

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

State of Ohio

Court of Appeals No. L-08-1142

Appellee

Trial Court No. CR07-2346

v.

Laron Young

**DECISION AND JUDGMENT**

Appellant

Decided: September 11, 2009

\* \* \* \* \*

Julia R. Bates, Lucas County Prosecuting Attorney, and  
Claudia A. Ford, Assistant Prosecuting Attorney, for appellee.

Neil S. McElroy, for appellant.

\* \* \* \* \*

OSOWIK, J.

{¶ 1} This is an appeal from a judgment of the Lucas County Court of Common Pleas that found appellant guilty of one count of burglary and sentenced him to four years incarceration. For the following reasons, the judgment of the trial court is affirmed.

{¶ 2} The undisputed facts relevant to the issues raised on appeal are as follows. On June 27, 2007, appellant was indicted on one count of burglary in violation of R.C. 2911.12(A)(2) and (C). Appellant entered a plea of not guilty. On August 2, 2007, appellant filed a motion to suppress his pretrial identification by the victim of the burglary. A hearing was held on the motion, and on November 21, 2007, the motion was denied. The matter proceeded to trial, and on April 14, 2008, the jury returned a verdict of guilty. The trial court sentenced appellant to four years incarceration.

{¶ 3} Appellant sets forth four assignments of error:

{¶ 4} "Assignment of Error no. 1:

{¶ 5} "The trial court's denial of Mr. Young's Motion to Suppress resulted in a violation of his right to due process as guaranteed by the Constitutions of the United States and the State of Ohio.

{¶ 6} "Assignment of Error no. 2:

{¶ 7} "Mr. Young was deprived of his right to a fair trial, guaranteed by the Constitutions of the United States and the State of Ohio, through prosecutorial misconduct.

{¶ 8} "Assignment of Error no. 3:

{¶ 9} "Mr. Young's right to confront the witnesses against him, as guaranteed by the Constitutions of the United States and the State of Ohio, was violated when the court permitted hearsay of a testimonial nature.

{¶ 10} "Assignment of Error no. 4:

{¶ 11} "The cumulative effect of the errors at trial was a violation of the appellant's right to a fair trial as guaranteed by the Fifth Amendment to the United States Constitution and by Art. I, §10 of the Ohio Constitution."

{¶ 12} In support of his first assignment of error, appellant argues that the victim's "one-on-one show up identification" of him the night of the burglary was unnecessarily suggestive and unreliable under the totality of the circumstances and therefore should have been suppressed. It is undisputed that appellant was identified by Wagner during a "one-on-one" identification, in which a witness is shown only one suspect within a relatively short period of time after an incident occurs.

{¶ 13} When considering a motion to suppress, the trial court assumes the role of trier of fact and is therefore in the best position to resolve factual questions and evaluate the credibility of witnesses. *State v. Smith*, 80 Ohio St.3d 89, 105, 1997-Ohio-355; *State v. Fanning* (1982), 1 Ohio St.3d 19, 20. This court is bound to accept the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Davis* (1999), 133 Ohio App.3d 114. Applying those facts, we must then independently determine as a matter of law whether the facts meet the appropriate legal standard. *State v. Klein* (1991), 73 Ohio App.3d 486, 488.

{¶ 14} At the suppression hearing, appellant presented the testimony of Brittni Wagner, whose home was burglarized, and Officer Jeff Bodeman, who responded to the

initial 9-1-1 call. Wagner testified that during the night of June 15, 2007, she awakened to see a man walking from her bedroom. She got up and followed the intruder out to the hallway. Wagner testified that the lights in her hallway, living room and kitchen had been left on all night. She stopped in the hallway "an arm's length away" from the man, looked him "dead in the eyes" and asked him who he was. The intruder told Wagner he was "the cops" and was looking for "T.J.," who was her roommate's boyfriend. Wagner testified that she turned away to tell her roommate that somebody wanted to see T.J. and when she turned around again the intruder was running out of her house. Wagner then walked into her living room and saw that some of her possessions had been stolen. She looked out the window and saw the taillights of a red car as it drove away.

