[Cite as *State v. Poteet*, 2020-Ohio-4732.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
COLUMBIANA COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

WILLIAM A. POTEET,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 19 CO 0030

Criminal Appeal from the
Court of Common Pleas of Columbiana County, Ohio
Case No. 2018 CR 130

BEFORE:
David A. D'Apolito, Gene Donofrio, Cheryl L. Waite, Judges.

JUDGMENT:
Affirmed.

Atty. Robert Herron, Columbiana County Prosecutor and *Atty. John E. Gamble*, Assistant Prosecuting Attorney, 105 South Market Street, Lisbon, Ohio 44432, for Plaintiff-Appellee and

Atty. Richard Hura, P.O. Box 3707, Boardman, Ohio 44513, for Defendant-Appellant.

Dated: September 24, 2020

D'APOLITO, J.

{¶1} Appellant William A. Poteet appeals his conviction for felonious assault, in violation of R.C. 2903.11(A)(2), a felony of the second degree, following a jury trial in the Columbiana Court of Common Pleas. Appellant contends that the trial court abused its discretion when it declined to provide a jury instruction on self-defense. Appellant further contends that the trial court erred when it overruled a motion for a mistrial, which was based on testimony regarding Appellant's pre-arrest silence. Finally, Appellant argues that the prosecution failed to identify him through witness testimony as the perpetrator of the crime. For the following reasons, Appellant's conviction is affirmed.

FACTS

{¶2} Benjamin ("Ben") and Kara Sturgeon, along with Cory Pierson ("the victim") and his girlfriend, Amanda McCullough attended a small gathering at the home of Jacqueline Poteet and her then live-in boyfriend Eric Snyder on March 17, 2018. The Sturgeons, the victim, and his girlfriend had originally planned to attend a St. Patrick's Day party that evening. When the party was abruptly canceled, Jacqueline invited them to her home to celebrate her birthday.

{¶3} The group had spent countless evenings together grilling food, drinking alcohol, and enjoying backyard campfires at each other's homes without incident. By all accounts, they were good friends.

{¶4} Jacqueline's sons, Appellant, age 20, and his brother Addison Poteet, age 26, were present when the guests arrived. However, Appellant left for several hours to visit his friend Becky Althouse.

{¶5} The investigating officer provided the following description of the house: The front door opens into a small corridor, which contains a washer and dryer ("mudroom"). The mudroom leads into the kitchen, which has an island in the center of the room and a table to the right of the island. The witnesses agreed that the kitchen is relatively small when compared to an average kitchen.

{¶6} Appellant provided the following testimony regarding the events of the evening of March 17, 2018 and the early morning of March 18, 2018. Appellant consumed two beers (despite being underage) before he returned home that evening. However, he conceded that Althouse followed him home because of his alcohol consumption.

{¶7} When Appellant returned to the Poteet residence a little after 2:00 a.m., he was hungry so he made a plate of food and sat at the kitchen table. While he ate, he engaged in a friendly conversation with the victim, who Appellant met for the first time that evening. Appellant acknowledged that "pretty much everyone [at the Poteet residence that evening] had a lot to drink." (*Id.,* p. 348.)

{¶8} The roughly hour-long conversation between Appellant and the victim was punctuated by four shots of clear alcohol, and a fifth shot of Jameson Irish whiskey. Appellant merely sipped the final shot, because he did not like the taste of whiskey.

{¶9} During their conversation, Appellant told the victim that he was looking for work, and the victim encouraged Appellant to apply at the company where the victim was employed.

{¶10} Jacqueline commented that Appellant was very energetic, which led to a discussion of Appellant's amateur boxing career. Appellant conceded that he was boastful, despite the fact that he lost one of his total of two boxing matches. He informed the victim that he lost the second match in 2016, and, as a result, lost his interest in boxing.

{¶11} Appellant was 20 years old, 5'5" and 135 lbs. The victim was 35 years old, 6'4" and 270 lbs. Despite the obvious difference in their height and weight, Appellant told the victim that he could "take a punch from him." (*Id.* at 350.)

{¶12} Appellant conceded on cross-examination that he "egged the victim on" for ten minutes to exchange punches. The victim agreed to trade punches, with the caveat that he and Appellant wear boxing gloves.

