

STATE OF OHIO)
)ss:
COUNTY OF LORAIN)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C.A. No. 21CA011801

Appellee

v.

DONALD MIMS

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF LORAIN, OHIO
CASE No. 19CR101456

Appellant

DECISION AND JOURNAL ENTRY

Dated: August 14, 2023

FLAGG LANZINGER, Judge.

{¶1} Defendant-Appellant, Donald Mims, appeals from the judgment of the Lorain County Court of Common Pleas. This Court affirms.

I.

{¶2} K.T. went out to a bar with a friend one evening. He planned to spend the night at the friend’s house. Sometime after midnight, he left his friend at the bar and walked back to the friend’s house alone. He decided to sit in a chair outside the house to wait for his friend. While waiting, he heard a girl screaming. He looked across the street. He saw a man dragging a girl by her hair.

{¶3} K.T. yelled at the man. The man eventually walked over to K.T. The man pointed a gun at him. K.T. observed the gun had a light mounted on it. The two exchanged words, and the man began beating K.T. with the gun. The man hit K.T. multiple times. The man then walked

back across the street. When K.T. was able to stand, he walked to a nearby police station for help. Officers interviewed him at the station before an ambulance took him to the hospital.

{¶4} Officers responded to the scene of the incident to investigate. They saw a car parked in the area. There was a female in the driver's seat and a male in the front passenger's seat. The officers later identified the male as Mr. Mims. As the police cruiser approached the parked car from behind, Mr. Mims exited the car. He entered a nearby house. The officers then approached the car on foot and spoke with the female.

{¶5} An officer saw a gun lying on the front passenger floorboard of the car. He also saw what appeared to be blood on the front passenger's side door handle. Officers eventually located Mr. Mims inside the house they saw him enter. They noted that he had removed his sweatshirt and had changed his pants. Nevertheless, the officers observed a small bloodstain on his t-shirt and a fresh wound to his hand. The officers arrested Mr. Mims. They confiscated the gun from the car. The gun had a light mounted on its end. The gun had one live round in its chamber and several rounds in its magazine. DNA testing uncovered one major DNA profile on the gun. That profile was consistent with Mr. Mims' profile.

{¶6} In Criminal Case No. 19CR101456, Mr. Mims was charged with (1) tampering with evidence; (2) two counts of having a weapon under disability; (3) carrying a concealed weapon; (4) improperly handling a firearm in a motor vehicle; and (5) obstructing official business. In Criminal Case No. 19CR101457, he was charged with two counts of felonious assault. Each of his felonious assault counts also carried a firearm specification.

{¶7} Upon motion, the trial court consolidated Mr. Mims' cases for trial. A jury was unable to reach a unanimous verdict on three counts: tampering with evidence, obstructing official business, and one count of felonious assault. Further, the jury was unable to reach a unanimous

verdict on either firearm specification. The jury found Mr. Mims not guilty of carrying a concealed weapon. It found him guilty of his remaining four charges.

{¶8} The trial court merged the two counts of having a weapon under disability as allied offenses of similar import. The court sentenced Mr. Mims to a total of nine to twelve and one-half years in prison.

{¶9} Mr. Mims now appeals his convictions. He raises four assignments of error for review. To facilitate our review, we rearrange his assignments of error.

II.

ASSIGNMENT OF ERROR IV

THE TRIAL COURT ERRED TO THE PREJUDICE OF THE APPELLANT BY FAILING TO DECLARE A MISTRIAL BASED ON JUROR MISCONDUCT.

{¶10} In his fourth assignment of error, Mr. Mims argues the trial court erred by refusing to declare a mistrial. He claims juror misconduct deprived him of a fair trial. This Court rejects his argument.

{¶11} “A trial court enjoys broad discretion in dealing with matters of juror misconduct.” *State v. Hickman*, 9th Dist. Summit No. 27321, 2015-Ohio-4668, ¶ 31. Consequently, a court’s ruling on a motion for mistrial or a motion for a new trial based on juror misconduct will be reversed only for an abuse of discretion. *State v. Roper*, 9th Dist. Summit No. 29466, 2021-Ohio-188, ¶ 8; *State v. Dukes*, 9th Dist. Summit No. 27966, 2019-Ohio-2893, ¶ 19. An abuse of discretion implies the court’s decision is arbitrary, unreasonable, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983). When applying this standard, a reviewing court is precluded from simply substituting its own judgment for that of the trial court. *Pons v. Ohio State Med. Bd.*, 66 Ohio St.3d 619, 621 (1993).

