

STATE OF OHIO)
)ss:
COUNTY OF LORAIN)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C.A. No. 09CA009720

Appellee

v.

KEITH B. WARD

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF LORAIN, OHIO
CASE No. 09CA078844

Appellant

DECISION AND JOURNAL ENTRY

Dated: February 7, 2011

BELFANCE, Judge.

{¶1} Appellant, Keith B. Ward, appeals his conviction from the Lorain County Court of Common Pleas. For the reasons that follow, this Court affirms in part, reverses in part, and remands.

BACKGROUND

{¶2} Keith B. Ward was indicted on September 9, 2009 and charged with one count of aggravated robbery, with two gun specifications and one repeat violent offender specification; two counts of having weapons under disability; and one count of receiving stolen property, with two gun specifications. He was tried before a jury beginning on October 26, 2009. The trial court granted Mr. Ward's motion for acquittal for the receiving stolen property count and its attendant specifications. Mr. Ward was found guilty of the remaining counts of the indictment. The trial court sentenced him to a total of twenty years in prison.

{¶3} Mr. Ward has appealed his convictions and assigns three errors for our review: (1) the State failed to present sufficient evidence to support the repeat violent offender and firearm specifications, and the charges for weapons under disability, and the convictions were against the manifest weight of the evidence; (2) count one of the indictment suffered from duplicity and should have been severed into two counts; and (3) the prosecutor's misconduct deprived Mr. Ward of a fair trial. For ease of analysis, we have rearranged the assigned errors.

INDICTMENT

{¶4} In his second assignment of error, Mr. Ward argues that the charge of aggravated robbery in count one of the indictment was duplicitous because it failed to specify the victim or victims of the alleged robbery and failed to specify what items were alleged to have been stolen. In response, the State argues that Mr. Ward has waived this argument because he did not object to the alleged defect in the indictment prior to trial. The State also argues that the indictment was not duplicitous because Mr. Ward's actions were part of a continuing course of conduct, thus, one robbery.

{¶5} Pursuant to Crim.R. 8(A), each offense must be separately delineated in the indictment. An indictment is duplicitous when two or more separate offenses are joined in one count. *State v. Abuhilwa* (Mar. 29, 1995), 9th Dist. No. 16787, at *5, citing *Parker v. Maxwell* (1963), 174 Ohio St. 471, 471. "The prohibition against duplicity is geared to protect the accused's Sixth Amendment right to notice of the nature of the charge against him and prevent confusion as to the basis of the verdict." *State v. Smith* (Oct. 4, 1978), 9th Dist. No. 8869, at *1, citing *United States v. Tanner* (C.A.7, 1972), 471 F.2d 128, 139. A criminal defendant is entitled to a unanimous jury verdict. Crim.R. 31(A). If two distinct offenses are presented in a single charge, however, unanimity may be compromised. That is, if two offenses are joined in a single

count, while the jury may agree that the defendant is guilty of that count, they may have not unanimously decided which set of facts resulted in the offense. If the trial court finds that the indictment is duplicitous, the indictment shall not be quashed, set aside or dismissed. R.C. 2941.28(B). Instead, the trial court may sever the indictment into separate indictments or separate counts. R.C. 2941.28.

{¶6} In a recent decision, the Supreme Court of Ohio considered the requirement of juror unanimity in the context of a challenge to the trial court's jury instructions. *State v. Gardner*, 118 Ohio St.3d 420, 2008-Ohio-2787, at ¶2. Three justices agreed that jurors do not have to unanimously agree upon which underlying criminal offense a defendant intended to commit to support a conviction for aggravated burglary. *Id.* at ¶68. Although *Gardner* is not binding because a majority of the Court did not concur in the analysis, we nonetheless note that *Gardner* is distinguishable from the instant matter in that the Court decided that the jurors need not agree on the particular way in which an element of a crime was satisfied. *Id.* at ¶¶67-68. Here, however, the facts support two distinct crimes—a meaningful factual distinction as acknowledged in *Gardner*. *Id.* at ¶50.

