[Cite as *State v. Price*, 2009-Ohio-3503.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 90308

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

LAMAR PRICE

DEFENDANT-APPELLANT

JUDGMENT: APPLICATION DENIED

APPLICATION FOR REOPENING
MOTION NO. 414405
LOWER COURT NO. CR-489211
COMMON PLEAS COURT

RELEASE DATE: July 14, 2009

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SEAN C. GALLAGHER, J.:

{¶ 1} In *State v. Price*, Cuyahoga County Court of Common Pleas Case No. CR-489211, applicant was convicted of three counts of aggravated robbery, each with firearm specifications. This court affirmed that judgment in *State v. Price*, Cuyahoga App. No. 90308, 2008-Ohio-3454. The Supreme Court of Ohio denied applicant's motion for leave to appeal and dismissed the appeal as not involving any substantial constitutional question. *State v. Price*, 120 Ohio St.3d 1454, 2008-Ohio-6813, 898 N.E.2d 968.

{¶ 2} Price has filed with the clerk of this court an application for reopening. He asserts that he was denied the effective assistance of appellate counsel and

submits eleven proposed assignments of error. We deny the application for reopening. As required by App.R. 26(B)(6), the reasons for our denial follow.

{¶ 3} Having reviewed the arguments set forth in the application for reopening in light of the record, we hold that Price has failed to meet his burden to demonstrate that "there is a genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal." App.R. 26(B)(5). In *State v. Spivey*, 84 Ohio St.3d 24, 1998-Ohio-704, 701 N.E.2d 696, the Supreme Court specified the proof required of an applicant. "In *State v. Reed* (1996), 74 Ohio St.3d 534, 535, 660 N.E.2d 456, 458, we held that the two prong analysis found in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, is the appropriate standard to assess a defense request for reopening under App.R. 26(B)(5). [Applicant] must prove that his counsel were deficient for failing to raise the issues he now presents, as well as showing that had he presented those claims on appeal, there was a 'reasonable probability' that he would have been successful. Thus [applicant] bears the burden of establishing that there was a 'genuine issue' as to whether he has a 'colorable claim' of ineffective assistance of counsel on appeal." Id. at 25. Applicant cannot satisfy either prong of the *Strickland* test. We must, therefore, deny the application on the merits.

{¶ 4} Price was convicted of participating with others in the daytime robbery of three adults as they walked with young children to a wading pool. One of the actors in the robbery had a gun. During the robbery, the assailants removed the clothing and the shoes of the male adult. Cuyahoga App. No. 90308, 2008-Ohio-3454,

supra, at ¶5, et seq. In his first proposed assignment of error, Price argues that the trial court engaged in "judicial factfinding" because, in determining his sentence, the trial court considered the psychological harm which the robbery caused on two "bystanders." "Trial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences." *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, paragraph 7 of the syllabus, cited in *State v. Clay*, Cuyahoga App. No. 89763, 2008-Ohio-1415, at ¶25. As a consequence, his first proposed assignment of error does not provide a basis for reopening.

{¶ 5} In his second proposed assignment of error, Price argues that the state should have merged the three counts of aggravated robbery. He states that only one person was robbed and argues that these were allied offenses of similar import. Yet, Price does not cite to any portion of the record at which the issue of allied offenses was raised.

{¶ 6} "Where, as is the instant case, a defendant does not raise the issue of allied offenses at trial, the issue is waived for purposes of appeal unless plain error is shown. *State v. Thrower* (1989), 62 Ohio App. 3d 359, 376, 575 N.E.2d 863, 874, jurisdictional motion overruled (1990), 49 Ohio St. 3d 717, 552 N.E.2d 951. See, also, *State v. Comen* (1990), 50 Ohio St. 3d 206, 211, 553 N.E.2d 640, 646; *State v. Fields* (1994), 97 Ohio App. 3d 337, 344, 646 N.E.2d 866, 870, motion for delayed

appeal denied (1998), 84 Ohio St. 3d 1427, 702 N.E.2d 903***. *State v. Stansell*, (Apr. 20 2000) Cuyahoga App. No. 75889, unreported;

