[Cite as *State v. Valentin*, 2009-Ohio-6038.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2009-P-0010**
- vs -	:	
JUAN A. VALENTIN,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 2008 CR 0591.

Judgment: Affirmed.

Victor V. Vigluicci, Portage County Prosecutor, and *Pamela J. Holder*, Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

Leonard J. Breiding, II, 4825 Almond Way, Ravenna, OH 44266 (For Defendant-Appellant).

TIMOTHY P. CANNON, J.

{¶1} This matter is submitted to this court on the record and the briefs of the parties. Appellant, Juan A. Valentin, appeals the judgment entered by the Portage County Court of Common Pleas. The trial court sentenced Valentin to a seven-year prison term for his conviction for aggravated robbery.

{¶2} Late in the evening of September 8, 2008, Asa Benjamin was in Streetsboro, Ohio. Benjamin called Amanda Alter ("Alter"), who was an acquaintance of his. Benjamin knew Alter, because he previously dated Alter's older sister. Benjamin stated the purpose of the call was to see if Alter wanted to "hang out." However, the

topic of the conversation quickly turned to marijuana. Benjamin asked Alter if she knew anyone who was interested in purchasing three ounces of marijuana. Eventually, Alter agreed to purchase the marijuana, and she agreed to meet Benjamin at the Circle K convenience store in Streetsboro.

{¶3} At the time she received Benjamin's phone call, Alter was at Danelle Layne's ("Layne") residence in Windham, Ohio. Layne shared the residence with her husband, Michael Layne. In addition to Alter and Layne, Valentin and Daniel Graham, who was dating Alter, were present at the residence. Michael Layne was not present.

{¶4} The group at Layne's residence decided they wanted the marijuana. However, they did not have enough money to purchase it. Despite their lack of money, they informed Benjamin of their intent to purchase the marijuana. In fact, the group devised a plan to steal the marijuana from Benjamin.

{¶5} Graham, Alter, Layne, and Valentin got into Graham's vehicle, a Toyota Scion. Graham was driving the vehicle; Alter sat in the front passenger seat; and Layne and Valentin were in the back seat, with Layne sitting behind the driver. They went to Jason Miller's residence in Windham. While the others remained in the vehicle, Valentin went into Miller's residence and obtained a pellet gun, which some witnesses described as a BB gun.

{¶6} After stopping at Miller's residence, the group traveled to the Circle K in Streetsboro to meet Benjamin. When the group arrived at the Circle K, Alter rolled down her window and spoke to Benjamin. She told Benjamin to get in the vehicle, and he complied with her request. Benjamin sat in the back seat, behind Graham, who was still driving. Layne slid over to the middle of the back seat and was now sitting between Valentin and Benjamin.

{¶7} Graham told Benjamin that he did not want to conduct the drug sale at the Circle K because there were too many people present. Graham asked Benjamin if he knew of a more secluded location. Benjamin directed Graham to an isolated location on Coit Road in Shalersville Township. On the way to Coit Road, Benjamin handed the marijuana to Alter for her to inspect it.

{¶8} Upon arriving at the Coit Road location, Valentin pulled out the gun and pointed it at Benjamin. Valentin held the gun close to Benjamin, and, at one point, Benjamin stated he felt the gun on his neck. Valentin demanded Benjamin give him his belongings. At that time, Graham turned in the driver's seat and was yelling at Benjamin. In addition, Graham punched Benjamin in his face and chest. At the direction of Valentin, Layne removed items from Benjamin's pockets, including his wallet and cell phone.

{¶9} Valentin forced Benjamin out of the vehicle and told him to walk away without looking at the vehicle or its occupants. After waiting for the vehicle to leave, Benjamin walked back to his car, which was still at the Circle K. He did not report the incident to the police that night.