{¶13} When the victim punched Appellant, he stumbled as a result of the blow, but Ben caught him before he hit the floor. Appellant collected himself then punched the victim. After they removed the boxing gloves, the victim acknowledged that Appellant "punch[ed] pretty hard for a small guy." (*Id.* at 351.)

{¶14} Then, Addison punched the victim in his left ear. Appellant testified that he was shocked and confused when Addison assaulted the victim, and Appellant did not know if Addison struck the victim with full force. Appellant testified that Addison, who was 26 years old, 5'11" and 195 lbs., was Appellant's older brother and "protector." In retrospect, Appellant testified that his exchange of punches with the victim must have "irritated" Addison. (*Id.*)

{¶15} The victim arose and punched Addison two or three times, and Addison stumbled into the island. The countertop on the island was not affixed to the base, so the countertop toppled over, sending a microwave, several plates, and all the food that was on the countertop crashing to the floor. Appellant testified that both he and Addison were on the ground at that point and the victim walked behind them out of sight.

{¶16} According to Appellant's testimony, Addison was incoherent. As Appellant stared at Addison, in an effort to determine whether he needed medical attention, Appellant felt someone touch his right shoulder. It was Kara. Believing it to be the victim, he "turned around and punched" Kara.

{¶17} Appellant offered no explanation for his decision to turn and strike the person he believed to be the victim. His testimony established that his punching contest with the victim ended amicably. Appellant further testified that the victim only struck Addison in self-defense after Addison attacked the victim without provocation.

{¶18} Although Appellant apologized to Kara three times, she cried out, "You hit me. You hit me." Ben (Kara's husband), 6'5" and 220 lbs., took Appellant by the throat and braced him against the wall. Ben told Appellant, "you don't hit a girl." (*Id.* at 353.) Appellant testified that while he was in Ben's grasp he could not breathe and thought he was going to pass out.

{¶19} Ben released Appellant and turned to leave the house, because Snyder had told everyone to "get out, leave, the party's over" when the melee began. Appellant testified that he "couldn't stand on his own two feet at [the] time" but he did recall Kara coming back at him as Ben left the kitchen. He also recalled thinking that the victim heard Kara cry out, "He hit me." (*Id.* at 355.)

{¶20} The victim, who Appellant had seen leaving the kitchen earlier, "rushed" Appellant, Addison tried to defend Appellant, and the victim "beat [Addison] up again."

(*Id.* at 358-59.) Next, the victim threw Appellant to the ground and punched him four or five times. While the victim was straddling Appellant, Appellant "literally grabbed the nearest thing * * * [which he first] thought [ ] was just a pen or something." (*Id.* at 359.) It was a steak knife.

{¶21} Appellant testified that he was scared. Because the victim had knocked Addison out twice, and broken Appellant's nose "in about two hits," Appellant reasoned that the victim "[could] definitely give [him] brain damage." (*Id.*) He also feared that Ben was going to return and join the affray. Appellant testified that he was "pretty much crying and didn't know what to do." (*Id.* at 360.) He thought the victim was going to kill him, because the victim was very angry, very drunk, and striking Appellant in the head with both fists. Appellant testified that he could not escape because the victim was on top of him.

{¶22} As a consequence, Appellant stabbed the victim with the steak knife nine times, eight times in the chest and once in the buttock. Appellant testified that the initial stab wounds did not halt the victim's attack. After the final jab, "[the victim] just looked down and got off of [Appellant]. Like, as soon as [the victim] looked down, he got off of [Appellant] and then went outside." (*Id.* at 364.)

{¶23} The victim was taken by McCullough to Salem Hospital and then life-flighted to another hospital for emergency surgery to repair a hernia caused by a deep perforation in his lower abdomen. The remaining wounds to his chest and abdomen were cauterized and closed with two staples. The wound to his buttock was superficial and required no treatment.

{¶24} Addison was the only other witness offered by the defense. He testified that he did not drink very often, but consumed ten alcoholic beverages that evening. Addison attributed the initial punching contest to "a little bit of testosterone." (*Id.* at 322.) He recalled the victim getting on his knees and both men putting on the boxing gloves. Every witness with the exception of Appellant testified that the victim insisted on kneeling during the punching contest to reduce his distinct height and weight advantage. Addison conceded at trial that he did not remember much after that point.

{¶25} Addison testified that he saw the victim punch Appellant with a gloveless fist. He is the only witness who claims that the initial punch was delivered without a boxing

glove. Because of the victim's size, Addison attempted to "deescalate" the situation by pulling the victim away from Appellant, but then the victim turned on Addison.

