[Cite as *State v. Marshall*, 2009-Ohio-4877.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91988

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

RICHARD MARSHALL

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-510970

BEFORE: Boyle, J., Stewart, P.J., and Sweeney, J.

RELEASED: September 17, 2009

JOURNALIZED:

ATTORNEY FOR APPELLANT

Kelly A. Gallagher

Post Office Box 306
Avon Lake, Ohio 44012

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor
BY: Debra A. Obed
Assistant County Prosecutor
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

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).

MARY J. BOYLE, J.:

{¶ 1} Defendant-appellant, Richard Marshall, appeals from an order convicting him of felonious assault and robbery. Finding no merit to the appeal, we affirm.

{¶ 2} The grand jury indicted Marshall on four counts: one count of aggravated robbery in violation of R.C. 2911.01(A)(1), two counts of felonious assault, one in violation of R.C. 2903.11(A)(1) and one in violation of R.C. 2903.11(A)(2), and one count of robbery in violation of R.C. 2911.02(A)(2). All counts had one- and three-year firearm specifications attached. Marshall pled not guilty to the charges, and the case proceeded to a jury trial where the following facts were presented.

{¶ 3} Kelvin Price, the victim, testified for the state that he was, at the time of trial, in the county jail on pending charges. He further testified to his past lengthy criminal record. Price stated that his girlfriend of two years, Ruby, had previously dated Marshall. Price also knew Marshall from his neighborhood. Prior to January 2008, Price said that he never had any kind of confrontation with Marshall.

{¶ 4} Price testified that on the evening of January 19, 2008, he was walking by himself to Walgreen's. He said that he had Ruby's coat on, a large "puffy" coat. He "heard someone call Ruby's name." He saw a group of people in a white car. Price said, "No, it's not Ruby but what's up?" Marshall pointed to Price and replied, "You." He recognized Marshall, who got out of the car, along with about five other men. One of the men pointed a "pistol" at him. Price said

he took off running when he saw the gun. He said the group of men followed him in the white car. They caught him when he "ran into a dead-end." All of the men got out of the car again. Price testified that the men then "beat" him. Price said that he saw Marshall put brass knuckles on his hands and then hit him in the head with them. The same man who had the gun before still had the gun. A couple of the guys hit him repeatedly, and Marshall continued to hit him in the head and face with the brass knuckles. Price further stated that he saw Marshall take his wallet and cell phone. The man with the gun also hit him on the top of the head with it. Price could not remember if he fought back. He said that Marshall told him, "[t]ell Ruby congratulations on the baby."

{¶ 5} Price said that he must have passed out because an elderly man woke him up in an alley. He was in a lot of pain and was bleeding. Price said that he had about $92 in his wallet, which was missing along with his cell phone. He went to a pay phone and called 911. He gave a statement to the police and identified Marshall as one of his assailants. He further identified Marshall in a photo array.

{¶ 6} The state rested. Marshall moved for a Crim.R. 29 acquittal, which the trial court denied. Marshall then presented the following witnesses.

{¶ 7} Glenda Monday, Marshall's mother, testified that on the night Price was assaulted, Marshall was home all evening, lying on the couch. She remembered this day because it was the day after her other son's 18th birthday. She further testified that Marshall was seriously injured in March 2007, and that

since then, he mostly laid around on the couch. She said that he was also unable to work due to his injuries.

{¶ 8} Aaron Marshall, Marshall's brother, testified that on the night of the alleged assault, Marshall was at home with him. Aaron Marshall said that he and his brother watched two movies that night.

{¶ 9} April Booth, a friend of Marshall's, testified that she talked to Marshall on a daily basis. She talked to him on the night of the incident around the time it happened. She said that Marshall was at home when she talked to him.

{¶ 10} Jennifer Jones, Marshall's aunt, testified that on the night in question, she spoke with Marshall for about 30 minutes. They talked about movies and food. She also said that she was a nurse's assistant; she helped care for Marshall after he was seriously injured, and he has had many problems since then.

{¶ 11} On cross-examination, all four defense witnesses admitted that they never contacted the police after the alleged assault to tell the police that Marshall was at home on the night in question.

{¶ 12} Marshall rested and renewed his Crim.R. 29 motion for acquittal, which was again denied by the trial court.

