[Cite as *State v. Flowers*, 2009-Ohio-4876.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91864

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ARTEZ FLOWERS

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-505118

BEFORE: Gallagher, P.J., Dyke, J., and Sweeney, J.

RELEASED: September 17, 2009

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

SEAN C. GALLAGHER, P.J.:

{¶ 1} Defendant-appellant, Artez Flowers, appeals his conviction from the Cuyahoga County Court of Common Pleas, alleging ineffective assistance of counsel and prosecutorial misconduct. For the reasons that follow, we affirm.

{¶ 2} On November 20, 2007, at approximately 5:40 p.m., in the area of E. 90th Street and Superior Avenue, in Cleveland, Yolanda Cooke and Randall Hardy were out walking. They were on their way to a park to drink the beer that they had just bought at a corner store. While walking on Superior Avenue toward E. 105th Street, they noticed a group of kids hanging out on the sidewalk. In an effort to avoid any potential conflict, they walked across the street. Hardy testified that he heard someone yell "get them," and then they heard gunshots. Hardy and Cooke ran and hid behind a Catholic school until they felt it was safe to leave. Hardy was headed back toward Superior Avenue when he was approached by three males who asked him if he was okay. One of the males, later identified as Flowers, pulled a gun out and stuck it in Hardy's face demanding money, while the other two males went through his pockets. Hardy described the gunman as wearing a hooded sweatshirt with white stripes on the sleeves and a different colored hood. He described the gun as an automatic. Hardy testified that he told them he did not have any money on him, so the assailants pulled a gun on Cooke, who had been walking behind Hardy.

{¶ 3} Cooke testified that she heard one of the robbers say, "Man, there go the b**** right there. Let's go get her." The males approached Cooke. At first she struggled with them over her purse, but then she heard the click of the gun and thought they might be ready to shoot, so she gave up her purse. She said they took her purse and the bag containing the beer and chips. She testified that she had $60, cigarettes, and marijuana in her purse. She testified that Flowers was the male with the gun and that he was wearing a hooded sweatshirt with white stripes on the sleeve and a green hood.

{¶ 4} Jovon Whitfield testified that on the night in question, he was walking in the neighborhood getting exercise when he saw Cooke get robbed at gunpoint. He saw Flowers take Cooke's purse and run onto the porch of a vacant home on E. 90th Street. Whitfield and Hardy testified that they observed Flowers going through Cooke's purse. Cooke testified that she went back to the store and called police.

{¶ 5} The police arrived within a few minutes. Hardy told the police, "We got robbed and the guys are standing right on the porch." Hardy, Cooke, and Whitfield described the suspect as a black male in his late teens, who had a beard and mustache and was wearing a black hooded sweatshirt with white stripes. The officers headed toward the vacant house when Flowers, the male matching the victims' description, and another male ran into the house next door. The officers ordered the males to stop; one stopped and got

down on the ground, but Flowers ran into the house. The police pursued Flowers into the house. When the occupants refused to let the officers in, Officer Grabowski kicked in the door. Flowers was found in the third floor attic without his shirt on. Officer Grabowski testified that when he was taking Flowers downstairs, he noticed the hooded sweatshirt that Flowers had been wearing laying on the bed. Officer Grabowski took it with him.

{¶ 6} Hardy and Cooke identified Flowers as the male who robbed them. They also identified the sweatshirt as being the one Flowers was wearing during the robbery. Whitfield identified Flowers as the male he saw rob Cooke at gunpoint. Cooke's purse was located, emptied out, on the porch of the abandoned house. The gun was never recovered.

{¶ 7} At trial, Hardy, Cooke, and Whitfield identified Flowers as the robber and the sweatshirt as the one worn by Flowers on the night of the robbery.

{¶ 8} Venus Flowers testified on behalf of the defendant, her son. She testified that on the night in question, Flowers was home all day until she sent him to the store to buy her some cigarettes. She said he returned about five or ten minutes later. Then she heard a big bang, and then her house was full of police. She testified that she helped secure the dogs while the police searched for her son. She testified that the sweatshirt belonged to her

brother, who lived with her, and that Flowers did not wear his uncle's clothes.

{¶ 9} William Woods, Flowers's uncle and Venus's brother, testified that on the day in question, he was going back and forth to the store all day for his sister while she was preparing for Thanksgiving. He testified that he saw his nephew walking to the store for cigarettes and joined him. He said they picked up beer and cigarettes and headed back to the house.

{¶ 10} Woods testified that as they were walking, the police pulled up with shotguns drawn and ordered him to stop. He said he stopped, but Flowers had already walked into the house. He testified that the sweatshirt was his and he had worn it earlier that day.

{¶ 11} Flowers testified that he woke up around noon that day and played video games and watched TV most of the day until his mother wanted him to get her some cigarettes. He went to the Superior Deli with his uncle. Flowers testified that he was wearing a white T-shirt and jeans. He said that when he returned home, he looked for his mother and then headed up to the attic. He heard the police kick in the front door, and he thought they were coming to arrest him on his outstanding warrant. He denied wearing the sweatshirt and robbing Cooke and Hardy.

