[Cite as *State v. Weaver*, 2009-Ohio-5923.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2009-01-022
	:	O P I N I O N
- vs -		11/9/2009
	:	
SAMUEL WILLIAM WEAVER,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR2008-03-0478

Robin N. Piper, Butler County Prosecuting Attorney, Gloria J. Sigman, Government Services Center, 315 High Street, 11th Fl., Hamilton, Ohio 45011, for plaintiff-appellee

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BRESSLER, P.J.

{¶1} Defendant-appellant, Samuel Weaver, appeals his conviction from the Butler County Court of Common Pleas for aggravated robbery, aggravated burglary, felonious assault and grand theft. We affirm appellant's conviction.

{¶2} In April 2007, Michella Eldridge held a yard sale at her home in Hamilton, Ohio. Appellant came to the sale, and at trial, Eldridge testified that she remembered he had driven a white minivan with a steering wheel that had a cover with cherries on it. Eldridge also remembered that he arrived at her yard sale with a female and small child

who remained in the vehicle. At the yard sale, appellant showed interest in a handgun that Eldridge's husband was showing to his father. Although he did not purchase anything at that time, appellant returned later that day and bought a pair of "Ninja" swords.

{¶3} Approximately a week after the yard sale, appellant returned to Eldridge's house in the white minivan and arrived just as she was cleaning up after another yard sale. Before leaving, appellant purchased a plant from Eldridge.

{¶4} On May 19, 2007, Eldridge was at home with her daughters when she heard the doorbell ring. She went to the back door and saw appellant. Appellant asked her whether she still had the gun he saw at the yard sale. When Eldridge told him she no longer had the gun, he asked her whether she had any other "firearms." Eldridge explained that they had a "Tech 9," but that she was not sure her husband wanted to sell it. Appellant then asked if he could see the gun and told her that he would get the money to purchase it.

{¶5} Eldridge told appellant to wait outside, and she pushed the back door almost completely closed. She then went through the house and retrieved the gun from a dresser. She placed the gun on her dining room table. She did not notice appellant was in the room until he reached across her and grabbed the weapon. As Eldridge pleaded with appellant to give the gun back to her, he struck her on the head with the butt of the gun.

{¶6} Appellant smiled after hitting Eldridge the first time and started for the back door, but Eldridge followed him. As she was asking for the gun, appellant's arm went up to strike her a second time, and Eldridge hit him in the face. He then hit her in the head again with the butt of the gun. Eldridge testified that the blow "dazed" her and "kind of put [her] out." Appellant then took off out the back door. Eldridge testified that she

"shook it off" and chased after appellant.

{¶7} Eldridge caught appellant and grabbed his shirt. She testified that he exclaimed, "Let go of me you fucking bitch," and he struck her in the head with the butt of the gun three more times. Eldridge was bleeding, and appellant fled. She called 9-1-1 and was taken to the hospital, where she received 28 stitches in her head for a wound deep enough to expose her skull.

{¶8} On April 16, 2008, a grand jury indicted appellant on one count of aggravated robbery, a first-degree felony in violation of R.C. 2911.01(A)(1), one count of aggravated burglary, a first-degree felony in violation of R.C. 2911.11(A)(1), one count of felonious assault, a second-degree felony in violation of R.C. 2903.11(A)(2), and one count of grand theft, a third-degree felony in violation of R.C. 2913.02(A)(1). A Butler County jury convicted appellant on all counts. After overruling a motion for a new trial, the trial court merged the aggravated burglary and aggravated robbery counts and sentenced appellant to six years in prison for robbery, with a three-year mandatory term for a gun specification. The court also sentenced appellant to five years for felonious assault with a three-year mandatory gun specification term to be served consecutively to the sentence for robbery and four years for grand theft to be served concurrently. Appellant timely appeals, asserting five assignments of error.

