[Cite as *State v. Bauldwin*, 2011-Ohio-1066.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94876

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

LINDSEY BAULDWIN

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART; REVERSED IN PART;
REMANDED FOR RESENTENCING

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-528042

BEFORE: Celebrezze, J., Boyle, P.J., and Cooney, J.

RELEASED AND JOURNALIZED: March 10, 2011

ATTORNEY FOR APPELLANT

Steve W. Canfil
1370 Ontario Street
2000 Standard Building
Cleveland, Ohio 44113

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor
BY: Maxwell M. Martin
Assistant Prosecuting Attorney
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

FRANK D. CELEBREZZE, JR., J.:

{¶ 1} Appellant, Lindsey Bauldwin, a.k.a. Orlando Patterson, appeals his conviction and sentence stemming from the robbery and shooting of victim, Donte Rogers. He specifically argues that the state engaged in instances of misconduct during closing argument, that his defense attorney undermined his rights to effective assistance of counsel, and that he was improperly sentenced on charges that constituted allied offenses. After a thorough review of the record and case law, we affirm in part, reverse in part, and remand for resentencing.

Statement of the Facts

{¶ 2} On May 22, 2009, the robbery and shooting of Donte Rogers took place at Manny's Tire Shop, located on St. Clair Avenue in Cleveland, Ohio. Rogers testified

that on the day of the incident, he was visiting Manny's Tire Shop to purchase a car radio from Manny, the owner. At the time Rogers was shot, he was carrying $2,500 on his person. When Rogers arrived at the tire shop, he did not see Manny and asked Booker Liddell, an acquaintance of Manny's, where he was. Booker indicated that Manny had stepped out of the shop for a few minutes.

{¶ 3} Rogers waited approximately ten minutes for Manny to return before he decided to leave. As he walked to his vehicle, Rogers noticed a man with a gun approaching him. Rogers testified that he knew the man as "OJ." This man was later identified as appellant. Rogers testified that appellant took his money, then said, "I should kill your m****** f****** a**." Appellant then shot Rogers in the right leg with a .38 caliber handgun. Rogers testified that he got a good look at appellant's face and would "never forget that face." After being shot in the leg, Rogers attempted to run away, and he was shot six more times.

{¶ 4} After being shot, Rogers managed to call 911 from inside the tire shop. Thereafter, Rogers decided to drive himself to the hospital, where he was treated. Rogers's medical records state in relevant part, "Trauma patient was shot with gunshots to the legs, to the buttocks, to the lower back, the right femur. [Patient] reports he was shot and robbed. He knows who tried to rob him and feels safe to go home."

{¶ 5} Detective William Tinsley of the Cleveland Police Department met with Rogers at the hospital. At that time, Rogers told Det. Tinsley that "OJ" had shot him.

Rogers informed Det. Tinsley that "OJ" lived on the street across from Manny's Tire Shop and that he drove a white Park Avenue.

{¶ 6} Det. Tinsley investigated the white Park Avenue and found it parked outside a house on E. 124th Street in Cleveland. Using the address, Det. Tinsley looked through the law enforcement database and found the name Orlando J. Patterson linked to the address. Based on this discovery, Det. Tinsley believed the man Rogers referred to as "OJ" might be appellant. Rogers later came to the police station where he identified appellant as "OJ" in a photo array created by Det. Tinsley. Det. Tinsley testified that he did not tell Rogers which of the males in the photo array was appellant, and he did not tell Rogers which photo to pick. Rogers testified that he picked the photo of appellant on his own and that he immediately recognized appellant as the man who shot him.

{¶ 7} Subsequently, appellant was charged in a four-count indictment. Count 1 of the indictment charged appellant with attempted murder in violation of R.C. 2903.02(A), with firearm specifications. Count 2 of the indictment charged him with aggravated robbery in violation of R.C. 2911.01(A)(3), with firearm specifications. Count 3 charged him with aggravated robbery in violation of R.C. 2911.01(A)(1), with firearm specifications. Count 4 of the indictment charged him with kidnapping in violation of R.C. 2905.01(A)(2), with firearm specifications. A jury trial commenced, and the jury returned a verdict of guilty on all counts.

