

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

State of Ohio

Court of Appeals No. WD-14-026

Appellee

Trial Court No. 2013CR0490

v.

Darrell Lynn Cowan

DECISION AND JUDGMENT

Appellant

Decided: May 29, 2015

* * * * *

Paul A. Dobson, Wood County Prosecuting Attorney, Gwen Howe-Gebbers, Chief Assistant Prosecuting Attorney, and David T. Harold, Assistant Prosecuting Attorney, for appellee.

Mollie B. Hojnicky, for appellant.

* * * * *

YARBROUGH, P.J.

I. Introduction

{¶ 1} Appellant, Darrell Cowan, appeals the judgment of the Wood County Court of Common Pleas, convicting him of one count of aggravated trafficking in drugs in violation of R.C. 2925.03(A)(1) and (C)(1)(f), a felony of the first degree, with a major drug offender specification. We affirm.

A. Facts and Procedural Background

{¶ 2} On September 18, 2013, the Wood County Grand Jury indicted appellant on one count of aggravated trafficking in drugs, in violation of R.C. 2925.03(A)(1) and (C)(1)(f), with a major drug offender specification. The charges were based on appellant's conduct on September 10, 2013, when he sold eight kilograms of methamphetamines to an undercover agent.

{¶ 3} Because appellant was indigent, the trial court appointed an attorney to represent him. Thereafter, appellant entered a plea of not guilty, and the matter proceeded towards a jury trial scheduled to begin on April 9, 2014.

{¶ 4} On April 4, 2014, the trial court held a hearing in response to a handwritten letter from appellant in which he requested that his appointed counsel be terminated. Appellant asserted in the letter that counsel had expressed problems with the prosecutor, had not pursued or verified some parts of his defense, had not informed appellant of the status of the case, and seemed more concerned with the clothes that appellant would be wearing to court. Appellant concluded that he was not receiving fair representation from appointed counsel. At the hearing, appointed counsel disputed the allegations in the letter, but nonetheless advocated that the fact of the request indicated a serious breakdown in the attorney-client relationship that was irreversible and that would affect her ability to present the anticipated defense.

{¶ 5} Upon considering the motion and the arguments, the trial court denied appellant's request. The court noted that there had been a recent trend at the Wood

County Justice Center of defendants waiting until a week before trial to request new counsel in an effort to get the trial delayed so that, if sentenced, the defendant would get credit for local time rather than prison time. In response to appellant's specific request, the court concluded that the request was unreasonable and a delay tactic because the trial date had been set since December, the matters contained in the letter were not substantial issues, appellant had not indicated a problem with counsel at any prior time, and the record revealed that counsel had zealously represented appellant up to that point with appellant's cooperation.

{¶ 6} Thereafter, a jury trial commenced on April 9, 2014. At the trial, the state presented evidence in the form of testimony from the undercover agent who arranged the sale and purchased the drugs, and other agents who were present at the sale and arrest. The state also presented audio recordings of the drug transaction, surveillance video of the transaction, the drugs, and the money given by the agent to appellant prior to the purchase of the drugs.

{¶ 7} Following the state's presentation of evidence, appellant took the stand in his own defense. Appellant admitted to selling the drugs to the undercover agent, but testified that he did so under duress. Appellant, a United States citizen, stated that he lived with his family in Mexico, and was in the process of applying for citizenship for his wife and stepson. He testified that, approximately two to three years ago, he was approached at his home by a man named Edgar who represented that he worked for a drug cartel. Edgar demanded that appellant transport money in the United States for the

cartel or else there would be trouble for appellant's family. Appellant testified that Edgar was carrying a gun when he made this threat. Thereafter, appellant was forced to quit his job in the oil industry and began transporting cash across the United States. Appellant also rented spaces in Texas for the cartel to store its drugs. Appellant testified that he was compensated by the cartel for his efforts.

{¶ 8} Regarding the incident that led to his arrest, appellant testified that it was the first time he had transported drugs. Appellant stated that he objected when he was told by Edgar that he would be transporting drugs, but Edgar responded by threatening his family. Specifically, appellant testified that Edgar said, "You are in Dallas. I am in Mexico, Reynosa, with your family, so you need to take the Meth to Atlanta."

{¶ 9} After he was arrested, appellant was cooperative with the agents, offering to provide information or attempt to set up a meeting with Edgar. Appellant testified that he asked to be compensated for his cooperation so that he could help his family by getting them money to move to a safe location. Notably, the agents that spoke with appellant after his arrest testified that appellant never mentioned that his family was in danger or that he was trafficking the drugs out of fear for his family's safety.

{¶ 10} On cross-examination, over objection, appellant acknowledged that he had a prior felony conviction for trafficking 204 pounds of marijuana. Appellant later revealed that he was released from prison on that charge in 2008, after which he was able to obtain legitimate employment until being approached by Edgar.

