

[Cite as *State v. Bourn*, 2010-Ohio-1203.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92834

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MELVIN BOURN

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-519957

BEFORE: Jones, J., Dyke, P.J., and Celebrezze, J.

RELEASED: March 25, 2010

JOURNALIZED:

ATTORNEY FOR APPELLANT

Thomas A. Rein
The Leader Building, Suite 940
526 Superior Avenue
Cleveland, Ohio 44114

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor

BY: Jesse W. Canonico
Joseph C. Patituce
Assistant Prosecuting Attorneys
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

LARRY A. JONES, J.:

{¶ 1} Defendant-appellant, Melvin Bourn (“Bourn”), appeals the decision of the lower court finding him guilty on three separate counts. Having reviewed the arguments of the parties and the pertinent law, we hereby affirm the decision of the lower court.

STATEMENT OF THE CASE

{¶ 2} A grand jury returned a three-count indictment in Case No. CR-519957 against Bourn. Count 1 was for failure to provide notice of change of address with a prior conviction, in violation of R.C. 2950.05(E)(1), a felony of the third degree. Count 2 was for failure to verify address with a prior conviction, in violation of R.C. 2950.06(F), a felony of the third degree. Count 3 was for tampering with records, in violation of R.C. 2913.42, a felony of the third degree.

{¶ 3} At his arraignment, Bourn entered pleas of not guilty. A jury trial commenced. The state presented its case and at the close of the state’s case, the defense moved for acquittal. The motion was denied.

{¶ 4} The jury found Bourn guilty on all three counts. The court sentenced Bourn to a mandatory 5-year prison term on each count, to be served concurrently. Bourn now appeals.

STATEMENT OF THE FACTS

{¶ 5} This case involves the address registration requirement for Tier 3 convicted sex offender, Bourn. He had most recently registered with the sheriff's office on July 23, 2008. Bourn listed his permanent residence address as 3276 West 33rd Street, Cleveland, Ohio, and gave no secondary residential address.

{¶ 6} Detective Kathleen Orlando ("Orlando"), of the Cuyahoga County Sheriff's Office, Sex Crimes / Sex Offender's Unit, received a tip that Bourn did not actually live at the West 33rd Street address listed as his permanent address. Orlando contacted the tipster, confirmed the substance of the tip, and then began an investigation. Bourn had an outstanding arrest warrant, so Orlando engaged Deputy Eric Enk ("Enk"), of the Cuyahoga County Sheriff's Office, and the Sheriff's Intensive Supervised Probation unit to assist in apprehending Bourn.

{¶ 7} On July 28, 2008, Deputy Jeff Sikora ("Sikora"), also of the Cuyahoga County Sheriff's Office, and Enk met with Francine Bourn, Bourn's wife, at the sheriff's office. She told officers that Bourn had listed his permanent residence as 3276 West 33rd Street, but that he was actually living at 12805 Lock Avenue in Cleveland. Sikora and Enk went to 12805 Lock Avenue and knocked on the door. Bourn's girlfriend answered and told officers Bourn was inside the house.

{¶ 8} Sikora saw Bourn standing at the top of the staircase. Bourn got dressed and was asked to sit on the couch, and was then arrested on the outstanding arrest warrant. The police did a protective sweep of the house to ensure that no other criminals or fugitives were being harbored there. Sikora searched one bedroom and observed men's shirts, coats, pants, shoes, and other

clothing both in the closet and on the floor near the bed. The bed was not made and appeared to have been recently slept in. It appeared to Sikora that a male lived in the house.

{¶ 9} A few days later on August 1, 2008, after Bourn was arrested on the warrant violation, as part of their investigation, Orlando and her partner, Detective Susan Dechant (“Dechant”), went to the 3276 West 33rd Street residence and met with Bourn’s mother. Orlando learned that Bourn had no personal sleeping area in his mother’s home and no clothing there. Bourn’s mother told the detectives that Bourn did not live there permanently and eventually admitted that she had not seen or spoken to her son recently. She further stated that she had no idea Bourn had been arrested two days earlier and was being held in jail.

