

[Cite as *State v. Engle*, 2009-Ohio-4787.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO

:

Plaintiff-Appellee

:

C.A.

CASE NO. 22934

v.

:

T.C. NO. 08 CR 1021/2

ADAM J. ENGLE

:

(Criminal appeal from
Common Pleas Court)

Defendant-Appellant

:

:

.....

OPINION

Rendered on the 11th day of September, 2009.

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FROELICH, J.

{¶ 1} Defendant-appellant Adam Engle appeals his convictions on one count each of Aggravated Robbery with a firearm specification, Carrying a Concealed Weapon, Having a Weapon Under Disability, and Failure to Comply with the Order or Signal of a Police Officer. Engle presents seven assignments of error on appeal. He argues that his convictions are not supported by sufficient evidence and that they are against the manifest weight of the evidence. He claims that the trial court erred in refusing to grant a mistrial and in failing to more fully investigate potential jury contamination. Engle also maintains his trial counsel was ineffective and that due to cumulative errors, he was denied a fair trial. For the following reasons, we will affirm the judgment of the trial court.

I

{¶ 2} Early in the evening of March 10, 2008, Tommy Dilbeck was leaving a friend's apartment and heading to his car, when he saw Adam Engle, whom he had known for many years, in a red Jeep Cherokee at a stop sign across the street. Engle parked in the driveway behind Dilbeck's car, ran up to Dilbeck, and pointed a gun in his face. Engle was yelling and cussing about a ring that Dilbeck had stolen from him the previous year. After a few seconds, Dilbeck ran and hid behind the apartment building, where he remained for a short time. When Dilbeck came out from behind the building, he saw Engle taking his stereo speakers from the trunk of his car and putting them into the Jeep. Engle left with the speakers, and Dilbeck called the police.

{¶ 3} Dayton Police Officers Cope and Trupp responded to the scene where a very shaken Dilbeck told the officers what had happened. He described Engle's vehicle

as a red Jeep Grand Cherokee with a broken passenger wing window. The officers obtained a license plate number and an address to which the vehicle was registered and put out a broadcast for Engle and his Jeep.

{¶ 4} Dayton Police Officer Imwalle heard the broadcast and, as she was driving on Fifth Street, she saw Engle's Jeep in the parking lot of a gas station. When Engle saw Officer Imwalle pulling into the gas station, he left the parking lot without signaling and turned onto June Street, driving at a high rate of speed. Officer Imwalle followed Engle, keeping dispatch advised of her location.

{¶ 5} Officer Imwalle activated her overhead lights and siren, but Engle sped through four stop signs and failed to signal at another turn. By this time, other officers had joined the pursuit, also with lights and sirens on. Engle continued, going through two red lights and swerving into oncoming traffic several times, narrowly missing hitting other vehicles. Officers estimated that Engle was traveling at 70-80 miles per hour as he turned onto Third Street, in a primarily residential area. When he had to swerve to avoid another vehicle, Engle hit a patch of snow and slid into a telephone pole. He then fled from his vehicle on foot.

{¶ 6} Officer Imwalle stayed with the Jeep because there were four other occupants. Officer Schraml assisted in securing the passengers, some of whom had stereo speakers piled on their laps. She also conducted an inventory search of Engle's vehicle, finding a loaded handgun under the front passenger's seat. In the meantime, Officer Glass and other officers chased Engle, who finally stopped when the officers were gaining on him. Engle was initially indicted on one count each of Aggravated Robbery, Carrying a Concealed Weapon, Having a Weapon Under Disability (he was

under indictment on a charge of drug possession), and Failure to Comply. The indictment was later amended to include a firearm specification on the Aggravated Robbery charge. A jury found Engle guilty as charged, and the trial court sentenced him to eight years in prison. Engle appeals.

II

{¶ 7} Engle’s First Assignment of Error:

{¶ 8} “APPELLANT’S CONVICTION FOR AGGRAVATED ROBBERY IS NOT SUPPORTED BY SUFFICIENT EVIDENCE AND IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.”

