[Cite as *State v. Ray*, 2010-Ohio-513.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92749

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DARRIEL RAY

DEFENDANT-APPELLANT

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

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-508106

BEFORE: Gallagher, A.J., Kilbane, J., and McMonagle, J.

RELEASED: February 18, 2010

JOURNALIZED:

ATTORNEY FOR APPELLANT

David L. Doughten
The Brownhoist Building
4403 St. Clair Avenue
Cleveland, Ohio 44103

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor

BY: Aaron Brockler
Assistant Prosecuting Attorney
The Justice Center, 9th Floor
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), 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).

SEAN C. GALLAGHER, A.J.:

{¶ 1} Defendant-appellant, Darriel Ray, appeals his convictions from the Cuyahoga County Court of Common Pleas. For the reasons that follow, we affirm in part, reverse in part, and remand.

{¶ 2} Ray was indicted in two separate cases. The first case charged him with having a weapon while under a disability. The second case charged him with carrying a concealed weapon, receiving stolen property, and having a weapon while under a disability. The state's motion for joinder was granted, and a jury trial ensued.

{¶ 3} Officer John Bechtel from the East Cleveland Police Department testified that on April 13, 2006, around 1 a.m., he was patrolling Euclid Avenue when he heard multiple gunshots. Less than 30 seconds after hearing the gunshots, he saw Ray running across Euclid Avenue toward Wadena Street. Officer Bechtel observed something in Ray's hand. He testified that there were no vehicles or pedestrians in the area. Officer Bechtel called for backup and then pursued Ray in his police cruiser.

{¶ 4} Officer Bechtel testified that he saw Ray throw something to the ground and then start running through backyards. Officer Bechtel started to pursue Ray on foot. Ray tripped and fell, and Officer Bechtel secured and

returned him to the police cruiser. Ray stated that he was on parole for robbery.

{¶ 5} Officer Kenneth Bolton arrived on scene in his vehicle with lights and sirens. Officer Bechtel directed him to the area where Ray had thrown the object. Officer Bolton recovered a revolver that was warm to the touch. The revolver had six spent shell casings. The gun was later test-fired and found to be operable.

{¶ 6} Officer Kyle Cunningham of the East Cleveland Police Department testified that on June 9, 2007, at about 1:30 p.m., he was on routine patrol when he observed Ray fail to stop at a stop sign on Wadena Street and then turn left onto Euclid Avenue. Officer Cunningham initiated a traffic stop.

{¶ 7} As Officer Cunningham was approaching the vehicle, he observed Ray lean toward the passenger and then try to exit the vehicle. He ordered Ray to stay in the vehicle. Ray stayed in the car and put his hands out the window. Officer Cunningham ran Ray's information and learned that Ray was driving under suspension. Ray was arrested.

{¶ 8} Officer Cunningham arranged for the vehicle to be towed. When he returned to the car, the passenger, Marcellous Brown, informed Officer Cunningham that there was a gun in the car. Brown was removed from the

car, and a revolver was recovered from under the passenger seat. Both Brown and Ray denied ownership. Brown was also arrested.

{¶ 9} Sergeant Terry Wheeler from the East Cleveland Police Department testified that the gun recovered on June 9, 2007, from Ray's car was reported to the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") as stolen from a bait and tackle shop located in Lorain, Ohio.

{¶ 10} Marcellous Brown testified that Ray was an acquaintance of his from the neighborhood. He stated that when Ray was stopped by the police, Ray told him he had a gun under his seat, reached under his seat, and then dropped something on Brown's side of the car.

{¶ 11} Brown told the officer that he thought Ray had just dropped a gun under his seat. Brown was removed, and the gun was located under his seat. Brown testified that Ray repeatedly asked Brown to take responsibility for the gun because he did not have a record and Ray did.

{¶ 12} Ray testified on his own behalf. He stated that on April 13, 2006, when he was leaving Whatley's Lounge, he heard gunshots. He thought someone was shooting at him, so he ran to his grandmother's house on Wadena Street. He stated he tripped and fell and was apprehended by police. He testified that he did not have a gun in his hand; he had a cell phone in his hand. Ray denied throwing anything.

