

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

State of Ohio

Court of Appeals No. L-12-1173

Appellee

Trial Court No. CR0201102812

v.

Antonio L. Mays

DECISION AND JUDGMENT

Appellant

Decided: August 16, 2013

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Frank H. Spryszak, Assistant Prosecuting Attorney, for appellee.

Lawrence A. Gold, for appellant.

* * * * *

SINGER, P.J.

{¶ 1} Appellant, Antonio Mays, appeals from his conviction in the Lucas County Court of Common Pleas on one count of having a weapon while under disability, a violation of R.C. 2923.13(A)(3) and a felony of the third degree. He was sentenced to serve 36 months in prison. For the reasons that follow, we affirm.

{¶ 2} Appellant asserts two assignments of error:

I. Appellant received ineffective assistance of counsel in violation of his rights under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §10 of the Constitution of the State of Ohio.

II. Appellant's conviction was against the manifest weight of the evidence introduced at trial by the State of Ohio.

{¶ 3} We will initially consider appellant's second assignment of error where he argues that his conviction was contrary to the manifest weight of the evidence. The elements of R.C. 2923.13(A)(3), having a weapon while under a disability, are:

[N]o person shall knowingly acquire, have, carry, or use any firearm or dangerous ordnance, if * * * [T]he person is under indictment for or has been convicted of any felony offense involving the illegal possession, use, sale, administration, distribution, or trafficking in any drug of abuse or has been adjudicated a delinquent child for the commission of an offense that, if committed by an adult, would have been a felony offense involving the illegal possession, use, sale, administration, distribution, or trafficking in any drug of abuse.

{¶ 4} In determining whether a conviction is against the manifest weight of the evidence, 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 jury clearly lost its way so as to create a manifest miscarriage of justice. *State v. Thompkins*, 78 Ohio St.3d 380, 768 N.E.2d 541 (1997).

{¶ 5} Before appellant's jury trial commenced, appellant's counsel stipulated to the fact that appellant was convicted in 2005 for trafficking in marijuana.

{¶ 6} At trial, Brijanna Butler testified that on October 29, 2011, she resided in a house, on Greenwood Avenue in Toledo, Ohio, with Star Moton, Moton's mother, Cynthia Bennett, and Bennett's boyfriend, appellant. That evening, Butler, Moton and a friend, Marissa Schmude, were in Moton's bedroom when appellant arrived home. Butler testified that she saw appellant enter Bennett's room carrying a gun. When she heard appellant hit Bennett, Butler ran out of the house and called 911. State's exhibit No. 1, a recording of Butler's 911 call, was played for the jury. During the call, Butler states that she needs help because appellant, who is carrying a gun, is beating up both Bennett and Moton.

{¶ 7} Schmude testified that she saw appellant walk up the stairs to Bennett's room with a gun in the waistband of his pants. She identified state's exhibit No. 2 as the gun she saw in appellant's waistband.

{¶ 8} Toledo police officer, Michael Haynes, testified that he responded to Butler's 911 call regarding a domestic situation and a man with a gun at the Greenwood Avenue house. When he arrived, Butler was standing outside and was "hysterical." She screamed that "[h]e's got a gun" and "[h]e's in the house upstairs." Haynes testified that as he approached the house, he saw appellant coming down the stairs. When appellant

saw Haynes, he slammed the door and locked it. Haynes testified he could hear a lot of banging and thumping coming from inside the house. Seconds later, appellant opened the door and “acted like nothing was wrong.” He was immediately placed under arrest.

{¶ 9} Toledo police officer, Roger Minnich, identified state’s exhibit No. 2 as the gun he found, concealed in a couch, following a search of the home.

{¶ 10} Bennett testified that on the night of October 29, 2011, she went out drinking with some friends. She eventually called her daughter and her friends Butler and Schmude for a ride home. She testified that when appellant arrived at the house, he punched her in the eye. She also testified that she did not see appellant with a gun that night although, she acknowledged, that ammunition that was found in the house did belong to appellant.

