

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NO. C-080860
	:	TRIAL NO. B-0803530
Plaintiff-Appellee,	:	
vs.	:	<i>DECISION.</i>
	:	
NORWOOD MCCRARY,	:	
Defendant-Appellant.	:	

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: August 28, 2009

Joseph T. Deters, Hamilton County Prosecuting Attorney, and *Scott M. Heenan*,
Assistant Prosecuting Attorney, for Plaintiff-Appellee,

Michaela M. Stagnaro, for Defendant-Appellant.

Please note: This case has been removed from the accelerated calendar.

DINKELACKER, Judge.

{¶1} Defendant-appellant, Norwood McCrary, appeals convictions for having weapons while under a disability under R.C. 2923.13(A)(2), resisting arrest under R.C. 2921.33(C)(2) with accompanying specifications, and obstructing official business under R.C. 2921.31(A). We find no merit in his five assignments of error, and we affirm the trial court’s judgment.

I. Facts and Procedure

{¶2} The state’s evidence showed that Cincinnati Police Officer Thomas Haas stopped McCrary for a red-light violation. McCrary told Officer Haas that he did not have any identification with him, so Officer Haas asked him for his name, date of birth, and social-security number. The name and birth date turned out to be false, but the social security-number was correct. From the social security number, Officer Haas discovered that McCrary was wanted on outstanding warrants.

{¶3} While Officer Haas was checking the information, McCrary’s car sped away from him. Officer Haas chased the car for a few blocks until it stopped on a dead-end street. McCrary jumped out of the car and ran into a wooded area.

{¶4} Officer Haas chased McCrary on foot and yelled, “Stop, you’re under arrest,” several times. He shot his Taser at McCrary, but missed. Eventually, he lost sight of McCrary as he ran into a ravine. He heard crashing, as if McCrary had fallen. When he saw McCrary again, he was on his knees with his back towards him. He saw McCrary’s hands go towards his belly or waistline, leading the officer to believe that he had a weapon.

{¶5} Officer Haas again yelled to McCrary that he was under arrest. McCrary got off the ground and started running again. The officer saw McCrary

again reach for his waistline and screamed, “Get on the ground[.] [Y]ou’re under arrest.” Then, Officer Hass saw McCrary remove his left hand from his waist and produce a black object, which the officer realized was a gun. He yelled, “Drop the gun.”

{¶6} At the same time, McCrary fell forward and Officer Haas saw him flip the gun out of his hand. The officer saw the gun travel 10 to 15 feet in front of McCrary and land on the ground. McCrary also landed on the ground with his hands underneath him. Even though he had fallen, McCrary kept trying to get away.

{¶7} Officer Haas fired his Taser at McCrary. One taser barb hit him and had a “partial effect.” McCrary jerked, but continued to try to get away. The officer then jumped on McCrary’s back and was able to “complete the circuit” to shock McCrary again.

{¶8} Officer Hass ordered McCrary to put his hands to the side, and McCrary complied. He then told McCrary to put his hands behind his back. McCrary complied at first, but as soon as the officer began putting handcuffs on him, he started to resist again. Nevertheless, Officer Haas was able to handcuff him.

{¶9} After assistance arrived, Officer Hass went to look for the gun. He found a .40 caliber handgun approximately ten feet away from where McCrary had been lying. The officer later test fired the gun and found it to be operable.

{¶10} A jury found McCrary guilty of having weapons while under a disability, resisting arrest, obstructing official business, improperly handling firearms in a motor vehicle, and carrying concealed weapons. The trial court merged the counts for improperly handling a firearm in a motor vehicle and carrying concealed weapons with other counts. It sentenced McCrary to serve a total of ten

and one-half years' imprisonment on the remaining three counts. This appeal followed.

II. Ineffective Assistance of Counsel

{¶11} In his first assignment of error, McCrary contends that he was denied the effective assistance of counsel. He argues that his counsel failed to prosecute a previously filed motion to suppress, admitted to the jury that he had committed the offenses of obstructing official business and resisting arrest, and undermined his credibility. This assignment of error is not well taken.

{¶12} A court will presume that a properly licensed attorney is competent, and the defendant bears the burden to show ineffective assistance of counsel.¹ To sustain a claim of ineffective assistance of counsel, a defendant must demonstrate that counsel's performance was deficient, and that the deficient performance prejudiced the defense.²

{¶13} First, McCrary contends that counsel was ineffective for failing to prosecute his motion to suppress. But counsel's failure to file or prosecute a motion to suppress would be prejudicial only if the defendant had a reasonable probability of success on that motion.³

{¶14} McCrary's motion to suppress was not specific as to the grounds for suppressing the evidence. But the record shows that Officer Hass was justified in stopping McCrary's car for a red-light violation, in detaining him when he discovered that the name and birth date McCrary had given him were false, and in arresting him when he discovered the outstanding warrants on him and when his car sped away

¹ *State v. Hamblin* (1988), 37 Ohio St.3d 153, 155-156, 524 N.E.2d 476; *State v. Hirsch* (1998), 129 Ohio App.3d 294, 314, 717 N.E.2d 789.

