

[Cite as *State v. Smith*, 2010-Ohio-4006.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93593

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ERIC SMITH

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED IN PART; REVERSED IN PART**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-521598

BEFORE: McMonagle, P.J., Dyke, J., and Jones, J.

RELEASED AND JOURNALIZED: August 26, 2010

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CHRISTINE T. McMONAGLE, P.J.:

{¶ 1} Defendant-appellant, Eric Smith, appeals from the trial court's judgment, rendered after a jury verdict, finding him guilty of one count of aggravated robbery with a one-year firearm specification, and one count of drug possession, and sentencing him to ten years incarceration. He contends that the evidence was insufficient to support his conviction on the firearm specification, and that his convictions for aggravated robbery and the firearm specification were against the manifest weight of the evidence. We affirm in part and reverse in part.

{¶ 2} At trial, East Cleveland detective Randy Hicks testified that at approximately 7:30 p.m. on February 28, 2009, he and fellow detectives Wilbert Nevels and Mark Allen were engaged in a buy/bust operation with a private citizen acting as a police agent at a house in East Cleveland. Hicks was parked a half-block down from the targeted house; Nevels and Allen were in another vehicle down the street.

{¶ 3} Hicks listened as the citizen, who was wired, pulled his car up to the targeted house and motioned to two men standing outside that he wanted to buy marijuana. A male, later identified as Smith (who was not the target of the operation), went to the car and told the citizen that he wanted the money before he got the drugs. The citizen gave Smith \$20, but when Smith began walking away, the citizen demanded his money back. Smith got into his car and the two men started arguing. Hearing the argument, Detective Hicks decided to move in, and the police blocked the car with their cars. Hicks jumped out of his car yelling “police, don’t move,” but Smith ran from the citizen’s car.

{¶ 4} Hicks testified that he chased Smith as he ran through a backyard and over a fence. According to Hicks, Smith fell after he jumped the fence. Hicks testified that as he approached Smith, who was on the ground, he saw Smith reaching for his waistband, so he pulled out his handgun. Hicks testified that as he was straddling Smith’s feet and pointing

his gun at him, Smith suddenly reached up and grabbed Hicks's gun with both hands.

{¶ 5} Hicks further testified that he never lost control of his gun. He stated, "He grabbed it, gave it a good tug, and at that time I kicked him right in the chest and was able to pull it back and take a couple steps back." On cross-examination, Hicks stated, "I don't ever lose control of my gun." Hicks also stated that he had arrested Smith several other times, and that Smith "usually runs from us," so he "chases him down" and arrests him. Hicks stated that Smith had never reached for Hicks's gun on any of the other occasions.

{¶ 6} Detective Nevels, who was also chasing Smith, testified that as he came upon the scene, he saw Smith and Hicks "tussling" over the gun. Like Hicks, Nevels testified that Smith never got the gun from Hicks and never gained control of the weapon. Nevels said he saw Hicks "knee" Smith in the chest, forcing him down, and then he handcuffed Smith. The police subsequently found one rock of crack cocaine in Smith's pants pocket.

{¶ 7} The trial court denied Smith's Crim.R. 29 motion for acquittal, and the jury subsequently found him guilty of aggravated robbery in violation of R.C. 2911.01(B)(1) with a one-year firearm specification. (The jury found Smith not guilty of the three-year firearm specification.) The jury also found him guilty of one count of drug possession in violation of R.C. 2925.11(A).

The trial court sentenced him to eight years incarceration for the aggravated robbery, one year on the firearm specification, and 12 months for the drug possession, all consecutive, for a total of ten years.

II

{¶ 8} In his first assignment of error, Smith contends that the trial court erred in denying his Crim.R. 29(A) motion for acquittal regarding the one-year firearm specification.

{¶ 9} A Crim.R. 29 motion challenges the legal sufficiency of the evidence. The test for sufficiency requires a determination of whether the prosecution met its burden of production at trial. *State v. Bowden*, 8th Dist. No. 92266, 2009-Ohio-3598, ¶12. 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. *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 942, paragraph two of the syllabus.

