[Cite as *State v. Froe*, 2003-Ohio-7334.]

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

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee,	:	Case No. 02CA2860
	:	
v.	:	
	:	
ERIC FROE,	:	DECISION AND JUDGMENT ENTRY
	:	
Defendant-Appellant.	:	**RELEASED 12/30/03**

APPEARANCES:

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EVANS, P.J.

{¶1} Defendant-Appellant Eric Froe appeals his conviction for robbery, a second-degree felony in violation of R.C. 2911.02(A)(2). Appellant argues that several instances of prosecutorial misconduct prejudiced him and denied him a fair trial. Specifically, appellant contends that the state improperly elicited testimony from two detectives about appellant's post-*Miranda* invocation of his right to

remain silent, and that the state improperly commented during its closing argument on appellant's failure to testify.

{¶2} This Court affirms appellant's conviction for robbery because the state's elicitation of testimony describing appellant's invocation of his right to remain silent did not prejudice appellant, and because the state did not improperly comment on appellant's failure to testify.

Proceedings and Facts

{¶3} On July 22, 2002, Defendant-Appellant Eric Froe was indicted for robbery. The indictment alleged that appellant did, in attempting or committing a theft offense, or in fleeing immediately after the attempt or offense, inflict, attempt to inflict, or threaten to inflict physical harm on another, a violation of R.C. 2911.02(A)(2). Appellant's case was tried to a jury. On October 1, 2002, the jury found appellant guilty of robbery. Appellant timely appealed to this Court.

{¶4} The facts surrounding appellant's robbery charge are as follows. On or about June 25, 2002, a robbery occurred at the Super Quick convenience store located in Portsmouth, Ohio. Nathan Lykins, an employee of the Super Quick, was working the third shift during the early hours of June 25, 2002. At around 1:00 a.m. to 1:20 a.m., Lykins noticed appellant, an African-American male, dressed in a white Nascar t-shirt and purple shorts, using the pay phone outside of the store. Several minutes later, Anthony Hiles, also an employee of the Super Quick, noticed an African-American male with a plastic bag tied

over his head with eye and mouth holes cut out of it, wearing a white Nascar t-shirt and purple shorts, walk into the store and confront Lykins.

{¶5} The perpetrator directed Lykins to the cash register. The perpetrator's right hand was concealed by a brown paper sack. The perpetrator, pointing with the sack, motioned Lykins to give him the money in the register. After Lykins handed him $173, the perpetrator fled. Thereafter, Hiles called the police while Lykins locked the doors.

{¶6} At trial, Lieutenant Ware, the midnight supervisor for the Portsmouth Police Department, testified that he was called to the scene. He testified that he found a black plastic bag and a brown paper sack in the parking lot of the Super Quick in the same general direction that the perpetrator fled. Ware also testified that he watched the store's surveillance tapes to ascertain what exactly went on. After seeing the perpetrator on tape, Ware initially suspected appellant. Ware testified that he based his suspicion on a familiarity with appellant over twenty years, having attended school with appellant and seeing him around town during his work as an officer. More specifically, Ware testified that he had seen appellant within the forty-eight hours prior to the robbery wearing the same clothes that he saw on the tape and that Lykins and Hiles had described to him.

{¶7} Missy Pennington, the assistant manager of Clark's Pump and Shop, testified that she was working the 6:00 a.m. to 2:00 p.m. shift

on June 24, 2002. She testified that appellant regularly patronized Clark's and that she was familiar with him. Specifically, Pennington further testified that she saw appellant in her store on the morning of June 24, 2002. She stated that appellant was wearing purplish burgundy shorts and a white Nascar shirt. She also testified about a surveillance tape from her store that showed appellant in Clark's dressed in the same clothes on that morning.

{¶8} Detective Pat Hutchins testified that he arrived at the Super Quick to process the scene and begin his investigation in the early morning hours of June 25, 2002. Hutchins testified that Ware indicated to him his suspicion that appellant was the perpetrator. Hutchins, familiar with appellant over the course of twelve years, testified that, after conducting an initial investigation of the Super Quick, he was called to Clark's Pump and Shop. There, he and Lieutenant Lynn Brewer watched the surveillance tape that showed appellant had patronized Clark's in the twenty-four hours prior to the robbery at the Super Quick. Hutchins testified that the Clark's tape showed appellant wearing the same clothes as the perpetrator on the Super Quick tape and as described by Lykins and Hiles.

