

[Cite as *State v. Peasley*, 2010-Ohio-4333.]

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C.A. No. 25062

Appellee

v.

JEFFREY J. PEASLEY

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CR 09 04 1284(A)

Appellant

DECISION AND JOURNAL ENTRY

Dated: September 15, 2010

BELFANCE, Presiding Judge.

{¶1} Defendant-Appellant, Jeffrey Peasley, appeals the judgment of the Summit County Court of Common Pleas. This Court affirms.

I.

{¶2} Tessa Myers called her friend, Ronald Copeland to ask him if he wanted to buy her old computer and a video game console. Copeland was interested in the computer and Myers agreed to bring it to his house so he could inspect it. Copeland told her he would have cash to purchase the computer. When the deal for the computer fell through, Myers and Copeland went to a nearby gas station so that Copeland could buy beer for Myers. After leaving the gas station, Myers told Copeland that she wanted to talk to him and she drove to a business on Ley Drive rather than to Copeland's home. On the way to there, the vehicle Myers was driving was struck from behind, causing Myers to pull to the side of the road. Almost immediately, two men approached the passenger side and forcibly pulled Copeland out of the car. One of the men held

Copeland up against the car and searched his pockets while the other man pointed a gun at Copeland. When Copeland tried to look at the men, the one with the gun yelled at him to turn around. Copeland recognized the voice as that of Jeffrey Peasley, a man he knew as Myers' boyfriend. When Copeland turned to look at Peasley and addressed him by name, he saw that Peasley was holding the gun in his right hand and attempting to cover his face with his left hand. Copeland remembers being hit on the back of his head with a gun. After being relieved of his cash and wallet, Copeland was ordered to run away. Copeland hid a safe distance away from the scene and called 911. Copeland spoke with police and sheriff's officers at his home shortly after the robbery. Myers was picked up at her home and Copeland identified her in person. Peasley was arrested after a short pursuit and taken to the hospital before being booked. Copeland later identified the man who held him against the car and searched his pockets from a photo array. He also later identified another man who was at the scene of the robbery, but did not participate in the assault on Copeland.

{¶3} Peasley was charged with aggravated robbery, felonious assault, and having weapons under disability. Firearms specifications were attached to the robbery and assault charges. Following a jury trial, Peasley was convicted of aggravated robbery and felonious assault. The jury found him not guilty of having weapons under disability and the firearms specifications. The trial court sentenced Peasley to a total of nine years in prison for his convictions. On appeal, Peasley raises three assignments of error for our review: (1) he was denied his right to remain silent when a sheriff's detective testified at trial that Peasley requested an attorney prior to questioning; (2) he was prejudiced when the jury received information concerning his prior convictions, and; (3) the conviction for felonious assault is against the manifest weight of the evidence.

II.

Right to Remain Silent

{¶4} In his first assignment of error, Peasley contends that the State violated his Fifth Amendment right to remain silent during the prosecutor's questioning of the detective who spoke to Peasley the night of the robbery.

{¶5} Pursuant to the Fifth Amendment to the United States Constitution, one cannot be compelled to be a witness against oneself. This is expressed as the right to remain silent when questioned by law enforcement. *State v. Leach*, 102 Ohio St.3d 135, 2004-Ohio-2147, at ¶¶11-13. Derivative of the right to remain silent is the right to the presence of an attorney during questioning. *Id.*, quoting *Wainwright v. Greenfield* (1986), 474 U.S. 284, 298-299 (Rehnquist, J., concurring). See, also, *In re J.R.*, 9th Dist. No. 04CA0066-M, 2005-Ohio-4090, at ¶50 (Moore, J., concurring in part, and dissenting in part). The prosecution violates an offender's constitutional rights when it attempts to elicit evidence at trial of the offender's post-arrest silence, see *Doyle v. Ohio* (1976), 426 U.S. 610, 618; *Greenfield*, 474 U.S. at 291, or request for an attorney. *Leach* at ¶18.