{¶ 13} Ray testified that on June 9, 2007, he was stopped for running a stop sign. After he was stopped, Brown told him he had a gun. Ray testified that his license was not suspended because he simply did not have a license.

{¶ 14} The jury found Ray guilty of all charges. He was sentenced to a total of two years in prison. Ray appeals, advancing three assignments of error for our review, which will be addressed out of order.

{¶ 15} "II. The prosecutor's improper questioning and closing argument deprived the appellant of a fair trial."

{¶ 16} Ray alleges that the prosecutor engaged in prosecutorial misconduct during cross-examination and during closing arguments. A defendant is entitled to a new trial when a prosecutor makes improper remarks that substantially prejudice him. *State v. Tibbetts*, 92 Ohio St.3d 146, 168, 2001-Ohio-132, 749 N.E.2d 226. "It must be clear beyond a reasonable doubt that, absent the prosecutor's comments, the jury would have found defendant guilty." *State v. Smith* (1984), 14 Ohio St.3d 13, 15, 470 N.E.2d 883. "To determine prejudice, the effect of the prosecutor's misconduct must be considered in light of the whole trial. *State v. Frazier*, 115 Ohio St.3d 139, 164, 873 N.E.2d 1263, 2007-Ohio-5048." *State v. Hudson*, Cuyahoga App. No. 89588, 2008-Ohio-1265, at ¶22.

{¶ 17} Ray argues that it was improper for the state to imply during cross-examination that Ray had a gun because he carried a gun in another case.

{¶ 18} The state did not argue or imply that because Ray carried a gun in his prior case, he carried a gun in this case. Further, cross-examination may properly include all relevant matters and those related to the credibility of the witness. *State v. Slagle* (1992), 65 Ohio St.3d 597, 605, 605 N.E.2d 916, 925.

{¶ 19} Next, Ray complains that during closing arguments the state argued that because he was convicted of carrying a gun in the past, he is guilty of carrying a gun in this case.

{¶ 20} A review of the record reveals no such assertion. The state argued that Ray was not accidentally or mistakenly in possession of a firearm.

{¶ 21} Lastly, Ray complains about the following:

> **"Finally, I wanted to leave you with this. For those of us that are firearm's people or own firearms, there is a common misconception in society that guns kill people. Guns do not kill people. And one of the most important laws in our society, because of that fact, is that certain types of people with certain criminal histories, violent histories, violent felonies, cannot be in possession or around guns. And that is one of the main rules that keeps our society organized and safe. Because, people that commit aggravated robberies at gun point, we don't want them around or near guns."**

{¶ 22} "[T]he prosecutor may not invite the jury to judge the case upon standards or grounds other than the evidence and law of the case. Thus, he cannot inflame the passion and prejudice of the jury by appealing to community abhorrence or expectations with respect to crime in general, or crime of the specific type involved in the case. *United States v. Solivan* (C.A.6, 1991), 937 F.2d 1146." *State v. Snyder*, Licking App. No. 2008-CA-25, 2009-Ohio-2473.

{¶ 23} Although the state's colloquy is borderline improper, we find that Ray was not prejudiced by the remarks because it is clear that, absent these remarks, the jury would still have found Ray guilty.

{¶ 24} Ray's second assignment of error is overruled.

{¶ 25} "III. The failure to request separate trials, and object to unfairly prejudicial questioning, testimony and argument denied the appellant his right to effective assistance of counsel."

{¶ 26} In order to substantiate a claim of ineffective assistance of counsel, the appellant 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, 310, 2009-Ohio-2961, 911 N.E.2d 242, citing *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674. Judicial scrutiny of defense

counsel's performance must be highly deferential. *Strickland*, 104 S.Ct. 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. Failure to object to error, alone, is not sufficient to sustain a claim of ineffective assistance. *State v. Fears*, 86 Ohio St.3d 329, 1999-Ohio-111, 715 N.E.2d 136; *State v. Contreras*, Cuyahoga App. No. 89728, 2008-Ohio-1413.

