[Cite as *State v. Copeland*, 2010-Ohio-2192.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 09AP-917 (C.P.C. No. 09CR-402)
Joseph Copeland, Jr.,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on May 18, 2010

Ron O'Brien, Prosecuting Attorney, and *Sheryl L. Prichard*, for appellee.

Kirk A. McVay, for appellant.

APPEAL from the Franklin County Court of Common Pleas

TYACK, P.J.

{¶1} Joseph Copeland, Jr., is appealing from his convictions for robbery. He assigns five errors for our consideration:

> [I.] THE TRIAL COURT ERRED WHEN IT ENTERED JUDGMENT AGAINST THE DEFENDANT AS TO RENUMBERED COUNTS ONE AND TWO OF THE INDICTMENT WHEN THERE WAS INSUFFICIENT EVIDENCE TO SUSTAIN THOSE CONVICTIONS AND THEY ARE 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 CONSTITUTIOIN AND ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION.

[II.] THE TRIAL COURT ERRED WHEN IT FAILED TO INSTRUCT THE JURY IN A MANNER INCORPORATING INTO THE DEFINITION OF FORCE THE REQUIREMENT OF *ACTUAL OR POTENTIAL HARM*, AND THAT A VICTIM'S FEAR OF PERSONAL HARM MUST BE OBJECTIVELY REASONABLE, IN RENUMBERED COUNT TWO, IN VIOLATION OF DEFENDANT-APPELLANT'S RIGHT TO DUE PROCESS AND A FAIR TRIAL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION.

[III.] THE TRIAL COURT ERRED WHEN IT FAILED TO INSTRUCT THE JURY AS TO RENUMBERED COUNTS ONE AND TWO OF THE INDICTMENT THAT ITS VERDICT MUST BE UNANIMOUS AS TO EITHER OF THE ALTERNATIVE MEANS BY WHICH DEFENDANT-APPELLANT COULD HAVE RECKLESSLY INFLICTED, ATTEMPTED TO INFLICT, OR THREATENED TO INFLICT PHYSICAL HARM ON ANOTHER, AND USED OR THREATENED THE IMMEDIATE USE OF FORCE AGAINST ANOTHER, IN VIOLATION OF DEFENDANT-APPELLANT'S RIGHT TO JURY UNANIMITY UNDER CRIM.R. 31(A) AND HIS RIGHTS TO DUE PROCESS AND A FAIR TRIAL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION.

[IV.] THE TRIAL COURT ERRED WHEN IT GAVE AN "ACQUITTAL FIRST INSTRUCTION" (WITH PARALLEL ACCOMPANYING VERDICT FORM) REGARDING THE JURY'S CONSIDERATION OF THE LESSER INCLUDED OFFENSES OF THEFT BY THREAT AND THEFT BY INITIMIDATION, IN VIOLATION OF DEFENDANT-APPELLANT'S RIGHTS TO DUE PROCESS AND A FAIR TRIAL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES

> CONSTITUTION AND ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION.
>
> [V.] 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 THE FAILURE OF THE TRIAL COURT TO PROPERLY INSTRUCT THE JURY AS AVERRED IN THE SECOND, THIRD, AND FOURTH ASSIGNMENTS OF ERROR.

{¶2} The first assignment of error questions the weight of the evidence and the sufficiency of the evidence presented at Copeland's jury trial.

{¶3} Sufficiency of the evidence is the legal standard applied to determine whether the case should have gone to the jury. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386. In other words, sufficiency tests the adequacy of the evidence and asks whether the evidence introduced at trial is legally sufficient as a matter of law to support a verdict. Id. "The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus, following *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781. The verdict will not be disturbed unless the appellate court finds that reasonable minds could not reach the conclusion reached by the trier of fact. *Jenks* at 273. If the court determines that the evidence is insufficient as a matter of law, a judgment of acquittal must be entered for the defendant. See *Thompkins* at 387.