{¶ 11} Following the presentation of evidence, the jury deliberated and shortly thereafter found appellant guilty of the crime as charged. The trial court immediately moved to a forfeiture hearing, after which the jury found that appellant's truck and \$592 were subject to forfeiture. Following the forfeiture hearing, the trial court proceeded to sentencing and imposed the mandatory sentence of 11 years in prison and a \$10,000 fine.

B. Assignments of Error

{¶ 12} Appellant has timely appealed his conviction, asserting four assignments of error for our review:

1. THE APPELLANT WAS DENIED HIS RIGHT TO COUNSEL AS GUARANTEED BY THE UNITED STATES AND OHIO CONSTITUTIONS WHEN THE COURT DID NOT GRANT TRIAL COUNSEL'S MOTION TO WITHDRAW.

2. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING TRIAL COUNSEL'S MOTION TO WITHDRAW AS COUNSEL.

3. APPELLANT'S CONVICTION IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

4. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT ALLOWED THE ADMISSION OF EVIDENCE IN VIOLATION OF EVID.R. 609 OVER TRIAL COUNSEL'S OBJECTION.

II. Analysis

{¶ 13} For ease of discussion, we will address appellant’s assignments of error out of order, combining them where appropriate.

A. Motion to Terminate Counsel

{¶ 14} Appellant’s first and second assignments of error relate to the same topic, thus we will address them together. In his first assignment of error, appellant argues that he was denied the effective representation of counsel as provided for in the constitutions of the United States and Ohio when the court failed to remove his trial counsel and appoint new counsel. Similarly, in his second assignment of error, he argues that the trial court abused its discretion when it denied his motion to terminate counsel.

{¶ 15} “The right to appointed counsel entitles a defendant to competent, effective legal representation, not the counsel of the defendant’s choice or an attorney with whom the defendant can have a harmonious relationship.” *State v. Taylor*, 6th Dist. Lucas No. L-12-1037, 2013-Ohio-3066, ¶ 6, citing *Morris v. Slappy*, 461 U.S. 1, 13-14, 103 S.Ct. 1610, 75 L.Ed.2d 610 (1983). “The defendant is entitled to new appointed counsel on constitutional grounds only upon a showing that there is a ‘conflict of interest, a cessation of communication, or an irreconcilable conflict which would jeopardize the defendant’s right to effective assistance of counsel and lead to an unjust verdict.’” *Id.* at ¶ 7, quoting *State v. Love*, 6th Dist. Lucas No. L-96-156, 1997 WL 133329, *4 (Mar. 21, 1997). “If there is no Sixth Amendment violation, substitution of counsel is solely within the discretion of the trial court.” *Id.*, citing *U.S. v. Calabro*, 467 F.2d 973, 986 (2d Cir.1972).

{¶ 16} We review the trial court’s decision relating to the substitution of counsel for an abuse of discretion. *State v. Jones*, 91 Ohio St.3d 335, 343, 744 N.E.2d 1163 (2001). “Factors to consider in deciding whether a trial court erred in denying a defendant’s motion to substitute counsel include ‘the timeliness of the motion; the adequacy of the court’s inquiry into the defendant’s complaint; and whether the conflict between the attorney and client was so great that it resulted in a total lack of communication preventing an adequate defense.’” *Id.* at 342, quoting *U.S. v. Jennings*, 83 F.3d 145, 148 (6th Cir.1996).

{¶ 17} In support of his assignments of error, appellant points to the protestations in his letter that counsel was not pursuing his avenues of defense and was not explaining the legal process to him as evidence of a total lack of cooperation and trust between himself and counsel. Further, he notes that counsel herself asserted that appellant’s request created a conflict of interest and an irreversible breakdown in the attorney-client relationship.

{¶ 18} In denying appellant’s motion, the trial court reasoned that none of the matters raised by appellant indicated any substantial issues. In addition, the court found that counsel had zealously represented appellant, and that it believed counsel would continue to do so. The court also noted that, from the date of arraignment, appellant had cooperated with his attorney—a span that included three different pretrial conferences resulting in a plea offer removing the major drug offender specification—and nothing in the record suggested otherwise until the court received appellant’s letter one week before

trial. Thus, the court concluded that the request was unreasonable, and was a tactic to continue the trial date.

{¶ 19} We do not find that the trial court’s decision was unreasonable, arbitrary, or unconscionable. The court examined appellant’s purported reasons for terminating counsel, which vaguely referred to counsel’s failure to “verify some parts of my defense” or “pursue certain avenues of defense,” and did not find them to be credible when considering that the trial date had been set for almost four months and appellant waited until a week before trial to raise the issue. Moreover, the court found that counsel had zealously represented appellant and could continue to do so. Therefore, we hold that the trial court’s determinations that the request was a delay tactic and appellant did not demonstrate sufficient reasons for new counsel were supported by the record, and the court’s decision to deny the motion was not an abuse of discretion.

