

[Cite as *State v. Norton*, 2015-Ohio-2516.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102017

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JOVAN D. NORTON

DEFENDANT-APPELLANT

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

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-13-578127-B

BEFORE: Boyle, J., E.A. Gallagher, P.J., and Blackmon, J.

RELEASED AND JOURNALIZED: June 25, 2015

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MARY J. BOYLE, J.:

{¶1} Defendant-appellant, Jovan Norton, was convicted of kidnapping and aggravated robbery, which carried firearm specifications, and having a weapon while under disability. He appeals his convictions and sentence, challenging the trial court's evidentiary rulings, instructions to the jury, and order of restitution. He also argues that the jury verdict as to the gun specifications is against the manifest weight of the evidence.

We affirm Norton's convictions but vacate the order of restitution and remand for further proceedings.

Procedural History and Facts

{¶2} Norton was indicted on four counts: two counts of kidnapping in violation of R.C. 2905.01(A)(2) and (3), aggravated robbery in violation of R.C. 2911.01(A)(1), and having a weapon while under disability in violation of R.C. 2923.13(A)(3). The kidnapping and aggravated robbery counts carried one- and three-year firearm specifications. Norton pleaded not guilty to the charges and elected to have a bench trial on the having a weapon while under disability count, but proceeded to a jury trial on the remaining counts, where the following evidence was presented.

{¶3} John Currie, the victim, testified that on May 26, 2013, after he finished his shift at Seaway Foods and while standing outside of his car, he was approached by Norton. According to Currie, he knew Norton from his past association with a gang called the Vice Lords — they both were members between 1993 and 1995, but Currie left

the gang. Currie further testified that a work colleague, Andre Wilson, who was also a member of Vice Lords, had been approaching him lately about returning to the gang.

{¶4} Currie testified that Norton greeted him and then quickly revealed that he was there to collect “dues” from Currie. According to Currie, Norton threatened him and warned him not to run when Currie stepped back. Believing that Norton had a gun, Currie followed his instructions and got in his car with Norton, who then told Currie that he wanted \$300 and instructed him to drive to “Mookie’s,” a liquor store on Miles Road. While inside Mookie’s, Currie pulled his money out of his wallet, at which point Norton “snatched it” and started counting it. Currie “tried to run out of store” but Andre Wilson was standing at the door, along with two other individuals.

{¶5} Currie further testified that Norton then instructed Sean, one of the individuals blocking the door, to drive with Currie to Sean’s house. Currie testified that, instead of driving to Sean’s house, he drove to the Rascal House and ran inside, asked for help, and then passed out. According to Currie, he woke up to water being thrown in his face and then Norton placing him in a choke hold and dragging him out of the store. Eventually, the EMS arrived and took Currie to the hospital. While en route to the hospital, Currie told the EMS workers that he had just been kidnapped and robbed.

{¶6} Felicia Sawyer testified that she was working at the Rascal House on May 26, 2013, and recalled seeing Currie “staggering, holding his chest” outside the store before walking inside, sitting down, and ultimately falling on the floor. Sawyer called 911. Sawyer further testified that there were no other customers in the store at that time

but that the other gentleman who was in the car with Currie came inside after being on his phone and then another car pulled up with two individuals, who also walked inside. Sawyer corroborated Currie's testimony regarding the water being poured on him and ultimately being dragged out of the store. According to Sawyer, Currie appeared to be fearful of the other men but never stated that he had been robbed or kidnapped when he entered the store. Sawyer testified that the EMS arrived seconds after the men had placed Currie in his car.

{¶7} The state also offered the testimony of the first responders to the 911 call. Maple Heights Fire Department paramedic, Jim Hamrick, testified that when he arrived on the scene, Currie was being assisted by the firefighters already there. Hamrick asked the four gentlemen that were behind Currie if they were Currie's friends, and they indicated that they were and that they were planning on taking him to the hospital in his car. According to Hamrick, Currie was very insistent about getting his keys back and appeared to be very nervous. At that point, Currie was placed into the squad and checked for signs of a stroke. Hamrick testified that Currie disclosed, while they were heading to the hospital, that "he made that up to get out of the situation"; "those men weren't his friends, that they were going to kidnap him and take him somewhere to kill him." Hamrick further testified that there were no medical issues and that the entire incident seemed to be "more a means to get him out of a situation."