{¶ 13} The jury found Marshall guilty of felonious assault in violation of R.C. 2903.11(A)(1), but without the firearm specifications, and guilty of robbery, but without the firearm specifications. The jury further found Marshall not guilty of

aggravated robbery and felonious assault under R.C. 2903.11(A)(2).

{¶ 14} The trial court sentenced Marshall to six years on each conviction and ordered that they run concurrently to one another. It further imposed three years of postrelease control upon his release from prison.

{¶ 15} It is from this judgment that Marshall appeals, raising seven assignments of error for our review.

{¶ 16} "[1.] The trial court erred in limiting Mr. Marshall's cross-examination of the victim on his pending rape charge.

{¶ 17} "[2.] The trial court erred by allowing victim to appear in civilian clothing and being seated prior to the jury's arrival.

{¶ 18} "[3.] The trial court erred by allowing victim to object to his own testimony before the jury.

{¶ 19} "[4.] There was insufficient evidence to convict Mr. Marshall of felonious assault.

{¶ 20} "[5.] Mr. Marshall's conviction for felonious assault was against the manifest weight of the evidence.

{¶ 21} "[6.] There was insufficient evidence to convict Mr. Marshall of robbery.

{¶ 22} "[7.] Mr. Marshall's conviction for robbery was against the manifest weight of the evidence."

Evid.R. 609

{¶ 23} In his first assignment of error, Marshall maintains that the trial court

erred when it refused to allow him to question the victim on cross-examination regarding the specifics of the victim's then-pending criminal case. We disagree.

{¶ 24} Prior to trial, Marshall requested that he be allowed to cross-examine the victim regarding the specifics of his then-pending rape case. The trial court stated that it would allow him to question the witness about whether he was currently in jail on pending charges, but not "as to what the charge" was. The trial court then stated, "[a]nd that is assuming, [prosecutor], that you are not giving the witness who is charged with rape consideration of his charge to testify in this particular case." The prosecutor replied, "[n]ot to my knowledge, your Honor. I haven't discussed that case with him. I haven't discussed it with the prosecutor handling the case. I stayed completely away from that charge."

{¶ 25} Defense counsel again stated that he would like "to go into what it is that he is charged with." The trial court replied, "I understand that. And I don't think that's *** relevant. There is no indication that there has been any kind of plea bargain. I think we would all find it nearly impossible to believe that someone would get a plea bargain on a rape to testify against someone who is charged in this particular case. And I just think it's more prejudicial than probative."

{¶ 26} Whether to admit or exclude evidence is a matter within the trial court's sound discretion. *State v. Mays* (1996), 108 Ohio App.3d 598, 617. Thus, we will not reverse such a decision absent an abuse of discretion. Abuse of discretion connotes more than an error of law; it implies that the trial court's

attitude is unreasonable, arbitrary, or unconscionable. *State v. Adams* (1980), 62 Ohio St.2d 151, 157.

{¶ 27} Under Evid.R. 609(A)(1), a witness other than the accused may be impeached by evidence that the witness has been *convicted* of a felony. Thus, Evid.R. 609 only applies to prior convictions – i.e., not current or pending charges. See, generally, *State v. Brooks* (1996), 75 Ohio St.3d 148, 151.

{¶ 28} There is a limited "self-interest" exception, however, where cross-examination of a pending case is permitted.

{¶ 29} In *State v. Hector* (1969), 19 Ohio St.2d 167, the Ohio Supreme Court explained:

{¶ 30} "While ordinarily the credibility of a witness may be attacked by proof of conviction of crime, but not by proof of indictment, this rule is subject to the exception that a witness in a criminal case may be asked if he is under indictment for crime, if such fact would reasonably tend to show that his testimony might be influenced by interest, bias, or a motive to testify falsely.

{¶ 31} "*** [E]vidence that criminal charges are then pending in the same court against a witness for the prosecution is a circumstance tending to show that the testimony of the witness is or may be influenced by the expectation or hope that, by aiding in the conviction of the defendant, he might be granted immunity or rewarded by leniency in the disposition of his

own case." (Internal citations omitted.) Id. at 178-179.

{¶ 32} Here, Price's felony case was pending in the same court and thus, the limited "self-interest" exception could apply. The prosecutor, however, stated on the record that she had not talked to Price about his pending rape charges, nor had she promised him anything or even spoken to the prosecutor on that case. Thus, the trial court did not err when it denied Marshall's request to question Price about the specifics of the pending case since there was no possible motive or influence that Price hoped to gain by testifying against Marshall.

