

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

State of Ohio

Court of Appeals No. E-10-027

Appellee

Trial Court No. 2009-CR-520

v.

Maurice S. Hopkins

DECISION AND JUDGMENT

Appellant

Decided: November 10, 2011

* * * * *

Kevin J. Baxter, Erie County Prosecuting Attorney, and Mary Ann Barylski, Assistant Prosecuting Attorney, for appellee.

Benjamin M. Chapman, for appellant.

* * * * *

OSOWIK, P.J.

{¶ 1} This is an appeal from a judgment of the Erie County Court of Common Pleas, which following a jury trial, found appellant guilty of aggravated burglary, having a weapon while under disability, felonious assault, and attempted murder. Appellant was

also determined to be a repeat violent offender ("RVO"). For the reasons set forth more fully below, the judgment of the trial court is hereby affirmed.

{¶ 2} Appellant, Maurice Hopkins, sets forth the following 15 assignments of error:

{¶ 3} "1. It was error for the Court to deny Appellant's Motion to Dismiss based on Speedy Trial grounds.

{¶ 4} "2. It was an error of law for the RVO specification to be tried to the jury.

{¶ 5} "3. The evidence as to the count of Having A Weapon Under Disability in Case No. 2009-cr-520 was insufficient and contrary to law.

{¶ 6} "4. A Rule 29 Motion to Acquit should have been granted with reference to the Appellant Having A Weapon under Disability in Case No. 2010-CR-088.

{¶ 7} "5. The Court's finding that Appellant is a Repeat Violent Offender must be reversed based on insufficient evidence.

{¶ 8} "6. It was plain error for the Court to not grant a Rule 29 Motion as to the count of Having a Weapon Under Disability in Case No. 2009-CR-520.

{¶ 9} "7. The Prosecutor's improper comments to the jury constituted plain error and denied the Appellant a fair trial.

{¶ 10} "8. It was plain error for trial counsel to not file a Rule 12 pre-trial Motion To Dismiss 2010-CR-088.

{¶ 11} "9. It was error for court to sentence Defendant under the mandatory provision of the RVO Statute (2929.14).

{¶ 12} "10. It was error for the Court to deny Appellant his right to call witnesses to testify on his behalf.

{¶ 13} "11. The convictions should be reversed based upon ineffectiveness of counsel.

{¶ 14} "12. The cumulative effects of the errors deprived Appellant of his Constitutional right to a fair trial.

{¶ 15} "13. The jury verdicts were against the weight of the evidence.

{¶ 16} "14. It was error for trial Court to deny Appellant's Motion for Mistrial.

{¶ 17} "15. It was error for the trial Court to allow the audio tapes from the jail to be played to the jury."

{¶ 18} The following undisputed facts are relevant to the issues raised upon appeal. On November 24, 2009, Chris Brown was at his home in Sandusky, Ohio. When he answered an unexpected knock at his door, he found two unknown and armed males at the door. As the men attempted to forcibly invade the residence, Brown shouted to his father to warn him and for assistance. Although Brown and his father did prevail in preventing the intruders from entering their home, a melee ensued on the landing and down onto the front steps. During this scuffle, appellant shot at Brown. Appellant missed Brown and accidentally shot himself in the hand. As the assailants fled, they continued shooting at Brown and his father.

{¶ 19} It was subsequently discovered that appellant's brother, Gabriel Hopkins, visited Brown's home just one day before these events occurred on behalf of the victims'

neighbor to ostensibly borrow a diaper. While inside the victims' residence, Hopkins observed in plain view a stack of money that Brown had just set aside in planning for a vacation.

{¶ 20} Upon hearing the gunfire, a neighbor called the police. The police recovered six .45 caliber bullets and gathered all physical evidence at the scene. Brown and his father described the perpetrators to the police. They later definitively selected appellant in a photo array as one of the assailants.

{¶ 21} On December 4, 2009, appellant was discovered hiding at the residence of his brother who had first observed the cash in the victims' residence. Notably, the investigating police officers observed a gunshot wound on appellant's hand consistent with having shot himself in the hand during the incident as previously reported by the victims. In conjunction with this, and of even greater significance, blood recovered from the scene matched appellant's DNA in subsequent testing.

