[Cite as *State v. Ochoa*, 2004-Ohio-6465.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio — Court of Appeals No. L-03-1197

Appellee — Trial Court No. CR-2003-1891

v.

Justin Ochoa — **DECISION AND JUDGMENT ENTRY**

Appellant — Decided: December 3, 2004

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
James E. Vail, Assistant Prosecuting Attorney, for appellee.

Deborah Kovac Rump, for appellant.

* * * * *

SINGER, J.

{¶ 1} This is an appeal from a judgment of conviction on a jury verdict for felonious assault with a firearm specification issued by the Lucas County Court of Common Pleas. For the following reasons, we affirm appellant's conviction and sentence.

{¶ 2} On July 2, 2002, a group of between 15 and 25 teenagers gathered late at night in a park near Lake Erie in eastern Lucas county. The teens, representing factions

from Toledo's eastside and Northwood, were ostensibly present to oversee a fight between a representative of each side over a girl.

{¶ 3} Jamin Cannon is from Toledo's east side and was present at the gathering. Cannon later testified, however, that as he walked into the street he heard what he believed was a distant gunshot. A short time later, Cannon reported, when he heard what he believed was a second gunshot, he was knocked off his feet, struck in the face, chest and leg by shotgun pellets. He was later treated for these wounds. Another eastsider, Cody Conine, was also injured slightly at the same time.

{¶ 4} Police eventually arrested appellant, 17-year-old Justin Ochoa, for the shooting. Following a hearing in juvenile court, appellant was bound over to be tried as an adult. On April 14, 2003, the Lucas County Grand Jury handed down an indictment, charging appellant with two counts of felonious assault, each with a firearm specification.

{¶ 5} At trial, the principal witness against appellant was 18-year-old Joseph Donaldson. Donaldson testified that that it was he who brought a 12 gauge shot gun to the fight and that he fired the first shot from the weapon into the air. According to Donaldson, he then gave the shotgun and a second shell to appellant. Donaldson testified that he saw appellant load the gun, aim it toward the crowd and fire.

{¶ 6} Following trial, the jury found appellant guilty of one count of felonious assault with a firearm specification, but acquitted on the count and specification involving Cody Conine. The trial court accepted the verdict and, following a presentence investigation, sentenced appellant to a term of incarceration of three years to be served

following the statutorily mandated three-year term for the gun specification. From this judgment and sentence, appellant now brings this appeal.

{¶ 7} Appellant advances the following four assignments of error:

{¶ 8} "I. The prosecutor engaged in misconduct by repeatedly making prejudicial and improper statements during closing arguments.

{¶ 9} "II. Appellant did not receive effective assistance of counsel at the trial court level.

{¶ 10} "III. Appellant was convicted on the uncorroborated testimony of an accomplice, for which no cautionary instructions were given to the jury.

{¶ 11} "IV. The sentence received by appellant was not consistent with sentences imposed by similar crimes committed by similar offenses."

{¶ 12} Appellant's brief is captioned "MOTION TO REMAND FOR FURTHER FACTUAL FINDINGS OR APPELLANT'S BRIEF." According to appellant, this matter should be remanded to the trial court, "* * * to have a hearing to determine if a new trial is warranted * * *." Appellant suggests that this is necessary because the appellate record fails to include factual matters which should have been raised during trial.

{¶ 13} The composition of the appellate record is defined by App.R. 9. That rule also provides several methods by which omissions or errors in the record may be rectified. See App.R. 9(C), (D), and (E). Here, however, appellant does not contend that there is any portion of the App.R. 9 record which has been omitted. Rather, he wants a

new trial so that he may place into the record evidence which was never before the trial court.

{¶ 14} Crim.R. 33(B) provides that, except where premised on newly discovered evidence, a motion for a new trial must be raised in the trial court within 14 days after a verdict is rendered. Appellant raises no issue of evidence which was not available at the time of the trial; therefore, any new trial motion at this point would be well out of rule. Accordingly, appellant's request for a remand is denied.

