[Cite as *State v. Croskey*, 2019-Ohio-2444.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO, :

Plaintiff-Appellee, :

No. 107772

v. :

TEACO A. CROSKEY, :

Defendant-Appellant. :

JOURNAL ENTRY AND OPINION

JUDGMENT: REVERSED AND REMANDED
RELEASED AND JOURNALIZED: June 20, 2019

Criminal Appeal from the Cuyahoga County Court of Common Pleas
Case No. CR-18-629650-A

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Anthony M. Stevenson, Assistant Prosecuting Attorney, *for appellee*.

Paul W. Flowers Co., L.P.A., and Louis E. Grube, *for appellant*.

SEAN C. GALLAGHER, P.J.:

{¶ 1} Teaco A. Croskey appeals his convictions for attempted aggravated burglary, felonious assault, and misdemeanor assault. Croskey is serving an

aggregate two-year term of imprisonment. For the following reasons, we reverse the convictions.

{¶ 2} On the day of the incident, Croskey approached the victim's apartment. The victim's boyfriend[1] was present but did not reside at the apartment. The boyfriend claimed there was another individual present, but it is unclear whether that person was present during the altercations — the boyfriend claimed that person immediately left after being punched by Croskey, but before the ensuing altercations involving the victim and the boyfriend. There were three separate incidents. The investigating officer, who filed the report, indicated that the boyfriend was not initially present when Croskey first arrived. That officer did not testify at trial. Instead another detective testified, but she neither filed the report nor drafted the officer's narrative. The detective testified that the investigating officer would have included the statements presented to him by the victims. The report indicated that the boyfriend was not present when Croskey first arrived. The state did not explain the discrepancy, and because the investigating officer did not testify, it is unclear where the statement originated.

{¶ 3} Nevertheless, according to the trial testimony, when Croskey first arrived, he stood on the porch and asked to speak with the boyfriend about a money dispute. The "porch" was a flat, concrete pad with no separate entrance. It was open to the "outside world." While Croskey and the boyfriend were on the front porch,

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[1] Although the boyfriend was a victim of the crime, for the sake of clarity, he will be referred to as "boyfriend" throughout this opinion. This by no means is to detract from his status as the second victim.

the two began a "heated discussion" that led to a fist fight. The boyfriend claims that Croskey pulled out a box cutter (also described as a razor blade) during that first altercation. The boyfriend described the box cutter incorrectly, asserting there was a bronze component to what was an all-silver item. The boyfriend claimed that the victim saw the box cutter and then told Croskey and the boyfriend to leave because of it. The victim, however, was present during the entire altercation and never saw any weapons, much less a box cutter. Croskey and the boyfriend separated, with the boyfriend walking away from the property altogether. The boyfriend claimed he walked to a nearby store, about a quarter of a mile from the victim's apartment. The boyfriend, from his own testimony, spent anywhere from five to seven minutes in the store before walking the quarter of a mile back to the apartment.

{¶ 4} About 10 to 15 minutes after the fist fight concluded, according to the victim, Croskey returned to the victim's apartment. The victim claimed that the boyfriend was in the apartment again, although he claims he was not present when Croskey returned the second time. According to the victim, when Croskey returned the second time, 10 to 15 minutes following the first incident, he tried to force his way into the apartment to fight the boyfriend. The victim asked Croskey to leave, but he instead "launched" at the victim, punching her in the nose while attempting to get through the door. The victim punched Croskey in return. According to the victim, Croskey attempted to enter the apartment because "he wanted [the boyfriend]" and Croskey "punched [the victim] because [she] wouldn't let him in [her] house to fight [the boyfriend]." Croskey then left the area for a second time.

{¶ 5} The victim went to the store after the second incident. She was not present for the third incident in which Croskey is alleged to have cut the boyfriend with the box cutter. According to the boyfriend, he returned to the apartment after Croskey had already left the second time. After 30 minutes or so of his return, the boyfriend heard Croskey shouting at him from a distance, trying to "egg on" the boyfriend into another fight. It was then that the boyfriend claimed to have been cut by the box cutter, in that third incident. There is no evidence that Croskey attempted to enter the apartment at that time.