{¶6} Detective Larry Brown of the Summit County Sheriff's Office testified at trial on behalf of the State. Det. Brown interviewed Peasley at the Detective Bureau after Peasley was arrested. During direct examination, the State asked Det. Brown if he had an opportunity to speak with Peasley after his arrest. Det. Brown responded, "Yes." The prosecutor continued, "And what, if anything, did he tell you?" To which Det. Brown replied, "He just requested an attorney." Peasley did not object, and the State moved on to questioning Det. Brown about the search for other suspects and Copeland's injuries. A short time later, the State again asked Det. Brown what he learned of the relationship between Myers, Peasley, and the other suspects of the

robbery. Det. Brown testified, “I know what their relationship is, yes.” The prosecutor inquired, “How do you know that?” Then, the following exchange took place:

“[Det. Brown]: I was told - -

“[Defense Counsel]: Objection as to lack of foundation, personal knowledge.

“The Court: He can tell me what he was told.

“[Det. Brown]: I was told of their relationship, yes.

“[Prosecutor]: And did you have any conversation with Mr. Peasley about his relationship with Tessa Myers?

“[Det. Brown]: No. Jeffrey Peasley? No. He requested an attorney, I did not talk to him.

“[Prosecutor]: Okay. And what was the relationship that you learned between Jeff Peasley and Tessa Myers?

“[Defense Counsel]: Objection, You Honor.

“The Court: Sustained.

“[Prosecutor]: Okay. Did you learn about the relationship between [another suspect] and Tessa Myers?

“[Det. Brown]: Yes, I did.

“[Defense Counsel]: Objection, Your Honor.

“The Court: You can answer. ‘Yes, I did,’ that answer will stand.”

The State continued with its line of questioning as to what Det. Brown learned about the relationship of the robbery suspects and whether Myers was acquainted with Copeland. Peasley again objected, the parties had a discussion with the court off the record, and the State rephrased its questions with regard to the relationship between Myers and Copeland. Peasley did not move for a mistrial or request a curative instruction based on the detective’s statements.

{¶7} We do not interpret the State’s questions as designed to elicit comments on Peasley’s post-arrest silence. Based on the entirety of the exchange, we determine that the State

was attempting to explore a theory of the case that the individuals involved knew each other and had perhaps conspired to rob Copeland of the money he had to potentially purchase Myers' computer. Peasley did not contemporaneously object to either question that led Det. Brown to respond that Peasley requested an attorney. At one point, Peasley objected on the basis of lack of foundation and personal knowledge, but defense counsel did not state a basis for the subsequent objections. At no time did Peasley assert that his Fifth Amendment rights had been violated.

{¶8} Because Peasley did not lodge an objection at trial based on a violation of his right to remain silent, we review his first assignment of error for plain error. *State v. Riffle*, 9th Dist. No. 07CA0114-M, 2008-Ohio-4155, at ¶3. “Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court.” Crim.R. 52(B). The doctrine of plain error requires that there must be: (1) a deviation from a legal rule; (2) that is obvious, and; (3) that affects the appellant’s substantial rights. *State v. Hardges*, 9th Dist. No. 24175, 2008-Ohio-5567, at ¶9. “We will not reverse for plain error unless the appellant established that the outcome of the trial clearly would have been different but for the alleged error.” *State v. Kobelka* (Nov. 7, 2001), 9th Dist. No. 01CA007808, at *2, citing *State v. Waddell* (1996), 75 Ohio St.3d 163, 166. “Notice of plain error is to be taken with the utmost caution, under exceptional circumstances, and only to prevent a manifest miscarriage of justice.” *Kobelka*, at *2, citing *State v. Phillips* (1995), 74 Ohio St.3d 72, 83. Thus, assuming arguendo, that the prosecutor purposefully posed questions to Det. Brown to put evidence before the jury that Peasley asked for an attorney, such error is reversible if it clearly affected the outcome of the trial. *Riffle* at ¶12 (prosecutor’s improper comments will result in reversal if defendant was

denied fair trial). Peasley “bears the burden of demonstrating that a plain error affected his substantial rights.” *State v. Perry*, 101 Ohio St.3d 118, 2004-Ohio-297, at ¶14.