{¶9} Detective Hutchins further testified that, based on all the evidence, the Portsmouth Police Department arrested appellant. Hutchins testified about the arrest and the subsequent questioning of appellant at the police station. During the interview, Hutchins testified that he suggested to appellant that he could get the prosecutor to come to the station and inform appellant of the

potential penalty for the crime. Hutchins testified that appellant's response to that suggestion was "it's too early for that."

{¶10} In his direct examination, Lieutenant Brewer testified about questioning appellant at the police station. Lieutenant Brewer, when asked what appellant's response was when presented with the option of talking to the prosecutor, confirmed that "The defendant told us that it was too early to discuss something like that, that he wanted to talk to his lawyer."

{¶11} Appellant did not present any witnesses in his defense. Thus, after all the evidence was admitted, and after each party's closing argument, the jury retired for deliberations. Upon their return, the jury found appellant guilty of robbery. By way of judgment entry filed October 1, 2002, the court entered a finding of guilt and sentenced appellant to seven years imprisonment.

The Appeal

{¶12} Appellant timely filed an appeal assigning as error the following.

{¶13} First Assignment of Error: "The trial court erred to the prejudice of the defendant by denying defendant's motion for mistrial when during the prosecution's closing argument, the prosecution commented on the defendant's refusal to testify at trial."

{¶14} Second Assignment of Error: "The trial court erred to the prejudice of the defendant by denying defendant's motion for mistrial when during the trial, the prosecution presented evidence and comment on the defendant's silence."

{¶15} Appellant's assignments of error allege several instances of prosecutorial misconduct not only during the trial, but also during closing arguments. Appellant essentially asserts two instances of prosecutorial misconduct. First, appellant contends that it was improper for the prosecutor to elicit testimony from Detective Hutchins and Lieutenant Brewer that appellant, when asked if he wanted to talk to the prosecutor, stated that it was "too early for that." Appellant alleges that evidence of his invocation of his *Miranda* rights amounted to *Doyle* violations. Second, appellant argues that the prosecutor's statements in closing argument that appellant "doesn't admit to robbing the store, but he doesn't deny it either" improperly refer to appellant's decision not to testify. We will address these claimed errors in reverse order.

I. Plain Error

{¶16} We note that appellant's trial counsel failed to contemporaneously object to several, if not all, of the statements made by the prosecution that form the basis for this appeal. Generally, an appellate court need not excogitate an error that was not called to the trial court's attention at a time when that error could have been avoided or rectified by the trial court. *State v. Hill*, 92 Ohio St.3d 191, 196, 2001-Ohio-141, 749 N.E.2d 274, citing *State v. Williams* (1977), 51 Ohio St.2d 112, 117, 364 N.E.2d 1364. Consequently, an alleged error is considered waived absent plain error. See Crim.R. 52(B).

{¶17} "Plain errors are those that so affect the substantial rights of a defendant that they should be noticed in order to prevent a manifest miscarriage of justice, not only to protect the defendant, but also to protect the integrity and the reputation of the judicial system." *State v. Steinman* (1992), 79 Ohio App.3d 246, 252, 607 N.E.2d 67. When deciding whether plain error occurred, "a reviewing court 'must examine the error asserted by the [defendant] in light of all of the evidence properly admitted at trial and determine whether the jury would have convicted the defendant even if the error had not occurred.'" *State v. Hill*, 92 Ohio St.3d at 203, quoting *State v. Slagle* (1992), 65 Ohio St.3d 597, 605, 605 N.E.2d 916. To succeed under this standard, appellant must demonstrate that the outcome of his trial would clearly have been different had the claimed errors not transpired. *State v. Jones* (1996), 114 Ohio App.3d 306, 315, 683 N.E.2d 87. Further, "[n]otice of plain error under Crim.R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *State v. Long* (1978), 53 Ohio St.2d 91, 372 N.E.2d 804, paragraph three of the syllabus. We will turn to appellant's assignments of error with these fundamentals as the foundation for our analysis.

II. Testimony Concerning Appellant's Invocation of His *Miranda* Rights

{¶18} In his Second Assignment of Error, appellant argues that the trial court erred when it denied appellant's motion for a mistrial after the prosecution, in its case in chief, offered testimony of appellant's silence. Appellant alleges that the court permitted the

state to elicit improper testimony from both Detective Hutchins and Lieutenant Brewer concerning his invocation of his right to remain silent.

{¶19} During his direct examination, Detective Hutchins offered testimony about the arrest and subsequent questioning of appellant at the police station. During his testimony, the following colloquy took place:

{¶20} "[PROSECUTING ATTORNEY MS. MATHEW] Q: Could you tell us a little bit about the conversation?

