[Cite as *State v. Oliver*, 2009-Ohio-4928.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2008-L-160**
- vs -	:	
BOBBY R. OLIVER,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 07 CR 000686.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor, and *Joshua S. Horacek*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

R. Paul LaPlante, Lake County Public Defender, and *Vanessa R. Clapp*, Assistant Public Defender, 125 East Erie Street, Painesville, OH 44077 (For Defendant-Appellant).

TIMOTHY P. CANNON, J.

{¶1} Appellant, Bobby R. Oliver, appeals the judgment of the Lake County Court of Common Pleas confirming the verdict rendered by the jury. For the following reasons, we affirm the judgment of the trial court.

{¶2} On September 16, 2007, Oliver met his girlfriend, Sheryl Stidham, and Brenda Smart at the 306 Lounge in Mentor, Ohio. After consuming alcohol, Oliver,

Stidham, and Smart left the 306 Lounge and went to Smart's home in Eastlake, Ohio. At Smart's home, they played dice games and continued to consume alcohol.

{¶3} At 11:00 p.m., Oliver and Stidham left Smart's home and returned home. At home, an argument ensued regarding Stidham's alleged infidelity. As Stidham began to collect her purse and cellular telephone in an attempt to leave the scene, Oliver snatched Stidham's cellular telephone and stated, "we will straighten this out right now." Oliver began searching the contacts listed in Stidham's telephone and threatened to "kill them all." When Stidham tried to retrieve her cellular telephone, Oliver shoved her. She then tried to call the police using the landline telephone, but Oliver ripped it out of the wall. Oliver hit Stidham on the side of her face with the landline telephone.

{¶4} Stidham then testified that as she was leaving, Oliver threw her down on the floor, straddled her, and started to choke her saying, "I will *** kill you, bitch. I will choke you to *** death right now." Stidham pleaded with Oliver not to kill her. Escaping from Oliver's hold, Stidham ran outside. Stidham attempted to drive away but, as she put the key into the ignition of the truck, she observed Oliver coming out of the house with a gun. Stidham "ducked down" and heard the first gunshot. She hit the gas pedal and backed out of the driveway. When Stidham looked up, "Oliver was walking across the yard toward [her] and the truck with the gun still up and still shooting."

{¶5} The evidence revealed that six bullet holes had struck the truck occupied by Stidham; all of them were grouped around the driver's-side headlight. Eight bullet casings and two actual bullets were located in the front yard of the residence.

{¶6} Oliver was found guilty by a jury of felonious assault, a felony of the second degree, in violation of R.C. 2903.11(A)(2), with a firearm specification as set

forth in R.C. 2941.145; domestic violence, a misdemeanor of the first degree, in violation of R.C. 2919.25(A); and using weapons while intoxicated, a misdemeanor of the first degree, in violation of R.C. 2923.15. The trial court sentenced Oliver to an aggregate term of seven years imprisonment.

{¶7} Oliver appeals his convictions and asserts the following assignments of error for our review:

{¶8} "[1.] The defendant-appellant's due process rights and rights to a fair trial as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Sections 5 and 10, Article I of the Ohio Constitution were violated by prosecutorial misconduct in closing argument.

{¶9} "[2.] The trial court erred to the prejudice of the defendant-appellant when it returned a verdict of guilty against the manifest weight of the evidence."

{¶10} Oliver claims that the trial court erred by allowing the state to make an improper closing argument.

{¶11} In *State v. Bleasdale* (Sept. 6, 1996), 11th Dist. No. 95-A-0047, 1996 Ohio App. LEXIS 3876, *6-7, this court held:

{¶12} "[A] prosecutor has wide latitude in closing arguments. As long as an improper comment is isolated and does not deprive the defendant of a fair trial, it will not constitute reversible error. *** 'The test for prosecutorial misconduct is whether remarks are improper and, if so, whether they prejudicially affected substantial rights of the accused.'" (Internal citations omitted.)

{¶13} To determine whether the prosecutor's comments were improper, an appellate court must consider the following factors: "(1) the nature of the remarks; (2)

whether an objection was made by opposing counsel; (3) whether corrective instructions were given; and (4) the strength of the evidence against the defendant." *State v. Mann* (1993), 93 Ohio App.3d 301, 312.