{¶7} In the case at bar, Mr. Ward did not request a bill of particulars specifying the facts underlying the alleged aggravated burglary charge. He also did not object to the indictment prior to trial. Pursuant to Crim.R. 12(C)(2), objections based on defects in the indictment must be raised prior to trial. Failure to do so results in a forfeiture of the argument. Crim.R. 12(H). See, also, *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, ¶23 (the failure to preserve an objection constitutes a forfeiture). However, the court may grant relief from the forfeiture for good cause shown. Crim.R. 12(H). The Supreme Court of Ohio has previously employed plain error analysis in the context of a failure to object to an indictment prior to trial. See *State v.*

Noling, 98 Ohio St.3d 44, 2002-Ohio-7044, at ¶¶61-62. We likewise determine that plain error analysis is appropriate in this case.

{¶8} “Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court.” Crim.R. 52(B). The doctrine of plain error requires that there must be: (1) a deviation from a legal rule; (2) that is obvious, and; (3) that affects the appellant’s substantial rights. *State v. Hardges*, 9th Dist. No. 24175, 2008-Ohio-5567, at ¶9. An error affects the appellant’s substantial rights if it affected the outcome of the trial. *State v. Barnes* (2002), 94 Ohio St.3d 21, 27. “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. Kobelka* (Nov. 7, 2001), 9th Dist. No. 01CA007808, at *2, citing *State v. Phillips* (1995), 74 Ohio St.3d 72, 83.

{¶9} The evidence at trial demonstrated that Brittany Beko and Tom Moran were at the Azure Blue bar in Elyria, Ohio on July 29, 2009. Mr. Ward and his friend, Eddie Hildreth, were also drinking at the bar that night. All four sat near each other. At closing time, Ms. Beko placed her purse on the bar to her right. She also noticed that Mr. Ward was standing behind her to her right. Ms. Beko turned to her left to talk with Mr. Moran. When she turned back around, her purse was gone.

{¶10} A surveillance video played during the trial showed that Mr. Hildreth grabbed Ms. Beko’s purse while her back was turned and tossed it to Mr. Ward who was standing on the opposite side of the bar by the exit. Mr. Ward left the bar, but Mr. Hildreth did not. The bouncer testified that he saw Mr. Ward walk out of the bar carrying the purse and a gun. The bartender went outside to find Mr. Ward and saw him with the purse and the gun sitting in a car outside of the bar. When she went back into the bar to call the police, Mr. Hildreth was taking money from

the cash register. Mr. Hildreth ran out of the bar and the bartender followed. The bouncer grabbed Mr. Hildreth and the two began wrestling. Mr. Ward approached, pointed a gun at the bartender and told the bouncer to release Mr. Hildreth. The bartender testified that Mr. Ward approached and ordered the bouncer to let Mr. Hildreth go while he pointed the gun at the bartender. The bartender remembered hearing the sound of Mr. Ward cocking the gun. Mr. Hildreth was set free and he and Mr. Ward left the scene. Within minutes, police arrived and apprehended Mr. Ward. A gun was found at his feet.

{¶11} The aggravated robbery charge in the indictment had two gun specifications attached to it. One specification alleged that Mr. Ward possessed a firearm during the commission of the theft offense and the other alleged that Mr. Ward displayed, brandished, used, or indicated possession of a firearm during the commission of the theft offense. During opening statements, the prosecutor stated:

“So, essentially, what you have here is two robberies. And we can only have one count, but we have [Mr. Ward] actually committing two robberies. The robbery with the purse with the gun, and we also have the robbery that he helps Eddie Hildreth take the money out of the cash register.”