{¶26} The victim punched and kicked Addison repeatedly and threw him into the island, which collapsed onto him. Addison suffered a concussion, a broken nose, multiple face lacerations, bruises on his torso and abdomen, and a split lip that required fifteen stitches. He has some hearing loss and difficulty breathing. Addison testified that he drifted in and out of consciousness, but recalled Appellant standing close to him in a protective state at some point.

{¶27} Ben, Kara, Snyder, and the victim testified on behalf of the state. Their testimony was consistent with respect to all of the material facts. First, they testified that Appellant was intoxicated when he returned from Althouse's residence that evening. Snyder, who lived with Appellant, described his behavior as "amped up" and "over excitable." (*Id.* at 248.)

{¶28} The state's witnesses further testified that the victim initially refused to box with Appellant, but Appellant badgered him. Snyder testified that the victim told Appellant that he could "box him all day on his knees" and called Appellant "little guy." (*Id.* at 250.) When Appellant's prodding failed, Appellant asked the victim if he did not want to box because he was a "pussy," and the victim responded, "go get the gloves." (*Id.* at 182, 274.)

{¶29} Out of concern for the state of the kitchen, Snyder convinced Appellant and the victim to trade punches instead of box. The victim knelt during the contest in order to diminish his obvious size advantage. Both men wore a boxing glove.

{¶30} The victim punched Appellant and landed a body shot, which knocked Appellant back a couple of feet. Ben caught Appellant before he hit the ground. Appellant collected himself, and punched the victim on the side of the face or neck area. According to both Ben and Snyder, the victim complimented Appellant's punch. The victim testified that the exchange of punches ended in laughter and was all in good fun.

{¶31} At that point, Addison broke away from Jacqueline and Kara, with whom he had been arguing. Kara surmised that Addison was infatuated with McCullough, who was the victim's girlfriend. All of the witnesses agree that Addison charged from behind the victim and punched him in the back of the head.

{¶32} According to the victim, he arose and Addison "puffed up" so he punched Addison in the face, which sent him stumbling into the kitchen island. (*Id.* at 277.) The countertop of the island toppled over, spilling its contents, including a microwave oven, onto the floor. The state's witnesses testified that both brothers then attacked the victim and he defended himself. The victim testified that he was trying to crawl to the door but the brothers kept jumping on him.

{¶33} Snyder yelled "That's enough, that's it, no more," and physically inserted himself into the fracas in an effort to remove Addison. However, Addison turned on Snyder and put him in a choke hold, then Appellant grabbed Snyder by the legs. The victim testified that Snyder was "turning colors." (*Id.* at 277.) With the brothers preoccupied with Snyder, McCullough pulled the victim toward the mudroom.

{¶34} Snyder testified that he was able to pull Addison into a bedroom, but Addison continued to struggle with Snyder and escaped back to the kitchen. Snyder dragged Addison back into the bedroom a second time, but was unable to subdue him. At that point, Addison "cracked [Snyder] on the head on the way by with something. And back out he went for more." (*Id.* at 253.) After Snyder steadied himself, he returned to the kitchen, but Ben, Kara, and the victim were gone.

{¶35} While Snyder tried and failed to control Addison, Kara stepped in the path of Appellant, who was walking toward the victim as he and McCullough attempted to exit the Poteet residence through the mudroom. Kara said to Appellant, "no, we're leaving," and Appellant responded, "Fuck you, bitch," and punched Kara in the face. (*Id.* at 186, 230.)

{¶36} Ben took Appellant by the throat and braced him up against the wall. He told Appellant, "you just hit a fucking woman. Don't do it again or I will beat your ass." (*Id.* at 187, 231-232.) When Ben released Appellant, Kara stepped in and swung her fist at Appellant, so he punched her in the face a second time.

{¶37} The victim testified that he was about five or six feet away in the mudroom when he heard Ben yell "You just hit my wife," then he saw Appellant punch Kara the second time. (*Id.* at 278-279.) Ben likewise testified that the victim was in the mudroom when Appellant punched Kara.