{¶ 22} Following his arrest, appellant boasted about his role in the events during telephone calls in prison and discussed his efforts to have the victims contacted to discourage them from proceeding with the charges. In addition appellant disclosed his culpability to a fellow inmate.

{¶ 23} On January 11, 2009, appellant was indicted by the Erie County Grand Jury for aggravated burglary, having a weapon while under disability, felonious assault, and attempted murder under case No. 2009-CR-520. The grand jury also attached three firearm specifications and a repeat violent offender determination.

{¶ 24} Appellant was later granted the conditional privilege of being released under house arrest. He was released on a personal recognizance bond and fitted with a GPS monitoring device. Within one day of being granted this privilege, appellant unlawfully cut off the device and fled the jurisdiction. On March 5, 2010, appellant was arrested in Elyria, Ohio. At the time of this arrest, appellant had obtained and was in possession of more guns.

{¶ 25} On March 8, 2010, appellant was indicted for escape in case No. 2010-CR-088. On April 14, 2010, appellant was indicted for two additional counts of having weapons under disability in connection to the new case. An entry filed April 30, 2010, granted a motion to join case No. 2009-CR-520 and case No. 2010-CR-088 for trial purposes.

{¶ 26} On May 24, 2010, following jury trial on all pending charges, appellant was found guilty of aggravated burglary, having a weapon under disability, felonious assault, and attempted murder. On June 1, 2010, appellant was sentenced to a total of 34 years in prison.

{¶ 27} In his first assignment of error appellant contends the trial court violated his right to a speedy trial. The record shows that after appellant was arrested on December 4, 2009, he spent a total of 81 days in jail. As previously stated, appellant was released on a personal recognizance bond on February 23, 2010. A trial date was set for March 1, 2010. Upon release, the defendant cut off his court ordered GPS monitoring

device, obtained weapons, and fled the jurisdiction. He was rearrested on March 5, 2010. A new trial date was set for May 24, 2010.

{¶ 28} Under Ohio law, a defendant who fails to appear at a scheduled trial waives the right to speedy trial for the time period from initial arrest to subsequent arrest. *State v. Bauer* (1980), 61 Ohio St.2d 83, 85. In addition, the triple count provision set forth in R.C. 2945.71(E) applies only to defendants held in jail solely on the pending charge. *State v. Brown* (1992), 64 Ohio St.3d 476, 479.

{¶ 29} Appellant contends that he was not brought to trial within the proper period mandated by R.C. 2945, which states that a person charged with a felony "shall be brought to trial within two hundred seventy days after the person's arrest." Appellant claims his trial was untimely pursuant to the "triple count" provision of R.C. 2945, which provides that each day during which the accused is held in jail in lieu of bail on the pending charge is counted as three days.

{¶ 30} Appellant claims that for R.C. 2945 purposes, he waited a total of 494 days until trial. In order to accumulate the purported figure, appellant added the original time he served from December 4, 2009, to February 23, 2010, prior to violating bond to the subsequent time served from March 5, 2010, to May 24, 2010, after he fled the area and was later arrested. In addition, appellant's suggested computation includes, as counting against the statutory speedy trial deadline, the 11 days during his release on bond until he was rearrested.

{¶ 31} Appellant's argument fatally fails to recognize that the second period of incarceration was the result of appellant's intervening criminal acts and cannot be added to the initial time of incarceration. The latter period of time served stemmed from the new charges, not the original pending charges.

{¶ 32} The record clearly reflects that appellant served 243 days for the original set of charges and 240 days for the subsequent charges, taking into account the triple count provision. Neither period of incarceration exceeded the speedy trial maximum permissible incarceration period of 270 days pursuant to R.C. 2945. Wherefore, appellant's first assignment of error is not well-taken.

{¶ 33} The second assignment of error set forth by appellant contends that the trial court erred by submitting to the jury the determination of whether the appellant was a RVO. Appellant claims this error occurred when the RVO instruction was submitted to the jury.

