[Cite as *State v. Hunley*, 2013-Ohio-129.]

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

State of Ohio

Appellee

v.

Kijuan L. Hunley

Appellant

Court of Appeals Nos. L-11-1066
L-11-1068

Trial Court Nos. CR0201001752
CR0201002451

DECISION AND JUDGMENT

Decided: January 18, 2013

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Michael D. Bahner, Assistant Prosecuting Attorney, for appellee.

Eric Allen Marks, for appellant.

* * * * *

OSOWIK, J.

{¶ 1} This is a consolidated appeal from two judgments of the Lucas County Court of Common Pleas that found appellant guilty of two counts of assault of a peace officer and imposed sentences of 17 months on each conviction, to be served consecutively. For the following reasons, the judgments of the trial court are affirmed.

{¶ 2} Appellant sets forth the following assignments of error:

First Assignment of Error

It constituted plain error and prosecutorial misconduct when the state instructed the jury in closing arguments to disregard its duty to weigh the evidence presented before entering a finding of guilty on the assault charges.

Second Assignment of Error

Appellant was denied his right to due process under the law in violation of the Fourteenth Amendment to the United States Constitution and Article I, Sections 1, 2, 16 & 19 of the Ohio Constitution.

Third Assignment of Error

Appellant's conviction was against the manifest weight of the evidence in violation of the due process clause of the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution and Sections 1, 2, 10, 16 & 19 of Article I of the Ohio Constitution.

Fourth Assignment of Error

Appellant was denied his right to effective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 1, 2, 10, 16, & 19 of the Ohio Constitution.

{¶ 3} The following undisputed facts, stemming from two trial court cases that have been consolidated by this court, are relevant to the issues raised on appeal. On April 29, 2010, appellant was indicted in case No. CR0201001752 on one count of assault in violation of R.C. 2903.13(A) and (C)(3). Appellant was later arraigned and a trial date was set. On August 12, 2010, appellant was indicted in case No. CR0201002451 on one count of felonious assault in violation of R.C. 2903.11(A)(1). Appellant was arraigned and the matter was scheduled for trial with the aforementioned case No. CR0201001752.

{¶ 4} On January 13, 2011, after two continuances, both cases were scheduled for trial on February 22, 2011. It is relevant to this appeal that appellant also had an unrelated indictment for murder set for trial on February 8, 2011, with the same judge. On February 8, 2011, when it was determined at pretrial that the murder trial could not proceed on that date due to the unavailability of a material witness, the trial court discussed the matter with defense counsel and determined that it would proceed to trial on the assault charges that same day. Appellant was found guilty of two counts of assault and, on February 23, 2011, was sentenced to serve two 17-month terms of imprisonment to run consecutively. It is from that judgment that appellant appeals.

{¶ 5} In support of his first assignment of error, appellant asserts that during rebuttal closing argument the state twice inferred that the jury did not need to consider whether an assault occurred, that it could ignore the court's instructions, and that it could

forget that it must apply the facts presented by the state. The offending remarks by the prosecutor, to which defense counsel did not object, are as follows:

> [Defense counsel] did not argue that it * * * didn't happen. So knowing that there's no argument that these two indictments happened, I would submit to you that you don't have to even consider that anymore. That seems pretty simple. The only thing then for you to consider is whether or not there is serious physical harm.
>
> * * *
>
> [Defense counsel] never argued that the assaults didn't occur. The only thing is whether or not it is serious physical harm.

{¶ 6} Generally, prosecutors are entitled to considerable latitude in opening statement and closing arguments. *State v. Gravelle*, 6th Dist. No. H-07-10, 2009-Ohio-1533. The test for prosecutorial misconduct is whether the prosecutor's remarks were improper, and if so, whether they prejudicially affected the defendant's substantial rights. *State v. Sargent*, 169 Ohio App.3d 679, 2006-Ohio-6823, 864 N.E.2d 155 (1st Dist.) The standard of analysis is not that of the prosecutor's blameworthiness, but the level of fairness of the trial. Plain error does not exist unless, but for the effort, the trial's outcome would have been different. *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978).