ASSIGNMENTS OF ERROR

{¶ 10} Bourn assigns six assignments of error on appeal:

{¶ 11} “[1.] The trial court erred in violation of the Sixth and Fourteenth Amendments to the United States Constitution which provide rights to confrontation and cross-examination, and Ohio Evidence Rules 801 and 802, when it permitted state witnesses to testify with inadmissible hearsay statements.

{¶ 12} “[2.] The state failed to present sufficient evidence to sustain a conviction against appellant.

{¶ 13} “[3.] Appellant’s convictions are against the manifest weight of the evidence.

{¶ 14} “[4.] The trial court erred and deprived appellant of a fair trial when it allowed other acts testimony whose prejudicial effect outweighs its probative value.

{¶ 15} “[5.] Appellant was denied a fair trial by the deputy’s improper comments while testifying.

{¶ 16} “[6.] Appellant was denied effective assistance of counsel as guaranteed by Section 10, Article I, of the Ohio Constitution and the Sixth and Fourteenth Amendments of the United States constitution when defense counsel failed to object to hearsay testimony, failed to object to the deputy’s opinion testimony, failed to object to Appellant’s other pending case, and opening the door as to Appellant’s character.”

LEGAL ANALYSIS

Witness Testimony

{¶ 17} Bourn argues that the lower court erred regarding his right to confrontation and cross-examination when it allegedly allowed the state witnesses to testify to inadmissible hearsay statements.

{¶ 18} However, a review of the trial court record reflects that Bourn failed to raise this argument in the trial court. Bourn’s failure to object to any of the alleged hearsay testimony waives all but plain error review. In order to prevail on a claim of plain error, appellant must be able to demonstrate that the outcome of the trial would have been clearly different. *State v. Moulder*, Cuyahoga App. No. 80266, 2002-Ohio-5327. The plain error rule does not require reversal unless,

but for the error, the outcome of the trial would clearly have been otherwise. *State v. Alexander*, Cuyahoga App. No. 87109, 2006-Ohio-4760; *State v. Long* (1978), 53 Ohio St.2d 91, 372 N.E.2d 804.

{¶ 19} Here, significant testimony and evidence establishing Bourn's guilt was presented. For example, Orlando and Dechant, who specialize in these types of cases, testified that during the course of their investigation they learned that Bourn was not living at the registered address. In addition, a review of the direct examination of Bourn's mother shows inconsistencies in her testimony and even provides some support for the state's case:

Q. "Okay. Ma'am, I want to direct your attention back to July of last year. Do you remember when Detective Orlando and Detective DeChant from the county sheriff's office came out to speak with you?"

A. "I know detectives came out. I don't remember their names."
* * *

Q. "Is that detective here sitting at the table?"

A. "Yes."

Q. "Okay. And when they came out to your house did they tell you why they were there?"

A. "Yes."
* * *

Q. "Did they ask you if he lives there?"

A. "Yes."

Q. "And what did you tell them?"

A. "I told them that he did."

Q. "Okay. And did there come a time during this interview when you became upset?"

A. "Yes."

* * *

Q. "Okay. Well, at some point in this interview you told the detectives that your son, Melvin Bourn, does *not* live with you on a permanent basis, did you?"

A. "Yes."

* * *

Q. "And are you aware that as part of his registration Melvin is required to register his *permanent* residence address with the county?"

A. "Yes."¹

(Emphasis added.)

{¶ 20} The testimony concerning the tip police received from Bourn's wife did not violate his constitutional rights. In fact, when the testimony is reviewed against the totality of the state's evidence, it is clear that the testimony does not rise to the level of plain error.

{¶ 21} The relevant testimony is as follows:

Mr. Patituce: "Okay. Now I want to just direct your attention to a certain person. Did you ever have the occasion to arrest a Melvin Bourn?"

Deputy Sikora: "Yes, I did."

¹Tr. 307-316.