{¶ 8} Appellant was senteced to an 11-year term of incarceration. The trial court sentenced him to eight years on each count, to run concurrently. He was also sentenced

to three years for the firearm specifications, to run prior and consecutive to the eight years for the underlying sentence.

{¶ 9} Appellant timely appealed and raises three assignments of error for our review.

Prosecutorial Misconduct

{¶ 10} Appellant argues in his first assignment of error that the state engaged in instances of misconduct during its closing argument. Specifically, he claims that the prosecutor's misconduct affected the jury's ability to properly fulfill its function of weighing the evidence presented in an impartial manner, therefore denying him a fair trial.

{¶ 11} The test for prosecutorial misconduct is whether the prosecutor's remarks were improper and, if so, whether they prejudicially affected substantial rights of the accused. *State v. Bey*, 85 Ohio St.3d 487, 1999-Ohio-283, 709 N.E.2d 484. The focus of that inquiry is on the fairness of the trial, not the culpability of the prosecutor. Id. Generally, prosecutors are entitled to considerable latitude in opening statements and closing arguments. *Maggio v. Cleveland* (1949), 151 Ohio St. 136, 84 N.E.2d 912; *State v. Clay*, 181 Ohio App.3d 563, 2009-Ohio-1235, 910 N.E.2d 14.

{¶ 12} "In closing argument, a prosecutor may comment freely on 'what the evidence has shown and what reasonable inferences may be drawn therefrom.' 'Moreover, because isolated instances of prosecutorial misconduct are harmless, the closing argument must be viewed in its entirety to determine whether the Defendant has

been prejudiced.'" (Internal citations omitted.) *State v. Justice*, Montgomery App. No. 21375, 2006-Ohio-5965, ¶32.

{¶ 13} Initially, we note that appellant did not object to the comments he now challenges as being improper. In the absence of objection to improper comments, the alleged prosecutorial misconduct can only be the basis for reversal if it rises to the level of plain error. Crim.R. 52(B). To constitute plain error, the error must be obvious on the record, palpable, and fundamental, so that it should have been apparent to the trial court without objection. See *State v. Tichon* (1995), 102 Ohio App.3d 758, 767, 658 N.E.2d 16. Moreover, plain error does not exist unless the appellant establishes that the outcome of the trial clearly would have been different but for the trial court's allegedly improper actions. *State v. Waddell*, 75 Ohio St.3d 163, 166, 1996-Ohio-100, 661 N.E.2d 1043. Notice of plain error is to be taken with utmost caution, under exceptional circumstances, and only to prevent a manifest miscarriage of justice. *State v. Phillips*, 74 Ohio St.3d 72, 83, 1995-Ohio-171, 656 N.E.2d 643.

{¶ 14} Appellant argues that the statements made by the prosecutor (1) denigrated him and his counsel, (2) improperly expressed the prosecutor's opinion of his own witness's truthfulness, (3) improperly appealed for sympathy on behalf of the victim, and (4) attempted to shift the burden of proof to the defense.

A. Denigration of Appellant and Defense Counsel

{¶ 15} Appellant challenges comments made by the prosecutor during his closing argument, which allegedly denigrated appellant and his attorney. Generally, it is improper to denigrate defense counsel in the presence of the jury. *State v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2, 880 N.E.2d 31.

{¶ 16} Specifically, appellant cites the following comments as being prejudicial:

{¶ 17} "What I didn't know about defense counsel is that she is so creative. A lot of what she is asking you to believe is pure conjecture. She made things up in her closing arguments that were not testified to. She is guessing. Counsel is insinuating a drug deal. * * * [Counsel's] cross-examination and her 45 minute argument are inconsequential, irrelevant * * *."

{¶ 18} The prosecutor referred to defense counsel's argument as "a complete non-issue" and stated that counsel "got creative and maybe exaggerating [Roger's] demeanor on the stand."

{¶ 19} When read in the context of the prosecutor's entire closing argument, we cannot say that there was an attempt to insult or denigrate defense counsel. The prosecutor was merely responding to arguments developed by defense counsel and her opinion of what really happened on the day Rogers was shot. Viewing the prosecutor's comments in light of the defense attorney's closing argument, we find that appellant fails to establish a prejudicial effect to his substantial rights.

