[Cite as *State v. Stowers*, 2014-Ohio-147.]

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

State of Ohio — Court of Appeals No. E-12-055

Appellee — Trial Court No. 2012-CR-055

v.

Justin M. Stowers — **DECISION AND JUDGMENT**

Appellant — Decided: January 17, 2014

* * * * *

Kevin J. Baxter, Erie County Prosecuting Attorney, and Mary Ann Barylski and Frank Zeleznikar, Assistant Prosecuting Attorneys, for appellee.

Matthew H. Kishman, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Defendant-appellant, Justin Stowers, appeals the August 17, 2012 judgment of the Erie County Court of Common Pleas which, following a bifurcated jury and bench trial finding him guilty of complicity to commit felonious assault and complicity to

commit aggravated robbery, having weapons under a disability, and a repeat violent offender specification, sentenced appellant to a total of 27 years of imprisonment. For the reasons set forth herein, we affirm in part and reverse in part.

{¶ 2} On February 8, 2012, appellant was indicted on the charges of complicity to commit aggravated robbery and felonious assault and having a weapon while under a disability. The charges all contained firearm specifications. The aggravated robbery and felonious assault charges contained repeat violent offender specifications. Appellant entered not guilty pleas to all counts.

{¶ 3} On July 31, 2012, the case proceeded to a jury trial as to the complicity counts as well as the count of having a weapon while under disability. The victim (referred to herein by his surname, Jackson) testified that that he met Ashlei Kimble-Palmer at a strip club in Cleveland, Ohio, where she worked as a dancer. He only knew her by the name "Light Skin Dancer." After exchanging text messages for a period, Ashlei invited Jackson to visit her in Sandusky, Ohio, where she resided. Jackson stated that Ashlei gave her an address which did not "match the house" so she directed him to meet her at the Sail Inn Bar. He waited a bit for her at the bar; she arrived and they had one drink together. Jackson testified that she seemed in a hurry to leave after asking him to go to her home. Ashlei asked him what kind of car he was driving; she repeated what Jackson told her to someone on her cellular phone.

{¶ 4} After they left the bar she directed him to a location and he parked on the street behind a car. After exiting the car, Jackson stated that he observed a male walking

toward him with a mask and a hood on. When the man got up to him he said "you know the procedure," implying that he was about to be robbed. Jackson continued to walk away and the individual shot at him. Jackson testified that he then drew his loaded weapon and returned fire. At that point, he observed a second individual who also began shooting at him. He shot back at him as well. The men then ran away. Jackson got back in his truck and drove to the nearest State Highway Patrol Office to report the incident. After the incident Jackson noticed that a bullet had grazed his leg. Jackson was able to pick Ashlei out of a photo array.

{¶ 5} During cross-examination, Jackson agreed that during the incident, he only observed co-defendants Ashlei Palmer, Tion Swain and Keith Alexander, he did not observe appellant.

{¶ 6} Toledo Police Officer and computer and cellular forensic specialist, David Monford, testified that the Sandusky Police Department provided him with Ashlei's cell phone for him to extract data from. He testified as to the procedure used and authenticated the report.

{¶ 7} Ashlei Palmer testified that she had been indicted for complicity charges for aggravated robbery and aggravated burglary. In exchange for her testimony against her three co-defendants, Ashlei agreed to enter a plea to robbery and the state would recommend community control.

{¶ 8} In January 2012, Ashlei was in a relationship with appellant. On January 9, 2012, there was a plan formulated between her and appellant to lure Jackson to a location

in Sandusky, Ohio, so he could be robbed. Ashlei testified that it was appellant's idea to rob Jackson and that he had asked her in the past but this was the first time she agreed.

{¶ 9} On the night of the incident, on the way to the Sail Inn to meet Jackson, Ashlei stopped at a house on the corner of Meigs and Madison Streets to speak with appellant. There were two other individuals at the house. Ashlei proceeded to the Sail Inn where she met Jackson. Ashlei stated that while she was at the bar, she was texting appellant who was using Keith Alexander's cell phone. Before leaving the bar, Ashlei texted appellant a description of Jackson's vehicle. Ashlei testified that after parking on Madison Street she exited the vehicle first then Jackson exited. She began walking across the street and observed "guys" on the street who began arguing; she then heard gunshots. Ashlei further testified that as she was running down the street, appellant was coming up the street. They proceeded to appellant's house at the corner of Meigs and Madison. Ashlei testified that her foot was numb; she took off her shoe and observed what looked like a burn mark. She realized that she had been shot.

