

[Cite as *State v. Carter*, 2010-Ohio-1661.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92859

STATE OF OHIO

PLAINTIFF-APPELLEE

VS.

TROY CARTER

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-516020

BEFORE: Kilbane, J., Rocco, P.J., and Celebrezze, J.

RELEASED: April 15, 2010

**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), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten 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. 2.2(A)(1).

MARY EILEEN KILBANE, J.:

{¶ 1} Appellant, Troy Carter (“Carter”), appeals his conviction for burglary, a fourth degree felony, in violation of R.C. 2911.12(A)(4). Carter argues that he was denied his right to due process and a proper indictment because the indictment failed to allege any mens rea element, and that the trial court failed to properly instruct the jury on the elements of burglary. Carter further argues that the prosecutor engaged in improper conduct and that his counsel was ineffective. After reviewing the facts and the appropriate law, we affirm.

Procedural History

{¶ 2} On September 30, 2008, a Cuyahoga County Grand Jury charged Carter with one count of burglary, a second degree felony, in violation of R.C. 2911.12(A)(1).¹

{¶ 3} On January 15, 2009, a jury trial commenced.

{¶ 4} On January 23, 2009, the jury found Carter not guilty of burglary under R.C. 2911.12(A)(1), but guilty of the lesser included offense of burglary,

¹R.C. 2911.12(A)(1) states:
“(A) No person, by force, stealth, or deception, shall do any of the following:
(1) Trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure, when another person other than an accomplice of the offender is present, with purpose to commit in the structure or in the separately secured or separately occupied portion of the structure any criminal offense[.]”

a fourth degree felony under R.C. 2911.12(A)(4).² That same day, the trial court sentenced Carter to one year of incarceration and fined him \$2,500.

{¶ 5} On January 29, 2009, the trial court journalized its sentencing entry.

{¶ 6} On February 23, 2009, Carter appealed.

Statement of Facts

{¶ 7} The following facts were adduced at trial.

{¶ 8} Carter lived with his grandmother at 5475 Grasmere Avenue in Maple Heights, Ohio, across the street from the victims, Maurice Middlebrooks (“Middlebrooks”) and Michelle Angelo (“Angelo”), who lived at 5466 Grasmere Avenue with their young son.

{¶ 9} On August 18, 2008, at approximately 2:15 p.m., Middlebrooks and his son left the family home to get a haircut and a bite to eat. At approximately 2:45 p.m., Angelo was in her bedroom preparing to go jet skiing with her friends when she heard loud pounding on her back door. She dressed hurriedly and went downstairs, where she surprised a young man standing in her kitchen.

{¶ 10} Upon being confronted, the young man asked if Rob was home.

²R.C. 2911.12(A)(4) states:

“(A) No person, by force, stealth, or deception, shall do any of the following:

(4) Trespass in a permanent or temporary habitation of any person when any person other than an accomplice of the offender is present or likely to be present.”

Angelo replied that no one named Rob lived there. The young man immediately turned and left. Angelo closed and locked her back door and left her house at approximately 3:00 p.m. to join her friends.

{¶ 11} At approximately 7:30 p.m., on August 18, 2008, Middlebrooks returned home with his son to find their back door had been forced open and the home had been burglarized. Among the items stolen were a flat screen television, a CD player, a computer, and approximately \$900 in cash. Since Middlebrooks had no telephone, he went directly to the Maple Heights police station to report the incident.

{¶ 12} Angelo returned home from her afternoon of jet skiing to find the police investigating the break-in at her home. She confirmed the items that were missing with the police. That night, Angelo never mentioned to the police the afternoon incident involving the young man at her back door.

{¶ 13} The following day, as Angelo, Middlebrooks, and their son walked down their driveway to go to the corner store, they heard Carter calling out to them from across the street. According to Angelo, Carter seemed to be taunting them about the break-in, and he specifically mentioned that he knew their television and computer were stolen. Middlebrooks and Carter nearly came to blows before Angelo interceded. After the altercation, Angelo decided to inform the police about Carter's presence in her home the previous day.

{¶ 14} Aside from the testimony of both Angelo and Middlebrooks

regarding the events surrounding the crime and the items stolen, Maple Heights Police Officer Jeremy Jesenovec (“Officer Jesenovec”) testified that he showed Angelo a photo array in the course of his investigation, and that Angelo identified Carter’s picture from the array without any hesitation as being the man she found in her kitchen on the same day as the burglary.

