements made by appellant in its response to a discovery request, Sergeant Smith's statement at trial was not provided. The statements provided to appellant during pre-trial discovery consisted of the following: "[Appellant] made a spontaneous statement that the victim struck him first and that [appellant] tackled the victim. [Appellant] said when he tackled the victim, the victim's head struck the front door of the Village Tavern." State's Response to Request for Discovery. However, at trial, Sergeant Smith testified as follows: "I asked [appellant] just what happened. He stated that they were walking by the bar, that the victim came out. I believe, if I remember correctly, he asked him for a light. Some words were exchanged. The [appellant] made the statement to me that the victim took a swing at him and that he was so drunk he missed. - -." T.(II) 187-188.

{¶23} Upon appellant's objection and motion for mistrial, the trial court inquired into the circumstances. The prosecuting attorney confirmed that appellant's alleged statement had not previously been provided to appellant. The prosecutor explained that he was not aware of this alleged statement until Sergeant Smith testified. After considering the arguments of appellant's counsel and the prosecuting attorney, the trial court denied appellant's motion for a mistrial and issued a curative instruction to the jury. The jury was told to disregard any of Sergeant Smith's testimony that concerned any statement appellant allegedly made that night.<sup>1</sup>

{¶24} Appellant contends the trial court abused its discretion when it denied the motion for a mistrial. Appellant's argument is based upon Crim. R. 16(E)(3), which states the following: "Failure to comply [with discovery procedures]. If at any time during the

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<sup>1</sup> The trial court gave a curative instruction for the jury to "disregard anything which [Sergeant Smith] said about any statements made to him by the [appellant] or any statement which he heard the [appellant] make on the morning of July 1." T. (II) 188-201.

course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may make such other order as it deems just under the circumstances.” Criminal Rule 16(E)(3) vests in the trial court the discretion to determine the appropriate response for failure of a party to disclose material subject to a valid discovery request. *State v. Wiles* (1991), 59 Ohio St.3d 71,78, 571 N.E.2d 97. In exercising that discretion, “a trial court must inquire into the circumstances surrounding a discovery rule violation and, when deciding whether to impose a sanction, must impose the least severe sanction that is consistent with the purpose of the rules of discovery.” *City of Lakewood v. Papadelis*, (1987), 32 Ohio St.3d 1, 5, 511 N.E.2d 1138. Should a trial court choose to issue a curative instruction as a result of a discovery violation, “[a] jury is presumed to follow [the] curative instructions.” *State v. Loza*, 71 Ohio St.3d 61, 75, 1994-Ohio-0409, 641 N.E.2d 1082.

{¶25} In this case, appellant sought a mistrial. Mistrials need only be declared when the ends of justice so require and a fair trial is no longer possible. *State v. Garner*, (1995), 74 Ohio St.3d 49, 59, 1995-Ohio-0168, 656 N.E.2d 623; *State v. Franklin* (1991), 62 Ohio St.3d 118, 127, 580 N.E.2d 1.

{¶26} We find that the trial court did not abuse its discretion in denying appellant’s motion for a mistrial and in issuing the curative instruction. It does appear that the State failed to provide the statement testified to by Sergeant Smith, as required by Crim. R. 16. Despite the prosecutor’s claimed lack of knowledge of the statement, knowledge on the part of a law enforcement officer must be imputed to the state. *State v. Wiles*, supra at 78 (citing *State v. Sandlin* (1983), 11 Ohio App.3d 84, 89, 463 N.E.2d 85, 90-91). However, there is nothing in the record to indicate that the prosecuting attorney was aware of these

statements prior to the trial such as to suggest a willful violation of Crim.R. 16.