{¶38} The victim admitted that he "went enraged a little bit," and ran over and separated Kara and Appellant, then threw Appellant to the ground and hit him a couple of times. (*Id.* at 278-279.) Ben also testified that the victim "bumrushed" Appellant, tackling him to the floor, punching him several times, and saying "you do not hit a woman, especially her. What the hell are you doing?" (*Id.* at 189.) Kara testified that the victim saw Appellant punch her the second time, said '"[t]hat's it,'" and "[the victim] attacked Appellant[,] and Addison attacked [the victim]." At that point, Kara pulled Ben out of the house and onto the porch, where they waited for the victim. (*Id.* at 231-32.)

{¶39} The victim testified that he knelt over Appellant while the victim punched Appellant a few times, then stood up to hasten Kara and Ben's exit from the house, however, Addison approached the victim from the front and engaged him. At this point, Appellant, Addison, and the victim were the only witnesses in the kitchen.

{¶40} The victim testified that, while he was occupied with Addison, Appellant jumped on the victim's back and stabbed him repeatedly with the steak knife. When the victim realized he was being stabbed, he looked down and moved his arm, which caused the knife to break and fall to the floor.

{¶41} The victim was able to throw Appellant from his back, but the brothers continued to attack him. The victim backed toward the mudroom, and, when he turned to exit, he felt the final stab in his buttock. At that point, the victim escaped to the front porch, where he informed Ben, Kara, and McCullough that he had been stabbed.

{¶42} Kara testified that she and Ben returned to the kitchen after McCullough and the victim departed for the hospital. She saw the handle of the steak knife but not the blade. The brothers told Kara and Ben to leave the residence, but Snyder, who had returned to the kitchen shortly before Ben and Kara, insisted that they remain at the house because they were witnesses.

{¶43} Snyder testified that Appellant set the knife handle on the microwave after Ben and Kara left the house. However, when Appellant saw that Snyder was looking at the knife handle on the microwave, Appellant tossed it into the trash can.

{¶44} Jacqueline dialed 9-1-1. Deputy Jon Price was the first Columbiana County Sheriff's Deputy dispatched to the scene. When he arrived, Deputy Price noticed droplets of blood on the steps leading to the front door.

{¶45} Deputy Price entered the kitchen through the mudroom and immediately recognized that the people in the home had been battered. He noted that Appellant had slight injuries to his face. Deputy Price later testified that neither brother had sustained any life-threatening injuries. Kara, Ben, and Snyder likewise testified that Appellant's injuries were not life threatening.

{¶46} Addison requested an ambulance, despite the fact that Jacqueline declined an ambulance during the 9-1-1 call. When Deputy Price asked the occupants what had occurred, Jacqueline told Snyder and the brothers, "[b]e quiet. Don't tell [Deputy Price] anything." (*Id.* at 134.) Defense counsel objected to Deputy Price's statement on the grounds of hearsay, but the objection was overruled. Deputy Price further testified that he noticed a broken steak knife on the kitchen table.

{¶47} Snyder spoke privately with Deputy Price and informed him that a boxing match had taken place. Despite Jacqueline's admonition to remain silent, Addison told the deputy that the victim "beat everyone up." (*Id.*, at 142.)

{¶48} At this point, Deputy Price stepped outside to converse with his dispatcher. The dispatcher informed Deputy Price that Appellant had stabbed the victim several times. Deputy Price testified that the information provided by the dispatcher explained the droplets of blood he noticed on the front porch when he first arrived at the scene.

{¶49} When Deputy Price returned to the kitchen, the steak knife on the table had disappeared. He asked the occupants what had happened to the knife, and one of them responded that they did not know. The knife was found in the trash can near the island.

{¶50} Deputy Price testified that "he gave [Appellant] the opportunity to try to speak with [Deputy Price] again [when Deputy Price returned with the information that Appellant had stabbed the victim]." Deputy Price further testified, "[a]nd once again his mother told him not to speak to me. And at that time, I took him into custody." (*Id.* at 147.)

{¶51} At this point in the proceedings, a sidebar was held, during which the defense moved for a mistrial based on the testimony that Jacqueline repeatedly told the witnesses not to respond to Deputy Price's inquiries, and that Appellant declined to offer any information regarding the preceding events. The state argued that Deputy Price was merely recounting the steps of his investigation and Appellant was not in custody. The motion for mistrial was overruled.

{¶52} The jury returned a verdict of guilty on the sole count in the indictment. The trial court imposed a sentence of four years, to be served consecutively to a sentence to be imposed in a separate case. This timely appeal followed.