{¶ 10} The two guys who were on the porch earlier returned and they were carrying guns. They left after the police left the area. Ashlei testified that during the events, her daughter was with a friend and that she texted the friend "I f*cked up."

{¶ 11} Ashlei stated that on January 10, 2012, she was arrested by the Sandusky Police Department. She admitted that she initially lied to the police.

{¶ 12} Ashlei was questioned about the cellular phone records, specifically text messages between her and appellant prior to the incident where she expressed fear about

the setup and appellant's assurance that nothing was going to happen to her. They decided to do it that night (January 9, 2012) and appellant indicated whenever Ashlei was ready. Ashlei was texting back and forth with two men, Jackson and a man identified as "Tank" on her cell phone. She was trying to get one of them to meet her for the robbery.

{¶ 13} Once Jackson agreed to meet her, she and appellant exchanged texts about where they would meet. At some point appellant began texting Ashlei on co-defendant Keith Alexander's cell phone whose number was identified in the cellular records. Appellant asked Ashlei if she was with him and Ashlei texted back, "yea." Ashlei then testified regarding a series of texts as follows:

A: Where y'all at, this niggas stalling and the other dude's somewhere looking for me.

Q: Okay. What do you mean by that?

A: By?

Q: Who's stalling?

A: [Jackson].

Q: [Jackson] is stalling, and who's the other dude looking for you?

A: Some other guy from Cleveland.

Q: Tank?

A: No, Ty.

Q: Ty. So you're setting up Ty also?

A: Right.

Ashlei then texted “red Chevy truck” to appellant. Ashlei also texted appellant when she and Jackson arrived at the location.

{¶ 14} The day after the incident, Ashlei received additional texts from appellant.

{¶ 15} During cross-examination, Ashlei admitted that she initially lied to police. She also said that she and appellant never discussed the use of weapons during the incident and that prior to the attempted robbery, she did not know that the other co-defendants had guns. Ashlei stated that when she exited Jackson’s truck, she saw Keith. Ashlei stated that she heard voices prior to the gunshot, but that she ran once the first shot was fired. After running from the scene she encountered appellant. They ran back to where appellant was living and, a short time later, Keith and Tion arrived carrying guns.

{¶ 16} After Jackson contacted the police, Sandusky Police Detective David West testified that he was asked to determine who “Light Skinned Dancer” was by tracing her cell phone number. Once the police identified Ashlei as a suspect they created a photo line-up. Jackson picked Ashlei out of the line-up.

{¶ 17} Detective West testified that they brought Ashlei to the police station for questioning. They were also able to confiscate her cell phone. Detective West further stated that Ashlei had an injury to her left foot.

{¶ 18} Detective West stated that after Ashlei was represented by counsel, she made an agreement with the state to testify in exchange for a reduced charge and a recommendation of community control in lieu of prison.

{¶ 19} Sandusky Police Detective Gary Wichman testified that, at the time of the incident, appellant was under indictment for unrelated felony offenses. Detective Wichman stated that a defendant is not permitted to have a firearm while under indictment. The indictment was admitted into evidence.

{¶ 20} Detective Wichman testified that the Erie County Jail has a telephone monitoring process whereby they can record conversations between inmates and outside parties. At the start of every call placed, an automated voice informs the parties that the call is being recorded. An audiotape of a conversation between appellant and bail bondsperson Peggy Mayo was played for the jury. Mayo connected appellant with co-defendant Tion Swain. On the tape, appellant expressed dissatisfaction with Ashlei's decision to cooperate with police.

