

[Cite as *State v. Smith*, 2004-Ohio-3619.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 83007

STATE OF OHIO

Plaintiff-Appellee :

vs.

RODRICK L. SMITH :

Defendant-Appellant :

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:
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JOURNAL ENTRY

and

OPINION

DATE OF ANNOUNCEMENT
OF DECISION:

July 8, 2004

CHARACTER OF PROCEEDING:

Criminal appeal from
Court of Common Pleas
Case No. CR-431836

JUDGMENT:

AFFIRMED

DATE OF JOURNALIZATION:

APPEARANCES:

For Plaintiff-Appellee:

WILLIAM D. MASON
Cuyahoga County Prosecutor
ANDREW J. NICHOL, Assistant
1200 Ontario Street
Cleveland, Ohio 44113

For Defendant-Appellant:

ANTHONY A. GEDOS
815 Superior Avenue, N.E.
Suite 2010

Cleveland, Ohio 44114

RODRICK L. SMITH, pro se
Inmate No. 444-854
Mansfield Correctional Institution
P.O. Box 788
Mansfield, Ohio 44901

[Cite as *State v. Smith*, 2004-Ohio-3619.]
COLLEEN CONWAY COONEY, J.:

{¶1} Defendant-appellant, Rodrick Smith (“Smith”), appeals his convictions for kidnapping, aggravated burglary, aggravated robbery, having a weapon while under disability, disrupting public service, and possession of criminal tools. We find no merit to his appeal and affirm.

{¶2} In December 2002, Smith was charged with six counts of kidnapping with firearm specifications, aggravated burglary with firearm specifications, aggravated robbery with firearm specifications, having a weapon while under disability, disrupting public service, possession of criminal tools, and intimidation. The following evidence was presented at his April 2003 jury trial.

{¶3} On October 25, 2002, at approximately 11:30 p.m., Ralonte Brown (“Brown”) pulled into his driveway on Coit Road. Upon exiting his vehicle, he was ordered at gunpoint to put up his hands. Two men grabbed his car keys and cell phone while a third man, later identified as Smith, put a gun to his head and ordered him to lie on the ground. The men then emptied his pockets and took his house keys. Next, they ordered him to unlock the door of the house. Brown testified that he recognized one of the perpetrators as Smith because Smith’s uncle was his business partner and he had socialized with Smith numerous times.

{¶4} When they entered the house, Brown’s twelve-year-old sister-in-law, D.W., was in the family room watching television. The perpetrators ordered Brown and D.W. to lie on the floor while they ransacked the house. Brown stated that the perpetrators took approximately \$1,200 in cash and his stereo amplifiers, and the phone was ripped from the wall.

{¶5} D.W. corroborated Brown’s testimony. She further testified that Smith was wearing latex gloves.

{¶6} Ericka Brown testified that she was upstairs with her three children when the perpetrators entered her house. She went into the hallway to investigate the commotion and saw Smith pointing a gun at her husband. She also heard the intruders order her sister and husband to lie on the floor as they searched the house. Ericka immediately phoned the police from her upstairs bedroom.

{¶7} East Cleveland Police Officer John Bechtel heard the dispatch that a breaking and entering was in progress in the home immediately behind his location. He observed three men running from the rear of the Coit Road residence, down a driveway on Taylor Road. After identifying himself as a police officer and ordering the men to stop, Officer Bechtel tackled Smith while the other two men ran toward Elderwood Road. Officer Bechtel testified that Smith was wearing latex gloves at the time he was apprehended.

{¶8} Two other officers also responded to the call. Both officers testified that when they arrived at the residence on Coit Road, they observed three men fleeing through the backyard. The men dropped stereo amplifiers and a telephone. The officers were unable to apprehend two of the suspects, who ran toward Elderwood Road.

{¶9} East Cleveland Detective Jay Hodge testified that Smith admitted to being at the Coit Road residence earlier in the day but denied any involvement in the incident. All three victims identified Smith in a photo array.

{¶10} After the presentation of the State's case, Smith moved for an acquittal of all the charges. The court granted his motion as to the kidnapping charges involving Ericka and her three children because Smith was not aware of their presence in the house. The court also dismissed the intimidation charge.