{¶ 15} Maple Heights Police Officer Alexander Casey (“Officer Casey”) testified that he questioned Carter, who provided a videotaped statement indicating he was elsewhere at the time of the burglary and that he had never been inside the victims’ home. Carter also provided a written statement, which the police determined was inconsistent with his oral statement. Specifically, Officer Casey testified that he interviewed Carter and that he appeared nervous as he questioned Carter’s version of the facts and his alibi. Further, Officer Casey testified that even as Carter continued to deny his involvement in the crime, he volunteered specific information during the course of the interview about the nature of the crime and his alibi that made him the prime suspect.

{¶ 16} Carter testified on his own behalf and called three additional witnesses, including his grandmother, his mother, and his friend, Raqschala Weston. While Carter was impeached by the State regarding his version of events surrounding the crime, no material evidence linked Carter to the crime.

{¶ 17} The jury found Carter not guilty of burglary under R.C.

2911.12(A)(1), but guilty of the lesser included offense of burglary, in violation of R.C. 2911.12(A)(4), for “trespass[ing] in a permanent or temporary habitation of any person when any person other than an accomplice of the offender is present or likely to be present,” as mentioned above.

{¶ 18} Carter appeals, asserting three assignments of error for our review. Carter’s first assignment of error states:

“I. Mr. Carter’s state constitutional right to a grand jury indictment and state and federal constitutional rights to due process were violated when his indictment ommited[sic] an element of the offense and when his trial was permeated with the lack of such evidence or jury instruction.”

{¶ 19} Within this assignment of error, Carter argues that his indictment was defective because it failed to include the requisite mens rea of “recklessness” to the charge of burglary. Since the indictment allegedly presents a structural error, and such error was compounded throughout the course of the trial, Carter argues that the indictment should be dismissed on the authority of *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749, 893 N.E.2d 169. Carter further argues that the State failed to prove that he acted recklessly, and also argues that the trial court erred in instructing the jury regarding the elements of burglary as outlined in R.C. 2911.12(A)(1) and (A)(4) without the requisite mens rea. We disagree.

{¶ 20} At the outset, we note that Carter’s counsel never objected to the

trial court's instructions regarding the elements of the offense of burglary. He therefore waives all but plain error on appeal. See Crim.R. 52(B). 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.

{¶ 21} This court has already confronted this issue and has determined that, with reference to R.C. 2911.12(A)(1), which is the same statutory section Carter was charged under, the "level of intent to commit a burglary offense is clearly expressed in the statute, i.e., 'with purpose to commit * * * any criminal offense.'" *State v. Bell*, 8th Dist. No. 92442, 2009-Ohio-5693. We therefore find that Carter's indictment put him on notice of the requisite mental state that the State was required to prove at trial, and that the State was not required to specifically prove that Carter acted recklessly in order to prove the elements of burglary under R.C. 2911.12(A)(1) or (A)(4).

{¶ 22} Carter's argument that the trial court failed to properly instruct the jury is similarly unavailing. Regarding the charged offense of burglary under R.C. 2911.12(A)(1), the trial court instructed the jury in part:

"Now we go into the elements. Everybody get that, date, venue and identity in the first sentence? Then the defendant, by force, stealth or deception, that's the first element now beyond date, venue and identity, trespassed in an occupied structure when Michelle Angelo, not the accomplice of the offender, was present with the purpose to commit in that structure any criminal offense. And the

State alleges here theft. Okay?” (Tr. 781.)

{¶ 23} Regarding the mens rea for the commission of burglary, the trial court instructed the jury as follows:

“All right. Now to trespass means that the defendant, without privilege to do so, knowingly entered or remained on the land or premises of Michelle Angelo. (Tr. 783.)

* * *

Purpose. The purpose to commit in the structure of another any criminal offense is an essential element of the crime of burglary.” (Tr. 787.)

{¶ 24} These instructions comport with both the statute and *Bell*, supra, in that they evidence an intent to commit any criminal offense. Therefore, they were proper instructions.

