

[Cite as *State v. Tufts*, 2011-Ohio-73.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94276

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

NAIYA TUFTS

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-497187

BEFORE: Kilbane, A.J., Stewart, J., and Celebrezze, J.

RELEASED AND JOURNALIZED: January 13, 2011

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MARY EILEEN KILBANE, A.J.:

{¶ 1} Defendant-appellant, Naiya Tufts, appeals her conviction, rendered after a jury trial, for theft. Tufts contends that she was denied a fair trial because the prosecutor improperly (1) elicited “other acts” evidence of her prior arrests, (2) argued that the arrests were a reason to find her guilty in this case, and (3) commented on her failure to testify. She also argues that her due process rights were violated because the trial court

imposed costs in its judgment entry even though the judge told her at sentencing that costs would be suspended. We affirm.

I. Background

{¶ 2} In June 2007, Tufts was charged with theft in violation of R.C. 2913.02(A)(1).¹ She pleaded not guilty and the matter proceeded to trial. The State presented testimony from five witnesses. Tufts testified as the sole defense witness and, in response, the State called a rebuttal witness. The trial ended with a hung jury.

{¶ 3} Upon retrial, the prosecution presented the same five witnesses; the defense offered no witnesses. Because Tufts did not testify, the rebuttal witness did not testify. Tufts was convicted and sentenced to 90 days probation.

{¶ 4} The following facts and testimony were elicited by the State's witnesses upon retrial.² On April 5, 2007, Irwin Hausman, the controller for American Dental Centers ("ADC"), discovered that ADC had inadvertently overpaid Tufts, a part-time employee, for her overtime during the previous pay period. Tufts had worked 10.46 hours of overtime during the pay period,

¹R.C. 2913.02(A)(1) states that "[n]o person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services * * * without the consent of the owner or person authorized to give consent."

²In her brief on appeal, Tufts recites to facts elicited at the first trial (e.g., her marital status, how many children she has) that were not elicited upon retrial. Such facts are not relevant to this appeal and therefore we do not consider them, nor Tufts's

but due to a clerical error, ADC entered her overtime as 1,046 hours and erroneously deposited (by electronic transfer) approximately \$10,400 into Tufts's savings account as payment for the overtime.

{¶ 5} ADC's operations manager, Donna Rossman, telephoned Tufts early in the day on either April 11 or 12, 2007. She told Tufts about the overpayment error and informed her that if she returned the money to ADC by 5:00 p.m. that day, ADC would not take any legal action against her. Rossman testified that Tufts told her "she didn't know anything about any money." Later that day, after Tufts failed to appear with the money, Rossman called Tufts again. This time, after Rossman identified herself, the individual who answered the phone hung up on her. Rossman testified that Tufts was never fired from ADC but did not return to work after April 1, 2007.

{¶ 6} According to Tom McKay, security coordinator for the Ohio Educational Credit Union, credit union records relating to Tufts's savings and checking accounts indicated that on March 30, 2007, "American Dental Payroll" deposited \$10,410.69 into Tufts's savings account. The records further indicated that on March 30, 2007, the same day ADC made its erroneous deposit, \$10,000 was transferred from Tufts's savings account to her checking account, a check for \$9,000 payable to "Naiya S. Tufts or Debra

arguments relating to them, in deciding this appeal.

Johnson” and endorsed by Tufts was then drawn on the checking account, and \$900 cash was withdrawn. The credit union records further indicated that Tufts was the individual who drew the \$9,000 check on her checking account.

{¶ 7} After receiving a complaint from ADC, Mayfield Heights police detective Douglas Suydan spoke with Tufts on April 12, 2007. She denied knowing anything about the money and told Suydan that she would check her account and call him back, but never did. Suydan testified that he did not try calling her again because after reviewing credit union records relating to Tufts’s accounts, he “realized she in fact had already taken the money out of the account by the time [he] had spoken to her on April 12th.” Suydan confirmed that the social security number and date of birth listed on the endorsement of the \$9,000 check were Tufts’s.

{¶ 8} The defense did not present any witnesses. The jury found Tufts guilty of theft and the trial court sentenced her to 90 days probation. Although the trial judge stated at sentencing that costs would be suspended, the court’s subsequent journal entry of sentencing dated July 7, 2008 ordered Tufts to pay court costs. But in a journal entry dated October 6, 2008, the trial court ordered that “defendant’s costs are hereby suspended.”

{¶ 9} This court subsequently granted Tufts’s motion to file a delayed appeal.

