[Cite as *State v. Pate*, 2011-Ohio-1692.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 95382

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DONALD PATE

DEFENDANT-APPELLANT

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

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-535104

BEFORE: Cooney, J., Stewart, P.J., and E. Gallagher, J.

RELEASED AND JOURNALIZED: April 7, 2011

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COLLEEN CONWAY COONEY, J.:

{¶ 1} Defendant-appellant, Donald Pate ("Pate"), appeals his conviction for aggravated robbery and robbery. Finding some merit to the appeal, we affirm in part and remand for merger and resentencing on the allied offenses.

{¶ 2} In March 2010, Pate was indicted on one count of aggravated robbery and one count of robbery, both with one- and three-year firearm specifications. In June 2010, a jury

found him guilty of all charges. Pate was sentenced to ten years in prison for the aggravated robbery and eight years on the robbery, to run concurrently. The firearm specifications were merged for an aggregate 13-year sentence.

{¶ 3} Pate now appeals, initially raising three assignments of error through counsel and two additional assignments of error pro se, for a total of five assignments of error.

Manifest Weight

{¶ 4} In his first assignment of error, Pate argues that his firearm specification convictions are against the manifest weight of the evidence because "lay witness testimony did not satisfy the prosecution's burden of proof." In his fourth assignment of error, Pate, pro se, argues that his conviction is against the manifest weight of the evidence. These two assignments of error will be discussed together as they pertain to the same standard of review and involve the same evidence.

{¶ 5} A challenge to the manifest weight of the evidence attacks the verdict in light of the State's burden of proof beyond a reasonable doubt. *State v. Thompkins*, 78 Ohio St.3d 380, 386-87, 1997-Ohio-52, 678 N.E.2d 541. When inquiring into the manifest weight of the evidence, the reviewing court sits as the "thirteenth juror and makes an independent review of the record." Id. at 387; *Tibbs v. Florida* (1982), 457 U.S. 31, 42, 102 S.Ct. 2211, 72 L.Ed.2d 652. The appellate court reviews the entire record, weighs the evidence and all reasonable inferences, considers the credibility of all witnesses, and determines whether in resolving

conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the judgment must be reversed and a new proceeding ordered. *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717.

{¶ 6} Where a judgment is supported by competent, credible evidence going to all essential elements to be proven, the judgment will not be reversed as being against the manifest weight of the evidence. *State v. Mattison* (1985), 23 Ohio App.3d 10, 14, 490 N.E.2d 926. Accordingly, reversal on manifest weight grounds is reserved for "the exceptional case in which the evidence weighs heavily against the conviction." *Martin* at 175.

{¶ 7} Pate was convicted of aggravated robbery and robbery, in violation of R.C. 2911.02(A)(1) and (2) that state:

> "(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;
>
> "(2) Inflict, attempt to inflict, or threaten to inflict physical harm on another[.]"

{¶ 8} Pate was also convicted of one- and three-year firearm specifications, pursuant to R.C. 2941.141(A) and 2941.145(A).

{¶ 9} Pate claims that the State failed to provide evidence to prove that he had an operable gun on his person at the time of the robbery. We disagree. This court previously

addressed this issue in *State v. Nicholson,* Cuyahoga App. No. 85977, 2006-Ohio-1569, and found the following:

> "According to the Ohio Supreme Court, a firearm specification can be proven beyond a reasonable doubt by circumstantial evidence. That evidence may consist of the testimony of lay witnesses who were in a position to observe the instrument and the circumstances of the crime.
>
> **{¶ 10}** "Furthermore, in *Thompkins* the Ohio Supreme Court rejected the view that the circumstantial proof of operability must consist of certain recognized indicia, such as bullets, the smell of gunpowder, bullet holes, or verbal threats by the user of the weapon that he or she would shoot the victim." (Citations omitted.)

{¶ 11} The following evidence was adduced at trial. Nilda Torres ("Torres") and Sonia Baez ("Baez") testified that on the night of March 7, 2010, they were returning to Baez's home after a night out at local clubs. Torres and Baez testified that Pate approached Torres from behind, while Baez attempted to open the door. Torres testified that Pate pressed an object against her head and told her to "give me your purse or I'll blow your brains out." Torres did not see the object clearly but testified that it was metal and had a light like a laser. Baez testified that she clearly saw a gun in Pate's hand. She also heard him order Torres to give him her purse or he would shoot her.

{¶ 12} Torres initially refused to let go of her purse, wrestling with Pate who dragged her to the ground and caused bruising to her arms. Torres eventually let go of the purse, and

Pate fled the scene. Torres and Baez called 911, identifying the robber as a black man wearing a grey sweatshirt and a camouflage jacket.

