

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

JEFFREY A. HARRINGTON

Defendant-Appellant

JUDGES:

Hon. W. Scott Gwin, P.J.
Hon. William B. Hoffman, J.
Hon. Sheila G. Farmer, J.

Case No. 15-CA-10

O P I N I O N

CHARACTER OF PROCEEDING:

Appeal from the Licking County Common
Pleas Court, Case No. 14CR462

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

October 16, 2015

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

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Hoffman, J.

{¶1} Defendant-appellant Jeffrey A. Harrington appeals his conviction on two counts of domestic violence entered by the Licking County Court of Common Pleas. Plaintiff-appellee is the state of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} Appellant was charged with two counts of domestic violence. Both counts involve incidents with A.H., Appellant's wife. The first incident stemmed from A.H.'s boyfriend sending A.H.'s daughter a birthday card. Appellant became upset at A.H., pushed her down, choked her, hit her in the throat, and fled the scene. A.H. did not cooperate with the prosecution and avoided being served with the Grand Jury subpoena. A.H. told the police she was afraid of what Appellant would do when he got out of jail.

{¶3} While Appellant was in jail waiting for the Grand Jury to convene, he called A.H. to apologize.

{¶4} The second incident involved Appellant slapping A.H. in the face while they were in a car. After Appellant got out of jail, A.H. went to a bar to meet him. Appellant became angry with A.H. and backhanded her in the mouth while she was driving. He was arrested shortly thereafter.

{¶5} Appellant made numerous phone calls to A.H. after he was arrested to apologize to her. He then begged A.H. not to appear in court. He asked A.H. to lie, and told her if she appeared in court, he would be gone for years.

{¶6} Appellant was charged with two counts of domestic violence, in violation of R.C. 2919.25, felonies of the third degree.

{¶7} A.H. did not appear for the initial scheduled trial despite being served. A warrant was subsequently issued for her arrest, and she was later found with Appellant. A.H. admitted on the stand she did not want to testify or to be in court.

{¶8} Following a jury trial, Appellant was convicted of the two counts of domestic violence. The jury made special findings Appellant had been convicted of domestic violence on two or more prior occasions. The trial court sentenced Appellant to two years on each count to run consecutively for an aggregate term of four years at the Orient Reception Center. The trial court also imposed a mandatory term of post-release control.

{¶9} Appellant assigns as error:

{¶10} "I. THE PROSECUTOR COMMITTED PROSECUTORIAL MISCONDUCT BY USING LEADING QUESTIONS ON HIS OWN WITNESSES, THEREBY DEPRIVING THE APPELLANT THE RIGHT TO A FAIR TRIAL.

{¶11} "II. THE PROSECUTOR'S PERCEIVED VIOLATION OF VARIOUS RULES OF EVIDENCE, ALONG WITH ELICITING AND GIVING TESTIMONY CALLING FOR SPECULATION, AND HIS OVERALL QUESTIONABLE TRIAL TACTICS RESULTED IN CUMULATIVE ERROR THAT DEPRIVED THE APPELLANT OF HIS RIGHT TO A FAIR TRIAL.

I.

{¶12} In the first assigned error, Appellant asserts the prosecutor herein committed prosecutorial misconduct by using leading questions on his own witnesses; thereby depriving Appellant of the right to a fair trial.

{¶13} Initially, we note, the trial court did not declare A.H. to be the court's witness pursuant to Ohio Evidence Rule 614. However, Evidence Rule 611 provides,

(C) Leading questions. Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

{¶14} A leading question is "one that suggests to the witness the answer desired by the examiner." 1 McCormick, Evidence (5th Ed.1999) 19, Section 6. Under Evid.R. 611(C), "[l]eading questions should not be used on the direct examination of a witness except as may be necessary to develop his testimony." However, the trial court has discretion to allow leading questions on direct examination. *State v. D'Ambrosio*, (1993), 67 Ohio St.3d 185, 190, 616 N.E.2d 909.

{¶15} Here, the record demonstrates A.H. was a reluctant, adverse witness, and the state needed to develop her testimony with leading questions. A.H. testified Appellant asked her not to testify and she did not appear at the previously scheduled trial. A.H. only appeared subsequent to the state's issuing a warrant for her appearance. Under these circumstances and although the state could not claim surprise, we find the trial court did not abuse its discretion in allowing the state to pose leading questions to A.H. in order to further develop her testimony. Additionally, the record demonstrates some or much of the testimony concerned matters proven by other testimony from A.H.'s

friend Mandy Perry. Appellant was given an opportunity to fully cross-examine A.H. We find no prejudicial error resulted.

{¶16} The first assignment of error is overruled.

II.

{¶17} In the second assignment of error, Appellant asserts cumulative error due to the other acts evidence introduced, the questions posed by the state calling for speculation and the implication the prosecutor was unethical.

{¶18} Misconduct of a prosecutor at trial will not be considered grounds for reversal unless the conduct deprives the defendant of a fair trial. *State v. Apanovitch* (1987), 33 Ohio St.3d 19, 514 N.E.2d 394; *State v. Maurer* (1984), 15 Ohio St.3d 239, 15 OBR 379, 473 N.E.2d 768. The touchstone of analysis is “the fairness of the trial, not the culpability of the prosecutor.” *State v. Underwood* (1991), 73 Ohio App.3d 834, 840-841, 598 N.E. 2d 822, 826, citing *Smith v. Phillips* (1982), 455 U.S. 209, 219, 102 S.Ct. 940, 947, 71 L.Ed.2d 78, 87-88. An appellate court should also consider whether the misconduct was an isolated incident in an otherwise properly tried case. *State v. Keenan* (1993), 66 Ohio St.3d 402, 410, 613 N.E.2d 203, 209-210; *Darden v. Wainwright* (1986), 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144.

{¶19} Appellant's brief notes a small handful of examples, but does not delineate all instances of improper questions. Rather, Appellant conclusorily argues the prosecutor's "perceived violation of various Rules of Evidence, along with eliciting and giving testimony calling for speculation, and his overall questionable trial tactics resulted in cumulative error."

{¶20} Appellant cites neither rule of criminal procedure nor statute alleged to have been violated by the prosecutor herein.

{¶21} “It is the duty of the appellant, not this court, to demonstrate [his] assigned error through an argument that is supported by citations to legal authority and facts in the record.” *State v. Taylor* (Feb. 9, 1999), 9th Dist. No. 2783-M. See, also, App.R. 16(A)(7). “It is not the function of this court to construct a foundation for [an appellant's] claims; failure to comply with the rules governing practice in the appellate courts is a tactic which is ordinarily fatal.” *Kremer v. Cox* (1996), 114 Ohio App.3d 41, 60.

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

{¶23} Appellant's conviction in the Licking County Court of Common Pleas is affirmed.

By: Hoffman, J.

Gwin, P.J. and

Farmer, J. concur