

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

State of Ohio

Court of Appeals No. L-03-1025

Appellee

Trial Court No. CR-02-2976
CR-02-2352

v.

Dustin Lawler

DECISION AND JUDGMENT ENTRY

Appellant

Decided: January 14, 2005

* * * * *

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

Jeffrey M. Gamso and Ronnie L. Wingate, for appellant.

* * * * *

KNEPPER, J.

{¶ 1} This is an appeal from a judgment of the Lucas County Court of Common Pleas, following a jury trial, in which appellant, Dustin M. Lawler, was found guilty of one count of complicity to commit aggravated robbery with a firearm specification, in violation of R.C. 2911.01(A)(1) and 2941.145, and was sentenced to serve a total of seven years in prison. For the following reasons, we affirm the judgment of the trial court.

{¶ 2} On appeal, appellant sets forth the following four assignments of error:

{¶ 3} "Assignment of error No. 1

"The trial court abused its discretion in permitting Jonas Overton to testify despite his violation of an order for separation of witnesses pursuant to Evid.R. 615. * * *

{¶ 4} "Assignment of error No. 2

{¶ 5} "The prosecutor committed prejudicial misconduct in telling the jury during voir dire that Baker and Lawler in fact committed the offense of aggravated robbery and by vouching for the credibility of his witnesses during rebuttal closing argument. * * *

{¶ 6} "Assignment of error No. 3

{¶ 7} "Defense counsel's representation was so deficient and prejudicial as to deprive Baker and Lawler of their constitutional right to the effective assistance of counsel.

{¶ 8} "Assignment of error No. 4

{¶ 9} "The court erred in imposing sentence outside the defendants' presence."

{¶ 10} On June 23, 2002, Eldwin Ottrix, Jonas Overton, Kareem Johnson, and Stephanie White drove a 1985 Monte Carlo to the Club Liquid, also known as the Bubble Up, in Toledo, Ohio. Appellant and Baker were in the parking lot at the club. After driving through the parking lot, Ottrix drove to White's home. When Ottrix stopped the car, two men approached. One of the men brandished a gun and ordered Ottrix and the others to exit the Monte Carlo. A scuffle ensued and a gunshot was heard. The men then took off in the Monte Carlo. Witnesses at the scene identified the two men as appellant and Baker.

{¶ 11} On July 16, 2002, appellant and Baker were indicted by the Lucas County Grand Jury on one count each of aggravated robbery in violation of R.C. 2911.01(A)(1), a first degree felony, robbery in violation of R.C. 2911.02(A)(2), a second degree felony, and intimidation of a crime victim or witness, in violation of R.C. 2921.04(B), a third degree felony. A gun specification was added to the aggravated robbery charge pursuant to R.C. 2941.145. Both defendants pled not guilty.

{¶ 12} A jury trial was held on December 9, 2002, at which the state presented testimony by Ottrix, Overton, and Toledo Police Detective Sherri Wise. Before testimony was presented, the prosecutor told the trial court that the parties agreed to a separation of witnesses. The trial court then stated:

{¶ 13} "So all people expecting to testify in the case will remain outside until they are called as witnesses. I'll leave it up to counsel to police this order."

{¶ 14} Ottrix testified at trial that it was Baker who pulled the car door open, showed him a small handgun, and ordered Ottrix and the others to exit the Monte Carlo. Ottrix stated that he ran away after exiting the car; however, he turned when he heard gunshots fired and saw Johnson struggling with appellant and Baker. Ottrix further testified that appellant and Baker followed him to his grandmother's house on July 15, 2002, the day before he was to testify before the grand jury, yelled something at him, and left.

{¶ 15} When Overton was called to testify, he rose from a seat in the back of the courtroom. Appellant's attorney objected and moved to exclude Overton's testimony, on the basis that the trial court had granted the parties' request for a separation of witnesses.

The trial court then questioned Overton in chambers. When asked how long he had been in the courtroom, Overton replied that he came in "at the end" of Ottrix's testimony, and he did not pay attention to what Ottrix was saying. Defense counsel told the court that he did not make sure that Overton was outside the courtroom during Ottrix's testimony because he did not know what Overton looked like. The trial court denied the motion to exclude Overton's testimony.

{¶ 16} Overton testified at trial that he, Ottrix, Johnson, and White left the club and drove to White's home in the Monte Carlo. Overton stated that three men drove up to White's house in another car, and that appellant and Baker carjacked the Monte Carlo, while the third unidentified man drove away. Overton further testified that Baker was holding a small caliber gun when he approached the Monte Carlo, and that when Baker attempted to fire the gun it misfired before firing one shot. Overton stated that by the time the Monte Carlo was recovered on July 7, 2002, it had sustained a lot of damage, including a bullet hole.