{¶ 7} "Plain error consists of an obvious error or defect in the trial proceedings that affects a substantial right. Crim.R. 52(B). Under this standard, reversal is warranted only when the outcome of the proceedings below clearly would have been different absent the error. *State v. Lindsey* (2000), 87 Ohio St. 3d 479, 482, 721 N.E.2d 995, citing *State v. Long* (1978), 53 Ohio St. 2d 91, 7 Ohio Op. 3d 178, 372 N.E.2d 804, paragraph two of the syllabus. *State v. Stansell*, (Apr. 20 2000) Cuyahoga App. No. 75889, unreported." *State v. Gaston*, Cuyahoga App. No. 79626, 2002-Ohio-506, at 6-7.

{¶ 8} The state argues that there was a separate animus to support each count of aggravated robbery. Price and the others acted to deprive three separate individuals of their property. He has, therefore, failed to show any prejudice by the absence of this assignment of error on direct appeal. As a consequence, his second proposed assignment of error does not provide a basis for reopening.

{¶ 9} In his third, fifth, sixth, eighth and ninth proposed assignments of error, Price challenges the propriety of various jury instructions. He does not, however, identify where in the record an objection was made to any of the jury instructions which he now challenges. The state argues that Price must, therefore, demonstrate plain error. "Under Crim.R. 30(A), the failure to object to jury instructions waives any error relating to the instructions except in the event of plain error. See *State v. Gideons* (1977), 52 Ohio App.2d 70, 368 N.E.2d 67. A defective jury instruction

does not rise to the level of plain error unless it can be shown the outcome of the trial clearly would have been otherwise if the instruction was properly given. *Cleveland v. Buckley* (1990), 67 Ohio App.3d 799, 588 N.E.2d 912." *State v. Robinson* (June 1, 1995), Cuyahoga App. No. 67363, at 7, quoted with approval in *State v. Lawwill*, Cuyahoga App. No. 88251, 2007-Ohio-2627, at ¶41.

{¶ 10} In his third proposed assignment of error, Price contends that the trial court erred in its instruction to the jury by failing to state that a theft offense is depriving the owner of property *without the consent of the owner or the person authorized to give consent*. In *State v. Adams* (1980), 62 Ohio St.2d 151, 154, 404 N.E.2d 144, 146, the Supreme Court held "that a trial court's failure to separately and specifically charge the jury on every element of each crime with which a defendant is charged does not per se constitute plain error nor does it necessarily require reversal of a conviction. Only by reviewing the record in each case can the probable impact of such a failure be determined, and a decision reached as to whether substantial prejudice may have been visited on the defendant, thereby resulting in a manifest miscarriage of justice." Id. at 154 (footnote deleted). Price has not demonstrated that he was prejudiced by the absence of an instruction to the jury that a theft is depriving the owner of property without the consent of the owner or the person authorized to give consent. As a consequence, his third proposed assignment of error does not provide a basis for reopening.

{¶ 11} In his fifth proposed assignment of error, Price argues that the trial court erred by instructing the jury to take into consideration his interest in the case when

weighing his testimony. The trial court also instructed the jurors that they were to "apply to his testimony the same rules that [they would] apply to the testimony of all other witnesses ***." Tr. at 785. As the state observes, however, this court rejected the same argument with respect to a substantively identical instruction in *State v. Franklin* (May 10, 2001), Cuyahoga App. No. 77385. In *Franklin*, the defendant also did not object to the instruction. In light of this prior authority from this district, Price was not prejudiced by the absence of an assignment of error regarding the weight which the jury might give to his testimony. As a consequence, his fifth proposed assignment of error does not provide a basis for reopening.

{¶ 12} In his sixth proposed assignment of error, Price argues that the trial court erred by instructing the jury "that flight in and of itself does not raise a presumption of guilt. However, unless satisfactorily explained, it tends to show consciousness of guilt or a guilty connection with the alleged crime or crimes." Tr. 813. When the police approached Price to apprehend him, he was on a bicycle. He pedaled faster, told the officers he would not stop and was not taken into custody until he fell off the bicycle. Tr. 427-431.

