[Cite as *State v. Scales*, 2010-Ohio-2338.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92558

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

COURTLAND SCALES

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-506147

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

RELEASED: May 27, 2010

JOURNALIZED:

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MARY J. BOYLE, J.:

{¶ 1} Defendant-appellant, Courtland Scales, appeals his conviction and sentence for ten counts of felonious assault. He raises six assignments of error for our review:

{¶ 2} "[I.] The evidence was insufficient to sustain the felonious assault convictions in the case at bar.

{¶ 3} "[II.] The convictions of felonious assault are against the manifest weight of the evidence.

{¶ 4} "[III.] The trial court erred in overruling a defense motion for a mistrial as the injection of court precluded testimony for jury consideration violated the appellant's right to a fair trial.

{¶ 5} "[IV.] The trial court erred by allowing state witnesses to testify whose prior recorded statements had been lost by law enforcement.

{¶ 6} "[V.] The trial court erred when it failed to merge the ten counts of felonious assault to reflect five counts for one for each victim for purposes of sentencing where the resultant charges arose from the same act.

{¶ 7} "[VI.] The appellant was denied effective assistance of counsel when counsel alleged defense of others in opening statement and then failed to present any evidence of the affirmative defense."

{¶ 8} We affirm the conviction but vacate the sentence and remand for resentencing.

Procedural History and Facts

{¶ 9} In January 2008, Courtland was indicted for five counts of attempted murder, in violation of R.C. 2903.02(A), and ten counts of felonious assault, in violation of R.C. 2903.11(A)(1) and (2), with all counts carrying one- and three-year firearm specifications under R.C. 2941.141 and 2941.145. He was charged along with his brother, John Scales, who was also indicted on the same charges. The charges in this case arose from a shooting that occurred at the Knights Inn Motel in North Randall during which five males were shot. Both pled not guilty to the charges, and the matter proceeded to a joint jury trial. We have already discussed in detail the evidence presented at trial in the companion appeal and adopt those facts herein. See *State v. Scales*, 8th Dist. No. 92559, 2010-Ohio-2084. We will further discuss the relevant facts in our disposition of the assignments of error.

{¶ 10} After the close of the state's case, the defense moved for an acquittal of all the charges, which the court granted as to the attempted murder counts but denied as to the remaining felonious assault counts. The jury found Courtland guilty on all ten counts of felonious assault, and the trial court sentenced him to a total of nine years in prison.

Sufficiency of the Evidence

{¶ 11} In his first assignment of error, Courtland argues that the state failed to present sufficient evidence to support his convictions for felonious assault. We disagree.

{¶ 12} Our 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, 574 N.E.2d 492, 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, 678 N.E.2d 541. 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.

{¶ 13} Courtland was convicted of five counts of felonious assault as defined under R.C. 2903.11(A)(1) and five counts as defined under R.C. 2903.11(A)(2). The gravamen of Courtland's argument is that the state failed to prove that he was the shooter or aided in the shooting. He contends that the state's evidence only placed him in the hotel room where the shooting occurred and that no one identified him as having held or fired a gun during the altercation. While we acknowledge that there was no direct evidence specifically naming Courtland or his brother as the shooter, we find sufficient circumstantial evidence supporting Courtland's conviction.

{¶ 14} The evidence at trial revealed that Courtland and his older brother, John, crashed Tarica Curtis's 18th birthday party being held at the North Randall Knights Inn Motel. Upon arriving at the party, Courtland and John led a group of

males into the room where DeSean Griffin, one of the victims, was located and immediately confronted him. The testimony further revealed that words were exchanged and then a series of gunshots were fired. DeSean was shot in the chest and then shot in the hand and twice in the stomach. DeSean's brother, DeVon, and three friends were also shot, sustaining serious injuries. Although none of the victims would say who shot them, DeVon Griffin testified that he saw John with a gun in the waistband of his pants prior to the shooting and that he also saw another gun being passed among the males.

