[Cite as *State v. Bynes*, 2009-Ohio-5182.]

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

State of Ohio — Court of Appeals No. L-07-1309

Appellee — Trial Court No. CR0200201476

v.

Donald W. Bynes — **DECISION AND JUDGMENT**

Appellant — Decided: September 30, 2009

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Jeffrey D. Lingo, Assistant Prosecuting Attorney, for appellee.

Jerry P. Purcel, for appellant.

* * * * *

HANDWORK, P.J.

{¶ 1} This case is before the court on appeal from the judgment of the Lucas County Court of Common Pleas which, on August 23, 2007, following a jury trial, found appellant, Donald Bynes, guilty of aggravated robbery, in violation of R.C.

2911.01(A)(1), a felony of the first degree, and guilty of the firearm specification, in violation of R.C. 2941.145. Having waived any rights to a presentence investigation and report, appellant was sentenced on August 23, 2007,[1] to serve four years in the Ohio Department of Rehabilitation and Corrections, with an additional three years consecutive mandatory term of incarceration as to the firearm specification, pursuant to R.C. 2929.14(D)(1).

{¶ 2} Appellant timely appealed his conviction and sentence and raises the following assignments of error on appeal:

{¶ 3} "1. The indictment charging appellant was constitutionally defective.

{¶ 4} "2. Appellant's conviction was based on insufficient evidence.

{¶ 5} "3. Appellant's conviction was against the manifest weight of the evidence.

{¶ 6} "4. Trial counsel rendered appellant ineffective assistance of counsel.

{¶ 7} "5. The prosecutor's conduct at trial denied appellant his constitutional right to a fair trial."

{¶ 8} Appellant argues in his first assignment of error that the indictment charging him with a violation of R.C. 2911.01(A)(1) was constitutionally defective because it failed to mention the requisite mens rea required to commit the offense. Appellant challenges the sufficiency of his indictment pursuant to *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624 ("*Colon I*").

[1]The judgment entry of sentencing was journalized on August 28, 2007.

{¶ 9} Relying on *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749 ("*Colon II*"), wherein the Ohio Supreme Court emphasized that the facts leading to their decision in *Colon I* were "unique" and that the syllabus in *Colon I* is confined to the facts in that case, this court has already determined that *Colon I* and *Colon II* apply only to cases in which a defendant has been indicted for the offense of robbery in violation of R.C. 2911.02(A)(2). *State v. Hill*, 6th Dist. No. WD-07-022, 2008-Ohio-5798, ¶ 21; and *State v. Walker*, 6th Dist. No. L-07-1156, 2008-Ohio-4614, ¶ 72. In this case, because appellant was indicted for the offense of aggravated robbery, in violation of R.C. 2911.01(A)(1), not robbery, in violation of R.C. 2911.02(A)(2), we find that *Colon I* and *Colon II* are inapplicable to this matter. Appellant's first assignment of error is therefore found not well-taken.

{¶ 10} Appellant argues in his second and third assignments of error that his conviction was against the sufficiency and manifest weight of the evidence. In particular, appellant argues that the state failed to establish beyond a reasonable doubt that appellant knowingly attempted theft because, at trial, there was no evidence that "appellant knew the money he attempted to take was not his," or that the amount he demanded was more than what he was owed. In fact, appellant asserts that because the victims agreed to get him the money he demanded, "he had every reason to believe his demand was accurate." Further, appellant argues that because the victims were crack cocaine addicts, and had been spending various amounts of money for different quantities of drugs on numerous occasions, and had been borrowing money from appellant for many months, the victim's

estimation that they owed appellant around $100 was not credible, since they were "likely * * * confused about how much money they owed appellant."

{¶ 11} Crim.R. 29(A) states that a court shall order an entry of judgment of acquittal if the evidence is insufficient to sustain a conviction of the offenses. As such, the issue to be determined with respect to a motion for acquittal is whether there was sufficient evidence to support the conviction. Sufficiency of the evidence and manifest weight of the evidence are quantitatively and qualitatively different legal concepts. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386.

{¶ 12} "Sufficiency" applies to a question of law as to whether the evidence is legally adequate to support a jury verdict as to all elements of a crime. Id. In making this determination, an appellate court must determine whether, "after viewing the evidence in a 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, paragraph two of the syllabus.