II. Law and Analysis

A. Other Acts” Evidence

{¶ 10} The prosecutor asked no questions about Tufts’s prior arrests upon direct examination of Detective Suydan. But Tufts’s defense counsel raised the issue upon cross-examination:

“Q. Now, at this time, had you done a background check on Ms. Tufts?

“A. As far as?

“Q. Did you run a LEADS?

“A. Yes.

“Q. Would you tell the ladies and gentlemen of the jury what LEADS is?

“A. It’s to look for criminal history on a suspect or a person that you’re investigating.

“Q. What did you find?

“A. I found — I found two arrests on her.

“Q. Any convictions?

“A. That I can’t say one way or the other. LEADS won’t tell me that.

They’ll tell me about arrests.

“Q. Okay. But no convictions, right?

“A. None that I’m aware of. Can’t say yes or no to those.”

{¶ 11} Later in the cross-examination, defense counsel returned to the issue of the prior arrests:

“Q. You said there was [sic] some arrests, correct?

“A. That’s correct.

“Q. And you’re aware how LEADS works, right? If there has been a conviction, it would say what the conviction was and disposition?

“A. Sometimes yes; sometimes no.

“Q. Is this the LEADS you pulled on Ms. Tufts?

“A. Yes.

“Q. And you underscored two items, correct?

“A. Correct.

“Q. And are either of those items theft offenses?

“A. No, they’re not.

“MR. JOHNSON: Thank you. Nothing further.”

The prosecutor then clarified the detective’s testimony upon redirect:

“Q. Those two items you underscored, what are they, what offenses?

“A. The offense, the first one is for disrupting public service, felony. Second one is for assault of a caregiver against [an] impaired person, a misdemeanor.

“Q. That’s what showed upon your LEADS report?

“A. Correct.”

{¶ 12} In her first assignment of error, Tufts argues that she was denied her right to a fair trial because the prosecutor improperly elicited “other acts” testimony about her prior arrests. She contends that this testimony violated her right to a fair trial because “the jury never should have learned about the arrests in the first instance,” and the information about her prior arrests “forced” her to remain silent, rather than testify. We are not persuaded.

{¶ 13} First, it is readily apparent from the record that defense counsel, not the prosecutor, first raised the issue of Tufts’s prior arrests, apparently because he wanted the jury to know that she had not been convicted of any prior offenses.³ The jury would not have known of Tufts’s prior arrests but for defense counsel’s questions to Detective Suydan.

{¶ 14} Second, the record is silent regarding why Tufts chose not to testify upon retrial. Although Tufts contends she was “forced” not to testify because she feared the prosecutor would attempt to extract further details about the arrests, the record contains no information about the reason for Tufts’s decision not to testify. Although Tufts offers one explanation for her decision, she could just as easily have decided not to testify because, as the State contends, her testimony in the first trial was completely discredited by the State’s rebuttal witness.

³In his opening statement, defense counsel told the jury, “you [are] going to find out my client doesn’t have a criminal record. She’s never been accused of stealing anything before.”

{¶ 15} And third, even if evidence of Tufts’s prior arrests was improperly admitted,⁴ it did not deprive Tufts of her right to a fair trial. Because defense counsel did not object to the prosecutor’s questions on redirect, we review for plain error. *State v. Dowdell* (May 3, 2001), 8th Dist. No. 77863, citing *State v. Green*, 90 Ohio St.3d 352, 373, 2000-Ohio-182, 738 N.E.2d 1208. Plain error occurs when the error is an obvious error that affects a substantial right and “but for the error, the outcome of the trial clearly would have been otherwise.” *State v. Long* (1978), 53 Ohio St.2d 91, 94, 372 N.E.2d 804; *State v. Barnes*, 94 Ohio St.3d 21, 28, 2002-Ohio-68, 759 N.E.2d 1240; see, also, Crim.R. 52(B). When evaluating for plain error, we examine all properly admitted evidence and determine whether the jury would have convicted the defendant even if the alleged error had not occurred. *State v. Slagle* (1992), 65 Ohio St.3d 597, 605, 605 N.E.2d 916. We find no plain error in this case because the State presented sufficient evidence to find Tufts guilty beyond a reasonable doubt of theft in violation of R.C. 2913.02(A)(1), even absent the evidence of her prior arrests. The State’s evidence established that ADC erroneously overpaid Tufts by approximately \$10,000.

⁴ Under Evid.R. 404(B), “[e]vidence of other crimes, wrongs, or acts is not admissible to prove” a defendant’s character as to criminal propensity. “It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” The State makes no argument that evidence of Tufts’s prior arrests was admitted for any of the purposes permitted by the rule.