{¶21} "[HUTCHINS] A: It was brief. Lieutenant Lynn Brewer had been speaking with him briefly and you know basically we just wanted him to tell us what happened as far as the robbery went and the only thing I really mentioned to him was if you're thinking about how much time, you know, we might be talking or you might be wondering about, I said I can possibly call the prosecutors office and have one of their people come over if you would want to talk with one of them, and he said 'it's too early for that' and that was basically the end of our conversation.

{¶22} "Q: Okay, did you ask him about using, did you ask him about being at the location at the Super Quick?

{¶23} "A: I did not, no.

{¶24} "Q: Did you ask him about using the pay phone?

{¶25} "A: No, I believe Lieutenant Brewer had that conversation with him.

{¶26} "Q: Were you there?

{¶27} "A: Yes.

{¶28} "Q: Can you tell us what was said?

{¶29} "[DEFENSE ATTORNEY] MR. TRIPLETT: I'm going to object, Judge, as to what Lieutenant Brewer said as hearsay.

{¶30} "MS. MATHEW: No, I'm talking about what the defendant said. That's not hearsay.

{¶31} "THE COURT: He can testify as to what Mr. Froe said.

{¶32} "A: He said that he had used the pay phone outside the Super Quick."

{¶33} Lieutenant Brewer likewise testified about appellant's interview at the police station. The following exchange transpired:

{¶34} "[MS. MATHEW] Q: At any time did you talk to the Defendant?

{¶35} "[BREWER] A: Yes, we picked Mr. Froe up later on that morning at a residence on Findlay Street and took him down to the police station. I talked to Mr. Froe down there and advised him that based on the evidence we had, being the video, the fact that the person who had robbed Super Quick had used the phone outside just prior to doing the robbery, that we probably had his fingerprints and inquired if he wanted to talk about the crime. He told me that he had used the telephone outside Super Quick and had been there during that time period but wouldn't acknowledge whether he had went into the store.

{¶36} "Q: So he didn't admit going into the store?

{¶37} "***

{¶38} "A: No he would not.

{¶39} "Q: But he would not, but he didn't deny going into the store?

{¶40} "A: No he did not.

{¶41} "Q: Okay, but he just admitted that he was there?

{¶42} "A: Yes he did.

{¶43} "Q: And he admitted using the pay phone?

{¶44} "A: Yes.

{¶45} "Q: Okay, were you a witness to any of the other conversations between Mr. Froe and Pat Hutchins?

{¶46} "A: Yes I witnessed part of that.

{¶47} "Q: Okay, could you tell us about it?

{¶48} "A: Detective Hutchins came into the room when Mr. Froe and I were talking about him using the phone there and there was some conversation between Mr. Froe and Detective Hutchins of how much time he would get if he was convicted of a robbery. Detective Hutchins made an offer of –

{¶49} "MR. TRIPLETT: Objection as to what Mr. Hutchins said.

{¶50} "THE COURT: Sustained.

{¶51} "Q: Could you just tell us what the defendant said please?

{¶52} "A: The defendant told us that it was too early to discuss something like that, that he wanted to talk to his lawyer."

{¶53} In its closing argument, the prosecution reiterated that testimony to the jury. Specifically, the state argued: "Instead,

when asked if he wants to call the prosecutor about time, he says it's too early for that, then he clams up. Now by sitting there, making us go through this trial, he is basically saying he didn't do it." Following the last comment, the defense objected on the basis that appellant has a constitutional right to go to trial. The court called each attorney to the bench where defense counsel moved for a mistrial on the basis that the prosecutor should not have argued that appellant was making them go to trial. The trial court overruled the motion.

{¶54} Appellant contends that it was plain error to permit the prosecution to present evidence of appellant's invocation of his right to remain silent and to speak to an attorney. Appellant's assignment of error claims that he moved for a mistrial based on the above testimony. However, our independent review of the trial transcript plainly shows that appellant never moved for a mistrial based on that testimony. In fact, appellant only objected to the testimony of what the other officers said during appellant's interview based on the hearsay rule. The record is clear that appellant never contemporaneously objected to this testimony on the basis that it was improper questioning. The objection and motion for a mistrial came after the prosecutor's comments during closing argument, and we shall discuss those in conjunction with appellant's First Assignment of Error. Thus, because appellant failed to enter an objection, we are guided by plain error. See *State v. Hill*, 92 Ohio St.3d at 202.