{¶9} On appeal, Peasley argues that there was a lack of inculpatory evidence because the police did not find a gun or any items stolen from Copeland on Peasley when he was arrested. Despite this, the jury had other evidence before it to substantiate its guilty verdict. Copeland acknowledged that he was friends with Myers and that he became acquainted with Peasley through that friendship. Further, during the prior six months, he spent time with Peasley “[s]everal times a week[]” and last saw Peasley three or four days before the robbery. During the incident, when Copeland attempted to turn to look at his assailants, he recognized Peasley’s voice when he said, “Don’t look at me.” Copeland responded, “Jeff, what the []” and was hit on the back of the head with a gun. On the stand, Copeland identified Peasley as the gunman. Copeland also described the gun for the jury as a black, semi-automatic handgun. When Copeland called 911 to report the crime, he identified Peasley as one of the suspects to the 911 operator. The police report presented during the testimony of Sergeant Donald Joseph of the Summit County Sheriff states that Copeland identified Peasley as the gunman when giving a statement to the authorities after the robbery. Det. Brown also testified that he observed a red mark on the back of Copeland’s head and Copeland explained that he had been hit with a gun. We also note that Peasley testified at trial, thus, the jury was able to hear and evaluate his account of the events. Peasley admitted that he was at the scene when Copeland was robbed, but that he did not take part in the robbery and that he was not aware of what was taking place.

{¶10} The jury received evidence that Peasley was present during the robbery. The jury also heard from Copeland that Peasley, a man with whom he was well acquainted, pointed a gun at him while another man robbed him. Although Peasley denies this, the jury was able to

consider the credibility of the witnesses and weigh the evidence to decide whom to believe. Even without recovery of the weapon or the items stolen from Copeland, Peasley has failed to demonstrate that Det. Brown's statements affected the outcome of the trial or violated his substantial rights. See *Riffle* at ¶12; *Perry* at ¶14. Peasley's first assignment of error is overruled.

Prior Convictions

{¶11} Peasley argues in his second assignment of error that this Court should grant him a new trial because evidence of his prior convictions was introduced at trial over his objections. Peasley was also charged with having weapons under disability. Before trial, Peasley offered to stipulate that he had prior convictions related to drugs and an offense of violence to establish his disability in an attempt to prevent the jury from hearing the details of those convictions or receiving the judgment entries of conviction as evidence. The trial court permitted the judgment entries to be admitted into evidence; one of which was redacted to remove reference to other convictions and charges. Peasley relies on *Old Chief v. United States* (1997), 519 U.S. 172, 174, which held that a trial court abuses its discretion by admitting the defendant's prior judgment entries of conviction over defendant's objection.

{¶12} Pursuant to controlling precedent in this District, this Court does not apply the holding of *Old Chief* because that case interpreted a federal statute. *State v. Williams*, 9th Dist. No. 22877, 2006-Ohio-4720, at ¶21; *State v. Kole* (June 28, 2000), 9th Dist. No. 98CA007116, at *4, overruled on other grounds by *State v. Kole* (2001), 92 Ohio St.3d 303. But, see, *State v. Baker*, 9th Dist. No. 23713, 2009-Ohio-2340, at ¶23 (Belfance, J., concurring in judgment only). Instead, this Court applies the rule that "[n]either the [S]tate nor the trial court is required to accept a defendant's stipulation as to the existence of the conviction." *State v. Smith* (1990), 68

Ohio App.3d 692, 695. In light of the jurisprudence of this Court, the trial court did not commit reversible error in admitting the judgment entries of Peasley's prior convictions over his objection. We also note that the record reveals that Peasley testified at trial and discussed many of his prior convictions, including those not identified in the judgment entries submitted to the jury, thus, lessening the sting of the admission of the two redacted judgment entries. Peasley's second assignment of error is overruled.

Manifest Weight

{¶13} In his third and final assignment of error, Peasley asserts that his conviction for felonious assault is against the manifest weight of the evidence. In particular, he argues that the conviction cannot stand because the jury specifically indicated on its verdict form that Peasley did not have a firearm during the commission of the offense.

{¶14} When determining whether a conviction is supported by the manifest weight of the evidence,

“an appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether, in resolving conflicts in the evidence, the trier of fact 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. Cepec*, 9th Dist. No. 04CA0075-M, 2005-Ohio-2395 at ¶6, quoting *State v. Otten* (1986), 33 Ohio App.3d 339, 340.