{¶ 15} Wagner further testified that she had to go to a neighbor's house to call the police because the intruder had stolen her phone. When Officer Bodeman responded, she described the intruder as a tall, thin black man with a gold tooth. Wagner testified that about one hour after the burglary, Officer Bodeman told her he wanted to drive her to a location nearby to see someone who might be the intruder. As the officer drove Wagner by the location where appellant was standing handcuffed next to a police cruiser, he asked Wagner if that man was the intruder; she said that it was. Wagner also testified that the officer did not suggest to her that the man she saw was in fact the intruder.

{¶ 16} Officer Bodeman testified that when he arrived at Wagner's home, she described the intruder as a tall black man with a gold tooth and "Chuck" tattooed on his

arm. The officer testified that "T.J." thought he knew who the intruder was, based on Wagner's description, and gave the officer an address. Bodeman broadcast the description and address and shortly thereafter drove Wagner to the location where appellant was being held by other officers. Bodeman further testified that he told Wagner the officers had detained a suspect fitting her description of the intruder and further told her to "make sure that you take a good look at him and make sure that he's either the male that was inside your house or not."

{¶ 17} The legal standard to be met in this case is two-fold. First, the defendant must demonstrate that the challenged identification was unnecessarily suggestive. *State v. Freeman*, 8th Dist. No. 85137, 2005-Ohio-3480, ¶ 18. If that burden is met, we must then decide "whether the identification, viewed under the totality of the circumstances, is reliable despite the suggestive procedure." *State v. Torres*, supra, ¶ 80, citing *State v. Willis* (1997), 120 Ohio App.3d 320, 324-325.

{¶ 18} Although a one-on-one identification may be suggestive under certain circumstances, Ohio courts have held that under some circumstances, such as when the show-up occurs shortly after the time of the crime, the identification could be very accurate. *State v. Madison* (1980), 64 Ohio St.2d 322, 332, citing *Bates v. United States* (C.A.D.C. 1968), 405 F.2d 1104, 1106.

{¶ 19} In deciding whether a particular one-on-one identification was impermissibly suggestive, courts are to consider five factors: "(1) the opportunity of the

witness to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the criminal; (4) the level of certainty demonstrated by the witness; and (5) the length of the time between the crime and the confrontation." *State v. Thompson*, 8th Dist. No. 79938, 2002-Ohio-2390, ¶ 14-20, citing *Neil v. Biggers* (1972), 409 U.S. 188.

{¶ 20} In this case, it is undisputed that appellant was the only person shown to Wagner for identification. He was standing by a police cruiser and was handcuffed. The record also shows that Wagner identified appellant within approximately one hour of the burglary. Appellant matched the physical description Wagner had given Officer Bodeman immediately after the incident, as far as the intruder's race and size, the gold tooth and the tattoo. Wagner testified that she was only an arm's length away from appellant when she confronted him in her hallway, the lights were on, she was wearing her eyeglasses and she looked him "dead in the eyes." Wagner and appellant had a brief verbal exchange. When Wagner later identified appellant, she told Officer Bodeman appellant was "identical to the person that was in my house except for he had different clothes on." Officer Bodeman further testified that after Wagner looked at appellant, she told the officer she was "a hundred percent sure that's him, without a doubt."

{¶ 21} After considering the circumstances surrounding the identification of appellant in this case, we find that the identification was not unnecessarily suggestive and that there was not a substantial likelihood of misidentification. Therefore, we find that

the trial court did not err by denying appellant's motion to suppress. Appellant's first assignment of error is not well-taken.

{¶ 22} In his second assignment of error, appellant asserts that he was prejudiced by several instances of prosecutorial misconduct. Appellant states that the prosecutor's misconduct included (1) repeatedly appealing to the emotions of the jurors; (2) violating a stipulation related to an interrogation of the defendant wherein the defendant invoked his right to counsel; (3) insinuating that a defense witness was lying and (4) suggesting that the jury should "take however long it takes" to reach a verdict of guilty.