{¶12} “When analyzing a case of alleged juror misconduct, it must be determined (1) whether misconduct actually occurred and (2) whether the misconduct materially prejudiced the defendant’s substantial rights.” *State v. Morris*, 9th Dist. Summit No. 25519, 2011-Ohio-6594, ¶ 28. *Accord Roper* at ¶ 9. “Thus, even when juror misconduct has, in fact, occurred, a complaining party must establish prejudice.” *Hickman* at ¶ 32. “[T]he trial judge is in the best position to ascertain the nature of the alleged jury misconduct and to fashion the appropriate remedy if the conduct did occur.” *Dukes* at ¶ 19. “A juror’s belief in his or her own impartiality is not inherently suspect and may be relied upon by the trial court.” *State v. Phillips*, 74 Ohio St.3d 72, 89 (1995).

{¶13} At the start of Mr. Mims’ trial, the trial court instructed the jury they were not permitted to take notes during the trial. A full day of testimony ensued. On the second day of trial, defense counsel alerted the court that one of the jurors may have taken notes. The trial court interviewed the juror. The juror admitted she had taken some notes because she had a poor memory. She apologized profusely and indicated that she meant to ask the court whether she could take notes during breaks. The trial court explained that no notetaking of any kind was permitted. The court asked the juror whether she had shared her notes with any other jurors. The juror denied having done so. The court then spoke with the attorneys.

{¶14} Mr. Mims moved for a mistrial based on juror misconduct. He argued that the juror could not continue to serve. He further argued that the trial could not proceed because there was no alternate juror. The trial court refused to declare a mistrial. Instead, the court confiscated the juror’s notes, admonished her, reminded her notetaking was prohibited, and instructed her not to discuss her notetaking with any of her fellow jurors. The juror repeatedly apologized. She agreed she would not take any additional notes or discuss her notes or notetaking with the other jurors.

{¶15} Mr. Mims argues juror misconduct occurred when the juror disregarded the trial court’s instruction and took notes. According to Mr. Mims, that misconduct prejudiced him because (1) the trial court did not question the other jurors to see if the misconduct had affected them, and (2) the court acknowledged the misconduct had placed everyone “in a very difficult position” given that there was no alternate juror. Under the foregoing circumstances, Mr. Mims argues, the court abused its discretion by denying his motion for a mistrial.

{¶16} Having reviewed the record, this Court cannot conclude that the trial court went so far as to abuse its discretion when it denied Mr. Mims’ motion for a mistrial. *See Dukes*, 2019-Ohio-2893, at ¶ 19. “[N]otetaking by a juror does not, by itself, constitute unfair prejudice to the defendant.” *State v. Loza*, 71 Ohio St.3d 61, 74 (1994). Moreover, the record reflects the trial court promptly took corrective actions when it learned that a juror had not adhered to its instruction not to take notes. The trial court confiscated the juror’s notes, ensured that she understood its instructions going forward, emphasized the importance of following its instructions, and asked whether she had shared her notes with any of the other jurors. The juror profusely apologized, promised to follow the court’s instruction going forward, and confirmed that she had not shared her notes with anyone. It was not unreasonable for the trial court to rely on her statements. *See Phillips*, 74 Ohio St.3d at 89. Mr. Mims has not shown that any juror misconduct that occurred herein materially prejudiced his substantial rights. *See Morris*, 2011-Ohio-6594, at ¶ 28. Nor has he shown that the court acted unreasonably, arbitrarily, or unconscionably in refusing to grant a mistrial. *See State v. Cody*, 9th Dist. Summit No. 13182, 1987 WL 31924, *1 (Dec. 23, 1987). As such, his fourth assignment of error is overruled.

ASSIGNMENT OF ERROR III

THE VERDICT IN THIS CASE IS AGAINST THE SUFFICIENCY OF THE EVIDENCE AND SHOULD BE REVERSED BECAUSE IT VIOLATES THE

FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTION 10 OF THE CONSTITUTION OF THE STATE OF OHIO.

{¶17} In his third assignment of error, Mr. Mims argues his convictions for having a weapon under disability are based on insufficient evidence. Specifically, he argues the State failed to prove operability and, as such, never proved he had a “firearm.” This Court rejects his argument.