{¶ 6} The prearrest investigation was limited. The police officer who took the victim's and the boyfriend's statements did not testify at trial. The arresting officer testified at trial, but his involvement was limited to taking Croskey into custody and collecting a box cutter from Croskey's pocket the day following the incident. A detective testified at trial, but her involvement was also limited. On the day the victim and the boyfriend filed a police report, the day after the incident, the detective was "asked [by her commander] if [she] would go and assist the officer * * * in the lobby with identifying and assisting him in the process of what was going on with the incident" because the commander was "unaware of how to make sense of what was going on[.]" The detective conducted no investigation of her own. She was "familiar with the facts presented to [her] by [her] officers and by speaking" to the victim and the boyfriend. In other words, the detective was aware of the allegations, but she did not review or procure any evidence. According to the detective, the investigating officer "reports the facts that are presented to him by the

individuals at the time of the incident being reported." Although there was a photograph of the boyfriend's injuries taken the day following the incidents, there was no photograph of the victim's injury. The cut on the right side under the boyfriend's lip was self-described as a "scratch" caused by the box cutter the left-handed Croskey wielded with his right hand.

{¶ 7} In short, the convictions primarily rest on the testimonial evidence of the two victims and their written statements, which were introduced into evidence, along with a photograph of the boyfriend's injury. The victim's and the boyfriend's written statements differed from their trial testimony. For example, the victim wrote that she was punched the first time Croskey went to the house, while her boyfriend was present. Croskey and the boyfriend first fought after the victim was punched. Croskey left and returned once after that, but the second time he merely spat on the victim's house. The boyfriend stated that Croskey wielded the box cutter during the first encounter and that Croskey punched the victim during a second encounter when the boyfriend was not present.

{¶ 8} During the trial and again in closing arguments, Croskey argued that law enforcement failed to conduct any independent investigation into the allegations before arresting him. Police officers took the victim's and the boyfriend's statements and immediately proceeded to arrest Croskey. The state took Croskey's challenge against the lack of a prearrest investigation as an invitation to comment on Croskey's postarrest and trial silence in contravention of the Fifth Amendment.

According to the state, the commentary was a "fair use" in response to an unfair argument raised by the defense counsel during closing argument.

{¶ 9} Croskey appeals claiming, in relevant part, that the conviction for attempted, aggravated burglary under R.C. 2911.11(A)(1) is based on insufficient evidence, and that his remaining convictions should be reversed and remanded for a new trial based on the prosecutor's use of Croskey's postarrest and trial silence as evidence of guilt. The latter argument has merit, but the result is a new trial. As a result, the insufficiency argument, which could result in an acquittal, must be separately addressed.

{¶ 10} A claim of insufficient evidence raises the question whether the evidence is legally sufficient to support the verdict as a matter of law. S*tate v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52, 678 N.E.2d 541. In reviewing a sufficiency challenge, "[t]he 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.

{¶ 11} Croskey was indicted on two counts of aggravated burglary under R.C. 2911.11(A)(1): one count alleging that he trespassed in an occupied structure by force, stealth, or deception when the victim was present with the purpose to commit a felonious or simple assault; and a separate count for trespassing in an occupied structure by force, stealth, or deception when the boyfriend was present with the purpose to commit a felonious or simple assault. The jury acquitted Croskey of the

latter offense. Thus, in order to prove there is sufficient evidence of the attempted aggravated burglary for which Croskey was convicted, the state was required to prove (1) that Croskey attempted to trespass in the occupied structure for the purpose of committing an assault in the occupied structure and (2) that Croskey inflicted, attempted, or threatened to inflict physical harm on the victim. R.C. 2911.11(A)(1).

{¶ 12} There is sufficient evidence that Croskey had the requisite criminal intent and did cause physical harm to the victim. The second incident, as the victim presented it at trial, is the basis of the attempted aggravated burglary conviction — the incident in which the boyfriend may or may not have been present, but when the victim was punched in the nose while attempting to prevent Croskey from entering the apartment for the purpose of assaulting the boyfriend. Tr. 158:2-24. The victim's testimony that Croskey intended to trespass into the apartment with the intent to assault the boyfriend and the resulting physical harm to the victim (being punched in the nose), respectively, satisfies the elements of R.C. 2911.11(A) and (A)(1). *State v. Shields*, 8th Dist. Cuyahoga No. 91033, 2009-Ohio-956, ¶ 15, citing *State v. Spears*, 3d Dist. Crawford No. 3-07-32, 2008-Ohio-2408.[2] That there is no corroboration of the physical harm inflicted on the victim is irrelevant for the

[2] Although the state argues in its appellate brief that the assault on the victim is alone sufficient, the jury was presented a different consideration. During the state's closing argument, the state asked the jury to consider Croskey's intent to assault the boyfriend as a basis for the burglary and the physical harm inflicted on the victim as the aggravating factor.

sufficiency analysis. That would be more appropriately addressed under the weight-of-the-evidence review.