{¶8} Bedford Heights police detective Ericka Payne testified that she investigated Currie's allegations after he reported the incident to the police while in the

hospital. Det. Payne first interviewed Currie and then followed up with his reports. She went to Currie's place of employment and recovered video surveillance from the day in question that corroborated Currie's story. Det. Payne also went to Mookie's beverage store, spoke with the owner, and requested the video surveillance footage from inside the store on the day of the incident. Det. Payne testified that she reviewed the video at Mookie's but was not able to obtain a copy the same day because the owner did not know how to copy it. The owner indicated that he would call his "IT guy" and provide a copy later. Det. Payne explained, however, that the IT guy subsequently copied the wrong portion of the video surveillance and that the correct footage had already been purged by the time that Det. Payne caught the mistake.

{¶9} Det. Payne also testified that she interviewed the Rascal House employee who observed Currie on the day of the incident. Det. Payne further requested video surveillance from the Rascal House but none was available.

{¶10} On cross-examination, Det. Payne acknowledged that she never interviewed Norton.

{¶11} Norton presented three witnesses on his behalf, including himself. Michael Walker, a co-worker and friend of both Andre Wilson and Currie, as well as Norton's friend, testified that he personally witnessed Wilson loan \$300 to Currie, which Currie agreed to repay. Walker further testified that Currie later avoided Wilson and never repaid the loan.

{¶12} Norton testified on his own behalf. According to Norton, on May 26, 2013, he was getting a ride from Wilson to a barbecue at a relative's house. Prior to heading to the barbecue, they stopped at Currie's work to pick up the money that Currie owed Wilson. According to Norton, he greeted Currie and asked for Wilson's money, to which Currie indicated that he needed to go to an ATM. Norton accompanied Currie in his car, and the two drove to Mookie's liquor store. After exiting the store, Norton left in Wilson's car to go to the barbecue, and Currie got into his car with a third individual, who Norton did not know. Norton further testified that Wilson received a call that Currie was having a medical problem at the Rascal House so they drove over there. Norton stated that he attempted to revive Currie while there. Norton further testified that he does not carry a gun and was not carrying one on the day in question.

{¶13} The defense recalled Det. Payne to the stand and questioned her regarding the videotaped interview of Currie. Det. Payne testified that Currie never reported actually "seeing" a gun on Norton. Det. Payne indicated that Currie stated he felt "what felt like a gun" and indicated more than once that he believed that Norton had a gun on him.

{¶14} The jury found Norton guilty on the two kidnapping counts and the aggravated robbery count, along with the attached firearm specifications. The trial court separately found Norton guilty on the having a weapon while under disability count. The trial court ordered a presentence investigation report and set the matter for sentencing.

{¶15} At the sentencing hearing, after the trial court merged the allied offenses, the state elected to proceed on Count 1, kidnapping, and Count 3, aggravated robbery. The trial court ultimately imposed a total prison term of seven years and ordered restitution in the amount of \$470.

{¶16} Norton now appeals his conviction and sentence, raising the following five assignments of error:

I. The defendant should have been permitted to impeach the victim with his statement to police concerning his opinion of the robbery and personal experience with robberies.

II. The trial court erred by permitting the police detective to testify that she viewed a video of the crime when the court had previously ruled that such testimony was inadmissible.

III. The trial court's instruction that the jury should merely disregard Mr. Currie's statement that his testimony could cost him his life was insufficient to protect against the prejudice that the statement presented.

IV. The jury's verdict as to the gun specifications were against the manifest weight of the evidence.

V. The trial court erred in ordering the defendant to pay restitution in the amount of \$470.

Evid.R. 403

{¶17} In his first assignment of error, Norton argues that the trial court abused its discretion in disallowing defense counsel from impeaching Currie with prior statements that Currie had given to the police regarding his assessment of Norton and his associates' tactics in committing the crimes. We disagree.

{¶18} Evid.R. 402 provides that “[e]vidence which is not relevant is not admissible.” Evid.R. 403(A) states that a judge must exclude evidence, regardless of its relevance, if “its probative value is substantially outweighed by the danger of unfair prejudice.” *State v. Thompson*, 141 Ohio St.3d 254, 2014-Ohio-4751, 23 N.E.3d 1096, ¶ 112. Unfairly prejudicial evidence usually appeals to the jury’s emotions, rather than to intellect. *Oberlin v. Akron Gen. Med. Ctr.*, 91 Ohio St.3d 169, 172, 743 N.E.2d 890 (2001).