{¶ 34} In support, appellant cites to *State v. Smith*, 12th Dist. No. CA 2008-03-064, 2009-Ohio-5517. Our review of *Smith* reveals that it actually is materially distinguishable from the case before us. In *Smith*, the appellant argued that only a jury can determine whether an offender is a RVO. The court rejected that argument. The *Smith* court held, "the determination need not be made by a jury and is properly made by a trial court." Thus, the RVO specification may properly be made by either the trial court or the jury.

{¶ 35} The definition of a repeat violent offender is one who was previously convicted of: "Aggravated murder, murder, any felony of the first or second degree that is an offense of violence, or an attempt to commit any of these offenses if the attempt is a felony of the first or second degree." R.C. 2901(CC).

{¶ 36} The record establishes that appellant comports with the statutory definition of a repeat violent offender. At trial, appellee submitted a judgment entry from case No. 98-CR-025 showing appellant had been found guilty of a second degree felony. Pursuant to *Smith*, either the jury or trial court could properly make the RVO determination. Accordingly, appellant's second assignment of error is not well-taken.

{¶ 37} Appellant's third and fifth assignments of error argue that the evidence as to the count of having a weapon under disability and the RVO specification in case No. 2009-CR-520 was insufficient and contrary to law. In appellant's sixth assignment of error, he argues that it was error for the trial court not to grant a Crim.R. 29 motion as to the count of having a weapon under disability. Given their common foundation, we will address these assignments together.

{¶ 38} In the third and fifth assignments, appellant specifically argues that his conviction in case No. 98-CR-025 should be deemed to be void, and, therefore, there would be no basis for the charge of having a weapon under disability or the RVO specification. Appellant is asking this court to construe a 1998 judgment, not overturned on appeal, void in a context in which the case relevant to his assertion is not even before us. Such a line of reasoning and argument is barred by *res judicata*.

{¶ 39} Another argument proffered by appellant is that the second count of having weapons under disability in this case alleged a prior conviction of felonious assault in case No. 2007-CR-664 which was based on a defective indictment. The record reveals the indictment reads as follows:

{¶ 40} "[A]nd the said Maurice S. Hopkins was under indictment for or having been convicted of a felony offense of violence, to wit: Felonious Assault in Erie County Common Pleas Court Case No. 98-CR-025 and 2007-CR-664, in violation of O.R.C. §2923.13(A)(2)."

{¶ 41} The record reflects that the judgment entry in the 2007 case shows that appellant was found guilty of the amended offense of attempted felonious assault with a physical harm specification. This offense of violence is one which prevents appellant from owning or possessing a firearm. As such, there is clearly no prejudicial effect from the indictment not mentioning the actual offense.

{¶ 42} According to controlling Ohio caselaw, "failure to timely object to a defect in an indictment constitutes a waiver of the error. Crim.R. 12(C)(2) (objections to defect in indictment must be raised before trial). Any claim of error in the indictment in such a case is limited to a plain-error review on appeal." *State v. Horner*, 126 Ohio St.3d 466, 2010-Ohio-8930, ¶ 46.

{¶ 43} There is absolutely no evidence that this verdict would have been different had the error not occurred. Appellant's third, fifth, and sixth assignments of error are not well-taken.

{¶ 44} Appellant's fourth assignment of error asserts that a Crim.R. 29 motion should have been granted and, as a result of its denial, the jury heard improper evidence. His argument states that the indictment alleging having weapons under disability in Lorain County should have been met with a Crim.R. 29 motion to acquit on the basis of improper venue. We will also address appellant's eighth assignment of error which argues that it was plain error for trial counsel to not file a motion to dismiss the cases triggered by appellant's violation of bond and flight from the jurisdiction, case No. 2010-CR-088.

{¶ 45} As previously discussed, appellant was released on bond in Erie County, unlawfully removed his court ordered GPS monitoring device, and fled to Lorain County. He was subsequently arrested in Elyria in possession of two guns. Given these new acts by appellant, appellant was then indicted for having the weapons under disability.