{¶ 13} In response, Croskey claims that the state was required to prove his intent to harm the victim in her apartment to satisfy its burden of proving the burglary. The indictment is not specific with respect to the victim of the assault. Croskey is confusing the aggravating element of causing physical harm to the victim (the R.C. 2911.11(A)(1) factor that distinguishes an R.C. 2911.11 violation with simple burglary under R.C. 2911.12) with the 2911.11(A) primary element of trespassing in an occupied structure with the purpose to commit "any criminal offense." *Shields*. In this case, the R.C. 2911.11(A) element was satisfied by the victim's testimony that Croskey attempted to trespass in her apartment to assault the boyfriend, a criminal offense for the purposes of R.C. 2911.11(A). The testimonial evidence that the victim was punched in the nose satisfied the aggravating factor under R.C. 2911.11(A)(1). There is no requirement that the anticipated criminal offense be committed against the same person against whom the offender inflicts physical harm. The conviction for attempted aggravated burglary is supported by sufficient evidence.

{¶ 14} Croskey next claims that the state violated Croskey's Fifth Amendment right, using his postarrest and trial silence to prove guilt. As previously mentioned, there is merit to this argument. During the state's closing argument, the prosecutor told the jury: "Let's start off with the uncontradicted testimony. And what I mean by that is that, *no one* got on the stand to contradict what [the victim]

and [the boyfriend] said." (Emphasis added.) Tr. 287:2-5. The prosecutor then continued that same theme:

> There were also some comments about not everything was corroborated. Guess what, that's not the real world. Sometimes things happen. Okay? There was also testimony about that the police didn't interview the defendant. Well, guess what? He didn't talk to the police officer. He could have said to the police at any point, hey, here's what happened. Here's my perspective. He didn't do that.

Tr. 292:13-19. Croskey unsuccessfully objected to the prosecutor's latter statement. The state claims the use of Croskey's silence was in response to unfair arguments raised in the defense's closing arguments.

{¶ 15} "'A defendant's decision to exercise his right to remain silent during police interrogation is generally inadmissible at trial either for purposes of impeachment or as substantive evidence of guilt.'" *State v. Alghaben*, 8th Dist. Cuyahoga No. 86044, 2005-Ohio-6490, ¶ 37, citing *State v. Perez*, 3d Dist. Defiance No. 4-03-49, 2004-Ohio-4007; *State v. Leach*, 102 Ohio St.3d 135, 2004-Ohio-2147, 807 N.E.2d 335. The rule is not absolute. When a defendant unfairly claims the government denied him the opportunity to explain his conduct, which is based on the offender's assertion of the right to remain silent, such claims open the door to the state using the defendant's silence as rebuttal. *United States v. Robinson*, 485 U.S. 25, 26, 108 S.Ct. 864, 99 L.Ed.2d 23 (1988). The state's argument in reliance on *Robinson* is true, but only in the vacuous sense — *Robinson* and its progeny are inapplicable to the facts of this particular case.

{¶ 16} To begin with, it is important to note that there were no other witnesses to the three incidents underlying the convictions. Although the victim and the boyfriend claimed another person was present, there is no indication whether that person witnessed the incidents giving rise to Croskey's convictions, and the state does not claim the existence of another eyewitness. Thus, the prosecutor's statement that "no one got on the stand" to contradict the victim's and the boyfriend's testimony, based on the particular facts of this case, was a thinly veiled reference to Croskey. He was the only other person present during all three incidents able to offer any relevant testimony at trial. Although there was no objection to the prosecutor's comment in this regard, there was an unsuccessful objection to the state's comments about Croskey's postarrest silence that continued the same theme.

