[Cite as *State v. Slaughter*, 2015-Ohio-5303.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	C.A. CASE NO. 26135
	:	
v.	:	T.C. NO. 13CR2486
	:	
CHARLES SLAUGHTER	:	(Criminal Appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the ___18th___ day of ____December____, 2015.

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FROELICH, P.J.

{¶ 1} Charles Slaughter was found guilty by a jury in the Montgomery County Court of Common Pleas of felonious assault (deadly weapon) with an accompanying firearm specification, discharge of a firearm on or near prohibited premises (serious physical harm), and intimidation of a witness. A charge of having weapons while under disability

was tried to the court, which found him guilty of that offense. The trial court merged the discharge of a firearm offense into the felonious assault and imposed consecutive sentences, totaling 12 years in prison. Slaughter appeals from his convictions.

{¶ 2} Slaughter's original appellate counsel filed a brief pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), stating that after thoroughly examining the record and the law, he found Ano reversible error." Counsel stated nine potential assignments of error, but indicated that none of these potential arguments had merit. By entry, we informed Slaughter that his attorney had filed an *Anders* brief on his behalf and granted him 60 days from that date to file a pro se brief. Slaughter requested and received three continuances to file his pro se brief, but no pro se brief was filed. Upon conducting our independent review of the record pursuant to *Penson v. Ohio*, 488 U.S. 75, 109 S.Ct. 346, 102 L.Ed.2d 300 (1988), we concluded that there was a non-frivolous claim that the trial court had erred in denying Slaughter's motion for a mistrial, which was one of the issues raised by appellate counsel. Having found at least one non-frivolous issue for review, we did not further review the record or resolve any other potential issues raised by counsel. Rather, we set aside the *Anders* brief and appointed new appellate counsel to act as Slaughter's advocate on appeal. We instructed that new counsel should review the entire record and raise any issues that counsel believed had arguable merit.

{¶ 3} Slaughter, with new counsel, now raises one assignment of error on appeal, namely, "The trial court erred in failing to grant Appellant's motion for a mistrial."

{¶ 4} The State's first witness at trial was one of the complainants, Andrew Locklin. Locklin testified that he and Slaughter both have a child with April Danley, the second

complainant. Around 6:00 p.m. on August 7, 2013, Locklin was at Danley's home after the two took their daughter to the doctor. While Locklin was watching television at Danley's house, Slaughter came in, and Slaughter and Danley began to argue. Locklin decided to leave and went downstairs toward the front door. Danley followed Locklin downstairs.

{¶ 5} Locklin went out onto the front porch, followed by Danley and Slaughter. While Danley and Slaughter were on the porch, Slaughter pulled out a gun and pointed it at Danley. Slaughter then pointed the gun at Locklin, who was now on the sidewalk in front of the house, and said, "I never liked that motherf**ker anyway." Locklin pulled out his cell phone and called 911. During the call, Locklin identified Slaughter by name, described Slaughter's clothing, described Slaughter's conduct, and stated that Slaughter had just been released from jail.[1] The recording of that call was played to the jury, without objection.

{¶ 6} Locklin further testified that he walked from Danley's home toward Main Street, which was about a half a block away. Locklin saw Slaughter sitting in the passenger seat of a four-door silver Grand Prix, and he again called 911 to give the police the car's license plate number. Locklin testified that, as he spoke with a dispatcher, Slaughter pointed a gun out of the car window and fired three shots at him. During the second 911 call, Locklin stated that Slaughter had been in prison.

{¶ 7} After the second 911 call was played for the jury, Slaughter's counsel objected. During a sidebar discussion, the prosecutor indicated that the references to

[1] The record does not include the unredacted 911 calls that were played for the jury. However, Locklin's statements are reflected in the trial transcript.

Slaughter's criminal record were supposed to have been redacted from the 911 audio recordings and that she didn't "know what the heck happened." Defense counsel asked for a mistrial, noting that Slaughter had waived a jury trial on the weapons while under disability charge because he did not want the jury to know about his prior convictions. The trial court reserved its ruling on the motion for a mistrial until after Locklin finished testifying.