{¶19} We review a trial court’s decision regarding the admission of such evidence under an abuse of discretion standard. *State v. Sage*, 31 Ohio St.3d 173, 510 N.E.2d 343 (1987), paragraph two of the syllabus. Therefore, we will not disturb a trial court’s evidentiary ruling unless we find the ruling to be an abuse of discretion, i.e., unreasonable, arbitrary, or unconscionable. *State v. Adams*, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980). Further, an error in an evidentiary ruling does not warrant reversal of the trial court’s judgment “unless the trial court’s actions were inconsistent with substantial justice and affected the substantial rights of the parties.” *State v. Azbell*, 5th Dist. Fairfield No. 04CA11, 2005-Ohio-1704, ¶ 151.

{¶20} Norton argues that Currie testified at trial that the robbery and kidnapping did not happen consistent with what he observed *on television*, which contradicted his statements to the police. As proffered by the defense counsel, Currie had previously stated to the police that the robbery attempts were “bush league” and that he would have acted differently — statements which he based on his past experiences in committing

robberies. Norton contends that these statements should have been admissible to show that Currie was lying on the stand.

{¶21} Here, we cannot say that the trial court abused its discretion. As explained by the trial court, defense counsel's desire to probe Currie as to his past experience and expertise in the area of robberies would be more prejudicial than probative on the relevant issues in the case. Indeed, Currie's past expertise in robberies is not relevant to whether Norton committed the acts alleged by Currie, and defense counsel's desire to probe Currie's expertise in robberies would serve only to appeal to the jury's emotions. Given that the probative value of Currie's inconsistent statements is substantially outweighed by the danger of unfair prejudice, we find no abuse of discretion.

{¶22} The first assignment of error is overruled.

Detective's Testimony Regarding Unavailable Video Recording

{¶23} In his second assignment of error, Norton argues that the trial court erred in allowing Det. Payne to testify that she viewed a video of the crime when the court had previously ruled that such testimony was inadmissible.

{¶24} The record reflects that, prior to trial, defense counsel moved to exclude any testimony regarding the video surveillance from Mookie's observed by the detective. Because the state was unable to turn over a copy of the video to the defense, the trial court excluded any testimony regarding the detective's impressions of the actions of people on the video. Norton complains that the following testimony was improperly admitted in contravention of the trial court's earlier ruling:

[Defense Counsel:] Q. I'm talking about a robbery and a kidnapping. Do we have some other witness who saw this happen, this event, Mr. Currie being kidnapped and robbed? Do we have a single other witness that viewed this other than John Currie?

THE COURT: You may answer if you know.

[Det. Payne:] A. It was observed on video.

{¶25} Even if we agreed that this testimony should not have been admitted, we find that any error is harmless. An error is harmless if it does not affect a substantial right of an accused. Crim.R. 52(A); *State v. Mims*, 8th Dist. Cuyahoga No. 100520, 2014-Ohio-5338, ¶ 60. "The accused, therefore, has a constitutional guarantee to a trial free from prejudicial error, not necessarily one free of all error." *State v. Jones*, 8th Dist. Cuyahoga No. 101514, 2015-Ohio-2151, ¶ 58, citing *State v. Fears*, 8th Dist. Cuyahoga No. 89989, 2008-Ohio-2661, ¶ 14. And where there is no reasonable possibility that the unlawful testimony contributed to a conviction, the error is harmless and therefore will not be grounds for reversal. *Id.*, citing *State v. Lytle*, 48 Ohio St.2d 391, 358 N.E.2d 623 (1976), paragraph three of the syllabus, *vacated on other grounds, Lytle v. Ohio*, 438 U.S. 910, 98 S.Ct. 3134, 57 L.Ed.2d 1154 (1978).

{¶26} The record reveals that immediately after this, Det. Payne testified as follows:

[Defense Counsel:] Q. Do you have a witness who was present who
a witness statement was taken
from who saw this event?

[Det. Payne:] A. No.

[Defense Counsel:] Q. No other evidence?

[Det. Payne:] A. Of the robbery, no.