{¶ 25} Regarding the lesser included offense of burglary under R.C. 2911.12(A)(4), the trial court stated this to the jury:

“Okay. Now, the offense of burglary under — I’ll call it (A)(4) now, everybody knows what I’m talking about, is distinguished from burglary under (A)(1) by the absence or failure to prove that the defendant trespassed in the residence of Michelle Angelo with the purpose to commit in the residence any criminal offense, that is, theft. Let’s look at the lesser-included offense on your sheet here, There’s three elements instead of four beyond date, venue and identity. You got the same first one, the same second one, the first one is force, stealth or deception, by means of; two, trespass, and the third is the same, right?

The fourth isn’t there. That’s why it’s a lesser-included offense. Everybody follow that?” (Tr. 794.)

{¶ 26} As indicated by the record, both of these instructions mention the requisite mens rea, as indicated in the statute, which was upheld in *Bell*, supra. Specifically, the trial judge's instructions to the jury regarding R.C. 2911.12 (A)(1) were appropriate in that one cannot trespass in an occupied structure without the mens rea of "knowingly." While it is admittedly a higher standard than recklessly, as Carter points out, Carter could not be prejudiced by the imposition of this higher standard for mens rea under R.C. 2911.12(A)(4), when he complains that the lower level of mens rea "recklessly" should have been imposed. The instructions on the lesser included offense were therefore appropriate.

{¶ 27} Carter's first assignment of error is overruled.

{¶ 28} Carter's second assignment of error states:

"II. The prosecution violated Mr. Carter's constitutional rights under Article I, Section 10 of the Ohio Constitution, the Fifth Amendment of the United States Constitution and the Due Process Clause of the Fourteenth Amendment to the United States Constitution when it engaged in improper argument designed to appeal to the passions of the finder of fact."

{¶ 29} Within this assignment of error, Carter argues that the prosecutor made improper arguments in his opening and closing statements regarding Carter's credibility, essentially stating that Carter's testimony was not credible, while the testimony of Middlebrooks and Angelo was credible.

{¶ 30} Carter argues that this court found such comments unacceptable in *State v. Hart*, 8th Dist. No. 79564, 2002-Ohio-1084, and that Carter would not have been convicted without these comments. We disagree.

{¶ 31} In *Hart*, we stated the standard of review for prosecutorial misconduct is as follows:

“The test for prejudice regarding prosecutorial misconduct in closing argument is ‘whether the remarks were improper and, if so, whether they prejudicially affected substantial rights of the defendant.’ Closing arguments must be viewed in their entirety to determine whether the disputed remarks were prejudicial. Isolated comments by a prosecutor are not to be taken out of context and given their most damaging meaning. An appellant is entitled to a new trial only when a prosecutor asks improper questions or makes improper remarks and those questions or remarks substantially prejudice appellant.” Id. at 1. (Internal citations omitted.)

{¶ 32} We note that Carter’s counsel failed to object to any instance of alleged prosecutorial misconduct and therefore has waived all but plain error. Notice of plain error applies only under exceptional circumstances to prevent a manifest miscarriage of justice. *State v. Long* (1978), 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*, supra; see, also, *State v. Phillips* (1995), 74 Ohio St.3d 72,83, 656 N.E.2d 643.

{¶ 33} In *Hart*, supra, this court held that the “trial court’s admission of a police officer’s testimony vouching for the credibility of the victim was not harmless error because the only evidence supporting the fact that the defendant was the wrongdoer was the victim’s testimony; thus, her credibility was a key issue in the case.” *State v. Allen*, 8th Dist. No. 92482, 2010-Ohio-9, citing *Hart* at 4-5. Further, *Hart* held that the cumulative effect of a prosecutor’s improper comments during closing arguments and the improper questioning of police officers regarding the credibility of the victim required reversal, where the victim was the only witness to the incident. *Hart* at 5.

{¶ 34} In the instant case, several witnesses testified for both the State and the defense and described the events surrounding the crime in detail. While it is true that Angelo was the only witness to actually see Carter in the home, no witness, and particularly no police officer, needed to “vouch” for

Angelo's credibility, as in *Hart*. Further, the credibility of each witness was entirely within the jury's purview. The jury, as the factfinder, was free to believe all, part, or none of the testimony of each witness appearing before it. *Hill v. Briggs* (1996), 111 Ohio App.3d 405, 412, 676 N.E.2d 547. When assessing witness credibility "the choice between credible witnesses and their conflicting testimony rests solely with the finder of fact and an appellate court may not substitute its own judgment for the finder of fact." *State v. Awan* (1986), 22 Ohio St.3d 120, 123, 489 N.E.2d 547.