{¶14} Under this assignment of error, Oliver complains the prosecutor attacked the character of defense counsel. This argument is without merit.

{¶15} Oliver cites to the following comments offered by the state during closing argument:

{¶16} "[Prosecutor]: *** Now, I would suggest to you that the whole defense of this case has been a slick attempt to indoctrinate you -- [Objection by defense counsel overruled.] -- desensitize you and concessions.

{¶17} "The indoctrination. Let's go back to *voir dire*. 'It is better to let a guilty man go free than to convict an innocent man.' Bobby Oliver is not innocent. But again, playing on your emotions. [Objection by defense counsel overruled.]

{¶18} "In an attempt to indoctrinate you, desensitize you, in *voir dire* you were told that Bobby Oliver behaved badly. *** Concessions. Well yes, maybe he did cause physical harm to Sheryl Stidham a household member, Domestic Violence. Yes, maybe he did fire this gun while he was under the influence of alcohol. Concessions to buy credibility.

{¶19} "[Objection by defense counsel overruled.]

{¶20} "*** This indoctrination, desensitization and concessions are all efforts to get you to abandon your reason and your common sense."

{¶21} The prosecutor's argument was not improper, since the remarks were in response to Oliver's closing argument at trial. For example, during closing argument,

Oliver's attorney, on numerous occasions, mentioned what he had told the jury during voir dire. In fact, Oliver's attorney characterized this incident as a "horrible thing" and noted that Stidham has a right to be "scared," "terrified," "petrified," and "extremely angry." Our review of the record reveals the prosecutor was, in fact, attempting to refute the strategy taken by Oliver's attorney.

{¶22} Additionally, Oliver complains the prosecutor suggested to the jury that he lied during his interview with the police. Specifically, Oliver cites to the following comments:

{¶23} "Now, let's look at what Bobby Oliver told the police during his interview. I am going to characterize as lied and denied. *** When else did he lie and deny? 'I told her to stop the truck. I wanted my keys and Sheryl didn't hear that. *** He was trying to minimize his behavior. Just like all of these things that he lied, denied about."

{¶24} Oliver, however, has taken the prosecutor's comments in the instant case out of context. A review of the record, in its entirety, reveals that the prosecutor was not announcing his opinion as to the veracity of Oliver. Rather, the prosecutor outlined the evidence presented at trial and suggested inferences that might be drawn from the evidence and testimony presented. "[The prosecutor] can say, 'The evidence supports the conclusion that the defendant is lying, is not telling the truth, is scheming, has ulterior motives, including his own hide, for not telling the truth.'" *State v. Draughn* (1992), 76 Ohio App.3d 664, 670. (Citations omitted). The prosecutor cannot say, however, "'I believe these witnesses,' because such argument invades the province of the jury, and invites the jury to decide the case based upon the credibility and status of the prosecutor. *** In a sense, such argument by the prosecutor injects himself into the

trial as a thirteenth juror, and claims to himself the first vote in the jury room." Id. (Citations omitted). Therefore, this argument is not well-taken.

{¶25} The statements complained of by Oliver did not deny him a fair trial. We further recognize that the outcome of the trial would not have been different had the prosecutor not made the statements; the record demonstrates ample evidence upon which a jury could base its verdict of guilty. Consequently, Oliver's first assignment of error is not well-taken.

{¶26} Under his second assignment of error, Oliver alleges the verdict was against the manifest weight of the evidence. Oliver, however, has failed to support this argument. Instead, he attacks the sufficiency of the evidence by arguing that the "state failed to present sufficient evidence at trial to prove that he did in fact knowingly attempt to cause physical harm to Stidham." As this court stated in *State v. Schlee* (Dec. 23, 1994), 11th Dist. No. 93-L-082, 1994 Ohio App. LEXIS 5862, at *13-14:

{¶27} "'Sufficiency' challenges whether the prosecution has presented evidence on each element of the offense to allow the matter to go to the jury, while 'manifest weight' contests the believability of the evidence presented."