The prosecutor further stated that the State’s theory was that Mr. Ward and Mr. Hildreth committed the robbery of the purse in order to divert attention so that they could steal the cash from the register. During closing argument, the prosecutor stated that although two items were stolen, the thefts were one continuous action. Throughout closing, the State referred to the events of July 30, 2009 both as two separate robberies and as one continuous act. In his summation to the jury, Mr. Ward’s counsel stated that the State’s original theory was that Mr. Ward stole Ms. Beko’s purse; however, during the course of the trial the State had adjusted its theory to allege that Mr. Ward participated in a series of thefts amounting to a continuing course of conduct that constituted the aggravated robbery charge. The jury instructions did not specify

the victim of the theft offense contained in the aggravated robbery charge. Nor did the instructions specify what property was allegedly taken during the theft. The jury was also instructed as to complicity. The jury ultimately found that Mr. Ward committed aggravated robbery, that during the robbery he possessed a firearm, and that he displayed, brandished, used or indicated possession of the firearm in the commission of the robbery.

{¶12} Given the evidence, the State's characterization of that evidence, and the jury instructions, it is clear that the jury could have been confused as to whether Mr. Ward was being prosecuted for taking the purse, for helping Mr. Hildreth steal from the register, for both individually, or for both as one continuous act. Despite the jury's ability to agree that Mr. Ward was guilty of aggravated robbery, each member of the panel may not have based his or her decision on the same set of facts.

{¶13} The two gun specifications to the aggravated robbery charge added to the confusion. Although the State presented evidence that Mr. Ward was carrying the gun and the purse when he left the bar, it is debatable whether he used or displayed the gun during the commission of that offense. On the other hand, the State presented evidence that he both possessed and used the gun to aid in the theft of money from the register.

{¶14} Moreover, counsel for Mr. Ward stated that he understood the charges to relate only to the theft of the purse. The indictment did not give Mr. Ward adequate notice of the crime he was alleged to have committed and raised the possibility for confusion among the jurors. See *Smith*, at *1, citing *Tanner*, 471 F.2d at 139. The trial court could have severed the aggravated robbery count into two counts based on the facts of the case. See R.C. 2941.28. The court's failure to do so constituted plain error because we cannot say that the error did not affect the

outcome of Mr. Ward's trial. See *Barnes*, 94 Ohio St.3d at 27. Accordingly, Mr. Ward's second assignment of error is sustained.

SUFFICIENCY

{¶15} Mr. Ward argues in his first assignment of error that some of his convictions were not based on sufficient evidence. Specifically, he contends that the sentencing entries admitted into evidence were not properly authenticated, thus the evidence was insufficient to support his convictions for having weapons under disability and to demonstrate that he was a repeat violent offender. He also asserts that the State failed to demonstrate operability of the firearm, thus his convictions for the firearm specifications and having weapons under disability must be reversed.

{¶16} Although Mr. Ward attacks the sufficiency of the repeat violent offender and firearms specifications attached to the aggravated robbery, we have determined above that that the aggravated robbery indictment was defective. “[A] specification is, by its very nature, ancillary to, and completely dependent upon, the existence of the underlying criminal charge or charges to which the specification is attached.” *State v. Evans*, 113 Ohio St.3d 100, 2007-Ohio-861, at ¶15, quoting *State v. Nagel* (1999), 84 Ohio St.3d 280, 286. Because the specifications were ancillary to the robbery charge, we will not address Mr. Ward's sufficiency argument with respect to the specifications. However, we will address his argument with respect to sufficiency as to his separate convictions for having weapons under disability.

{¶17} “Whether a conviction is supported by sufficient evidence is a question of law that this Court reviews de novo.” *State v. Williams*, 9th Dist. No. 24731, 2009-Ohio-6955, at ¶18, citing *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386. The relevant inquiry is whether the prosecution has met its burden of production by presenting sufficient evidence to sustain a conviction. *Thompkins*, 78 Ohio St.3d at 390 (Cook, J., concurring). In reviewing the evidence,

we do not evaluate credibility and we make all reasonable inferences in favor of the State. *State v. Jenks* (1991), 61 Ohio St.3d 259, 273. The State's evidence is sufficient if it allows the jury to reasonably conclude that the essential elements of the crime were proven beyond a reasonable doubt. *Id.*

