[Cite as *State v. Elliott,* 2009-Ohio-5816.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91999

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

LAROSCOE ELLIOTT

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART; REVERSED
IN PART AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-511390

BEFORE: Sweeney, J., Rocco, P.J., and Kilbane, J.
RELEASED: November 5, 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 courts announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

JAMES J. SWEENEY, J.:

{¶ 1} Defendant-appellant, Laroscoe Elliot ("defendant"), appeals from his convictions for aggravated burglary, drug trafficking, tampering with evidence, failure to comply, and one-year firearm specifications as well as a schoolyard specification. For the reasons that follow, we affirm in part, reverse in part, and remand.

{¶ 2} The indictment charged defendant with the above-stated offenses and having a weapon while under disability. Defendant requested a bifurcated trial to have all counts but the having a weapon while under disability count (Count 5) tried to a jury. Defendant executed a jury waiver as to Count 5 and the court granted his request for bifurcation. The jury found defendant guilty of all counts and not guilty of the weapons while under disability charge.

{¶ 3} The following evidence was presented at trial: Officer Jasenchack testified that on August 9, 2007 he was patrolling the area of East 36th Street near Community College Avenue in the City of Cleveland. He described this area as a "hot spot" for drug activity. At the corner of East 36th Street and Capers, he observed a transaction between a female and a juvenile male. It appeared to him that they exchanged cash for a small baggy indicative of packaged marijuana. When the officers pulled up to that corner, Officer Jasenchack recognized defendant from prior dealings. Defendant began walking away clenching his waistband. The manner in which defendant held his waistband led

the officer to believe he was concealing a weapon. Officer Jasenchack and his partner ordered defendant to stop but defendant continued walking away.

{¶ 4} A juvenile female, S.J.,[1] was exiting an apartment on East 36th Street. She told defendant he could not enter and attempted to push him away. Defendant forced his way into the apartment and closed the door. Officer Jasenchack immediately ran to the back of the apartment, believing that defendant would immediately exit. His partner stayed at the front door. The officer gained entry to the residence and detained defendant in custody.

{¶ 5} Defendant was arrested. In the ensuing search incident to the arrest, the officers found 10 small bags of suspected marijuana in defendant's pocket. Police also seized $32 and a cell phone from his person. The contents of the bags tested positive for marijuana, 9.12 grams.

{¶ 6} The officers also recovered a gun from inside the apartment. An eyewitness, K.B., informed the officers of its location in a cardboard box covered by a T-shirt at the foot of the steps. The witnesses said defendant tried to hide it there.

{¶ 7} Defense questioned Officer Jasenchack, "Would you know, that my client would know you two if he sees you? Would he know you as the police?" To which he responded, "Yes, we've dealt with him before."

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[1]The parties are referred to herein by their initials or title in accordance with this Court's established policy regarding non-disclosure of identities of juveniles.

{¶ 8} S.J., a 12-year-old eyewitness, testified that she and her 14-year-old sister, K.B., were at their cousin's residence in Cleveland when she saw defendant. However, their cousin was not home. According to S.J., she was talking to defendant at the door "[t]hen he went to somebody car, and came back. That's when the police had stopped [and told defendant to come here] * * * [defendant] was like, hold on, let me put my pop down. That's when he started to come in." S.J. told him to "hold on," and he pushed her arm a little bit and went inside the apartment. She believes he put a gun behind the door, set a pop down, and then ran upstairs. S.J. and her sister ran into the bathroom and closed the door because they were scared. She told defendant, "you can't come in." The police were allowed inside.

{¶ 9} K.B. testified that she saw defendant with a gun and identified it at trial. Her testimony otherwise was consistent with S.J.'s testimony.

{¶ 10} Ms. Adams testified that she resided in the home that defendant entered during the incident. She never gave defendant permission to enter her home. She does not own a gun.

{¶ 11} Officer Taylor spontaneously testified that he had "encountered and arrested" defendant "prior to the encounter today that we're here on." The court sustained the defense objection and ordered the testimony stricken. The court then advised the jury, "[w]e're here today, ladies and gentlemen, for events that took place on August 9, 2007, period."

{¶ 12} Officer Taylor stated that he observed a hand-to-hand transaction between defendant and a female. Defendant handed her a baggy and she gave him money. Officer Taylor called to defendant "what are you doing? * * * come here." Defendant said no and kept walking away and Officer Taylor kept ordering defendant to come to him. Officer Taylor heard the girls tell defendant not to enter the door. He saw defendant run inside and slam the door. Officer Taylor entered and the girls pointed to a box and told him to look inside. He saw a gun when he looked toward the box. Officer Taylor went upstairs and arrested defendant. After handcuffing defendant, Officer Taylor found bags of marijuana in his pants pocket.