ASSIGNMENT OF ERROR NO. 1

THE COURT ABUSED ITS DISCRETION USURPING THE JURY'S ROLE WHEN IT FAILED TO PROVIDE THE JURY A SELF-DEFENSE INSTRUCTION.

{¶53} "It is well-settled that a criminal defendant is entitled to a complete and accurate jury instruction on all issues raised by the evidence." *State v. Levonyak*, 7th Dist. Mahoning No. 05 MA 227, 2007-Ohio-5044, ¶ 53. "When reviewing a trial court's jury instructions, the proper standard of review is whether the trial court's refusal to give a requested jury instruction constituted an abuse of discretion under the facts and circumstances of the case." *State v. Everson*, 7th Dist. Mahoning No. 12 MA 128, 2016-Ohio-87, ¶ 58, 57 N.E.3d 289, citing *State v. DeMastry*, 155 Ohio App.3d 110, 2003-Ohio-5588, 799 N.E.2d 229 ¶ 72 (7th Dist.). An abuse of discretion can only be found if the court's attitude is unreasonable, arbitrary or unconscionable. *Id.*, citing *State v. Adams*, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980).

{¶54} Pursuant to the law in Ohio applicable at the time Appellant was indicted, he was required to offer evidence to establish the following three facts in order to assert self-defense by the use of deadly force: (1) he was not at fault at creating the situation giving rise to the affray; (2) he had a bona fide belief that he was in imminent danger of death or great bodily harm and his only means of escape from such danger was the use of such force; and (3) he did not violate any duty to retreat or avoid the danger. *State v. Robbins*, 58 Ohio St.2d 74, 388 N.E.2d 755 (1979), paragraph two of the syllabus.

{¶55} When all three elements are raised by the evidence, the trial court must give a self-defense instruction. *State v. Williams*, 7th Dist. Mahoning No. 10-MA-13, 2011-Ohio-2463, ¶ 17, citing *State v. Jackson*, 22 Ohio St.3d 281, 284 (1986). When the instruction is given, the defendant must prove by a preponderance of the evidence that

he acted in self-defense. *State v. McGee*, 7th Dist. Mahoning No. 07 MA 137, 2009-Ohio-6397, ¶ 74

{¶56} "The proper standard for determining in a criminal case whether a defendant has successfully raised an affirmative defense under R.C. 2901.05 is to inquire whether the defendant has introduced sufficient evidence, which if believed, would raise a question in the minds of reasonable men concerning the existence of such issue." *State v. Melchior*, 56 Ohio St.2d 15, 381 N.E.2d 195 (1978), paragraph one of the syllabus. When determining whether sufficient evidence has been adduced at trial to warrant a self-defense instruction, the evidence should be construed in the light most favorable to the defendant. *Williams, supra,* ¶ 17, *citing Jackson, supra*, at 28.

{¶57} After considering the arguments of counsel, the trial court concluded that Appellant created the situation giving rise to the affray. The trial court opined:

> And I think in this case, [Appellant] – there's a lot of evidence showing that he was at fault. He pestered, badgered [the victim] into this boxing incident. Perhaps even more compelling is that he called [the victim] an offensive name within a room full of people. And so it was only after that that [the victim], quote, consented, unquote to box. 'Go get the gloves." So there were certainly incidences of [Appellant's] behavior leading to the agreement to box.
>
> Separate and apart from that, the testimony is that [Appellant], twice, hit – I believe it's Kara Sturgeon – that's the correct name twice in the face. Again, so I believe those are elements that I can't ignore that would demonstrate that he was at fault in creating the situation.

(*Id.*, p. 394-395.)

{¶58} Appellant contends that the trial court abused its discretion when it considered the state's testimony in determining the propriety of the self-defense instruction. However, even if the trial court had considered only Appellant's testimony, it could have concluded that no self-defense instruction was warranted.

{¶59} First, Appellant conceded that he bragged about his boxing "career" and asserted that he could "take a punch" from the victim. Appellant further conceded on cross-examination that he "egged the victim on" to engage in a boxing match. The boxing match was the spark that set the events that followed in motion.

{¶60} In his brief, Appellant contends that the punching contest ended amicably, and, therefore, could not have given rise to the affray. Appellant argues instead that it was Addison, that is, Addison's unexpected assault of the victim, that started the fight.