{¶ 13} When considering whether a judgment is against the manifest weight of the evidence in a bench trial, an appellate court will not reverse a conviction where the trial court could reasonably conclude from substantial evidence that the state has proved the offense beyond a reasonable doubt. *State v. Eskridge* (1988), 38 Ohio St.3d 56, 59. The court reviews the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether, in resolving conflicts in the evidence, the court "clearly lost its way and created such a manifest miscarriage of

justice that the conviction must be reversed and a new trial ordered." *Thompkins* at 387, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175. The discretionary power to grant a new trial should be exercised only in exceptional cases where the evidence weighs heavily against the conviction. Id.

{¶ 14} Appellant was convicted of aggravated robbery. R.C. 2911.01(A)(1), states that "[n]o person, in attempting or committing a theft offense, * * * or in fleeing immediately after the attempt or offense," shall "[h]ave a deadly weapon on or about the offender's person or under the offender's control and either display the weapon, brandish it, indicate that the offender possesses it, or use it."

{¶ 15} The victims, James and Nancy, testified that they had purchased crack cocaine from appellant on a number of occasions and, at first, had always paid him cash when the drugs were received. The victims met appellant through appellant's girlfriend's mother, Irene, who would regularly smoke crack cocaine with the victims. After establishing a relationship with appellant, appellant would "front" the victims crack cocaine, to be paid for at a later date. The victims testified that they owed appellant approximately $100 for crack cocaine, which appellant had fronted them between January and February 2002. The victims testified that they had moved their residence in an effort to avoid having to pay outstanding debts to appellant and other people who sold them crack.

{¶ 16} On March 1, 2002, appellant and another man arrived at the victim's home around 8:00 a.m. James answered the door, believing that it was his boss arriving to pick

him and Nancy up for work. When James saw that it was appellant, he struggled to get the door closed, and told Nancy to call the police. James testified that he tried to keep appellant out because he knew he owed appellant money for drugs and was scared of what appellant would do to attempt to collect the debt. During the struggle at the door, appellant dropped a gun, which James described as a black 9 millimeter. Once James saw the gun, he backed away and appellant and the other assailant, who was armed with a silver gun, entered the home. While pointing his gun at Nancy, appellant told her to hang up the phone, which she did. Appellant demanded the money he was owed. James told appellant that James and Nancy's boss was on his way over to pick them up for work and would have their week's paycheck with him, which they could give appellant. Both assailants sat at the dining table, laid their guns down on the table, while keeping their hands on their guns, and waited for the arrival of the victims' boss.

{¶ 17} Meanwhile, the 911 operator called back several times in an attempt to identify the problem at the residence. By pretending to be speaking to his boss, James was able to convey to the operator that there were armed men in his house to whom he owed money for drugs. On the recording of the 911 call, the operator asked what amount was owed and James asked appellant. Appellant told James that he owed him $400 and James asked, "$400? * * * How did it get that high?" Besides appellant's cursing, his response to James' question was inaudible.

{¶ 18} Appellant threatened to shoot the victims if the police came. As such, when James heard sirens in the distance, he exited his house through the front door and

ran to his right, down the street to meet the police. Appellant followed James outside, but did not encounter the police that day. The other assailant left through the back door of the house and was seen by the police standing in the victims' backyard.

{¶ 19} Police found a silver .25 caliber handgun in a stove that the victims were storing next to their house, which, according to photographs in evidence, was adjacent to a parking area located behind the house. The victims testified that the gun did not belong to them and that no gun had been in the stove when it was placed in the backyard.

{¶ 20} Appellant's El Camino was found on the victims' street, approximately three houses down from the victims' home. When James exited his home to meet the police, he ran toward the direction of the El Camino. Inside the El Camino, the police found a case, with a cushioned interior, that contained a silver gun that was nearly identical to the one found in the stove. Appellant's vehicle was photographed with a lump in its tonneau cover, which was snapped in place around the bed of the vehicle. Detective William Seymour testified that the lump was indicative of a metal bar that bows upward underneath the cover to provide support. Seymour, however, did not look under the cover and does not know if any other officer did; however, he indicated that it was customary to do so when taking inventory of impounded vehicles, and that there was no record of anything being found in the bed of the vehicle.