{¶10} Graham drove the Scion back to Layne's residence in Windham. On the way, members of the group discarded some of the contents of Benjamin's wallet out the windows of the vehicle. In addition, Alter destroyed Benjamin's cell phone and threw the pieces out the window. Graham, Alter, and Valentin split the stolen marijuana.

{¶11} Upon returning to Windham, Alter wanted cigarettes and blunt wraps and Valentin sought to use Benjamin's ATM card. Alter and Valentin entered the Circle K convenience store in Windham. Valentin attempted to use Benjamin's ATM card in the

machine inside the store. Surveillance video from the Windham Circle K store showed both Alter and Valentin in the store.

{¶12} A few hours later, Alter called Benjamin at his parents' residence in an attempt to smooth things over.

{¶13} The following day, Benjamin went to the Portage County Sheriff's Office to report the robbery. Benjamin reported the details of the robbery; however, he did not mention the marijuana.

{¶14} Deputy James Acklin took Benjamin's statement and began the investigation. He obtained the surveillance video from the Circle K store in Streetsboro of the Toyota Scion. On September 10, 2008, Deputy Daniel Burns noticed a Toyota Scion matching the description of the vehicle in question parked outside a store in Windham. Valentin was driving the Scion, and Layne was a passenger. Valentin informed Deputy Burns that Graham owned the vehicle.

{¶15} A few weeks after the robbery of Benjamin, Alter and Graham stole several firearms from Alter's grandmother's residence. While being questioned for this offense, Alter admitted the group's involvement in the robbery.

{¶16} Valentin was arrested on an unrelated criminal charge and held in the Portage County Jail. During this time, Deputy Acklin showed him the surveillance video from the Windham Circle K, and Valentin stated that he was in the video. Also, the video shows Valentin wearing a uniquely-patterned coat, which Deputy Acklin testified matched the description provided by Benjamin of what the gunman was wearing. Valentin told Deputy Acklin he found the ATM card in the grass and decided to try to use it.

{¶17} In relation to the instant matter, Valentin was indicted on one count of aggravated robbery, in violation of R.C. 2911.01(A)(1) and a first-degree felony.[1] This count contained a firearm specification, in violation of R.C. 2929.14(D) and 2941.145.

{¶18} Valentin pled not guilty to the charged offense, and a jury trial was held. Benjamin, Alter, Layne, and Graham testified for the state. Alter, Graham, and Layne all testified pursuant to plea agreements. They pled guilty to reduced charges in exchange for testifying against Valentin. In addition, Alter and Graham pled to reduced charges in relation to the theft of the firearms from Alter's grandmother's residence.

{¶19} Following the state's case-in-chief, Valentin moved for acquittal pursuant to Crim.R. 29. The trial court overruled the motion with respect to the underlying aggravated robbery count. However, the trial court granted the motion with respect to the firearm specification. Valentin did not call any witnesses.

{¶20} The jury found Valentin guilty of aggravated robbery. The trial court sentenced Valentin to a seven-year prison term for his conviction.

{¶21} Valentin has timely appealed the trial court's judgment entry to this court. Valentin raises three assignments of error. We will address his assigned errors out of numerical order. Valentin's second assignment of error is:

{¶22} "The trial court erred in failing to grant appellant's Criminal Rule 29 motion to dismiss the aggravated robbery charge at the conclusion of the state's case and at the conclusion of the evidence."

{¶23} A trial court shall grant a motion for acquittal when there is insufficient evidence to sustain a conviction. Crim.R. 29(A). When determining whether there is sufficient evidence presented to sustain a conviction, "[t]he relevant inquiry is whether,

1. Graham, Alter, and Layne were also charged with aggravated robbery.

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.

{¶24} In his appellate brief, Valentin does not provide details as to what specific areas he claims the state failed to meet its evidentiary burden. He merely asserts, "[t]he state of Ohio did not prove all essential elements of [the] charge." Valentin was charged with aggravated robbery, in violation of R.C. 2911.01(A)(1), which provides:

{¶25} "(A) No person, in attempting or committing a theft offense, as defined in section 2913.01 of the Revised Code, or in fleeing immediately after the attempt or offense, shall do any of the following:

{¶26} "(1) Have a deadly weapon on or about the offender's person or under the offender's control and either display the weapon, brandish it, indicate that the offender possesses it, or use it[.]"