{¶61} Appellant correctly argues that the punching contest ended amicably. As a consequence, Appellant had no reason to turn and punch the person behind him, who he believed to be the victim, but turned out to be Kara. Based on Appellant's testimony, he should not have expected that the victim intended to assault him, as the victim had only resorted to violence in order to defend himself against Addison's unwarranted attack. Appellant conceded that the victim turned his attention to Appellant only after Appellant assaulted Kara. So even if we found that the punching contest did not precipitate the brawl, we find, in the alternative, that Appellant's assault on Kara gave rise to his affray with Appellant. For these reasons, we find that the trial court did not abuse its discretion when it declined to instruct the jury on self-defense.

{¶62} Even assuming arguendo that the trial court abused its discretion when it refused to provide the self-defense instruction, we find that such a failure would be harmless error. Pursuant to Crim.R. 52(A), "any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded." In order to find an error harmless, a reviewing court must be able to declare a belief that the error was harmless beyond a reasonable doubt. *State v. Lytle*, 48 Ohio St.2d 391, 403, 358 N.E.2d 623 (1976). A reviewing court may overlook an error where the remaining admissible evidence, standing alone, constitutes "overwhelming" proof of a defendant's guilt. *State v. Williams*, 6 Ohio St.3d 281, 290, 452 N.E.2d 1323 (1983).

{¶63} Had the trial court given the jury instruction on self-defense, Appellant could not have established that he acted in self-defense by a preponderance of the evidence. All of the state's witnesses testified that Appellant goaded the victim into the punching contest, and that he and Addison were the aggressors toward the victim, who was merely

defending himself from their attacks. Based on the lion's share of the testimony offered at trial, there was overwhelming proof of Appellant's guilt.

{¶64} Accordingly, we find that the trial court did not abuse its discretion when it declined to provide the instruction on self-defense, and, in the alternative, that any error was harmless beyond a reasonable doubt. Therefore, Appellant's first assignment of error has no merit.

ASSIGNMENT OF ERROR NO. 2

THE COURT ERRED WHEN IT FAILED TO GRANT A MISTRIAL WHEN THE PROSECUTOR IMPROPERLY IMPLIED THAT THE DEFENDANT WAS GUILTY FOR FAILING TO SPEAK TO LAW ENFORCEMENT.

{¶65} The decision on a motion for a mistrial will not be reversed unless the trial court abused its discretion. *State v. Treesh*, 90 Ohio St.3d 460, 480, 739 N.E.2d 749 (2001). The mere existence of error or irregularity does not warrant a mistrial. *Id.* "The granting of a mistrial is necessary only when a fair trial is no longer possible." *Id.*, citing *State v. Franklin*, 62 Ohio St.3d 118, 127, 580 N.E.2d 1 (1991) ("Mistrials need be declared only when the ends of justice so require and a fair trial is no longer possible").

{¶66} Appellant contends that Deputy Price's testimony during the state's case-in-chief violated his Fifth Amendment right to remain silent. The protections of the Fifth Amendment apply to the states through the Fourteenth Amendment. *State v. Leach*, 102 Ohio St.3d 135, 2004-Ohio-2147, 807 N.E.2d 335, citing *Malloy v. Hogan*, 378 U.S. 1, 6, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964).

{¶67} The Ohio Supreme Court considered the Fifth Amendment implications of pre-arrest silence in *Leach*. The *Leach* Court held that "[u]se of a defendant's pre-arrest silence as substantive evidence of guilt violates the Fifth Amendment" because "the use of [the defendant's] pre-arrest silence in the state's case-in-chief as substantive evidence of guilt subverts the policies behind the Fifth Amendment." *Id.* at syllabus; ¶ 30.

{¶68} The *Leach* Court reasoned that the "[u]se of pre-arrest silence in the state's case-in-chief would force defendants either to permit the jury to infer guilt from their silence or surrender their right not to testify and take the stand to explain their prior

silence." *Id.* at ¶ 31. The Ohio Supreme Court explained that "[t]o hold otherwise would encourage improper police tactics, as officers would have reason to delay administering warnings pursuant to *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), so that they might use the defendant's pre-arrest silence to encourage the jury to infer guilt." *Id.*

{¶69} Unlike the defendant in *Leach*, Appellant testified on his own behalf, thereby abandoning his Fifth Amendment right against self-incrimination. The *Leach* Court distinguished the use of pre-arrest silence in the state's case in chief from pre-arrest silence used to impeach. The latter is allowed, because impeachment necessarily means the defendant has elected to set aside the Fifth Amendment protection and to testify.