The evidence further established that instead of returning the money, Tufts withdrew it from her account. Further, when questioned by the police about the missing money, Tufts lied, stating she had no knowledge of the money, even though her credit union records demonstrated otherwise. On this evidence, it is apparent that Tufts committed theft in violation of R.C. 2913.02(A)(1) by knowingly exerting control over ADC's money without ADC's consent. Thus, even if improper, the admission of the testimony about her prior arrests does not rise to the level of plain error.

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

B. Prosecutorial Misconduct

{¶ 17} In her second assignment of error, Tufts contends that her due process rights were violated because of prosecutorial misconduct.

{¶ 18} She first argues that the prosecutor improperly elicited testimony about her prior arrests during trial. As set forth above, we find no plain error in the admission of this evidence.

{¶ 19} She next contends that the prosecutor's closing argument was improper

{¶ 20} because the prosecutor improperly (1) accused her of lying, (2) argued that her prior arrests were substantive evidence of her guilt in this case, and (3) commented on her failure to testify.

{¶ 21} The test for prosecutorial misconduct is whether the remarks were improper and, if so, whether they prejudicially affected substantial rights of the accused. *State v. Williams*, 99 Ohio St.3d 439, 2003-Ohio-4164, 793 N.E.2d 446, ¶44. Prosecutorial misconduct will not provide a basis for reversal unless the misconduct can be said to have deprived the appellant of a fair trial based upon the record as a whole. *State v. Lott* (1990), 51 Ohio St.3d 160, 166, 555 N.E.2d 293. “The touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor.” *State v. Maurer* (1984), 15 Ohio St.3d 239, 473 N.E.2d 768, certiorari denied (1985), 472 U.S. 1012, 109 S.Ct. 1357, 103 L.Ed.2d 825, quoting *Smith v. Phillips* (1982), 455 U.S. 209, 219, 102 S.Ct. 940, 71 L.Ed.2d 78.

{¶ 22} Tufts first contends that the prosecutor’s closing argument was improper because he accused her of lying to Detective Suydan when he asked her about the money.⁵ She argues that this was improper because she testified *in the first trial* that she called her credit union on March 30, 2007 and learned that her balance was suddenly \$10,000 more than it had been the day before. Accordingly, she asserts, because “the money simply appeared in

⁵The prosecutor asked the jury, “[a]nd if she was lying about not knowing about the money, what else was she lying about?”

her account, * * * when the police officer accused her of stealing a payroll check, she rightfully denied knowing what he was talking about.”

{¶ 23} But Tufts did not testify on retrial and the facts she alludes to are not part of the record in this appeal. Moreover, it is well established that during closing argument, a prosecutor may comment on the evidence presented, as well as the inferences that can be drawn from the evidence. *State v. Martin*, 8th Dist. No. 91276, 2009-Ohio-3282, ¶51. Detective Suydan testified that when he spoke with Tufts on April 12, 2007, she denied knowing anything about the money, even though her credit union records indicated that she had already taken the money out of her account by that time. Thus, the prosecutor’s comment that Tufts lied about not knowing about the money was supported by the evidence; his question as to what else she was lying about simply raised a natural inference from that evidence. Hence, we find no error in this comment.

{¶ 24} Tufts next contends that the prosecutor improperly commented on her failure to testify by telling the jury:

{¶ 25} “At the beginning, I concluded my opening statement by asking a question, a question that has gone unanswered. The question was: what other reasonable explanation exists for this? We still have not heard an answer to that question. What other explanation exists? There is no other explanation.” Again we find no error.

{¶ 26} The Ohio Supreme Court has held that “it is improper for a prosecutor to comment on the defendant’s failure to testify.” *State v. Twyford*, 94 Ohio St.3d 340, 355, 2002-Ohio-894, 763 N.E.2d 122. “The question 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.’” (Emphasis sic.) *State v. Webb*, 70 Ohio St.3d 325, 328-29, 1994-Ohio-425, 638 N.E.2d 1023, quoting *Knowles v. United States* (C.A.10 1955), 224 F.2d 168, 170.

{¶ 27} The State is permitted to comment upon a defendant’s failure to offer evidence in support of its case. *State v. Collins*, 89 Ohio St.3d 524, 527-28, 2000-Ohio-231, 733 N.E.2d 1118. “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.” *Id.*

{¶ 28} Our review of the record indicates that the prosecutor’s closing argument was not a comment on Tufts’s failure to testify but fair comment that, on the evidence presented by the State, there could be no explanation other than that Tufts stole ADC’s money. The record demonstrates that the prosecutor made the statement after defense counsel argued in closing that Tufts had not committed a crime because ADC “gave” the money to her. On rebuttal, the prosecutor reviewed the evidence presented by the State’s

witnesses and then concluded that there could be no other “reasonable explanation” than that Tufts stole the money. This argument was not a comment on Tufts’s decision not to testify but, rather, a legitimate argument on the evidence presented.