{¶11} Smith denied any involvement in the incident. He testified that he was driving home when he saw a friend. He offered her a ride and when they reached her aunt's house, he went inside to talk. He testified that he was taking out the trash for the aunt when suddenly two or three men came over the fence, running toward him. In response, he ran to his car and was tackled by a police officer. He claimed that he was wearing latex gloves because the trash contained dog feces. On cross-examination, Smith indicated that he failed to tell the police this version of the events because they never asked. He further admitted that he had prior convictions for drug-related offenses, domestic violence, and carrying a concealed weapon.

{¶12} The jury found Smith guilty on all the remaining counts, and the court sentenced him to a total of ten years in prison. Smith raises two assignments of error on appeal, as well as one additional assignment of error in his pro se brief.

Reading the Indictment

{¶13} In his first assignment of error, Smith contends that the court unlawfully prejudiced his case by reading the indictment to the jury. Specifically, he contends that the court's reference to the charge of having a weapon while under disability unfairly revealed to the jury that he had a criminal record.

{¶14} Smith's argument lacks merit for several reasons. First, there is no authority that precludes a trial court from reading the indictment to the jury. Moreover, Smith never moved to sever the weapon under disability count. See Crim.R. 14; see, also, *State v. Rutledge* (June 1, 2001), Montgomery App. No. 18462. In fact, defense counsel did not stipulate to Smith's prior convictions until after the trial court read the indictment. Finally, Smith testified at trial and, therefore, any alleged harm resulting from the reading of the indictment was negated by his testifying. By choosing to testify, Smith put his felony record before the jury.

{¶15} Smith’s first assignment of error is overruled.

Ineffective Assistance of Counsel

{¶16} In his second assignment of error, Smith argues that he was denied effective assistance of counsel because his trial counsel (1) never obtained a preliminary hearing transcript for purposes of discrediting the State’s witnesses, (2) neglected to speak with his previous counsel, (3) failed to sufficiently communicate with him for the preparation of his defense, and (4) failed to provide the State with discovery.

{¶17} In a claim of ineffective assistance of counsel, the burden is on the defendant to establish that counsel’s performance fell below an objective standard of reasonable representation and prejudiced the defense. *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph two of the syllabus; *State v. Lytle* (1976), 48 Ohio St.2d 391, vacated on other grounds (1978), 438 U.S. 910; and *Strickland v. Washington* (1984), 466 U.S. 668. Hence, to determine whether counsel was ineffective, Smith must show that (1) “counsel’s performance was deficient,” in that “counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment,” and (2) counsel’s “deficient performance prejudiced the defense,” in that “counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” *Strickland*, supra, at 687.

{¶18} In Ohio, a properly licensed attorney is presumed competent. *Vaughn v. Maxwell* (1965), 2 Ohio St.2d 299, 301. In evaluating whether a petitioner has been denied effective assistance of counsel, the Ohio Supreme Court held that the test is “whether the accused, under all the circumstances, * * * had a fair trial and substantial justice was done.” *State v. Hester* (1976), 45 Ohio St.2d 71, paragraph four of the syllabus. When making that determination, a court must determine “whether there has been a substantial violation of any of defense counsel’s essential duties

to his client” and “whether the defense was prejudiced by counsel’s ineffectiveness.” *State v. Lytle* (1976), 48 Ohio St.2d 391, 396, and *State v. Calhoun* (1999), 86 Ohio St.3d 279, 289. To show that a defendant has been prejudiced, the defendant must prove “that there exists a reasonable probability that, were it not for counsel’s errors, the result of the trial would have been different.” *Bradley*, at paragraph three of the syllabus, and *Strickland*, *supra*, at 686.

{¶19} Smith’s argument that his trial counsel was deficient for failing to obtain a preliminary hearing transcript lacks merit. The record reveals that Smith’s trial counsel requested that the court order the transcript at the State’s expense and the request was granted. Smith essentially argues that his trial counsel failed to discredit the State’s witnesses at trial through their inconsistent statements made at the preliminary hearing. However, Smith fails to identify any inconsistent statements and, further, has neglected to make the transcript a part of the record on appeal. As a result, we must presume regularity in the proceedings below and reject this argument. See *State v. Hutchins*, Cuyahoga App. Nos. 83421, 83564, 2004-Ohio-2403, at ¶15, citing *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197. See, also, App.R. 9(B) and 10(A).