{¶27} Alter, Graham, and Layne all testified that Valentin held a weapon to Benjamin's throat and ordered Layne to empty Benjamin's pockets. Thus, there was evidence presented that Valentin displayed and/or brandished the weapon. In addition, this occurred during a theft offense. Benjamin's wallet, cell phone, and marijuana were stolen. Valentin received a portion of the marijuana.

{¶28} Further, we note there was additional evidence presented by the state, which corroborated the testimony of the codefendants. The surveillance video at the Circle K in Windham shows Valentin attempting to use Benjamin's ATM card. This attempt occurred only minutes after the robbery.

{¶29} Accordingly, the state presented sufficient evidence that Valentin committed a theft offense while displaying or brandishing a weapon.

{¶30} Next, we determine whether the state presented sufficient evidence that Valentin used a *deadly* weapon.

{¶31} The police never recovered the weapon used in this offense. Benjamin testified it was a handgun, but he did not know if it was a real gun. He stated the gun felt "like cold steel" when it was held to his neck. Alter, Layne, and Graham all testified that the weapon used was a pellet or BB gun. The group decided to use a BB gun to minimize the risks associated with the robbery. Alter specifically testified she is familiar with BB guns and identified the weapon used in this offense as a BB gun. She stated she saw a lever on the top of the gun, which is used to load the BBs. Finally, Graham testified he shot the BB gun at cans upon returning to Layne's residence on the night in question. Deputy Acklin testified that, based on his investigation, the gun used in this crime was a "Crossman pellet gun, black looking, looking like a .45 caliber semi auto handgun."

{¶32} Based on this evidence, the trial court concluded there was a lack of sufficient evidence presented that the weapon used was a real gun. Thus, the trial court dismissed the firearm specification upon Valentin's motion. Accordingly, our analysis will focus on whether a BB gun or pellet gun may be a deadly weapon.

{¶33} "'Deadly weapon' means any instrument, device, or thing capable of inflicting death, and designed or specially adapted for use as a weapon, or possessed, carried, or used as a weapon." R.C. 2923.11(A).

{¶34} The Second Appellate District has held:

{¶35} "While a BB gun does not fall within the purview of a 'firearm,' it may constitute a deadly weapon, and if a defendant uses a BB gun in the commission of a theft offense, he or she may be convicted of aggravated robbery." *State v. Mills* (1991), 73 Ohio App.3d 27, 33, citing *State v. Gaines* (1989), 46 Ohio St.3d 65, 68. (*State v. Gaines* modified in part on other grounds.)

{¶36} In addition, the First Appellate District has held:

{¶37} "[T]he law in Ohio is fairly well settled that a BB gun *may be* a deadly weapon if *capable of inflicting death*, as a bludgeon, or perhaps as used in some other manner (one could envision a BB gun so powerful that it could be a deadly weapon by its very nature.)" *State v. Brown* (1995), 101 Ohio App.3d 784, 788. (Emphasis sic.)

{¶38} The determination of whether a BB gun is a deadly weapon is a question of fact. Id. (Citations omitted.) In *State v. Brown*, the court determined there was not sufficient evidence presented that the BB gun, as used in that case, was capable of inflicting death. Id. at 789. It is important to note that the victims in *State v. Brown* were shot with a "'long'" BB gun with a "'pump'" in the buttocks. Id. at 785-786, 788. One of the victims had a "visible injury," while the other victim was unharmed. Id. at 785-786.