{¶70} Citing *Fletcher v. Weir*, 455 U.S. 603, 607, 102 S.Ct. 1309, 71 L.Ed.2d 490 (1982), the *Leach* Court observed that, when a defendant has been arrested but has not been read his *Miranda* rights, then later takes the stand in his own defense, the Fifth Amendment is not violated when the state cross-examines the defendant concerning his post-arrest silence. The United States Supreme Court predicated its holding in *Fletcher* on the fact that the defendant has not been given the affirmative assurances embodied in the *Miranda* warnings that the government will not use his silence against him prior to arrest. In *Fletcher*, the defendant was arrested and later given the *Miranda* warnings. His first statement explaining his actions was made when he took the witness stand and claimed that he had acted in self-defense. The *Fletcher* Court opined that the state was able to cross-examine him on his reasons for remaining silent upon arrest, given his claim that he had been the real victim.

{¶71} The Ohio Supreme Court further observed in *Leach, supra,* that the "use of pre-arrest silence as impeachment evidence is permitted because it furthers the truth-seeking process. Otherwise, a criminal defendant would be provided an opportunity to perjure himself at trial, and the state would be powerless to correct the record." *Leach, supra* at ¶ 33.

{¶72} Deputy Price mentioned Appellant's pre-arrest silence four times during his testimony in the state's case in chief. Further, the state referred to Appellant's pre-arrest silence during both its opening and closing arguments.

{¶73} Deputy Price testified that, when he first arrived at the scene, he was aware that an assault had taken place, but initially believed that the brothers were the victims. When Deputy Price asked about the events leading to the 9-1-1 call, Jacqueline told Snyder and the brothers not to answer Deputy Price's questions. Shortly thereafter, the prosecutor asked, "And as you indicated you were unable to obtain information from the occupants of the residence; correct?" Deputy Price responded, "Correct." (Tr. at 140.)

{¶74} Later in Deputy Price's testimony, the prosecutor asked if Deputy Price was able to garner any additional information from the brothers after his conversation with Snyder, and Deputy Price responded that Jacqueline again told the boys not to say anything. (*Id.* at 142.) Finally, Deputy Price testified that he gave Appellant an opportunity to explain the events that led to the victim's injuries, after his discussion with the dispatcher but prior to Appellant's arrest, but Jacqueline repeated her admonition, and Appellant did not respond.

{¶75} The state referenced Appellant's pre-arrest silence in its opening and closing arguments. In its opening argument, the prosecutor observed:

> [I]t was not immediately clear nor was it made clear to Deputy Price what had happened. As a matter of fact, he was met with great resistance from particularly [Appellant's] mother, but also from [Appellant] and his brother about his [sic] what his purpose in being there was. Why he was called to the residence [sic].

(*Id.* at 111.)

{¶76} During the state's closing argument, the prosecutor asked:

> When the Sheriff arrived, was anybody being honest, and open, and candid, and frank? The Sheriff's Office didn't even know anybody had been stabbed until the Salem Hospital reported that they had a stab victim who reported that he had been stabbed by the defendant on Mountz Road. * * *Do we believe someone when they are so lack of frank [sic]? When they are so un-candid [sic]? * * *My grandad used to tell me as a little boy, "Johnny, once a liar; always a liar."

(*Id.* at 408.)

{¶77} Appellant correctly argues that Deputy Price's testimony was offered during the state's case-in chief in direct contravention of the Ohio Supreme Court's holding in *Leach, supra.* Nonetheless, Appellant later took the stand in his own defense, thereby waiving his Fifth Amendment right. As a consequence of Appellant's testimony at trial, the state would have committed no Fifth Amendment violation, had it offered Deputy Price's testimony regarding Appellant's pre-arrest silence in rebuttal to impeach Appellant's testimony.

{¶78} Accordingly, we find that the admission of Deputy Price's testimony during the state's case in chief is harmless error. We are aware that the *Leach* Court's prohibition on the use of pre-arrest silence during the state's case in chief was predicated, in part, on the concern that it would cause a defendant to surrender his right not to testify and take the stand to explain his prior silence. *Id.* at ¶ 3. In this appeal, Appellant does not allege that he would not have testified but for Deputy Price's testimony. In fact, Appellant's testimony was the only testimony that did not depict him and Addison as the aggressors in the affray. Consequently, Appellant would have been obliged to testify in order to place his version of the events before the jury, regardless of the admission of Deputy Price's testimony in the state's case in chief. Of equal import, we further find that the remaining evidence in the record constitutes overwhelming evidence of Appellant's guilt beyond a reasonable doubt. Therefore, Appellant's second assignment of error is meritless.