{¶ 9} Engle’s Second Assignment of Error:

{¶ 10} “APPELLANT’S CONVICTION FOR CARRYING A CONCEALED WEAPON IS NOT SUPPORTED BY SUFFICIENT EVIDENCE AND IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.”

{¶ 11} Engle’s Third Assignment of Error:

{¶ 12} “APPELLANT’S CONVICTION FOR FLEEING AND ELUDING IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.”

{¶ 13} Engle’s Fourth Assignment of Error:

{¶ 14} “APPELLANT’S CONVICTION FOR HAVING WEAPONS WHILE UNDER DISABILITY IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.”

{¶ 15} In his first four assignments of error, Engle argues that his convictions are not supported by sufficient evidence and that they are against the manifest weight of the evidence. For the following reasons, we disagree.

{¶ 16} A sufficiency of the evidence argument challenges whether the State has presented adequate evidence on each element of the offense to allow the case to go to the jury or to sustain the verdict as a matter of law. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52. The proper test to apply to such an inquiry is the one set forth in paragraph two of the syllabus of *State v. Jenks* (1991), 61 Ohio St.3d 259: "An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine 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. 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." In contrast, when reviewing a judgment under a manifest weight standard of review "[t]he 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 [factfinder] 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 evidence weighs heavily against the conviction." *Thompkins*, supra, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶ 17} Engle was convicted of Aggravated Robbery with a firearm specification, Carrying a Concealed Weapon, Having a Weapon Under Disability, and Failure to Comply with the Order or Signal of a Police Officer. We have combined Engle's first four assignments of error, because the same standards of review apply to each and

because there is considerable overlap among his arguments.

{¶ 18} Engle begins by challenging his conviction for Aggravated Robbery, pursuant to R.C. 2911.01(A)(1), which states in relevant part: “No person, in attempting or committing a theft offense...or in fleeing immediately after the attempt or offense, shall...[h]ave 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.” Engle does not deny that a firearm is a deadly weapon as defined by R.C. 2923.11(A). However, he insists that there is no evidence that he used a deadly weapon in committing a theft offense, which is proscribed by R.C. 2913.03(A). That section states: “No person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services...without the consent of the owner...by deception; by threat; [or] intimidation.” The trial court properly instructed the jurors that in order to find Engle guilty of Aggravated Robbery, they “must find beyond a reasonable doubt that *** the defendant while committing *** the offense of theft ***, had a deadly weapon on or about his person or under his control and recklessly displayed the weapon, brandished the weapon, indicated possession of the weapon or used the weapon.” The same language was used on the verdict form.

{¶ 19} Engle argues that the speakers were taken as an afterthought, independent from the confrontation over the ring. On the other hand, the State compares this case to that of felony murder, arguing that a defendant should not avoid a conviction for Aggravated Robbery when his act of pointing a gun in his victim’s face caused the victim to run away in fear, providing the defendant with the opportunity to steal the victim’s property.

{¶ 20} In the context of felony murder, the Ohio Supreme Court has explained that “the term ‘while’ does not indicate *** that the killing must occur at the same instant as the [predicate felony], or that the killing must have been caused by the [felony]. *** Nor does it mean that the felony must have been the motive for the killing. *** Rather ‘while’ means that the killing must be directly associated with the [felony] as part of one continuous occurrence ***. [T]he term ‘while’ means that the death must occur as part of acts leading up to, or occurring during, or immediately subsequent to the [relevant felony]. *** ‘The sequence of events’ may be ‘examined in light of time, place, and causal connection’ to determine whether it ‘amounts to one continuous occurrence.’” *State v. Johnson*, 112 S.Ct.3d 210, 2006-Ohio-6404, ¶56, internal citations omitted. A defendant “cannot escape the effect of the felony-murder rule by claiming that the aggravated robbery was simply an afterthought.” *State v. Biros* (1997), 78 Ohio St.3d 426, 450, citing *State v. Smith* (1991), 61 Ohio St.3d 284.

