

[Cite as *State v. Hardware*, 2010-Ohio-4346.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93639

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

VAUGHN HARDWARE

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART, REVERSED
IN PART, AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-514466

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

RELEASED AND JOURNALIZED: September 16, 2010

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FRANK D. CELEBREZZE, JR., J.:

{¶ 1} Defendant-appellant, Vaughn Hardware, appeals his convictions on two counts of aggravated robbery. Based on our review of the record and

pertinent case law, we affirm in part, reverse in part, and remand for resentencing.

{¶ 2} On August 8, 2008, Kelly Bickenheuser and Brock Maxwell (“the victims”) were sitting in their car in the parking lot of Slim & Chubby’s, a bar in Lakewood, Ohio, waiting for some friends. The two noticed that the bouncer of the bar would unlock the bar’s doors and let individuals in, but they assumed that the bar was hosting a private party.

{¶ 3} After approximately 25 minutes, the victims noticed some commotion outside the bar. They testified that they saw several men yelling at someone inside the bar; two of the men were pounding on the door and were attempting to kick in the windows. These individuals were later identified as appellant and his co-defendant, Kenneth Morman.

{¶ 4} Once the commotion had stopped, appellant walked over to the victims’ car and asked Maxwell and Bickenheuser if they were cops. When they answered in the negative, appellant waved two men over to the car. The two men, Morman and a man who was never identified, walked up to the driver’s side door. The unidentified man put a gun to Maxwell’s head and demanded money. Maxwell refused to give the men any money, but Bickenheuser gave them \$180. According to Bickenheuser, appellant was yelling at the pair to give up their money throughout the robbery.¹ Maxwell

¹Bickenheuser provided a description of the men. The man she later

testified that appellant was only standing there, but was antagonizing or motivating the situation. Both victims testified that appellant then tried to reach into the car and take the keys. After appellant failed in this attempt, the victims drove off in the car, contacted the police, and waited at a restaurant for the police to arrive.

{¶ 5} Officer Richard Greco testified that he was dispatched to Slim & Chubby's due to reports that there were males attempting to break into the bar. Officer Greco was given a description of the men, a black vehicle, and a license plate number that was reported from the scene. Officer Greco went to the address that corresponded with the license plate number, which was an apartment building. As he pulled into the parking lot, he noticed the black vehicle parked there. He also noticed a male who fit one of the descriptions provided and learned that other officers had detained appellant. Officer Greco testified that the victims were driven to the apartment location and identified appellant and Morman as two of the men who robbed them.

{¶ 6} Appellant was indicted in a five-count indictment on two counts of kidnapping, two counts of aggravated robbery, and one count of vandalism. The state dismissed the vandalism count; a jury found appellant guilty of two counts of

identified as appellant was wearing a white tank top shirt and a pair of jeans. The man later identified as Morman was described as wearing jeans and a multi-colored polo. According to Bickenheuser, appellant and Morman arrived in a black vehicle and the other man had arrived in a Cadillac.

aggravated robbery, but not guilty of the firearm specifications and the two counts of kidnapping. Appellant was sentenced to four years for each count to run consecutively to one another for an aggregate sentence of eight years. This appeal followed. Appellant's counsel presents six assignments of error for our review; appellant raises three assignments of error in a pro se supplemental brief.

Law and Analysis

{¶ 7} For ease of discussion, appellant's arguments will be addressed in an order different from that in which they were presented.

Racial Composition of the Grand Jury

{¶ 8} Appellant argues in his pro se brief that he was denied the effective assistance of counsel when his trial attorney failed to challenge the systematic exclusion of members of his race from the jury. In order to substantiate a claim of ineffective assistance of counsel, appellant is required to demonstrate that: 1) the performance of defense counsel was seriously flawed and deficient; and 2) the result of appellant's trial or legal proceeding would have been different had defense counsel provided proper representation. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Brooks* (1986), 25 Ohio St.3d 144, 495 N.E.2d 407.

{¶ 9} In this case, appellant has presented no evidence that individuals of his race were systematically excluded from the jury selection process. He has also failed to demonstrate that the outcome of his trial would have been

different had these alleged errors not occurred. As such, appellant has not met his burden with regard to an ineffective assistance of counsel claim, and this assignment of error must be overruled.

Faulty Indictment

{¶ 10} In his pro se brief, appellant argues that the indictment in this case was faulty because it failed to include a mental state of recklessness as required by *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, 885 N.E.2d 917. Despite appellant's argument, the Ohio Supreme Court recently overruled its holding in *Colon* and held that "[a]n indictment that charges an offense by tracking the language of the criminal statute is not defective for failure to identify a culpable mental state when the statute itself fails to specify a mental state." *State v. Horner*, Slip Opinion No. 2010-Ohio-3830, paragraph one of the syllabus.

{¶ 11} Appellant argues that recklessness is the appropriate mens rea for aggravated robbery in violation of R.C. 2911.01(A)(2). While this may be true, appellant was indicted and convicted under R.C. 2911.01(A)(1). A review of the indictment in this case reveals that it tracks the language of R.C. 2911.01(A)(1), and thus no error occurred. Based on the Ohio Supreme Court's holding in *Horner*, appellant's first pro se assignment of error is overruled.

Manifest Weight of the Evidence

{¶ 12} Appellant argues, both pro se and through his attorney, that his convictions are against the manifest weight of the evidence. When determining whether a conviction is against the manifest weight of the evidence, “[t]he [appellate] 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.” *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717.

{¶ 13} In this case, the victims provided substantially similar versions of what occurred on August 8, 2008. Both testified that appellant approached their car and asked if they were the police. Once they answered in the negative, appellant waved two other men over to the car and a robbery occurred. Both victims also testified that appellant was not holding the gun throughout the robbery, but he was antagonizing the situation and demanding money.