{¶ 21} The victims were cross-examined extensively concerning the amount of money they actually owed appellant. James testified that appellant fronted him drugs two or three times in $20 or $40 increments, or there abouts, totaling approximately $100,

"He dropped off, like I said, 20 at a time or 40 at a time, like adds up, but he was only there a few times that he fronted to me, and then he cut me off." The victims were asked if they had made arrangements with appellant to repay the debt they owed him by delivering phone books on the evening of February 28, 2002, in appellant's El Camino. The victims denied that they borrowed the El Camino and stated that they made no arrangements to deliver phone books. In fact, James testified that he worked from 4:00 or 5:00 p.m. until 9:00 p.m. on the evening of February 28, 2002, the night before the incident.

{¶ 22} Julia Medellin, appellant's girlfriend and daughter to Irene, testified that in mid-February 2002, appellant lent $150 to the victims for groceries, which was to be repaid the following Friday. Medellin testified that she knew the victims through her mother, and knew that they were addicted to crack cocaine, but nevertheless had lent them money on about five previous occasions for groceries or utilities, in amounts of "about $20 or something of that nature." She testified that until the $150 loan, the victims had always repaid the loans when promised. When the $150 loan was not repaid, Medellin testified that appellant arranged with the victims that they would borrow his El Camino and deliver phone books in order to repay the loan. Appellant contracted with a company to deliver the phone books, for which appellant was to receive $250. Medellin testified that $150 would go toward repayment of the debt, $50 would go to the victims, and the remaining $50 would be kept by appellant for profit and reimbursement of expenses incurred from allowing them to use his vehicle.

{¶ 23} Medellin testified that she and appellant picked up the phone books on the morning of February 28, 2002, and loaded them in the bed of the El Camino. In the early afternoon, the victims came to her house to pick up the El Camino. She testified that she gave them the keys and went over a map with them, showing where the books were to be delivered. According to Medellin, the victims told her they would deliver the books that evening and return the El Camino that night, which they never did.

{¶ 24} Medellin stated that she and appellant had argued on February 28, and that he left their home and did not return that day or the next. She did not know where appellant was or what plans he had for the morning of March 1, 2002, and did not know that he planned to go to the victims' home. Medellin testified that she went to the victims' home on the morning of March 1, to retrieve the El Camino, but found it surrounded by police. The police would not release appellant's vehicle to her and she never asked for the phone books that were allegedly in the bed.

{¶ 25} When asked by the prosecutor about the $250 difference in the amount between the $150 loan and the $400 demanded by appellant, Medellin stated that, perhaps, the additional amount owed was for interest on the loan that had accumulated during the two weeks that the victims had the money. Appellant and Medellin moved to Texas several weeks after the incident.

{¶ 26} Upon reviewing the trial testimony in a light most favorable to the prosecution, we find that there was substantial evidence upon which any rational jury reasonably could have relied in concluding that the state proved the essential elements of

the offense of aggravated robbery beyond a reasonable doubt. Appellant argues that he was only present in the victims' home to collect money owed him. We, however, find that appellant demanded, at gunpoint, $400, which was more than twice the amount that the victims and Medellin testified was owed appellant. As such, we find that the jury reasonably could have concluded that appellant knew the actual amount owed, but sought to commit a theft offense by demanding an amount that was in excess of the amount owed by the victims. With respect to Medellin's testimony concerning the phone books, we find that, even if it were true that the victims agreed to deliver them,[2] such a fact would have no bearing on the amount the victims owed appellant.

{¶ 27} Accordingly, we find that the trial court did not err in denying appellant's Crim.R. 29 motion, that the evidence presented was sufficient to establish the elements of the offense of aggravated robbery beyond a reasonable doubt, and that the jury did not clearly lose its way or create such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. Appellant's second and third assignments of error, therefore, are found not well-taken.

