[Cite as *State v. Cover*, 2010-Ohio-291.]

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

State of Ohio — Court of Appeals No. H-08-033

Appellee — Trial Court Nos. CRI-2007-0366
CRI-2008-0617

v.

Eric Cover — **DECISION AND JUDGMENT**

Appellant — Decided: January 29, 2010

* * * * *

Russell V. Leffler, Huron County Prosecuting Attorney, and
Jennifer DeLand, Assistant Prosecuting Attorney, for appellee.

George C. Ford, Huron County Public Defender, and
David J. Longo, Assistant Public Defender, for appellant.

* * * * *

HANDWORK, J.

{¶ 1} Appellant, Eric Cover, appeals the judgment of the Huron County Court of Common Pleas. A jury convicted appellant of eight offenses: two counts of kidnapping, violations of R.C. 2905.01(A)(2) and (3) and felonies of the second degree; aggravated burglary,

a violation of R.C. 2911.11(A)(1)(2), and a felony of the first degree; felonious assault, a violation of R.C. 2903.11(A)(1) and a felony of the second degree; aggravated robbery, a violation of R.C. 2911.01(A)(1) and a felony of the first degree; robbery, a violation of R.C. 2911.02(A)(2) and a felony of the second degree; and conspiracy, a violation of R.C. 2903.01(A)(1) and (2) and a felony of the second degree.

{¶ 2} After the guilty verdict but before his sentencing hearing, appellant filed a motion for a new trial based on newly discovered evidence pursuant to Crim.R. 33(A)(6). At a hearing on the motion, appellant presented the testimony of Jeremy Holmberg, his half-brother, who was convicted for the same offenses and who was appellant's conspirator in the offenses. At the hearing, Holmberg testified that he committed the crimes with a second person and that appellant was not present and did not participate in the crimes.

{¶ 3} The trial court denied the motion for a new trial from the bench, finding that Holmberg's testimony did not constitute "newly discovered evidence" as required by Crim.R. 33(A)(6) and that Holmberg was not credible. Proceeding immediately to a sentencing hearing, the trial court sentenced appellant to a total of nine years incarceration. Appellant does not challenge his sentences on appeal.

{¶ 4} From that judgment of conviction, appellant raises three assignments of error for review:

{¶ 5} "I. Defendant-Appellant's convictions for kidnapping, aggravated burglary, aggravated robbery, felonious assault, robbery and conspiracy were against the manifest weight of the evidence.

{¶ 6} "II. The trial court erred to the prejudice of the Defendant-Appellant in overruling his objection to improper, inflammatory remarks by the state, during its rebuttal closing argument.

{¶ 7} "III. The trial court erred to the prejudice of the Defendant-Appellant in denying his motion for a new trial."

{¶ 8} We begin with appellant's first assignment of error. A conviction is against the manifest weight of the evidence when a greater amount of credible evidence supports acquittal. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387. Challenges to the weight of the evidence attack the credibility of the evidence presented. Id. In reviewing a claim that a trial court's judgment is against the manifest weight of the evidence, an appeals court acts as a "thirteenth juror" to determine whether the trier of fact lost its way and created such a manifest miscarriage of justice that the conviction must be overturned and a new trial ordered. Id. Reversals occur "only in the exceptional case in which the evidence weighs heavily against the conviction." Id.

{¶ 9} At trial, the state presented the following evidence relevant to appellant's arguments on appeal. On March 18, 2007, intruders kicked in the door of the residence of Brandon Taft and April Spain. Spain was asleep in a bedroom with her infant son sleeping in a bassinet next to her; Taft was in the living room. The intruders beat Taft and used duct tape to bind his hands and feet together, and wound duct tape around his face. One intruder then ordered Spain to crawl from the bedroom to the kitchen, where her hands and feet were duct taped and a jacket was thrown over her head. Spain was also beaten, and the intruders demanded drugs and money from both Spain and Taft. The intruders threatened to harm the

infant and Spain if Taft did not cooperate and tell them where his valuables were. Taft testified that at least one intruder threatened him with a knife; he felt a knife being pressed against his sides and he was subsequently treated for small puncture wounds.

{¶ 10} Taft testified that three intruders entered the residence, wearing dark t-shirts with "police" printed on them and shouting "police." They also wore dark ski masks which covered their faces. Neither Spain nor Taft were, therefore, able to identify the intruders by sight or by voice. Taft was definite, however, that three men entered the residence. The intruders took money, some jewelry, a Playstation, and a purse. Taft was treated for extensive injuries, photographs of which were introduced into evidence; his injuries required a hospital stay of several days.