{¶ 14} Common sense dictates that appellant’s vehicle was at the bar that evening because the vehicle’s license plate number was used to locate appellant’s residence after reports that men with guns were attempting to break into the bar. Both victims also identified appellant as one of the men involved in the robbery and stated that they were certain of their

identifications. This testimony was sufficient to find appellant guilty of aggravated robbery. There were no significant discrepancies in the testimony, and thus appellant's convictions were not against the manifest weight of the evidence.

Inconsistent Verdicts

{¶ 15} Appellant argues that the jury's verdict is inconsistent because it found him not guilty of the firearm specifications, but guilty of aggravated robbery, which requires the use of a deadly weapon or dangerous ordnance. "Under Ohio law, the several counts of an indictment containing more than one count are not interdependent, and an inconsistency in a verdict does not arise out of inconsistent responses to different counts, but only arises out of inconsistent responses to the same count." *State v. Houser* (May 30, 1996), Cuyahoga App. No. 69639. The issue to be determined then is whether the firearm specifications are considered to be part of the aggravated robbery count. *Id.*

{¶ 16} Appellant acknowledges this court's long line of cases holding that a not guilty verdict with regard to a firearm specification is not inconsistent with a guilty verdict for aggravated robbery. He relies on *State v. Evans*, 113 Ohio St.3d 100, 2007-Ohio-861, 863 N.E.2d 113, to argue that the firearm specification is considered dependent on the underlying charge, and thus the two are considered the same count. In *Evans*, the Court held

that “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.” *Id.* at ¶15, quoting *State v. Nagle*, 84 Ohio St.3d 280, 286, 1990-Ohio-507, 703 N.E.2d 773.

{¶ 17} Despite appellant’s contention that this language mandates that the verdicts in his case are inconsistent, this court has repeatedly held that a not guilty verdict on a firearm specification is not inconsistent with a guilty verdict for aggravated robbery. *State v. Fair*, Cuyahoga App. No. 89653, 2008-Ohio-930. In making this determination, the court in *Fair* held that the underlying offense and the firearm specification constitute different crimes. *Id.* at ¶24, citing *State v. Boyd* (1996), 110 Ohio App.3d 13, 673 N.E.2d 607. See, also, *State v. Howell*, Cuyahoga App. No. 91569, 2009-Ohio-3092. We are unwilling to overrule this court’s holding in *Fair*. Appellant’s first assignment of error is overruled.

Considering Alienage or Immigration Status at Sentencing

{¶ 18} Appellant argues that the trial court impermissibly considered his alienage or immigration status at sentencing. R.C. 2929.11(C) provides that “[a] court that imposes a sentence upon an offender for a felony shall not base the sentence upon the race, ethnic background, gender, or religion of the offender.” Although the trial judge in this case may not have harbored ill will or a discriminatory intent against appellant, the comments made at

sentencing in relation to appellant's immigration status were improper. The evidence is unclear as to whether the trial judge actually considered appellant's status in determining the proper sentence to be imposed; however, the comments were extensive enough to question whether his immigration status did, in fact, play a role. As such, this case is remanded for a de novo sentencing hearing wherein the trial judge may not consider appellant's national origin or immigration status in determining the proper sentence to be imposed.

{¶ 19} Appellant's remaining arguments relate only to his sentencing and are rendered moot by our disposition of his fourth assignment of error. Accordingly, those arguments will not be considered.

Conclusion

{¶ 20} Appellant presented no evidence to show that members of his race were systematically excluded from the jury or that the outcome of his trial would have been different had his trial counsel objected to an alleged exclusion. In addition, appellant's indictment tracked the language of R.C. 2911.01(A)(1), the aggravated robbery statute, and thus no mental state is required to be included. Appellant's convictions were not against the manifest weight of the evidence, nor did he receive inconsistent verdicts. The trial court erred, however, when it referenced appellant's immigration

status at sentencing. As such, appellant's convictions are affirmed, but this case must be remanded for a de novo sentencing.

{¶ 21} Convictions affirmed; cause reversed in part and remanded to the lower court for further proceedings consistent with this opinion.

It is ordered that appellant and appellee share the 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 convictions having been affirmed, any bail pending appeal is terminated.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

FRANK D. CELEBREZZE, JR., JUDGE

MELODY J. STEWART, P.J., CONCURS;
ANN DYKE, J., CONCURS IN PART AND DISSENTS
IN PART (WITH SEPARATE OPINION)

ANN DYKE, J., CONCURRING IN PART AND DISSENTING IN
PART:

{¶ 22} I agree with the conclusions reached by the majority with regard to the racial composition of the grand jury and the manifest weight of the evidence. I, likewise, agree that the indictment was not faulty and the verdicts were not inconsistent. I, however, disagree with the majority that

the case needs to be remanded for a new sentencing hearing because of the comments the trial judge made regarding appellant's alienage or immigration status.

{¶ 23} After reviewing the sentencing hearing in its entirety, I would find that the comments of the trial judge did not compromise the fundamental fairness of the sentencing proceeding. The record demonstrates that the judge considered the required statutory factors, including applicable seriousness and recidivism factors, such as appellant's criminal history and his conduct in the instant offense, before imposing the sentence — a sentence well within the acceptable range of penalties for two aggravated robbery convictions. Furthermore, as the majority notes, the record is void of any evidence affirmatively demonstrating that the appellant's alienage or immigration status was the basis of her sentencing decision. Accordingly, while the remarks were not advisable, I would find this assignment of error without merit and proceed to consider appellant's remaining assignments relating to his sentencing.