{¶ 33} Accordingly, Marshall's first assignment of error is overruled.

Witness in Civilian Clothing

{¶ 34} In his second assignment of error, Marshall contends that the trial court erred when it granted the state's request to have the victim, who was then in the county jail, testify in civilian clothing. He maintains that allowing the victim to do so bolstered his credibility. He further argues that the trial court erred by allowing the victim to be seated prior to the jury's arrival. Essentially, Marshall's argument is that "[t]his case *** hinged largely on the credibility of the witnesses, and deprived the jury of the knowledge that Mr. Price was currently incarcerated in the county jail." We find Marshall's arguments to be wholly without merit.

{¶ 35} The prosecutor first asked Price, "Mr. Price, you're currently in county jail, correct?" Price replied that he was. The prosecutor then reviewed

Price's lengthy criminal record.

{¶ 36} On cross-examination, defense counsel then asked Price again about his prior criminal record, even reviewing it more in depth than the prosecutor did. The following exchange then occurred between defense counsel and Price:

{¶ 37} "Q. And then you have charges pending in this court right now?

{¶ 38} "A. Right.

{¶ 39} "Q. Okay. And you're in the county jail?

{¶ 40} "A. Mm-hmm.

{¶ 41} "Q. And that's why you have an escort behind you. Correct?

{¶ 42} "A. Right.

{¶ 43} "Q. Now, you're dressed in street clothes today. Correct?

{¶ 44} "A. Yes, sir.

{¶ 45} "Q. Okay. Was that your idea?

{¶ 46} "A. No."

{¶ 47} It is clear from this exchange, as well as from Price's direct examination, that the jury was fully aware that Price was in the county jail at the time he testified for charges that were pending against him. We find no error on the part of the trial court.

{¶ 48} Marshall's second assignment of error is overruled.

Victim Objecting to His Own Testimony

{¶ 49} In his third assignment of error, Marshall contends that the trial court

erred by allowing the victim to continually object to his own testimony. Throughout his testimony, Price stated on two separate occasions that he did not want to testify against Marshall, saying, "I don't want to do this," and "I don't want to see nothing happen to him." In response, the trial court ordered Price to answer the prosecutor's questions without objection from Marshall. Marshall claims this had the effect of bolstering Price's credibility. We disagree.

{¶ 50} We note that Marshall failed to raise an objection to the trial court regarding this issue and cites no authority in support of his argument. The failure to cite either case law or statute in support of an argument, as required by App.R. 16(A)(7), provides grounds to disregard an assignment of error. See App.R. 12(A)(2). As is our discretion, however, we will briefly address it. But since Marshall failed to object, he waived all but plain error.

{¶ 51} "Plain error exists where there is an obvious deviation from a legal rule which affected the defendant's substantial rights, or influenced the outcome of the proceeding." *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68. An error does not rise to the level of a plain error unless, but for the error, the outcome of the trial would have been different. *State v. Krull*, 154 Ohio App.3d 219, 2003-Ohio-4611, ¶ 38. Notice of plain error must be taken with utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice. *State v. Long* (1978), 53 Ohio St.2d 91, 95.

{¶ 52} We find no error on the part of the trial court, plain or otherwise. Even if we were to assume that somehow Price's credibility was bolstered

because the jury knew that he did not want to testify against Marshall, it did not lead to an unfair trial. The jury was well aware of Price's extensive criminal history, as well as his then-pending charge that put him in jail. Moreover, Price's not wanting to testify could have just as easily had the opposite effect on Price's credibility – rather than bolster it. Thus, this was not an "exceptional circumstance" that caused a manifest miscarriage of justice.

{¶ 53} Marshall's third assignment of error is overruled.

Sufficiency and Weight of the Evidence

{¶ 54} In his fourth, fifth, sixth, and seventh assignments of error, Marshall maintains that his convictions for felonious assault and robbery were not supported by sufficient evidence and were against the manifest weight of the evidence. He essentially makes the same arguments for sufficiency and manifest weight of the evidence and thus, we will address them together.

{¶ 55} An appellate court's function in reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus. "In essence, sufficiency is a test of adequacy. Whether the evidence is legally sufficient to sustain a verdict is a question of law." *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386. The relevant inquiry is whether, after viewing the evidence

in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *Jenks* at 273.