{¶18} Whether a conviction is supported by sufficient evidence is a question of law, which we review de novo. *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997). In carrying out this review, our “function * * * is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant’s guilt beyond a reasonable doubt.” *State v. Jenks*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus. “The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.” *Id.*

{¶19} R.C. 2923.13(A) prohibits anyone who has been convicted of a qualifying offense from knowingly acquiring, having, carrying, or using “any firearm or dangerous ordnance * * *.” The term “[f]irearm’ means any deadly weapon capable of expelling or propelling one or more projectiles by the action of an explosive or combustible propellant.” R.C. 2923.11(B)(1). The term “includes an unloaded firearm, and any firearm that is inoperable but that can readily be rendered operable.” *Id.* “In determining whether a firearm is operable, the trier of fact examines the totality of the circumstances.” *State v. Johnson*, 9th Dist. Lorain No. 14CA010688, 2016-Ohio-872, ¶ 8. “Proof of the operability of a firearm can be established by circumstantial evidence, which can consist of the brandishing of a firearm by the defendant and an implicit threat to shoot it.” *State v. Clayton*, 9th Dist. Summit No. 26910, 2014-Ohio-2165, ¶ 8. *Accord* R.C.

2923.11(B)(2). When a gun was loaded at the time of an offense and was later submitted into evidence, “a jury could reasonably conclude that the [gun] was operable.” *State v. Hunter*, 9th Dist. Medina No. 17CA0069-M, 2018-Ohio-4249, ¶ 8.

{¶20} Mr. Mims was charged with violating R.C. 2923.13(A)(2) and (A)(3). He does not dispute that the State proved he was subject to a disability under those subsections. Nor does he dispute that the State proved he had a gun in his possession. Instead, Mr. Mims argues his convictions are based on insufficient evidence because the State never proved the gun was operable, and thus, a “[f]irearm” for purposes of R.C. 2923.11(B)(1). He points to the testimony of the State’s lead detective. When asked whether he believed the gun was operable, the lead detective testified:

I don’t have anything to say one way or the other. It doesn’t make much sense that someone would carry around a firearm that is not operable.

Mr. Mims argues the detective’s inability to testify that the gun was operable shows the State failed to prove operability.

{¶21} Viewing the evidence in a light most favorable to the State, a rational trier of fact could have concluded that the State proved operability beyond a reasonable doubt. *See Jenks*, 61 Ohio St.3d at paragraph two of the syllabus. The jury heard testimony that Mr. Mims held a gun to K.T.’s head before beating him with it. *See Clayton* at ¶ 8 (brandishing a gun serves as circumstantial evidence of operability). The gun had a flashlight mounted on its end. The gun the police confiscated from the car they saw Mr. Mims vacate also had a flashlight mounted on its end. From that evidence, the jury reasonably could have concluded that the gun in the car was the same one Mr. Mims had brandished at K.T. While the lead detective refused to testify that the gun was operable, he noted it would not “make much sense [for] someone [to] carry around a firearm that [was] not operable.” A different officer testified the gun was loaded with one round in the

chamber and several in its magazine. He testified that, when he recovered the gun, it “was in the position and/or capable to shoot with the pull of a trigger.” The State also submitted the gun as evidence at trial. Based on the totality of the circumstances, the jury reasonably could have concluded that the State proved operability through circumstantial evidence. *See Hunter* at ¶ 8. As such, Mr. Mims’ third assignment of error is overruled.

ASSIGNMENT OF ERROR I

THE TRIAL COURT ERRED IN CONSIDERING AND ACCEPTING THE TESTIMONY OF THE OFFICER AS AN EXPERT WITNESS AS HIS CREDENTIALS AND TESTIMONY WERE NOT IN COMPLIANCE WITH EVID.R. 703 AND 705 AND LAW OF THE STATE OF OHIO.

{¶22} In his first assignment of error, Mr. Mims argues the trial court erred when it allowed the State to present expert testimony without tendering its witness as an expert or submitting an expert report in advance of trial. Upon review, we reject his argument.

{¶23} “For reversible error to exist, there must be both error and resulting prejudice.” *State v. Ross*, 9th Dist. Lorain No. 21CA011729, 2023-Ohio-1185, ¶ 25. Error in the admission of testimony will not result in a reversal if the record reflects the error was harmless beyond a reasonable doubt. *See State v. Boaston*, 160 Ohio St.3d 46, 2020-Ohio-1061, ¶ 60. The error must have impacted the verdict. *See State v. Ali*, 9th Dist. Summit No. 29611, 2021-Ohio-4596, ¶ 10.