[2]We note that the jury reasonably could have found Medellin's testimony to be not credible with respect to the phone books and the borrowing of the El Camino. The vehicle was not parked in the parking area behind the victims' home, but was down the street, several houses away, and contained a case and a gun that was similar to the one carried by the other assailant. Also, James testified that he worked the evening of February 28, which would be incongruous with him being able to deliver the phone books that evening. Finally, there was no evidence that any phone books were found in the vehicle.

{¶ 28} Appellant argues in his fourth assignment of error that he was denied the effective assistance of counsel because: (1) counsel failed to review important discovery materials prior to preparing for trial; and (2) counsel failed to challenge the victims' testimonial characterization of appellant as a "drug dealer." The discovery documents referred to by appellant include police reports that summarized statements made by the victims on the day of the incident. Redacted portions of police reports were available to counsel, but not all were reviewed by counsel prior to the start of trial.

{¶ 29} In Ohio, a properly licensed attorney is presumed competent and the burden is on the appellant to show counsel's ineffectiveness. *State v. Lytle* (1976), 48 Ohio St.2d 391; *State v. Hamblin* (1988), 37 Ohio St.3d 153. The United States Supreme Court, in *Strickland v. Washington* (1984), 466 U.S. 668, 686, set forth a two-part test for reviewing claims of ineffectiveness:

{¶ 30} "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 by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable."

{¶ 31} The United States Supreme Court held that "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial court cannot be relied on as having

produced a just result." Id. Specifically, to establish ineffectiveness, appellant must show that, but for counsel's deficient performance, there is a reasonable probability the result of the trial would have been different. Id.

{¶ 32} The record is clear that prior to cross-examining the state's first witness, defense counsel was provided unredacted copies of the police reports and was able to fully review them. Defense counsel found that there was no inconsistency between the police reports and the testimony provided by the witness. Defense counsel thoroughly cross-examined all of the state's witnesses and there was no deficiency apparent in the record concerning counsel's preparation for trial or ability to present an effective defense.

{¶ 33} Appellant, however, also asserts that defense counsel should have objected to the victims' characterization of appellant as a "drug dealer." First, we find that appellant failed to establish that counsel's failure to object to that characterization, thereby calling greater attention to it, was deficient representation. Rather, defense counsel presented Medellin's testimony that appellant did not sell crack cocaine, and that they both were against its use because of the negative impact crack cocaine had on their families. Second, the victims testified that they bought crack cocaine from appellant on numerous occasions. The term "drug dealer" simply labeled appellant's relationship with the victims. In light of all the testimony, we find that appellant failed to establish that he was prejudiced by defense counsel's failure to object to the victims calling appellant a "drug dealer."

{¶ 34} Accordingly, we find that appellant failed to establish that his defense counsel's representation was deficient or that he was prejudiced by any alleged deficiency. Appellant's fourth assignment of error, therefore, is found not well-taken.

{¶ 35} Appellant argues in his fifth assignment of error that the prosecutor's misconduct during closing arguments denied appellant his constitutional right to a fair trial. Specifically, appellant alleges that the following statement by the prosecutor denied appellant his right to remain silent:

{¶ 36} "When the police arrived, neither Donald Bynes nor Antwain Williams stayed. Donald Bynes did not sit there and tell the police this is just about books or there are no guns involved, because there are no prints on it. Instead, he fled. He ran."

{¶ 37} Defense counsel objected to this statement as being prosecutorial misconduct and argued that the state was not permitted to comment on appellant's decision not to talk to the police because appellant has a constitutional right to remain silent. The prosecutor responded that appellant was not in custody, was not asked any question, but, instead, fled the scene.

{¶ 38} It is well established that "[f]light from justice, and its analogous conduct," is admissible as evidence, as it may be indicative of a consciousness of guilt. *State v. Eaton* (1969), 19 Ohio St.2d 145, 160. Accordingly, we find that the state did not commit prosecutorial misconduct by commenting on appellant fleeing from the scene, rather than staying to explain the situation to the police. Appellant's constitutional right

to remain silent was not infringed upon. Appellant's fifth assignment of error is therefore found not well-taken.

{¶ 39} 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. Appellant is ordered to pay the costs of this appeal 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.

Peter M. Handwork, P.J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

Richard W. Knepper, J. _____
CONCUR.
JUDGE

Judge Richard W. Knepper, retired, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.