{¶ 46} "When an offender, as part of a course of criminal conduct, commits offenses in different jurisdictions, the offender may be tried for all of those offenses in any jurisdiction in which one of those offenses or any element of one of those offenses occurred. Without limitation on the evidence that may be used to establish the course of criminal conduct, any of the following is prima facie evidence of a course of criminal conduct:

{¶ 47} "(3) The offenses were committed as part of the same transaction or chain of events, or in furtherance of the same purpose or objective." R.C. 2901.12(H).

{¶ 48} Under Ohio law, "Venue is not a material element of any crime but, unless waived, is a fact that must be proven at trial beyond a reasonable doubt." *State v. DeBoe*, 6th Dist. No. H-02-057, 2004-Ohio-403, ¶ 41.

{¶ 49} Under the facts and circumstances of this case, venue was proper in either Erie County or Lorain County. We find no error in regards to venue. Appellant's fourth and eighth assignments of error are not well-taken.

{¶ 50} In his seventh assignment of error, appellant argues that comments by the prosecution to the jury were improper, constituted plain error, and denied appellant a fair trial. Appellant asserts that the prosecution wrongly referred to appellant as untruthful and that the prosecutor inserted personal knowledge.

{¶ 51} The test concerning prosecutorial misconduct is whether the remarks were improper and, if so, whether they prejudicially affected substantial rights of the defendant. *State v. Lott* (1990), 51 Ohio St.3d 160. The state has the latitude to comment on "what the evidence has shown and what reasonable inference may be drawn therefrom." *State v. Stephens* (1970), 24 Ohio St.2d 76, 82.

{¶ 52} After a careful review of the record and the statements highlighted by appellant, we find the disputed remarks did not constitute prosecutorial misconduct. The generic, challenged remarks were permissible under *Stephens*. Accordingly, appellant's seventh assignment of error is not well-taken.

{¶ 53} In his ninth assignment of error, appellant contends that it was error for the court to sentence defendant under the mandatory provision of the RVO statute.

{¶ 54} Under Ohio law, full discretion is given to the trial court at sentencing and its judgment will not be overturned absent a finding of an abuse of discretion. An abuse of discretion requires finding the trial court action was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. As this court has consistently held, an RVO determination in and of itself allows the trial court to impose a maximum sentence upon an offender. *State v. Johnson*, 6th Dist. No. L-03-1206, 2005-Ohio-1222, ¶ 38.

{¶ 55} There is no evidence that the disputed sentence violated any applicable sentencing statutes. Appellant has not shown an abuse of discretion. Appellant's ninth assignment of error is not well-taken.

{¶ 56} Appellant's tenth assignment of error maintains the trial court erred by not allowing appellant to call two witnesses during defense counsel's case-in-chief. The record shows that no discovery involving the two witnesses was presented before trial and that no proffer about the content of potential testimony was given to the court.

{¶ 57} Without any proffer we must adhere to the rule in *State v. Chapin* (1981), 67 Ohio St.2d 437. *Chapin* provides: "When a proffer of proof is not made upon the record following a trial court's ruling to exclude evidence, an appellate court has nothing to review." *Id.* at 444. Since this court has no proffer to review, we have no means to determine whether the trial court abused its discretion. Appellant's tenth assignment of error is not well-taken.

{¶ 58} Appellant's eleventh assignment of error alleges ineffective assistance of counsel. It is well-established that claims of ineffectiveness assistance of counsel are reviewed under the standard set out in *Strickland v. Washington* (1984), 466 U.S. 668. In order to prove ineffective assistance of counsel, the appellant must show both that the performance of trial counsel was defective and must also establish that, but for that defect, the trial outcome would have been different. *Id.* at 687.

{¶ 59} Appellant bases this claim upon the very same arguments we have rejected in his other assignments of error. As such, this assignment of error is found not well-taken.