{¶55} "In *Doyle v. Ohio* (1976), 426 U.S. 610, 96 S.Ct. 2240, the United States Supreme Court held that the use for impeachment purposes

at trial of a defendant's silence, at time of his arrest and after receiving *Miranda* warnings, violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution." *State v.* Hill, 92 Ohio St.3d at 202. *Doyle* has been held to mean that *Miranda* warnings contained an implied assurance that a defendant would not suffer any penalty for invoking his right to remain silent. *Wainwright v. Greenfield* (1986), 474 U.S. 284, 295, 106 S.Ct. 634. In *Wainwright*, the court held that "*Doyle* rests on 'the fundamental unfairness of implicitly assuring a suspect that his silence will not be used against him and then using his silence to *impeach* an explanation subsequently offered at trial." Id. at 291. (Emphasis added.) In *State v. Rogers* (1987), 32 Ohio St.3d 70, 73, 512 N.E.2d 581, the Supreme Court of Ohio recognized that "federal courts, in applying the plain or harmless error analysis in cases where there had been *Doyle* violations, with near unanimity, have held such to be violative of due process and therefore prejudicial, requiring a reversal." In both *Wainwright* and *Rogers*, the court reversed convictions when defendants' pretrial exercise of rights of silence and to consult attorneys was used to refute insanity pleas. However, the case sub judice is somewhat distinct from the established precedent in that the prosecution did not use appellant's silence to directly impeach him on cross examination, as appellant never testified.

{¶56} In support of his claim of error, appellant relies solely on *State v. Hill* (2000), 136 Ohio App.3d 636, 737 N.E.2d 577 (*Hill I*),

where the Fifth District Court of Appeals held that it was plain error for the prosecution to argue that, during questioning, the defendant told a detective "You do what the fuck you have to, I'm not saying anything." From that case, appellant draws an analogy to what he said to detectives during his interview, i.e., that "it's too early [to talk to prosecutors]." Appellant contends that, just as in *Hill I*, it was plain error for the state to elicit from the detectives testimony of appellant's invocation of his right to remain silent and to talk to an attorney.

{¶57} The problem with appellant's argument is that the Supreme Court of Ohio had occasion to review the Fifth Appellate District's holding in *Hill I*. *State v. Hill*, 92 Ohio St.3d 191, 2001-Ohio-141, 749 N.E.2d 274. In reversing, the Supreme Court of Ohio found that the appellate court essentially created a "plain error *per se*" rule based on the precepts of *Doyle v. Ohio*, 426 U.S. 610, instead of fully considering the record "to determine if a manifest miscarriage of justice occurred." *State v. Hill*, 92 Ohio St.3d at 202-203. The court withheld a determination of whether plain error had occurred because of the appellate court's ruling that four of the defendant's assignments of error were moot in light of its two rulings. However, since the Supreme Court of Ohio disagreed with the way the appellate court ruled on those two assignments of error, "several of the issues raised within the unaddressed assignments of error might [have] affected a plain-error inquiry." Id. at 203.

{¶58} Nevertheless, the Supreme Court of Ohio indicated that "given our determination that no plain error requiring summary reversal occurred in admitting appellee's statement that he was not talking, those unaddressed assignments of error must be evaluated in their own right to determine their effect, if any, on the plain-error inquiry ***." Id. at 204. In remanding the case, the Supreme Court of Ohio held that "when a court of appeals engages in a plain-error analysis, it must conduct a complete review of all relevant assignments of error in order to determine whether a manifest miscarriage of justice has occurred that clearly affected the outcome of the trial." Id. at syllabus.

{¶59} On remand, the Fifth Appellate District engaged in an analysis to determine whether the statements elicited by the prosecution prejudiced the defendant and, if so, whether the prejudice created a manifest injustice. *State v. Hill*, 5th Dist. No. 98CA67, 2002-Ohio-227. The court answered that query in the negative. Id. Thus, although the statements rose to the level of *Doyle* violations, the plain error doctrine required a finding of prejudice that resulted in a manifest injustice so that the outcome of the trial was affected. See id. And, as the Supreme Court of Ohio admonished, in order to make those findings, the appellate court must conduct a complete review of all relevant assignments of error. *State v. Hill*, 92 Ohio St.3d at 204.