{¶ 17} Detective Wise testified that she arrived at White's home shortly after the carjacking was reported to 911. Wise stated that she found one unspent bullet and one spent cartridge, both .22 caliber, at the scene. Wise further testified that she interviewed Ottrix, Overton, and Johnson; however, no one inside White's house would speak to the police. Wise further stated that the unspent bullet had a dent in it that was probably caused by jamming in the cartridge.

{¶ 18} After Wise's testimony, the prosecution rested, and the defense presented testimony by Stephanie White. White stated that she was with Ottrix, Overton, and

Johnson in the club parking lot when Baker approached the Monte Carlo and began flirting with White. White stated that Overton, Ottrix, and Johnson got out of the car and that Ottrix argued with an unknown female, after which they all got back into the Monte Carlo and drove to White's home. White testified that she got out of the car and went into the house just before she heard a noise that sounded like gunshots being fired. At the close of White's testimony, the defense rested.

{¶ 19} The jury found appellant guilty of complicity to commit aggravated robbery with a gun specification, and not guilty of intimidation. The alternative charge of robbery was dismissed.

{¶ 20} A sentencing hearing was held on January 3, 2003, at which appellant was present, along with counsel. The trial court reviewed the record, which included appellant's prior criminal history and a later conviction for aggravated assault that arose while appellant was awaiting trial in this case. Appellant then apologized for his actions and stated that he was anxious to "move on." The trial court sentenced appellant to five years in prison for the offense of complicity to commit aggravated robbery, and a consecutive, mandatory three year sentence for the gun specification, for a total of eight years.

{¶ 21} On January 9, 2003, appellant filed a motion for reconsideration and modification of his sentence. In support thereof, appellant argued that the court had jurisdiction to modify the sentence pronounced on January 3, 2003, because it had not yet been journalized. Appellant further argued that information in the presentence

investigation report and letters sent on his behalf by family and friends demonstrated the presence of mitigating circumstances in his favor.

{¶ 22} On January 14, 2003, a hearing was held on appellant's motion to modify, at which appellant was present, along with defense counsel. Defense counsel stated that a modification of appellant's sentence would allow him to qualify for judicial release, thereby giving him additional motivation for changing his behavior. Appellant told the trial court that a lesser sentence would give him a "more positive attitude to look forward to coming out to a better life and not so far down the road." The state opposed modification of the sentence. The trial court took the matter under advisement. On January 27, 2003, the trial court filed a judgment entry in which it reduced appellant's sentence for complicity to commit aggravated robbery from five years to four years. The rest of appellant's sentence remained unchanged. A timely appeal was filed.

{¶ 23} Appellant asserts in his first assignment of error that the trial court erred when it allowed Overton to testify over defense counsel's objection. In support thereof, appellant argues that, since the jury did not convict either defendant of witness intimidation, they must have doubted Ottrix's credibility. Appellant concludes, therefore, that Overton's testimony was prejudicial because, without it, appellant would not have been convicted of any crime.

{¶ 24} The purpose of separating witnesses is to prevent them from hearing the testimony of other witnesses and tailoring their testimony accordingly. *State v. Waddy* (1992), 63 Ohio St.3d 424,434, certiorari denied (1992), 506 U.S. 921, 121 L. Ed. 2d 255, citing Evid.R. 615. Generally, a trial court's determination to allow a witness to testify

despite a violation of its separation order will not be reversed on appeal absent an abuse of discretion. *State v. Tichon* (1995), 102 Ohio App.3d 758, 764, citing *State v. Morris* (1982), 8 Ohio App.3d 12, 17. In reviewing the trial court's actions, an appellate court must keep in mind that "[e]vidence should not be excluded unless procurement of the violation by the opposing party, or his connivance in it, is shown. The preferred sanction is simply to allow the transgression to reflect upon the witness's credibility." *State v. Williams* (Oct. 16, 1998), 2d Dist. App. No. 97-CA-0131, citing *State v. Franklin* (1991), 62 Ohio St.3d 118, certiorari denied (1992), 504 U.S. 960, 119 L. Ed. 2d 235.

{¶ 25} It is undisputed that the record contains no evidence that the prosecution improperly procured Overton's presence in the courtroom. It is further undisputed that defense counsel failed to exclude Overton from the courtroom because he did not recognize him. In addition, Overton told the trial court that he came into the room at the end of Ottrix's testimony, and he did not pay attention to what Ottrix said. Contrary to appellant's assertion, the record contains no indication that the jury failed to convict appellant of witness intimidation because Ottrix's testimony was not credible.

