[Cite as *State v. Caldwell*, 2010-Ohio-1324.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	No. 09AP-685 (C.P.C. No. 09CR-44)
v.	:	(REGULAR CALENDAR)
Walter L. Caldwell,	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on March 30, 2010

Ron O'Brien, Prosecuting Attorney, and *Kimberly M. Bond*, for appellee.

Kirk A. McVay, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, J.

{¶1} This is an appeal by defendant-appellant, Walter L. Caldwell, from a judgment of sentence and conviction entered by the Franklin County Court of Common Pleas, following a jury trial in which appellant was found guilty of having a weapon while under disability.

{¶2} On January 5, 2009, appellant was indicted on one count of having a weapon while under disability, in violation of R.C. 2923.13. The matter came for trial before a jury beginning June 8, 2009.

{¶3} At trial, the state presented the following evidence. In November 2008, appellant's niece, Shaquayla Caldwell, resided at the Nelson Park Apartments, located on Maryland Avenue. On the evening of November 8, 2008, Caldwell and her boyfriend, Reggie Swan, drove to a nearby restaurant and then returned to Caldwell's apartment. A short time later, as Caldwell was inside her apartment, she heard the sound of gunshots. Caldwell initially ran into the bathroom with one of her children, but when the noise stopped she went outside and observed "my uncle's car pulling out." (Tr. 73.) Caldwell described appellant's vehicle as long and silver, similar to a Lincoln, with a dent in the back.

{¶4} Swan testified that he was upstairs in Caldwell's apartment when he heard gunshots. Swan "looked down, and while the last couple of shots were going off, I seen Mr. Caldwell shooting at her car." (Tr. 101.) Swan then observed appellant drive away. Swan testified that appellant "wasn't in a rush. He just got in his car and drove off." (Tr. 103.) Swan described the weapon as "long in range," not a handgun. (Tr. 103.) Swan did not observe anyone else in the area at the time.

{¶5} Part of the state's theory of the case was that appellant was upset with Caldwell, fearing she might tell appellant's girlfriend of his involvement with another woman; at trial, Caldwell testified that appellant "might have been scared that I would say something to his girlfriend." (Tr. 90.) Caldwell further testified that appellant later admitted to her that he shot the vehicle. Specifically, appellant "[j]ust explained the situation, why he felt that I was wrong, and he shot up my vehicle." (Tr. 83.) According to Caldwell, appellant "was angry at the situation. He was letting me know why he shot it up, but it wasn't like anger towards me." (Tr. 83.)

{¶6} Photographs of Caldwell's 1996 Pontiac Grand Am were admitted at trial. The vehicle had bullet holes in all four doors; Caldwell testified that the radiator and gear shift were damaged by the shots, and that the vehicle was inoperable following the incident.

{¶7} On the evening of November 8, 2008, Kyle Fishburn, an off-duty Columbus Police Officer, was working a special duty assignment at the Nelson Park Apartments, and spoke with a female who stated that her vehicle had been "shot up." (Tr. 59.) The female was very upset. Officer Fishburn and another officer collected approximately 15 shell casings at the scene. The officer observed that the vehicle had in excess of six or seven bullet holes.

{¶8} Columbus Police Officer Jeffrey Lazar and his partner were on patrol duty on November 8, 2008, when they received a report regarding a shooting incident at an apartment complex. The officers received a description of a vehicle, as well as the address of a suspect. The officers drove to the suspect's address, but the individual was not present at the time. Later, at approximately 4:30 a.m., the officers observed appellant walking up to the residence. At the time, the officers did not observe appellant's vehicle; three days later, police officers observed a vehicle at appellant's residence matching the earlier description.

{¶9} On November 15, 2008, Columbus Police Detective Robert A. Hoffman interviewed Caldwell at her apartment complex. Detective Hoffman, who took photographs of Caldwell's vehicle, testified there were "probably 15 or so" bullet holes in the vehicle. (Tr. 29.) Caldwell gave a written statement to police officers. Swan also gave a written statement to police officers one week after the shooting.