{¶ 15} One of the female eyewitnesses, Kashmere Chairs, who did not previously know either of the defendants, testified that she saw John standing next to the shooter when the shots were fired. She further described the shooter as wearing Timberline boots and a red coat. Tarica Curtis, who knew Courtland, testified that she saw him confronting DeSean and then a couple of minutes later heard gunshots.

{¶ 16} Immediately following the shooting and based on information obtained on the scene, North Randall police received a license plate number and found the plate belonged to a car owned by John Scales. A short time later, the car was located in the parking lot of John's girlfriend's apartment building in Bedford. The police executed a search warrant on the apartment and recovered a black jacket, a black and gray "hoodie," and a burgundy and orange "hoodie" in a laundry basket. DNA from Courtland and John was found on the inside neck and cuffs of the garments and gunshot residue was found on the cuffs and around the

pockets of the black jacket and burgundy and orange hoodie. Gunshot residue was also found on the cuffs of the black and gray hoodie. DNA testing revealed that Courtland was the "major" contributor of DNA on the burgundy and orange "hoodie," which was also described as a "red sweatshirt" during trial.

{¶ 17} Police recovered 11 spent bullet cartridge casings, four fired bullets, and multiple bullet fragments. They also recovered one unfired bullet cartridge from just outside the entrance of the hotel room where the victims were hanging out prior to the shooting. Forensic evidence showed that ten bullets were fired from one gun and one bullet from a different gun, both 9mm pistols. The unfired bullet was also from a 9mm pistol.

{¶ 18} The state's evidence therefore placed Courtland and John at the lead of the group that charged into the hotel room and confronted DeSean immediately prior to the shooting. John was identified as standing right next to the shooter and wearing a black jacket. Both Courtland and John fled the scene after the shooting. The general description of the clothing of the shooter matched the "hoodie" recovered at John's girlfriend's apartment, which the DNA evidence linked Courtland as the major contributor. Significantly, this "hoodie" contained gunshot residue both on the cuffs and around the pockets. Likewise, the black jacket with John's DNA also contained gunshot residue on the cuffs and pocket. The forensic evidence established that 11 shots were fired from two 9mm pistols, with ten originating from the same pistol. Construing this evidence in a light most favorable to the state, we find that the state sustained its burden: any rational trier

of fact could have found that Courtland committed, or actively participated with his brother in committing, the offense of felonious assault against each of the five victims. The first assignment of error is overruled.

Manifest Weight of the Evidence

{¶ 19} In his second assignment of error, Courtland argues that his conviction is against the manifest weight of the evidence. We disagree.

{¶ 20} In determining whether a conviction is against the manifest weight of the evidence, the court of appeals functions as a "thirteenth juror," and, after "reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387, 678 N.E.2d 541. Reversing a conviction as being against the manifest weight of the evidence and ordering a new trial should be reserved for only the "exceptional case in which the evidence weighs heavily against the conviction." Id.

{¶ 21} Relying on the same argument advanced in his first assignment of error, Courtland contends that the state's evidence only proved his presence at the scene, nothing else. He further contends that the eyewitness testimony was "dubious," emphasizing that even victims who were shot at close range could not identify him; that the police work was not credible because the lead investigator lost evidence and the crime scene was chaotic; and that the DNA evidence alone

did not prove his involvement in the shooting. We find Courtland's argument, however, to be unpersuasive.

{¶ 22} While we agree that some of the testimony of the victims seemed "dubious," such as their failure to identify the shooter given their close proximity, we cannot say that the jury lost its way in evaluating all of the state's evidence. Despite the victims not naming the shooter at trial, the state was still able to present a clear picture of what transpired and who was responsible. Notably, the testimony of the two female witnesses, who seemed to be the most forthcoming at trial, implicated Courtland in the shooting. Their testimony, coupled with the other evidence recovered by the police, i.e., defendants' garments with gunshot residue and the forensic evidence of the ammunition recovered, support the conviction.

{¶ 23} The second assignment of error is overruled.