{¶ 12} Flowers was found guilty of one count of aggravated robbery with firearm specifications with Yolanda Cooke as the named victim. He was

found not guilty of aggravated robbery with firearm specifications with Randall Hardy as the named victim. Flowers was sentenced to a total of seven years in prison. He appeals, advancing two assignments of error for our review.

{¶ 13} Flowers's first assignment of error states the following:

{¶ 14} "I. The defendant was denied effective assistance of counsel."

{¶ 15} In order to substantiate a claim of ineffective assistance of counsel, the appellant is required to demonstrate that (1) the performance of defense counsel was seriously flawed and deficient and (2) the result of the appellant's trial or legal proceeding would have been different had defense counsel provided proper representation. *Strickland v. Washington* (1984), 466 U.S. 668; *State v. Brooks* (1986), 25 Ohio St.3d 144. Judicial scrutiny of defense counsel's performance must be highly deferential. *Strickland*, 466 U.S. at 689. In Ohio, there is a presumption that a properly licensed attorney is competent. *State v. Calhoun*, 86 Ohio St.3d 279, 1999-Ohio-102.

{¶ 16} Flowers claims he was denied effective assistance of counsel because his attorney failed to object to the fact that his client was wearing jail clothing at the start of trial when his attorney knew that family members were to bring clothes for Flowers the following day. Also, Flowers contends that his trial counsel failed to object to leading questions asked on direct and redirect examination by the state.

{¶ 17} We are cognizant of the potential for prejudice when a defendant appears before a jury in jail clothes. "The constant reminder of the accused's condition implicit in such distinctive, identifiable attire may affect a juror's judgment." *Holbrook v. Flynn* (1986), 475 U.S. 560, 567, 106 S.Ct. 1340, citing *Estelle v. Williams* (1976), 425 U.S. 501, 504-505.

{¶ 18} However, in *Estelle,* the Supreme Court refused to establish an across-the-board rule that a conviction must be overturned, under any circumstances, when the accused wore jail clothing at trial. Instead, the inquiry must focus on whether the accused's appearance before the jury in jail clothes was compelled. Id. at 507. Though a defendant cannot be compelled to appear at trial in identifiable prison clothes, he may choose to do so. *State v. Wigley* (Feb. 6, 1997), Cuyahoga App. No. 69920. Also, there may be other circumstances that indicate a lack of compulsion.

{¶ 19} The trial court inquired on the record about Flowers's clothing before any prospective jurors were seated, asking why he was not in civilian clothes when the court ordered such. Flowers's attorney explained that a month before the trial date, he told the defendant's parents to bring clothes for Flowers, but his parents never brought the clothes. The attorney spoke with Flowers's parents again that day and told them to bring clothes for the next day.

{¶ 20} In a similar case, *State v. Dorsey* (Apr. 23, 1998), Cuyahoga App. No. 72177, this court held that the defendant was not forced to stand trial in his prison clothing when the defendant had ample time before the trial date to have civilian clothes brought to court but did not make the effort. The court further found that the defense attorney was not ineffective when he did not request a continuance. The court reasoned that the defendant did not demonstrate that the result of the trial would have been different had he been in civilian clothes.

{¶ 21} We conclude that Flowers was not *forced* to stand trial in prison clothing. We further find that his attorney was not ineffective. Flowers has not demonstrated that the result of his trial would have been different had he started the trial in civilian clothes.

{¶ 22} Finally, we find no merit to Flowers's argument that his attorney was ineffective for failing to object when the prosecutor asked leading questions. It is within the trial court's discretion to allow leading questions on direct examination, and therefore, the failure to object to leading questions does not usually constitute ineffective assistance of counsel. *State v. Skinner*, Licking App. No. 2007CA00024, 2007-Ohio-6793, ¶32, citing *State v. Jackson*, 92 Ohio St.3d 436, 449, 2001-Ohio-1266. Further, the failure to object is not a per se indicator of ineffective assistance of counsel because sound trial

strategy might well have been to not interrupt the proceedings. Id., citing *State v. Gumm* (1995), 73 Ohio St.3d 413.

{¶ 23} A review of the record indicates that the state asked numerous leading questions, particularly with the 15-year-old witness, Jovon Whitfield. Evid.R. 611(C) allows leading questions when attempting to develop the testimony. Here, the state was trying to develop the witness's testimony, not to influence his testimony. Further, Flowers has failed to demonstrate that the result of his trial would have been different had his attorney objected to every leading question; therefore, we conclude that trial counsel was not ineffective. Accordingly, Flowers's first assignment of error is overruled.

{¶ 24} Flowers's second assignment of error states the following:

{¶ 25} "II. The defendant was materially prejudiced by instances of prosecutorial misconduct."