{¶ 8} After Locklin's testimony was completed, the court and counsel met in chambers, and the trial court overruled the motion for a mistrial.[2] The trial court then asked defense counsel if he wished to have a curative instruction or, instead, to take a "less is more" approach and not draw more attention to Slaughter's record. Counsel elected not to ask for a curative instruction.

{¶ 9} The next day, the State presented three witnesses. The first witness, Officer Jordan Wortham, discussed his conversation with Danley after Locklin had contacted the police. Wortham testified that, when he and Danley talked, Danley had "threatened to call [Slaughter's] probation officer." Defense counsel objected, the court sustained the objection, and it instructed the jury to disregard the statement. The court admonished the police officer not to say "another word about what anybody told [him] regarding probation." After Wortham's testimony was completed, defense counsel told the court that he would be discussing with Slaughter whether to make another motion for a mistrial.

{¶ 10} Danley testified after Wortham and described the events at her house on August 7, 2013. She also testified about threatening text messages that she received

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[2] In a discussion with counsel after the State rested, the trial court reiterated what had occurred regarding the 911 calls, and it cited, for the record, the cases upon which it had relied in reaching its decision to deny the motion for a mistrial.

from Slaughter and a telephone call that she had received from Slaughter on August 8 while she was meeting with Detective Nathan Via. During that telephone call, Slaughter asked Danley why she had called the police, and he threatened to kill her and Locklin. Slaughter also acknowledged that he had shot at Locklin the day before. After Danley finished testifying, defense counsel informed the court that Slaughter did not want counsel to request a mistrial at that juncture.

{¶ 11} The State presented one additional witness, Detective Via. Via also described the telephone conversation between Danley and Slaughter that occurred while Danley was meeting with him (Via), as well as the text messages on Danley's phone. In addition, Detective Via testified about his interview with Slaughter, who was arrested on August 8. In the interview, Slaughter initially denied having or using a gun on August 7, and he denied making any threats against Danley. After Via confronted Slaughter with the evidence he (Via) said he had against Slaughter, Slaughter admitted to pointing a gun at Danley and Locklin, but he denied shooting at Locklin. Slaughter ultimately admitted to shooting at Locklin, but only to scare him.

{¶ 12} The defense presented no witnesses; Slaughter did not testify on his own behalf. The State redacted the recording of the 911 calls prior to the jury's deliberation, and the redacted calls were admitted into evidence as State's Exhibit 1. During closing arguments, neither party mentioned that Slaughter had been in jail and prison or that Slaughter had a criminal record. Defense counsel did emphasize that Locklin had five felony convictions, a fact which came out during Locklin's cross-examination, and that the jury could consider those convictions to test Locklin's credibility.

{¶ 13} After deliberating, the jury found Slaughter guilty of felonious assault

(deadly weapon) with an accompanying firearm specification, discharge of a firearm on or near prohibited premises (serious physical harm), and intimidation of a witness. The court found Slaughter guilty of having weapons while under disability. The trial court sentenced him to an aggregate sentence of 12 years in prison.

{¶ 14} On appeal, Slaughter asserts that the trial court should have granted his motion for a mistrial, which was made after Locklin's second 911 call was played for the jury.

{¶ 15} It is generally improper for the State to present or elicit evidence regarding a defendant's prior criminal record in its case-in-chief. *State v. Isa*, 2d Dist. Champaign No. 07 CA 37, 2008-Ohio-5906, ¶ 13. However, references to a defendant's prior criminal history or to having been in prison do not necessarily result in the denial of a fair trial, warranting a mistrial. *See State v. Green*, 2d Dist. Greene No. 2007 CA 2, 2009-Ohio-5529, ¶ 181-188. A mistrial should only be declared when a fair trial is no longer possible. *State v. Franklin*, 62 Ohio St.3d 118, 127, 580 N.E.2d 1 (1991). The decision whether to grant a mistrial is within the trial court's sound discretion. *Green* at ¶ 182.