Improper Testimony

{¶ 24} In his third assignment of error, Courtland argues that the trial court abused its discretion in failing to grant a mistrial after the lead detective improperly testified that the police recovered crack cocaine along with the clothing retrieved at John's girlfriend's apartment. He contends that the trial court's curative instruction to the jury was insufficient to negate the prejudicial effect. We disagree.

{¶ 25} "A jury is presumed to follow the instructions, including curative instruction, given it by a judge." *State v. Garner* (1995), 74 Ohio St.3d 49, 59, 656 N.E.2d 623. The decision whether to grant or deny a motion for mistrial "lies

within the sound discretion of the trial court" and will not be reversed absent a showing of an abuse of discretion. Id.

{¶ 26} "A mistrial should not be ordered in a criminal case merely because some error or irregularity has intervened, unless the substantial rights of the accused or the prosecution are adversely affected; this determination is made at the discretion of the trial court." *State v. Reynolds* (1988), 49 Ohio App.3d 27, 33, 550 N.E.2d 490. Instead, the granting of a mistrial is necessary only when "a fair trial is no longer possible." *State v. Franklin* (1991), 62 Ohio St.3d 118, 127, 580 N.E.2d 1, citing *Illinois v. Somerville* (1973), 410 U.S. 458, 93 S.Ct. 1066, 35 L.Ed.2d 425.

{¶ 27} We cannot say that the trial court abused its discretion in denying Courtland's motion for a mistrial. Immediately following the improper statement, the trial court instructed the jury to disregard the testimony. Following a sidebar, the court again cautioned the jury to disregard the testimony and then later provided a third curative instruction after denying the defendants' motion for a mistrial. Given that this case did not involve any drug-related offense and that the improper comment was a single, fleeting reference immediately followed by a curative instruction, we find no basis to conclude that the comment deprived Courtland of a fair trial. See *Garner*, 74 Ohio St.3d at 59.

{¶ 28} The third assignment of error is overruled.

Lost Recorded Statements and Motion for a Mistrial

{¶ 29} In his fourth assignment of error, Courtland argues that the trial court erred in allowing state witnesses to testify whose prior recorded statements had been lost by law enforcement. He contends that the absence of the recorded statements deprived him of his ability to effectively cross-examine the witnesses and that the state's failure to preserve the evidence amounted to bad faith, thereby warranting a new trial. We disagree.

{¶ 30} Here, the lead investigator on the case, Lieutenant Harry Rose, had recorded statements from three of the victims. The tape recording, however, had been lost while Lt. Rose was out on extensive medical leave. Notably, the defendants were advised of this prior to trial and had been given an opportunity to review Lt. Rose's summaries of each of the tape-recorded interviews.

{¶ 31} Initially, we note that Courtland does not allege, let alone demonstrate, that the recorded statements are materially exculpatory; instead, his claim focuses on the fact that the recorded statements are potentially useful to his defense. Under such circumstances, Courtland's due process claim requires a showing that the police or prosecution acted in bad faith. See *Arizona v. Youngblood* (1988), 488 U.S. 51, 57-58, 109 S.Ct. 333, 102 L.Ed.2d 281 (recognizing that the failure to preserve evidence that by its nature or subject is merely potentially useful violates a defendant's due process rights *only if* the police or prosecution acted in bad faith).

{¶ 32} In determining whether the state acted in bad faith for purposes of its constitutional duty to preserve evidence, we must look to the state's handling of

the evidence. And absent a showing that the state "deliberately lost, concealed or destroyed" the evidence, the defendant fails to demonstrate a due process violation. *State v. Burke* (1995), 73 Ohio St.3d 399, 403, 653 N.E.2d 242. Here, we find no bad faith. The record is devoid of any evidence or allegation that the state deliberately lost, concealed, or destroyed the tape to warrant a finding that Courtland's due process rights were violated.

{¶ 33} Finally, the court instructed the jury that it may make an unfavorable inference as a result of the state's failure to produce the recorded statements. We therefore find that Courtland's due process rights were further safeguarded by the trial court's instruction to the jury regarding the lost tape-recorded statements.

{¶ 34} The fourth assignment of error is overruled.