{¶ 17} At trial, Croskey's trial strategy was straightforward. He claimed that law enforcement officers failed to conduct any prearrest investigation into the allegations. According to the defense's closing argument, "[t]he police department did not help the prosecution either. They sit here, but they haven't done what they are supposed to do to prove their case beyond a reasonable doubt." Tr. 275:5-8. Defense counsel continued, "[s]o if you do your job as a police officer, you document things. And you follow procedures and you do things the right way. You don't jump to conclusions." Tr. 276:2-5. In clarifying the argument, the defense counsel stated:

> *And you investigate.* And you go to the *alleged* defendant and you say, do you have something to say? Do you want to make a statement? They didn't do that. *They didn't supervise those statements* [referring to the

> victim's and the boyfriend's statements] that were made. They didn't get statements from him. They jumped to a conclusion.

(Emphasis added.) Tr. 276:9-16. Thus, the argument in its totality was limited to the prearrest failure to investigate the allegations, an acceptable, and oft relied-upon trial strategy. As the detective testified, he and two other officers approached Croskey and immediately arrested him based on the filing of the initial report. There is no evidence that Croskey asserted his Fifth Amendment right to remain silent before his arrest and that he was further using that silence to challenge the lack of an investigation. Nevertheless, because of the manner that defense counsel challenged the purported inadequate investigation, we understand how the prosecutor might feel the door was opened to comment on the defendant's silence. Defense counsel's reference to the officers not asking Croskey to make a statement must be viewed in the context of how it was delivered. Defense counsel was clearly focusing on the lack of an investigation and not on Croskey's failure to make a statement. There is a significant difference.

{¶ 18} The only evidence leading to Croskey's arrest was the victims' written statements. In light of the arrest occurring immediately upon the report being filed, the defense's tactic of challenging the prearrest investigation was not unfair and was not based on Croskey asserting his right to remain silent. In short, this is not the same type of argument as discussed in *Robinson* or its progeny,[3] in which it was

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[3] The state cites *State v. Jones*, 5th Dist. Stark Nos. 2007-CA-00041 and 2007-CA-00077, 2008-Ohio-1068, ¶ 64, *State v. Carter*, 3d Dist. Allen No. 1-15-62, 2017-Ohio-1233, ¶ 131, and *State v. Canada*, 10th Dist. Franklin No. 14AP-523, 2015-Ohio-2167, ¶ 84, in support of its comments on Croskey's silence. Those cases collectively dealt with the

concluded that a defendant cannot unfairly decry the lack of an opportunity to present his story while hiding behind his right to remain silent following an arrest. In that situation, the defense opens the door to the government's rebuttal that all defendants have the opportunity to present their story after the arrest. *Id.* at syllabus. The state's argument would be applicable if Croskey had been questioned by law enforcement officers, asserted his right to remain silent, and then challenged the lack of the postarrest investigation into his version of events. In that hypothetical situation, the defendant would be hiding behind the Fifth Amendment to criticize the lack of an investigation opening the door to the state's "fair use" rebuttal to explain why the police officers were unable to take the defendant's statements. *Robinson*. In this case, however, Croskey challenged the lack of any investigation before his arrest and the state rebutted that with references to Croskey's silence at trial and after the arrest. Defendants do not have to choose between attacking the lack of a prearrest investigation and ceding their right to remain silent following the arrest and at trial.

{¶ 19} In light of the facts in this case, the objection to the state's closing in this case should have been sustained. The state did not have a valid justification for

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prosecutor's interpretation of facts in evidence or the overall credibility of a witness, not an offender's Fifth Amendment rights. Those cases are inapplicable and are not persuasive in light of the different standards involved. Similarly, *State v. Dorsey*, 5th Dist. Stark No. 1994-CA-00055, 1994 Ohio App. LEXIS 5237, 4 (Nov. 14, 1994), is of little support. In that case, the defendant testified at trial and the state questioned the defendant about not sharing his testimony with the police earlier. *Id.* *Dorsey* discusses using a defendant's silence to impeach him after he chooses to testify at trial, as distinguished from the use of silence as substantive evidence of guilt. *State v. Haddix*, 12th Dist. Warren No. CA2011-07-075, 2012-Ohio-2687, ¶ 22.

pinning the victim's and the boyfriend's credibility to Croskey's postarrest and trial silence when Croskey challenged the lack of a prearrest investigation.