{¶ 16} The State acknowledges, and we agree, that the statements in Locklin's 911 calls indicating that Slaughter had just been released from jail and had been to prison were inadmissible and should not have been heard by the jury.[3] Moreover, unlike unanticipated statements from a witness from the witness stand, the recordings of the 911 calls were within the control of the State, and the State should have verified that the

[3] The jury also should not have heard Officer Wortham's reference to Slaughter's probation officer. However, as the motion for a mistrial was directed only to the improper statements on Locklin's 911 calls, we will not focus on this remark.

recordings had been redacted prior to playing the calls for the jury. We do not doubt the prosecutor's representations to the trial court that the 911 calls were supposed to have been redacted by an IT employee within the prosecutor's office and that she did not know "what the heck happened." Nevertheless, the State had the ability to ensure, prior to trial, that the inadmissible statements were removed from the recordings to be used at trial. This is especially true once the first unredacted 911 call was played.

{¶ 17} Regardless, we do not find that record supports a finding of reversible error. The record does not include an unredacted recording of the 911 calls, but there is no indication in the record that Locklin's statements were anything more than a passing reference to Slaughter's just having been released from jail and having been in prison. The trial court repeatedly describes the offending statements simply as statements that Slaughter had just been released from jail and had been to prison, with no additional details. It appears that neither 911 call referenced the underlying charges for which Slaughter had been in jail and prison. Moreover, the second 911 call, which contained the reference to prison, was over six minutes long and focused on the description of the vehicle and Slaughter's act of shooting at Locklin from the vehicle; there is no suggestion that Slaughter's time in prison was a focal point of the 911 call.

{¶ 18} In addition, although there was no physical evidence that Slaughter had shot at Locklin, there was ample evidence to support Slaughter's convictions. Locklin and Danley testified about the events of August 7, the jury heard recordings of the 911 calls from both complainants (including one during the shooting), there was testimony from Danley and Detective Via that Slaughter made incriminating statements regarding his behavior on August 7, and photographs of Slaughter's threatening text messages

were admitted into evidence. Given the evidence against Slaughter and the nature of the improper statements on the 911 recordings, we cannot say that Slaughter was denied a fair trial because the jury heard statements that he had been in jail and in prison. Had the trial court provided a curative instruction to disregard the references to Slaughter's past incarceration, we would conclude that the references were harmless. (The court did provide such an instruction regarding the reference to a probation officer, and we presume the jury followed that instruction.)

{¶ 19} Here, defense counsel opted not to draw attention to the references to Slaughter's time in jail and prison and declined the court's offer to provide a curative instruction. That decision was a matter of reasonable trial strategy. *E.g.*, *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, 848 N.E.2d 810, ¶ 111 ("counsel's decision not to request a jury instruction falls within the ambit of trial strategy"); *State v. Bankston*, 2d Dist. Montgomery No. 24192, 2011-Ohio-6486, ¶ 28 ("a competent attorney could reasonably choose not to seek a limiting instruction as a matter of trial strategy in order not to highlight [a defendant's] prior convictions"). Upon review of the record, we conclude that defense counsel exercised reasonable discretion when he elected not to have the improper statements highlighted for the jury. Where defense counsel reasonably decides to forego a curative instruction, the absence of the instruction cannot be used on appeal as grounds for reversal. *State v. Lacy*, 2d Dist. Greene No. 83-CA-58, 1984 WL 4049, *4 (Oct. 5, 1984).

{¶ 20} Slaughter's assignment of error is overruled.

{¶ 21} We note that the trial court's judgment entry does not include the statutory findings for imposing consecutive sentences. However, "[a] trial court's inadvertent

failure to incorporate the statutory findings [for consecutive sentences] in the sentencing entry after properly making those findings at the sentencing hearing does not render the sentence contrary to law; rather, such a clerical mistake may be corrected by the court through a nunc pro tunc entry to reflect what actually occurred in open court." *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, ¶ 30. Accordingly, the failure to incorporate the findings, made at the sentencing hearing, into the sentencing entry, is not a basis for reversal of the judgment. *State v. Snowden*, 2d Dist. Montgomery No. 26329, 2015-Ohio-1049, ¶ 13, ¶ 18.

{¶ 22} The trial court's judgment will be affirmed. However, the matter will be remanded to the trial court for the issuance of a nunc pro tunc entry which incorporates into the judgment entry the trial court's findings that were made at the sentencing hearing with respect to the imposition of consecutive sentences. We note that the trial court's issuance of such an amended judgment entry "is not a new final order from which a new appeal may be taken." *Bonnell* at ¶ 31.

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FAIN, J. and HALL, J., concur.

Copies mailed to:

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