

ORIGINAL

In the
Supreme Court of Ohio

STATE OF OHIO,)	Case No.: 2014-0718
)	
Plaintiff-Appellee,)	On Appeal from the Seneca County
)	Court of Appeals,
)	Third Appellate District
-v.-)	
)	Court of Appeals Case No.:
JEFFERY C. ARNOLD,)	13-13-27
)	
Defendant-Appellant.)	

MERIT BRIEF OF PLAINTIFF-APPELLEE STATE OF OHIO

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INTRODUCTION

On March 25, 2013, Defendant-Appellant Jeffery C. Arnold sparked an argument with his father after complaining about what his mother had cooked for dinner. When his father left the kitchen table, Arnold followed him into a back room in the residence, where Arnold choked his father and pulled his hair. Arnold's mother fled the house and a neighbor called the police. After a bench trial, Arnold was convicted of Domestic Violence, a misdemeanor in the first degree.

In his brief, Arnold contends that three errors warrant overturning his conviction. First, he asserts that his father's Fifth Amendment rights were violated when the prosecutor and the court advised Arnold's father that he could not properly invoke the Fifth Amendment privilege while testifying. Second, Arnold claims that he was denied a fair trial when the trial court made a comment about an evidentiary objection being asserted by Arnold's counsel. Third, Arnold asserts that his right to confront adverse witnesses was violated when Arnold's father read into the record a statement he made to police, and that writing was subsequently admitted into evidence without objection.

Arnold cannot succeed on his claims. First, under well-established precedent, Arnold lacks standing to assert his father's Fifth Amendment rights. Further, even if Arnold had standing, his father could not properly assert a Fifth Amendment privilege under these circumstances. Second, the trial court's off-hand comment was innocuous and did not demonstrate bias sufficient to deny Arnold a fair trial. Finally, Arnold waived his Confrontation Clause challenge by not objecting during trial, and in any event had an adequate opportunity to cross-examine his father to satisfy the Clause's requirements. Thus, the trial court's judgment should be affirmed.

STATEMENT OF THE FACTS

A. On March 25, 2013, police were called to the Arnold residence to investigate a report of domestic violence

The Arnold family resides in a home on a cul-de-sac on Monroe Street, which is in the City of Fostoria in Wood County. The events of this case stem from a family dinner on March 25, 2013, when Defendant-Appellant Jeffery C. Arnold (hereafter, “Arnold” or “Appellant”) complained about his mother’s cooking, and began bickering with his father, Lester. (Tr., pg. 23, ln. 21-25; pg. 24, ln. 1-7). To deescalate the confrontation, Lester left the kitchen table and walked down the hall to the computer room. Arnold followed him out of the kitchen and into the room. (Tr., pg. 24, ln. 15-20). Arnold’s mother then heard a crashing sound—a sound of struggling—coming from the room that Lester and Arnold had just entered. (Tr., pg. 24, ln. 22-25). Mrs. Arnold’s priority was then removing her eleven year-old grandson from the home, which she did. (Tr., pg. 24, ln. 24-25). Once outside the family home, Mrs. Arnold asked a neighbor to call the police. (Tr., pg. 25, ln. 8-9).

Officers Bethel and Ely responded to a dispatch referencing a domestic disturbance at the Arnold home. (Tr., pg. 14, ln. 19; pg. 35, ln. 10-11). But they were not alone—indeed, the Arnold family was well-known to the Fostoria police, and dispatch ordered all officers on shift to respond to the situation. *Id.* When they arrived, officers stationed their cruisers some distance from the Arnold home. (Tr., pg. ln. 1-3). In an effort to protect Lester, police officers approached the residence and spoke to Arnold, who ranted that he did not have to speak to them based on the United States Constitution and the “commercial code” and then slammed the door in their faces. (Tr., pg. 36, ln. 10-13).

Fostoria Police feared being “out-gunned” based on their knowledge and past interactions with the Arnold family. (Tr., pg. 37, ln. 10-14). In the event that they needed to make a forced

entry, the officers obtained high-powered guns from the police station and called the SWAT team. (Tr., pg. 37, ln. 4-7, pg. 38, ln. 5-14). After using the loudspeakers on their cruisers to warn Arnold of an impending forced-entry and arrival of the SWAT team, it was discovered that Arnold had fled from the residence. (Tr., pg. 39, ln. 10-25).