{¶ 21} The decision of whether Engle’s act of pointing the gun at Dilbeck and the theft of the speakers amounted to “one continuous occurrence” is a question for the jury. In this case, we conclude that the jury was justified in not seeing these two events as separate and distinct. There is sufficient evidence to support the State’s argument that it was Engle’s act of pointing a gun at Dilbeck that caused Dilbeck to flee, which in turn gave Engle the opportunity to exert control over Dilbeck’s speakers without his permission. Furthermore, Engle’s pointing the gun was not removed in time from the theft of the speakers, as Dilbeck’s best estimate of the time that he hid behind the building was about thirty seconds.

{¶ 22} We are similarly unpersuaded by Engle’s claim that there was no credible

evidence from which a jury could find that he had a gun in his possession while he took the speakers. The evidence shows that Engle brandished a gun immediately prior to the theft, and he was arrested with a gun in his possession shortly after the theft. This was enough evidence to warrant submitting the charge to the jury and to support the jury's finding that Engle had the deadly weapon on his person or under his control at the time of the theft.

{¶ 23} Engle concludes his challenge of his Aggravated Robbery conviction by insisting that Dilbeck's testimony was not credible because there were some discrepancies between his testimony and the statement that he gave to the police. However, the credibility of witnesses and the weight to be given to their testimony are matters for the trier of fact to resolve. *State v. DeHass* (1967), 10 Ohio St.2d 230, 231. Engle had the opportunity to cross-examine Dilbeck about these discrepancies, and the jurors were free to believe or disbelieve Dilbeck, just as any other witness.

{¶ 24} Engle next challenges his conviction for Carrying a Concealed Weapon in violation of R.C.2923.12(A)(2), which states: "no person shall knowingly carry or have, concealed on his person or concealed ready at hand...a handgun." This charge arose from the officer's discovery of a handgun under the front passenger seat of Engle's vehicle. Engle maintains that the handgun, found under the front passenger seat of the vehicle he was driving, was not "ready at hand" to him, as the driver. We disagree.

{¶ 25} We have defined "ready at hand" to mean "so near as to be conveniently accessible and within immediate physical reach." *State v. Miller*, Montgomery App. No. 19589, 2003-Ohio-6239, ¶14, citing *Porello v. State* (1929), 121 Ohio St. 280. We have previously rejected arguments like Engle's. For example, in *Miller*, we found that guns

were ready at hand when they were hidden under carpet under the dashboard, although the defendant was found sleeping in the back seat. We explained that the defendant could easily have reached the guns by pushing the front seat down and leaning over or by exiting the vehicle to reach the guns. *Id.* Moreover, we have reached the same conclusion in cases more factually similar to the instant case. In *State v. Warnement* (Aug. 4, 2000), Miami App. No. 00CA13, we held that a knife hidden in an unlocked glove box was “ready at hand” to the driver. And, in *State v. Thornton* (May 4, 2001), Montgomery App. No. 18545, we found that a gun under the front passenger seat of a vehicle that the defendant was driving was “ready at hand.”

{¶ 26} Similarly, Engle challenges his conviction for Having a Weapon Under Disability, under R.C. 2923.13(A)(3). Engle does not deny that he was “under disability.” Instead, he contends that Dilbeck’s testimony is the only evidence placing the gun in his hands, and he again insists that Dilbeck’s testimony was not credible. There are two faults with Engle’s argument.

{¶ 27} First, as we stated above, witness credibility is a decision for the jury. *DeHass*, *supra*, at 231. Second, even constructive possession of a gun can be sufficient to support a conviction for Having a Weapon Under Disability. *State v. Cherry*, 171 Ohio App.3d 375, 2007-Ohio-2133, ¶¶ 10-11 (defendant in constructive possession of gun under seat in car). “Constructive possession exists when an individual exercises dominion and control over an object, even though that object may not be within his immediate physical possession.” *Id.*, ¶11, quoting *Sate v. Wolery* (1976), 46 Ohio St.2d 316, 329. Not only was there testimony that Engle was seen with a gun immediately prior to taking the speakers, but a gun was found under the front seat of his Jeep

subsequent to his arrest. Moreover, Dilbeck identified the gun found under Engle's seat as being the same one that had been pointed at his face, and as the same gun he had previously seen in Engle's possession. The possession of the gun while pointed at Dilbeck and/or the possession of the gun hidden under the seat could support a conviction for Having a Weapon Under Disability.