{¶10} At trial, the parties entered into a stipulation that appellant had been convicted of possession of cocaine on August 15, 2008. Following the presentation of evidence, the jury returned a verdict finding appellant guilty of having a weapon while under disability. The trial court sentenced appellant by entry filed June 10, 2009.

{¶11} On appeal, appellant sets forth the following four assignments of error for this court's review:

> First Assignment of Error
>
> THE TRIAL COURT ABUSED ITS DISCRETION, DENYING DEFENDANT HIS RIGHT TO A TRIAL BY AN IMPARTIAL JURY GUARANTEED BY AMENDMENTS V AND XIV OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION WHEN IT SUSTAINED PLAINTIFF STATE OF OHIO'S CHALLENGE FOR CAUSE AS TO JUROR NUMBER 5, MR. BENSON, AND ALSO WHEN IT OVERRULED DEFENDANT'S CALLENGE FOR CAUSE AS TO JUROR NUMBER 4, MS. BOLIN.
>
> Second Assignment of Error
>
> THE TRIAL COURT ERRED WHEN IT ENTERED JUDGMENT AGAINST THE DEFENDANT AS TO COUNT ONE OF THE INDICTMENT WHEN THE VERDICT OF THE JURY IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE, IN VIOLATION OF DEFENDANT-APPELLANT'S RIGHTS TO DUE PROCESS OF LAW AND A FAIR TRIAL GUARANTEED BY AMENDMENTS V AND XIV OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION.
>
> Third Assignment of Error
>
> DEFENDANT-APPELLANT WAS DENIED HIS RIGHTS TO REMAIN SILENT AND A FAIR TRIAL UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION WHEN OFFICER LAZAR TESTIFIED THAT DEFENDANT-

> APPELLANT REFUSED TO SPEAK TO THE POLICE ABOUT THE INCIDENT IN QUESTION.
>
> Fourth Assignment of Error
>
> DEFENDANT-APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY AMENDMENTS VI AND XIV OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION WHEN COUNSEL FOR DEFENDANT-APPELLANT FAILED TO OBJECT TO CONDUCT OF THE JURY SELECTION PROCESS (*VOIR DIRE*) WITHOUT TRANSCRIPTION FOR THE RECORD EXCEPTING CHALLENGES OF POTENTIAL JURORS BY COUNSEL.

{¶12} Under the first assignment of error, appellant argues that the trial court erred in ruling on two challenges for cause following voir dire. Specifically, appellant asserts the trial court abused its discretion in granting the state's request to exclude for cause a juror identified as Mr. Benson or Juror No. 5 (hereafter "Juror Benson"), while denying defense counsel's request to excuse for cause a juror identified as Ms. Bolin (hereafter "Juror Bolin").

{¶13} At the outset, we note that the voir dire proceedings were not transcribed; specifically, the record indicates that, "by agreement of counsel, voir dire on the record was waived." (Tr. 7.) However, the challenges for cause as to both Jurors Benson and Bolin, following voir dire, are part of the record on appeal. In this respect, the record indicates that the trial court, prosecutor, and defense counsel engaged in the following colloquy regarding the prosecutor's challenge for cause of Juror Benson:

> THE COURT: Okay. We are outside of the presence of the other jurors. We have a challenge for cause as to No. 5 * * *.
>
> Do you want to state your reasons for No. 5, please?

> [PROSECUTOR]: Yes, Your Honor. I had some concerns. Initially during the State's part of voir dire, I asked the jurors if anybody had any issues with police being unfair or concerns about police officers in general.
>
> Mr. Benson didn't say anything at that point. However, when the defense counsel was talking, it seemed that there is a concern that police generally have some issue of racism or bias towards black defendants, and that he had concern that this defendant would not stand a fair trial just because of (a), the number of officers. And I am not sure if that includes the civilian witnesses as well. So I guess the State - -
>
> THE COURT: I think he said something to the effect - -
>
> JUROR NO. 5: Number of officers.
>
> THE COURT: He said something to the effect that he didn't have a prayer or didn't have a chance or something like that. I don't remember exactly what he said. Is that what you said?
>
> JUROR NO. 5: Yeah, didn't have a chance. That is my opinion. You told me to be honest.
>
> THE COURT: No, no, no, no, no. We want you to be honest.
>
> * * *
>
> [DEFENSE COUNSEL]: Judge, the only thing I would say is that after that discussion Mr. Benson did indicate that he could be fair and impartial and that he would listen to the State as well as the defense as far as presenting their evidence and making a judgment accordingly.
>
> THE COURT: All right. I am going to excuse Mr. Benson for cause.

