**[Cite as *State v. White*, 2009-Ohio-4151.]**

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

BOBBY BELL WHITE

Defendant-Appellant

JUDGES:
Hon. W. Scott Gwin, P. J.
Hon. William B. Hoffman, J.
Hon. John W. Wise, J.

Case No. 2009 CA 00053

O P I N I O N

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| CHARACTER OF PROCEEDING: | Criminal Appeal from the Court of Common Pleas, Case No. 2008 CR 01466 |
| JUDGMENT: | Affirmed |
| DATE OF JUDGMENT ENTRY: | August 17, 2009 |

APPEARANCES:

For Plaintiff-Appellee

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*Wise, J.*

**{¶1}** Defendant-appellant Bobby Bell White appeals his conviction and sentence entered by the Stark County Court of Common Pleas, on one count of aggravated burglary following a jury trial. This charge also included a firearm specification.

**{¶2}** Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE CASE AND FACTS

**{¶3}** On August 8, 2008 at approximately 6:00 p.m., Opal and Stanley Marshall were sitting on the porch of their home on Shorb Avenue, Canton, Ohio, when Opal heard a noise coming from the back of the house. Stanley went to check the back door and discovered the screen door cut and the lock unlocked. Stanley went into the home and found that several items were missing. Stanley's wallet was missing from the top of the bedroom dresser, along with some money which had been on the dresser - a $20 dollar bill, two $5 dollar bills, some $1 dollar bills and some coins. Stanley looked in the closet and saw that his fireproof safety box was gone which contained the deed to his house and other miscellaneous papers. Finally, Stanley found that the Glock 30 .45 caliber firearm and loaded cartridge that he kept on his nightstand was also missing.

**{¶4}** The Marshalls called 911 and Police Officer Shawn Overdorf responded within minutes to a burglary-in-progress call. After speaking with the Marshalls, Officer Overdorf called for a "canine" to search the residence. Officer Overdorf also learned that the Marshalls' son lived across the alley and that he had installed a video camera after an attempted robbery some years before. The camera was placed in such a way that it captured the back screen door and the burglar who cut the screen to gain entry. Officer Overdorf viewed the VHS tape video on the television screen and saw an

intruder who was a black male, wearing a white t-shirt, blue jean shorts, black socks, white tennis shoes and a skinny blue backpack. Officer Overdorf was unable to see the face clearly but could clearly see the clothing and shoes worn by the burglar.

**{¶5}** By this time, there were five cruisers combing the vicinity doing a perimeter search. With the help of neighbors, the police, including park policeman, Michael Swihart, were able to track the fleeing burglar to Hoover Place.

**{¶6}** The fleeing burglar, Appellant Bobby Bell White, was taken into custody, read his Miranda rights and placed in the back of a police cruiser. The police were able to recover Stanley's stolen Glock .45 and magazine with cartridges, in an alley on Hoover Place between Louisiana and Oxford in the line of travel that the burglar had taken. The Stanley's lock box was not found. Money, however, was found on the burglar – one $20 dollar bill, two $5 dollar bills and six $1dollar bills.

**{¶7}** On September 8, 2008, the Stark County Grand Jury indicted Appellant on one count of aggravated burglary, in violation of R.C. §2911.11, with a firearm specification, in violation of R.C. §2941.141.

**{¶8}** The matter proceeded to jury trial, commencing on October 22, 2008.

**{¶9}** The State presented five witnesses including the victims, Opal and Stanley Marshall. The state also presented a videotape of the burglary taken from a camera positioned outside the Marshalls' home showing the burglar, a black male wearing a white t-shirt, blue jean shorts, black socks, white tennis shoes and a skinny blue backpack.

**{¶10}** Officer Swank testified that upon being arrested and taken into custody, Appellant asked him what he was being charged with, and that when Officer Swank told

him and also told him they had viewed a video of him entering and leaving the back of the Shorb Avenue residence, Appellant replied that "he didn't doubt that he had gone in and taken that stuff, but he had a bicycle accident earlier that day and didn't recall anything that had occurred that day." (T. at 148-149).