In the meantime, the garage door of the Arnold home opened and out came Lester to the safety of waiting police. (Tr., pg. 16, ln. 9-13). Lester was questioned immediately and told Officer Bethel that Arnold grabbed him, choked him and pulled his hair. (Tr., pg. 16, ln. 16-23; pg. 17, passim). Lester's hair was disheveled, and he appeared very scared and agitated. *Id.* Mrs. Arnold also appeared to Officer Bethel as scared, agitated, nervous, and he recalled her voice sounding shaky. (Tr., pg. 18, ln. 15-16). Lester made a voluntary written statement to police about what had happened.

The State of Ohio filed a criminal complaint charging Arnold with Domestic Violence in violation of Section 2919.25 of the Ohio Revised Code, a misdemeanor of the first degree, on March 27, 2013.

B. Arnold was convicted of domestic violence after a bench trial

On June 18, 2013, this matter came on for a bench trial before the Honorable Mark E. Repp, Visiting Judge by appointment of this Court.¹

The State's lead witness was the victim, Lester Arnold. During his direct testimony Lester initially cooperated with the Assistant Director of Law and testified as to venue and the familial relationship between him, his wife Connie, and Appellant. (Tr., pg. 6, passim). Then, Lester decided that he could not remember when police were dispatched to his home. *Id.* The exchange then took a bizarre turn, as follows:

¹ The elected judge of the Fostoria Municipal Court, the Honorable Barbara L. Marley, passed away under tragic circumstances on April 14, 2012.

BY THE ASSISTANT DIRECTOR OF LAW:

Q. Were they dispatched there in the spring of this year?

A. Yes.

Q. Do you recall why?

A. Uhm, at this time, I'd like to plead the Fifth and I'm refusing to testify.

Q. Okay. Do you understand you don't have the right to refuse to testify?

A. I have a right from self-incrimination under the Fifth Amendment and I do have a right to refuse to testify.

BY THE COURT: You also understand you also may be held in contempt for failing to answer?

BY MR. ARNOLD: Well, if that's the way that the rules work, yes. I'm also being treated for Post Traumatic Stress Disorder, chronic and severe. I've been on medication and treatment for, since 2005. So if you want to hold me in contempt for refusing you can do that, sir.

(Tr. pg. 6-7, passim).

Lester was then asked about a written statement he made on the day in question, to which he refused to comment upon, invoking his "Fifth Amendment" rights. (Tr. pg. 8, ln. 1-9). The Assistant Director of Law then asked Lester to read his written statement. Defense Counsel promptly objected to this query based on Lester's proclaimed "Fifth Amendment" rights, not on the basis of hearsay. (Tr. pg. 8, ln. 16-19). The trial court then overruled that objection, stating: "He's refused to answer. I don't see what the harm would be in having him read the statement." (Tr., pg. 9, ln 5-7). Lester read his written statement, and it said that Arnold grabbed him by the hair and choked him, and that Lester suffered from a ruptured disc in his neck between the C-2 and C-3. (Tr., pg. 9, ln. 9-17). Lester recounted that despite his pleas, Arnold would not let him go. *Id.*

Defense Counsel then made a continuous objection based on the fact that Lester invoked his “Fifth Amendment” rights. (Tr., pg. 10, ln. 25; pg. 11, ln. 1-2). Yet despite making a continuous objection to Lester’s testimony upon direct examination on the basis of Lester’s “Fifth Amendment” rights, Defense Counsel then proceeded to launch a cross-examination to discredit Lester. Under Defense Counsel’s examination, Lester admitted he could not remember if his written statement was true and voluntary because of health issues. (Tr. pg. 11, ln. 24-25; pg. 12, ln. 1, 7-14). Defense Counsel also elicited an admission from Lester that he did not want his son arrested or charged. (Tr., pg. 10, ln. 21-24). Finally, Lester testified upon cross examination that he did not think, but could not remember, if Arnold attempted to cause him physical harm on March 25, 2013. (Tr., pg. 12, ln. 19-20).

The State presented no further witnesses, and Defense Counsel offered no evidence. The State, before resting, moved into evidence Lester Arnold’s signed statement to police. Defense counsel was offered an opportunity to object, but, significantly, did not object to the admission of Lester’s written statement into evidence. (Tr., pg. 43, ln. 23-24). Defense Counsel was speaking to his client when the trial court inquired if he had any objections. (Tr., pg. 45, ln. 18-20).

The trial court found Appellant guilty as charged, and sentenced him to 150 days in jail.