(Tr. 9-10.)

{¶14} Following the above exchange, defense counsel expressed concern that another prospective juror, Juror Bolin, "may treat police officers' testimony more special, to quote what she actually indicated during voir dire when she was questioned by [the

prosecutor]." (Tr. 11.) Defense counsel further stated: "She [Juror Bolin] does have a relationship with two police officers from what she stated, and that she would look more favorably on police officers potentially testifying." (Tr. 11.) The trial court noted that this juror "did say * * * paraphrasing crudely, that she would give greater credence to a police officer. Did you not?" (Tr. 11.) Juror Bolin responded: "I probably did. I don't recall that. I don't think I would." (Tr. 11.) The court then asked this juror: "You understand that police officers, like anybody else, you are to evaluate their testimony just like you would anyone else?" (Tr. 12.) The juror responded affirmatively to the trial court's inquiry. The trial court ultimately overruled the challenge for cause as to Juror Bolin.

{¶15} Pursuant to R.C. 2313.42(J), "good cause" exists to challenge any person called as a juror if that individual "discloses by his answers that he cannot be a fair and impartial juror or will not follow the law as given to him by the court." R.C. 2945.25(B) provides in part that an individual called as a juror in a criminal case may be challenged for cause if "he is possessed of a state of mind evincing enmity or bias toward the defendant or the state." Trial courts are vested with "discretion in determining a juror's ability to be impartial, * * * and such a ruling 'will not be disturbed on appeal unless it is manifestly arbitrary * * * so as to constitute an abuse of discretion.' " *State v. Roberts,* 110 Ohio St.3d 71, 2006-Ohio-3665, ¶106, quoting *State v. Tyler* (1990), 50 Ohio St.3d 24, 31.

{¶16} As indicated by the transcript portion cited above, the prosecutor sought a challenge for cause as to Juror Benson based upon the prosecutor's concern that this juror had raised, during voir dire, issues of "racism or bias" by police officers "toward black defendants." Subsequent to the voir dire proceedings, in response to questioning

by the trial court, the juror expressed his "opinion" that an African American defendant "didn't have a chance" because of the "[n]umber of officers." This juror's candid response to the trial court's inquiry arguably raised legitimate doubts as to his ability to consider the testimony of police officers free from bias. See, e.g., *United States v. Wilson* (E.D.N.Y., 2006), 493 F.Supp.2d 445 (excluding, for cause, juror who expressed sincere belief that law enforcement officers are biased against African Americans). Based upon the record presented, appellant has not demonstrated that the trial court's decision to excuse this juror for cause was so unreasonable as to constitute an abuse of discretion.

{¶17} Regarding the challenge for cause as to Juror Bolin, the record indicates that the trial court questioned her about a statement apparently made during voir dire regarding whether she would give greater credence to the testimony of a police officer. The juror responded: "I don't think that I would." The trial court then instructed her about the need to evaluate a police officer's testimony "just like you would anyone else," and this juror responded that she would do so. The limited record on appeal does not allow this court to review the actual statements made by Juror Bolin during voir dire; however, in light of the trial court's subsequent inquiry and admonition, and the juror's representation that she would give no greater weight to the testimony of a police officer than any other witness, we find no abuse of discretion by the trial court in denying the motion to excuse this juror. See *State v. Jones*, 91 Ohio St.3d 335, 339, 2001-Ohio-57 ("[w]here * * * a juror gives conflicting answers, it is for the trial court to determine which answer reflects the juror's true state of mind").

{¶18} Appellant's first assignment of error is without merit and is overruled.

{¶19} Under the second assignment of error, appellant argues that his conviction was against the manifest weight of the evidence. Appellant's primary contention is that the testimony of Swan was not credible.