ASSIGNMENT OF ERROR NO. 3

THE COURT ERRED WHEN IT DID NOT GRANT A MISTRIAL WHEN THE STATE FAILED TO IDENTIFY THE DEFENDANT THROUGH A WITNESS IN ITS CASE-IN-CHIEF.

{¶79} At the conclusion of the state's case, defense counsel made a Rule 29 motion because he was not identified in court by any witness. Defense counsel argued, "I don't recall any of witness pointing to the defendant, describing an article of clothing, saying that that is, in fact, the defendant and then the Court indicating for the record, let

the record reflect that the defendant has been identified. That simply did not happen in this trial." (*Id.* at 309.) The trial court denied the motion, but offered defense counsel the opportunity to research the matter during the lunch recess. The motion was not revisited when the trial court reconvened.

{¶80} There is no general requirement in criminal cases that the defendant must be visually identified in court by a witness. *State v. Irby*, 7th Dist. Mahoning No. 03 MA 54, 2004-Ohio-5929, ¶ 14. This Court observed in *State v. Scott*, 3 Ohio App.2d 239, 210 N.E.2d 289 (1965):

> The general rule is that to warrant conviction the evidence must establish beyond a reasonable doubt the identity of the accused as the person who committed the crime. 23 C.J.S. Criminal Law § 920, p. 643; 1 Wharton's Criminal Evidence, Twelfth Edition, 46; 1 Underhill's Criminal Evidence, Fifth Edition, 243. 23 C.J.S. Criminal Law § 920, p. 645, states:
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> Identity may be established by direct evidence, but direct evidence of identification is not required; circumstantial evidence may be sufficient to establish the identity of accused as the person who committed the crime * * * The circumstances proved must, however, lead to but one fair and reasonable conclusion pointing to accused to the exclusion of all others as the guilty person and exclude every other reasonable hypothesis except that of accused's guilt.

(*Id.* at 244-245.)

{¶81} Throughout the state's case-in-chief, Appellant was identified as "Alex" by the state's witnesses. Snyder had cohabitated with Appellant for four years prior to March 18, 2019. (*Id.* at 245.) Kara testified that Jacqueline was her best friend and she had known the Poteets, specifically Appellant, for seven years prior to the crime. (*Id.* at 223.) She further testified that it was "common for [them] to hangout with one another." (*Id.*, p.

224.) The victim testified that he engaged in a lengthy conversation with Appellant at the kitchen table before the punching contest.

{¶82} More pointedly, Kara affirmed that "the defendant" was present when she and Ben arrived at the Poteet residence on March 17, 2019, and that "the defendant" left for a couple of hours, then returned. (*Id.* at 224-225.) Similarly, Deputy Price affirmed that "the defendant" was among the people at the Poteet house when he entered. Deputy Price testified that Ben stated that "the defendant" hit Kara. (*Id.* at 151.) Finally, a photograph of Appellant, taken on the morning of March 28, 2019, was admitted into evidence.

{¶83} Although none of the state's witnesses specifically identified Appellant in court, it can be gleaned from the record that Appellant is "Alex Poteet." Given the familiarity of the witness with Appellant, there was no reasonable possibility of misidentification in this case. To the extent that the state erred when it failed to positively identify Appellant as the perpetrator of the crime, we find in this case that the error was harmless beyond a reasonable doubt, and, therefore, Appellant's third assignment of error has no merit.

CONCLUSION

{¶84} In summary, we find that the trial court did not abuse its discretion when it declined to provide a jury instruction on self-defense. We further find that the state's violation of Appellant's Fifth Amendment right against self-incrimination was harmless error, insofar as the remaining evidence in the record constitutes overwhelming evidence of Appellant's guilt beyond a reasonable doubt. The same is true with respect to the state's failure to specifically identify Appellant as the perpetrator of the crime. Accordingly, Appellant's conviction is affirmed.

Donofrio, J., concurs.

Waite, P.J., concurs.

For the reasons stated in the Opinion rendered herein, the assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Columbiana County, Ohio, is affirmed. Costs to be waived.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.