{¶ 11} On cross-examination, appellant's counsel confronted Taft with his testimony from Holmberg's trial and out-of-court statements made to investigators, that there were two or three intruders and that Taft was uncertain as to whether there were two or three. Despite the discrepancy, Taft stated that there were three intruders. Spain could only say that she thought there were two or three, but could only say definitely that there were two.

{¶ 12} Five days later, appellant was a passenger in a car driven by Holmberg when a detective with the Huron County Sheriff's Department attempted to stop the vehicle. Holmberg led the officer on a chase which ended when Holmberg's vehicle crashed. Both appellant and Holmberg were arrested.

{¶ 13} At the station, appellant admitted that Holmberg asked appellant to rob the victims' residence, that they made masks in preparation, and that he accompanied Holmberg to

the victims' residence. Appellant denied, however, that he actually participated in the offenses, instead insisting that he abandoned the scene. Appellant's one hand and knuckles were bruised and had been bleeding; medical records showed that appellant had sought medical treatment after the offenses. During his testimony, appellant explained that he had punched a wall a couple of days after the offenses.

{¶ 14} The state also introduced evidence that appellant had given a purse to a female friend the day after the offenses. The purse was identified as belonging to Spain and was taken during the offenses. Appellant explained that Holmberg had given him the purse after the offenses, but that appellant did not know it was taken from the victims.

{¶ 15} Appellant was convicted of kidnapping, a violation of R.C. 2905.01(A)(2) and (3), which provide:

{¶ 16} "(A) No person, by force, threat, or deception, * * * shall remove another from the place where the other person is found or restrain the liberty of the other person, for any of the following purposes:

{¶ 17} "* * *

{¶ 18} "(2) To facilitate the commission of any felony or flight thereafter;

{¶ 19} "(3) To terrorize, or to inflict serious physical harm on the victim or another; * * *."

{¶ 20} Appellant was also convicted of aggravated burglary, a violation of R.C. 2911.11(A)(1) and (2), which provide:

{¶ 21} "(A) No person, by force, stealth, or deception, shall trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure, when another person other than an accomplice of the offender is present, with purpose to commit in the structure or in the separately secured or separately occupied portion of the structure any criminal offense, if any of the following apply:

{¶ 22} "(1) The offender inflicts, or attempts or threatens to inflict physical harm on another;

{¶ 23} "(2) The offender has a deadly weapon or dangerous ordnance on or about the offender's person or under the offender's control."

{¶ 24} Appellant was also convicted of felonious assault, a violation of R.C. 2903.11(A)(1), which provides:

{¶ 25} "(A) No person shall knowingly do either of the following:

{¶ 26} "(1) Cause serious physical harm to another or to another's unborn; * * *."

{¶ 27} Appellant was also convicted of aggravated robbery, a violation of R.C. 2911.01(A)(1), which provides:

{¶ 28} "(A) No person, in attempting or committing a theft offense, as defined in section 2913.01 of the Revised Code, or in fleeing immediately after the attempt or offense, shall do any of the following:

{¶ 29} "(1) Have a deadly weapon on or about the offender's person or under the offender's control and either display the weapon, brandish it, indicate that the offender possesses it, or use it; * * *."

{¶ 30} Appellant was also convicted of robbery, a violation of R.C. 2911.02(A)(2), which provides:

{¶ 31} "(A) No person, in attempting or committing a theft offense or in fleeing immediately after the attempt or offense, shall do any of the following:

{¶ 32} "* * *

{¶ 33} "(2) Inflict, attempt to inflict, or threaten to inflict physical harm on another; * * *."

{¶ 34} Last, appellant was convicted of conspiracy, a violation of R.C. 2903.01(A)(1) and (2), which provide:

{¶ 35} "(A) No person, with purpose to commit or to promote or facilitate the commission of * * * kidnapping, * * * aggravated robbery, robbery, aggravated burglary, * * * shall do either of the following:

{¶ 36} "(1) With another person or persons, plan or aid in planning the commission of any of the specified offenses; * * *."

{¶ 37} In his arguments, appellant makes much of the lack of evidence connecting him directly to the offenses, such as a positive identification or DNA evidence taken from blood at the scene. This argument is unpersuasive. It is axiomatic that circumstantial evidence carries the same probative value as direct evidence. *State v. Nicely* (1988), 39 Ohio St.3d 147, 151. Appellant also argues that he presented an alibi in the form of an ex-girlfriend's testimony. However, the testimony presented did not establish that appellant was definitively accounted for during the time in which the offenses were committed. Moreover, appellant's bruised knuckles,

the time frame in which he sought medical treatment, his possession of the stolen purse, and appellant's statements to investigators and his subsequent explanations, are all such that the jury could have found all elements of the offenses proven beyond a reasonable doubt.

