[Cite as *State v. Morales*, 2015-Ohio-1741.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101745

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JOSE L. MORALES

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-14-582234-A

BEFORE: Kilbane, J., Jones, P.J., and Blackmon, J.

RELEASED AND JOURNALIZED: May 7, 2015

ATTORNEY FOR APPELLANT

Richard H. Drucker
820 West Superior Avenue
Suite 800
Cleveland, Ohio 44113

ATTORNEYS FOR APPELLEE

Timothy J. McGinty
Cuyahoga County Prosecutor
John D. Kirkland
Assistant County Prosecutor
The Justice Center - 9th Floor
1200 Ontario Street
Cleveland, Ohio 44113

MARY EILEEN KILBANE, J.:

{¶1} Defendant-appellant, Jose Morales ("Morales") appeals from his convictions for discharging a firearm into a habitation and discharge of a weapon into prohibited premises. Having reviewed the record and the controlling case law, we affirm.

{¶2} On February 14, 2014, Morales was indicted pursuant to a four-count indictment in connection with an alleged shooting into a residence. In Counts 1 and 2, he was charged with felonious assault with one- and three-year firearm specifications. In Count 3, he was charged with improperly discharging a firearm into an occupied structure, in violation of R.C. 2923.161(A)(1); in Count 4, he was charged with discharge of a weapon on or near prohibited premises, in violation of R.C. 2923.162(A)(3). These counts also set forth one- and three-year firearm specifications. In Count 5, he was charged with having a weapon while under disability.

{¶3} Morales waived his right to a jury trial on the charge of having a weapon while under disability, and the matter proceeded to a jury trial on the remaining charges on July 16, 2014.

{¶4} Edwin Rosello ("Rosello") testified that he has known Morales for approximately two years. On November 9, 2013, there was a surprise birthday party for his stepfather, Axel Rosado ("Rosado"), at Rosado's home. Rosello arrived there at around 8:00 p.m. At that point, Rosado and his wife were at dinner with Rosello's mother, and Morales was there with his wife and son.

{¶5} After Rosado and his wife returned home, the group celebrated Rosado's birthday. Eventually, Morales and his wife had an argument because she did not want him to drive. Morales then left the party on foot. The hosts of the party next asked Rosello to move his car because it was blocking other cars. Rosello moved the car, but Morales's car was still blocking

other vehicles. Because Morales had the keys to the car, Rosello and Rosado went to find him. They subsequently found him a short distance away walking near West 76th Street and Lake Avenue.

{¶6} Rosello testified that he opened his car door and told Morales to get in so that he could return to Rosado's home and move his car. At that point, Morales said nothing, so Rosado got out of the car to get him. In response, Morales just stared at them. Morales then took a few steps back, pulled out a gun, and fired it two or three times. Rosado stated that he shot sideways, and that he and Rosado then got back into their car and went home.

{¶7} Rosello admitted that he had consumed three or four beers and could not remember what Morales had been wearing during this incident.

{¶8} Cleveland Police Officer Maguth ("Officer Maguth") testified that on the evening of November 9, 2013, he responded to a call at 1345 West 76th Street for shots fired into a house. The owner, Wilfredo Quinones ("Quinones"), reported to him that he heard a loud noise, like breaking glass, then checked his house. He observed a broken window on the south side of an enclosed porch. Paint was also chipped, and there was a hole in the house. Although he could not see a projectile, it appeared to Officer Maguth that the defects were bullet holes. Officer Maguth looked on the ground for bullets, but he could not find any.

{¶9} While Officer Maguth was responding to Quinones's house, he received another call from an individual who reported being shot, approximately one-half a block away.

{¶10} Quinones testified that his house is located at 1345 West 76th Street, which is near the intersection of West 76th Street and Lake Avenue. In the early morning hours of November 10, 2013, he heard the sound of glass breaking. He then noticed that one of the windows on his porch was broken and observed that the siding was bent and there was a hole in the siding of the

porch. According to Quinones, three people who were standing on a porch further up the street yelled to him that they were sorry for what had happened.

{¶11} Rosado testified that he could not recall the events of the evening, but he stated that Morales is a good man and is like a brother to him. When asked how he knows Morales, Rosado spontaneously stated that he met Morales when he "was locked up." At that point, the trial court advised Rosado to simply answer the question with a yes or no response. The prosecuting attorney repeated the question, but Rosado could not hear it. The prosecuting attorney asked the question again as follows, "You said you met him while you were locked up, correct?" The prosecuting attorney quickly apologized and asked that the question be stricken. On cross-examination, Rosado stated that everyone, including the state's key witness Rosello, drank at the party before this incident. He also stated that he did not see Morales with a gun.

{¶12} Detective Christopher Hamrick ("Detective Hamrick") testified that he conducted a follow-up investigation in this matter. During the course of the investigation at Quinones's home, and in the area described by Rosello, neither a weapon, bullets, nor bullet casings were recovered.

{¶13} On July 21, 2014, the jury found Morales not guilty on the charges of felonious assault in Counts 1 and 2, but guilty as to Counts 3 and 4, and the firearm specifications. Morales then pled no contest on the charge of having a weapon while under disability. The trial court merged the sentences for discharging a firearm into a habitation, and discharging a firearm into prohibited premises in Counts 3 and 4, and sentenced Morales to a total of five years of imprisonment.

{¶14} He now appeals and assigns the following errors for our review:

Assignment of Error I

Appellant's convictions were against the manifest weight of the evidence.