² *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052; *Hirsch*, supra, at 314.

³ *State v. Brown*, 115 Ohio St.3d 55, 2007-Ohio-4837, 873 N.E.2d 858, ¶65; *State v. Canyon*, 1st Dist. Nos. C-070729, C-070730, and C-070731, 2009-Ohio-1263, ¶23.

during the stop.⁴ Therefore, no Fourth Amendment violation occurred, and the motion to suppress would not have been successful. Counsel was not ineffective for failing to prosecute the motion.

{¶15} McCrary also argues that counsel was ineffective for admitting certain conduct and undermining his credibility. The record shows that, in opening argument, McCrary's counsel admitted that McCrary was guilty of obstructing official business and resisting arrest. He also stated that McCrary was stupid for running away from the police.

{¶16} Counsel's trial strategy was to acknowledge the less serious offenses but to contest that McCrary had a gun. The camera in Officer Haas's cruiser clearly showed McCrary's vehicle leaving the scene of the stop, the car being chased by Haas's cruiser for several blocks, and McCrary running from the stopped car. Under the circumstances, counsel's strategy was valid. A defendant cannot succeed on an ineffective-assistance claim based on a disagreement about his attorney's trial strategy.⁵

{¶17} McCrary has not demonstrated that his counsel's representation fell below an objective standard of reasonableness or that, but for counsel's unprofessional errors, the result of the proceeding would have been otherwise. Therefore, he has failed to meet his burden to show ineffective assistance of counsel.⁶ We overrule his first assignment of error.

⁴ See *State v. Robinette*, 80 Ohio St.3d 234, 239-243, 1997-Ohio-343, 685 N.E.2d 762; *State v. Lopez*, 166 Ohio App.3d 337, 2006-Ohio-2091, 850 N.E.2d 781, ¶12-22; *State v. Kiefer*, 1st Dist. No. C-030205, 2004-Ohio-5054, ¶7-16.

⁵ *Brown*, supra, at ¶53; *State v. Winstead*, 1st Dist. No. C-080092, 2009-Ohio-973, ¶17.

⁶ See *Strickland*, supra, at 687-689, 104 S.Ct. 2052; *Hirsch*, supra, at 314-315.

III. Prosecutorial Misconduct

{¶18} In his second assignment of error, McCrary contends that the prosecutor's remarks in closing argument were improper. He argues that the prosecutor's remarks were not based on the evidence. He also argues that the prosecutor improperly commented on his credibility while vouching for Officer Haas's credibility. This assignment of error is not well taken.

{¶19} Prosecutors are normally entitled to wide latitude in their remarks.⁷ The test for prosecutorial misconduct is (1) whether the remarks were improper, and (2) if so, whether the remarks affected the accused's substantial rights.⁸ The conduct of the prosecuting attorney during trial cannot be grounds for error unless the conduct deprives the defendant of a fair trial.⁹

{¶20} McCrary failed to object to the comments that he now claims were improper. Thus, he cannot raise those issues on appeal unless they rise to the level of plain error.¹⁰ Our review of the prosecutor's entire argument shows that even if some comments were improper, none of the instances of which McCrary complains was so egregious as to affect his substantial rights or to deny him a fair trial. They certainly did not rise to the level of plain error.¹¹ Consequently, we overrule McCrary's second assignment of error.

IV. Weight and Sufficiency

{¶21} In his third assignment of error, McCrary argues that the evidence was insufficient to support his convictions. Our review of the record shows that a

⁷ *State v. Mason*, 82 Ohio St.3d 144, 162, 1998-Ohio-370, 694 N.E.2d 932; *State v. Williams*, 1st Dist. Nos. C-060631 and C-060668, 2007-Ohio-5577, ¶49.

⁸ *State v. Lott* (1990), 51 Ohio St.3d 160, 165, 555 N.E.2d 293; *Williams*, supra, at ¶49.

⁹ *State v. Keenan* (1993), 66 Ohio St.3d 402, 405, 613 N.E.2d 203; *Williams*, supra, at ¶49.

¹⁰ *State v. Underwood* (1983), 3 Ohio St.3d 12, 13, 444 N.E.2d 1332; *State v. Burrell*, 1st Dist. No. C-030803, 2005-Ohio-34, ¶24.