B. Opinion of Witness's Credibility

{¶ 20} Appellant next argues that the prosecutor also improperly expressed his own opinion that he believed his witness was credible and trustworthy. An attorney may not express his or her opinion regarding the credibility of a witness. *State v. Thornton*, Cuyahoga App. No. 80136, 2002-Ohio-6804, ¶11. Appellant cites to the following remarks by the prosecutor:

{¶ 21} "His body language suggests truthfulness * * * he got emotional on cross-examination. There is no weakness in the identification whatsoever. * * * If there was the slightest bit of untruth to the victim's story it would have been revealed. If there was the slightest shred of evidence that tended to suggest that defendant did not try to murder, you would know it. There are no cracks in Roger's [sic] story."

{¶ 22} Considering the latitude granted to prosecutors and our review of the entire record, we find that the prosecutor was not attempting to express his opinion regarding Rogers's credibility. Rather, he was rebutting arguments made by defense counsel that certain facts brought out during trial indicated that Rogers had to be lying. Defense counsel discussed Rogers's poor demeanor on the stand, the large amount of money on his person at the time of the shooting, and claimed that Det. Tinsley acted inappropriately in creating the photo array. Taking this information together, defense counsel attempted to cast doubt on Rogers's truthfulness and his account of what really occurred on the day he was shot. The prosecutor was merely responding to these accusations. Accordingly, we find that the prosecutor's comments were not improper.

C. Appeal For Sympathy

{¶ 23} Appellant next argues that the prosecutor appealed for sympathy from the jury. He specifically cites the following statement: "Equal protection. Justice for all. Donte Rogers falls within that category — all. He deserves justice. This trial is equally important to the victim, he almost died. * * * Give this victim a fair shake, give him the justice he deserves. No doubts raise to the level of being reasonable."

{¶ 24} We find that the comments made by the prosecutor, taken in context, were not made for the purpose of appealing to the jury's sympathy and did not prejudice appellant's right to a fair trial.

D. Burden Shifting

{¶ 25} Appellant also argues that the state attempted to shift the burden of proof to the defense. The prosecutor stated, "I'd like to point out the defense has every bit as much ability to go out and get evidence. They can subpoena phone records. If they were relevant, you would get them. That didn't happen, so if a phone call was made * * *."

{¶ 26} After careful review of the entire record, we find that the prosecutor's comments were not made in an attempt to shift the burden of proof in this case. Rather, they were made in response to defense counsel's belief that the police acted erroneously when they failed to obtain Rogers's phone records. Taken in context, we find that the prosecutor was merely commenting on the irrelevance of such evidence. The alleged attempt to shift the burden of proof did not relate to the charges appellant faced at trial, and we find the comments did not create a manifest miscarriage of justice.

{¶ 27} The record indicates that the comments made by the prosecutor were not so obvious, palpable, and fundamental that they should have been apparent to the trial court without objection. Additionally, we find that appellant has failed to establish that, "but for" the comments made by the prosecutor, the outcome of the case would have been different. Accordingly, we find that the jury was able to properly fulfill its function of weighing the evidence in an impartial manner.

{¶ 28} Appellant's first assignment of error is overruled.

Ineffective Assistance of Counsel

{¶ 29} In his second assignment of error, appellant argues that his trial attorney did not fulfill the essential duties owed to him, thereby undermining his constitutional rights to effective assistance of counsel.

{¶ 30} In order to substantiate a claim of ineffective assistance of counsel, the appellant is required to demonstrate that: 1) the performance of defense counsel was seriously flawed and deficient; and 2) the result of appellant's trial or legal proceeding would have been different had defense counsel provided proper representation. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Brooks* (1986), 25 Ohio St.3d 144, 495 N.E.2d 407.

{¶ 31} In reviewing a claim of ineffective assistance of counsel, it *must* be presumed that a properly licensed attorney executes his legal duty in an ethical and competent manner. *State v. Smith* (1985), 17 Ohio St.3d 98, 477 N.E.2d 1128; *Vaughn v. Maxwell* (1965), 2 Ohio St.2d 299, 209 N.E.2d 164.