{¶39} The Second District examined the *State v. Brown* holding in the context of a case where a victim was struck with a pool cue. *State v. Thaler*, 2d Dist. No. 21129, 2006-Ohio-4017. In *Thaler*, the court distinguished its holding from *State v. Brown*, noting that the target areas of the victim, his head and neck, were "obviously far more vulnerable to life-threatening injury than the buttocks." Id. at ¶54.

{¶40} In the case sub judice, the weapon was pointed at Benjamin's head and neck. In addition, Benjamin testified that he felt the weapon actually touch his neck, indicating the weapon was held at point-blank range. Viewing this evidence in a light

most favorable to the state, a rational trier of fact could have concluded that one or more shots fired from the BB gun at this close range were capable of inflicting death.

{¶41} Moreover, Benjamin testified that the weapon was "cold steel." In light of the evidence that Valentin placed the gun in direct physical contact with Benjamin's neck and the intimidating actions of Valentin and Graham during the robbery, under the facts and circumstances of this case and when viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could have concluded that the weapon was capable of inflicting death if used as a bludgeon.

{¶42} Valentin's second assignment of error is without merit.

{¶43} Valentin's first assignment of error is:

{¶44} "Appellant's conviction of aggravated robbery was contrary to the manifest weight of the evidence."

{¶45} In determining whether a verdict is against the manifest weight of the evidence, the Supreme Court of Ohio has adopted the following language as a guide:

{¶46} "'The court, 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. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction.'" *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387. (Citations omitted.)

{¶47} The weight to be given to the evidence and the credibility of witnesses are primarily matters for the jury to decide. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. Also, in assessing the witnesses' credibility, the jury, as

the trier-of-fact, had the opportunity to observe the witnesses' demeanor, body language, and voice inflections. *State v. Miller* (Sept. 2, 1993), 8th Dist. No. 63431, 1993 Ohio App. LEXIS 4240, at *5-6. Thus, the jury was "clearly in a much better position to evaluate the credibility of witnesses than [this] court." Id.

{¶48} Valentin argues that several of the state's witnesses provided alternative versions of what occurred on the night in question.

{¶49} When Benjamin initially reported the incident, he did not mention marijuana. Then, in his second statement, he mentioned that he had some marijuana he intended to smoke; he did not inform the officers of the quantity of marijuana or that he intended to sell it. Benjamin informed the assistant prosecutor shortly prior to trial that he actually intended to sell three ounces of marijuana on the night in question. He also testified that he was trying to sell the three ounces of marijuana at trial.

{¶50} Layne was questioned about the incident the following day. However, at that time, she stated that she did not know the identity of the driver or the gunman. Layne later provided a written police statement regarding the incident. Therein, she stated several details of the robbery. At trial, Layne testified that the statement contained some false statements, including a statement that Alter, Graham, and Valentin just showed up at her house and asked her to go on the trip to get marijuana. Layne testified that, in fact, Alter, Graham, and Valentin were drinking alcohol at her residence prior to the trip. After providing the written statement, Layne was interviewed by the police, which was recorded. At trial, she admitted to lying in the taped interview.

{¶51} Layne stated she provided the false statements for two reasons. One, she had been threatened by Valentin. And two, she was afraid of getting into more trouble.

{¶52} When Alter was initially questioned by the police, she told them that she, Graham, Layne, and Valentin were watching movies on the night in question.

{¶53} A few weeks after the robbery of Benjamin, Alter and Graham stole several firearms from Alter's grandmother's residence. When Alter was questioned in relation to the firearms incident, she was asked if a small handgun was the weapon used in the robbery of Benjamin. She responded "no" and realized she had implicated herself in relation to that offense. The officers then questioned her about the robbery of Benjamin. During this interview, Alter minimized her involvement, which included telling the officers that she did not know there was a gun involved in the incident.

{¶54} Graham testified that he initially told the police that he was sleeping on the night in question. However, at trial, he testified that he drove the vehicle during the robbery.