{¶ 26} A prosecuting attorney's conduct during trial does not constitute grounds for error unless the conduct deprives the defendant of a fair trial. *State v. Keenan* (1993), 66 Ohio St.3d 402, 405; *State v. Gest* (1995), 108 Ohio App.3d 248, 257. The touchstone of a due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor. *Smith v. Phillips* (1982), 455 U.S. 209. The effect of the prosecutor's misconduct must be considered in light of the whole trial. *State v. Durr* (1991), 58 Ohio St.3d 86, 94; *State v. Maurer* (1984), 15 Ohio St.3d 239, 266.

{¶ 27} Flowers claims that the prosecutor committed misconduct by asking leading questions, asking the same questions repeatedly, suggesting Flowers's family contrived their testimony, arguing that the defense attorney tried to confuse a witness by asking the witness why he did not contact the prosecutor with information regarding the case, and arguing that the defense stipulated that results of the gunshot residue test were meaningless.

{¶ 28} Evid.R. 611(C) provides that leading questions cannot be used on direct examination of a witness "except as may be necessary to develop his testimony." The exception of Evid.R. 611(C) "is quite broad and places the limits upon the use of leading questions on direct examination within the sound discretion of the trial court." *State v. Lewis* (1982), 4 Ohio App.3d 275, 278.

{¶ 29} There were several instances throughout the trial where the state asked leading questions to its witnesses on direct and redirect examination, again, particularly with the 15-year-old witness, Jovon Whitfield. Having reviewed the record, however, we conclude that the prosecutor resorted to leading questions to move the trial along, not to influence his witnesses' testimony or to supply them with answers. See *State v. Canyon*, Hamilton App. Nos. C-070729, C-070730, C-070731, 2009-Ohio-1263 (finding that it was not improper for the prosecutor to resort to leading questions to move the trial along); *State v. Poling*, Portage App. No. 2004-P-0044, 2006-

Ohio-1008 (finding the prosecutor's misuse of leading questions, effectively supplying answers to its witnesses, denied defendant a fair trial). Even if the questions had been improper, given the victims' testimony, we cannot say that the outcome of the trial would have been different had leading questions not been asked.

{¶ 30} Upon review of the record, we conclude that although the trial court may have improperly admitted the repetitive questions and answers, such error was harmless error. Harmless error is "[a]ny error, defect, irregularity, or variance which does not affect substantial rights." Crim.R. 52(A). When determining whether an error in the admission of evidence is harmless, an appellate court must find there is "no reasonable probability that the evidence may have contributed to the defendant's conviction." *State v. Cureton*, Medina App. No. 01CA3219-M, 2002-Ohio-5547, citing *State v. DeMarco* (1987), 31 Ohio St.3d 191, 195. See, also, *State v. Brown* (1992), 65 Ohio St.3d 483, 485. After reviewing the record as a whole, this court is convinced that, although vexing and tedious, the repetitive questions did not contribute to Flowers's conviction.

{¶ 31} In general, prosecutors are given considerable latitude in opening statement and closing argument. *State v. Ballew* (1996), 76 Ohio St.3d 244, 255, 1996-Ohio-81. In closing argument, a prosecutor may comment on "'what the evidence has shown and what reasonable inferences may be drawn

therefrom.'" *State v. Lott* (1990), 51 Ohio St.3d 160, 165, quoting *State v. Stephens* (1970), 24 Ohio St.2d 76, 82. A prosecutor may not express his personal belief or opinion as to the credibility of a witness, the guilt of an accused, or allude to matters that are not supported by admissible evidence. *State v. Smith* (1984), 14 Ohio St.3d 13, 14. The test for prosecutorial misconduct during closing argument is whether the remarks were improper and, if so, whether they prejudicially affected the accused's substantial rights. Id. To determine prejudice, the record must be reviewed in its entirety. *State v. Lott* (1990), 51 Ohio St.3d 160, 166.

{¶ 32} We agree with Flowers that the prosecutor's statements about the gunshot residue results were incorrect and improper. In addition, the prosecutor's statements in which he claimed that Jovon Whitfield attended a special needs school was not exactly accurate because the prosecutor was implying that Whitfield was a special needs student when the testimony reflects that he had behavioral problems (i.e., "cussing at people"). Further, the prosecutor's personal attack on the defense attorney when he stated, "God bless Mr. Jamison for confusing him. God bless him," was not proper.

{¶ 33} Although the prosecutor made several improper remarks during closing, we do not find that the comments prejudicially affected the substantial rights of Flowers. When considering the entire record in this case, we cannot say that, absent the improper remarks of the prosecutor, the

jury verdict would have been different. Accordingly, Flowers's second assignment of error is overruled.

{¶ 34} Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

SEAN C. GALLAGHER, PRESIDING JUDGE

ANN DYKE, J., and
JAMES J. SWEENEY, J., CONCUR