[Cite as *State v. Renfroe*, 2013-Ohio-5179.]

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

State of Ohio — Court of Appeals No. L-12-1146

Appellee — Trial Court No. CR0201201291

v.

Kiron Renfroe — **DECISION AND JUDGMENT**

Appellant — Decided: November 22, 2013

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Michael D. Bahner, Assistant Prosecuting Attorney, for appellee.

George J. Conklin, for appellant.

* * * * *

SINGER, P.J.

{¶ 1} Appellant, Kiron Renfroe, appeals from his convictions in the Lucas County Court of Common Pleas, on two counts of felonious assault and one count of attempt to commit murder, with a firearm specification. For the reasons that follow, we affirm.

{¶ 2} On February 9, 2012, Duran Bell was shot in the chest near the intersection of Central and Stickney in Toledo, Ohio. Additionally, he received a grazing wound to his right ear. Bell identified appellant as the person who shot him. Consequently, appellant was indicted for the shooting and a jury found him guilty. He was sentenced to serve 13 years in prison. Appellant now appeals setting forth the following assignments of error:

> I. The defendant-appellant's rights to due process of law and equal protection were violated by the state's remarks upon his constitutional rights to remain silent and to counsel guaranteed under the Fifth Amendment, Sixth Amendment, and the Fourteenth Amendment to the United States Constitution and Sections 10 and 16, Article I of the Ohio Constitution.
>
> II. The trial court should have declared a mistrial when the state of Ohio violated the defendant-appellant's constitutional rights.
>
> III. The defendant-appellant was denied effective assistance of counsel.
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> IV. The defendant-appellant's convictions were not supported by a sufficiency of the evidence.
>
> V. Defendant's convictions are against the manifest weight of the evidence.

VI. The cumulative effect of the errors committed by the trial court violated the appellant's right to a fair trial.

{¶ 3} Initially, we will address appellant's fourth and fifth assignments of error. In his fourth assignment of error, appellant argues that his convictions were based on insufficient evidence.

{¶ 4} "In essence, sufficiency is a test of adequacy. Whether the evidence is legally sufficient to sustain a verdict is a question of law." *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus.

{¶ 5} Appellant's jury trial commenced on April 24, 2012. Toledo Police Officer Nora Mugler testified that she was on duty the afternoon of February 9, 2012, when she responded to a call of a shooting at Stickney and Central Avenue in Toledo. When she arrived she found Duron Bell with a gunshot wound to his chest. He told Mugler that a black male had jumped out of a gray van, shot at him approximately four times, and then left in the van. He told Mugler he did not know the shooter's name but he did say he had recently been incarcerated with the shooter and that the two had "a history." According to Bell, the actual shooting had taken place a block away. At that location, Muglar testified she recovered bullet projectiles.

{¶ 6} Toledo Police Detective Andre Cowell testified that he was the lead investigator of Bell's shooting. At the hospital, Bell told Cowell that he had been incarcerated with the shooter and that one night, in the Lucas County Jail, the shooter had punched him in the face. Bell also told Cowell that jail officials had made a report of this incident. Based on this information, officers were able to retrieve a jail incident report involving an altercation between Bell and appellant on June 30, 2011. From there, a photo array of six men, including appellant, was assembled and shown to Bell. Cowell testified that Bell identified appellant as the man who had shot him.

{¶ 7} Bell also testified at appellant's trial. He identified appellant, in court, as the man who shot him on February 9.

{¶ 8} Deputy coroner, Dr. Diane Scala-Barnett, testified that she examined Bell's medical records from the shooting and that in her opinion, Bell had sustained serious physical harm and that the nature of his injury could have easily resulted in death. In addition to the chest wound, she noted that the grazing injury he sustained to his ear was dangerously close to his brain.

{¶ 9} Appellant's indictment set forth the elements of R.C. 2903.11(A)(2), felonious assault. "No person shall knowingly * * * cause or attempt to cause physical harm to another or to another's unborn by means of a deadly weapon or dangerous ordnance."

{¶ 10} The indictment also set forth the elements of R.C. 2923.02 and 2903.02, attempted murder. "No person, purposely or knowingly, and when purpose or knowledge

is sufficient culpability for the commission of an offense, shall engage in conduct that, if successful, would constitute or result in the offense. * * * No person shall purposely cause the death of another * * *."

{¶ 11} Viewing the evidence in a light most favorable to the prosecution, we find that a rational trier of fact could have found the essential elements of the crimes proven beyond a reasonable doubt. The state presented circumstantial evidence that a shooting occurred by way of the projectiles found at the location where Bell claimed he had been shot and the state presented eyewitness testimony, which if believed, establishes beyond a reasonable doubt that appellant shot Bell. Appellant's fourth assignment of error is found not well-taken.

{¶ 12} Even when there is sufficient evidence to support the verdict, a court of appeals may decide that the verdict is against the weight of the evidence. *Thompkins*, 78 Ohio St.3d 380, 678 N.E.2d 541, at paragraph two of the syllabus. In his fifth assignment of error, appellant contends his conviction was against the manifest weight of the evidence.