{¶60} Typically, *Doyle* violations involve the prosecutor using post-*Miranda* silence to impeach a defendant during trial. See *Doyle*

v. Ohio, supra. Nevertheless, we believe that the basic principles underlying the rational for the *Doyle* rule can apply to other inferences drawn by the prosecutor during trial from the defendant's invocation of his *Miranda* rights. For instance, as in this case, a prosecutor can implicitly imply the defendant's silence is evidence of guilt through police testimony about the defendant invoking his right to remain silent or to consult an attorney. See, generally, *State v. Combs* (1991), 62 Ohio St.3d 278, 581 N.E.2d 1071. Another reason for applying the *Doyle* rule to other witness testimony is that the *Miranda* warnings "contain an implied assurance, based in the Constitution, that silence would carry no penalty." *State v. Hill*, 92 Ohio St.3d at 202. No penalty means invoking one's *Miranda* rights will not be used in any way at trial. After all, *Miranda v. Arizona* (1996), 384 U.S. 436, 86 S.Ct. 1602, did not exclusively limit the protections afforded a suspect invoking the rights to impeachment purposes. Further, other courts have applied the *Doyle* standard to other witness testimony. See *State v. Jones* (Aug. 28, 1998), 1st Dist. No. C-970043. Thus we will apply the *Doyle* test to determine whether the statements elicited were improper, and if so, whether appellant suffered any prejudice.

{¶61} The test under *Doyle* is to determine whether the prosecutor's comment was extensive and whether the prosecutor stressed to the jury an inference of guilt from the accused's silence as a basis of conviction. See *State v. Jones*, supra. In the case sub judice, the prosecution elicited appellant's post-*Miranda* statement that "it's too early [to talk to prosecutors]" from two witnesses and

mentioned that testimony once in closing argument. The prosecution first elicited this testimony from Detective Hutchins, who testified in response to a general question posed by the prosecution inquiring about appellant's arrest and subsequent interview. Next, the prosecution elicited the same testimony from Lieutenant Brewer, but in a more pointed manner. The prosecution asked Brewer specifically what appellant said during his interview.

{¶62} Then, in closing, the prosecution reiterated that testimony to the jury. Thus, it is apparent that this was not an isolated comment made by the prosecutor. Rather, the fact that the prosecutor made reference to appellant's statement three times indicates that those comments were extensive. Moreover, the inference to be drawn from that testimony is that appellant was guilty, otherwise he would have continued to talk to Hutchins and Brewer. While appellant admitted to talking on the phone, he did not admit nor deny that he entered the store. Thus, appellant offered some information to the police, but when it came time to talk about a possible plea bargain with the prosecutors, "it's too early for that." In this situation, to a reasonable jury, appellant's statement invoking his right to remain silent and right to an attorney certainly carries an inference that he was guilty. Thus, the statements rise to the level of *Doyle* violations.

{¶63} Accordingly, it was improper for the prosecution to elicit the testimony about appellant's invocations of his right to remain silent and right to an attorney from Hutchins and Brewer. However, in

light of all the evidence presented at trial, we cannot conclude that the outcome of the trial clearly would have been different had the trial court not allowed this testimony. Thus, appellant has not suffered prejudice from that testimony and no manifest injustice has occurred. Thus, we do not find that the error amounted to plain error.

{¶64} Appellant's Second Assignment of Error is overruled.

III. Prosecutorial Misconduct in Closing Argument

{¶65} In his First Assignment of Error, appellant alleges that the trial court erred when it denied appellant's motion for a mistrial after the prosecution commented upon appellant's failure to testify at trial. Specifically, appellant contends that the following comments made by the prosecutor during its closing were improper:

{¶66} "He admits to using the phone. He corroborates Nathan Lykins in that he admits to using the phone. He doesn't admit to robbing the store, but he doesn't deny it either. He doesn't deny robbing the store."

{¶67} After those comments, the prosecution continued: "Instead, when asked if he wants to call the prosecutor about time, he says it's too early for that, then he clams up. Now by sitting there, making us go through this trial, he is basically saying he didn't do it.

{¶68} "MR. TRIPLETT: Objection, Your Honor. The man has a Constitutional right to go to trial. We're not saying anything."

{¶69} Following that objection, the court held a conference at the bench where defense counsel made a motion for a mistrial. However,

the objection levied and subsequent motion for a mistrial were based, not on the statements at issue now, but on the prosecutor's statement that appellant was "making us go through this trial."

{¶70} At that point, the court read a curative instruction to the jury explaining that appellant's plea of not guilty puts the burden on the state to prove each and every essential element of the offense. The court further cautioned that "it is not necessary that the defendant take the witness stand in his own defense. He has Constitutional right not to testify. The fact that the defendant did not testify must not be considered for any purpose. The State of Ohio has the burden of proof in this case."