{¶ 20} Accordingly, appellant’s first and second assignments of error are not well-taken.

B. Prior Bad Acts Evidence Under Evid.R. 609

{¶ 21} In his fourth assignment of error, appellant argues that the trial court erred when it allowed the state to question appellant on his prior felony conviction for drug trafficking.

{¶ 22} “The trial court has broad discretion in the admission and exclusion of evidence and unless it has clearly abused its discretion and the defendant has been

materially prejudiced thereby, this court should be slow to intervene.” *State v. Hymore*, 9 Ohio St.2d 122, 128, 224 N.E.2d 126 (1967).

{¶ 23} Evid.R. 609(A)(2) provides that for the purpose of attacking the credibility of a witness,

evidence that the accused has been convicted of a crime is admissible if the crime was punishable by death or imprisonment in excess of one year pursuant to the law under which the accused was convicted and if the court determines that the probative value of the evidence outweighs the danger of unfair prejudice, of confusion of the issues, or of misleading the jury.

Evid.R. 609(B) imposes a time limit on the evidence, and states that evidence of a conviction is not admissible if a period of more than ten years has elapsed since the later of the “date of the conviction or of the release of the witness from the confinement, or the termination of community control sanctions, post-release control, or probation, shock probation, parole, or shock parole imposed for that conviction.”

{¶ 24} Here, appellant does not contest that the prior conviction was within the time parameters of Evid.R. 609(B). Rather, appellant contends that the probative value of the evidence was outweighed by the danger of unfair prejudice since it allowed the jury to conclude that because he had been convicted of trafficking in the past, he must be guilty of trafficking in this case. The state, on the other hand, argues that while the evidence of appellant’s prior conviction was prejudicial, it was not unfairly so in light of appellant’s duress defense. We agree with the state. Appellant’s defense was that he

only committed the instant offense out of immediate fear for the safety of his family. In that context, we find that evidence of a prior conviction for drug trafficking holds significant probative value regarding the truth of appellant's testimony as to whether he was subject to duress. Therefore, we hold that the trial court did not abuse its discretion in admitting the evidence of appellant's prior conviction.

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

C. Manifest Weight of the Evidence

{¶ 26} In his third assignment of error, appellant asserts that his conviction is against the manifest weight of the evidence because he established the defense of duress by a preponderance of the evidence.

{¶ 27} When reviewing a manifest weight claim,

The 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 the conviction. *State v. Lang*, 129 Ohio St.3d 512, 2011-Ohio-4215, 954 N.E.2d 596, ¶ 220, quoting *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997).

{¶ 28} The burden of proving an affirmative defense, such as duress, rests on the defendant to establish such defense by a preponderance of the evidence. *State v. Poole*, 33 Ohio St.2d 18, 19, 294 N.E.2d 888 (1973). “One of the essential features of the defense of duress is a sense of immediate, imminent death, or serious bodily injury if the actor does not commit the act as instructed.” *State v. Getsy*, 84 Ohio St.3d 180, 199, 702 N.E.2d 866 (1998). “The force used to compel the actor’s conduct must remain constant, controlling the will of the unwilling actor during the entire time he commits the act, and must be of such a nature that the actor cannot safely withdraw.” *Id.* Notably, we have recognized that duress may be found when the threat is made against the defendant’s family. *See State v. Luff*, 85 Ohio App.3d 785, 804, 621 N.E.2d 493 (6th Dist.1993) (stating that jury instruction on duress should have been given where defendant testified that someone threatened to destroy his family).

{¶ 29} Appellant argues that the jury lost its way in convicting him because the evidence demonstrates that Edgar threatened appellant’s family unless appellant worked for the cartel, and it is common knowledge that Mexican drug cartels are dangerous and violent. Appellant contends that the threats were real, present, and continuing, thus he had to cooperate to save his family.

{¶ 30} We disagree, and do not find this to be the exceptional case where the evidence weighs heavily against the conviction. Appellant revealed that he had been engaged in drug trafficking before meeting Edgar. Further, appellant was entrusted with significant amounts of drugs and money by the cartel and was compensated for his

efforts, suggesting that he was not being forced to commit the acts against his will. Finally, when appellant was arrested, and up to the point of trial, appellant did not mention that he was subject to duress or that his family was in physical danger. From this evidence, we conclude that the jury's finding of guilt did not constitute a manifest miscarriage of justice and appellant's conviction is not against the manifest weight of the evidence.

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

III. Conclusion

{¶ 32} For the foregoing reasons, the judgment of the Wood 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, J.

JUDGE

Stephen A. Yarbrough, P.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>