{¶15} In *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, ¶ 25, the Ohio Supreme Court described a challenge to the manifest weight of the evidence supporting a conviction as follows:

> [T]he reviewing court asks whose evidence is more persuasive — the state's or the defendant's? * * * "When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a 'thirteenth juror' and disagrees with the factfinder's resolution of the conflicting testimony." *Id.*, citing *Tibbs v. Florida* (1982), 457 U.S. 31, 42, 102 S.Ct. 2211, 72 L.Ed.2d 652.

{¶16} Moreover, an appellate court may not merely substitute its view for that of the jury, but must find that "'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*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541, quoting *State v. Martin*, 20 Ohio App.3d 172, 485 N.E.2d 717 (1st Dist.1983). Accordingly, reversal on manifest weight grounds is reserved for "'the exceptional case in which the evidence weighs heavily against the conviction.'" *Id.*, quoting *Martin*. In addition, this court must remain mindful that the weight to be given the evidence and the credibility of the witnesses are matters left primarily to the jury. *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967). Reversing a conviction on the manifest weight of the evidence requires the unanimous concurrence of all three appellate judges. *Thompkins* at paragraph four of the syllabus.

{¶17} In this matter, the state presented eyewitness testimony from Rosello who stated that he and Rosado stopped Morales in the area of West 76th Street and Lake Avenue to have

him return to the party to move his car. The state's evidence demonstrated that when Rosello and Rosado confronted Morales, he stared menacingly at Rosello, and then fired his weapon. A request for police assistance was made a short time later by Quinones who lives about one-half of a block away. According to Quinones, he heard a loud noise and found broken glass and a hole shaped defect in his front porch. While Officer Maguth was assisting Quinones, a call came in moments later from someone at the Rosado surprise party. The caller reported that Morales had fired his weapon.

{¶18} After reviewing the entire record, weighing the evidence and all reasonable inferences, we find that the jury did not clearly lose its way or create such a manifest miscarriage of justice in convicting Morales of discharging a firearm into a habitation and discharging a firearm into prohibited premises. The first assignment of error is without merit.

Assignment of Error II

> The state committed prosecutorial misconduct when impermissibly referring to appellant's prior incarceration.

{¶19} In this assignment of error, Morales asserts that the prosecuting attorney committed misconduct by eliciting from witness Rosado that Morales had previously been incarcerated.

{¶20} In order to determine whether a prosecuting attorney's conduct rises to the level of prosecutorial misconduct, a reviewing court determines if the prosecuting attorney's actions were improper, and, if so, whether the substantial rights of the defendant were actually prejudiced. *State v. Smith*, 14 Ohio St.3d 13, 14, 470 N.E.2d 883 (1984). A conviction may only be reversed for prosecutorial misconduct when the improper conduct deprives the defendant of a fair trial. *State v. Carter*, 72 Ohio St.3d 545, 557, 1995-Ohio-104, 651 N.E.2d 965. "[T]he touchstone of analysis 'is the fairness of the trial, not the culpability of the prosecutor.'" *State v.*

Hanna, 95 Ohio St.3d 285, 2002-Ohio-2221, 767 N.E.2d 678, ¶ 61, quoting *Smith v. Phillips* 455 U.S. 209, 219, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982). An appellate court should not deem a trial unfair if, in the context of the entire trial, it appears clear beyond a reasonable doubt that the jury would have found the defendant guilty even without the improper comments. *State v. LaMar*, 95 Ohio St.3d 181, 2002-Ohio-2128, 767 N.E.2d 166, ¶ 121.

{¶21} In this matter, the record indicates as follows:

Prosecuting Attorney: Do you know a Jose Morales?

Rosado: I was locked up, and you know, and I met him there.

The Court: Sir, the answer is yes, I do; or no, I don't.

Rosado: Yes. Yes, I do.

The Court: Next question.

* * *

Prosecuting Attorney: How did you come to know Jose Morales? You said you met him while you were locked up, correct?

Defense Counsel: Objection.

Prosecuting Attorney: My apology. Strike that.

The Court: Overruled.

Prosecuting Attorney: So you do know a Jose Morales?

Rosado: He's a good man.

* * *

The Court: The question is how do you know him?

Rosado: Well, when I was locked up.

{¶22} From the foregoing, the record indicates that the comment was initially made spontaneously by the witness, so misconduct is not to be imputed to the prosecuting attorney. *State v. Fields*, 8th Dist. Cuyahoga No. 99593, 2014-Ohio-299 (prosecutorial misconduct not imputed when a witness supplies an answer that goes beyond the question asked). Thereafter, however, the prosecuting attorney repeated that answer. This was improper. The record next indicates that the prosecuting attorney immediately apologized and asked to strike his own question. The defense objected, but the witness again, even after further instruction from the trial court, spontaneously said that he had met the defendant while he was in jail. On our review of the record as a whole, we conclude that, although the prosecuting attorney erred in restating the witness's improper answer that he had met Morales in jail, the substantial rights of the defendant were not prejudiced by the prosecuting attorney's question. In the context of the entire trial, Morales was not deprived of a fair trial. Moreover, from the record as a whole, we conclude that this exchange did not contribute to the conviction in this matter, in light of the evidence of record.

{¶23} The second assignment of error is without merit.

{¶24} Judgment is affirmed.

It is ordered that appellee recover of appellant 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. A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY EILEEN KILBANE, JUDGE

LARRY A. JONES, SR., P.J., and
PATRICIA A. BLACKMON, J., CONCUR