{¶9} Assignment of Error No. 1:

{¶10} "THE STATE PROCURED STRUCTURAL ERROR IN SEEKING AN INDICTMENT THAT DID NOT CONTAIN ALL THE ESSENTIAL ELEMENTS OF AGGRAVATED ROBBERY."

{¶11} Appellant's first assignment of error relates to the indictment used to charge Weaver. At oral argument, appellant expressed a desire to concede the issue, based on the supplemental authority submitted by the state: *State v. Lester*, Slip

Opinion No. 2009-Ohio-4225. Accordingly, we overrule appellant's first assignment of error.

{¶12} Assignment of Error No. 2:

{¶13} "THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT WHEN IT REPLAYED THE TESTIMONY OF THE VICTIM FOR THE JURY."

{¶14} Appellant argues the trial court abused its discretion when it replayed the victim's testimony on two occasions for the jury.

{¶15} After beginning deliberations, the jury first indicated it wanted to hear the description of the assailant that Eldridge gave to Detective Weissenger of the Hamilton Police Department, the detective assigned to the case. Over objection, the court permitted that description to be replayed for the jury. During deliberations the following day, the jury next requested to listen to Eldridge's entire testimony at trial. Over objection, the trial court also permitted that testimony to be replayed.

{¶16} It is well-settled that a trial court has broad discretion in determining whether to permit a jury to rehear all or part of a witness' testimony during deliberations. *State v. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235, ¶123; *State v. Berry* (1971), 25 Ohio St.2d 255, paragraph four of the syllabus; *State v. Cox*, Butler App. No. CA2005-12-513, 2006-Ohio-6075, ¶11. Therefore, a reviewing court will not reverse a trial court's decision absent an abuse of discretion. Id.

{¶17} As this court discussed in *Cox*, there are "two inherent dangers" in allowing a jury to rehear testimony during deliberations. *Cox* at ¶14, citing *United States v. Rodgers* (C.A.6, 1997), 109 F.3d 1138. First, the jury may place "undue emphasis" on the testimony; second, the jury may take the testimony "out of context." Id., quoting

Rogers at 1143; *United States v. Padin* (C.A.6, 1986), 787 F.2d 1071. Also, this court recognized other general concerns, including, (1) the transcript provided to the jury must be accurate; (2) transcription of side bar conferences, and any other matters not meant for jury consumption, must be redacted; and (3) the court should take into consideration the reasonableness of the jury's request and the difficulty complying therewith. Id., citing *United States v. Hernandez* (C.A.9, 1994), 27 F.3d 1403.

{¶18} The *Rodgers* Court explained that there is a heightened concern that the jury will place inordinate emphasis on testimony it reviews after it has reported its inability to arrive at a verdict. *Rodgers* at 1144; *Cox* at ¶15. In finding that no such situation occurred in the circumstances of the case before it and noting that there was not an inordinate amount of deliberation before or after the delivery of the transcript, the court held the case did not present an "obvious intent to emphasize a specific portion of the transcript." Id.

{¶19} Also, in *Rodgers*, the court emphasized that the district court eliminated the inherent danger of taking testimony out of context when it provided the jury with the entire testimony of the witness. Id.; *Cox* at ¶17.

{¶20} In the case at bar, we find the trial court did not abuse its discretion when it permitted the jury to rehear both the portion of Eldridge's testimony involving her description of the assailant and her entire trial testimony. First, the record does not support appellant's contention that the jury placed undue emphasis on the testimony it reviewed. There was not an inordinate amount of deliberation before or after the delivery of the recording, as the jury's first request came at some point within the first two hours of deliberation on the first day, and the second request came after an additional hour and eight minutes of deliberating on the second day. After hearing Eldridge's entire testimony, the jury deliberated again for another hour and 13 minutes

before reaching its decision. This case did not involve a situation where the jury reported an inability to reach a verdict or show an obvious intent to emphasize a specific portion of the trial proceedings. *Rodgers* at 1144; *Cox* at ¶15. Although appellant asserts Eldridge's testimony was the only substantial testimony or evidence used to convict him, the record shows that the state presented testimony from five witnesses, and the defense presented testimony from appellant, his mother, and his aunt. Also, 16 exhibits were submitted into evidence.

{¶21} In addition, we do not find the record supports a concern that the jury took Eldridge's testimony out of context. The jury's second request was for Eldridge's entire testimony. The *Rodgers* Court emphasized that a trial court can eliminate the inherent danger of taking testimony out of context when it provides the jury with the entire testimony of a witness. *Rodgers* at 1144; *Cox* at ¶17.

{¶22} Furthermore, as in *Cox* and *Rodgers*, the accuracy of the recordings was not disputed, appellant does not challenge that the jury heard material not meant for its consumption, and the recordings were available for review shortly after the jury made the requests.

{¶23} Accordingly, we find the court did not abuse its discretion in permitting the jury to rehear Eldridge's testimony.

{¶24} Appellant also argues the court erred in failing to issue a limiting instruction cautioning the jury against putting undue emphasis on the replayed testimony. Because appellant's trial counsel did not request any limiting instruction, our review of this issue is limited to a determination of whether the court committed plain error in failing to sua sponte give a limiting instruction regarding the recording. *Cox* at ¶ 20, citing *State v. Davis* (1991), 62 Ohio St.3d 326, 339.

{¶25} Crim.R. 52 governs harmless and plain error, stating that "plain errors or

defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Ohio law recognizes that plain error does not exist unless, but for the error, the outcome of the trial would have been different. *Cox* at ¶21, citing *State v. Haney,* Clermont App. No. CA2005-07-068, 2006-Ohio-3899, ¶50. Further, "notice of plain error is to be taken with utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." Id.

{¶26} Appellant cites the *Rodgers* case, discussed above, for the proposition that the trial court was required to sua sponte issue a limiting instruction cautioning the jury about the proper use and weight of the recorded testimony. In *Rodgers*, the court held that a district court is required to give a cautionary instruction when providing a deliberating jury with such a transcript. *Rodgers* at 1145. The court explained that an instruction cautioning the jury not to emphasize replayed testimony over other evidence represented the "minimum amount of protection" a court should provide if it grants a deliberating jury's request for testimony. Id.

{¶27} As previously discussed in *Cox*, this court is unaware of a case in Ohio that has applied the rule announced in *Rodgers*. *Cox* at ¶23. We also note that, even if we were to follow the rule declared in *Rodgers* as requested by appellant, any error in failing to issue a limiting instruction in this case would not rise to the level of plain error. In *Rodgers*, the court held that although the district court had erred in failing to issue such a limiting instruction, that error failed to rise to the level of plain error. *Rodgers* at 1145. The court explained that the district court's failure to give the cautionary instruction did not prejudicially affect the outcome of the trial or result in a miscarriage of justice. Id. The court therefore held that the error did not rise to the level of plain error and overruled the appellant's argument.

{¶28} Similar to the appellant in *Rodgers,* appellant in the case before us has

failed to demonstrate that the court's failure to provide the jury with a limiting instruction affected the outcome of the case. As we have already discussed above, we find the record does not support appellant's contention that the jury afforded the recording "undue emphasis." Therefore, we do not find the court's failure to instruct the jury regarding the proper use or weight of the recording to have affected the outcome of the case or created a manifest miscarriage of justice. Accordingly, appellant's second assignment of error is overruled. See *Cox* at ¶22.

{¶29} Assignment of Error No. 3:

{¶30} "THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT WHEN IT ALLOWED THE STATE TO PRESENT REBUTTAL EVIDENCE WHICH HAD NOT BEEN DISCLOSED IN DISCOVERY."

{¶31} Appellant argues the trial court erred in admitting a tape recording of a conversation between Detective Weissinger and appellant's mother regarding her corroboration of appellant's alibi.

{¶32} The record demonstrates that appellant first filed a notice of alibi on August 19, 2008, one week prior to trial, alleging that he was at 179 East McMillan Avenue in Cincinnati on the date of the crimes. In his second notice of alibi, filed two days before trial, he stated that he was at 912 Burton Street in Cincinnati.

{¶33} At trial, appellant, his mother, and his aunt all testified that appellant was at his own birthday party on Burton Street in Cincinnati on the day of the robbery and assault. On rebuttal, the state called Detective Weissinger, who testified that when appellant gave his statement to the detective, he could not say where he was on May 19, 2007. The detective also identified state's exhibit 20, which was a recording of a short telephone conversation between the detective and appellant's mother, made for

purposes of his investigation of appellant's first alibi. In that conversation, appellant's mother stated that she could not recall where appellant was in 2007, which contradicted her testimony at trial.

{¶34} Appellant argues the court erred when it admitted the tape recording over his counsel's objections because the state had not disclosed the evidence in pretrial discovery and informed appellant of its existence on the day of trial.

{¶35} The admission of rebuttal evidence rests within the sound discretion of the trial court, and an appellate court will not disturb a ruling on its admissibility absent an abuse of discretion. *State v. Finnerty* (1989), 45 Ohio St.3d 104, 109. Rebuttal evidence is used to "explain, refute or disprove new facts introduced into evidence by the adverse party[.]" *State v. McNeil*, 83 Ohio St.3d 438, 446, 1998-Ohio-293.

{¶36} Crim.R. 16 requires the state, upon motion of the defendant, to make available evidence material to the preparation of the defense, and parties are under a continuing duty to disclose supplemental evidence discovered that would have been subject to discovery under the original request. Crim.R. 16(B), (D).

{¶37} As stated, appellant filed his amended notice of alibi only two days before trial, even though Crim.R. 12.1 requires a defendant to file a notice of alibi not less than seven days before trial with specific information as to the place at which the defendant claims to have been at the time of the alleged offense. In addition, the recording could not have been brought up in the state's case-in-chief because it did not become relevant until appellant's mother testified to appellant's whereabouts on May 19, 2007. See *State v. Hicks*, Lucas App. No. L-02-1254, 2003-Ohio-4968, ¶18. Although the state could speculate as to how his mother would testify, it would not have known whether the recording was useful as rebuttal evidence until she actually testified. Id.

{¶38} Appellant argues the alleged delay in disclosing the recording to him was

prejudicial because he was prohibited from amending the questions to appellant's mother or calling additional witnesses with clearer memories. The record reflects, however, that although appellant's counsel objected to the admission of the recording, counsel did not ask for a continuance. When no request for a continuance is made, a trial court may properly conclude that defense counsel is prepared to go forward at that time. See *Finnerty* at 108, citing *State v. Edwards* (1976), 49 Ohio St.2d 31, 43; *State v. Howard* (1978), 56 Ohio St.2d 328, 333. See, also, *Hicks* at ¶12, 17. The record also reflects that defense counsel cross-examined Detective Weissinger regarding the recording. See *Finnerty* at 108; *Hicks* at ¶17.

{¶39} Based on the foregoing, we find the trial court did not abuse its discretion in admitting the telephone recording into evidence, as appellant has failed to demonstrate that the state violated its duty under Crim.R. 16 and that the trial court's admission of the evidence was unconscionable or arbitrary. Appellant's third assignment of error is without merit.

{¶40} Assignment of Error No. 4:

{¶41} "THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT WHEN IT OVERRULED HIS MOTION FOR A NEW TRIAL."

{¶42} Appellant argues he is entitled to a new trial because the trial court erred when it (1) permitted the jury to hear Eldridge's testimony during deliberations, and (2) admitted the recorded telephone conversation between Detective Weissinger and appellant's mother.

{¶43} Counsel for appellant filed a motion for a new trial on December 3, 2008, under Crim.R. 33(A)(1), which allows for a new trial when there is an irregularity in the proceedings. A reviewing court will not disturb a trial court's decision granting or denying a Crim.R. 33 motion for new trial absent an abuse of discretion. *State v. LaMar*, 95 Ohio

St.3d 181, 201, citing *State v. Schiebel* (1990), 55 Ohio St.3d 71, 76.

{¶44} As we have thoroughly discussed in appellant's second and third assignments of error, the alleged irregularities upon which appellant based his motion are meritless. Accordingly, the trial court did not abuse its discretion in denying appellant's motion for a new trial and the fourth assignment of error is overruled.

{¶45} Assignment of Error No. 5:

{¶46} "THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT WHEN IT IMPOSED TWO CONSECUTIVE SENTENCES OF THREE YEARS EACH FOR THE GUN SPECIFICATIONS RELATING TO THE AGGRAVATED ROBBERY AND TO THE FELONIOUS ASSAULT."

{¶47} Appellant argues the trial court erred in imposing two consecutive sentences of three years each for the gun specifications relating to his convictions. He asserts the trial court can sentence him to only one because his felonies arose out of the same act or transaction.

{¶48} Appellant's indictment for aggravated robbery, aggravated burglary, and felonious assault each contained a firearm specification pursuant to R.C. 2941.145. At the sentencing hearing, the trial court merged the aggravated burglary and aggravated robbery convictions and imposed a six-year sentence on the robbery conviction only. The court also imposed an additional three-year term on the robbery charge for the gun specification pursuant to R.C. 2929.14(D)(1)(a). The court then imposed a five-year prison term for appellant's felonious assault conviction and again included an additional three-year term for the gun specification.

{¶49} This issue presents a mixed question of law and fact. We must uphold the trial court's factual findings unless they are clearly erroneous. Any purely legal issues and the trial court's application of the law to the facts are subject to de novo review,

however. *State v. Moore*, 161 Ohio App.3d 778, 2005-Ohio-3311, at ¶36 (citations omitted).

{¶50} R.C. 2929.14(D)(1)(a)(ii) imposes a mandatory three-year prison term when a defendant is convicted of a firearm specification pursuant to R.C. 2941.145. A court, however, is not authorized to impose more than one sentence for multiple firearm specifications if the specifications refer to the same criminal act or transaction. R.C. 2929.14(D)(1)(b).

{¶51} In assessing multiple gun specifications, a court should focus on an individual's, "overall criminal objectives, not on the specific animus for each crime." *Moore* at ¶45. Whether a defendant had a common purpose in committing multiple crimes is a broader concept than animus. Id. at ¶46.

{¶52} "Transaction," as used in the firearm specification statutes, has been defined as "a series of continuous acts bound together by time, space and purpose, and directed toward a single objective" or a "single criminal adventure." Id. at ¶37; *State v. Gregory* (1993), 90 Ohio App.3d 124, 129.

{¶53} We find the facts in the case at bar do not present sufficient separate purposes to support the two gun specification sentences. As appellant argues, all of his actions were committed within one continuous transaction, limited by time, space, and purpose. The record demonstrates that appellant's actions occurred within a short period of time, where he grabbed the gun from Eldridge and beat her with it. When Eldridge fought back, appellant hit her again. The attack on Eldridge occurred within appellant's overall scheme to steal the gun and get out of the house. Therefore, appellant may be sentenced to a term of incarceration for only one of the firearm specifications. R.C. 2929.14(D)(1)(b). See, also, *Gregory* at 130.

{¶54} Accordingly, we sustain appellant's fifth assignment of error, enter the

judgment the trial court should have entered, and vacate one of the three-year terms of actual incarceration. *Gregory* at 130 (citations omitted).

{¶55} Judgment affirmed as modified.

POWELL and RINGLAND, JJ., concur.