{¶ 13} When weighing the evidence, the court of appeals must consider whether the evidence in a case is conflicting or where reasonable minds might differ as to the inferences to be drawn from it, consider the weight of the evidence, and consider the credibility of the witnesses to determine if 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." *Id*. at 387.

{¶ 14} In this assignment of error, appellant challenges the credibility of Bell. However, it is clear from the verdicts, in a trial that lacked physical evidence tying appellant to the shooting, that the jury found Bell to be credible. Finding no evidence that they "lost their way," or "created a manifest miscarriage of justice," appellant's fifth assignment of error is found not well-taken.

{¶ 15} Next, we will consider appellant's first two assignments of error wherein he contends the prosecutor violated his Fifth Amendment rights by improperly eliciting testimony regarding his silence after his arrest. Appellant further contends that his error should have resulted in a mistrial.

{¶ 16} The Fifth Amendment of the United States Constitution guarantees an accused the right to remain silent and prevents the prosecution from commenting on the silence of a defendant who asserts the right. *Griffin v. California*, 380 U.S. 609, 614, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965).

{¶ 17} Appellant cites to the testimony of Toledo Police Detective Andre Cowell who testified that he met with appellant at the police station, shortly after his arrest. Cowell testified that he read appellant his *Miranda* rights and that appellant immediately stated he had nothing to say and asked for a lawyer.

{¶ 18} Appellant's counsel did not object to this testimony. We are therefore limited to a plain error review. *State v. Hill*, 92 Ohio St.3d 191, 202, 749 N.E.2d 274 (2001). Under Crim.R. 52(B), "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." A defendant has

the burden to satisfy the plain-error rule, and a reviewing court may consult the whole record when considering the effect of any error on substantial rights. *United States v. Vonn*, 535 U.S. 55, 59, 122 S.Ct. 1043, 152 L.Ed.2d 90 (2002). Ohio law recognizes that plain error does not exist unless, but for the error, the outcome of the trial would have been different. *State v. Noling*, 98 Ohio St.3d 44, 2002-Ohio-7044, 781 N.E.2d 88, ¶ 19. Furthermore, the Supreme Court of Ohio has stated that Crim.R. 52(B) is to be invoked "with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *State v. Landrum*, 53 Ohio St.3d 107, 111, 559 N.E.2d 710 (1990).

{¶ 19} If there is overwhelming evidence of the defendant's guilt, an improper reference to the defendant's post-arrest silence may be harmless beyond a reasonable doubt. *State v. Moreland*, 50 Ohio St.3d 58, 64-65, 552 N.E.2d 894 (1990). "A single comment by a police officer as to a suspect's silence without any suggestion that the jury infer guilt from the silence constitutes harmless error." *State v. Treesh*, 90 Ohio St.3d 460, 480, 739 N.E.2d 749 (2001).

{¶ 20} Here, Detective Cowell's testimony at issue was in response to the prosecutor's general question about what happened during the course of the investigation. The prosecutor did not attempt to elicit further testimony on that issue. At the close of Cowell's direct testimony, the prosecutor asked to approach the bench wherein he expressed his concern about Cowell's testimony and asked for a curative instruction. The

judge asked appellant's counsel if he would like such an instruction and appellant's counsel agreed. The judge then instructed the jury as follows:

> Ladies and gentlemen, there was a reference in the detective's testimony that the defendant in this case, Mr. Renfroe, declined to make any statement to the police. That is his constitutional right and you should not consider that statement for any purpose in deciding the disputed questions of fact in this case. He had every right to say he didn't want to speak with anyone. And again, you cannot use that statement for any purposes. In fact, I would instruct you now you are to disregard it.

Given the nature of the prosecutor's questioning, the curative instruction and the evidence of appellant's guilt in the form of the victim's testimony, we do not believe Cowell's testimony rises up to anything other than harmless error and we do not believe that the outcome of appellant's trial would have been different but for Detective Cowell's testimony. Accordingly, appellant's first two assignments of error are found not well-taken.

{¶ 21} In his third assignment of error, appellant contends he was denied effective assistance of counsel. To prevail on a claim of ineffective assistance of counsel, appellant must show that counsel's conduct so undermined the proper functioning of the adversarial process that the trial court cannot be relied upon as having produced a just result. The standard proof requires appellant to satisfy a two-pronged test. First, appellant must show that counsel's representation fell below an objective standard of

reasonableness. Second, appellant must show a reasonable probability that, but for counsel's perceived errors, the results of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). This burden of proof is high given Ohio's presumption that a properly licensed attorney is competent. *State v. Hamblin*, 37 Ohio St.3d 153, 524 N.E.2d 476 (1988).

{¶ 22} Appellant cites to numerous instances of alleged ineffective assistance of counsel. First, he contends his trial counsel's failure to ensure that a certain stipulation was put into writing for the jury amounted to ineffective assistance of counsel. Prior to trial, counsel agreed to stipulate that appellant and Bell knew each other before the shooting. The parties agreed to put this into writing for the jury. Appellant claims that the written stipulation was never provided to the jury. We fail to see how appellant was prejudiced by this omission as the testimony at trial established the prior relationship between appellant and Bell.