{¶ 13} Defense counsel questioned Officer Taylor about his familiarity with defendant. Officer Taylor said that he knew defendant and had grown up in the area. Defense counsel questioned Officer Taylor whether he spoke with Officer Jasenchack about his testimony. Taylor stated that they had spoken about the case. On redirect, the State inquired whether anyone had told Officer Taylor what to say, to which he responded, "No." He confirmed that his testimony was the truth as he remembered it. In response to cross-examination as to whether the officers considered detaining the female observed in the transaction with defendant, the State inquired why the officers focused on defendant rather than her. Officer Taylor responded, "the unfortunate thing is, it's a gang, I guess gang activity * * *." The court sustained an objection to this testimony. Defense

counsel then moved for a mistrial. The court denied the motion and instructed the jury as follows:

{¶ 14} "Ladies and gentlemen, I want to make it absolutely clear that in this case there are no allegations of any kind of gang activity with respect to this defendant, or any other charges that I indicated. So, to the extent that that is in the record, you are to disregard it."

{¶ 15} The State rested after the testimony of the drug analyst and the testimony of Detective Bush, who conducted the follow-up investigation in this matter. Defense counsel placed his motion for mistrial on the record due to the following: Officer Taylor's testimony that defendant had a prior arrest; that Officer Jasenchack discussed his testimony with Officer Taylor; and Officer Taylor's statement about gangs. The court admonished the parties that the mention of defendant's prior arrest "was so improper, and it's very, very upsetting to this Court. * * * A 10-year police officer knows better, or should know better." The State requested the Court to give another curative instruction rather than declare a mistrial, which the court agreed to do.

{¶ 16} The trial court denied defendant's motion for acquittal. The defense called no witnesses, rested its case, and renewed the motion for acquittal that was again overruled.

{¶ 17} The parties presented closing arguments that will be discussed in further detail as relevant to various assigned errors. Defendant's assigned

errors will be addressed in the order presented and together where appropriate for ease of discussion.

{¶ 18} "I. The government's lawyer committed prosecutorial misconduct when he elicited testimony intended to connect the appellant with a criminal gang.

{¶ 19} "II. The government's lawyer committed prosecutorial misconduct when he repeatedly vouched for the credibility of his own witnesses.

{¶ 20} "III. The government's lawyer committed prosecutorial misconduct when he elicited testimony of the defendant's prior arrests by the same police officers.

{¶ 21} "IV. The appellant was denied due process of law and a fair trial as the cumulative effect of the government's misconduct."

{¶ 22} Defendant seeks a new trial in each of these assignments of error due to alleged prosecutorial misconduct on various grounds, including: gang references; vouching for the credibility of witnesses; references to prior arrests; and the cumulative effect of the improper statements.

{¶ 23} In order for this Court to reverse a conviction on the grounds of prosecutorial misconduct, we must find that (1) the remarks were improper and (2) that they prejudicially effected substantial rights of the defendant. *State v. Smith* (1984), 14 Ohio St.3d 13, 14.

{¶ 24} The Ohio Supreme Court has repeatedly held, "the effect of counsel's misconduct 'must be considered in the light of the whole case.'" *State*

v. Durr (1991), 58 Ohio St.3d 86, 94, quoting *State v. Maurer* (1984), 15 Ohio St.3d 239, 266, quoting *Mikula v. Balogh* (1965), 9 Ohio App.2d 250, 258.

{¶ 25} The "touchstone of 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, 219, 102 S.Ct. 940, 947. As such, the defendant must show that there is a reasonable probability that, but for the prosecutor's misconduct, the result of the proceeding would have been different. *State v. Loza* (1994), 71 Ohio St.3d 61, ¶78-79, overruled on other grounds.

{¶ 26} "[T]he conduct of a prosecuting attorney during trial cannot be made a ground of error unless that conduct deprives the defendant of a fair trial." Id. (Other citations omitted.) Both the defense and prosecution have wide latitude in summation. *State v. Lott* (1990), 51 Ohio St.3d 160, 165. "Prosecutors must avoid insinuations and assertions calculated to mislead. They may not express their personal beliefs or opinions regarding the guilt of the accused, and they may not allude to matters not supported by admissible evidence." Id. at 166.