{¶ 32} The Ohio Supreme Court held in *State v. Bradley* (1989), 42 Ohio St.3d 136, 141-142, 538 N.E.2d 373, that, "'[w]hen considering an allegation of ineffective assistance of counsel, a two-step process is usually employed. First, there must be a determination as to whether there has been a substantial violation of any of defense counsel's essential duties to his client. Next, and analytically separate from the question of whether the defendant's Sixth Amendment rights were violated, there must be a determination as to whether the defense was prejudiced by counsel's ineffectiveness.' *State v. Lytle* (1976), 48 Ohio St.2d 391, 396-397, 2 O.O.3d 495, 498, 358 N.E.2d 623, 627, vacated in part on other grounds (1978), 438 U.S. 910, 98 S.Ct. 3135, 57 L.Ed.2d 1154. This standard is essentially the same as the one enunciated by the United States Supreme Court in *Strickland v. Washington* (1984), 466 U.S. 668 * * *.

{¶ 33} "Even assuming that counsel's performance was ineffective, this is not sufficient to warrant reversal of a conviction. 'An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. Cf. *United States v. Morrison*, 449 U.S. 361, 364-365 [101 S.Ct. 665, 667-68, 66 L.Ed.2d 564] (1981).' *Strickland*, supra, 466 U.S. at 691, 104 S.Ct. at 2066. To warrant reversal, '[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' *Strickland*, supra, at 694, 104 S.Ct.

at 2068. In adopting this standard, it is important to note that the court specifically rejected lesser standards for demonstrating prejudice." *Bradley* at 142.

{¶ 34} "Accordingly, to show that a defendant has been prejudiced by counsel's deficient performance, the defendant must prove that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different." Id. at 143.

{¶ 35} Specifically, appellant claims that his trial counsel provided ineffective assistance by failing to challenge the identification evidence offered by the state. The Sixth Amendment guarantee of assistance of counsel does not require trial counsel to file a motion to suppress in every case. *State v. Carey*, Cuyahoga App. No. 88487, 2007-Ohio-3073, ¶25. However, if the defendant can show that the failure to file the motion to suppress caused him prejudice, such as where "there is a solid possibility that the court would have suppressed the evidence," he has demonstrated ineffective assistance. *State v. Garrett* (1991), 76 Ohio App.3d 57, 600 N.E.2d 1130.

{¶ 36} Courts apply a two-prong test in determining the admissibility of challenged identification testimony. First, the defendant bears the burden of demonstrating that the identification procedure was unnecessarily suggestive. Suggestiveness depends on several factors, including the size of the array, its manner of presentation, and its contents. *State v. Willis* (1997), 120 Ohio App.3d 320, 697 N.E.2d 1072. If this burden is met, the court must consider whether the procedure was so unduly suggestive as to give rise to irreparable mistaken identification, when viewed under the totality of the circumstances.

Id. at 324, citing *Manson v. Brathwaite* (1977), 432 U.S. 98, 114 S.Ct 2243, 53 L.Ed.2d 140.

{¶ 37} The record indicates that Det. Rogers was told by Det. Tinsley that he was able to get a good look at the man who had shot him and that he knew the man as "OJ." Rogers stated that he knew appellant from the neighborhood. Rogers informed Det. Tinsley where appellant lived and what kind of car he drove. Based on this information, Det. Tinsley investigated the location of appellant's house and car and was able to determine where "OJ" lived. Subsequently, Det. Tinsley entered the address in the Cleveland Police database and found that appellant, a.k.a. Orlando J. Patterson, lived at that address. Believing appellant may be the person Rogers was refering to as "OJ," Det. Tinsley obtained a photo of appellant and created a photo array.

{¶ 38} The photo array presented to Rogers consisted of six photos, one of which was a photo of appellant. The other photos contained pictures of other men who had facial features and body types similar to appellant. Additionally, Det. Tinsley did not tell Rogers that the man who shot him was in the array, nor did he tell Rogers who to pick from the photo array. Rogers immediatly recognized appellant as the man who had shot him and signed his name below appellant's photo indicating the same.

{¶ 39} Appellant has failed to establish that the photo array was unnecessarily suggestive. Additionally, appellant has not established that there was a reasonable probability that a motion to suppress the photo array identification would have been successful. Since appellant has failed to identify an error in the identification procedure

to suggest that the evidence could have been properly suppressed, we find no basis to conclude that his counsel was ineffective for failing to file a motion to suppress the photo identification.