{¶ 28} Finally, Engle attacks his conviction for Failure to Comply with the Order or Signal of a Police Officer, in violation of R.C. 2921.331(B), which states: "No person shall operate a motor vehicle so as willingly 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." Engle argues that there was insufficient evidence that he was the driver of the Jeep.

{¶ 29} Engle claims that the only person identifying him as the driver of the Jeep is Officer Imwalle and that her testimony was unreliable because another officer testified that the vehicle was moving too quickly for Imwalle or the second officer to be able to identify the driver. We begin by noting, once again, that witness credibility is a decision for the jury. *DeHass*, supra, at 231.

{¶ 30} In any event, Engle overlooks the fact that Officer Imwalle first saw the jeep when it was in the gas station parking lot, before Engle began his flight. She also testified that it was Engle who got out of the crashed Jeep and fled from the scene on foot. This identification is corroborated by Dilbeck's testimony that Engle both drove up and left in the Jeep. It is further supported by the testimony of other officers who saw a male driving the Jeep and who saw a white male get out of the Jeep after it crashed. Furthermore, the evidence shows that the Jeep was registered to Curtis Engle, who

resides at the same address as the defendant.

{¶ 31} For these reasons, we conclude that the State offered sufficient evidence of each element of each offense to warrant submitting the case to the jury. The evidence also refutes Engle's claim that the jury lost its way in convicting him of each charge. Therefore, Engle's first four assignments of error are overruled.

III

{¶ 32} Engle's Fifth Assignment of Error:

{¶ 33} "THE COURT ERRED IN DENYING A MISTRIAL OR FAILING TO INVESTIGATE THE EXTENT OF JUROR CONTAMINATION."

{¶ 34} In his fifth assignment of error, Engle insists that the court erred in denying his motion for mistrial. Specifically, he maintains that the court should have conducted a more thorough inquiry into the possible taint of the entire jury based on the dismissal of a juror who advised the court after opening statements that he could not be impartial. For the following reasons, we conclude that the court conducted a sufficient inquiry before dismissing the juror and that the court did not abuse its discretion in denying Engle's motion for a new trial.

{¶ 35} A mistrial should only be declared when a fair trial is no longer possible. *State v. Franklin* (1991), 62 Ohio St.3d 118, 127, citations omitted. "The decision whether to grant a mistrial lies within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *State v. Brown*, 100 Ohio St.3d 51, 2003-Ohio-5059. An abuse of discretion means more than a mere error of law or an error in judgment. It implies an arbitrary, unreasonable, unconscionable attitude on the part of the trial court. *State v. Adams* (1980), 62 Ohio St.2d 151." *State v. Williams*,

Montgomery App. No. 22126, 2008-Ohio-2069.

{¶ 36} Immediately following opening statements, the court recessed for lunch. At some point during that recess, a juror told the bailiff that he had already reached a decision about Engle's guilt. Upon learning of this statement, the judge questioned the juror at length in the presence of both counsel, but out of the presence of any other jurors. The juror claimed, "I've already formed my opinion on this case, and it's not going to change." The judge thoroughly explored whether the juror could fulfill his oath to be impartial and to make his decision based on the law and the evidence, but the juror continued to insist, "I'd say it's 99.9% sure that I wouldn't be able to really, you know, be objective as far as the true vote for a verdict."

{¶ 37} Based on these statements, defense counsel moved for dismissal of the juror and for a mistrial, positing that the rest of the jury might have been tainted. The court agreed to dismiss the juror, but denied the motion for a mistrial. Counsel asked the court if he could renew the motion for a mistrial, after having the opportunity to do some research. The court told him, "Feel free to renew it." The motion was never renewed.

{¶ 38} In essence, Engle asks us to presume that once he moved for a mistrial, the court was required to conduct a complete investigation into the possibility of jury taint based on the one juror's claim of bias. To the contrary, nothing reflected in the record regarding the information that the juror conveyed to the bailiff or the judge indicates the likelihood of the entire jury's being tainted. A trial judge is in the best position to evaluate whether a situation in his courtroom warrants a mistrial. *State v. Glover* (1988), 35 Ohio St.3d 18, 19; *State v. Garner*, 74 Ohio St.3d 49, 59, 1995-Ohio-

168.