{¶ 27} In *Lott*, the Ohio Supreme Court instructed, "where the reference to matters outside the record is short, oblique, and justified as a reply to defense arguments and elicits no contemporaneous objection, there is no prejudicial error." Id., citing *State v. Watson* (1969), 20 Ohio App.2d 115, 252 N.E.2d 305, paragraph two of the headnotes, sentence modified (1971), 28 Ohio St.2d 15, 275 N.E.2d 153.

{¶ 28} Where the defendant fails to object to the alleged misconduct, he waives all but plain error. *Lott*, 51 Ohio St.3d at 167, citing *State v. Johnson* (1989), 46 Ohio St.3d 96, 102, 545 N.E.2d 636, 642; *State v. Salihudden*, Cuyahoga App. No. 90874, 2009-Ohio-466, ¶55, citing *State v. Slagle* (1992) 65 Ohio St.3d 597, 604.

{¶ 29} "Pursuant to Crim.R. 52(B), plain error or defects which affect substantial rights may be grounds for reversal even though they were not brought to the attention of the trial court. Notice of plain error, however, applies only under exceptional circumstances to prevent a manifest miscarriage of justice. *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804, paragraph three of the syllabus. 'Plain error does not exist unless it can be said that but for the error, the outcome of the trial would clearly have been otherwise.' *State v. Moreland* (1990), 50 Ohio St.3d 58, 62, 552 N.E.2d 894, 899." *State v. Phillips* (1995), 74 Ohio St.3d 72, 83.

{¶ 30} A review of the record clearly illustrates that the prosecutor repeatedly made improper remarks throughout the trial. Due to the record evidence in this case, and largely due to the court's intervention and curative instructions, the misconduct does not rise to the level of plain error and does not warrant a new trial in this case as detailed below. Nonetheless, it must be emphasized that such prosecutorial commentary and conduct is expressly disapproved and not sanctioned by this Court.

A. <u>Gang Reference</u>

{¶ 31} Defendant maintains that defendant's alleged gang membership is not admissible to prove that he or she had a propensity to commit a crime pursuant to Evid.R. 404(B). But in this case, the trial court did not admit such evidence.

{¶ 32} Here, defendant objected to the State's inquiry to Officer Jasenchack whether defendant "made any statement to [him] about affiliations?," to which he responded, "no." On further prodding, the officer said, "Um, * * * after this arrest, we have a — a person in our unit that kind of specializes in the gang — gang activities in the City, in our district especially. From his experience, he knew —."

{¶ 33} At this point, the defense contemporaneously objected and the trial court sustained the objection.

{¶ 34} Officer Taylor later testified that "the unfortunate thing is, it's a gang, I guess gang activity –." Again, the defense lodged an objection, which the court sustained. The defense then moved for a mistrial, which was denied. However, the court gave a curative instruction to the jury and later admonished the parties about Officer Taylor's improper commentary. The State suggested an additional curative instruction, which the court agreed to provide.

{¶ 35} The court instructed the jury that the evidence "does not include the Grand Jury indictment, opening and closing arguments. Further, it does not include any answers to questions that I might have instructed you to disregard, particularly, the statement yesterday by the patrol officer with respect to gangs. There is not a whiff of gang activity in this case, ladies and gentlemen." A jury is

presumed to follow the instructions given to it by a trial judge. *Loza*, at 71 Ohio St.3d 61, 75.

{¶ 36} The cited testimony, which was not admitted as evidence, does not warrant a new trial in light of the whole case. Given the trial court's actions in sustaining the objections and the curative instructions, defendant has failed to establish that the officers' gang references resulted in his substantial prejudice.

B. Vouching

{¶ 37} "An attorney may not express a personal belief or opinion as to the credibility of a witness." *State v. Davis* 116 Ohio St.3d 404, 437, 2008-Ohio-2, ¶85-86, citing *State v. Williams* (1997), 79 Ohio St.3d 1, 12, 679 N.E.2d 646. "Vouching occurs when the prosecutor implies knowledge of facts outside the record or places his or her personal credibility in issue." Id., citing *State v. Jackson*, 107 Ohio St.3d 53, 2005-Ohio-5981,¶117.

{¶ 38} In several instances, the prosecutor stated his personal belief that certain witnesses were truthful. For example, he said, "Now, again, I would concede, I think [S.J.] told the truth." This was improper vouching.