**{¶11}** Appellant testified in his own behalf offering the defense that he didn't do it and that this case was one of mistaken identity. Appellant testified that earlier that day, he was at Aultman Hospital being treated for alcohol induced pancreatitis and that he was given morphine. (T. at 175), He stated that after his release, he walked home, bought cigarettes, beer and wine and that he had $36.81 left over after such purchase. (T. at 147, 178). He further testified that he drank the beer and wine in Monument Park. (T. at 176, 181). He stated that he was walking towards Shorb when the Marshalls' house was robbed. He explained that the reason he ran from the police was because he was on misdemeanor probation and that he had violated his probation by consuming alcohol. (T. at 177).

**{¶12}** Appellant also stated that he did not tell the police that he had "no doubt that he did it" as claimed Officer Swank, but that he had stated that there was "no way he could do this." (T. at 178). Appellant also claimed he did not tell the officers he had been at the hospital for falling off of his bike as the police officers testified. (T. at 180). Appellant denied committing the burglary at the Marshall residence. (T. at 179).

**{¶13}** After hearing all the evidence and deliberations, the jury found Appellant guilty of aggravated burglary with the firearm specification as charged.

**{¶14}** Appellant was subsequently sentenced to serve ten (10) years on the aggravated burglary charge. He was ordered to serve this term consecutive to a one-year term for the firearm specification.

**{¶15}** It is from this conviction and sentence Appellant appeals, raising the following assignments of error:

ASSIGNMENTS OF ERROR

**{¶16}** "I. THE TRIAL COURT'S FINDING OF GUILT IS AGAINST THE MANIFEST WEIGHT AND SUFFICIENCY OF THE EVIDENCE.

**{¶17}** "II. THE APPELLANT WAS DEPRIVED OF DUE PROCESS BY THE MISCONDUCT OF THE PROSECUTOR."

I.

**{¶18}** In his first assignment of error, Appellant challenges his conviction as against the sufficiency and manifest weight of the evidence. We disagree.

**{¶19}** Our standard of reviewing a claim the verdict was not supported by sufficient evidence is to examine the evidence presented at trial to determine whether the evidence, if believed, would convince the average mind of the accused's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in the 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. *State v. Jenks* (1991), 61 Ohio St. 3d 259.

**{¶20}** The Supreme Court has explained the distinction between claims of sufficiency of the evidence and manifest weight. Sufficiency of the evidence is a question for the trial court to determine whether the State has met its burden to produce

evidence on each element of the crime charged, sufficient for the matter to be submitted to the jury.

**{¶21}** Manifest weight of the evidence claims concern the amount of evidence offered in support of one side of the case and is a jury question. We must determine whether the jury, in interpreting the facts, so lost its way that its verdict results in a manifest miscarriage of justice. *State v. Thompkins* (1997), 78 Ohio St. 3d 387, citations deleted. On review for manifest weight, a reviewing court is "to examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses and determine whether in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the judgment must be reversed. The discretionary power to grant a new hearing should be exercised only in the exceptional case in which the evidence weighs heavily against the judgment." *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175. Because the trier of fact is in a better position to observe the witnesses' demeanor and weigh their credibility, the weight of the evidence and the credibility of the witnesses are primarily for the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, syllabus 1.

**{¶22}** In *State v. Thompkins* (1997), 78 Ohio St.3d 380, 678 N.E.2d 541, the Ohio Supreme Court held "[t]o reverse a judgment of a trial court on the basis that the judgment is not sustained by sufficient evidence, only a concurring majority of a panel of a court of appeals reviewing the judgment is necessary." Id. at paragraph three of the syllabus. However, to "reverse a judgment of a trial court on the weight of the evidence, when the judgment results from a trial by jury, a unanimous concurrence of all three

judges on the court of appeals panel reviewing the case is required." Id. at paragraph four of the syllabus; *State v. Miller* (2002), 96 Ohio St.3d 384, 2002-Ohio-4931 at ¶38, 775 N.E.2d 498.

**{¶23}** Appellant was convicted of aggravated burglary with the firearm specification.

**{¶24}** R.C. §2911.11(A)(1) defines the offense of aggravated burglary as:

**{¶25}** "(A) No person, by force, stealth, or deception, shall trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure, when another person other than an accomplice of the offender is present, with purpose to commit in the structure or in the separately secured or separately occupied portion of the structure any criminal offense, if any of the following apply:

**{¶26}** " ***

**{¶27}** "(2) The offender has a deadly weapon or dangerous ordnance on or about the offender's person or under the offender's control."

