[Cite as *State v. Gary*, 2004-Ohio-6686.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2003-T-0124**
- vs -	:	
FREDERICK R. GARY,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 03 CR 109.

Judgment: Affirmed.

Dennis Watkins, Trumbull County Prosecutor, and *LuWayne Annos*, Assistant Prosecutor, Administration Building, Fourth Floor, 160 High Street, N.W., Warren, OH 44481 (For Plaintiff-Appellee).

Erik M. Jones, One Cascade Plaza, 20th Floor, Akron, OH 44308 (For Defendant-Appellant).

WILLIAM M. O'NEILL, J.

{¶1} This appeal arises from the Trumbull County Court of Common Pleas, wherein appellant, Frederick R. Gary, was convicted of felonious assault, a felony in the second degree.

{¶2} On June 20, 2002, at approximately 11:23 p.m., the Warren City Police Department received a call about a woman being assaulted at 408 Highland Avenue.

Patrolman Timothy Brown arrived at the scene. As he arrived, he was approached by Delphine Green ("Green") who told him her boyfriend, appellant, had hit her. Patrolman Brown noted that Green had a bruise on her face and her eye was swollen. Green informed the officer that appellant was no longer on the premises. After a cursory look around the apartment, Patrolman Brown waited with Green until the ambulance arrived to take Green for medical assistance.

{¶3} Appellant was subsequently charged with felonious assault, in violation of R.C. 2903.11(A)(1). Appellant entered a plea of not guilty. A jury trial commenced August 4, 2003. The state presented the testimony of Patrolman Brown, Henry Price (an upstairs neighbor), Green, Green's mother, and medical testimony by Dr. Andrew Bystell. At the close of the state's evidence, appellant advanced a Crim.R. 29 motion for acquittal, which was overruled by the trial court. The defense rested without presenting any evidence. The jury subsequently found appellant guilty on the felonious assault charge.

{¶4} Following a presentence investigation, a sentencing hearing was held on August 18, 2003. The trial court sentenced appellant to a term of four years incarceration. Appellant filed this timely appeal, presenting two assignments of error. The first assignment of error is:

{¶5} "The trial court abused its discretion by overruling appellant's objection to the closing arguments of the prosecution, in violation of appellant's rights as guaranteed by the Fifth Amendment to the United States Constitution."

{¶6} In his first assignment of error, appellant takes issue with the trial court's failure to sustain appellant's objections to the repeated use of the words "undisputed" and "uncontested" by the prosecution during closing arguments.

{¶7} The reviewing court's role in resolving whether prosecutorial misconduct has occurred is two-fold. First, we must determine whether the remarks at issue were improper, and, if so, whether the remarks prejudicially affected a substantial right of the appellant.[1] For the prosecution's statements to be considered prejudicial, the remarks must be of such a nature that they are "so inflammatory as to render the jury's decision a product solely of passion and prejudice."[2]

{¶8} Generally, the prosecution is given wide latitude in closing arguments to state what it feels the evidence has demonstrated and what inferences can be drawn from that evidence.[3]

{¶9} In the instant case, appellant takes issue with the following statement made by the prosecution at closing:

{¶10} "Ladies and gentlemen, it is *undisputed and uncontested* that on June 20, 2002, and in Trumbull County, Ohio, someone punched Delphine Green in the face and caused her physical harm. It is *undisputed and uncontested* that the physical harm she suffered is serious physical harm.

{¶11} "***

{¶12} "Ladies and gentlemen, the evidence in this case, as far as the basic elements of the crime, are *undisputed and uncontested*.

1. *State v. Smith* (2000), 87 Ohio St.3d 424, 442.
2. *State v. Williams* (1986), 23 Ohio St.3d 16, 20.
3. *State v. DeRose*, 11th Dist. No. 2000-L-076, 2002-Ohio-4357, at ¶45.

{¶13} "Quite frankly, the only issue you really need to decide when you get back into the jury room, is who is responsible. And, again, the evidence is not only overwhelming, but it's *undisputed, uncontested*, that the only person responsible is this Defendant, Fred Gary." (Emphasis added.)

{¶14} Appellant asserts that the terms "undisputed" and "uncontested" used in this context interfere with appellant's ability to remain free from testifying on his own behalf if he so chooses. In other words, appellant asserts that, by using those terms, the prosecution is directing the jury's attention to the fact that he did not testify or present any evidence on his own behalf and such conduct is prejudicial to the defense. We disagree with appellant's contentions.

{¶15} The United States Supreme Court has held:

{¶16} "Comment to the jury by a prosecutor in a state criminal trial upon a defendant's failure to testify as to matters which he can reasonably be expected to deny or explain because of facts within his knowledge or by the court that the defendant's silence under those circumstances evidences guilt violates the Self-Incrimination Clause of the Fifth Amendment of the Federal Constitution as made applicable to the States by the Fourteenth."[4]

{¶17} The above statements by the prosecution served merely to restate the evidence and what the state felt the evidence demonstrated. They did not rise to the level of creating passion and prejudice in the jury and affecting the ultimate verdict. Moreover, this court has previously held that the prosecution's use of the words

4. *Griffin v. California* (1965), 380 U.S. 609, syllabus.

"uncontradicted" and "unrebutted" is not an improper reference to a defendant's failure to testify but, rather, referred to the strength of the state's case.[5]

{¶18} Thus, the prosecution's statements were permissible, and the trial court did not abuse its discretion in overruling appellant's objection.

{¶19} Appellant's first assignment of error is without merit.

{¶20} The second assignment of error is:

{¶21} "The appellant's conviction is against the manifest weight of the evidence."

{¶22} In determining whether a verdict is against the manifest weight of the evidence, ""the court reviewing the entire record, *weighs the evidence* and all reasonable inferences, considers the credibility of the witnesses and determines whether in resolving conflicts in the evidence, 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.""[6] The appellate courts sit as the "thirteenth juror" and engage in a limited weighing of the evidence introduced at trial.[7]

{¶23} Appellant contends that, although the state presented the testimony of several witnesses, only Green's testimony linked appellant to the injuries. Appellant further asserts that this testimony alone, in the absence of any other witnesses or DNA evidence, cannot sustain his conviction. Appellant also directs this court's attention to the fact that Green's credibility was undermined by her history of dishonesty and her denial of a previous conviction.

---

5. *State v. Brumley* (Mar. 29, 1996), 11th Dist. Nos. 89-P-2092 and 89-P-2099, 1996 Ohio App. LEXIS 1390, at *107, citing *State v. Poindexter* (1988), 36 Ohio St.3d 1, 5.
6. (Citations omitted.) *State v. Schlee* (Dec. 23, 1994), 11th Dist. No. 93-L-082, 1994 Ohio App. LEXIS 5862, at *15.
7. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387-388.

{¶24} We are not persuaded by appellant's contentions. While Green's credibility may have been called into question during cross-examination, the jury ultimately concluded the state had established that appellant was the assailant. It is well-settled that "the weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts."[8] Moreover, the state presented the testimony of Henry Price, the upstairs neighbor, who testified that Green came up to his apartment to use the telephone and shortly after he heard appellant outside yelling and screaming at Green.

{¶25} Thus, based on the evidence presented, we conclude the jury did not lose its way in convicting appellant on the felonious assault charge and the conviction is not against the manifest weight of the evidence.

{¶26} Appellant's second assignment of error is without merit.

{¶27} Based on the foregoing, appellant's assignments of error are not well-taken and the judgment of the Trumbull County Court of Common Pleas is affirmed.

DONALD R. FORD, P.J.,

CYNTHIA WESTCOTT RICE, J.,

concur.

8. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus.