[Cite as *State v. Jones*, 2011-Ohio-3136.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2009-05-140
- vs -	:	OPINION ON RECONSIDERATION
	:	6/27/2011
KOBE J. JONES,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR2008-12-2236

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HENDRICKSON, P.J.

{¶1} This matter is before the court on a timely application for reconsideration filed by defendant-appellant, Kobe Jones, and an alternative application for reconsideration filed by appellee, the State of Ohio, pursuant to App.R. 26(A). Jones requests that we reconsider our May 2, 2011 judgment in which we affirmed Jones' convictions for single counts of burglary, robbery, and obstructing official business. *State v. Jones*, Butler App.No. CA2009-05-140, 2011-Ohio-2097 (*Jones I*). The state requests that we reconsider the same decision specific to the proper application of

Evid.R. 806(A). Finding the state's argument meritorious, we modify our prior decision in *Jones I* regarding the trial court's admission of testimony concerning Jones' prior convictions.

{¶2} The test for deciding an application for reconsideration in the court of appeals is "whether the motion calls to the attention of the court an obvious error in its decision, or raises an issue for consideration which was either not considered at all or was not fully considered by the court when it should have been." *Grabill v. Worthington Industries, Inc.* (1993), 91 Ohio App.3d 469, 471. Because the state calls to our attention the valid application of Evid.R. 806(A), we hereby grant the state's application for reconsideration.

{¶3} In *Jones I*, Jones argued in part that he was denied a fair trial due to prosecutorial misconduct, and a large portion of Jones' arguments centered on the trial court's decision to admit testimony and evidence. This court noted that a trial court's decision regarding evidentiary matters, whether proper or improper, does not impute to the prosecutor or cause prosecutorial misconduct. In doing so, we addressed Jones' argument that the prosecutor improperly elicited testimony from a witness regarding Jones' prior convictions.

{¶4} During Jones' cross-examination of a police officer who investigated the burglary, defense counsel elicited an exculpatory statement from the officer regarding Jones' denial of being involved in the crimes. After cross-examination was complete, the state informed the trial court of its intention to impeach Jones' credibility because of the exculpatory statements elicited during cross-examination.

{¶5} In *Jones I,* we quoted the following excerpts of the cross-examination pertinent to our analysis.

{¶6} "[Q.]: * * * but the point about the garage, Kobe told you 'I wasn't in that garage'?

{¶7} "[A.]: That's what he said.

{¶8} "[Q.]: He told you that more than once?

{¶9} "[A.]: Yes.

{¶10} "[Q.]: Okay. Now, the—and that would be because you know, you asked him more than once?

{¶11} "[A.]: Correct.

{¶12} "[Q.]: And you even told him they would go easier on him if he just admitted it, correct?

{¶13} "[A.]: No.

{¶14} "[Q.]: Well, why did you keep asking him if he kept denying it?

{¶15} "[A.]: Because I had an eye witness that said he was in the garage."

{¶16} Later in the cross-examination, defense counsel posed another question to the state's witness regarding why the police did not take fingerprints, and stated "I mean, you've got an alleged victim saying I saw somebody in my garage. You've got Kobe Jones saying I wasn't that somebody in your garage."

{¶17} After the cross-examination ended, the state asked the trial court for a bench conference, during which it announced its intent to re-examine the police officer about Jones' prior criminal record. The state argued that defense counsel placed Jones' credibility in issue by introducing exculpatory statements through its cross-examination questions of the police officer. After Jones objected, the following exchange then occurred:

{¶18} "[TRIAL COURT]: You solicit it. You're trying to put your client's veracity at issue by asking the witness.

{¶19} "[DEFENSE COUNSEL]: Asking what?

{¶20} "[TRIAL COURT]: About an exculpatory statement.

{¶21} "[DEFENSE COUNSEL]: That doesn't open the door to get into that.

{¶22} "[TRIAL COURT]: Sure it does.

{¶23} " * * *

{¶24} "[DEFENSE COUNSEL]: That's the first I ever heard about that. They are not allowed to get in * * * or risk hearing about a criminal record.

{¶25} "[TRIAL COURT]: You're the one that elicited an exculpatory statement."

{¶26} In *Jones I*, we concluded that the trial court erred by permitting the state to introduce evidence of Jones' prior convictions because he did not appear as a witness as is contemplated in Evid.R. 609(A), which states, "for the purpose of attacking the credibility of a witness," a party can introduce evidence that the witness has been convicted of a crime so long as "the crime involved dishonesty or false statement." Evid.R. 609(A)(3). Because Jones was not a witness at trial, we concluded that the trial court erred in permitting the state to attack his credibility. Nonetheless, we went on to conclude that the error was harmless because the trial court instructed the jury on the proper use of the prior-conviction testimony, and because the state had presented overwhelming evidence of guilt.

{¶27} However, according to Evid.R. 806(A), "when a hearsay statement, * * * has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence that would be admissible for those purposes if declarant had testified as a witness."

{¶28} Upon further review, we conclude that the trial court properly admitted the prior conviction testimony based on Evid.R. 806(A), and did not commit error, harmless

or otherwise. See *State v. Heinish* (1990), 50 Ohio St.3d 231, 237; and *State v. Dickess*, 174 Ohio App.3d 658, 2008-Ohio-39, ¶38-39.

{¶29} Our decision to modify *Jones I* to the extent that the trial court did not err in permitting the state to attack Jones' credibility based on Evid.R. 806(A) also brings our decision in harmony with another decision this court recently released, *State v. Chambers*, Butler App.No. CA2010-06-136, 2011-Ohio-1187. In *Chambers*, the trial court admitted evidence of Chambers' prior convictions once Chambers elicited an exculpatory statement through one of the state's witnesses. We applied Evid.R. 806(A) and found that the evidence was properly admitted despite the fact that the defendant had not appeared as a witness at trial. In response to the state's alternative motion for reconsideration, Jones applied for an en banc consideration to resolve the conflict between *Chambers* and *Jones I*. However, once we modified *Jones I*, the cases are not in conflict. We therefore deny Jones' request for oral arguments and an en banc decision regarding how this court will apply Evid.R. 806(A).

{¶30} Our decision to modify the analysis in *Jones I*, however, does not change the disposition of the case, as we found no prosecutorial misconduct based on the trial court's decision, and continue to find no improper actions by the prosecutor in relation to offering Jones' criminal record to attack his credibility as a hearsay declarant under Evid.R. 806(A).

{¶31} Within Jones' application for reconsideration, he reiterates his claim that the prosecutor engaged in misconduct that denied him a fair trial. However, we disagree. Jones' argues first that the way in which the state offered evidence of Jones' prior criminal record constitutes misconduct, and second, that this court should question whether Jones received a fair trial based on the prosecutor's professional and personal history.

{¶32} At the onset, we purposefully disregard Jones' second argument because his memorandum in support of reconsideration relies upon facts not in the record, and wages accusations against the prosecutor based on rumors and innuendos of which this court takes no notice. Because "appellate review is strictly limited to the record, and this court cannot consider matters outside the record that were not part of the trial court proceedings," we decline to address Jones' accusations regarding prosecutorial misconduct based on claims that are not part of the record. *State v. Carroll*, Clermont App.Nos. CA2007-02-030, CA2007-03-041, 2007-Ohio-7075, ¶62.

{¶33} Regarding Jones' argument that the prosecutor improperly offered evidence of his prior convictions, we note once more that a decision by the trial court to admit evidence cannot cause prosecutorital misconduct. Jones argues that the state failed to produce certified copies of the conviction entries, and engaged in prosecutorial misconduct by discussing the convictions and related documents during its re-examination of the police officer. However, the trial court's decision to admit Jones' criminal record via documentation and witness testimony did not result in prosecutorial misconduct.

{¶34} According to Evid.R. 609(F), "when evidence of a witness's conviction of a crime is admissible under this rule, the fact of the conviction may be proved only by the testimony of the witness on direct or cross-examination, or by public record shown to the witness during his or her examination." Jones asserts that nothwithstanding the trial court's decision, the state engaged in misconduct once it offered evidence regarding the convictions because the state did not submit certified convictions and because he was never convicted of the crimes. However, before and after the state offered its evidence regarding Jones' criminal history, the trial court held two bench conferences to discuss

the state's impeachment evidence and expressly found "sufficient public record" of Jones' convictions to satisfy Evid.R. 609(F).

{¶35} While Jones argues that he was not convicted of the crimes for which the state offered evidentiary material, we note that the documents used during the state's re-examination were not entered into or definitively identified on the record. Accordingly, we "must presume the regularity of the trial court proceedings and the presence of sufficient evidence to support the trial court's decision." *State v. Lewis*, Fayette App.No. CA2010-08-017, 2011-Ohio-415, ¶23. While the record is not clear what documents were used, the trial court explicitly determined that the documents comported with Evid.R. 609(F) and were public records, and we will accept the trial court's ruling in the absence of any documentation in the record stating otherwise.

{¶36} As this court has previously held, "it is appellant's responsibility to include all evidence in the appellate record so that the claimed error is demonstrated to the reviewing court." *State v. Linville*, Warren App. No. CA2002-06-057, 2003-Ohio-818, ¶6. Although Jones was obviously unhappy with the documents used by the state and contested whether there were actual convictions for all of the charges, he did not re-cross-examine the officer regarding the authenticity of the documents or their contents, or develop the officer's actual knowledge of the documents or the convictions. Nor did Jones proffer the documents into evidence so that this court could have a complete record to review.

{¶37} We also note that as part of his discovery, Jones requested that the state provide him with his prior criminal record. In the state's answer, the state provided Jones' known criminal record, which included the three receiving stolen property convictions discussed during the state's examination. Therefore, Jones had ample opportunity to challenge the existence of criminal records, or demonstrate to the court in

a motion in limine that the state's records were inaccurate regarding his criminal record. We therefore endorse our previous decision that the prosecutor did not engage in misconduct by eliciting the evidence and testimony.

{¶38} Although we have granted the state's motion to reconsider our former opinion, and have modified our decision in *Jones I* to the extent that the trial court properly applied Evid.R. 806(A), we deny Jones' request to reconsider our opinion in *Jones I* as it applied to prosecutorial misconduct, and reaffirm his convictions.

{¶39} Judgment affirmed as modified.

BRESSLER and RINGLAND, JJ., concur.