{¶ 39} Also, very troubling is the prosecutor's remark that "we [the State] don't prosecute innocent people" and "my job is not to prosecute innocent people. My job is to prosecute guilty people, to meet my burden." While these remarks did not constitute vouching, they were wholly improper as they wrongfully implied that a presumption of guilt attached by virtue of an indicted offense.

{¶ 40} We find no support in the record for the prosecutor's contention that these remarks were responsive to comments made by the defense.

{¶ 41} We note the prosecutor made other remarks indicating that the jury would ultimately decide the credibility of the witnesses. For example, he said, "you are the finders of fact. You are the finders of the truth." And, "I believe she told the truth. But what I believe does not matter. It's what all of you believe." The prosecutor also conveyed to the jury that his job included satisfying the burden of proof: "The State has met its burden. The defense asked you to hold me to my standard. I said in the beginning that I wanted to be held to my standard, because that's my job. * * * My burden of proof beyond a reasonable doubt."

{¶ 42} Correct statements of the law do not alter the impropriety of the other remarks. In other words, the prosecutor is not saved from a finding of misconduct by interspersing proper statements of the law among improper comments. The State may not bolster the testimony of a witness with statements of his or her personal belief in the credibility of the witness's testimony. Because there was no objection to any of the comments defendant casts as improper vouching, reversal is unwarranted on this basis absent plain error.

{¶ 43} The prosecutor's comments, although totally improper, do not rise to the level of plain error. In this case, there was substantial evidence of

defendant's guilt and the trial court took pains to instruct the jury as to their role as finder of fact and the law.

{¶ 44} In addition to the instructions cited previously in this opinion, the court further instructed the jury as follows: "You are, ladies and gentlemen, the sole judges of the facts, the credibility of the witnesses, and the weight to be given to the testimony of each witness who came into this courtroom, raised their right hand and swore to tell the truth."

{¶ 45} The court instructed the jury at length on how to weigh the credibility of witness testimony and to make the determination of credibility. The court also advised that opening and closing arguments do not constitute evidence. Considering the totality of the evidence and the record as a whole, defendant has not satisfied the second prong necessary to warrant a new trial on the basis of prosecutorial misconduct for improper vouching.

C. Prior Arrests.

{¶ 46} Defendant alleges that the prosecutor improperly elicited testimony from Officers Jasenchack and Taylor concerning defendant's prior arrests. Specifically, he cites to Officer Jasenchack's testimony that "we recognized [defendant] from dealing with him before" and Officer Taylor's testimony that "we had encountered and arrested [defendant] prior to the encounter today that we're here on." In neither instance did the prosecutor elicit or solicit the subject testimony. In the first case, Officer Jasenchack's remark appears at the end of his narrative in response to the State's question, "On August 9, 2007, last year,

did anything particular happen? * * * Can you please describe for the jury what that was." There was no objection to the testimony and the officer's unsolicited remark does not actually refer to a prior arrest. This statement did not constitute prosecutorial misconduct.

{¶ 47} Officer Taylor's statement was also not solicited by the prosecutor and was, in fact, non-responsive to the question that was asked of him, which was, "could you please tell the Court and the jury why you're here today." When the defense objected, the court sustained it and ordered the testimony stricken from the record. The court placed on the record that Taylor's statements were improper and found them "very, very, very upsetting." A curative instruction was given to the jury, which was also instructed to disregard the subject testimony.

{¶ 48} The testimony was not admitted and was the result of the officer's testimony, which did not appear on the record to be elicited by the prosecutor's conduct.

{¶ 49} Additionally, the record reflects that during cross-examination, the defense elicited similar testimony, with inquiries including, "Would you know, that my client would know you two if he sees you? Would he know you as the police?" and questions about Officer Taylor's familiarity with defendant.

{¶ 50} Having reviewed the entire record and the law, the improper conduct in this case did not amount to plain error or otherwise establish the requisite substantial prejudice that would merit a new trial.

{¶ 51} Assignments of Error I, II, III, and IV are overruled.

{¶ 52} "VI. [2] Appellant's State constitutional right to a Grand Jury indictment and State and Federal constitutional rights to due process were violated when his indictment omitted all the essential elements of the criminal offense failure to comply."

{¶ 53} In this matter, defendant was charged with failure to comply with the order of a traffic officer in violation of R.C. 2921.331(A).

{¶ 54} Specifically, Count 4 of the indictment alleged:

{¶ 55} "The Grand Jurors, on their oaths, further find that the Defendant(s) unlawfully did fail to comply with a lawful order or direction of a police officer invested with authority to direct, control or regulate traffic.