Mr. Patituce: “Could you describe to the jury and to the Court *the circumstances surrounding that arrest?*”

Deputy Sikora: “The 28th of July and a woman came down to our office and stated that she had some information. It was her husband and her name was Francine Bourn. She stated she had some information for us that he was not complying with the rules of sexual registration to verify his address* * *.”²

(Emphasis added.)

{¶ 22} A review of the record demonstrates that the testimony Bourn takes issue with was not offered to prove the truth of the matter asserted, but simply to explain the investigation. In addition to the testimony above, the state produced multiple witnesses that confirmed the tip that Bourn was not living at his registered address. As far as the tip itself is concerned, the state is allowed to offer to the jury, and explain to the jury, how Bourn was arrested.

{¶ 23} Accordingly, we find no error on the part of the lower court and overrule Bourn’s first assignment of error.

Insufficient Evidence and Manifest Weight

{¶ 24} Due to the substantial interrelation between Bourn’s second and third assignments of error, we shall address them together.

{¶ 25} “The legal concepts of sufficiency of the evidence and weight of the evidence are both quantitatively and qualitatively different.

{¶ 26} “With respect to sufficiency of the evidence, ‘sufficiency’ is a term of art meaning that legal standard which is applied to determine whether the case

may go to the jury or whether the evidence is legally sufficient to support the jury verdict as a matter of law. In essence, sufficiency is a test of adequacy. Whether the evidence is legally sufficient to sustain a verdict is a question of law. In addition, a conviction based on legally insufficient evidence constitutes a denial of due process.” (Internal citations omitted.) *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52, 678 N.E.2d 541.

{¶ 27} “Although a court of appeals may determine that a judgment of a trial court is sustained by sufficient evidence, that court may, nevertheless, conclude that the judgment is against the weight of the evidence. Weight of the evidence concerns ‘the inclination of the *greater amount of credible evidence*, offered in a trial, to support one side of the issue rather than the other. It indicates clearly to the jurors that the party having the burden of proof will be entitled to their verdict, if, on weighing the evidence in their minds, they shall find the *greater amount of credible evidence* sustains the issue which is to be established before them. Weight is not a question of mathematics, but depends on its *effect in inducing belief*.’

{¶ 28} “When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a ‘thirteenth juror’ and disagrees with the fact-finder’s resolution of the conflicting testimony.” *Id.*

{¶ 29} As to a claim that a judgment is against the manifest weight of the evidence, the court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses, and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction. *State v. Martin* (1983), 20 Ohio App.3d 172, 485 N.E.2d 717. The weight to be given the evidence and the credibility of the witnesses are primarily for the trier of fact to determine. *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212.

{¶ 30} In the case at bar, five witnesses testified or presented evidence supporting the lower court's decision. Bourn's mother testified regarding her statement that he did not reside with her on a permanent basis. Evidence and testimony was provided by deputies who investigated the allegations and discovered Bourn's actual residence. In addition, Orlando testified that the investigation revealed that Bourn was not residing at his registered address. Orlando testified as to her personal observations, and not hearsay, as Bourn claims in his argument. Sikora testified that he found Bourn residing at an address other than the address where he was registered. Sikora personally observed where Bourn was actually living and testified to the evidence that supported that conclusion.

{¶ 31} Accordingly, we find the evidence legally sufficient to sustain the trial court's convictions for all three counts: failure to provide notice of change of address with a prior conviction, failure to verify address with a prior conviction, and tampering with records. In addition, when the evidence is viewed in a light most favorable to the state, we find that all essential elements of Bourn's convictions were proven beyond a reasonable doubt. Moreover, nothing in the record demonstrates that the trial court lost its way in convicting Bourn.

Other Acts Testimony and Deputy Comments

{¶ 32} Bourn alleges the trial court committed error by allowing other acts testimony whose prejudicial effect does not substantially outweigh its probative

{¶ 33} value and by allowing improper comments by the deputy while testifying. Due to the substantial interrelation between appellant's fourth and fifth assignments of error we shall address them together.