{¶ 60} Appellant's twelfth assignment of error alleges the cumulative effects of the errors deprived appellant of his constitutional right to a fair trial. According to the Supreme Court of Ohio, "Although violations of the Rules of Evidence during trial, singularly, may not rise to the level of prejudicial error, a conviction will be reversed where the cumulative effect of the errors deprives a defendant of the constitutional right to a fair trial." *State v. DeMarco* (1987), 31 Ohio St.3d 191, 196-97.

{¶ 61} Our review of this matters shows that appellant has failed to establish any prejudice, singularly or cumulatively. Appellant's twelfth assignment of error is not well-taken.

{¶ 62} Appellant's thirteenth assignment of error contends that the jury verdicts were against the weight of the evidence. In support appellant alleges that versions of events relayed by Chris Brown are too irreconcilable to be found credible.

{¶ 63} Regardless of claimed inconsistencies of a victim, the record contains ample compelling evidence presented against appellant at trial. The primary evidence included identification by the victims, blood evidence recovered from the crime scene following the shootings that match appellant's DNA, multiple recorded conversations of appellant himself reflecting guilt, and testimony from fellow inmates that, taken together, all operate to conclusively establish appellant's guilt.

{¶ 64} In determining whether a verdict is against the manifest weight of the evidence, the appellate court "weighs the evidence and all reasonable inferences, and considers the credibility of witnesses." *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387. The court then makes a determination as to 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." *Id.* Under this manifest weight standard, the appellate court sits as a "thirteenth juror" and may disagree with the factfinder's resolution of the conflicting testimony. *Id.*

{¶ 65} We have carefully reviewed the record in its entirety. We find no evidence indicative that the fact finder lost its way or created a manifest miscarriage of justice. On the contrary, there was significant objective evidence of guilt. Appellant's thirteenth assignment of error is not well-taken.

{¶ 66} In his fourteenth assignment of error, appellant argues that comments by the court on the third day of trial gave reason for the court to recuse itself. Thus, according to appellant, the trial court should have granted appellant's motion for mistrial.

{¶ 67} The record reveals that the incident referred to by appellant involved the trial court noting defense counsel being less than honest when acting surprised by an appellee witness. The record shows this incident took place outside of the hearing of the jury.

{¶ 68} The record reveals nothing that would have us believe the comments made by the trial court prejudiced appellant. Appellant's fourteenth assignment of error is not well-taken.

{¶ 69} In his fifteenth and final assignment of error, appellant argues that it was error for the trial court to allow audio tapes from the jail to be played to the jury. In support, appellant alleges that no foundation was properly laid to support admission and that the tapes prejudicially attack appellant's character.

{¶ 70} The record reveals the tapes to include conversations between appellant and various persons. The tapes reveal, in appellant's own voice and words, his undeniable role in the crimes. The record shows that an investigating detective testified to the authenticity of the tapes and identified the voice on the tapes to be appellant's.

{¶ 71} The trial court has broad discretion with the admissibility of evidence and an appellate court should not interfere absent an abuse of discretion. *State v. Maurer* (1984), 15 Ohio St.3d 239, 265. In the 8th District case of *State v. Sowell*, 8th Dist. No. 06AP-443, 2008-Ohio-3285, the issue of jail phone calls was addressed on appeal. The court said that the jail phone recordings were evidence offered against the party and were

the party's own statements as consistent with Evid.R. 801(D)(2)(a). The evidence was deemed admissible. Id.

{¶ 72} In the instant case, it is uncontroverted that the voice on the tapes was that of appellant. The telephone calls were originated by appellant while incarcerated on the underlying charges. The recordings are extremely relevant. The record already encompassed significant adverse evidence in addition to the tapes, ranging from a DNA match to victim identification of appellant as the perpetrator.

{¶ 73} Wherefore, we find no abuse of discretion. Appellant's fifteenth assignment of error is not well-taken.

{¶ 74} Wherefore, we find substantial justice has been done. The judgment of the Erie County Court of Common Pleas is affirmed. Pursuant to App.R. 24, costs of this appeal are assessed to appellant.

JUDGMENT AFFIRMED

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

JUDGE

Arlene Singer, J.

JUDGE

Thomas J. Osowik, P.J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.