ARGUMENT

PROPOSITION OF LAW NO. 1:

Lester Arnold had no “Fifth Amendment” rights, and Jeffery C. Arnold has no standing upon appeal to claim them.

In his First Proposition of Law, Appellant argues that the trial court violated his father’s right against self-incrimination, thereby creating reversible error. Arnold is wrong, for two reasons: First, he lacks standing to bring this challenge, and second, his father could not invoke the Fifth Amendment under these circumstances.

A. Arnold cannot assert his father's Fifth Amendment rights

The right to be free from self-incrimination is a personal right. It is black letter law that one cannot invoke that testimonial privilege on behalf of a third person. *See, e.g., Couch v. United States*, 409 U.S. 322, 328 (1973). “The privilege is limited to its historic function of protecting only the natural individual from compulsory incrimination through his own testimony or personal records.” *State v. Diana*, 48 Ohio St. 2d 199, 206 (1973). A third party does not have standing to raise this issue. *Id.* In this case, Arnold claims that the trial court violated his father's Fifth Amendment privilege against self-incrimination. But Arnold lacks standing to assert his father's privilege.

The Eighth District Court of Appeals rejected an argument on all fours with Arnold's argument. *State v. Ramjit*, 8th Dist. Cuyahoga App., 2001-Ohio-4234, 2001 Ohio App. LEXIS 562 (Feb. 15, 2001) (citing *State v. Jenkins*, 15 Ohio St.3d 164, 228 (1984); *State v. Diana*, 48 Ohio St. 2d at 206). In the *Ramjit* case, the appellant was convicted of aggravated murder based upon the testimony of one of his criminal associates. The Eighth District, relying upon precedent from this Court as well as the U.S. Supreme Court, held that appellant had no standing to raise someone else's Fifth Amendment right, and summarily dismissed the argument. Likewise, this Court should overrule Arnold's First Proposition of Law for the same reason: he has no standing to claim a violation of *his father's* Fifth Amendment rights.

B. Lester Arnold could not properly invoke the Fifth Amendment privilege against self-incrimination

The Fifth Amendment to the U.S. Constitution, similar to Section 10, Article I of the Ohio Constitution, provides that “no person shall be . . . compelled in any criminal case to be a witness against himself.” The privilege applies only to answers that, in and of themselves, furnish a “link in the chain of evidence” necessary to prosecute. *Hoffman v. United States*, 341

U.S. 479, 486 (1951). Further, the testimony must be such that “an individual reasonably believes [it] could be used against him in a criminal prosecution.” *Maness v. Meyers*, 419 U.S. 449, 461 (1975).

When a witness refuses to testify because of concern over self-incrimination, a court must engage in a complex analysis to determine if the witness has a valid claim as to that particular testimony, because a blanket assertion is not sufficient. *State v. Landrum*, 53 Ohio St. 3d 107, 120 (1990); *In re Morganroth*, 718 F.2d 161, 167 (6th Cir. 1983) (citing *Hoffman*, 341 U.S. at 486-88). The witness’s bare assertion that his testimony would tend to incriminate him is inadequate. *McGorray v. Sutter*, 80 Ohio St. 400, syl. ¶ 2 (1909). The privilege cannot be invoked wholesale merely by claiming that a response would be incriminating. *Cincinnati v. Bawtenheimer*, 63 Ohio St.3d 260, 266 (1992). A witness must supply additional statements under oath and other evidence in response to each question so as to enable the court to determine the nature of the criminal charge for which the witness fears prosecution. *In re Rebecca S.*, 6th Dist. Lucas App. No. L-97-377, 1997 Ohio App. LEXIS 4806 (Oct. 31, 1997). A witness must have reasonable cause to fear incrimination—an imaginary, remote or speculative possibility is not sufficient. *Morganroth* 718 F.2d at 167 (citing *United States v. Apfelbaum*, 445 U.S. 115, 128 (1980)).

Here, the Assistant Director of Law asked Lester seven questions before Lester decided he had a constitutional right against compelled self-incrimination. Lester then made merely a blanket statement that he had a “Fifth Amendment” right, nothing more. This is the sort of bald assertion this Court has rejected as a basis for invoking the privilege since 1909. The trial court, hearing the initial exchange between prosecutor and witness must have come to the conclusion that Lester was being obstinate—possibly to avoid helping to convict his son. The context of the

questions can lead to no other valid conclusion, because, simply put, Lester was questioned about three fundamental facts:

- 1) Why did police officers arrive at your home?
- 2) Do you remember speaking with police officers?
- 3) Did you make a written statement to police officers?