{¶ 26} On consideration of the foregoing, this court finds that appellant has failed to demonstrate that Overton's testimony was overly prejudicial. Accordingly, the trial court did not abuse its discretion or otherwise err by allowing Overton to testify over defense counsel's objection. Appellant's first assignment of error is not well-taken.

{¶ 27} Appellant asserts in his second assignment of error that remarks made by the prosecutor during the course of the trial amounted to prosecutorial misconduct. In support thereof, appellant argues that the prosecutor stated as fact in his opening remarks

that appellant and Baker took a vehicle from Ottrix and improperly vouched for Ottrix's and Overton's credibility in his closing remarks.

{¶ 28} Because defense counsel failed to object to the alleged improper comments, he waived all but plain error. *State v. Slagle* (1992), 65 Ohio St.3d 597, 604, certiorari denied (1996), 516 U.S. 1052, 133 L. Ed. 2d 672; Crim.R. 52(B). "[W]hen a court of appeals engages in a plain-error analysis, it must conduct a complete review * * * in order to determine whether a manifest miscarriage of justice has occurred that clearly affected the outcome of the trial." *State v. Hill* (2001), 92 Ohio St.3d 191, syllabus. In other words, we must determine whether the jury would have convicted appellant even if the alleged errors had not occurred. *Slagle*, supra, at 605.

{¶ 29} The record shows that, during voir dire, the prosecutor told the jury: "I may make a mistake and I say I suggest that the evidence shows this or I believe this or something like that in opening arguments or closing arguments." Later, the prosecutor told the jury:

{¶ 30} "Okay. Now, the facts in this case involve Mr. Baker and Mr. Lawler having a gun and - and taking a car that was being driven by Edwin Ottrix."

{¶ 31} During closing, defense counsel told the jury that, in deciding appellant's guilt or innocence, "you have got to evaluate Mr. Ottrix and his credibility, and we know that either he's lying or [Overton] is lying or they are both lying because they both talk about the different things that happened to them sometime on the same day. Impossible.

* * *." During his rebuttal closing remarks the prosecutor, addressing defense counsel's attacks on the witness's credibility, stated: "you know, I put up credibility and this strikes me as being very credible. * * * Credible? Absolutely. If [Otrix] is going to conspire about the whole thing. He isn't conspiring, he is very credible. Mr. Overton is very credible."

{¶ 32} While instructing the jury, the trial court stated:

{¶ 33} "Evidence is all the testimony received from the witnesses, exhibits admitted during the trial and any facts stipulated by counsel. Evidence may be direct or circumstantial or both. * * *

{¶ 34} "Now, the evidence does not include the indictment, the opening statements or closing arguments of counsel. The opening statements and closing arguments of counsel are designed to assist you, but they are not evidence."

{¶ 35} As set forth above, evidence as to appellant's guilt was presented through the testimony of three witnesses, including Otrix and Overton. After reviewing the entire transcript of appellant's trial, we cannot say that a reasonable jury would not have convicted appellant if those statements had not been made by the prosecutor during voir dire. See *State v. Slagle*, supra; *State v. Campbell* (1994), 69 Ohio St.3d 38, certiorari denied (1994), 513 U.S. 913, 130 L. Ed. 2d 204.

{¶ 36} As for appellant's claim that the prosecutor's statements during closing were improper, it is well-settled that "[a] prosecutor's remarks constitute misconduct if the remarks were improper and if the remarks prejudicially affected an accused's substantial rights." *State v. Williams* (2003), 99 Ohio St.3d 439, 447, ¶44,

certiorari denied (2004), ___ U.S. ___, 158 L. Ed. 2d 406, citing *State v. Smith* (1984), 14 Ohio St.3d 13. "The touchstone of this analysis 'is the fairness of the trial, not the culpability of the prosecutor.'" *Id.*, quoting *Smith v. Phillips* (1982), 455 U.S. 209, 219.

{¶ 37} As set forth above, the prosecutor's remarks were made during rebuttal closing, in direct response to defense counsel's statements that Ottrix's and Overton's testimony could not possibly be credible. In the context of closing arguments, such statements are considered proper, since "[p]rosecutors are entitled to latitude as to what the evidence has shown and what inferences can be drawn therefrom." *State v. Richey* (1992), 64 Ohio St.3d 353, 362. We further note that, following closing arguments, the trial court gave the jury instructions, including the above-quoted admonition that counsel's closing statements are not to be considered as evidence. Accordingly, we cannot say that the prosecutor's statements were improper or overly prejudicial to appellant.

{¶ 38} This court has considered the entire record of proceedings that was before the trial court and, upon consideration thereof and the law, we find no indication that a manifest miscarriage of justice occurred that clearly affected the outcome of appellant's trial. Accordingly, the prosecutor's statements during voir dire and closing argument do not rise to the level of plain error. Appellant's second assignment of error is not well-taken.