[Defense Counsel:] Q. No? And we don't have a video from Mookie's?

[Det. Payne:] A. Correct.

[Defense Counsel:] Q. And we don't have a video from Rascal House?

[Det. Payne:] A. Correct.

{¶27} We find that Det. Payne's one isolated statement that "it was observed on video" constitutes harmless error when reviewed in its entire context. Defense counsel immediately established that the state had no other witnesses who were present during the robbery that offered a statement to the police. We simply do not agree that Det. Payne's single reference to the video improperly contributed to Norton's conviction. Accordingly, we find that the error complained of was harmless beyond a reasonable doubt.

{¶28} The second assignment of error is overruled.

Curative Instruction

{¶29} In his third assignment of error, Norton argues that the trial court failed to provide an adequate curative instruction after Currie stated that his testimony "may cost me my life." He contends that the trial court should have declared a mistrial or provided a more extensive curative instruction. We disagree.

{¶30} The record reflects that immediately after Currie's improper statement, the trial court sustained the objection and instructed the jury to disregard the statement. "A

jury is presumed to follow the instructions, including curative instructions, given it by a trial judge.” *State v. Garner*, 74 Ohio St.3d 49, 59, 656 N.E.2d 623 (1995). There is no basis to conclude that the jury did not follow the trial court’s instruction. Nor do we find any merit to Norton’s claim that this statement deprived him of a fair trial. Notably, defense counsel never moved for a mistrial nor requested a more in depth curative. Norton has therefore waived all but plain error. *State v. Childs*, 14 Ohio St.2d 56, 236 N.E.2d 545 (1968), paragraph three of the syllabus. And here Norton has failed to establish any error, let alone plain error.

{¶31} The third assignment of error is overruled.

Manifest Weight of the Evidence

{¶32} In his fourth assignment of error, Norton argues that the jury’s verdict as to the gun specifications were against the manifest weight of the evidence. We disagree.

{¶33} When an appellate court analyzes a conviction under the manifest weight standard, it must review the entire record, weigh all of the evidence and all of the reasonable inferences, consider the credibility of the witnesses, and determine whether, in resolving conflicts in the evidence, the factfinder 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, 678 N.E.2d 541 (1997). Under a manifest weight standard, an appellate court sits as a “thirteenth juror” and may disagree with the factfinder’s resolution of the conflicting testimony. *Id.* Although the appellate court may act as a thirteenth juror, it should give due deference to the findings

made by the factfinder. *Id.* at 388. Only in exceptional cases, where the evidence “weighs heavily against the conviction,” should an appellate court overturn the trial court’s judgment. *Id.*

{¶34} R.C. 2941.145 requires proof beyond a reasonable doubt that “the offender had a firearm on or about the offender’s person or under the offender’s control while committing the offense and displayed the firearm, brandished the firearm, indicated that the offender possessed the firearm, or used it to facilitate the offense.”

{¶35} Norton argues that, although Currie testified at trial that he “saw” a gun, this testimony was not consistent with the statements he had given to the police and EMS, wherein he only indicated that he “believed” Norton had a gun. In essence, Norton argues that the jury lost its way in believing Currie at trial when Currie had never previously stated that he actually “saw” a gun. Norton’s argument, however, lacks merit.

{¶36} First, as Norton concedes, Currie expressly stated at trial that he “saw” the gun possessed by Norton. Currie also explained that, although he did not see the gun when Norton first approached him, he later observed and felt the gun while they were both in the car. The jury heard the testimony regarding any inconsistency between Currie’s statements to the police and testimony at trial. The jury may take note of any inconsistencies and resolve them accordingly, “believ[ing] all, part, or none of a witness’s testimony.” *State v. Raver*, 10th Dist. Franklin No. 02AP-604, 2003-Ohio-958, ¶ 21, citing *State v. Antill*, 176 Ohio St. 61, 67, 197 N.E.2d 548 (1964). Given that they are in

the best position to resolve any inconsistencies, we cannot say that they lost their way in believing Currie's testimony at trial.