{¶20} In *State v. Presar,* 10th Dist. No. 09AP-122, 2009-Ohio-5127, ¶13, this court discussed the task of a reviewing court in considering a manifest weight claim:

> A manifest weight of the evidence claim concerns the inclination of the greater amount of credible evidence offered to support one side of the issue rather than the other. *State v. Brindley*, 10th Dist. No. 01AP-926, 2002-Ohio-2425, ¶16. When presented with a challenge to the manifest weight of the evidence, an appellate court, after " 'reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.' " *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387, 678 N.E.2d 541, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717. An appellate court should reserve reversal of a conviction as being against the manifest weight of the evidence for only the most " 'exceptional case in which the evidence weighs heavily against the conviction.' " *Id*.

{¶21} R.C. 2923.13(A)(3) defines the offense of having a weapon under disability, and provides in part: "[N]o person shall knowingly acquire, have, carry, or use any firearm or dangerous ordnance, if * * * [t]he person is under indictment for or has been convicted of any offense involving the illegal possession, use, sale, administration, distribution, or trafficking in any drug of abuse."

{¶22} As noted under the facts, Swan testified at trial that he was upstairs in Caldwell's apartment when he heard gunshots; he looked out a window and observed appellant fire shots at Caldwell's vehicle and then drive away. According to Swan,

appellant "wasn't in a rush. He just got in his car and drove off." Swan gave a description of the weapon, and testified that he did not observe anyone else in the parking lot at the time. Swan, who had dated appellant's niece (Caldwell) for several years, testified that he was acquainted with appellant.

{¶23} Appellant argues that the credibility of Swan is suspect based upon the testimony of Officer Fishburn, who was working off-duty at the apartment complex on the date of the incident, and who testified that the only individual who gave a statement to him that evening was Caldwell. Swan, who gave a written statement to the police one week after the shooting, recalled speaking to officers on the date of the incident.

{¶24} Under Ohio law, the weight to be given the evidence and credibility of the witnesses are primarily for the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph two of the syllabus. A criminal defendant is not entitled to a reversal on manifest weight grounds "merely because inconsistent evidence was prepared at trial," as "the trier of fact is in the best position to take into account inconsistencies, along with the witnesses' manner and demeanor, and determine whether the witnesses' testimony is credible." *State v. McDowall,* 10th Dist. No. 09AP-443, 2009-Ohio-6902, ¶9. Further, the trier of fact "is free to believe or disbelieve all or any of the testimony." Id. Thus, "although an appellate court must act as a 'thirteenth juror' when considering whether the manifest weight of the evidence requires reversal, it must also give great deference to the fact finder's determination of the witnesses' credibility." *Presar* at ¶14, citing *State v. Covington*, 10th Dist. No. 02AP-245, 2002-Ohio-7037, ¶28; *State v. Hairston*, 10th Dist. No. 01AP-1393, 2002-Ohio-4491, ¶74.

{¶25} In the present case, the trier of fact had the opportunity to consider any inconsistencies in the evidence, and the jury was free to believe or disbelieve any part of Swan's testimony. In light of the verdict rendered, the jury apparently found at least portions of his testimony to be credible, and it was within its province to do so. We further note that Caldwell also testified regarding the incident, and stated that, after hearing the sound of gunfire, she looked out the window and observed her uncle's vehicle driving away. Caldwell testified that appellant later acknowledged to her that he fired the shots at her vehicle, explaining to Caldwell "why he felt that I was wrong," and that "he shot up my vehicle." Finally, in addition to the testimony of Swan and Caldwell, the parties entered into a stipulation that appellant was convicted of possession of cocaine on August 15, 2008.

{¶26} Upon review of the record and the evidence presented, we are unable to conclude that the jury lost its way and created such a miscarriage of justice that the conviction must be reversed. Rather, there was competent, credible evidence to support the jury's verdict, and appellant's second assignment of error is hereby overruled.

{¶27} Under the third assignment of error, appellant argues that he was denied his right to remain silent and to a fair trial. Specifically, appellant challenges testimony by Officer Lazar that appellant refused to speak to police about the incident in question.