We must only invoke the discretionary power to grant a new trial in “extraordinary circumstances when the evidence presented weighs heavily in favor of the defendant.” *State v. Flynn*, 9th Dist No. 06CA0096-M, 2007-Ohio-6210 at ¶9, citing *Otten*, 33 Ohio App.3d at 340. When reviewing a conviction pursuant to the manifest weight standard, we must determine whether the State met its burden of persuasion. *Cepec* at ¶6. We must examine the evidence as if this Court were the “thirteenth juror[.]” *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387,

quoting *Tibbs v. Florida* (1982), 457 U.S. 31, 42. As Peasley has confined his manifest weight argument to the element concerning a firearm, we will confine our analysis accordingly.

{¶15} Peasley was convicted of felonious assault pursuant to R.C. 2903.11(A)(2), which states that, “[n]o person shall knowingly * * * [c]ause or attempt to cause physical harm to another or to another’s unborn by means of a deadly weapon or dangerous ordnance.” In the first paragraph of the jury verdict form, the jury was to indicate whether it found Peasley “Guilty” or “Not Guilty” of felonious assault. In the next paragraph, it was to indicate whether it found Peasley “did” or “did not” have a firearm on his person or under his control while committing the offense. By filling in the appropriate blanks, the jury found Peasley guilty of felonious assault and found that he did not have a firearm.

{¶16} As previously explained, the victim of the assault testified at trial that he saw Peasley pointing a gun at him. He stated that the gun was approximately “a foot, foot and a half away[]” from him. He further remembered that Peasley was holding the gun in his right hand as if he was going to pull the trigger. Copeland described the gun to the jury. While one of the men held Copeland’s head to the car and went through his pockets, he attempted to turn to look at his assailants, one of whom yelled at him to turn back around. He realized it was Peasley and again tried to turn to speak to him. At that point, Copeland testified he was hit on the back of his head with the gun. He later told law enforcement officers that same story. At trial, Det. Brown acknowledged that he observed an injury to the back of Copeland’s head the night of the robbery.

{¶17} In his defense, Peasley testified that he took no part in the assault and robbery of Copeland and was not even aware of what was happening when he arrived at the scene. He also stated that he did not have a gun with him at all, never hit anyone with a gun that night, and, in

general, has not and does not use guns because he does not “agree with them.” In sum, Peasley stated that Copeland was lying about his involvement in the robbery and assault when he spoke to the 911 operator and law enforcement the night of the incident, and continued to lie when he testified at trial.

{¶18} When presented with conflicting evidence, the jury was free to believe or disbelieve any, or all, of Peasley’s testimony. A conviction is not against the manifest weight because the jury chose to credit the State’s version of events. *State v. Morgan*, 9th Dist. No. 22848, 2006-Ohio-3921, at ¶35. This is not the extraordinary case in which the evidence weighs heavily in favor of Peasley. See *Flynn* at ¶9, citing *Otten*, 33 Ohio App.3d at 340. The jury heard unequivocal testimony from Copeland that Peasley pointed a gun at him while the other man searched through Copeland’s pockets and held him against the car. Although it is unclear from his testimony whether Copeland actually saw Peasley hit him on the head with the gun; it is possible that the jury determined that Peasley struck Copeland with an object that was either dangerous or deadly, but were unable to come to a consensus as to whether the object was a firearm. Additionally, the language of the statute provides that one is guilty of felonious assault if one causes harm using “a deadly weapon or dangerous ordnance[;]” it does not specify that the instrument that inflicts harm must be a firearm. R.C. 2903.11(A)(2). Det. Brown substantiated Copeland’s version of events when he testified that he observed an injury on Copeland’s head. In light of the above, we cannot determine that the jury lost its way when it convicted Peasley of felonious assault and that a new trial is necessary to prevent a manifest miscarriage of justice, thus, we overrule his third assignment of error. See *Cepec* at ¶6, quoting *Otten*, 33 Ohio App.3d at 340.

III.

{¶19} Peasley's three assignments of error are overruled. The judgment of the Summit 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 Summit, 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(E). 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.

EVE V. BELFANCE
FOR THE COURT

CARR, J.
MOORE, J.
CONCUR

APPEARANCES:

DONALD GALLICK, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and HEAVEN DIMARTINO, Assistant Prosecuting Attorney, for Appellee.