

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ROSS COUNTY

STATE OF OHIO, :
 :
 Plaintiff-Appellee, : Case No. 08CA3038
 :
 vs. : **Released: June 2, 2010**
 :
 RONALD C. KIGHT, : DECISION AND JUDGMENT
 : ENTRY
 Defendant-Appellant. :

APPEARANCES:

Timothy Young, Ohio State Public Defender, and Sarah M. Schregardus, Andrew King and Stephen P. Hardwick, Assistant Ohio State Public Defenders, Columbus, Ohio, for Defendant-Appellant.

Michael M. Ater, Ross County Prosecuting Attorney, and Richard W. Clagg, Ross County Assistant Prosecuting Attorney, Chillicothe, Ohio, for Plaintiff-Appellee.

McFarland, P.J.:

{¶1} Ronald C. Kight, Defendant-Appellant, appeals the decision of the Ross County Court of Common Pleas. Kight argues there was error below in that: 1) the prosecutor engaged in misconduct during his closing argument; 2) the trial court erred by not sua sponte correcting the alleged misconduct; and 3) he had ineffective assistance of counsel in that his trial counsel failed to object to the alleged misconduct. Because we find that none of the prosecutor's statements during closing constituted misconduct,

we overrule Kight's assignments of error and affirm the decision of the court below.

I. Facts

{¶2} As the result of a dispute during a drug transaction, a man was severely beaten. Defendant-Appellant Ronald Kight was indicted for his role in the attack. A jury subsequently found him guilty on one count of felonious assault and the trial court sentenced him to six years of incarceration.

{¶3} Kight appealed the decision, but due to a series of events largely beyond his control, he failed to file an appellate brief and we dismissed the appeal. The Ohio Public Defender's Office filed an application for reopening, arguing that Kight's former appellate counsel failed to provide effective assistance of counsel. We agreed and granted his application and now consider the merits of Kight's appeal. As explained more fully below, his appeal is based entirely upon the alleged misconduct of the prosecution during closing arguments.

II. Assignments of Error

First Assignment of Error

THE PROSECUTOR'S MISCONDUCT DENIED MR. KIGHT A FAIR TRIAL AND DUE PROCESS OF LAW, IN VIOLATION OF MR. KIGHT'S FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES

CONSTITUTION, AND SECTIONS 10 AND 16, ARTICLE I OF THE OHIO CONSTITUTION.

Second Assignment of Error

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR WHEN IT FAILED TO IMMEDIATELY CORRECT THE PROSECUTOR'S MISCONDUCT IN HIS CLOSING ARGUMENT DEALING WITH MR. KIGHT'S DECISION TO GO TO TRIAL. FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION, AND SECTIONS 10 AND 16, ARTICLE I OF THE OHIO CONSTITUTION.

Third Assignment of Error

TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE PROSECUTOR'S MISCONDUCT DEPRIVING MR. KIGHT OF HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL, IN VIOLATION OF MR. KIGHT'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION, AND SECTIONS 10, ARTICLE I OF THE OHIO CONSTITUTION.

III. Standard of Review

{¶4} “The test for prosecutorial misconduct is whether the alleged remark was improper and, if so, whether it prejudicially affected the substantial rights of the defendant.” *State v. McGee*, 4th Dist. No. 05CA60, 2007-Ohio-426, at ¶13. When a defendant fails to object to the alleged misconduct during trial, the defendant waives all but plain error. Crim R. 52(B); *State v. Slagle* (1992), 65 Ohio St.3d 597, 604, 605 N.E.2d 916. Kight failed to so object in the case sub judice.

{¶5} “We may invoke the plain error rule only if we find (1) that the prosecutor's comments denied appellant a fair trial, (2) that the circumstances in the instant case are exceptional, and (3) that reversal of the judgment below is necessary to prevent a miscarriage of justice.” *McGee* at ¶15, citing *State v. Long* (1978), 53 Ohio St.2d 91, 372 N.E.2d 804, at paragraph three of the syllabus. “The plain error doctrine permits correction of judicial proceedings only when error is clearly apparent on the face of the record and is prejudicial to the appellant.” *Id.*

IV. Legal Analysis

{¶6} Kite alleges prosecutorial misconduct due to certain statements the prosecution made during its closing argument concerning the testimony of Steven LaPlante. LaPlante participated in the same assault for which Kight was prosecuted. At the time of Kight's trial, LaPlante had already pleaded guilty and been sentenced for his role in the assault. During Kight's trial, LaPlante was a witness for the prosecution, testifying that Kight had also been actively involved in the attack.

{¶7} In his brief, Kight cites the following statements, made by the prosecution during closing, to substantiate his allegation of misconduct:

{¶8} “Then we have the testimony of Steven LaPlante to consider. Now Steven LaPlante of course, was one of the other participants in this

particular beating. You've got the chance to observe him on the stand. Yes, he's -- he's incarcerated over this. There's -- and he admits to it freely. He admitted on the stand, that yes he was involved. He hit -- he hit the victim more than one time. He helped to contribute to these injuries. There's no question that he was involved in this. He also testified, though, that he was not alone in this. Now like I said, he freely admitted to being involved. He pleaded guilty to felonious assault. That's why he is in prison is because of his involvement in this incident. He decided that he would basically admit to what he had done and take his punishment. Took it like a man, freely admitted that things didn't go well in this drug transaction. That's why all of this took place.”