These three fundamental factual issues are not, on their face, incriminating to Lester in any way. Nor are they when taken in context of the direct examination, and neither Lester Arnold nor the Appellant have shed light on why this might be so. Indeed, there is nothing in the record that suggests that Lester Arnold was invoking the Fifth Amendment out of concern of self-incrimination; rather, the record suggests that he invoked the privilege to help protect his son from prosecution. *See, e.g., Tr., pg. 10, ln. 21-24.* That is not a proper basis upon which to invoke the privilege. *See, e.g., Hoffman, 341 U.S. at 486.*

The remainder of the exchange between the Assistant Director of Law and Lester consisted of legal objection and discussion by counsel and the court. And otherwise, Lester could not recall much. Nothing from the entire exchange supports the contention that Lester was in danger of incriminating himself of anything, and supports the trial court's conclusion that Lester had no privilege to claim. *See, e.g., United States v. Daly, 481 F.2d 28, 30 (8th Cir. 1973)* (finding defendant failed to demonstrate he had a Fifth Amendment privilege where he "made no reasonable showing with respect to how the disclosure of the amount of legal fees he received during the years in question . . . could possibly incriminate him").

Appellant's argument focuses on *State v. Beebe*, 172 Ohio App. 3d 512, 516, 2007 Ohio 3746 (4th Dist.). While identifying this Proposition of Law as one involving a violation of Lester's right against compelled self-incrimination, the *Beebe* case is inapposite. There, the main

issue was prosecutorial misconduct. In *Beebe*, the prosecutor made several comments during a jury trial that suggested to the jury that the witness was going to invoke his right against compelled self-incrimination. The line of questioning left little to the imagination about the motivations of the prosecutor. In fact, even the trial court in that case admonished the prosecutor and threatened a mistrial. Such is not the case here. Indeed, *Beebe* confirms that the Fifth Amendment privilege may only be invoked by the testifying party.

This Honorable Court should respectfully overrule Appellant's First Proposition of Law.

PROPOSITION OF LAW NO. II:

The trial court afforded Jeffery C. Arnold a fair trial.

In his Second Proposition of Law, Appellant challenges his conviction on the ground that he did not receive a fair trial from the trial court. Appellant provides no legal precedent in support of his argument.

This Court held that in determining if remarks of a trial judge were improper, an appellant must prove that the comments demonstrate prejudice. *State v. Wade*, 53 Ohio St. 2d 182 (1978). In *State v. Wade*, 53 Ohio St. 2d at 188, this Court held:

Generally, in determining whether a trial judge's remarks were prejudicial, the courts will adhere to the following rules: (1) The burden of proof is placed upon the defendant to demonstrate prejudice, (2) it is presumed that the trial judge is in the best position to decide when a breach is committed and what corrective measures are called for, (3) the remarks are to be considered in light of the circumstances under which they are made, (4) consideration is to be given to their possible effect upon the jury, and (5) to their possible impairment of the effectiveness of counsel.

However, this Court made it clear that the failure to object constitutes a waiver of this type of error, for it denies the judge the opportunity to give a jury a curative instruction. *Id.*, See also *State v. Williams*, 39 Ohio St. 2d 20 (1974).

In this case, this Court must bear in mind that this was a bench trial, and many, if not all of the concerns raised in *Wade* are not applicable because the trier of fact and the judge were one and the same. Furthermore, Arnold failed to object to the statements he now claims were prejudicial, and thus, at best, plain error review applies.

In any event, under any standard of review, Arnold cannot demonstrate prejudice. The trial court's colloquy with Defense Counsel at the end of the case is not an instance of prejudice. It was discourse about the elements of the case. During his closing argument, Defense Counsel vigorously represented his client by making an argument that there was no proof of physical harm, and not enough proof as to attempted harm. This was a sound trial strategy, and a proper argument by a competent attorney. Nonetheless, the discourse between the trial court and Defense Counsel is not objectively prejudicial, and not a basis for reversal here. Likewise, Arnold contends that the trial court's comment about "excited utterances" demonstrates prejudice. Yet, the trial court sustained Defense Counsel's timely objection. Thus, Arnold cannot demonstrate that he was denied a fair trial.