{¶55} There were several inconsistencies between the versions of the events presented by the state's witnesses. Generally, all of the witnesses attempted to minimize their behavior. However, when the evidence is viewed as a whole, the overall picture becomes much clearer. For example, while Graham denied punching Benjamin, the other witnesses testified that this occurred. Moreover, in relation to Valentin, all of the codefendants unequivocally testified that he pointed the weapon at Benjamin and demanded his money.

{¶56} Valentin notes that all three of the codefendants received favorable treatment pursuant to plea agreements for testifying against him. We agree that this is a relevant factor pertaining to the witnesses' credibility. In fact, the trial court instructed the jury that the testimony of Graham, Alter, and Layne "should be viewed with grave suspicion and weighed with great caution." However, the jury was in the best position to

view the witnesses' demeanors when testifying and evaluate their credibility in light of the totality of the evidence presented.

{¶57} Finally, we again note that there was video evidence presented of Valentin attempting to use Benjamin's ATM card at the Circle K in Windham only minutes after the robbery. This evidence shows Valentin wearing a coat that matched the description of the attire of the gunman as described by Benjamin.

{¶58} After reviewing the entire record, we cannot conclude that the jury lost its way or created a manifest miscarriage of justice by finding Valentin guilty of aggravated robbery.

{¶59} Valentin's first assignment of error is without merit.

{¶60} Valentin's third assignment of error is:

{¶61} "The trial court erred in failing to grant the appellant's motion for a mistrial on the basis of prosecutorial misconduct when the prosecutor improperly commented during closing argument on the appellant's failure to testify."

{¶62} Valentin contends he was prejudiced by a comment made by the assistant prosecutor during defense counsel's closing argument.

{¶63} "[P]rosecutorial misconduct will not be a ground for error unless the defendant is denied a fair trial." *State v. David*, 11th Dist. No. 2005-L-109, 2006-Ohio-3772, at ¶66, citing *State v. Maurer* (1984), 15 Ohio St.3d 239, 266.

{¶64} During defense counsel's closing argument, he was attempting to provide the jury with an alternative explanation of what might have occurred during the robbery. Defense counsel noted that Benjamin went to lunch with both Alter and Layne on separate days of the trial. Defense counsel proposed the theory that Michael Layne was actually the gunman in the robbery and that the group approached Valentin when

they returned to Windham and offered to split any money that Valentin could get out of the ATM machine using Benjamin's card. Defense counsel's argument continued:

{¶65} "Now, Juan Valentin folks, is no angel, I'm not going to say he is. Is he pathetic, is his life pathetic? Sure it is. And he's no angel, and when Juan is stopped by the police, and asked, actually he had a dispute with his girlfriend, so he was brought in on a criminal trespass at his girlfriend's house in Windham, trying to find a place to stay at night, when Juan is brought in and asked, does he tell the truth? No, he says he found [the ATM card] in the grass, do you know why? Danelle Layne has given him food before, so has Amanda Alter, so has Daniel Graham. They palled around with him, they're his friends. He's protecting his friends and says he found it in the grass. Doesn't say they found him after the robbery and said, hey, you want to split some money?

{¶66} "MR. MICHNIAK [assistant prosecutor]: Your Honor, I object. That was not at all the evidence.

{¶67} "THE COURT: Sustained.

{¶68} "MR. MICHNIAK: If this guy wanted to testify to that he should have but he didn't.

{¶69} "THE COURT: Sustained.

{¶70} "MR. GORMAN: Well, I'd object to that, Judge.

{¶71} "MR. MICHNIAK: You're testifying - -

{¶72} "MR. GORMAN: I'm going to ask for a mistrial.

{¶73} "THE COURT: Wait a minute, Mr. Michniak. Just object.

{¶74} "MR. GORMAN: I'll ask for a mistrial.

{¶75} "THE COURT: Overruled.

{¶76} "MR. MICHNIAK: Well, he's attempting to testify for the defendant. That's improper.

{¶77} "MR. GORMAN: It's argument."