{¶24} When the lead detective testified, the State asked him a series of questions regarding operability. The lead detective admitted the gun had not been test-fired, and he could not definitively say whether it was operable. The State then asked whether he had performed any kind of informal test to see if the gun worked. The lead detective said he had performed a pencil test. He explained that he had inserted a pencil into the barrel of the gun “to see if the hammer would fall, strike the firing pin, and eject the pencil.” He confirmed the test had resulted in the pencil being ejected. The State asked him to demonstrate the pencil test for the jury. The lead

detective complied. Mr. Mims objected to the State's questions regarding operability and the pencil test.

{¶25} According to Mr. Mims, the trial court allowed the State to elicit expert testimony from the lead detective. He argues that the operability of a firearm is not a matter within the common knowledge of a lay witness. He argues that any opinions the lead detective offered regarding operability and any tests he performed to aid in the formation of his opinions should have been disclosed in an expert report and sent to the defense in advance of the trial. Because the defense was not provided with that information before trial, Mr. Mims argues his due process rights were violated.

{¶26} Assuming without deciding that the trial court erred by admitting certain portions of the lead detective's testimony, this Court concludes that error was harmless beyond a reasonable doubt. *Boaston*, 160 Ohio St.3d 46, 2020-Ohio-1061, at ¶ 60. First, the lead detective readily admitted he could not say whether the gun was operable. He refused to offer an opinion on that ultimate issue. Second, the State produced sufficient evidence the gun was operable independent of his testimony. *See* Discussion of Assignment of Error III, *supra*. The jury heard testimony that Mr. Mims brandished the gun by pointing it at K.T.'s head. They heard a different officer testify the gun had a live round in its chamber, had several additional rounds in its magazine, and "was in the position and/or capable to shoot with the pull of a trigger." Mr. Mims did not object to that testimony. Moreover, the State produced the gun at trial. Even assuming the trial court should have excluded the lead detective's testimony about the pencil test, this Court is not convinced his testimony impacted the jury's verdicts. *See Ali*, 2021-Ohio-4596, at ¶ 39-43. Thus, Mr. Mims' first assignment of error is overruled.

ASSIGNMENT OF ERROR II

THE TRIAL COURT VIOLATED MR. MIMS' U.S. CONSTITUTION'S SIXTH AMENDMENT RIGHTS WHEN IT DENIED HIM THE ABILITY TO EFFECTIVELY CROSS-EXAMINE A WITNESS REGARDING AN ESSENTIAL ELEMENT OF THE CHARGED OFFENSE.

{¶27} In his second assignment of error, Mr. Mims argues the trial court denied him his constitutional right to effectively cross-examine the lead detective. According to Mr. Mims, he sustained prejudice when the court overruled his objections to the detective's testimony about the pencil test. He argues that he was unable to effectively cross-examine the detective about the reliability of that test because the first time he learned of it was at trial. By allowing the detective to testify about the test, Mr. Mims argues, the trial court violated his right to an effective cross-examination.

{¶28} Upon review, this Court rejects Mr. Mims' argument for two reasons. First, a review of the record reveals that he did cross-examine the lead detective about the pencil test and his testimony on operability. The detective admitted he could have requested the gun be test-fired to ensure it was operable. He also admitted that he, personally, would not rely on a gun that had not been test-fired. The detective never suggested the pencil test was a substitute for a test-fire to ensure operability. Indeed, even on direct examination, he declined to take a position on the ultimate issue of operability.

{¶29} Second, we have already determined that any error in the admission of the lead detective's testimony about the pencil test was harmless beyond a reasonable doubt. *See* Discussion of Assignment of Error I, *supra*. Reversible error will not lie in the absence of resulting prejudice. *Ross*, 2023-Ohio-1185, at ¶ 25. Because the admission of the detective's testimony was harmless under the circumstances, Mr. Mims' second assignment of error is overruled.

III.

{¶30} Mr. Mims' assignments of error are overruled. The judgment of the Lorain County Court of Common Pleas is affirmed.

Judgment affirmed.

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(C). 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 to Appellant.

JILL FLAGG LANZINGER
FOR THE COURT

SUTTON, P. J.
STEVENSON, J.
CONCUR.

APPEARANCES:

GIOVANNA V. BREMKE, Attorney at Law, for Appellant.

J.D. TOMLINSON, Prosecuting Attorney, and LINDSEY C. POPROCKI, Assistant Prosecuting Attorney, for Appellee.