

IN THE COURT OF APPEALS OF OHIO  
SIXTH APPELLATE DISTRICT  
FULTON COUNTY

State of Ohio

Court of Appeals No. F-11-010

Appellee

Trial Court No. 10CR62

v.

Tyler A. Hurst

**DECISION AND JUDGMENT**

Appellant

Decided: June 8, 2012

\* \* \* \* \*

Scott A. Haselman, Fulton County Prosecuting Attorney, and  
Paul H. Kennedy, Assistant Prosecuting Attorney, for appellee.

Eric Allen Marks, for appellant.

\* \* \* \* \*

**OSOWIK, J.**

{¶ 1} This is an appeal from a judgment of the Fulton County Court of Common Pleas. On March 4, 2011, the trial court convicted appellant, Tyler A. Hurst, of one count of felonious assault. Appellant was sentenced to a four-year term of incarceration. For the reasons set forth below, this court affirms the judgment of the trial court.

{¶ 2} Appellant set forth the following three assignments of error:

1. It constituted plain error and prosecutorial misconduct when evidence of defendant's pre-arrest silence was admitted into evidence.
2. Appellant was denied his right to effective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 10 of the Ohio Constitution.
3. Appellant was denied due process under Section 10 of Article 1 of the Ohio Constitution and the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution in the form of cumulative error.

{¶ 3} On Friday, April 30, 2010, a group of friends went out together for an evening of drinking in Swanton, Ohio. The group included appellant, appellant's girlfriend, and the victim. The group went together to the Free Bird bar in Swanton. After midnight, appellant and the victim left the bar. They walked to a nearby gas station for food. Appellant left the gas station by himself and walked north on Hallet Avenue. The victim attempted to rejoin appellant. Appellant conveyed that he wanted to be left alone. The victim later followed appellant to the Main Street apartment of a mutual friend. There were people gathered outside the friend's apartment. They had gathered there to continue to drink after leaving the bar. Although the friend was not home, the appellant, the victim, and others remained at the apartment drinking and socializing.

{¶ 4} Later that night, appellant severely assaulted the victim, fracturing facial bones. The victim received emergency room treatment. Several eyewitnesses, from the

post-bar gathering, testified to having observed appellant assault the victim. Notably, the witnesses were friends of both appellant and the victim. One witness testified that he observed appellant punching the victim and further testified that the victim was putting his hands up to protect himself. Several of the witnesses testified to having physically restrained appellant to stop the assault. Appellant attempted to strike the witnesses, got away from them, and then turned and hit the victim yet again. The victim was knocked unconscious. Appellant fled the scene prior to the arrival of the police.

{¶ 5} Patrolman Adam Berg testified that during his patrol of Swanton that night he heard a disturbance coming from an apartment complex on Main St. Berg stopped at the complex and found the injured victim. On May 2, 2010, Berg and Officer Lofiego went to the victim's apartment to obtain his statement. When exiting the police car, Berg saw appellant and his girlfriend leaving the apartment building. Upon seeing the approaching officers, appellant fled the scene. Appellant disobeyed their repeated orders for him to stop. The officers later located appellant wandering elsewhere in Swanton. They again attempted to question appellant. Appellant fled from the police a second time.

{¶ 6} In his first assignment of error, appellant alleges that the admission of evidence that he fled from the police and that he never contacted the police to give a voluntary statement was a violation of his Fifth Amendment rights which constituted prosecutorial misconduct and tainted the fairness of his trial.

{¶ 7} In support, appellant relies on and cites to *State v. Leach*, 102 Ohio St.3d 135, 2004-Ohio-2147, 807 N.E.2d 335. In *Leach* the Ohio Supreme Court held that the use of a defendant's pre-arrest silence as substantive evidence of guilt violates the Fifth Amendment privilege against self-incrimination. *State v. Leach*, 102 Ohio St.3d 135, 2004-Ohio-2147, 807 N.E.2d 335. The court stated that since the evidence of guilt was not overwhelming, the admission of the pre-arrest, pre-Miranda silence was clearly prejudicial. *Id.* However, the case at hand is materially distinguishable from *Leach*. The record reflects that the evidence of guilt in this case, separate and apart from the pre-arrest silence, was overwhelming. There were multiple eyewitnesses who testified to having witnessed appellant's assault of the victim. They even intervened in an effort to end the assault. Appellant argues that this case and *Leach* are similar. We find that they are not.

{¶ 8} Citing *Leach*, the First District Court of Appeals held in *State v. Sargent*, 169 Ohio App.3d 679, 2006-Ohio-6823, 864 N.E.2d 155 (1st Dist.), that a prosecutor's remarks about a defendant who ran when police tried to stop him for questioning were improper and prejudicial. However, when reversing the conviction the court noted that the evidence was limited to eyewitness testimony solely from the victim and that the prosecutor had also argued the defendant should have offered an alternative explanation of the event. By contrast, in this case, there is ample, independent evidence of appellant's guilt.

{¶ 9} The test for prosecutorial misconduct is whether the prosecutor's remarks were improper, and if they were, did they prejudicially affect the defendant's substantial rights. *Id.* The standard of analysis is not that of the prosecutor's blameworthiness, but actually the level of fairness of the trial. Plain error does not exist unless, but for the error, the trial's outcome would have been different. *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978).

{¶ 10} Given the referenced legal precedent, we note that appellant's first assignment of error is based upon an incomplete application of the precedent set in *Leach*. The record contains overwhelming testimony of appellant's guilt. As such, the disputed evidentiary admission did not constitute plain error. Appellant's first assignment of error is not well-taken.

{¶ 11} In appellant's second assignment of error, he asserts that he was denied effective assistance of counsel because his counsel did not object to hearsay testimony, object to speculative testimony, object to admission of evidence of pre-arrest silence, preserve the record for appeal, argue the correct mens rea during counsel's motion for the judgment of acquittal, and call witnesses to demonstrate provocation by the victim.

{¶ 12} To demonstrate ineffective assistance of counsel one must show both that counsel's performance was deficient and that counsel's errors were so serious as to deprive the appellant of a fair trial. *Strickland v. Washington*, 466 U.S. 668, 670, 104 S.Ct. 2052, 2056, 80 L.Ed.2d 674 (1984). Appellant must establish that, but for his counsel's errors, he would not have been convicted. *Id.*

{¶ 13} Appellant has failed to establish that there was any actual prejudice to his trial from his attorney's failure to preserve the record. We have reviewed the trial record and there is no evidence that, but for any of counsel's perceived missteps, appellant would not have been convicted. The record encompasses overwhelming, compelling evidence of appellant's guilt. Appellant's second assignment of error is not well-taken.

{¶ 14} Appellant's third and final assignment of error is that the cumulative effect of the previously mentioned errors deprived him of a fair trial. However, for the reasons set forth, the previous two assignments of error have been rejected, making cumulative error moot. As such we find appellant's third assignment of error is not well-taken.

{¶ 15} On consideration whereof, the judgment of the Fulton County Court of Common Pleas is affirmed. Appellant is ordered to pay costs of this appeal pursuant to App.R.24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Arlene Singer, P.J.

JUDGE

Thomas J. Osowik, J.

JUDGE

Stephen A. Yarbrough, J.  
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:  
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