{¶ 27} Ray complains that his attorney was ineffective because he failed to object to the state's motion for joinder. Although the state's motion for joinder was unopposed, we find that Ray was not prejudiced. Ray's attorney attempted to bifurcate (try to the bench) the case of having weapons under disability and the having weapons under disability charge in Ray's second case; however, Ray refused to agree to the bifurcation. After a lengthy discussion between the court and Ray, Ray himself decided that he wanted the jury to hear everything.

{¶ 28} We find that any error in not opposing the motion for joinder was invited error. The invited error doctrine provides that "a party will not be permitted to take advantage of an error that he himself invited or induced the trial court to make." *State ex rel. The V Cos. v. Marshall*, 81 Ohio St.3d 467, 471, 1998-Ohio-329, 692 N.E.2d 198, 202. The Ohio Supreme Court has stated that invited error occurs when defense counsel "was actively responsible for the trial court's error" or "when a party has asked the court to

take some action later claimed to be erroneous." *State v. Campbell*, 90 Ohio St.3d 320, 324, 2000-Ohio-183, 738 N.E.2d 1178, 1188, rehearing denied (2001), 91 Ohio St.3d 1433, certiorari denied (2001), 121 S.Ct. 2606, quoting *State v. Kollar* (1915), 93 Ohio St. 89, 91, 112 N.E. 196, 197.

{¶ 29} Ray also argues that his attorney was ineffective because he failed to object to the ATF report, which indicated that the gun found in Ray's possession on June 9, 2007, was reported stolen. He complains that the report is hearsay and that no one testified from the bait and tackle shop or ATF that the gun was reported stolen. Ray asserts that Sergeant Wheeler could not testify to the contents of the report because he was not the preparer of the report. Ray argues that his right to confrontation was violated and he was prejudiced by the inadmissible hearsay. Ray cites to this court's decision in *State v. Iverson*, Cuyahoga App. No. 85593, 2005-Ohio-6098, to support his argument.

{¶ 30} In *State v. Iverson*, the defendant was charged with carrying a concealed weapon. At trial, a police officer testified to the location and concealment of the weapon, as well as the gun's operability, but had no personal knowledge of these facts. He testified as to what another officer saw and set forth in his report. The officer with personal knowledge did not testify, neither did the officer who test fired the gun. This court held that the testimony regarding the location, concealment, and operability was

hearsay, violated the defendant's right to confrontation, and was inadmissible. Although trial counsel did not object, because the inadmissible hearsay was the only evidence presented as to the weapon's concealment and operability, this court found plain error.

{¶ 31} In the case at bar, trial counsel failed to object to the ATF report and Sergeant Wheeler's testimony regarding the contents of the report. The state was required to prove that the gun was stolen because Ray was charged with receiving stolen property (a gun) in violation of R.C. 2913.51, which states that no person shall receive, retain, or dispose of property of another knowing or having reasonable cause to believe that the property has been obtained through the commission of a theft offense. A review of the record reveals that the ATF report and Sergeant Wheeler's testimony regarding the report were offered to prove that the gun was stolen. However, his testimony and the ATF report were inadmissible hearsay, and the admission of such evidence violated Ray's right to confrontation. Since this testimony and the report were the only evidence presented that the gun was stolen property, we find that the admission was plain error. Accordingly, Ray's third assignment of error is sustained in part.

{¶ 32} Ray's first assignment of error states the following: "I. The evidence is insufficient to sustain a conviction for receiving stolen property in

violation of R.C. 2913.51." Ray's first assigned error is rendered moot by our decision in the third assignment of error.

~~{¶ 33}~~ Ray's conviction for receiving stolen property is reversed and remanded to the trial court.

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

It is ordered that appellant and appellee 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.

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

SEAN C. GALLAGHER, ADMINISTRATIVE JUDGE

MARY EILEEN KILBANE, J., and
CHRISTINE T. MCMONAGLE, J., CONCUR