{¶ 39} Appellant asserts in his third assignment of error that he received ineffective assistance of retained counsel at trial. In support thereof, appellant argues that defense counsel's representation was deficient because counsel did not cross-examine

Overton as to his presence in the courtroom during Ottrix's testimony; he failed to object to the prosecutor's alleged misconduct; and he did not object to a comment made by Overton that someone offered Overton money to not testify against appellant and Baker.

{¶ 40} Reversal of a conviction based on the ineffective assistance of counsel requires a deficient performance, in other words, "errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment;" and prejudice to the defendant that is "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland v. Washington* (1984), 466 U.S. 668, 687. As to whether counsel's performance was deficient, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. Accordingly, the burden is on the appellant to show counsel's ineffectiveness. *State v. Hamblin* (1988), 37 Ohio St.3d 153, certiorari denied (1988), 488 U.S. 975, 102 L. Ed. 2d 550

{¶ 41} The record shows that defense counsel objected to Overton's presence in the courtroom during Ottrix's testimony, and later questioned Overton in chambers as to whether he was influenced by Ottrix's testimony. In addition, the record shows that defense counsel did question Overton as to the offer of money in exchange for his refusal to testify. The decision to refrain from drawing further attention to either matter on cross-examination before the jury falls within the scope of sound trial strategy. See *State v. Campbell* (2000), 90 Ohio St.3d 320, 339.

{¶ 42} As to the alleged prosecutorial misconduct, we have previously determined that such remarks were not overly prejudicial. Accordingly, defense counsel's decision

not to object to the prosecutor's remarks does not mandate a finding of ineffective assistance of counsel. See *State v. Smith* (2000), 87 Ohio St.3d 424, 440, certiorari denied (2002), 537 U.S. 951, 154 L. Ed. 2d 298. Appellant's third assignment of error is not well-taken.

{¶ 43} Appellant asserts in his fourth assignment of error that the trial court erred by filing a sentencing judgment entry on January 27, 2003, that differed from the sentence it orally pronounced on January 3, 2003. In support thereof, appellant argues that, pursuant to Crim.R. 43(A), he had an absolute right to be present when the court imposed his modified sentence.

{¶ 44} Crim.R. 43(A) states, in relevant part, that:

{¶ 45} "The defendant shall be present at the arraignment and every stage of the trial, including the impaneling of the jury, the return of the verdict, and the imposition of sentence, * * *."

{¶ 46} Interpreting the wording of Crim.R. 43(A), the Ohio Supreme Court has held that the right of a defendant to be present at all stages of a criminal proceeding is not absolute. *State v. Hill* (1995), 73 Ohio St.3d 433, 444, certiorari denied (1996), 516 U.S. 1079, 133 L. Ed. 2d 738. The distinction to be made is whether the proceeding is so critical that the defendant's absence results in a prejudicial error, thereby thwarting a fair and just hearing. *State v. White* (1998), 82 Ohio St.3d 16, 26, certiorari denied (1998), 525 U.S. 1057, 142 L. Ed. 2d 562, citing *Snyder v. Massachusetts* (1934), 291 U.S. 97, 108. See, also, *State v. Ranieri* (1992), 84 Ohio App.3d 432 (Crim.R. 43(A) was violated

where the trial court journalized a modification of the defendant's sentence without holding a hearing "prior to or in conjunction with [his] resentencing * * *." Id. at 434).

{¶ 47} As set forth above, a sentencing hearing was held on January 3, 2003, at which appellant was sentenced to an aggregate prison sentence of eight years. It is undisputed that no judgment entry containing the January 3 sentence was ever journalized. In his motion for a modification of sentence filed on January 9, 2003, appellant specifically asked the trial court to reduce his eight-year sentence to seven years, so that he would be eligible to apply for judicial release in the future. After holding a hearing at which appellant was present, and then taking the matter under advisement, the trial court filed a judgment entry on January 27, 2003, in which it granted appellant's request and reduced appellant's sentence from eight to seven years.

{¶ 48} Upon consideration of the foregoing, we find that appellant received a fair and just hearing on the motion to modify his sentence. Accordingly, appellant was not unduly prejudiced when the trial court journalized a lesser sentence several weeks after the hearing. Appellant's fourth assignment of error is not well-taken.

{¶ 49} The judgment of the Lucas County Court of Common Pleas is affirmed. Pursuant to App.R. 24, costs of these proceedings are assessed to appellant.

JUDGMENT AFFIRMED.

STATE OF OHIO V. DUSTIN LAWLER
L-03-1025

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, J.

JUDGE

Richard W. Knepper, J.

JUDGE

Arlene Singer, P.J.
CONCUR.

JUDGE