{¶27} Further, appellant was aware, through the discovery response that was provided, that the State claimed that appellant made statements to the police that night. It is only the content of the statements that were at issue. The content of the undisclosed statement did not directly implicate appellant as an assailant. Appellant's defense centered around the contention that only the other alleged assailant kicked the victim, causing serious physical harm to the victim. However, the undisclosed statement was not in contradiction to appellant's assertion that he did not cause serious physical harm to the victim. Therefore, despite the jury hearing Sergeant Smith's undisclosed statement, we find that the issuance of the curative instruction was not an abuse of discretion. Despite the trial court's denial of appellant's motion for a mistrial, appellant was able to receive a fair trial.

{¶28} Appellant's second assignment of error is overruled.

### III

{¶29} In the third assignment of error, appellant contends that the trial court should have granted a motion for a mistrial following improper closing argument by the prosecuting attorney. We disagree.

{¶30} The test for prosecutorial misconduct is whether the remarks made by the prosecution were improper and, if so, whether they prejudicially affected substantial rights of the accused. *State v. White* (1998), 82 Ohio St.3d 16, 22, 693 N.E.2d 772, rehearing/reconsideration denied (1998), 82 Ohio St.3d 1469, 1470, 696 N.E.2d 226; *State v. Smith* (1984), 14 Ohio St.3d 13, 14, 470 N.E.2d 883. Reversal based upon improper statements is warranted "only if [they] 'permeate[d] the entire atmosphere of the trial.' " *State v. Tumbleson* (1995), 105 Ohio App.3d 693, 699, 664 N.E.2d 1318. "In general terms, the conduct of a prosecuting attorney during trial cannot be made a ground of error



unless that conduct deprives the defendant of a fair trial.” *State v. Papp* (1978), 64 Ohio App.2d 203, 211, 412 N.E.2d 401, 407.

{¶31} Wide latitude is afforded both parties during closing arguments. *State v. Smith* (1984), 14 Ohio St.3d 13, 14, 14 OBR 317, 318-319, 470 N.E.2d 883, 885. This latitude, however, does not "encompass inviting the jury to reach its decision on matters outside the evidence adduced at trial" or "allud[ing] to matters not supported by admissible evidence." *State v. Freeman* (2000), 138 Ohio App.3d 408, 419, 741 N.E.2d 566. Prosecutors should not appeal to public sentiment in closing arguments by urging the jurors to protect society, See *State v. Spirko* (1991), 59 Ohio St.3d 1, 13, or to consider what could have happened, *State v. Hart* (March 14, 2002), Cuyahoga No. 79564, 2002-Ohio-1084.

{¶32} In the case sub judice, appellant contends that the prosecuting attorney went beyond the facts in the case in two instances. First, appellant points to the prosecuting attorney’s request that the jury think what would have happened if Knotts and Miller were not in the bar that night.<sup>2</sup> Second, the prosecutor argued that the jury was not there to protect just the victim because he had already been beaten. The prosecutor argued that the jury was there to prevent this from happening to other people.<sup>3</sup> Appellant motioned for a mistrial, but the motion was overruled.

{¶33} The comments by the prosecuting attorney improperly invited the jury to decide this case on matters outside of the evidence. However, when these comments are viewed in the context of the whole trial, we cannot conclude that the prosecutor's comments denied appellant a fair trial.

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<sup>2</sup> The trial court sustained appellant’s objection to this comment.

<sup>3</sup> The trial court overruled objections raised by appellant to that argument.

{¶34} The prosecuting attorney's comments were brief and there is no indication that the comments inflamed or impassioned the jury. In fact, although appellant was charged with felonious assault, the jury returned a conviction for the lesser included offense of assault. We find that based upon the evidence presented and the jury's conviction for a lesser included offense of assault, any improper argument did not prejudicially affect appellant's substantial rights. Appellant was not deprived of a fair trial as a result of the prosecutor's statements. Therefore, we conclude that the trial court did not abuse its discretion when it denied appellant's motion for a mistrial following the closing argument.

{¶35} Appellant's third assignment of error is overruled.

{¶36} The judgment of the Stark County Court of Common Pleas is affirmed.

By Edwards, J.

Gwin, P.J. and

Farmer, J. concur

Topic: Assault - Manifest Weight