{¶71} Following that instruction, the state continued its closing argument. The prosecutor commented that "What I was trying to say was by pleading not guilty he is saying he didn't do it."

{¶72} "MR. TRIPLETT: Objection.

{¶73} "***.

{¶74} "THE COURT: Overruled.

{¶75} "***.

{¶76} "MS. MATHEW: Thank you, Your Honor. But yet if you will notice he didn't say he didn't do it to the police. Think about it. Why not?"

{¶77} The test for prosecutorial misconduct in closing argument is whether the statements made were improper and, if so, whether they prejudicially affected the substantial rights of the accused. *State v. Lott* (1990), 51 Ohio St.3d 160, 166, 555 N.E.2d 293. To determine

whether a prosecutor's remarks prejudiced the accused, the entire closing argument must be reviewed. *State v. Keenan* (1993), 66 Ohio St.3d 402, 410, 613 N.E.2d 203. However, the state is entitled to some latitude in its closing argument. *State v. Bies* (1996), 74 Ohio St.3d 320, 326, 658 N.E.2d 754.

{¶78} Once again we apply the plain error standard as appellant's objection and subsequent motion for a mistrial were not based on the comments at issue here. See *State v. Tumbleson* (1995), 105 Ohio App.3d 693, 700, 664 N.E.2d 1318. "Prosecutorial misconduct rises to the level of plain error if it is clear defendant would not have been convicted in the absence of the improper comments." Id.

{¶79} It is improper for a prosecutor to comment on the defendant's failure to testify. *Griffin v. California* (1965), 380 U.S. 609, 85 S.Ct. 1229; *State v. Fears*, 86 Ohio St.3d 329, 336, 1999-Ohio-111, 715 N.E.2d 136. When an appellant alleges that a prosecutor's statement improperly commented on the accused's failure to testify, the test to be applied 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." *State v. Cooper* (1977), 52 Ohio St.2d 163, 173, 370 N.E.2d 725, vacated on other grounds (1978), 438 U.S. 911, 98 S.Ct. 3137.

{¶80} The comments made by the prosecutor in this case can be read to impermissibly reference appellant's failure to take the witness stand. Taken by itself, the first comment is a clear violation of

appellant's Fifth Amendment rights: "He doesn't admit to robbing the store, but he doesn't deny it either. He doesn't deny robbing the store." However, the comment must be read in the entire context of the prosecutor's closing argument. See *State v. Keenan*, supra. After summarizing all the incriminating evidence for the jury, the prosecutor asked, "And what did this defendant say when confronted with all of this. He admits to using the phone. ***. He doesn't admit to robbing the store, but he doesn't deny it either. He doesn't deny robbing the store. Instead, when asked if he wants to call the prosecutor about time, he says it's too early for that, then he clams up." It is apparent that the prosecutor was not referencing appellant's failure to take the witness stand, but rather was referencing the post-arrest interview of appellant conducted by Detective Hutchins and Lieutenant Brewer. Even so, the comment impermissibly referenced appellant's post-arrest, post-*Miranda*, silence, as previously discussed.

{¶81} We also note that, even had the jury interpreted the comments as pertaining to appellant's failure to testify, the court immediately instructed the jury that they were not to consider the fact that appellant did not testify for any purpose. Thus, the instruction cured any improper reference that could have been inferred from the prosecutor's comments. See *State v. Smith*, 97 Ohio St.3d 367, 2002-Ohio-6659, 780 N.E.2d 221, at ¶57.

{¶82} The prosecutor's second comment, made after the court's curative instruction, was likewise improper. However, that comment

clearly references appellant's post-arrest, post-*Miranda* silence, not his failure to testify. While this comment was improper, it did not prejudicially affect a substantial right of appellant. Based upon our independent review of the record, we find that the state presented substantial, credible evidence which would allow a reasonable trier of fact to find appellant guilty of robbery. Thus, when viewed in light of all the evidence presented against appellant, we find that appellant would have been convicted had either of the comments not been made. Thus, appellant has failed to demonstrate plain error.

{¶83} Therefore, appellant's First Assignment of Error is overruled.

Conclusion

{¶84} While appellant has correctly argued that the comments made by the prosecution were improper, he has failed to demonstrate plain error. Accordingly, having overruled both of appellant's assignments of error, the judgment of the trial court is affirmed.

Judgment affirmed.

Harsha, J., and Abele, J.: Concur in Judgment Only.

FOR THE COURT

BY: ______________________________
David T. Evans
Presiding Judge