{¶ 40} Appellant's second assignment of error is overruled.

Allied Offenses

{¶ 41} In appellant's third assignment of error, he argues that he was improperly sentenced on charges that constituted allied offenses. In addition to the attempted murder charge, he was charged with committing aggravated robbery and kidnapping. Specifically, appellant contends that because these charges relate to the same transaction and were committed with the same animus, the court committed plain error by failing to consider the effect of R.C. 2941.25(A) and in sentencing him on each count.

{¶ 42} R.C. 2941.25(A) provides that, "[w]here the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one."

{¶ 43} In its recent decision in *State v. Johnson*, Slip Opinion No. 2010-Ohio-6314, ¶44, the Ohio Supreme Court held that "[w]hen determining whether two offenses are allied of similar import subject to merger under R.C. 2941.25, the conduct of the accused must be considered." (*State v. Rance*, 85 Ohio St.3d 632, 1999-Ohio-219, 710 N.E.2d 699, overruled.)

{¶ 44} In determining whether offenses are allied offenses of similar import, "* * * the question is whether it is possible to commit one offense and commit the other with the same conduct, not whether it is possible to commit one *without* committing the other. If the offenses correspond to such a degree that the conduct of the defendant constituting commision of one offense constitutes commission of the other, then the offenses are of similar import. Id. at 46.

{¶ 45} "If the mutiple offenses can be committed by the same conduct, then the court must determine whether the offenses were committed by the same conduct, i.e. 'a single act, committed with a single state of mind.' If the answer to both questions is yes, then the offenses are allied offenses of similar import and will be merged." (Internal citations omitted.) Id. at ¶48-50.

{¶ 46} We begin by determining whether it is possible to commit aggravated robbery, in violation of R.C. 2911.01(A)(1), and kidnapping, in violation of R.C. 2905.01(A)(2), with the same conduct.

{¶ 47} R.C. 2905.01(A)(2) defines kidnapping as follows: "(A) No person, *by force, threat, or deception,* * * * shall remove another from the place where the other person is found or restrain the liberty of the other person, for any of the following purposes: * * * (2) *To facilitate the commission of any felony* or flight thereafter." (Emphasis added.)

{¶ 48} R.C. 2911.01(A)(1) defines aggravated robbery as follows: "(A) No person, in attempting or committing a theft offense or in fleeing immediately after the

attempt or offense, shall do any of the following: (1) Have a deadly weapon on or about the offender's person or under the offender's control and either display the weapon, brandish it, indicate that the offender possesses it, or use it."

{¶ 49} "It is difficult to see how the presence of a weapon that has been shown or used, or whose possession has been made known to the victim during the commission of a theft offense, does not also forcibly restrain the liberty of another. These two offenses are 'so similar that the commission of one offense will necessarily result in commission of the other.'" *State v. Winn*, 121 Ohio St.3d 413, 2009-Ohio-1059, 905 N.E.2d 154, at ¶21, citing *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, 886 N.E.2d 181.

{¶ 50} We find that it is possible to commit one of these felonies, and likewise commit the other, with the same conduct. Having answered the first inquiry in the affirmative, we must next determine whether the record in the instant case establishes that the aggravated robbery and the kidnapping were, in fact, committed by the same conduct.

{¶ 51} The record indicates that the basis of the kidnapping charge was premised on the fact that "the defendant held a gun at victim while rifling through his pockets. He was unable to move." The record further indicated that the basis of the aggravatted robbery conviction rested on the same set of facts, i.e., appellant committing a theft while holding a gun to Rogers. Accordingly, we find that the charges of aggravated robbery and kidnapping were committed by the same conduct of appellant and are subject to merger under R.C. 2941.25(A).

{¶ 52} Accordingly, we reverse appellant's sentence and remand for merger and resentencing, at which the state must elect which allied offense it will pursue against appellant. *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, 895 N.E.2d 149, ¶43.

{¶ 53} This cause is 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. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for merger and resentencing.

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

FRANK D. CELEBREZZE, JR., JUDGE

MARY J. BOYLE, P.J., CONCURS;
COLLEEN CONWAY COONEY, J., CONCURS IN JUDGMENT ONLY