{¶ 20} This discussion then turns to the harmless-error analysis under Crim.R. 52(A). *State v. Powell*, 132 Ohio St.3d 233, 2012-Ohio-2577, 971 N.E.2d 865, ¶ 162, citing *State v. Thompson*, 33 Ohio St.3d 1, 4-5, 514 N.E.2d 407 (1987). Croskey concedes that a violation of the Fifth Amendment is subject to harmless-error analysis. *Id.* In *Powell*, for example, the Ohio Supreme Court concluded that the violation of the defendant's right against self-incrimination was harmless error because the trial court sustained the objection to the state's argument and immediately ordered the jury to disregard it, the improper comments were brief and isolated, and there was overwhelming evidence of guilt. *Id.* None of those reasons are present.

{¶ 21} In this case there is not overwhelming evidence of Croskey's guilt. "Overwhelming evidence of guilt" is evidence that clearly demonstrates guilt beyond a reasonable doubt. *See State v. Harris*, 9th Dist. Lorain No. 11CA009991, 2012-Ohio-2973, ¶ 23, citing *State v. Smith*, 14 Ohio St.3d 13, 15, 470 N.E.2d 883 (1984). The victim's and the boyfriend's testimony conflicted with each other in material respects, including whether Croskey brandished or possessed a weapon during the fight the victim witnessed, and the boyfriend was unable to accurately describe that weapon at trial. Further, their trial testimony was not consistent with the voluntary, written statements provided immediately after the incident. Although there is some evidence of guilt, it does not rise to the level of overwhelming evidence. *See, e.g., id.*

(prosecutor's commentary on defendant's postarrest silence was not harmless error in light of the lack of overwhelming evidence of guilt). Importantly, the state does not claim otherwise. App.R. 16(A)(7).

{¶ 22} Instead, the state claims that we can disregard the error as harmless because Croskey either opened the door to the prosecutor's comments or because the improper comments did not pervade the entire trial. The former argument has already been found to be without merit, and the latter is based on *State v. LaMar*, 95 Ohio St.3d 181, 2002-Ohio-2128, 767 N.E.2d 166, a capital case involving "the infamous April 1993 riot at Southern Ohio Correctional Facility" for which the defendant was sentenced to death for the murder of four people. The *LaMar* court rejected the argument that the state's improper comments regarding the defense counsel was reversible error because the comments were isolated and did not affect the substantial rights of the accused by pervading the entire trial. The *LaMar* case involved multiple counts of murder, demonstrated through the admission of numerous pieces of physical and testimonial evidence. *Id.* at ¶ 168.

{¶ 23} In this case, the prosecutor's comments were directed at the credibility of the only two witnesses to offer evidence in support of a conviction. The state is relying on Croskey's silence to claim that the victim's and the boyfriend's testimonial evidence was unconverted. *See, e.g., State v. Dzelajlija*, 8th Dist. Cuyahoga No. 88805, 2007-Ohio-4050, ¶ 39 (offering improper testimony or commentary on the credibility of the sole witness acts as a "litmus test" on key issues infringing on the role of the trier of fact). The victim's and the boyfriend's credibility

was the sole focus of trial, but their testimony conflicted on material issues — who was present during the second incident, whether Croskey brandished the box cutter during the first incident, and whether the boyfriend could accurately identify the box cutter. In this regard, the prosecutor's improper comments about Croskey not taking the stand to contradict their statements went to the heart of the matter. *State v. Stephens*, 24 Ohio St.2d 76, 263 N.E.2d 773 (1970). *LaMar* is inapplicable, and we cannot say the error in this case is harmless.

{¶ 24} In light of the foregoing, we reverse Croskey's convictions and remand for a new trial. The remaining assigned errors are moot as contemplated under App.R. 12(A)(1)(c). Reversed and remanded.

It is ordered that appellant recover from appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue of this court directing the common pleas court to carry this judgment into execution.

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

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SEAN C. GALLAGHER, PRESIDING JUDGE

KATHLEEN ANN KEOUGH, J., and
EILEEN A. GALLAGHER, J., CONCUR