**{¶28}** The firearm specification defined by R.C. 2941.145 provides that when the offender had a firearm on or about the offender's person or under the offender's control while committing the offense and displayed the firearm, brandished the firearm, indicated that the offender possessed the firearm, or used it to facilitate the offense of aggravated burglary.

**{¶29}** Appellant argues that the State failed to prove beyond a reasonable doubt identity of the perpetrator in this crime.

**{¶30}** In the case at bar, Appellant claims that evidence presented at trial showed that the perpetrator's face was not visible on the videotape, that the officers failed to fully investigate another lead they had concerning a juvenile that possibly matched the perpetrator, that no fingerprints were developed from the Marshall house, and that his clothing, which matched those worn by the perpetrator on the video, were very generic and common.

**{¶31}** Upon review, we find that the jury also had before it the testimony of the Marshalls and the police officers, as well as the videotape to consider. Because the trier of fact is in a better position to observe the witnesses' demeanor and weigh their credibility, the weight of the evidence and the credibility of the witnesses are primarily for the trier of fact. *State v. DeHass (*1967), 10 Ohio St.2d 230, 227 N.E.2d 212, para. one of the syllabus

**{¶32}** Viewing this evidence in a light most favorable to the prosecution, we find that any rational trier of fact could have found that Appellant committed the aggravated burglary in the instant case.

**{¶33}** Based upon the foregoing and the entire record in this matter, we find Appellant's conviction was neither against the manifest weight nor the sufficiency of the evidence.

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

II.

**{¶35}** In his second assignment of error, Appellant contends that prosecutorial misconduct resulted in reversible error. We disagree.

**{¶36}** The prosecutor's duty in a criminal trial is two-fold. The prosecutor is to present the case for the State as its advocate and the prosecutor is responsible to ensure that an accused receives a fair trial. *Berger v. U. S.* (1935), 295 U. S. 78; *State v. Staten* (1984), 14 Ohio App. 3d 197.

**{¶37}** Misconduct of a prosecutor at trial will not be considered grounds for reversal unless the conduct deprives the defendant of a fair trial. *State v. Apanovitch* (1987), 33 Ohio St.3d 19, 514 N.E.2d 394; *State v. Maurer* (1984), 15 Ohio St.3d 239, 15 OBR 379, 473 N.E.2d 768. The touchstone of analysis is “the fairness of the trial, not the culpability of the prosecutor.” *State v. Underwood* (1991), 73 Ohio App.3d 834, 840-841, 598 N.E.2d 822, 826, citing *Smith v. Phillips* (1982), 455 U.S. 209, 219, 102 S.Ct. 940, 947, 71 L.Ed.2d 78, 87-88. An appellate court should also consider whether the misconduct was an isolated incident in an otherwise properly tried case. *State v. Keenan* (1993), 66 Ohio St.3d 402, 410, 613 N.E.2d 203, 209-210; *Darden v. Wainwright* (1986), 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144.

**{¶38}** Appellant did not object to the comments to which he now claims error. Therefore, for those instances, we must find plain error in order to reverse.

**{¶39}** The defendant bears the burden of demonstrating that a plain error affected his substantial rights. *United States v. Olano* (1993), 507 U.S. at 725,734, 113 S.Ct. 1770; *State v. Perry* (2004), 101 Ohio St.3d 118, 120 802 N.E.2d 643, 646. Even if the defendant satisfies this burden, an appellate court has discretion to disregard the error and should correct it only to ‘prevent a manifest miscarriage of justice.' " *State v. Barnes* (2002), 94 Ohio St.3d 21, 27, 759 N.E.2d 1240, quoting *State v. Long* (1978), 53

Ohio St.2d 91, 372 N.E.2d 804, paragraph three of the syllabus. *Perry*, supra, at 118, 802 N.E.2d at 646.

**{¶40}** Initially, Appellant argues that the first instant of misconduct occurred during opening statements when the Prosecutor stated:

**{¶41}** "It was a nice day. Bobby White was casing the neighborhood looking for a place to break into. He found the house of Stanley and Opal Marshall. Looked like a nice house. He walked by it several times. Looked like it would be an easy place to break into. Sadly it was …" (T. at 89).

**{¶42}** As the video in the instant case showed the perpetrator walking past the Marshalls' house a number of times before cutting the screen on the back door and entering, we find no plain error in the State's characterization of the events.