{¶ 29} Further, we cannot conclude that the jury would naturally or necessarily interpret the words “no other explanation” as a comment on Tufts’s failure to testify. The jury could have rightly concluded that the prosecutor’s statement simply meant that its theory of the case was uncontradicted. “A prosecutor is allowed to comment upon the relative strength of the State’s case, which includes commenting on the fact that the State’s case has not been rebutted.” *State v. Ferguson* (1983), 5 Ohio St.3d 160, 163, 450 N.E.2d 265.

{¶ 30} Moreover, even if improper, the prosecutor’s comment did not deprive Tufts of a fair trial. The record reflects that the trial court instructed the jury that the State bore the burden of proving all the essential elements of the offense beyond a reasonable doubt. Further, the trial court instructed the jury that Tufts had a constitutional right not to testify and “the fact that the defendant did not testify must not be considered for any purpose.” See *Collins*, *supra* (even assuming prosecutor’s comments were inappropriate, no denial of right to fair trial where court instructed jury that

State bore burden of proving statutory violation and that defendant had constitutional right not to testify).

{¶ 31} Last, Tufts objects to the prosecutor's comments in closing argument that "[t]his isn't her first time being arrested," and "[s]he's been arrested for abusing the elderly. She's been arrested for disrupting public service." Tufts contends that these comments improperly implied that her prior arrests were substantive evidence of her guilt in this case.

{¶ 32} But even if improper, these comments had no bearing on Tufts's conviction. As discussed above, the record as a whole demonstrates that the jury would have found Tufts guilty of theft beyond a reasonable doubt even without this particular evidence.

{¶ 33} "Considered in the light of the whole case," the prosecutor's comments did not deprive Tufts of her right to a fair trial. *Maurer*, supra at 266. Appellant's second assignment of error is therefore overruled.

C. Costs

{¶ 34} In her third assignment of error, Tufts argues that the trial court improperly imposed costs, despite the judge's assurance at sentencing that costs would be suspended. Tufts refers us to the trial court's journal entry dated July 7, 2008, wherein the trial court ordered that "defendant is to pay costs." But our review of the record indicates that in a journal entry dated October 6, 2008, the trial court ordered that "defendant's costs are hereby

suspended,” just as the judge had promised. Accordingly, appellant’s assignment of error is overruled.

Affirmed.

It is ordered that appellee recover from appellant 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 common pleas court to carry this judgment into execution. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY EILEEN KILBANE, ADMINISTRATIVE JUDGE

MELODY J. STEWART, J., CONCURS;

FRANK D. CELEBREZZE, JR., J., CONCURS WITH SEPARATE OPINION.

FRANK D. CELEBREZZE, JR., J., CONCURRING:

{¶ 35} While I agree with the majority that the errors in this case are harmless in light of the insurmountable evidence against Tufts, I write separately to express my concern with the prosecutor’s behavior in this case.

{¶ 36} In his closing argument, the prosecutor said, “When you called back, you would probably not want to say, I have no idea what you’re talking about, and then when the police get involved and when the detective calls and says, hey, we need to talk about this, if you tell the detective, I don’t know

what you're talking about, that seems a little disingenuous at this point. In fact, I would say it's an outright lie. And if she was lying about not knowing about the money, what else was she lying about?

"[Defense Attorney]: Objection.

"THE COURT: Overruled.

"[Prosecutor]: Thank you. Let's go a step further. This isn't her first time being arrested.

"[Defense Attorney]: Objection.

"THE COURT: Overruled.

"[Prosecutor]: She's been arrested for abusing the elderly. She's been arrested for disrupting public service.

"[Defense Attorney]: Objection. Continuing objection, Your Honor. She hasn't been convicted.

"THE COURT: Overruled. That's improper, [defense counsel]. Do you understand?"

{¶ 37} The prosecutor first made improper comments by calling appellant a liar to the jury. The prosecutor then took these improper comments one step further and implied that because appellant has been arrested in the past, she should be convicted of theft in this case. Although these comments were improper and a flagrant violation of the Ohio Rules of Evidence, I cannot find beyond a reasonable doubt that appellant's trial would

have ended differently had these comments not been made. As such, I agree with the majority that the error was harmless.