Allied Offenses

{¶ 35} In his fifth assignment of error, Courtland argues that the trial court erred in failing to merge the ten counts of felonious assault to reflect five offenses, one against each victim. We agree.

{¶ 36} Courtland was indicted and convicted of ten counts of felonious assault, five counts as defined under R.C. 2903.11(A)(1) and five counts as defined under R.C. 2903.11(A)(2). These offenses, however, are "allied offenses of similar import, and therefore a defendant cannot be convicted of both offenses when both are committed with the same animus against the same victim." *State v. Harris*, 122 Ohio St.3d 373, 2009-Ohio-3323, 911 N.E.2d 882, ¶20. The state,

furthermore, concedes that Courtland's sentence constitutes plain error because the trial court imposed multiple sentences for the allied offenses.

{¶ 37} Indeed, a defendant may be indicted and tried for allied offenses of similar import, but may be sentenced on only one of the allied offenses. *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, 895 N.E.2d 149, ¶42. Moreover, pursuant to the Ohio Supreme Court's recent holding in *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, 922 N.E.2d 182, at paragraph one of the syllabus, "[t]he state retains the right to elect which allied offense to pursue on sentencing on a remand to the trial court after appeal." We therefore sustain Courtland's fifth assignment of error and remand to the trial court for further proceedings consistent with the holding in *Whitfield*.

Ineffective Assistance of Counsel

{¶ 38} In his final assignment of error, Courtland argues that he was deprived effective assistance of counsel by his trial counsel's abandonment of a self-defense theory after making that the focus of his opening statement.

{¶ 39} In *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, the Supreme Court of the United States set forth the two-pronged test for ineffective assistance of counsel. It requires that the defendant show (1) counsel's performance was deficient; and (2) the deficient performance prejudiced the defense. The first prong "requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 687. The second prong "requires

showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is unreliable." Id. See, also, *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373 (adopting *Strickland*).

{¶ 40} An attorney properly licensed in Ohio is presumed competent. *State v. Lott* (1990), 51 Ohio St.3d 160, 174, 555 N.E.2d 293. The defendant has the burden of proof and must overcome the strong presumption that counsel's performance was adequate or that counsel's action might be sound trial strategy. *State v. Smith* (1985), 17 Ohio St.3d 98, 100, 477 N.E.2d 1128. "Ultimately, the reviewing court must decide whether, in light of all the circumstances, the challenged act or omission fell outside the wide range of professionally competent assistance." *State v. DeNardis* (Dec. 29, 1993), 9th Dist. No. 2245, citing *Strickland* at 690.

{¶ 41} Based on the totality of the circumstances, we cannot say that Courtland's counsel was ineffective for abandoning a self-defense theory. Defense counsel's pretrial investigation and preparation of the case revealed that some of the victims had identified Courtland as the shooter and that the victims were being called as witnesses for trial. The state's case, however, unraveled when the victims failed to name Courtland as the shooter at trial. Thus, once the victims did not identify Courtland as the shooter, the state's case relied entirely on circumstantial evidence without any direct testimony identifying Courtland. Defense counsel therefore made a strategic, deliberate decision to abandon the self-defense theory in the hope that the jury would acquit. We cannot

second-guess counsel's decision simply because it was unsuccessful. See, generally, *State v. Selman*, 8th Dist. No. 90517, 2008-Ohio-4582 (counsel was not ineffective for failing to raise an affirmative defense of self-defense having mentioned self-defense in opening statements).

{¶ 42} Additionally, a jury is presumed to follow the instructions of the court. *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, 840 N.E.2d 1032, ¶86. Prior to charging the jury, the trial court expressly instructed the jury that it may not consider opening statements as evidence. We therefore cannot say that the outcome of Courtland's case would have been different absent the opening statement.

{¶ 43} Accordingly, we find no ineffective assistance of counsel and overrule the final assignment of error.

Affirmed in part, reversed in part, and remanded to the lower court for further proceedings consistent with this opinion.

It is ordered that appellee and appellant share the 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 resentencing.

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., and
ANN DYKE, J., CONCUR