{¶ 13} "While evidence of flight in and of itself does not raise a presumption of guilt, the jury may consider that evidence in their determination of guilt or innocence where the trial court instructs it accordingly. *State v. Bostick,* Cuyahoga App. No. 82933, 2004-Ohio-1902. Evidence of flight is admissible as tending to show consciousness of guilt. *State v. Eaton* (1969), 19 Ohio St.2d 145, 160, 48 Ohio Op.2d 188, 249 N.E.2d 897, vacated on other grounds (1972), 408 U.S. 935, 92

S.Ct. 2857, 33 L.Ed.2d 750; *State v. Williams,* 79 Ohio St.3d 1, 26, 1997-Ohio-407, 679 N.E.2d 646. It is well within a trial court's discretion to issue an instruction on flight if sufficient evidence exists in the record to support the charge. *State v. Benjamin,* Cuyahoga App. No. 80654, 2003-Ohio-281, ¶ 29, ¶ 31." *State v. Brown*, Cuyahoga App. No. 83976, 2004-Ohio-5863, at ¶25. Clearly, there was evidence in the underlying case to support an instruction on flight. As a consequence, his sixth proposed assignment of error does not provide a basis for reopening.

{¶ 14} In his eighth proposed assignment of error, Price argues that the trial court erred by failing to give an instruction on alibi. "'Where a defendant files a timely notice of alibi, presents evidence to support the contention, and relies on it as his sole defense, this court has held that a trial court's failure to instruct the jury on alibi violates the mandate of R.C. 2945.11, whether or not the defendant requests such instruction. So long as the defense is supported by testimony, the court has a duty to give an instruction, and failure to do so is plain error pursuant to Crim .R. 52(B). *State v. Mitchell* (1989), 60 Ohio App.3d 106, 108, 574 N.E.2d 573.'

{¶ 15} "'This court has subsequently held, however, that though a failure to instruct a jury on the defense of alibi is error even if not requested, it is plain error only if the instruction would have altered the outcome of the case or if its omission caused a manifest miscarriage of justice.' Id. 'As the evidence, including that of the defendant's own witnesses, tended to contradict the defendant's alibi, it was not unreasonable for a jury to disbelieve the alibi and find the defendant guilty beyond a

reasonable doubt.' Id. at 109, 574 N.E.2d 573." *State v. Greene*, Cuyahoga App. No. 91104, 2009-Ohio-850, at ¶105-106.

{¶ 16} Price filed a notice of alibi. He testified that he was in the area of the theft and saw an unclothed male running onto a porch. The victims testified that he was involved in the theft. On direct appeal, this court noted the "overwhelming evidence against" Price which clearly contradicts his alibi. Cuyahoga App. No. 90308, 2008-Ohio-3454, at ¶26. We cannot conclude that an alibi instruction would have changed the outcome of the case. Price was not prejudiced by the absence of an alibi instruction. As a consequence, his eighth proposed assignment of error does not provide a basis for reopening.

{¶ 17} In his ninth proposed assignment of error, Price argues that the trial court erred by instructing the jury that: "It is not necessary that the state prove the offenses were committed on the exact day charged in the indictment." Tr. at 786. Price does not demonstrate where in the record he disputed the date. "Price's convictions stem from an incident that occurred on the afternoon of August 2, 2006." Cuyahoga App. No. 90308, 2008-Ohio-3454, at ¶5. This is the same date as in the indictment and on which Price acknowledged seeing the male whose clothing had been removed running to the porch.

{¶ 18} In *State v. Bell*, Cuyahoga App. No. 87769, 2006-Ohio-6592, this court considered the same instruction. "This instruction is also a standard instruction in Ohio. The jury heard evidence from the State with regard to when the offenses occurred. The jury also heard evidence from Bell about his alibi. Accordingly, the

jury was free to weigh the evidence and this instruction did not result in any harm to Bell's case. The trial court did not err when it gave this instruction." Id. at ¶54. Likewise, this instruction did not prejudice Price. As a consequence, his ninth proposed assignment of error does not provide a basis for reopening.

