[Cite as *State v. Ghee*, 2009-Ohio-2630.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

MADISON COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2008-08-017
	:	O P I N I O N
- vs -		6/8/2009
	:	
DESHAWN GHEE,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM MADISON COUNTY COURT OF COMMON PLEAS
Case No. 2007 CR-04-044

Stephen J. Pronai, Madison County Prosecuting Attorney, Eamon P. Costello, 59 North Main Street, London, Ohio 43140, for plaintiff-appellee

Byron L. Potts & Co., LPA, Wilhelmina Cooper, Suite 112, 415 East Broad Street, Columbus, Ohio 43215, for defendant-appellant

RINGLAND, J.

{¶1} Defendant-appellant, Deshawn Ghee, appeals his conviction in the Madison County Court of Common pleas for failure to comply with an order or signal of a police officer.

{¶2} At approximately 3:00 p.m. on February 23, 2007, Trooper Myers and Trooper Meddock of the Ohio State Highway Patrol were working in tandem as part of an air speed unit. Trooper Myers was operating the air unit, while Trooper Meddock was stationed in a cruiser on the ramp at the interchange of State Route 42 and I-70. Trooper Myers observed

a silver car traveling at an excessive speed in a construction zone along I-70. Using a handheld watch, the trooper calculated that the vehicle was traveling at approximately 93 m.p.h. Trooper Myers radioed Trooper Meddock, advising him to initiate a traffic stop of the suspect vehicle. On the ground, Trooper Meddock attempted to initiate a stop of the silver Nissan Sentra, turning on his overhead lights. After the vehicle failed to stop, Trooper Meddock initiated his siren. At the beginning of the chase, Trooper Meddock was able to observe the driver of the vehicle by getting roughly alongside the vehicle. Trooper Meddock described the driver as being a black male with long braids, wearing a hat and glasses. The trooper also noted the vehicle's license plate number. The vehicle continued to travel along I-70, increasing speed up to 120 m.p.h. Over the 17-mile chase, the vehicle twice passed traffic on the berm at a high rate of speed, nearly rear-ended vehicles, and continually weaved in and out of traffic. The chase was terminated when the troopers lost sight of the vehicle once it entered Columbus traffic.

{¶3} The license plate information revealed that the car was a rental car registered to Thrifty Car Rental located at the Columbus Airport. Trooper Meddock proceeded to Thrifty and obtained a copy of the rental agreement. The agreement contained appellant's and his mother's names. The trooper retrieved appellant's information from the BMV database, including a driver's license photo. Trooper Meddock identified appellant as the driver of the vehicle based upon the photo.

{¶4} Appellant was charged with one count of failure to comply with an order or signal of a police officer in violation of R.C. 2921.331(B) with the specification that the operation of the vehicle caused a substantial risk of serious physical harm to persons or property, a felony of the third degree. A jury found appellant guilty as charged and appellant was sentenced to two years in prison with a five-year license suspension. Appellant timely appeals, raising five assignments of error.

{¶5} Assignment of Error No. 1:

{¶6} "THE VERDICT IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶7} In his first assignment of error, appellant argues his conviction is against the manifest weight of the evidence.

{¶8} R.C. 2921.331(B) provides, "No person shall operate a motor vehicle so as willfully to elude or flee a police officer after receiving a visible or audible signal from a police officer to bring the person's motor vehicle to a stop." A violation of R.C. 2921.331(B) is a felony of the third degree if the jury finds, by proof beyond a reasonable doubt, that the "operation of the motor vehicle by the offender caused a substantial risk of serious physical harm to persons or property." R.C. 2921.331(C)(5)(a)(ii).

{¶9} Weight of the evidence concerns the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other; weight is not a question of mathematics, but depends on its effect in inducing belief. *State v. Thompkins,* 78 Ohio St.3d 380, 387, 1997-Ohio-52. A court considering whether a conviction was against the manifest weight of the evidence must review the entire record, weighing the evidence and all reasonable inferences, and consider the credibility of witnesses. *State v. Hancock,* 108 Ohio St.3d 57, 2006-Ohio-160, ¶39. The question is "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." Id.; *State v. Blanton*, Madison App. No. CA2005-04-016, 2006-Ohio-1785, ¶7.

Identification

{¶10} Appellant first argues that the jury clearly lost its way due to the misidentification by Trooper Meddock. Appellant cites multiple inconsistencies in Trooper Meddock's testimony. Specifically, Trooper Meddock testified that the driver of the vehicle was wearing

a hat and glasses, yet failed to provide that information in his report. Next, the trooper described the driver of the vehicle as a black male with long braids, but appellant claims the he has never had long braids.

{¶11} The jury was presented with these inconsistencies at trial. The testimony revealed that Trooper Meddock was able to look at the driver of the vehicle during the chase. Trooper Meddock estimated that he was 15 to 17 feet away from the driver of the vehicle once he was able to get alongside the vehicle. Further, the trooper identified appellant based upon his driver's license photo and specifically identified appellant as the driver of the vehicle in the courtroom. The credibility of witnesses and the weight to be given their testimony are ultimately matters for the trier of fact to resolve. *State v. Dehass* (1967), 10 Ohio St.2d 230, 231. Despite the inconsistencies and failure to make detailed notes in the report, the trier of fact found Trooper Meddock's identification credible.