{¶ 56} "FUTHERMORE, in committing the offense, the offender was fleeing immediately after the commission of a felony."

{¶ 57} Defendant sought dismissal of this count for failure to specify the requisite mens rea, which, he contends, is recklessness. The State counters, as it did in the court below, that the offense is one of strict liability.

{¶ 58} Defendant relies on *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624 ("*Colon I* "), to support his argument that the omission of the

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[2]Defendant's brief contains two Assignments of Error IV. For ease of discussion, this opinion refers to defendant's second Assignment of Error IV as Assignment of Error V, and defendant's Assignment of Error V as Assignment of Error VI.

mens rea element constitutes structural error that requires reversal of the convictions, where the error permeates the entire criminal proceedings.

{¶ 59} The Ohio Supreme Court, on reconsideration, clarified its decision in *Colon I*, in a subsequent opinion. See *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749 ("*Colon II* "). In *Colon II*, the court instructed:

{¶ 60} "Applying structural-error analysis to a defective indictment is appropriate only in rare cases, such as *Colon I*, in which multiple errors at the trial follow the defective indictment. *In Colon I*, the error in the indictment led to errors that 'permeate[d] the trial from beginning to end and put into question the reliability of the trial court in serving its function as a vehicle for determination of guilt or innocence.' Id. at ¶23. Seldom will a defective indictment have this effect, and therefore, in most defective indictment cases, the court may analyze the error pursuant to Crim.R. 52(B) plain-error analysis. Consistent with our discussion herein, we emphasize that the syllabus in *Colon I* is confined to the facts in that case." Id. at ¶8.

{¶ 61} In *Colon II*, the Ohio Supreme Court clarified that multiple errors must permeate the trial before the omission of the mens rea from an indicted offense can be considered under a structural error analysis. Specifically, the court cited a failure to include recklessness as an element of the crime in the jury instructions, or during closing argument, and that the State treated the offense as one of strict liability.

{¶ 62} "When the section defining an offense does not specify any degree of culpability, and plainly indicates a purpose to impose strict criminal liability for the conduct described in the section, then culpability is not required for a person to be guilty of the offense. When the section neither specifies culpability nor plainly indicates a purpose to impose strict liability, recklessness is sufficient culpability to commit the offense." R.C. 2901.21(B).

{¶ 63} Given the default mens rea provided for by the General Assembly in R.C. 2901.21(B), we do not agree with the State's argument that every time a specific mens rea is omitted from one subsection of a statute but contained in another subsection, that it intended to create a strict liability offense. Instead, it is reasonable to conclude that the General Assembly intended for the default mens rea of recklessness to apply.

{¶ 64} At least one other appellate district has considered this precise issue and concluded that a violation of R.C. 2921.331(A) is not a strict liability offense. *State v. Brewer* (Aug. 10, 1994), Greene App. No. 93-CA-45. In reaching this conclusion, the court observed, "R.C. 2921.331 is not structured so as to proscribe a single act with expressly differentiated degrees of culpability. Rather, it proscribes two separate acts in two subsections that are not grammatically dependent on one another * * *. We find no plain indication in R.C. 2921.331 of an intent to impose strict liability." Id. Adhering to the directive that "statutes are to be strictly construed against the State and in favor

of the accused" the court, in *Brewer* concluded that recklessness is the necessary criminal intent element of R.C. 2921.331(A).

{¶ 65} The State considered, and treated, the offense as one of strict liability and this error permeated the trial. The indictment did not include a mens rea element in Count 4 and the defense objected. The jury instructions concerning Count 4 did not include the culpable mental state of recklessness either. Accordingly, plain error resulted, if not structural error, due to the omission of the requisite mens rea necessary to charge as offense under R.C. 2921.331(A).

{¶ 66} For these reasons, Assignment of Error VI is sustained; defendant's conviction and sentence for failure to comply under R.C. 2921.331(A) is reversed, and the charge is dismissed. This matter is remanded to the trial court for resentencing consistent with this opinion.

{¶ 67} "V. The trial court erred in elevating the offense of failure to comply from a misdemeanor to a felony of the third degree."

{¶ 68} Although the State has conceded the merits of Assignment of Error V, the disposition of Assignment of Error VI renders it moot.

Judgment affirmed in part, reversed in part, and remanded.

It is ordered that appellant and appellee shall each pay their respective 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. Case remanded to the trial court for resentencing.

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

JAMES J. SWEENEY, JUDGE

KENNETH A. ROCCO, P.J., and
MARY EILEEN KILBANE, J., CONCUR