{¶ 34} Bourn failed to object to any of the alleged improper character evidence and comments alleged at the time of trial. Accordingly, as previously stated here, Bourn waives all but plain error review. In order to prevail on a claim of plain error the appellant must be able to demonstrate that but for the alleged improper character evidence that the outcome of the trial would clearly have been otherwise. *State v. Underwood* (1983), 3 Ohio St.3d 12, 444 N.E.2d 1332; see, also, *State v. Long* (1978), 53 Ohio St.2d 91, 53 N.E.2d 804.

{¶ 35} As far as other acts testimony is concerned, Bourn argues that the state impermissibly introduced evidence that would not otherwise be introduced under Evid.R. 404(B). However, Evid.R. 404(B) allows for the state to introduce evidence pertaining to “motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” Bourn argues that the crime of felonious assault is not related to a sex crime or notification crime and should not have been permitted. However, a review of the record demonstrates that the state introduced the evidence of Bourn’s previous felonious assault warrant only to show motive, intent, plan, knowledge, and/or absence of mistake or accident, concerning Bourn’s criminal behavior in this case.

{¶ 36} As far as Bourn’s objections concerning Sikora’s comments while testifying, this court finds no error on the part of the trial court. Bourn claims that Sikora gratuitously offered his opinion about not believing Bourn’s story about where he lived and information about Bourn’s arrest record. However, a review of the transcript reveals that Sikora’s comments were proper because they were not used to bolster another witness. Sikora was testifying to the issuing of the warrants and the arrest of Bourn when he testified as follows:

Q. “When you observed Melvin what did you do?”

A. “We informed him the information that we received, that he was staying at this address, 12805 Lock Avenue, and he wasn’t supposed to be here.”

“And he immediately says, well, I don’t live here, I’m just here right now visiting.”

“Not to be the bearer of bad news, but I heard this story many times before. We ran him through LEADS, we found out he had an arrest warrant for Cleveland PD. We arrested him, turned him over to the Cleveland Police Department”³

{¶ 37} The testimony Bourn objects to simply concerns his outstanding warrants and how he was transferred into the custody of the Cleveland Police Department on his outstanding warrant. This portion of Sikora’s testimony does not concern the veracity of any of the state’s witnesses. The record demonstrates Sikora did not testify as to the veracity of any of the witnesses. Accordingly, we find no error on the part of the lower court.

{¶ 38} Bourn’s fourth and fifth assignments of error are hereby overruled.

Assistance of Counsel

{¶ 39} Bourn argues in his final assignment of error that he was denied effective assistance of counsel. In order to establish ineffective assistance of counsel, appellant must show that 1) the attorney’s performance was seriously deficient, and 2) such deficiencies must have prejudiced the defense to such an extent that the results of the trial are unreliable. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. Appellant must demonstrate a reasonable probability that, but for counsel’s unprofessional errors, the outcome of the trial would have been different. *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373. There is a presumption that all licensed attorneys are

³Tr. 271.

competent and that a challenged action or decision may be sound trial strategy. *State v. Hamblin* (1988), 37 Ohio St.3d 153, 524 N.E.2d 476.

{¶ 40} Bourn takes issue with defense counsel's questioning of Bourn's mother. Trial counsel's decision to use Bourn's mother to support his client's position was a part of counsel's trial strategy. Bourn's trial counsel was simply trying to execute what he believed to be the best strategy for this case. Bourn also argues that defense counsel should have objected to the testimony concerning his warrant. However, defense counsel may have surmised that objecting to the warrant testimony may have only served to draw more attention to that issue. Defense counsel may have thought it a better strategy to wait until Bourn testified to try to explain Bourn's motivation.

{¶ 41} A review of the record demonstrates nothing improper regarding the comments Bourn takes issue with. Bourn failed to demonstrate defense counsel's performance was seriously deficient, and such deficiencies must have prejudiced the defense to such an extent that the results of the trial are unreliable. We find no error on the part of the trial court.

{¶ 42} Accordingly, Bourn's sixth assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover of appellant 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, 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.

LARRY A. JONES, JUDGE

ANN DYKE, P.J., and
FRANK D. CELEBREZZE, JR., J., CONCUR