Prosecutorial Misconduct

{¶ 15} In this first assignment of error, appellant enumerates a catalog of statements made by the state during closing argument that appellant insists were improper. Candidly, however, appellant concedes that only one of these prosecutorial transgressions was objected to at trial and the remainder were, therefore, waived absent plain error. See *State v. Wogenstahl* (1996), 75 Ohio St.3d 344, 357, citing *State v. DeNicola* (1955), 163 Ohio St. 140, paragraph three of the syllabus. Plain error exists only when it can be said that, but for the error, the outcome of the trial would have been different. Id., citing *State v. Wickline* (1990), 50 Ohio St.3d 114, 120; Crim.R. 52(B).

{¶ 16} Appellant's trial counsel actually objected twice during the state's closing argument. One of the objections was sustained, but both went to arguments relating to the count for which appellant was acquitted. Error relating wholly to a criminal charge for which appellant was found not guilty cannot form the basis for reversal upon a charge for which he was convicted.

{¶ 17} Appellant also insists that the prosecutor vouched for the truthfulness of witnesses, exaggerated the victims' injuries, and argued without evidence that the motive for the shooting was a "turf war."

{¶ 18} It is improper for a prosecutor to vouch for the credibility of a witness. *State v. Draughan* (1992), 76 Ohio App.3d 664, 670. There is a substantial difference, however, between saying "I believe this witness" and saying "The evidence supports the conclusion that the [witness is] telling the truth." Id. The former implicates the credibility and status of the prosecutor, usurping the jury's function to determine the truth. This is improper. The latter is merely argument that the evidence suggests that a witness is or is not being truthful.

{¶ 19} The prosecutor's words, of which appellant complains, are, inter alia:

{¶ 20} "* * * Has Jamin Cannon deceived us? No. Again, let's review [his] testimony as it was given. Jamin Cannon, if he wanted to just say something to convict this defendant, Justin Ochoa, he would have said, yeah, I saw him and he's the one who did it. But no, he tells us what he saw, what happened."

{¶ 21} This is clearly argument, not voucher. The same is true of the state's suggestion that appellant's motive may have been to protect his turf. It takes little by way of inference to suggest that a group of 25 teenagers from different communities who come together in a dark isolated park in the middle night might be there for something other than a picnic. This is a fair inference on the state's part.

{¶ 22} The state also argued that since the victim testified that he still had pellets lodged near his eye, future problems were a possibility. This is proper argument. We see no prosecutorial overreaching here.

{¶ 23} Accordingly, appellant's first assignment of error is not well-taken.

Effective Assistant of Counsel

{¶ 24} In his second assignment of error, appellant maintains that he was denied effective assistance of counsel.

{¶ 25} "A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction * * * has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. * * * Unless a defendant makes both showings, it cannot be said that the conviction * * * resulted from a breakdown in the adversary process that renders the result unreliable." *Strickland v. Washington* (1984), 466 U.S. 668, 687. Accord *State v. Smith* (1985), 17 Ohio St.3d 98, 100.

{¶ 26} Scrutiny of counsel's performance must be deferential. *Strickland v. Washington* at 689. In Ohio, a properly licensed attorney is presumed competent and the burden of proving ineffectiveness is the defendant's. *State v. Smith*, supra. Counsel's actions which "might be considered sound trial strategy," are presumed effective. *Strickland v. Washington* at 687. "Prejudice" exists only when the lawyer's performance renders the result of the trial unreliable or the proceeding unfair. Id. Appellant must

show that there exists a reasonable probability that a different verdict would have been returned but for counsel's deficiencies. See id. at 694. See, also, *State v. Lott* (1990), 51 Ohio St.3d 160, for Ohio's adoption of the *Strickland* test.