{¶28} A review of the record indicates that defense counsel, during cross-examination, asked Officer Lazar if he had investigated for the presence of gunshot residue following the incident. During re-cross-examination, defense counsel questioned the officer as to whether he ever asked appellant if he washed his hands or had changed his clothing. The officer responded: "Mr. Caldwell at that time refused to speak to us

about this incident." (Tr. 56.) No objection was raised, nor did counsel request to strike the comment from the record.

{¶29} The Supreme Court of Ohio has observed that the "test for plain error is stringent. A party claiming plain error must show that: (1) an error occurred; (2) the error was obvious; and (3) the error affected the outcome of the trial." *State v. Frazier,* 115 Ohio St.3d 139, 2007-Ohio-5048, ¶206. Further, " '[n]otice of plain error * * * is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.' " Id. at ¶207, quoting *State v. Long* (1978), 53 Ohio St.2d 91, paragraph three of the syllabus.

{¶30} Here, in considering the statement at issue, we note that the officer's response may not have been interpreted by the jury as a comment on the right to remain silent; rather, considered in context, it may have merely been viewed as an explanation as to why the officer did, or did not, employ certain investigatory techniques. Regardless, in light of the other evidence presented, we are not persuaded that this lone remark, elicited in direct response to a question by defense counsel on cross-examination, affected the jury's verdict so as to rise to the level of plain error.

{¶31} Accordingly, the third assignment of error is overruled.

{¶32} Under the fourth assignment of error, appellant argues he was denied the effective assistance of counsel. Specifically, appellant contends that his trial counsel's performance was deficient in failing to object to the process of jury selection (voir dire) without transcription of the record "excepting challenges made by counsel subsequent to questioning of the jurors."

{¶33} A reversal predicated upon a claim of ineffective assistance of counsel requires a defendant to "show, first, that counsel's performance was deficient, and second, that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial." *State v. Diar,* 120 Ohio St.3d 460, 2008-Ohio-6266, ¶137, citing *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052; *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph two of the syllabus. In order to show prejudice, "a defendant must prove that, but for his lawyer's errors, a reasonable probability exists that the result of the proceedings would have been different." *State v. McGee,* 7th Dist. No. 07 MA 137, 2009-Ohio-6397, ¶13. Further, prejudice "may not be assumed," but "must be affirmatively shown." Id.

{¶34} As we previously noted in addressing the first assignment of error, "by agreement of counsel, voir dire on the record was waived." (Tr. 7.) Appellant's main contention appears to be that prejudice should be presumed based upon trial counsel's failure to ensure that a transcript of the voir dire was included as part of the record on appeal.

{¶35} In addressing a similar claim that trial counsel should have ordered a transcription of the jury voir dire, this court observed that "the issue of ineffective assistance of trial counsel is ordinarily a matter to be raised by a petition for post-conviction relief, unless it is apparent from the record that the trial counsel's conduct was deficient." *State v. Mitchell* (Feb. 4, 1993), 10th Dist. No. 88AP-695. Further, this court rejected the argument that a reviewing court should "assume prejudicial error * * * with respect to not having the voir dire of the jury transcribed for appeal." Id.

{¶36} In the instant case, appellant does not suggest any specific impropriety with respect to voir dire other than the failure to have the proceedings recorded. In *State v. Schwarzbach* (Nov. 6, 1990), 10th Dist. No. 89AP-1504, this court noted that it is "a common practice in non-capital cases to waive the presence of a reporter during *voir dire,* and this court has previously held that counsel has no duty to record *voir dire* examinations." Even assuming that trial counsel's agreement to waive the presence of a reporter during voir dire somehow constituted deficient performance, we decline to presume prejudice merely from the lack of a transcript itself. *Mitchell*. Having failed to affirmatively demonstrate prejudice, appellant's claim for ineffective assistance of counsel is not well-taken, and the fourth assignment of error is overruled.

{¶37} Based upon the foregoing, appellant's four assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

Judgment affirmed.

McGRATH and BRYANT, JJ., concur.

BRYANT, J., concurring.

{¶38} While the differing results on the two similar challenges under the first assignment of error concern me, I am compelled to concur in light of the prevailing case law governing this matter.