{¶ 56} While the test for sufficiency requires a determination of whether the state has met its burden of production at trial, a manifest weight challenge questions whether the state has met its burden of persuasion. *Thompkins*, supra, at 390. When a defendant asserts that a conviction is against the manifest weight of the evidence, an appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether, in resolving conflicts in the evidence, the fact finder clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. Id. at 387.

{¶ 57} Felonious assault is defined by R.C. 2903.11(A)(1), which states that "[n]o person shall knowingly *** [c]ause serious physical harm to another ***."

{¶ 58} Robbery is defined by R.C. 2911.02(A)(2), which provides that "[n]o person, in attempting or committing a theft offense or in fleeing immediately after the attempt or offense, shall do any of the following[:] *** [i]nflict, attempt to inflict, or threaten to inflict physical harm on another[.]"

{¶ 59} Here, the state presented evidence, which if believed, proved

beyond a reasonable doubt that Marshall repeatedly hit Price in the head with brass knuckles, causing him serious physical harm, and stole his cell phone and wallet. Price testified that he knew Marshall, who used to date Price's girlfriend. Price further testified that Marshall and a group of men followed him in a car, jumped him, beat him, and left him bleeding and unconscious in an alley. Price further stated that he saw Marshall take his phone and wallet. These facts are sufficient to establish the elements of felonious assault and robbery beyond a reasonable doubt.

{¶ 60} Marshall further argues that Price was not credible because there were inconsistencies between his statements that he made to police versus what he testified to in court. Defense counsel, however, did a thorough job of ensuring that the jury was well aware of these inconsistencies. The jury, however, was free to believe Price's testimony despite any inconsistencies. The jury was also free to believe Price over all of Marshall's alibi witnesses. We cannot conclude that the jury lost its way when it determined that Marshall was guilty of causing Price serious physical harm and taking his cell phone and wallet, especially since it found Marshall not guilty of aggravated robbery, felonious assault with a deadly weapon or dangerous ordnance, and all of the firearm specifications.

{¶ 61} Accordingly, Marshall's fourth, fifth, sixth, and seventh assignments of error are overruled.

{¶ 62} Judgment affirmed.

It is ordered that appellee recover of 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.

MARY J. BOYLE, JUDGE

MELODY J. STEWART, P.J., CONCURS;
JAMES J. SWEENEY, J., CONCURS IN PART AND CONCURS IN JUDGMENT ONLY AS TO ASSIGNMENT OF ERROR NUMBER ONE

JAMES J. SWEENEY, J., CONCURRING IN PART AND CONCURRING IN JUDGMENT ONLY AS TO ASSIGNMENT OF ERROR NUMBER ONE:

{¶ 63} I respectfully concur in judgment only with respect to the majority's disposition of the first assignment of error. I believe the "self-interest" exception set forth in *State v. Hector* (1996), 75 Ohio St.3d 148, would apply in this case. Price, who was under indictment on pending felony charges in the same court, certainly could have had an interest, bias or motive to testify in furtherance of the State's case against defendant with the "expectation" or "hope" that he be granted more favorable treatment from the State in the disposition of his own case. The "self-interest" exception does not require the State to have actually

promised the witness anything in exchange for testimony against the accused. Instead, it contemplates that a witness could be motivated to testify falsely as a State's witness against an accused third party in the hope of garnering favor from the State in the disposition of their own case. I believe the trial court erred by limiting the defense from inquiring into the specific charges that were pending against Price. The severity of the charge is probative of a potential motivation to testify falsely in hopes of reducing the penalty for "cooperating" with the prosecution. In other words, a person under indictment for a fifth degree felony offense would probably be less inclined to fabricate testimony than a person charged with a first degree felony rape.

{¶ 64} Nonetheless, I would overrule the assignment of error because any error by the trial court regarding the specific charges against Price was harmless error in this case. There was nothing prohibiting the defense from inquiring whether Price was testifying against the defendant with the hope that the State or court would reward him with leniency in the disposition of his own case. As the record reflects, the jury was made aware that Price was incarcerated and under indictment at the time he was offering testimony against the defendant. In my opinion, the first assignment of error lacks merit for the above stated reasons. In all other respects I concur with the majority opinion.