{¶ 23} Next, appellant contends his trial counsel's failure to compel the state to provide a bill of particulars constituted ineffective assistance of counsel.

{¶ 24} The failure to provide a bill of particulars upon request constitutes harmless error where the failure to provide the bill does not prejudice the defendant. *See State v. Chinn*, 85 Ohio St.3d 548, 569, 709 N.E.2d 1166 (1999). This is because the issue "ultimately turns on the question whether appellant's lack of knowledge concerning the specific facts a bill of particulars would have provided him actually prejudiced him in his ability to fairly defend himself." *Id.*

{¶ 25} Appellant vaguely claims that the state's failure to provide the bill of particulars "could have affected" trial preparation, yet appellant has not claimed or shown that his trial preparation was compromised. A review of the record shows that he was adequately put on notice of the time, place, nature, and substance of the harm he allegedly inflicted upon Bell, via the indictment. Moreover, he was provided with open file discovery. *See State v. Evans*, 2d Dist. Montgomery No. 20794, 2006-Ohio-1425, ¶ 24 ("[W]hen the State allows open-file discovery, as it did in this case, a bill of particulars is not required.") (Citation omitted.) It follows that the state's failure to produce the requested bill of particulars amounted to harmless error.

{¶ 26} Appellant also contends his counsel was ineffective in failing to challenge the photo array admitted into evidence. Prior to trial, counsel explained, on the record, that after discussing the issue with appellant, they decided to forgo filing a motion to suppress the photo array because they did not believe it to be unduly suggestive. This issue clearly falls into the realm of trial tactics and trial tactics, even debatable ones, do not establish ineffective assistance of counsel. *State v. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235, 818 N.E.2d 229, ¶ 146.

{¶ 27} Appellant contends that his counsel should have objected to the state's intention to introduce his booking records on an unrelated charge. These records were intended to show when appellant and Bell were incarcerated together. Appellant contends this was prejudicial to him because it informed the jury he was involved in another, unrelated criminal matter. We, however, fail to see how appellant was

prejudiced as the jury heard testimony that the two were incarcerated together before the shooting.

{¶ 28} Appellant next contends that he was not properly informed of the consequences of rejecting a potential plea offer. The record shows that prior to trial, the court questioned both trial counsel and appellant regarding a plea bargain that was offered by the state. Counsel explained they discussed the deal and that appellant had chosen to go forward with trial.

{¶ 29} Specifically addressing appellant, the court asked:

> You had been informed prior to today's date that the state offered to dismiss the second count of felonious assault and the gun specification and the third count of attempted murder and the gun specification and would allow you to plead to the first count. Were you informed of that offer?
>
> [Appellant]: Yes, I was.
>
> [The Court]: And this is something that you discussed with your attorney and in terms of whether you felt it was in your best interest to accept that offer?
>
> [Appellant]: Yes, sir.

{¶ 30} Counsel's duty under the Sixth amendment is to communicate any offers from the state to his client. *Missouri v. Frye*, ––– U.S. –––, 132 S.Ct. 1399, 1408, 182 L.Ed.2d 379 (2012). It is clear from the record that counsel fulfilled this duty.

{¶ 31} Appellant contends his counsel was ineffective in failing to object to the prosecutor's "long winded discussions of the law" during the trial. Appellant contends these issues are more properly discussed by the court. Appellant is not, however, contending that the prosecutor gave the jurors erroneous information regarding the law. As such, we find no prejudice.

{¶ 32} Additionally, appellant cites to numerous instances where his counsel failed to raise a hearsay objection. The "failure to make objections does not constitute ineffective assistance of counsel per se, as that failure may be justified as a tactical decision." *State v. Gumm*, 73 Ohio St.3d 413, 428, 653 N.E.2d 253 (1995). Once again, appellant has not shown how he was prejudiced and we therefore find this argument to be without merit. We also reject appellant's contention that his counsel was ineffective in failing to call witnesses. The decision to call, or not call, witnesses also falls within the purview of trial strategy. *Treesh*, 90 Ohio St.3d 460, 739 N.E.2d 749 at 490.

{¶ 33} Finally, appellant contends his counsel was ineffective in failing to object to Detective Cowell's testimony regarding his post-arrest interview with appellant. Having found no error with the testimony in appellant's first two assignments of error, we find this argument to be without merit.

{¶ 34} In sum, appellant has not shown that but for these perceived errors, the outcome of his trial would have been different. Accordingly, appellant's third assignment of error is found not well-taken.

{¶ 35} Appellant argues, in his final assignment of error, that the above cited errors were cumulative and deprived him of a fair trial, thereby requiring reversal of his conviction and sentence. In light of our analysis and disposition of his first five assignments of error, his sixth assignment of error is found not well-taken.

{¶ 36} The judgment of the Lucas County Court of Common Pleas is affirmed. Costs of this appeal are assessed to appellant 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.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, P.J. _____
JUDGE

James D. Jensen, J. _____
CONCUR.
JUDGE