{¶ 21} After the presentation of the evidence, closing arguments, and jury instructions, the jury returned guilty verdicts on the charges of aggravated robbery and felonious assault. The jury found appellant not guilty of the firearm specifications. The jury also found appellant guilty of having a weapon while under a disability. Thereafter, after a bench trial, the court found appellant to be a repeat violent offender as to the aggravated robbery and felonious assault charges.

{¶ 22} On August 17, 2012, appellant was sentenced to 21 years of imprisonment to be served consecutively to the sentences imposed in a prior criminal case for a total of 27 years of imprisonment. This appeal followed.

{¶ 23} Appellant raises three assignments of error for our review:

I. Appellant was denied his constitutional right to a fair trial and his presumption of innocence when the trial court erroneously required the jury to find him "not guilty beyond a reasonable doubt" in order to acquit.

II. Appellant's conviction for having a weapon while under a disability was against the manifest weight of the evidence.

III. The state committed prosecutorial misconduct by commenting on appellant's silence, enflaming the jury's passion, and referring to facts never established during the trial.

{¶ 24} Appellant's first assignment of error argues that he was deprived of the constitutional presumption of innocence when the trial court, on the jury verdict form, misstated the burden of proof. On each of the six verdict forms it stated: "We, the jury, find beyond a reasonable doubt that the Defendant is, *_____ of * * *." The jury was instructed to insert either "guilty" or "not guilty" as to the respective charge or specification. This, appellant argues erroneously placed the burden of proof on appellant to prove his innocence.

{¶ 25} Reviewing the identical wording used on a jury verdict form, the Third Appellate District concluded that the error did not render the trial so fundamentally unfair that it could not be a reliable basis for the determination of the defendant's guilt. *State v. Wilson*, 3d Dist. Allen No. 1-09-53, 2010-Ohio-2947, ¶ 26. Thus, because the error was not structural, it was reviewed under a harmless error analysis. *Id.* The court then

concluded that based upon the instructions given by the court and the evidence presented, any flaw in the verdict forms was harmless error. *Id.* at ¶ 28. *See State v. Schlee* 11th Dist. Lake No. 2004-L-070, 2005-Ohio-5117.

{¶ 26} In the present case, the potential jurors were instructed on the "beyond a reasonable doubt" standard during voir dire. At the close of the state's case, the jurors were reminded that the state has the burden of proof beyond a reasonable doubt and that "[t]he defense has absolutely no burden at all."

{¶ 27} The trial court instructed the jury:

> Burden of proof, presumption of innocence. The defendant is presumed innocent until his guilt is established beyond a reasonable doubt. The defendant must be acquitted, unless the State of Ohio, herein referred to as "the State", produces evidence which convinces you beyond a reasonable doubt of every essential element of the crimes.
>
> * * *
>
> The plea of not guilty has a further effect. It clothes the defendant with a legal presumption of innocence. This presumption is not a mere matter of form. It is a shield that the law places around the defendant. This presumption is with the defendant as he enters this trial and remains throughout the entire trial and during the examination of all the material elements necessary to be proven by the State. This presumption only leaves the defendant and is only overcome when you, as the jury, are

convinced that the State has proven each and every essential element of the crimes charged and the firearm specification beyond a reasonable doubt.

{¶ 28} Additionally, the jurors each had a copy of the instructions to refer to during deliberations.

{¶ 29} In this case, as in *Wilson*, *supra*, we find that the error did not render the trial so fundamentally unfair to rise to the level of structural error. We further find that the error was not plain error. "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Crim.R. 52(B). A plain error is "an obvious error which is prejudicial to an accused, although neither objected to nor affirmatively waived, which, if allowed to stand, would have a substantial adverse impact on the integrity of and public confidence in judicial proceedings." *State v. Bowman*, 144 Ohio App.3d 179, 190, 759 N.E.2d 856 (12th Dist.2001), citing *State v. Craft*, 52 Ohio App.2d 1, 7, 367 N.E.2d 1221(1st Dist.1977). Plain error, if it exists, should be noticed "with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978), paragraph three of the syllabus.

{¶ 30} Reviewing the totality of the circumstances, we find that the error in the verdict forms did not substantially affect the outcome of the trial. As set forth above, the trial court repeatedly instructed the jurors on the state's burden of proof and the presumption of innocence. There was ample evidence of appellant's participation in the robbery through the testimony of Ashlei Kimble-Palmer, the text message records, and

the recorded jail conversation. Accordingly, we find that appellant's first assignment of error is not well-taken.