**{¶43}** Appellant also claims that the prosecutor misled the jury by stating:

**{¶44}** "Stanley is one of those people who knows just how much money he had; one twenty, two fives and six ones, some change off the dresser." (T. at 91).

**{¶45}** Upon review, we find that Stanley Marshall's testimony differed on direct and cross-examination. On direct he testified:

**{¶46}** "I had a 20, 2 fives and I don't remember how much ones was there but there was some coins laying there, and they were gone." (T. at 108).

**{¶47}** On cross-examination he testified:

**{¶48}** "… I told them that it was a twenty, 2 tens, and I didn't know how many ones the was but 2 five's – twenty and 2 fives and a few ones. (T. at 112).

**{¶49}** While it is unclear if Mr. Marshall meant to say that he had two ten dollar bills or not, it is within the province of the jury to consider the witness' testimony and to

resolve any evidentiary inconsistencies. Given that Mr. Marshall was able to identify the denominations of the bills he had on his dresser, we do not find that the prosecution's statement was a false characterization of the evidence.

**{¶50}** Appellant further claims that the prosecutor committed misconduct by making the following statements during closing argument:

**{¶51}** "So while I'm stealing out of the Marshall's house, perhaps one of the nicest couples in Canton, Ohio, I get to steal a gun too. A gun that is loaded with ammunition. So I get to steal the deed to their house…" (T. at 186).

**{¶52}** " ***

**{¶53}** "When Opal and Stanley finished their yard work for the day, the house in that neighborhood they have spent forty years of their life in, they locked their doors. They should have been safe. They shouldn't have had to worry about Bobby White." (T. at 187).

**{¶54}** Appellant claims that these statements played upon the sympathy of the jurors and further preyed upon their desire to be safe in their own homes. (Appellant's brief at 11-12).

**{¶55}** A prosecutor is entitled to a certain degree of latitude in closing arguments. *State v. Liberatore* (1982), 69 Ohio St.2d 583, 589, 433 N.E.2d 561. Thus, it falls within the sound discretion of the trial court to determine the propriety of these arguments. *State v. Maurer* (1984), 15 Ohio St.3d 239, 269, 473 N.E.2d 768. A conviction will be reversed only where it is clear beyond a reasonable doubt that, absent the prosecutor's comments, the jury would not have found the defendant guilty. *State v. Benge,* 75 Ohio St.3d 136, 141, 1996-Ohio-227. Furthermore, "[i]solated comments by

a prosecutor are not to be taken out of context and given their most damaging meaning." *Donnelly v. DeChristoforo* (1974), 416 U.S. 637, 647, 94 S.Ct. 1868, 40 L.Ed.2d 431.

**{¶56}** Further, the court properly advised the jury that closing arguments of counsel are not evidence.

**{¶57}** A jury is presumed to follow instructions given it by the court. *State v. Henderson* (1988), 39 Ohio St.3d 24, 528 N.E.2d 1237. Appellant has failed to establish beyond a reasonable doubt that, absent the prosecutor's comments, the jury would not have found the defendant guilty. *State v. Benge,* 75 Ohio St.3d 136, 141, 1996-Ohio-227. See *State v. Campbell* (1994), 69 Ohio St.3d 38, 51 (where the Court opined that it was implausible for that defendant to argue that the jury determined a capital case based on a minor legal misstatement made by the state during voir dire).

**{¶58}** Upon review, we find no error plain or otherwise. No misconduct occurred because of the prosecutor's comments. Under these circumstances, there is nothing in the record to show that the jury would have found Appellant not guilty had the comments not been made on the part of the prosecution. *State v. Benge,* 75 Ohio St.3d 136, 141, 1996-Ohio-227.

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

**{¶60}** For the forgoing reasons, the judgment of the Court of Common Pleas, Stark County, Ohio, is affirmed.

By: Wise, J.

Gwin, P. J., and

Hoffman, J., concur.

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JUDGES

JWW/d 810

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

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|---|---|---|
| STATE OF OHIO | : | |
| Plaintiff-Appellee | : | |
| -vs- | : | JUDGMENT ENTRY |
| BOBBY BELL WHITE | : | |
| Defendant-Appellant | : | Case No. 2009 CA 00053 |

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Stark County, Ohio, is affirmed.

Costs assessed to Appellant.

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JUDGES