{¶ 23} Generally, a prosecutor's conduct at trial is not grounds for reversal unless that conduct deprives the defendant of a fair trial. *State v. Murray*, 6th Dist. No. L-04-1376, 2007-Ohio-4324, ¶ 36, citing *State v. Loza*, 71 Ohio St.3d 76, 78, 1994-Ohio-409. "The test for prosecutorial misconduct is whether the prosecutor's comments were improper and, if so, whether those remarks prejudicially affected the defendant's substantial rights." *State v. Eley*, 77 Ohio St.3d 174, 187, 1996-Ohio-323.

{¶ 24} Appellant footnotes each of the four claims with a reference to trial transcript pages but does not articulate how the conduct in each instance may have prejudicially affected his right to a fair trial. Rather than consider the prosecutor's conduct in the context of the entire trial, appellant refers to those isolated portions of the record. Without further explanation, appellant simply states that it is "nearly impossible to imagine the harm done by such repeated misconduct."

{¶ 25} As to appellant's claims of repeated appeals made to the jurors' emotions, appellant cites the prosecutor's statement during his opening remarks that "\* \* \* a lot more was taken from Brittni Wagner on June 15th. A lot more. She's lost her security. She's lost her sense of safety." Appellant also cites to two points during the trial when, in response to questions from the prosecutor, Wagner stated that she had moved from the address where the burglary occurred because she was "too scared" to stay there. Appellant does not explain how he was prejudiced in those instances. The evidence shows that appellant forced his way into Wagner's locked home during the night, confronted her and stole some of her possessions. We are unable to find that appellant's was prejudiced by the foregoing.

{¶ 26} Next, appellant asserts that the prosecutor violated a stipulated agreement "related to an interrogation of the defendant." Again, appellant does not specify the exact nature of the violation of his right to a fair trial, but merely cites to a page of the trial transcript. Appellant seems to focus on one question on the state's re-direct that, according to defense counsel at that time, may have made reference to information that was or was not gleaned from appellant's interrogation. Because appellant fails to show any prejudicial impact, this argument is without merit.

{¶ 27} Appellant also asserts that the prosecutor "insinuated" in one instance that a witness was lying when she stated, "You're doing really good. Have you ever testified in court before?" Defense counsel objected and the court admonished the prosecutor not to



make "comments." The question was stricken and the jury was admonished to disregard it. A jury is presumed to follow the trial court's instructions. *State v. Coleman*, 85 Ohio St.3d 129, 135, 1999-Ohio-258. Consequently, absent something to suggest that the presumption is invalid, we must conclude that appellant was not prejudiced by the comment or question. This argument is without merit.

{¶ 28} Finally, appellant claims that the prosecutor improperly "suggested that the jury should 'take however long it takes' to reach a verdict of guilty." Upon our review of the transcript, we find that appellant has not accurately represented the record in this regard. During closing argument, the prosecutor stated: "Gut feelings. If you head towards that door and you think, you know, God, I got a feeling he's guilty, but I just don't think the State made its case, please, turn back around, sit back down again for however long it takes --." Defense counsel interrupted the prosecutor with an objection and, during a bench discussion that followed, the court admonished the prosecutor not to tell the members of the jury that they have to continue deliberating after they have reached a verdict. Closing arguments then resumed. Generally, prosecutors are entitled to considerable latitude in opening and closing arguments. *State v. Ballew*, 76 Ohio St.3d 244, 1996-Ohio-81. Moreover, the prosecutor's conduct must be viewed in the context of the entire trial. *State v. Keenan* (1993), 66 Ohio St.3d 402, 410. Having reviewed the state's closing argument in the context of all of the evidence presented at trial, we find this argument to be without merit.

{¶ 29} Upon consideration of the foregoing, this court finds that appellant has not demonstrated that the outcome of his trial would have been different but for the prosecutor's statements. Accordingly, appellant's second assignment of error is not well-taken.