Sentencing Entries

{¶18} An offender is guilty of having weapons under disability if, inter alia, he knowingly carries or uses a firearm or dangerous ordnance and has previously been convicted of a felony offense of violence and/or certain offenses involving a “drug of abuse.” R.C. 2923.13(A)(2)-(3). The State offered into evidence certified copies of two judgment entries pertaining to Mr. Ward. A judgment entry from 1991 stated that Mr. Ward pleaded guilty to a violation of R.C. 2911.02, robbery. A violation of R.C. 2911.02 is an offense of violence. R.C. 2901.01(A)(9). The second entry was from 2008 and indicated that Mr. Ward pleaded guilty to, inter alia, possession of cocaine and marijuana. Cocaine and marijuana are each a “drug of abuse.” R.C. 2923.13(A)(3). See, also, R.C. 2925.01(B); 3719.011(A); 3719.01.

{¶19} Mr. Ward argues that the judgment entries accepted into evidence were not properly authenticated and should not have been admitted into evidence. Therefore, without this evidence, the State's evidence was not sufficient to establish Mr. Ward was guilty of having weapons under disability. Mr. Ward also suggests that the evidence presented did not clearly indicate that he was the individual identified in the entries.

{¶20} Mr. Ward has not separately challenged the propriety of the admission of the judgment entries in a separate assignment of error. To the extent that Mr. Ward asserts that the State's evidence was insufficient to sustain his conviction because evidence was improperly admitted, that argument is not well taken. The Supreme Court of Ohio has held that when

reviewing the sufficiency of the evidence, an appellate court is to consider all of the evidence admitted at trial, even if the evidence was improperly admitted. *State v. Brewer*, 121 Ohio St.3d 202, 2009-Ohio-593, at ¶19. See, also, *State v. Denny*, 9th Dist. No. 08CA0051, 2009-Ohio-3925, at ¶12 (“* * * the administration of justice dictates that the appellate court review the issue of sufficiency in consideration of all the evidence presented by the State in its case in chief, whether such evidence was properly admitted or not.”). Thus, Mr. Ward may not base his sufficiency argument on the contention that the judgment entries were improperly admitted. To the extent that Mr. Ward attempts to make such an argument, we overrule it.

{¶21} Mr. Ward additionally argues that the evidence was insufficient to allow the factfinder to conclude that he was the offender identified in the 1991 and 2008 judgment entries. R.C. 2945.75(B)(1) mandates that:

“Whenever in any case it is necessary to prove a prior conviction, a certified copy of the entry of judgment in such prior conviction together with evidence sufficient to identify the defendant named in the entry as the offender in the case at bar, is sufficient to prove such prior conviction.”

The judgment entries of Mr. Ward’s prior convictions entered into evidence were certified copies. With respect to the identity requirement of R.C. 2945.75(B)(1), the police officer investigating the crime testified that he examined Mr. Ward’s criminal history for prior convictions. He discovered the records pertaining to the 1991 and 2008 cases identified by the judgment entries offered by the State. The officer stated that he compared the full name and date of birth of Mr. Ward with the defendant in the two cases to determine that Mr. Ward was the defendant in those prior cases. The officer averred that the name and date of birth matched that of Mr. Ward. Mr. Ward did not object to this testimony when offered by the officer and did not cross-examine the officer on the subject.

{¶22} On appeal, Mr. Ward has not explained why the officer's testimony was insufficient to demonstrate that the prior convictions were his. Nor has he articulated by way of legal authority what would constitute sufficient evidence. We find that, based on the officer's testimony, the evidence was sufficient to allow the jury to conclude that Mr. Ward was the defendant identified in the judgment entries presented by the State. Accordingly, the evidence was sufficient to support the convictions for having weapons under disability.