{¶ 31} In appellant's second assignment of error, he contends that his conviction for having a weapon while under disability was against the manifest weight of the evidence. Specifically, appellant argues that there was no evidence presented linking him to the guns used during the attempted robbery.

{¶ 32} Under a manifest-weight standard, an appellate court sits as a "thirteenth juror" and may disagree with the fact finder's resolution of the conflicting testimony. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541(1997). The appellate court,

> reviewing 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 and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against conviction. *Id.*, quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983).

{¶ 33} Appellant was convicted of having a weapon while under disability; the relevant portion of the statute provides:

(A) Unless relieved from disability as provided in section 2923.14 of the Revised Code, no person shall knowingly acquire, have, carry, or use any firearm or dangerous ordnance, if any of the following apply:

* * *

(2) The person is under indictment for or has been convicted of any felony offense of violence 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 of violence.

{¶ 34} The parties do not dispute that at the time of the attempted robbery, appellant was under indictment for a felony offense and, thus, was not permitted to "have, use, or carry" a firearm. Appellant was charged as an accomplice to the crimes of aggravated robbery and felonious assault. R.C. 2923.03(A)(2), the complicity statute, provides that "[n]o person, acting with the kind of culpability required for the commission of an offense, shall * * * [a]id or abet another in committing an offense."

{¶ 35} As cited by the state, the Eighth Appellate District concluded that the appellant's conviction for having a weapon while under disability was supported by sufficient evidence where his accomplice possessed the firearm. *State v. Adams*, 8th Dist. Cuyahoga No. 93513, 2010-Ohio-4478. The defendant in *Adams* was charged based upon his participation in a robbery where his accomplice possessed and brandished the firearm and the defendant took money from one of the victims. *Id.* at ¶ 17. The court found that the appellant "constructively" possessed the weapon where there was an

accomplice relationship between the physical possessor and the accomplice. *Id.* at ¶ 15-17. The court explained that "have," as set forth in R.C. 2923.13, can mean actual possession or constructive possession by means of an agent. *Id.* at ¶ 16. *Accord State v. Chatman*, 10th Dist. Franklin No. 08AP-803, 2009-Ohio-2504; *State v. Boyd*, 8th Dist. Cuyahoga No. 65883, 1995 WL 12462 (Jan. 12, 1995).

{¶ 36} In the present case, unlike *Adams*, appellant was not at the scene of the robbery and there was no evidence presented to demonstrate that appellant knew that guns were going to be used or that he ever had control over the weapons. Ashlei specifically testified that she did not know that codefendants Tion Swain and Keith Alexander were going to be armed. She further denied any discussion between her and appellant regarding the codefendants being armed. Ashlei testified that she never saw appellant with a gun and the guns at issue were never recovered.

{¶ 37} Though not dispositive of the issue, we further find troubling the fact that the jury rejected the firearm specifications linked to the complicity counts which required only that the state prove that the principal offender or offenders "had a firearm on or about the offender's person or under the offender's control."

{¶ 38} Accordingly because the evidence fails to support the finding that appellant "knowingly" possessed a weapon, it follows that the jury lost its way when convicting him of having a weapon while under disability. Accordingly, appellant's second assignment of error is well-taken.

{¶ 39} In appellant's third and final assignment of error he argues that the state committed prosecutorial misconduct during closing arguments by commenting on appellant's failure to testify and commenting on facts not established during trial. Prosecutorial misconduct occurs when the prosecutor makes a statement that is improper and the improper statement causes prejudice to appellant. *State v. Smith*, 14 Ohio St.3d 13, 14, 470 N.E.2d 883 (1984). In determining if the alleged misconduct resulted in prejudice, an appellate court considers the following factors: "(1) the nature of the remarks, (2) whether an objection was made by counsel, (3) whether corrective instructions were given by the court, and (4) the strength of the evidence against the defendant." *State v. Braxton*, 102 Ohio App.3d 28, 41, 656 N.E.2d 970 (8th Dist.1995). Additionally, the appellate court should consider whether the alleged misconduct was "an isolated incident in an otherwise properly tried case." *Id.* A reversal for prosecutorial misconduct is not warranted unless it is clear beyond a reasonable doubt that the outcome of the trial would have been different but for the misconduct. *Smith* at 15.