Fleeing and Eluding

{¶12} Second, appellant claims that the driver of the vehicle was unaware that he was being pulled over since it is unclear whether the trooper's lights were activated in sufficient proximity to allow the driver to believe the trooper was initiating a traffic stop.

{¶13} Appellant's argument is unpersuasive. The trooper testified that he activated his overhead lights and siren while pursuing the vehicle and, at one point, the trooper drove alongside the vehicle. Once the pursuit began, the vehicle increased speed from 93 m.p.h. up to 120 m.p.h. Moreover, during the 17-mile chase, the vehicle nearly rear-ended vehicles on the highway and, at least twice, passed vehicles using the right-hand berm.

Vehicle

{¶14} Finally, appellant argues the trooper identified the wrong vehicle because Trooper Meddock erroneously wrote Hertz Car Rental in his report rather than Thrifty Car

Rental.

{¶15} This matter was fully explored during Trooper Meddock's testimony at trial. Trooper Meddock admitted that he wrote "Hertz" as the rental car company; however, the car was actually registered with Thrifty. The license plate, make and model of the car, and the rental agreement for the car involved in the chase were registered to Thrifty; which listed appellant as a potential driver under the agreement. Again, these are factual inconsistencies that the trier of fact was able to resolve. Further, the rental agreement was stipulated into the record and the Trooper identified appellant as the driver of the vehicle.

{¶16} After reviewing the entire record, weighing the evidence and all reasonable inferences, and considering the credibility of the witnesses, we cannot say the jury clearly lost its way and that the conviction must be reversed.

{¶17} Appellant's first assignment of error is overruled.

{¶18} Assignment of Error No. 2:

{¶19} "THE VERDICT IS UNJUST AS DEFENDANT WAS DENIED HIS RIGHT OF EFFECTIVE ASSISTANCE OF COUNSEL."

{¶20} Appellant argues in his second assignment of error that his trial counsel was ineffective. Appellant argues that counsel erred by stipulating to the authenticity of the rental car agreement, failing to adequately cross-examine Trooper Myers, and failing to object to the troopers' expert testimony regarding the speed of the vehicle and use of the on-board camera.

{¶21} To establish ineffective assistance, appellant must show that counsel's actions fell below an objective standard of reasonableness and that appellant was prejudiced as a result. *Strickland v. Washington* (1984), 466 U.S. 668, 687-88, 693, 104 S.Ct. 2052.

{¶22} To demonstrate an error in counsel's actions, appellant must overcome the strong presumption that licensed attorneys are competent, and that the challenged action is

the product of sound trial strategy and falls within the wide range of reasonable professional assistance. *Strickland,* 466 U.S. at 690-91. To demonstrate resulting prejudice, appellant must establish a reasonable probability that, but for counsel's unprofessional conduct, the result of the proceedings would have been different. Id. Appellant must demonstrate that, due to his attorney's ineffectiveness, his trial was so demonstrably unfair that there is a reasonable probability the result would have been different absent his attorney's deficient performance. Id. at 693.

{¶23} We find no error in counsel's stipulation to the rental car agreement. The make, model and license number of the vehicle rented from Thrifty was registered to appellant. Moreover, the record keeper for Thrifty Car Rental was subpoenaed and present to testify at the trial. Counsel's action was not improper as he merely stipulated to perfunctory evidence.

{¶24} Further, we find no error in counsel's cross-examination of Trooper Myers. Trooper Myers served as the pilot during the operation. Appellant argues that counsel's cross-examination of the pilot should have been more vigorous. Yet, during cross-examination, appellant's trial counsel was able to elicit testimony from Trooper Myers that he could not identify the driver of the vehicle and that the trooper eventually lost sight of the vehicle around the same time Trooper Meddock lost sight.

{¶25} Finally, we find no error in failing to object to the troopers' testimony without being qualified as experts. There is no requirement that a witness be qualified as an expert to testify regarding the speed of a vehicle. Evid.R. 701; *State v. Kelm*, Union App. No. 14-02-20, 2003-Ohio-1817, ¶6. Even from the air, Trooper Myers could estimate that appellant's vehicle was traveling at an excessive rate of speed. Moreover, there is no indication that the outcome of trial would have been different absent the challenged testimony.

{¶26} Appellant's second assignment of error is overruled.

{¶27} Assignment of Error No. 3:

{¶28} "THE COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION IN LIMINE REGARDING TESTIMONY CONCERNING HIS CURRENT INCARCERATION."

{¶29} Assignment of Error No. 4:

{¶30} "THE COURT ABUSED ITS DISCRETION WHEN IT DID NOT PROVIDE A LIMITING INSTRUCTION TO THE JURY CONCERNING DEFENDANT'S CURRENT INCARCERATION AND PREVIOUS CONVICTION."