¹¹ See *Burrell*, supra, at ¶26; *Hirsch*, supra, at 309-310.

rational trier of fact, after viewing the evidence in a light most favorable to the prosecution, could have found that the state had proved beyond a reasonable doubt all the elements of having weapons while under a disability under R.C. 2923.13(A)(2), resisting arrest under R.C. 2921.33(C)(2) with accompanying specifications, and obstructing official business under R.C. 2921.31(A).¹²

{¶22} McCrary’s primary argument is that the state failed to prove that he had a gun. But Officer Haas specifically testified that he saw McCrary with a gun, and the jury believed that testimony. Matters as to the credibility of evidence are for the trier of fact to decide.¹³

{¶23} McCrary also argues that his convictions were against the manifest weight of the evidence. After reviewing the record, we cannot say that the jury lost its way and created such a manifest miscarriage of justice that we must reverse McCrary’s convictions and order a new trial. Therefore, the convictions were not against the manifest weight of the evidence.¹⁴ We overrule his third assignment of error.

V. Jury Instructions

{¶24} In his fourth assignment of error, McCrary takes issue with the trial court’s jury instructions. He argues that the trial court failed to give a limiting instruction regarding “other acts” evidence, improperly answered a jury question, and improperly read back testimony to the jury. This assignment of error is not well taken.

¹² See *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus; *State v. Russ*, 1st Dist. No. C-050797, 2006-Ohio-6824, ¶13.

¹³ *State v. Bryan*, 101 Ohio St.3d 272, 2004-Ohio-971, 804 N.E.2d 433, ¶116; *Williams*, supra, at ¶45.

¹⁴ *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541; *Russ*, supra, at ¶22-23.

{¶25} A trial court must fully and completely give the jury all instructions that are relevant and necessary for the jury to weigh the evidence and to discharge its duty as the fact-finder.¹⁵ An appellate court will not reverse a conviction due to improper jury instructions unless the defendant was prejudiced.¹⁶

{¶26} We note that McCrary did not ask for or object to any of the instructions of which he now complains. Consequently, he has waived any error and we can reverse only upon a finding of plain error.¹⁷

{¶27} First, McCrary contends that the trial court should have given a limiting instruction relating to “other acts” evidence. Most of the evidence that, according to McCrary, should have been addressed in a limiting instruction was properly admitted at trial or admitted by McCrary himself on direct examination. The prosecutor did improperly ask him if he had ever run from police, but since he admitted that he had run from the police in the case before the court, any error was not prejudicial. We cannot hold that, but for the lack of a limiting instruction, the result of the trial clearly would have been otherwise. Therefore, the error did not rise to the level of plain error.¹⁸

{¶28} McCrary next argues that the trial court erred in answering the jury’s question. The jurors asked for a definition of the word “brandish,” and the trial court told them to use the “normal English meaning” of the term. He contends that one of the Ohio Jury Instructions defines the term, and that the trial court should have used that instruction.

¹⁵ *State v. Comen* (1990), 50 Ohio St.3d 206, 553 N.E.2d 640, paragraph two of the syllabus; *State v. Dieterle*, 1st Dist. No. C-070796, 2009-Ohio-1888, ¶21.

¹⁶ *Dieterle*, supra, at ¶21.

¹⁷ Crim.R. 30(A); *State v. Coley*, 93 Ohio St.3d 253, 266, 2001-Ohio-1340, 754 N.E.2d 1129; *State v. Dixon*, 1st Dist. No. C-030227, 2004-Ohio-2575, ¶21-22.

¹⁸ *State v. Wickline* (1990), 50 Ohio St.3d 114, 119-120, 552 N.E.2d 913; *Hirsch*, supra, at 309.

{¶29} The method used to answer questions asked by the jury lies within the trial court’s discretion.¹⁹ The use of the Ohio Jury Instructions is not mandatory, and they should not be blindly applied in all cases. They do not have the force or effect of a rule of law, but are merely guides.²⁰

{¶30} The Ohio Jury Instructions defined the term “brandish” at the time of the trial as “to wave or exhibit in a menacing or challenging manner.”²¹ This definition came from a comment under the section about firearm specifications. It was similar to the dictionary definition, which defines the term to mean “to shake or wave (as a weapon) menacingly.”²²

{¶31} Despite McCrary’s claim to the contrary, the definition of the term “brandish” would have been within the jury’s knowledge. Further, the dictionary definition is nearly identical to the one provided in the Ohio Jury Instructions. Under the circumstances, we cannot hold that the trial court abused its discretion in telling the jury to use the “normal English definition” of the word, much less that it committed plain error.