{¶28} When reviewing a challenge of the sufficiency of the evidence, a reviewing court examines "the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt." *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus. "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." Id.

{¶29} R.C. 2903.11(A)(2) defines felonious assault as follows: "[n]o person shall knowingly *** [c]ause or attempt to cause physical harm to another *** by means of a deadly weapon ***." "A person acts knowingly, regardless of purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist." R.C. 2901.22(B).

{¶30} Oliver claims that he intended only to scare Stidham when he fired eight shots at the front-end of the vehicle she was driving. To buttress his argument, Oliver attempts to distinguish the instant scenario from those presented in *State v. Butticci* and *State v. Owens*, where both the appellants argued the evidence was insufficient to support a finding of guilty to felonious assault. *State v. Butticci* (Nov. 22, 1996), 11th Dist. No. 95-L-121, 1996 Ohio App. LEXIS 5263; *State v. Owens* (June 28, 1996), 11th Dist. No. 11th Dist. No. 95-L-078, 1996 Ohio App. LEXIS 2728.

{¶31} In *Owens*, the appellant testified that he was "only trying to scare [the victim] when he fired the two shots, but had no intent to kill or harm [the victims.]" *State v. Owens*, 1996 Ohio App. LEXIS 2728, at *25. This court noted that the appellant shot at a vehicle that "contained two passengers"; "the risk of injury was significant"; and the "[a]ppellant's alleged lack of intent to kill or harm is irrelevant." Id. at *27.

{¶32} In *Butticci*, the appellant maintained the evidence presented at trial was insufficient to establish the element of "knowingly," since the house upon which he fired only contained three persons. *State v. Butticci*, 1996 Ohio App. LEXIS 5263, at *17-20. This court disagreed with the appellant's theory, noting that "the evidence was still sufficient to establish that [the appellant] 'knew' that he was shooting toward a

residential structure which appeared to be occupied." Id. at *18-19. Furthermore, this court emphasized that while the appellant did not shoot at a specific area of the house, "he was shooting directly toward the house; *i.e.,* the evidence did not support the finding that he was shooting the gun into the air and the bullets just happened to hit the house." Id. at *19.

{¶33} Contrary to Oliver's assertion, *Owens* and *Butticci* support his conviction of felonious assault. In *Owens* and *Butticci*, this court cited the Twelfth Appellate District in *State v. Gregory*, which stands for the proposition that "[t]he shooting of a gun in a place where there is a risk of injury to one or more persons supports the inference that appellant acted knowingly." *State v. Gregory* (1993), 90 Ohio App.3d 124, 131. (Citations omitted.) In addition, we recognize that "'[a]s a general proposition, the law presumes that a person intends "(***) the natural, reasonable and probable consequences of his voluntary acts." *State v. Johnson* (1978), 56 Ohio St.2d 35, 39.'" *State v. Owens*, 1996 Ohio App. LEXIS 2728, at *26. (Citation omitted.)

{¶34} Oliver maintains that the location of the bullets, all of them striking the front-end of the vehicle, illustrates his "intent to scare." We disagree.

{¶35} The evidence presented at trial demonstrates that a confrontation ensued between Stidham and Oliver. First, Stidham testified that Oliver threatened to kill all of the individuals listed as contacts in her cellular telephone. Then, Stidham testified that while Oliver was choking her, he repeatedly threatened to kill her. In an effort to escape, Stidham grabbed Oliver's keys and attempted to drive away. As Stidham was exiting the driveway, Oliver began shooting the vehicle with his .45 caliber gun. In an attempt to evade the bullets, she lowered herself behind the driver's-side console.

Oliver fired eight gunshots, six of which struck the front-end, driver's side of the vehicle that Stidham occupied.

{¶36} A review of the record reveals there was sufficient competent, credible evidence to support the jury's conclusion that Oliver acted knowingly when he fired eight gunshots at the vehicle occupied by Stidham. Oliver's second assignment is without merit.

{¶37} The judgment of the Lake County Court of Common Pleas is hereby affirmed.

MARY JANE TRAPP, P.J.,

CYNTHIA WESTCOTT RICE, J.,

concur.