{¶9} Kight also cites the following as an example of prosecutorial misconduct:

{¶10} “Now you might -- you might wonder, well yeah, but he's a convicted felon right. Keep in mind, he's a convicted felon because he admitted that he did this on his own. He had testified on the stand. He didn't receive anything for this. He had absolutely nothing to gain by testifying and nothing to lose either. He had no benefit, no burden, nothing of any sort when he took the stand. He simply took the stand and said, ‘that is what happened. I was there. I was involved. So was the defendant and

his [sic] is what he did.' He had nothing to gain from it, nothing to lose from it. He didn't have to -- he didn't have to testify. He could have sat on the stand and remained completely silent. He could have told someone completely [sic] different story if he wanted. But he chose to tell what happened.”

{¶11} Kight also cites this statement from the prosecutor:

{¶12} “Now Steven LaPlante didn't embellish his testimony either -- and again, he had no reason to say anything that he did on the stand the way he did. He already admitted his involvement. He took a six year sentence. Now the defense is trying to tell you that it was just because of a couple of knots on the head and he just basically jumped him. Who would take a six year sentenced to prison for giving up -- for giving someone a couple of knots on the head... He admitted freely ... He admitted it. He took his punishment -- taking his punishment as a matter of fact.”

{¶13} Kight contends that the prosecutor's statements related above violated his constitutional rights by impermissibly referring to his right to go to trial, his right to maintain post-arrest silence, his right not to testify during trial and by expressing a personal opinion as to Kight's guilt. Whether considering the prosecutor's statements by themselves or in the broader context of his entire closing, we find no merit in Kight's argument.

{¶14} First, and most obviously, none of the statements in question even mention Kight. In fact, despite Kight's arguments to the contrary, we can find no support for the conclusion that the prosecutor was intentionally drawing any comparison between Kight and LaPlante. Kight argues that by referring to LaPlante's decision to plead guilty and his willingness to testify, the prosecution actually implicitly referred to Kight's decision to take his case to trial and his decision not to testify. But a much more logical explanation for the statements in question is that the prosecution was simply trying to establish LaPlante's credibility as a witness. The same holds true for Kight's contention that the prosecution was stating an opinion as to Kight's guilt in saying LaPlante “took [the charges] like a man” and “freely admitted to being involved.”

{¶15} During cross-examination, Kight’s counsel himself brought up the fact that LaPlante admitted to his involvement in the assault and was currently serving a prison sentence for it:

{¶16} Q: “You're currently incarcerated. Correct.”

{¶17} A: “Yes sir.”

{¶18} Q: “And what are you incarcerated for.”

{¶19} A: “For this felonious assault.”

{¶20} Q: “For this -- so -- so you admitted to do -- to committing this felonious assault and how -- how long are you incarcerated for.”

{¶21} A: “I’ve got six years for it.”

{¶22} In our view, the statements cited by Kight as prosecutorial misconduct can more easily be seen as a straightforward attempt to convince the jury that LaPlante’s testimony was reliable, though it was the testimony of a convicted felon.

{¶23} Kight also argues that, because the prosecutor improperly referred to facts not in evidence, the following statement constituted misconduct:

{¶24} “[A]ll of these things just because of a transaction that didn't go the way we wanted it to and to make matters worse, it was a sixty dollar transaction. So the -- the victim in this case, Robert Cunningham, suffered the beating that you heard testimony about in this case all because of sixty dollars ... Multiple rib fractures, jaw fractures, multiple lacerations and contusions all suffered by the victim because of sixty dollars in a transaction that didn't go the way everyone thought it would.”

{¶25} Kight argues that the dollar amount involved in the drug transaction was not in evidence, and the fact that the prosecutor repeatedly referred to “sixty dollars” was somehow prejudicial. Again, we disagree.

Kight is correct that that the dollar amount was not part of the evidence presented during trial. But the dollar amount involved, at best a collateral matter, in no way went towards establishing any of the elements of felonious assault. The jury heard evidence that the felonious assault occurred due to a drug deal gone bad, a deal in which the perpetrators felt they did not receive what they paid for. Kight fails to demonstrate how he was prejudiced in any way by references to the specific dollar amount.

V. Conclusion

{¶26} After reviewing the prosecution's closing argument, we find that none of the statements contained therein constitute misconduct. We further conclude that even if the statements in question could be so construed, they do not rise to the level of plain error. Kight has not shown that the circumstances in his case are exceptional, that the comments denied him a fair trial, or that the statements require reversal to prevent a miscarriage of justice. As Kight's remaining assignments of error are wholly contingent upon a finding of prosecutorial misconduct, they are also overruled. Accordingly, we affirm the decision of the trial court.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and that the Appellee recover of 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 Ross County Common Pleas Court to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

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

Abele, J. and Kline, J.: Concur in Judgment and Opinion.

For the Court,

BY: _____
Matthew W. McFarland
Presiding Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.