{¶ 38} After thoroughly reviewing the record of proceedings in the trial court, we cannot say that the jury clearly lost its way and created such a manifest miscarriage of justice that appellant's convictions must be reversed. This is not the exceptional case where the evidence weighs heavily against conviction. Accordingly, we find that appellant's convictions were not against the manifest weight of the evidence and his first assignment of error is not well-taken.

{¶ 39} In his second assignment of error, appellant argues that several of the state's remarks made in closing arguments were prejudicial such that they deprived him of a fair trial. Specifically, appellant points to statements by one prosecutor that appellant and his co-conspirators were "idiots," that appellant's alibi was a "lie" and a "joke" and that appellant's counsel's arguments were "B.S." Appellant did not object to these statements. Additionally, appellant argues that the prosecutor misleadingly misstated the law when, referring to the stolen purse, he stated: "when you got * * * stolen property, the first inference is you're the thief." Appellant did object to the last statement.

{¶ 40} It is well-settled that prosecutors are generally given a certain degree of latitude in their closing arguments. *State v. Smith* (1984), 14 Ohio St.3d 13. "The test regarding prosecutorial misconduct in closing arguments is whether the remarks were improper and, if so, whether they prejudicially affected substantial rights of the defendant." Id. at 14. If a defendant fails to object to a prosecutor's statement when it is made, then the appellate court must decide

whether the admission of the statements constitutes plain error. *State v. Lott* (1990), 51 Ohio St.3d 160, 167. Plain error occurs if, but for the error, the outcome of the trial would have been different. *State v. Nicholas* (1993), 66 Ohio St.3d 431, 436.

{¶ 41} Given the evidence and our resolution of the first assignment of error, we find no plain error occurred in the prosecutor's use of the epithets listed above. Absent the statements, there is little possibility that the outcome would have been otherwise. And, given the evidence, the prosecutor's statement regarding stolen property did not cause prejudice to appellant; the trial court gave the jury correct instructions of law on this count and we presume the jury followed those instructions. The second assignment of error is, therefore, not well-taken.

{¶ 42} In his third assignment of error, appellant argues that the trial court erred in denying his motion for a new trial. A motion for a new trial pursuant to Crim.R. 33 is addressed to the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *State v. Scheibel* (1990), 55 Ohio St.3d 71, paragraph one of the syllabus. Appellant's motion for a new trial alleged grounds pursuant to Crim.R. 33(A)(6), which provides:

{¶ 43} "A new trial may be granted on motion of the defendant for any of the following causes affecting materially his substantial rights:

{¶ 44} "* * *

{¶ 45} "(6) When new evidence material to the defense is discovered which the defendant could not with reasonable diligence have discovered and produced at the trial. * * *."

{¶ 46} "To warrant the granting of a motion for a new trial in a criminal case, based on the ground of newly discovered evidence, it must be shown that the new evidence (1) discloses a strong probability that it will change the result if a new trial is granted, (2) has been discovered since the trial, (3) is such as could not in the exercise of due diligence have been discovered before the trial, (4) is material to the issues, (5) is not merely cumulative to former evidence, and (6) does not merely impeach or contradict the former evidence." *State v. Petro* (1947), 148 Ohio St. 505, syllabus.

{¶ 47} A trial court has not abused its discretion in denying a motion for new trial if the newly discovered evidence, forming the basis for the motion, fails to satisfy these standards. *State v. LaMar*, 95 Ohio St.3d 181, 2002-Ohio-2128, ¶ 85.

{¶ 48} Appellant argues that the trial court should have granted him a new trial because Holmberg's testimony, if offered at a new trial, would result in acquittals. However, Holmberg's testimony was evidence that could have, in the exercise of due diligence, been discovered before trial. Appellant's counsel conceded that no attempt was made to subpoena or otherwise obtain Holmberg's cooperation or testimony. Holmberg was incarcerated on his own convictions for these offenses for a substantial period of time prior to appellant's trial.

{¶ 49} Because appellant's motion for a new trial did not meet the test of *State v. Petro*, 148 Ohio St. 505, syllabus, the trial court did not abuse its discretion in denying the motion. Appellant's third assignment of error is, therefore, not well-taken.

{¶ 50} Finding that no prejudice resulted to appellant and that he was not prevented from having a fair and impartial trial, the judgment of the Huron County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

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