{¶ 13} Officers responded to the scene and searched for the robber. Officer Michael Brelo ("Brelo") testified that he first saw Pate crouching near a fence, clutching a purse, and wearing a camouflage jacket. Brelo testified that when Pate fled from police, Brelo observed Pate attempt to throw the purse over a fence. The police apprehended Pate and recovered the purse. Torres and Baez identified Pate during a cold-stand immediately after he was apprehended by police, and they identified the purse belonging to Torres.

{¶ 14} Pate argues that no gun was ever found despite the police search of the area. This argument is not persuasive because Pate could have disposed of the firearm while fleeing from the scene, before being apprehended by police.

{¶ 15} There is substantial evidence that Pate committed the robbery while in the possession of a firearm. Pate failed to discredit the testimony of any of the State's witnesses. Therefore, based on the evidence presented at trial, we do not find that Pate's convictions are against the manifest weight of the evidence.

{¶ 16} Accordingly, Pate's first and fourth assignments of error are overruled.

Prosecutorial Misconduct

{¶ 17} In his second assignment of error, Pate argues that prosecution committed misconduct when it made comments during closing arguments regarding the firearm specifications. We disagree.

{¶ 18} The test for prejudice regarding prosecutorial misconduct in closing arguments is "'"'whether the remarks were improper and, if so, whether they prejudicially affected substantial rights of the defendant.'"'" *State v. Hartman*, 93 Ohio St.3d 274, 2001-Ohio-1580, 754 N.E.2d 1150, quoting *State v. Hessler*, 90 Ohio St.3d 108, 125, 2000-Ohio-30, 734 N.E.2d 1237, quoting *State v. Smith* (1984), 14 Ohio St.3d 13, 14, 470 N.E.2d 883.

{¶ 19} Closing arguments must be viewed in their entirety to determine whether the disputed remarks were prejudicial. *State v. Mann* (1993), 93 Ohio App.3d 301, 312, 638 N.E.2d 585. "Isolated comments by a prosecutor are not to be taken out of context and given their most damaging meaning." *State v. Carter*, 89 Ohio St.3d 593, 2000-Ohio-172, 734 N.E.2d 345; citing *Donnelly v. DeChristoforo* (1974), 416 U.S. 637, 647, 94 S.Ct. 1868, 40 L.Ed.2d 431. 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 prejudiced appellant. *Smith*.

{¶ 20} In the instant case, Pate argues that the prosecution committed misconduct during closing arguments. Specifically, Pate argues that it was misconduct to inform the jury that when "[a] gun's not found, * * * you cannot conclude, based on that, that the defendant

didn't have a gun." Pate argues that this statement was bolstered by continued misconduct when the prosecutor said "[w]e're dealing with a big area, an area with, an [sic] a lot of houses, garages, trees, objects, places where this gun could be stashed." Pate characterizes these comments as jury instructions used to limit the jury's "power of examination." We disagree.

{¶ 21} We note at the outset that defense counsel did not object to the first of these two statements, and in turn has waived the issue on appeal except for plain error. *State v. Owens* (1975), 51 Ohio A pp.2d 132, 146, 366 N.E.2d 1367; see, also, *State v. Saade*, Cuyahoga App. Nos. 80705 and 80706, 2002-Ohio-5564; *State v. Hill*, Cuyahoga App. No. 80582, 2002-Ohio-4585; *State v. Fortson* (Aug. 2, 2001), Cuyahoga App. No. 78240.

{¶ 22} Under Crim.R. 52(B), notice of plain error is to be taken with the utmost caution, under exceptional circumstances and only 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. In order to find plain error under Crim.R. 52(B), it must be determined that, but for the error, the outcome of the trial clearly would have been otherwise. Id. at paragraph two of the syllabus.

{¶ 23} A review of the transcript reveals that these two comments from the prosecution were made during the State's final closing argument in response to defense counsel's argument that there was no evidence of a gun. We find that these comments were not improper and do not constitute a "jury instruction." Two witnesses testified to the presence

of a firearm during the robbery, therefore the prosecution was allowed to mention the presence of a firearm during its closing argument. There is no misconduct in merely pointing out that a firearm need not be produced in order to prove the existence of a weapon. The prosecution's comments were not improper and therefore, we find no misconduct.

{¶ 24} Accordingly, Pate's second assignment of error is overruled.

Ineffective Assistance of Counsel

{¶ 25} In his third assignment of error, Pate argues that he received ineffective assistance of counsel because his attorney failed to object to the prosecution's improper jury instruction during closing arguments.