{¶ 7} Considering the entirety of defense counsel's closing argument, we find that the prosecutor's comments that appellant conceded he committed both assaults was not

improper. Further, given our finding under appellant's third assignment of error that his conviction was supported by the weight of the evidence, we find that the disputed statements by the prosecutor did not constitute plain error. Appellant's first assignment of error is not well-taken.

{¶ 8} In support of his second assignment of error, appellant asserts that the trial court denied him his right to due process when it "forced" him to trial on charges that were originally scheduled for a later date.

{¶ 9} When the state established that it could not proceed in appellant's murder case without a certain material witness, the trial court determined that the best course of action would be to switch the murder trial date with the assault trial date. It is well established that a trial judge controls his own docket, and the judge herein determined that he was ready to try one of appellant's cases. Accordingly, the following dialog took place:

> THE COURT: Mr. Thebes, * * * I want to know from you whether, as being an officer of the Court, whether you have sufficient knowledge of those two other cases, referring to the assaults on sheriffs' departments or corrections officers, that you would be able to proceed as it relates to those cases.
>
> MR. THEBES: Judge, I would be able to proceed at this point. The cases are not complicated, quite frankly. I have the medical records. The issue is really the – concerns the medical records, especially in one of the

two cases. I'm prepared to proceed, Judge. I do not – I do not anticipate any legal issues that will require any extra time in order to prepare. In fairness to the Court, I'm prepared today to go forward.

THE COURT: Are there any witnesses that you feel necessary to properly represent Mr. Hunley as it relates to those two cases?

MR. THEBES: Not that I'm aware of, Judge. I have spoken to the prosecutor on this case. I spoke to previous counsel on the case and very briefly to one of the two victims, Mr. Gaston, I spoke very briefly about this case. I'm not aware of any, Judge, and I've been acquainted with this case since late November of last year.

{¶ 10} Upon review of the record, we find that appellant has not shown any prejudicial effect or articulated what other witnesses he believes should have been called. Based on the foregoing, we find that appellant was not denied due process and his second assignment of error is not well-taken.

{¶ 11} In support of his third assignment of error, appellant asserts that his conviction is against the manifest weight of the evidence. In determining whether a verdict is against the manifest weight of the evidence, the appellate court "weighs the evidence and all reasonable inferences, and considers the credibility of witnesses." *State v. Thompkins*, 78 Ohio St.3d 380, 678 N.E.2d 541 (1997). The court then makes a determination as to whether, in resolving conflicts in the evidence, the factfinder "clearly

lost its way and created such manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *Id*.

{¶ 12} We have carefully reviewed and considered the record of evidence. Appellant argues that there were discrepancies between the testimony of one of the victims and a witness to the assault. Specifically, the alleged inconsistent testimony related to whether or not words were exchanged between the victim and appellant prior to the assault. Appellant asserts that it is "not likely" that someone would attack an officer without provocation.

{¶ 13} Appellant is not entitled to a reversal of his conviction merely because inconsistent testimony was presented at trial. The weight to be given the evidence and the credibility to be afforded the testimony are issues to be determined by the trier of fact. "When conflicting evidence is presented at trial, a conviction is not against the manifest weight of the evidence simply because the fact finder believed the prosecution testimony." *State v. Conner*, 6th Dist. No. F-07-025, F-07-026, 2011-Ohio-146, ¶ 35.

{¶ 14} We find no evidence reflecting that the factfinder lost its way or created a manifest miscarriage of justice. The record contains ample evidence in support of conviction. Accordingly, appellant's third assignment of error is not well-taken.

{¶ 15} In support of his fourth assignment of error, appellant asserts that trial counsel was ineffective for agreeing to go to trial on the earlier of the two dates as explained above. Based on our finding as to appellant's second assignment of error in which we found that appellant was not prejudiced by going to trial on February 8, 2011,

rather than two weeks later, we are unable to find that counsel was ineffective for failing to argue for a continuance. Accordingly, appellant's fourth assignment of error is not well-taken.

{¶ 16} On consideration whereof, we find that appellant was not prejudiced or denied a fair trial. The judgments of the Lucas County Court of Common Pleas in case Nos. CR0201001752 and CR0201002451 are affirmed. Court costs of this appeal are assessed 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.

Peter M. Handwork, J. _____
JUDGE

Arlene Singer, P.J. _____
JUDGE

Thomas J. Osowik, J. _____
CONCUR.
JUDGE