{¶4} Even though supported by sufficient evidence, a conviction may still be reversed as being against the manifest weight of the evidence. *Thompkins* at 387. In so

doing, the court of appeals, sits as a " 'thirteenth juror' " and, 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.' " Id. (quoting *State v. Martin* [1983], 20 Ohio App.3d 172, 175); see, also, *Columbus v. Henry* (1995), 105 Ohio App.3d 545, 547-548. Reversing a conviction as being against the manifest weight of the evidence should be reserved for only the most " 'exceptional case in which the evidence weighs heavily against the conviction.' " *Thompkins* at 387.

{¶5} As this court has previously stated, "[w]hile the jury may take note of the inconsistencies and resolve or discount them accordingly, see [*State v.*] *DeHass* [(1967), 10 Ohio St.2d 230], such inconsistencies do not render defendant's conviction against the manifest weight or sufficiency of the evidence." *State v. Nivens* (May 28, 1996), 10th Dist. No. 95APA09-1236. It was within the province of the jury to make the credibility decisions in this case. See *State v. Lakes* (1964), 120 Ohio App. 213, 217 ("It is the province of the jury to determine where the truth probably lies from conflicting statements, not only of different witnesses but by the same witness.")

{¶6} See *State v. Harris* (1991), 73 Ohio App.3d 57, 63 (even though there was reason to doubt the credibility of the prosecution's chief witness, he was not so unbelievable as to render verdict against the manifest weight).

{¶7} The testimony at Copeland's trial indicated that Copeland entered a National City Bank in Columbus, Ohio, around 2:00 p.m. He leaped over a counter and grabbed over $10,000 in cash. He then leaped over a wooden barrier and left the bank.

{¶8} During his time in the bank, Copeland did not make any threats and did not brandish any weapons. Nevertheless, bank employees and others in the bank felt afraid and were "shaken up" by the incident. The question for this appellate court is whether the facts at trial satisfy the elements of R.C. 2911.02(A)(2) and/or (A)(3).

{¶9} R.C. 2911.02(A) reads:

> No person, in attempting or committing a theft offense or in fleeing immediately after the attempt or offense, shall do any of the following:
>
> (1) Have a deadly weapon on or about the offender's person or under the offender's control;
>
> (2) Inflict, attempt to inflict, or threaten to inflict physical harm on another;
>
> (3) Use or threaten the immediate use of force against another.

{¶10} The State of Ohio argues two theories as to why Copeland is guilty of robbery, as opposed to simple theft. First, the State argues that Copeland's encounter with a bank patron Saed Omar ("Omar") provided the necessary elements to elevate the case from a theft to a robbery. The State also argues that Copeland's clothing and actions constituted an "implicit threat."

{¶11} Omar is the owner of a small business near the bank. He was in the bank to make a deposit. He heard Copeland say, "robbery" immediately before Copeland jumped over the bank counter. Omar testified everybody was "screaming, yelling." (Tr.

171.) Omar then left the bank and positioned himself in the middle of the street when he called 9-1-1.

{¶12} When Copeland left the bank, Omar was on the phone to the Columbus Police Department. Omar made a gesture after Copeland made a movement of his arms to "try, you know, scare me." (Tr. 207.) Omar also testified that while he had been in the bank, Copeland "touch me. He hit my back." (Tr. 209.) Omar later testified "somebody just like push me, jump." (Tr. 210.)

{¶13} While being cross-examined at trial, Omar testified "then when he see me face-to-face he try, you know, act he got a gun, you know. And then he drop the $2,000." (Tr. 218.)

{¶14} Omar's testimony satisfies the requirements of R.C. 2911.02(A)(3). By pushing Omar, Copeland used force against him. The testimony indicates that the "somebody" who pushed Omar immediately before Copeland jumped over the counter was Copeland.