{¶31} Appellant's third and fourth assignments of error both allege improper admission of appellant's criminal history. In his third assignment of error, appellant argues that the trial court erred in allowing evidence of appellant's current incarceration for an unrelated felony conviction. Appellant claims that allowing the prosecution to mention the conviction unfairly prejudiced appellant. Further, in his fourth assignment of error, appellant argues the trial court erred by failing to provide a limiting instruction.

{¶32} The admission or exclusion of relevant evidence rests within the sound discretion of the trial court. *State v. Roten*, 149 Ohio App.3d 182, 2002-Ohio-4488, ¶5, quoting *State v. Sage* (1987), 31 Ohio St.3d 173, paragraph two of the syllabus. An appellate court will not disturb a trial court's ruling as to the exclusion of evidence absent an abuse of discretion. *Roten* at ¶6. A trial court abuses its discretion when it acts in an unreasonable, arbitrary, or unconscionable manner. Id.

{¶33} The trial court found that testimony concerning appellant's current incarceration, relating to a felony theft conviction, was admissible pursuant to Evid.R. 609(A).

{¶34} Evid.R. 609(A)(2) provides that "[f]or the purpose of attacking the credibility of a witness * * * notwithstanding Evid.R. 403(A), but subject to Evid.R. 403(B), evidence that the accused has been convicted of a crime is admissible if the crime was punishable by death or

imprisonment in excess of one year pursuant to the law under which the accused was convicted and if the court determines that the probative value of the evidence outweighs the danger of unfair prejudice, of confusion of the issues, or of misleading the jury."

{¶35} After review of the record, we find no abuse by the trial court in admitting the evidence relating to appellant's prior conviction and current incarceration. At trial, the court allowed testimony relating to appellant's prior felony conviction for theft, a crime of deception and relevant to appellant's credibility. *State v. Ewing*, Franklin App. No. 06AP-243, 2006-Ohio-5523, ¶24, citing *State v. Brown* (1993), 85 Ohio App.3d 716, 726; and *State v. Johnson* (1983), 10 Ohio App.3d 14, 16.

{¶36} Appellant took the stand in this case and there is no indication that the probative value of the evidence was outweighed by the concerns expressed in Evid.R. 609(A)(2) or Evid.R. 403(B). *State v. Brown*, 100 Ohio St.3d 51, 2003-Ohio-5059, ¶27.

{¶37} Further, appellant failed to request a limiting instruction from the court and does not claim ineffective assistance for failing to request the instruction. After review, we find no plain error in failing to provide a limiting instruction.

{¶38} Appellant's third and fourth assignments of error are overruled.

{¶39} Assignment of Error No. 5:

{¶40} "DEFENDANT WAS DENIED A FAIR TRIAL DUE TO PROSECUTORIAL MISCONDUCT."

{¶41} In his final assignment of error, appellant claims prosecutorial misconduct. Appellant argues the prosecutor inappropriately introduced appellant's BMV photographs without prior notification that the state wished to use the photographs during trial.

{¶42} In order reverse a conviction based upon prosecutorial misconduct, a defendant must prove that the prosecutor's actions were improper and that they prejudicially affected the defendant's substantial rights. *State v. Elmore*, 111 Ohio St.3d 515, 2006-Ohio-6207,

¶62. The focus of an inquiry into allegations of prosecutorial misconduct is upon the fairness of the trial, not upon culpability of the prosecutor. *State v. Hill*, 75 Ohio St.3d 195, 203, 1996-Ohio-222, quoting *Smith v. Phillips* (1982), 455 U.S. 209, 219, 102 S.Ct. 940. The Ohio Supreme Court has held that prosecutorial misconduct is not grounds for error unless the defendant has been denied a fair trial. *State v. Maurer* (1984), 15 Ohio St.3d 239, 266.

{¶43} After review of the record, we find no grounds to reverse based upon prosecutorial misconduct. No objection was made during trial regarding the BMV photos. Failure to object to alleged prosecutorial misconduct waives all but plain error. *State v. Lamar*, 95 Ohio St.3d 181, 2002-Ohio-2128, ¶126. "Plain error exists where there is an obvious deviation from a legal rule which affected the defendant's substantial rights, or influenced the outcome of the proceeding." *State v. Barnes,* 94 Ohio St.3d 21, 27, 2002-Ohio-68.

{¶44} Accordingly, we find no plain error in this case. The trooper's narrative provided to appellant before trial clearly indicated that the trooper established appellant as the driver of the vehicle by viewing the BMV photographs. Even if the prosecution failed to provide the BMV photographs before trial, there was no surprise in using the identification materials at trial. Moreover, appellant failed to alleged ineffective assistance for failure to object to the use of the photographs at trial.

{¶45} Appellant's fifth assignment of error is overruled.

{¶46} Judgment affirmed.

BRESSLER, P.J., and YOUNG, J., concur.

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