{¶ 35} Here, the record reflects that Carter's testimony contained many contradictions, and he was repeatedly impeached on cross-examination regarding whether he was ever accepted to the University of Akron, whether he had been seen consuming alcohol and drugs in the middle of his street, how he came to know with such specificity what items were stolen from the victims' home, and even whether he had ever been inside the victims' home.

{¶ 36} During his interview with the police, Carter stated that he had never been inside the victims' home. At trial, Carter testified that he had been in the home as a child, because he had a friend who used to live there, and that he knew "everything about the home." (Tr. 6-23.) Carter also testified that he had been accepted to the University of Akron and would have been enrolled there if not for the burglary case. On cross-examination, Carter revealed that he had never applied to the University of Akron.

Further, while Carter denied ever publicly consuming alcohol and drugs, the Maple Heights police found MySpace pictures posted to Carter's account depicting him in the street with a 40-ounce can of beer and a bag of suspected marijuana.

{¶ 37} Based upon the record, the prosecutor made no improper remarks except for expressing his personal opinion that Angelo's and Middlebrooks's version of the incident appeared more credible than did Carter's. While it is true that pursuant to *State v. Hill* (1996), 75 Ohio St.3d 195, 661 N.E.2d 1068, and *State v. Apanovitch* (1987), 33 Ohio St.3d 19, 514 N.E.2d 394, imprecise opinions in argument arguably constitute misconduct, the prosecutor's statements were not imprecise opinions, but were based on facts in the record and did not prejudicially affect Carter's right to a fair trial since ample evidence existed outside of the prosecutor's comments from which to convict Carter. See *State v. Bruce*, 8th Dist. No. 92016, 2009-Ohio-6214, holding "[t]he touchstone of [prosecutorial misconduct] analysis 'is the fairness of the trial, not the culpability of the prosecutor.' A trial is not unfair if, in the context of the entire trial, it appears clear beyond a reasonable doubt that the jury would have found the defendant guilty even without the improper comments." *Id.* at 12. (Internal citations omitted.)

{¶ 38} When viewing the arguments that the State's witnesses were believable, while the defendant was not, in the context of the entire record as

the law requires, it is clear that the trial court did not commit plain error in allowing these arguments into the record, as Carter would have been convicted even without these arguments. Carter's second assignment of error is overruled.

{¶ 39} Carter's third assignment of error states:

“III. Defendant Troy Carter was denied effective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the U.S. Constitution and Article I, Section 10 of the Ohio Constitution.”

{¶ 40} Carter argues that his counsel's performance was deficient because he failed to challenge the allegedly defective indictment and failed to object to the arguments of the State's attorney. Carter also argues that his counsel was deficient for failing to challenge the trial court's allegedly improper jury instructions.

{¶ 41} In order to substantiate a claim for ineffective assistance of counsel, Carter must show that (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defendant so as to deprive him of a fair trial. *State v. Trimble*, 122 Ohio St.3d 297, 311, 2009-Ohio-2961, 911 N.E.2d 242, citing *Strickland v. Washington* (1984) 466 U.S. 667, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674. Judicial scrutiny of defense counsel's performance must be highly deferential. *Strickland* at 2065. In Ohio, there is a presumption that a properly licensed attorney is competent. *State v.*

Calhoun, 86 Ohio St.3d 279, 1999-Ohio-102, 714 N.E.2d 905.

{¶ 42} Nothing in the record causes us to presume Carter's counsel acted deficiently in this case for failing to object to either the indictment, the jury instructions, or the State's arguments. Having already determined that the indictment against Carter was not defective, that the trial court's jury instructions were proper, and that ample evidence existed to convict Carter independent of the State's opening and closing arguments, we fail to see how Carter was prejudiced under *Strickland* by his defense counsel's failure to object. Carter's third assignment of error is overruled.

{¶ 43} 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.

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

MARY EILEEN KILBANE, JUDGE

KENNETH A. ROCCO, P.J., and
FRANK D. CELEBREZZE, JR., J., CONCUR