{¶ 39} Certainly, the trial court's inquiry would have been more thorough had the dismissed juror been questioned about whether he had discussed his opinion with any other jurors. However, without more information in the record, we cannot conclude that, under the particular facts and circumstances of this case, the court's failure to do so was an abuse of discretion. At the time of the ruling, the trial court was likely aware of factors outside of the record. Perhaps the court knew that the dismissed juror's statement was made so early in the lunch recess that he could not have had the opportunity to discuss his conclusion with the other jurors. Or maybe the court knew that the juror spent the recess alone and had not conversed with his fellow jurors. Absent evidence on the record pointing to anything more than a mere possibility of jury taint, a trial court does not abuse its discretion in keeping its investigation narrowly related to the issue before it, which was a juror's claim that he could not be impartial.

{¶ 40} Engle's fifth assignment of error will be overruled.

IV

{¶ 41} Engle's Sixth Assignment of Error:

{¶ 42} "APPELLANT WAS DENIED A FAIR TRIAL DUE TO THE INEFFECTIVE ASSISTANCE OF COUNSEL."

{¶ 43} In his sixth assignment of error, Engle contends that trial counsel was ineffective because he failed to renew the motion for a mistrial and because he failed to specifically ask the court to poll the jury for possible contamination after dismissing one juror. In order to prevail on a claim of ineffective assistance of counsel, the defendant

must show both deficient performance and resulting prejudice. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052. Trial counsel is entitled to a strong presumption that his conduct falls within the wide range of effective assistance, and to show deficiency the defendant must demonstrate that counsel's representation fell below an objective standard of reasonableness. *Id.*

{¶ 44} When moving for mistrial, although counsel did not specifically ask the court to poll the jury, he did state his concern about “the distinct possibility that [the dismissed juror] has contaminated the panel.” Counsel indicated his intent to research the issue, but there is no evidence in the record as to what the result of any research was. It is possible that the results of that research caused counsel to make a tactical decision to concentrate on other areas of his client's defense rather than spend time pursuing a renewed motion for a mistrial. Or perhaps counsel had a concern that a jury poll would highlight the juror's removal and cause speculation by the remaining jurors. Counsel's choice of trial tactics does not amount to ineffective assistance of counsel. See, e.g., *State v. Clayton* (1980), 62 Ohio St.2d 45.

{¶ 45} Furthermore, as discussed above in response to Engle's fifth assignment of error, there is no evidence in the record of jury contamination to warrant a jury poll. In fact, it would be difficult to tailor such a poll in a manner that would not emphasize the significance of the dismissal of one of their number. Absent evidence of a likelihood of jury taint rather than just conjecture, we conclude that trial counsel was not ineffective in failing to further pursue the matter on the record.

{¶ 46} Engle's sixth assignment of error is overruled.

V

{¶ 47} Engle’s Seventh Assignment of Error:

{¶ 48} “CUMULATIVE ERRORS DEPRIVED THE APPELLANT OF A FAIR TRIAL.”

{¶ 49} Finally, Engle maintains that cumulatively, all of the aforementioned errors served to deny him of his right to a fair trial. The Ohio Supreme Court has recognized that separate harmless errors, when considered together, may combine to deny a defendant a fair trial. *State v. Madrigal*, 87 Ohio St.3d 378, 397, 2000-Ohio-448. However, before there can be cumulative error warranting reversal, we must find that multiple errors were committed at trial. *Id.* at 398. Because we have found no error in Engle’s trial, we can find no cumulative error.

{¶ 50} Engle’s Seventh Assignment of Error is overruled.

VI

{¶ 51} Having overruled all seven of Engle’s assignments of error, the judgment of the trial court will be Affirmed.

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FAIN, J. and GRADY, J., concur.

Copies mailed to:

- Michele D. Phipps
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- Hon. Timothy N. O’Connell