{¶ 30} In his third assignment of error, appellant asserts that his right to confront witnesses against him was denied when the trial court permitted hearsay that was testimonial in nature. Specifically, appellant argues that "a variety of witnesses" were permitted to testify as to statements attributed to T.J. Northrup, who was present at the time of the burglary but did not testify. We note that appellant does not support his claim with any specific pages of transcript or point to any specific witness statements. Appellant also does not identify any witnesses whom he believes provided such hearsay testimony. Having said that, in the interest of conducting a thorough review, we have examined any testimony referring to T.J. Northrup's statements following the burglary and find that Northrup's statements to Officer Bodeman were not testimonial in nature.

{¶ 31} The Confrontation Clause of the Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right \* \* \* to be confronted with the witnesses against him." This guarantee is made applicable to state prosecutions by the Fourteenth Amendment to the United States Constitution. *Pointer v. Texas* (1975), 380 U.S. 400, 406. This right guarantees that the prior testimonial statements of a witness who is unavailable at trial may not be admitted into

evidence unless the defendant had been given a prior opportunity to cross-examine the declarant so that the veracity of the statement could be challenged. *Crawford v. Washington* (2004), 541 U.S. 36, 53-54.

{¶ 32} In *State v. Reardon*, 168 Ohio App.3d 386, 2006-Ohio-3984, this court held that a declarant's statements were non-testimonial in nature where the police officer's interrogation was aimed at resolving a present emergency and apprehending the suspects before they escaped the area or harmed others in the process of escaping. Our focus in *Reardon*, which we determined was consistent with the prevailing interpretations of *Crawford*, was on the purpose of the police interrogation. See, *State v. Quinn*, 6th Dist. No. L-05-1302, 2007-Ohio-878.

{¶ 33} Following our decision in *State v. Reardon*, supra, the Ohio Supreme Court addressed the issue of distinguishing between testimonial and non-testimonial statements in *State v. Stahl*, 111 Ohio St.3d 186, 2006-Ohio-5482, ¶ 19. In *Stahl*, the court adopted a broad view of the *Crawford* holding and held that " \* \* \* the courts should focus on the expectation of the declarant at the time of making the statement \* \* \*."

{¶ 34} In the case before us, Officer Bodeman testified that he arrived at the scene in response to a dispatch reporting a burglary in progress. While at the scene, he interviewed several witnesses, including Northrup, who had been sleeping in Wagner's home at the time of the burglary. The record reflects that Northrup responded to Bodeman's questions, posed very shortly after Bodeman arrived on the scene, in an effort

to aid the police in apprehending the suspect. Northrup provided the officer with a home address for the person he believed might be the intruder, based on Wagner's statements. Upon consideration of the evidence and the law, we find that there is no indication Northrup made statements with the intent they be used as testimonial evidence against appellant. Under the circumstances of this case, a reasonable person would not have believed that his answers to the officer's questions would be used against the suspect at trial. Therefore, we find that Northrup's statements were non-testimonial and that the Confrontation Clause was not violated in this case.

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

{¶ 36} In support of his fourth assignment of error, appellant asserts that the cumulative effect of each "violation" of his rights which occurred during trial requires reversal of his conviction. Because we have found that no prejudicial errors occurred in the trial of appellant's case, there can be no cumulative error. Accordingly, appellant's fourth assignment of error is not well-taken.

{¶ 37} On consideration whereof, this court finds that appellant was not prejudiced or prevented from having a fair trial and the judgment of the Lucas County Court of Common Pleas is affirmed. Costs of this appeal are assessed to appellant.

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.

Peter M. Handwork, P.J.

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JUDGE

Arlene Singer, J.

Thomas J. Osowik, J.  
CONCUR.

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JUDGE

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JUDGE

<p>This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: <a href="http://www.sconet.state.oh.us/rod/newpdf/?source=6">http://www.sconet.state.oh.us/rod/newpdf/?source=6</a>.</p>
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