{¶15} Omar's testimony does not indicate that Copeland inflicted or tried to inflict physical harm on him. However, the gesture made by Copeland which was construed by Omar as Copeland acting like he had a gun could legitimately be found by the jury as a threat to inflict physical harm on Omar.

{¶16} A bank robber reaching toward his clothing in a way to indicate the presence of a gun would reasonably be construed by the trier of fact as a threat to use a gun, a threat to inflict physical harm. The State of Ohio's argument of an implicit threat has merit based upon Omar's testimony, if for no other reason.

{¶17} We find the evidence of robbery, as opposed to theft, sufficient. We also find the jury's verdicts were not against the manifest weight of the evidence. The first assignment of error is overruled.

{¶18} In the second assignment of error, counsel for Copeland argued that actual or potential harm must be present for force to be demonstrated. R.C. 2911.02 does not include this as required for purposes of R.C. 2911.02(A)(3). The definition of "force" in R.C. 2901.01(A)(1) includes any compulsion, so pushing someone involves the use of force.

{¶19} Further, fear is not a criterion for purposes of R.C. 2911.02(A)(2). The statute looks to the actions of the offender, not the mental state of a witness. Copeland took an action which could legitimately be construed as reaching for a weapon. Omar's fear was objectively reasonable under the circumstances.

{¶20} In short, the jury did not need to be instructed as to actual or potential harm or as to objective reasonability.

{¶21} The second assignment of error is overruled.

{¶22} In the third assignment of error, counsel for Copeland asserts that an express charge requiring unanimity on the theory of conviction should have been given. No objection was made before the jury retired to deliberate, so we evaluate the assignment of error under a plain error standard.

{¶23} To constitute plain error, the error must be obvious on the record, palpable, and fundamental such that it should have been apparent to the trial court without objection. See *State v. Tichon* (1995), 102 Ohio App.3d 758, 767. Moreover, plain error

does not exist unless the appellant establishes that the outcome of the trial clearly would have been different but for the trial court's allegedly improper actions. *State v. Waddell* (1996), 75 Ohio St.3d 163, 166. Notice of plain error is to be taken with utmost caution, under exceptional circumstances, and only to prevent a manifest miscarriage of justice. *State v. Phillips* (1995), 74 Ohio St.3d 72, 83; *State v. Ospina* (1992), 81 Ohio App.3d 644, 647.

{¶24} We cannot find plain error under the facts of this case.

{¶25} The third assignment of error is overruled.

{¶26} A plain error standard also applies to the fourth assignment of error. The charge given by the trial court could be construed as misleading when the trial court states:

> * * * [I]n going over the lesser included offenses you only consider those if you find the Defendant not guilty of the main charge of robbery. * * *

(Tr. 445.)

{¶27} However, we cannot find that the failure to tell the jury that they could consider the lesser charges before unanimously rejecting the robbery charges constituted plain error.

{¶28} The fourth assignment of error is overruled.

{¶29} In the fifth assignment of error, appellate counsel for Copeland alleges that trial counsel rendered ineffective assistance. We cannot so find.

{¶30} The key case guiding such legal issues is *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052. *Strickland* causes criminal defendants to carry a heavy burden. That burden was not carried here.

> * * * [A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.

Id. at 690.

{¶31} Trial counsel was faced originally with a five count indictment which included aggravated robbery with a firearm specification and a repeat violent offender specification. That charge, along with a kidnapping and a weapon under disability charge was removed from the jury's consideration before or during the trial, heavily based upon trial counsel's performance. Trial counsel created a record which made arguments about the weight and sufficiency of the evidence at least arguable. Trial counsel did not make a mistake in failing to request an additional jury charge as to actual or potential harm. We cannot say the jury verdicts would have been any different had the trial court given a better instruction or unanimity of theory of conviction.

{¶32} In short, trial counsel rendered effective assistance of counsel. The fifth assignment of error is overruled.

{¶33} All assignments of error having been overruled, the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

BROWN and SADLER, JJ., concur.

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