{¶ 19} In his fourth proposed assignment of error, Price argues that the indictment did not identify a specific theft offense and, therefore, he did not receive sufficient notice of the charge. R.C. 2941.05 provides: "*In an indictment* or information charging an offense, *each count shall contain*, and is sufficient if it contains in substance, *a statement that the accused has committed some public offense* therein specified. Such statement may be made in ordinary and concise language without any technical averments or any allegations not essential to be proved. *It may be in the words of the section of the Revised Code describing the offense or declaring the matter charged to be a public offense*, or in any words sufficient to give the accused notice of the offense of which he is charged." (Emphasis added.) Price has not provided this court with any authority superceding R.C. 2941.05 nor has he demonstrated that he was prejudiced by the absence of this assignment of error. As a consequence, his fourth proposed assignment of error does not provide a basis for reopening.

{¶ 20} In his seventh proposed assignment of error, Price argues that the trial court erred because the instructions did not require the jury to agree unanimously on alternative theories of a principal offender or an aider and abettor. Nevertheless, the record is replete with the trial court's instructions to the jury that they were required

to reach a unanimous verdict. Additionally, at the defendant's request, the trial court polled the jury who confirmed that their verdict was unanimous. Price has not, therefore, demonstrated that he was prejudiced by the absence of this assignment of error. As a consequence, his seventh proposed assignment of error does not provide a basis for reopening.

{¶ 21} In his tenth proposed assignment of error, Price argues that the trial court erred when it ordered Price to remove his shirt and show his tatoos. In support of this assignment of error, he merely cites two federal circuit court cases without additional argument or reference to the record. "In *State v. Kelly* (Nov. 18, 1999), Cuyahoga App. No. 74912, reopening disallowed (June 21, 2000), Motion No. 12367, this court held that the mere recitation of assignments of error is not sufficient to meet applicant's burden to "prove that his counsel were deficient for failing to raise the issues he now presents, as well as showing that had he presented those claims on appeal, there was a 'reasonable probability' that he would have been successful." *Spivey*, supra.'" *State v. Gaughan*, Cuyahoga App. No. 90523, 2009-Ohio-955, reopening disallowed, 2009-Ohio-2702, at ¶5 (additional citations deleted). By failing to present argument, Price has failed to demonstrate that his counsel was deficient or that he was prejudiced.

{¶ 22} Additionally, there was testimony of Price's suspected involvement of being involved with a gang whose members had identifying tattoos. The trial court asked Price to remove his shirt in response to a question requested by the jury. In light of other testimony in the case, Price has not demonstrated that the trial court

abused its discretion by asking him to remove his shirt. As a consequence, his tenth proposed assignment of error does not provide a basis for reopening.

{¶ 23} In his eleventh proposed assignment of error, Price argues that the trial court erred by answering the jury's question during deliberations regarding the firearm specification. The trial court told the jury that there was no evidence that Price held the firearm but the state claimed he aided and abetted the person who did hold the firearm. "If a jury's inquiry suggests confusion regarding a legal issue of some significance, the trial court should not rely on general statements from the prior charge, but should clarify the point of concern. See *United States v. Nunez* (C.A.6, 1989), 889 F.2d 1564, 1568; *State v. Sales,* Franklin App. No. 02AP-175, 2002-Ohio-6563." *State v. Jones*, Cuyahoga App. No. 88203, 2007-Ohio-1717, at ¶23.

{¶ 24} In this case, the trial court clarified the instruction on aiding and abetting, edited it, signed it and gave it to the jury. In light of the overwhelming evidence in the trial, Price has not demonstrated that he was prejudiced by the trial court's response to the jury's question. As a consequence, his eleventh proposed assignment of error does not provide a basis for reopening.

{¶ 25} Price has not met the standard for reopening. Accordingly, the application for reopening is denied.

SEAN C. GALLAGHER, PRESIDING JUDGE

MELODY J. STEWART, J., and
FRANK D. CELEBREZZE, JR., J., CONCUR