Operability

{¶23} An offender is guilty of having weapons under disability if the offender has been convicted of "any felony offense of violence" or "illegal possession, use, sale, administration, distribution, or trafficking in any drug of abuse[]" and subsequently knowingly acquires, has, carries, or uses any firearm or dangerous ordnance. R.C. 2923.13(A)(2), (3). Mr. Ward argues that the State must prove operability to secure a conviction, however, operability is not explicitly an element of the crime of weapons under disability and Mr. Ward has not cited any law in support of his contention. We therefore conclude that Mr. Ward's argument concerning proof of operability is not well taken.

{¶24} To the extent that Mr. Ward argues in his first assignment of error that his convictions for weapons under disability were based on insufficient evidence, we overrule the assignment of error. Our resolution of Mr. Ward's second assignment of error has rendered his argument with respect to the repeat violent offender and firearm specifications moot.

MANIFEST WEIGHT

{¶25} Mr. Ward also argues in his first assignment of error that his convictions for aggravated robbery and weapons under disability were against the manifest weight of the evidence. In light of our conclusion that Mr. Ward's indictment was duplicitous because it

combined two separate offenses in one count of aggravated robbery, Mr. Ward's manifest weight argument with respect to that charge is moot and we decline to address it. See App.R. 12(A)(1)(c). We do, however, reach the issue of whether his convictions for weapons under disability were supported by the manifest weight of the evidence.

{¶26} For the most part, Mr. Ward argues sufficiency and manifest weight in tandem. He does not specifically attack the credibility of the witnesses; rather, he asserts that the State did not meet its burden of production. See *Thompkins*, 78 Ohio St.3d at 386-387 (sufficiency concerns whether the evidence was adequate to support the verdict, while manifest weight is a question of whether the greater amount of *credible* evidence supports the verdict). Without pointing to specific evidence in the record, see App.R. 16(A)(7), Mr. Ward states that the testimony of the witnesses that Mr. Ward possessed and displayed a gun was not credible because they had been consuming alcohol and the testimony was conflicting and fragmented.

{¶27} Many of the witnesses who were in the bar the night of the robbery did testify that they had been drinking, however, the evidence did not demonstrate that any of the witnesses was severely impaired or incapable of comprehending or remembering the incident. Additionally, one of the officers who responded to the scene testified that when he apprehended Mr. Ward, he had a gun on the ground at his feet.

{¶28} With respect to Mr. Ward's second contention, the testimony was not inconsistent. Both witnesses who saw Mr. Ward carrying and displaying the gun gave consistent descriptions of the firearm and Mr. Ward's use of it. Upon review of the record, we conclude that Mr. Ward's weapons under disability convictions were not against the manifest weight of the evidence. We overrule Mr. Ward's first assignment of error with regard to the manifest weight of the evidence.

PROSECUTORIAL MISCONDUCT

{¶29} In his third assignment of error, Mr. Ward alleges that the prosecutor committed misconduct during the trial that violated his right to a fair trial. Our resolution of Mr. Ward's second assignment of error has rendered his third assignment of error moot. As such, we decline to address it. See App.R. 12(A)(1)(c).

CONCLUSION

{¶30} Mr. Ward's first assignment of error is overruled as it relates to sufficiency and manifest weight of the evidence supporting the weapons under disability convictions and we do not reach the remainder of his assignment of error. We sustain Mr. Ward's second assignment of error. We decline to address Mr. Ward's third assignment of error. The judgment of the Lorain County Court of Common Pleas is affirmed in part, reversed in part, and the matter is remanded for proceedings consistent with this opinion.

Judgment affirmed in part,
reversed in part,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is

instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed equally to both parties.

EVE V. BELFANCE
FOR THE COURT

DICKINSON, P. J.
CARR, J.
CONCUR

APPEARANCES:

PAUL GRIFFIN, Attorney at Law, for Appellant.

DENNIS P. WILL, Prosecuting Attorney, and MARY SLANCZKA, Assistant Prosecuting Attorney, for Appellee.