{¶ 40} Appellant first argues that the prosecutor improperly commented on appellant's pre-arrest silence and that appellant "fled the area" in order to avoid arrest. During closing, the state mentioned the fact that appellant did not go to the police following the incident. This statement flowed from the fact that the victim did go to the police and that appellant's counsel was suggesting that the victim may have shot first. Further, counsel did not object to the statements that neither appellant nor his codefendants reported the incident to police.

{¶ 41} Regarding appellant "fleeing" to Lorain County, Ohio, where he was ultimately arrested, Ohio courts have held that the admissibility of such evidence is not made contingent on the amount of time between the criminal conduct and the act of fleeing though it is of greater probative value the shorter the time. *See State v. Bass*, 10th Dist. Franklin Nos. 12AP-622, 12AP-623, 2013-Ohio-4503, ¶ 16. During trial, Lieutenant John Orzech testified that the police were looking for appellant and that he was found in Lorain County. Thus, the statement was not improper.

{¶ 42} Appellant next argues that the prosecutor erroneously commented on appellant's failure to testify. It is well-established that it is improper for a prosecutor to comment on the defendant's failure to testify. *Griffin v. California*, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965); *State v. Fears*, 86 Ohio St.3d 329, 336, 715 N.E.2d 136 (1999).

{¶ 43} During closing argument, the prosecutor stated: "Don't let defense counsel muddy the waters. He's talking about things that were never even testified in this Court. You heard the testimony. You heard the witnesses. Defendant did not test – defense counsel did not testify and yet he's testifying during closing arguments."

{¶ 44} At that point, defense counsel objected and the court, though it felt the remark was inadvertent, instructed the jury stating:

> [W]hen the State was doing their rebuttal, they made a comment that the defendant testified, and then, and then she clarified it and said defense counsel is testifying. Remember the defendant didn't testify, but also

remember he has a Constitutional right not to testify that cannot be held against him. It was just a slip. She meant to say defense counsel and she tried to clear that up.

{¶ 45} Upon review, we find that the inadvertent comment by the state did not prejudice appellant. Further, a jury is presumed to follow the court's instructions. *See State v. Henderson*, 39 Ohio St.3d 24, 33, 528 N.E.2d 1237 (1988).

{¶ 46} The next alleged instances of prosecutorial misconduct during closing argument include the state's reference to Ashlei's lack of a criminal record and witness Nathan Williams' inconsistent testimony, which the state suggested was the result of intimidation. The fact that Williams was intimidated was a reasonable inference based upon the people in the gallery and the fact that Ashlei was intimidated during her testimony. Further, while the reference to the lack of a criminal record may have been in error, there was no objection and it cannot be said that, based on the evidence including the text messages and recorded jail conversation, absent the comment the result of the trial would have been different.

{¶ 47} Finally, appellant contends that the prosecutor improperly "inflamed the passion" of the jury by commenting on the safety of the neighborhood and that "Defendant, Tion Swain, Keith Alexander are the type, and Ashlei, are the type of people who encourage John Q citizens to carry guns * * *." No objection was made to the comments. Upon review we cannot find, even assuming the comments were improper,

that they affected the outcome of the trial. Based on the foregoing, we find that appellant's third assignment of error is not well-taken.

{¶ 48} On consideration whereof, we find that appellant was prejudiced and prevented from having a fair trial and the judgment of the Erie County Court of Common Pleas is reversed as to appellant's conviction and sentence for having a weapon while under disability and affirmed in all other respects. The matter is remanded for a new trial as to the weapons while under a disability charge. Pursuant to App.R. 24, appellee is ordered to pay the costs of this appeal.

Judgment reversed.

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, J. _____
JUDGE

Stephen A. Yarbrough, P.J. _____
CONCUR.
JUDGE