{¶ 11} Here, the trier of fact, in this case the jury, chose to believe the testimony of Butler and Schmude that appellant had a gun in his possession on the night in question. On review, we cannot say that the jury clearly lost its way or perpetrated a manifest miscarriage of justice. Accordingly, appellant’s second assignment of error is found not well-taken.

{¶ 12} In his first assignment of error, appellant contends he was denied effective assistance of counsel. To prevail on a claim of ineffective assistance of counsel, appellant must show that counsel’s conduct so undermined the proper functioning of the adversarial process that the trial court cannot be relied upon as having produced a just result. The standard proof requires appellant to satisfy a two-pronged test. First,

appellant must show that the counsel's representation fell below an objective standard of reasonableness. Second, appellant must show a reasonable probability that, but for counsel's perceived errors, the results of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). This burden of proof is high given Ohio's presumption that a properly licensed attorney is competent. *State v. Hamblin*, 37 Ohio St.3d 153, 524 N.E.2d 476 (1988).

{¶ 13} Appellant alleges four instances of his counsel's ineffectiveness. First, appellant contends that his counsel was ineffective when he stated, in his opening argument, that Butler lived at the Greenwood Avenue home. Appellant contends that this confused the jury.

{¶ 14} It is clear from a review of the transcript that Butler's status as a resident of the Greenwood home was fluid and inconsistent at times. In any event, it is undisputed that she was at the home on October 29, 2011, and it is undisputed that she knew appellant. As such, we do not find counsel's characterization of her as a resident to be prejudicial.

{¶ 15} Second, appellant contends that his counsel was ineffective in failing to object to the qualification of the state's witness, Chadwick Douglass, as an expert witness on firearms. The crucial aspect of Douglass' testimony was when he stated that state's exhibit No. 2, the gun found at the Greenwood home, was operable.

{¶ 16} The definition of "firearm," as used in R.C. 2923.13, requires the firearm to be operable or readily capable of being rendered operable.

{¶ 17} Douglass testified that he was a ten year employee of the Toledo Police Department Crime Laboratory and that he has a master's degree in forensic science. He participated in two Michigan internships in crime labs, attended seminars on forensics and engaged in firearm training. He estimated that in his career, he has test fired over 1,100 handguns. He testified that, as part of his job, he currently engages in the test fire of handguns. Though he acknowledged that he has only testified in a trial to the operability of one other gun besides the one in the instant case, we see no ineffective assistance in the lack of an objection. Defense counsel reasonably could have concluded that the state had established Douglass' qualifications as an expert.

{¶ 18} Third, appellant contends that his counsel was ineffective in cross-examining Schumde. Specifically, appellant contends that by questioning Schumde about her direct testimony that she saw appellant in possession of a gun, defense counsel essentially inferred that appellant was guilty as charged. We disagree. This argument misunderstands the functions of direct and of cross-examination. The purpose of direct examination is to establish facts; the purpose of cross-examination is to cast doubt on facts established during direct examination. Defense counsel had no choice but to refer to Schumde's direct testimony.

{¶ 19} Fourth, appellant contends that counsel was ineffective in calling Bennett to the stand as a witness for the defense, especially since she identified the ammunition found in her home as appellant's although she denied seeing him in possession of a gun. However, it is well settled that counsel's decision about whether to call a witness

generally “falls within the rubric of trial strategy and will not be second-guessed by a reviewing court.” *State v. Treesh*, 90 Ohio St.3d 460, 490, 739 N.E.2d 749 (2001).

{¶ 20} Based on our analysis above, we find that appellant has not demonstrated serious deficiencies in defense counsel’s performance, nor has he established that, as the result of defense counsel’s inferior performance, the outcome of the trial would have been different. Accordingly, appellant’s second assignment of error is found not well-taken.

{¶ 21} On consideration whereof, 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.

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, P.J.

JUDGE

Thomas J. Osowik, J.
CONCUR.

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: http://www.sconet.state.oh.us/rod/newpdf/?source=6.</p>