{¶78} The Supreme Court of Ohio has held:

{¶79} "Comments by prosecutors on the post-arrest silence or refusal to testify by defendants have always been looked upon with extreme disfavor because they raise an inference of guilt from a defendant's decision to remain silent. In effect, such comments penalize a defendant for choosing to exercise a constitutional right." *State v. Thompson* (1987), 33 Ohio St.3d 1, 4. Thus, an assistant prosecutor "may jeopardize the integrity of a trial by commenting on a criminal defendant's decision not to testify." *State v. Collins* (2000), 89 Ohio St.3d 524, 528. (Citations omitted.)

{¶80} In this matter, the assistant prosecutor acted appropriately by objecting to defense counsel's closing argument. However, the trial court sustained the prosecutor's objection prior to the comment about the fact that Valentin did not testify. Thus, it was unnecessary and inappropriate for the assistant prosecutor to make that comment. Had it been necessary for the assistant prosecutor to make the argument in support of the objection, the better practice would have been for him to request a side-bar conference, which would have permitted him to convey his concerns to the trial court without the danger of the jury being prejudiced by the remarks.

{¶81} Despite the inappropriate comment, we do not believe Valentin was denied a fair trial.

{¶82} We note there was substantial evidence of Valentin's guilt, including the testimony of the three codefendants and the video evidence of Valentin attempting to

use the victim's ATM card only minutes after the robbery. Thus, any error was harmless beyond a reasonable doubt. See *State v. Thompson*, 33 Ohio St.3d at 5.

{¶83} Moreover, the trial court instructed the jury that Valentin has a right not to testify and that they were not to consider the fact that he did not testify. The Supreme Court of Ohio has noted that "[t]he jury is presumed to have followed the court's instructions." *State v. Jones* (2001), 91 Ohio St.3d 335, 344, citing *State v. Raglin* (1998), 83 Ohio St.3d 253, 264. This instruction weighs against a finding of reversible error. See *State v. Collins*, 89 Ohio St.3d at 528.

{¶84} Valentin's third assignment of error is without merit.

{¶85} The judgment of the Portage County Court of Common Pleas is affirmed.

MARY JANE TRAPP, P.J., concurs,

COLLEEN MARY O'TOOLE, J., dissents with Dissenting Opinion.

COLLEEN MARY O'TOOLE, J., dissents with Dissenting Opinion.

{¶86} I respectfully dissent.

{¶87} The majority contends that appellant's second assignment of error is without merit because the BB or pellet gun was capable of inflicting death. I disagree.

{¶88} A "deadly weapon" is defined as "*** any instrument, device, or thing capable of inflicting death, and designed or specially adapted for use as a weapon, or possessed, carried, or used as a weapon." R.C. 2923.11(A).

{¶89} A "firearm" is defined as "*** any deadly weapon capable of expelling or propelling one or more projectiles by the action of an explosive or combustible propellant." R.C. 2923.11(B)(1).

{¶90} Pursuant to the language of R.C. 2923.11(B), a BB gun does not fall within the purview of a firearm. See *State v. Gray* (1984), 20 Ohio App.3d 318, 319.

{¶91} In the instant case, the trial court concluded that there was a lack of sufficient evidence presented that the weapon used was a real gun. Thus, the trial court dismissed the firearm specification upon appellant's motion. The majority concludes, however, that the state presented sufficient evidence that appellant used a deadly weapon because a rational trier of fact could have concluded that the BB or pellet gun was capable of inflicting death. However, the police never recovered the BB gun used in this offense; there was no evidence adduced that the BB gun was ever used or threatened to be used as a bludgeon; and there was no evidence adduced concerning the particular BB gun's capability of inflicting death. See *State v. Brown* (1995), 101 Ohio App.3d 784, 788-789. Thus, this writer believes appellant's second assignment of error is with merit.

{¶92} For the foregoing reasons, I respectfully dissent.