In *State v. Bell*, Seneca Co. App. No. 13-12-27, 2013-Ohio-1303 (April 1, 2013), the Third District Court of Appeals rejected appellant's contention that the trial judge's comments during a jury trial were prejudicial. In that case, the trial judge made several comments during a jury trial that appellant claimed showed the judge's bias or the appearance of bias in favor of the State and against defense counsel. In particular, the Court of Appeals held that appellant's trial counsel failed to object and thereby waived the issue. Still, had counsel timely objected, the Court of Appeals found that a curative instruction would have mitigated any prejudicial effect. Similarly, Arnold did not object to the trial court's supposed biased comments, and has not shown their prejudice.

For these reasons, Appellant's Second Proposition of Law should be respectfully overruled by this Court.

PROPOSITION OF LAW NO. III:

The trial court did not deny Jeffery C. Arnold his right to confront his accuser at trial.

A. Arnold's Confrontation Clause claim was not raised during trial and therefore has been waived

At trial in this case, at no time did Arnold object to Lester's written statement on any ground except to improperly invoke Lester's so-called "Fifth Amendment" rights. Similarly, Arnold did not object to the introduction of Lester's written statement into evidence. Arnold did not object to any comments by the trial court, or to make any proffers for the record. The failure to object at trial has consequences when it comes to raising issues on appeal.

This Court has consistently held that the failure to object waives all but plain error. *State v. Perez*, 124 Ohio St. 3d 122, 148; 920 N.E. 2d 104 (2009). "An alleged error is plain error only if the error is "obvious," *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68 (2002), and "but for the error, the outcome of the trial clearly would have been otherwise." *Id.*, citing *State v. Long*, 53 Ohio St.2d 91, syl. ¶ 2 (1978). Arnold never raised an objection that his confrontation rights were being violated at trial. This issue appeared for the first time upon direct appeal, and thus can only be reviewed for plain error.

A close reading of the record in this case shows that Arnold was afforded the right to face his accuser. In fact, the record is replete with many instances of effective cross examination of the police officers, Mrs. Arnold, and Lester. Particularly, Defense Counsel attacked Lester's credibility by obtaining the admission that his memory was faulty, that he suffered from serious health problems, and could not state that his son committed or attempted to commit an act of

violence. This alone shows that Arnold was not receiving a trial in the Star Chamber and had an adequate opportunity to confront and cross-examine his father.

On this basis alone, this Court should respectfully overrule this Proposition of Law.

B. Arnold had an adequate opportunity to cross-examine his father

In *Crawford v. Washington*, 541 U.S. 36, 68 (2004), the U.S. Supreme Court held that “[w]here testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.” The Court, in *Davis v. Washington*, 547 U.S. 813, 822 (2006) refined the definition of “testimonial” such that “[s]tatements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency.”

Prior testimonial statements by a witness do not violate the Confrontation Clause if the defendant has an opportunity to cross examine the witness about them in the presence of the fact finder. *State v. Knauff*, 4th Dist. Adams No. 10CA900, 2011-Ohio-2725, ¶ 43 (quoting *Crawford*, 541 U.S. at 59 n.9). For example, where a witness’s prior statement was admitted and the witness was subject to cross-examination at trial, this Court has found that the requirements of the Confrontation Clause were met. *See State v. Lang*, 129 Ohio St. 3d 512, 2011-Ohio-4215, ¶ 23; *State v. Leonard*, 104 Ohio St. 3d 54, 2004-Ohio-6235, ¶ 110. Even when the witness is unable to recollect the reason for a past statement, admission of his past statement nevertheless does not run afoul of the Confrontation Clause as long as the witness is subject to cross-examination at trial and his testimony can be impeached by his lack of memory or other deficiencies. *See United States v. Owens*, 484 U.S. 554, 559-60 (1988).

As identified above, Arnold was afforded the right to cross examine each witness at trial in person. The key witness, Lester, appeared and was subject to effective cross-examination by

Defense Counsel. Defense Counsel elicited several key admissions that undercut the state's theory, and weakened its case in chief. Under *Crawford*, this was all that was required under the Confrontation Clause to admit Lester's unobjected-to, sworn statement to police that Arnold choked him.

CONCLUSION

This Honorable Court should affirm the judgment of the Ohio Court of Appeals for the Third Judicial District.

Respectfully submitted,



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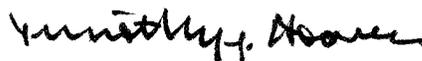
CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was served upon the following by regular U.S. Mail, first-class, postage pre-paid this 15th day of December, 2014:

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