{¶32} Finally, McCrary contends that the trial court erred by reading back only a portion of Officer’s Haas’s testimony upon a request by the jury. The decision whether to read testimony to the jury after it retires for deliberation lies within the trial court’s discretion.²³ The jury specifically asked the court to read back Officer Haas’s testimony about when McCrary had reached for his waist. This testimony was crucial to several issues in the case. We cannot hold that the trial court’s decision to

¹⁹ *State v. Haynes*, 1st Dist. No. C-020685, 2004-Ohio-762, ¶12.

²⁰ *Id.* at ¶10; *State v. Napier* (1995), 105 Ohio App.3d 713, 720-721, 664 N.E.2d 1330.

²¹ 4 Ohio Jury Instructions (2007), Section 413.37.

²² Merriam-Webster Online Dictionary (2009).

²³ *State v. Berry* (1971), 25 Ohio St.2d 255, 267 N.E.2d 775, paragraph four of the syllabus; *State v. Terry*, 1st Dist. No. C-040261, 2005-Ohio-4140, ¶39, reversed on other grounds, *In re Ohio Criminal Sentencing Statutes Cases*, 109 Ohio St.3d 313, 2006-Ohio-2109, 847 N.E.2d 1174.

read back that specific testimony was so arbitrary, unreasonable, or unconscionable as to connote an abuse of discretion.²⁴ Certainly, any error did not rise to the level of plain error, and we overrule McCrary's fourth assignment of error

VI. Sentencing

{¶33} In his fifth assignment of error, McCrary contends that he was improperly sentenced. First, he argues that his convictions for resisting arrest and obstructing official business should have been merged because they involved allied offenses of similar import under R.C. 2941.25. We find no merit in this argument.

{¶34} The state did not use the same conduct to prove resisting arrest and obstructing official business. The obstructing conviction was based on McCrary providing false information to Officer Haas. The resisting-arrest conviction was based on his running from the Officer Haas and struggling as the officer tried to arrest and handcuff him. Since the two offenses were based on separate conduct, McCrary cannot benefit from the protection of R.C. 2941.24(A), and we need not conduct the allied-offense analysis.²⁵ Consequently, the trial court properly sentenced McCrary for both resisting arrest and obstructing official business.

{¶35} McCrary next argues that his sentences were excessive. We first note that the trial court imposed consecutive sentences in this case. In *Oregon v. Ice*,²⁶ the United States Supreme Court recently discussed the constitutional implications of imposing consecutive sentences under another state's sentencing scheme. The full ramifications of that case on Ohio law have yet to be determined.²⁷ Nevertheless,

²⁴ See *State v. Clark*, 71 Ohio St.3d 466, 470, 1994-Ohio-43, 644 N.E.2d 331.

²⁵ *State v. Cooper*, 104 Ohio St.3d 293, 2004-Ohio-6553, 819 N.E.2d 657, ¶17-30; *State v. Johnson*, 1st Dist. Nos. C-080156 and C-080158, 2009-Ohio-2568, ¶85-92.

²⁶ (2009), ___ U.S. ___, 129 S.Ct. 711.

²⁷ *State v. Elmore*, ___ Ohio St.3d ___, 2009-Ohio-3478, ___ N.E.2d ___, ¶34-35.

even after *Ice*, Ohio courts still have authority to impose consecutive sentences.²⁸ Since McCrary failed to specifically raise any issue related to the imposition of consecutive sentences, he has waived the issue and we decline to address it.

{¶36} Trial courts have full discretion to impose prison sentences within the statutory range for the crimes committed.²⁹ McCrary was convicted of one third-degree felony and two fourth-degree felonies. The sentences were within the statutory ranges for those levels of offenses.³⁰ They were based on his criminal record and his failure to accept responsibility for the crimes. McCrary has failed to demonstrate that the sentences were so arbitrary, unreasonable, or unconscionable as to connote an abuse of discretion.³¹ Therefore, we overrule his fifth assignment of error, and we affirm his convictions.

Judgment affirmed.

HENDON, P.J., and SUNDERMANN, J., concur.

Please Note:

The court has recorded its own entry this date.

²⁸ *Id.*; *State v. Starett*, 4th Dist. No. 07CA30, 2009-Ohio-744, ¶35.

²⁹ *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, paragraph seven of the syllabus; *Dieterle*, *supra*, at ¶42.

³⁰ R.C. 2929.14(A)(3) and 2929.14(A)(4).

³¹ See *Clark*, *supra*, at 470; *State v. Henderson*, 1st Dist. Nos. C-060799 and C-060823, 2007-Ohio-5128, ¶7.