{¶ 27} Appellant suggests that trial counsel was ineffective for failing to object to prosecutorial misconduct in closing as discussed in this first assignment of error, as well as failure to object to other trial irregularities and failure to challenge identity testimony by raising the issue of appellant's identical twin brother. Appellant asserts all of these were "bad tactical decisions."

{¶ 28} As we discussed in appellant's first assignment of error, the prosecutorial misconduct that appellant asserts simply is not confirmed in the record. Moreover, as appellant concedes, the remainder of his complaints are premised on tactical decisions which may not form the basis of a finding of ineffective counsel. Finally, there is nothing in the record to suggest that appellant has an identical twin brother.

{¶ 29} Accordingly, appellant's second assignment of error is not well-taken.

Accomplice Testimony

{¶ 30} Appellant, in his third assignment of error, insists that because Joseph Donaldson brought to the scene the shotgun that appellant shot, he is an accomplice to the crime. Because Donaldson's testimony was that of an accomplice, appellant asserts, the trial court should have included in its jury charge the cautionary instructions mandated by R.C. 2923.03(D). Again, appellant concedes that because his trial counsel failed to request such an instruction or object to its absence, error is waived absent plain error.

{¶ 31} R.C. 2923.03(D) provides:

{¶ 32} "If an alleged accomplice of the defendant testifies against the defendant in a case in which the defendant is charged with complicity in the commission of or an attempt to commit an offense, an attempt to commit an offense, or an offense, the court, when it charges the jury, shall state substantially the following:

{¶ 33} "'The testimony of an accomplice does not become inadmissible because of his complicity, moral turpitude, or self-interest, but the admitted or claimed complicity of a witness may affect his credibility and make his testimony subject to grave suspicion, and require that it be weighed with great caution.

{¶ 34} "'It is for you, as jurors, in the light of all the facts presented to you from the witness stand, to evaluate such testimony and to determine its quality and worth or its lack of quality and worth.'"

{¶ 35} In this matter, although the statutory instruction was not included in the jury charge, evidence was adduced at trial that Donaldson had entered into an agreement with the state in which the state agreed not to prosecute him in return for his testimony. With respect to this, the court specifically instructed the jury that:

{¶ 36} "There has also been evidence that Joseph Donaldson entered into a plea agreement with the State under which he has received certain advantages. You may consider this plea agreement in judging the credibility of the witness."

{¶ 37} Given this cautionary instruction and that portions of Donaldson's testimony were corroborated by other witnesses, we cannot say that the trial court's failure to give the statutory instruction materially prejudiced appellant. There is certainly

nothing presented by which we could conclude that the absence of instruction altered the outcome of the trial. Accordingly, appellant's third assignment of error is not well-taken.

Inconsistent Sentences

{¶ 38} In his remaining assignment of error, appellant asserts that his sentence is inconsistent with the sentence imposed for crimes committed by similar offenders. Specifically, appellant complains that Joseph Donaldson, who supplied the gun and the ammunition and fired the first shot, escaped punishment entirely. Moreover, the others who organized the fight, brought weapons of their own, and created the dangerous environment that night, were not charged in any manner.

{¶ 39} Appellant misunderstands the meaning of the statutory direction that criminal sentences should be, "* * * consistent with sentences imposed for similar crimes committed by similar offenders." R.C. 2929.11(B). This means a broad comparison between the sentence imposed for the offense of which appellant has been convicted with the sentences of similar defendants in similar cases. *State v. Short*, 6th Dist. No. L-03-1117, 2004-Ohio-2050, at ¶5.

{¶ 40} Appellant directs our attention to no other similar cases and/or similar defendants who have received more favorable sentencing than he has. Accordingly, appellant's fourth assignment of error is not well-taken.

{¶ 41} On consideration whereof, the judgment of the Lucas County Court of Common Pleas is affirmed. Costs to appellant pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4, amended 1/1/98.

Peter M. Handwork, P.J. _____

_____
JUDGE

Judith Ann Lanzinger, J. _____

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Arlene Singer, J. _____ JUDGE

CONCUR.

_____
JUDGE