{¶ 26} To reverse a conviction for ineffective assistance of counsel, the defendant must prove "(1) that counsel's performance fell below an objective standard of reasonableness, and (2) that counsel's deficient performance prejudiced the defendant resulting in an unreliable or fundamentally unfair outcome of the proceeding." *State v. Madrigal*, 87 Ohio St.3d 378, 388-389, 2000-Ohio-448, 721 N.E.2d 52, citing *Strickland v. Washington* (1984), 466 U.S. 668, 687-688, 104 S.Ct. 2052, 80 L.Ed.2d 674.

{¶ 27} As to the second element of the test, the defendant must establish "that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different." *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, paragraph three of the syllabus; *Strickland* at 686. In evaluating whether a petitioner has

been denied effective assistance of counsel, the Ohio Supreme Court held that the test is "whether the accused, under all the circumstances, had a fair trial and substantial justice was done." *State v. Hester* (1976), 45 Ohio St.2d 71, 341 N.E.2d 304, paragraph four of the syllabus.

{¶ 28} This court must presume that a licensed attorney is competent and that the challenged action is the product of sound trial strategy and falls within the wide range of professional assistance. *Strickland* at 689. Courts must generally refrain from second-guessing trial counsel's strategy, even where that strategy is questionable, and appellate counsel claims that a different strategy would have been more effective. *State v. Jalowiec*, 91 Ohio St.3d 220, 237, 2001-Ohio-26, 744 N.E.2d 163.

{¶ 29} Pate argues that his counsel was ineffective because he failed to object to statements made by the prosecutor during closing argument regarding the existence of a firearm, as argued in his second assignment of error. Having found that the prosecutor's comments did not constitute misconduct, defense counsel was, therefore, not ineffective for failing to object to them. Moreover, defense counsel did object when the prosecutor stated "[w]e're dealing with a big area, an area with, an [sic] a lot of houses, garages, trees, objects, places where this gun could be stashed." Pate alleges that these comments constitute "jury instructions" used to limit the jury's "power of examination." We find no merit to this argument.

{¶ 30} Accordingly, Pate's third assignment of error is overruled.

Suppression Hearing

{¶ 31} In his fifth assignment of error, Pate, pro se, argues that the trial court committed plain error because it did not journalize its ruling from the suppression hearing. Pate cites *State v. Downie*, 183 Ohio App.3d 665, 2009-Ohio-4643, 918 N.E.2d 218, to support his claim. *Downie*, however, is easily distinguishable. In *Downie*, the court remanded the case because the trial court had failed to specify the amount of restitution as part of Downie's sentence. The *Downie* court made no mention of suppression hearings, nor are we faced with an incomplete sentence.

{¶ 32} This court has previously addressed the failure of a trial court to journalize the denial of a motion to suppress. In *State v. Howell*, Cuyahoga App. No. 91569, 2009-Ohio-3092, this court found no fault in failing to journalize the denial of a motion to suppress, stating:

{¶ 33} "We note that while there is no journal entry indicating appellant's motion to suppress regarding the photo identification was denied, we presume the trial court denied said motion when the record is silent as to a ruling. When a trial court fails to rule on a motion, the motion is considered denied. *Solon v. Solon Baptist Temple, Inc.* (1982), 8 Ohio App.3d 347, 351-352, 457 N.E.2d 858; *Georgeoff v. O'Brien* (1995), 105 Ohio App.3d 373, 378, 663 N.E.2d 1348.

{¶ 34} Thus, the trial court did not commit plain error by failing to journalize its ruling on Pate's motion to suppress.

{¶ 35} Accordingly, Pate's fifth assignment of error is overruled.

Merger of Allied Offenses

{¶ 36} During oral argument, Pate's counsel argued that the convictions for aggravated robbery and robbery are allied offenses of similar import and should be merged pursuant to R.C. 2941.25 and *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061.[1] Despite counsel's failure to properly raise this issue in appellant's brief or through supplemental authority, we sustain this argument and remand the case to the trial court to allow the State to elect which allied offense to pursue at resentencing. *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, 922 N.E.2d 182, paragraph one of the syllabus; *State v. Bauldwin*, Cuyahoga App. No. 94876, 2011-Ohio-1066.

{¶ 37} Judgment affirmed in part, reversed in part, and case remanded for further proceedings consistent with this opinion.

It is ordered that appellant and appellee share the costs herein taxed.

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[1]The record reflects only one victim is named for both charges, and the State conceded at argument that Torres was the victim and Baez merely a witness. Since there was only one act of robbery, Pate should be convicted of only one of the two offenses.

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.

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COLLEEN CONWAY COONEY, JUDGE

MELODY J. STEWART, P.J., and
EILEEN A. GALLAGHER, J., CONCUR