{¶ 10} Smith was convicted of aggravated robbery of a law enforcement officer in violation of R.C. 2911.01(B)(1), which provides that no one without privilege to do so shall knowingly remove or attempt to remove a deadly weapon from a law enforcement officer. He was also convicted of the accompanying one-year firearm specification under R.C. 2941.141(A), which

provides that “the offender had a firearm on or about his person or under his control while committing the offense.”

{¶ 11} Even construing the evidence most favorably for the prosecution, it is apparent that the State did not present sufficient evidence to support Smith’s conviction on the firearm specification. The State presented no evidence demonstrating that Smith had the gun “about his person or under his control” while he was attempting to get Hicks’s gun. “On or about his person or under his control” means that “the firearm was either carried on the defendant’s person or was so near the defendant’s person as to be conveniently accessible and within his immediate physical reach.” 2 Ohio Jury Instructions (2008) Section 4, at 127. Smith’s attempt to get Hicks’s gun obviously satisfies neither criteria of this definition. There was no evidence the gun was ever “carried” on Smith’s “person”; the fact that he may have had it in his hands while he was struggling for it does not mean he was “carrying” it. Nor was it under his control such that it was “conveniently accessible” to him; both Hicks and Nevels specifically testified that Smith never got control of the gun. At best, the evidence showed only a struggle for the gun; there was no evidence that Smith ever actually had the gun in his possession or control.

{¶ 12} Accordingly, the trial court erred in denying Smith’s Crim.R. 29 motion for acquittal regarding this specification. Appellant’s first

assignment of error is sustained; the matter is remanded to the trial court with instructions to vacate Smith's conviction on the one-year firearm specification.

III

{¶ 13} In his second assignment of error, Smith contends that his convictions for aggravated robbery of Hicks and the accompanying firearm specification are against the manifest weight of the evidence. We address only the aggravated robbery conviction because our resolution of the Smith's first assignment of error renders any consideration of the manifest weight of the evidence on the firearm specification moot. See App.R. 12(A)(1)(c).

{¶ 14} A manifest weight challenge questions whether the prosecution met its burden of persuasion at trial. *State v. Thomas* (1982), 70 Ohio St.2d 79, 80, 434 N.E.2d 1356. A reviewing court may reverse the judgment of conviction if it appears that the trier of fact "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*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541.

{¶ 15} Smith contends that his conviction for aggravated robbery was against the manifest weight of the evidence because the State's witnesses were not credible. His theory at trial was that the officers made up the story because they were angry he could not be charged with drug trafficking since

he had given the \$20 back to the citizen. On appeal, he points out several inconsistencies in their testimony as evidence that the officers fabricated the story about him trying to grab Hicks's gun.

{¶ 16} But as the finder of fact, the jury was free to accept or reject all or any part of the testimony of the witnesses and assess the credibility of the witnesses. *State v. Anderson*, 8th Dist. No. 90460, 2008-Ohio-4240, ¶18, citing *State v. Wilson*, 8th Dist. No. 88289, 2007-Ohio-2373. Despite some minor inconsistencies between Hicks's and Nevels's testimony, we cannot conclude that Smith's conviction was against the manifest weight of the evidence. Hicks and Nevels both described Smith grabbing for Hicks's gun, and it was within the province of the jury to determine whether their testimony was sufficiently reliable and accurate to be worthy of belief.

{¶ 17} After reviewing the record, weighing the evidence, and considering the credibility of the witnesses, we find that the jury did not lose its way in convicting Smith of aggravated robbery of a law enforcement officer and his conviction was supported by the manifest weight of the evidence. Therefore, the second assignment of error is overruled.

Reversed in part and affirmed in part. Remanded with instructions to the trial court to vacate the conviction on the one-year firearm specification.

It is ordered that the parties share equally 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.

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

CHRISTINE T. McMONAGLE, PRESIDING JUDGE

ANN DYKE, J., and
LARRY A. JONES, J., CONCUR