{¶37} Second, based on the circumstantial evidence presented, the jury could have found Norton guilty of the firearm specifications even if it did not believe that Currie actually "saw" the gun. In *Thompkins*, 78 Ohio St.3d 380, 678 N.E.2d 541, at paragraph one of the syllabus, the Ohio Supreme Court elaborated on the requisite proof to sustain a firearm specification:

A firearm enhancement specification can be proven beyond a reasonable doubt by circumstantial evidence. In determining whether an individual was in possession of a firearm and whether the firearm was operable or capable of being readily rendered operable at the time of the offense, the trier of fact may consider all relevant facts and circumstances surrounding the crime, which include any implicit threat made by the individual in control of the firearm.

(Citations omitted.)

{¶38} Currie's description of Norton's threats to Currie, along with his description of Norton's actions of putting what felt like a gun into his side, fully supports the jury's guilty finding on the firearm specifications. Currie stated that Norton threatened to "pop [his] ass" if he ran and further explained that Norton later pressed the gun into his side, wherein he felt the steel.

{¶39} This is not the exceptional case where the jury lost its way.

{¶40} The fourth assignment of error is overruled.

Restitution

{¶41} In his final assignment of error, Norton argues that the trial court erred in ordering Norton to pay \$470 in restitution. We agree.

{¶42} R.C. 2929.18(A)(1) governs restitution and provides that financial sanctions may include:

Restitution by the offender to the victim of the offender's crime * * * in an amount based on the victim's economic loss. * * * If the court imposes restitution, at sentencing, the court shall determine the amount of restitution to be made by the offender. If the court imposes restitution, the court may base the amount of restitution it orders on an amount recommended by the victim, the offender, a presentence investigation report, * * * and other information, provided that the amount the court orders as restitution shall not exceed the amount of the economic loss suffered by the victim as a direct and proximate result of the commission of the offense. If the court decides to impose restitution, the court shall hold a hearing on restitution if the offender, victim, or survivor disputes the amount.

{¶43} In *State v. Lalain*, 136 Ohio St.3d 248, 2013-Ohio-3093, 994 N.E.2d 423, ¶ 24, the Ohio Supreme Court recently emphasized that restitution ordered cannot be greater than the amount of economic loss suffered as a direct and proximate result of the

commission of the offense. Therefore, a trial court abuses its discretion in awarding restitution that is not the direct and proximate result of the defendant's offense. *Id.*

{¶44} Further, the amount of restitution must be supported by competent, credible evidence from which the court can discern the amount of restitution to a reasonable degree of certainty. *State v. Roberts*, 8th Dist. Cuyahoga No. 99755, 2014-Ohio-115, ¶ 7-8; *State v. Gears*, 135 Ohio App.3d 297, 300, 733 N.E.2d 683 (6th Dist.1999). The evidence in the record must be enough to “substantiate the relationship of the offender’s criminal conduct to the amount of the victim’s loss.” *Roberts* at ¶ 10, citing *State v. Brumback*, 109 Ohio App.3d 65, 83, 671 N.E.2d 1064 (9th Dist.1996). A trial court commits plain error in awarding restitution that is not supported by competent, credible evidence. *Roberts* at ¶ 8.

{¶45} Here, the evidence at trial established that Norton took “at most” \$175 from Currie. The trial court ordered, however, that Norton pay restitution “in the amount of \$470 through the Probation Department to John Currie for the cash that he indicated was taken as part of this robbery.” The state counters that an award exceeding \$175 was necessary to compensate the victim for the medical expenses he incurred as a result of Norton’s crimes. But the record does not contain any support for these alleged medical expenses. Indeed, the trial court expressly noted that, although the victim talked about bringing in medical bills, “the only requests for restitution we’ve had has been \$470 in cash that he asked to be reimbursed” — an amount that the trial court believed was taken during the robbery. This belief was erroneous. As stated above, the record established

that Norton took no more than \$175 from Currie, and therefore, the trial court lacked authority to order \$470 in restitution.

{¶46} And while Norton failed to object to the order of restitution, we find that the award exceeding \$175 constitutes plain error in this case. *Roberts* at ¶ 8.

{¶47} Accordingly, the fifth assignment of error is sustained. The restitution order is reversed, and the case is remanded to the trial court with instructions to limit the amount of restitution to \$175.

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

It is ordered that appellee and appellant 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 in part, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

—
MARY J. BOYLE, JUDGE

EILEEN A. GALLAGHER, P.J., and
PATRICIA ANN BLACKMON, J., CONCUR