{¶20} As to Smith’s remaining references to alleged errors by his trial counsel, he fails to demonstrate how these deficiencies prejudiced him. Without addressing whether counsel’s performance was deficient, we find that even if the alleged errors had not occurred, the outcome of the case would not have changed. Here, the evidence overwhelmingly demonstrated that Smith was guilty of the crimes charged. All three victims identified him in a photo array and testified that Smith entered their home with a gun and ransacked the house. The police apprehended Smith as he fled the scene. The police recovered the stereo amplifiers and the telephone outside of the house in the area from which Smith was fleeing. Consistent with D.W.’s testimony, Smith was wearing latex gloves when the police apprehended him. Moreover, Smith admitted that he was at the house.

Because he failed to present any evidence that the result of the trial would have been different had his attorney acted differently, we find that his claim of ineffective assistance of counsel lacks merit.

{¶21} Smith's second assignment of error is overruled.

Defective Indictment

{¶22} In his pro se assignment of error, Smith argues that his convictions should be reversed because the indictment was fatally defective. He maintains that the indictment omitted material elements for kidnapping, aggravated burglary, aggravated robbery, and disrupting public service.

{¶23} Initially, we note that Smith did not object to the form of the indictment in the trial court. Accordingly, he has waived all but plain error. See Crim.R. 12(C) and 12(H). See, also, *State v. Frazier*, 73 Ohio St.3d 323, 332, 1995-Ohio-235. To show plain error, a defendant must demonstrate "that the trial's outcome would clearly have been different but for the alleged errors." *State v. Campbell*, 69 Ohio St.3d 38, 49, 1994-Ohio-492. Notice of plain error is taken with the utmost caution, under exceptional circumstances, and only to prevent the manifest miscarriage of justice. *State v. Landrum* (1990), 53 Ohio St.3d 107, 111.

{¶24} A criminal indictment is sufficient when it provides a defendant with notice of all the elements of the offense with which the defendant is charged. Crim.R. 7. "Generally, the requirements of an indictment may be met by reciting the language of the criminal statute." *State v. Childs*, 88 Ohio St.3d 194, 199, 2000-Ohio-298, citing *State v. Murphy* (1992), 65 Ohio St.3d 554, 583.

{¶25} Our review of the record indicates that the indictment included all of the material elements of each offense charged. Smith erroneously contends that the indictment is defective as to the kidnapping count because it did not include the element "to hold for ransom, or as a shield or hostage." See R.C. 2905.01(A)(1). Smith was not indicted under this section; rather, he was

indicted under R.C. 2905.01(A)(2) and (A)(3). Similarly, as to the remaining offenses, Smith incorrectly cites other subsections of the statutes and argues that their omission was prejudicial. Because he was not indicted under these sections and, further, the indictment contains the material elements of the sections for which he was indicted, we find no merit to his argument.

{¶26} To the extent that Smith also implies that the indictment must specify the underlying felony supporting the kidnapping conviction, we disagree. In *State v. Skatzes*, Montgomery App. No. 15848, 2003-Ohio-516, the court overruled this same argument. In following the Ohio Supreme Court's decision in *Murphy*, supra, the Second Appellate District noted:

“The supreme court has held that an indictment is sufficient if it tracks the wording of the applicable statutes, especially when a bill of particulars may be used to obtain additional information. * * * [W]e are unaware of any case in which the supreme court has held that the failure to identify an underlying felony is a fatal defect in an indictment.” (Citations omitted.) Id. at ¶56.

{¶27} Moreover, based on the inclusion of the other felonies in the indictment, i.e., aggravated burglary and aggravated robbery, and the specific facts contained in the bill of particulars, we find that Smith was adequately notified of the underlying felonies supporting the kidnapping charges.

{¶28} Thus, because we find no error, plain or otherwise, Smith's pro se assignment of error is overruled.

Judgment affirmed.

PATRICIA ANN BLACKMON, P.J. and

FRANK D. CELEBREZZE, JR., J. CONCUR