[Cite as *State v. Lollis*, 2010-Ohio-4457.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

STATE OF OHIO Appellee v. THOMAS W. LOLLIS Appellant	C.A. No. 24826 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CR 08 07 2339 (A)

DECISION AND JOURNAL ENTRY

Dated: September 22, 2010

DICKINSON, Presiding Judge.

INTRODUCTION

{¶1} After a Fourth of July cookout, Thomas Lollis, Andre Wood, Brooke Thompson, and Ahmad Diggins drove together to a bar. On the way, they made one stop. During the stop, one of the men shot and killed Mr. Wood. The Grand Jury indicted Mr. Lollis for murder, having weapons while under disability, and tampering with evidence. A jury found him guilty of the offenses. The trial court sentenced him to 32 years in prison. Mr. Lollis has appealed, arguing that the prosecutor engaged in misconduct when he asked him about his prior convictions on cross-examination and declared that he was guilty during closing argument, that there was insufficient evidence to support his convictions, and that his convictions are against the manifest weight of the evidence. This Court affirms in part because Mr. Lollis opened the door to the prosecutor's questions about his prior convictions, the prosecutor's improper statements and gesturing during closing argument were not plain error, there was sufficient evidence to

support his murder and having a weapon while under disability convictions, and the murder and having a weapon while under disability convictions are not against the manifest weight of the evidence. This Court reverses in part because there was insufficient evidence presented by the State to convict Mr. Lollis of tampering with evidence.

TESTIMONY

{¶2} Bridgette Sommerville hosted a cookout at her house in Akron on July 4, 2007. Mr. Lollis helped her pay for the food and invited some of his friends to the party. One of the people he invited was Mr. Diggins, who lived in Cleveland. Because Mr. Diggins did not have a car, he asked Mr. Thompson to drive him to the cookout. They met Mr. Lollis at his home and followed him to Ms. Sommerville's house. Mr. Lollis had never met Mr. Thompson before.

{¶3} During the cookout, Mr. Diggins remembered that his friend Acea Wood lived in Akron and had a nice car, so he called and invited him to the cookout. Acea Wood was hosting his family at the time, but he drove his brother, Andre Wood, to the cookout because it was Andre's birthday the next day and he wanted to have some fun. Andre Wood was friends with Mr. Diggins and Mr. Thompson, but had never met Mr. Lollis. Acea Wood asked Mr. Thompson to drive Andre home after the cookout because he (Andre) also lived in Cleveland.

{¶4} Either Mr. Diggins or Mr. Thompson had a gun at the cookout. According to Ms. Sommerville and Mr. Lollis, Mr. Diggins had the gun. According to Acea Wood and Mr. Diggins, it was Mr. Thompson. Mr. Thompson testified that he was the one with the gun. He claimed he brought it for protection because he did not know anyone in Akron. According to him, at some point during the cookout, he put the gun in the glove box of his car because there were families with children at the cookout.

{¶5} According to Mr. Diggins and Mr. Thompson, Andre Wood and Mr. Lollis got into an argument at the cookout. After the cookout ended, however, Mr. Lollis agreed to go out with Andre Wood, Mr. Diggins, and Mr. Thompson. Mr. Thompson drove, Mr. Diggins sat in the passenger seat, and Mr. Lollis and Andre Wood sat in the backseat. Each of the men had already had a lot to drink. After driving a little while, they stopped along the side of the road and everyone got out of the car.

{¶6} According to Mr. Diggins, he thought they pulled over to go to the bathroom, so he walked down an alley to urinate. While he was down the alley, he heard gunshots, so he ducked down and tried to figure out what was going on. He thought that they might be getting robbed. When he emerged from the alley, he saw Andre Wood crawling on the ground. He ran to Mr. Wood, grabbed him, and told the other men to call 911. He saw Mr. Thompson get in the car and heard Mr. Lollis tell him to "[c]ome on." Mr. Diggins stayed with Mr. Wood, however, until an ambulance arrived. He said that Mr. Wood and Mr. Lollis were not wearing shirts. According to the coroner, Mr. Wood was shot four times, once in the front and three times in the back.

{¶7} According to Mr. Thompson, Mr. Wood and Mr. Lollis were arguing in the car. When he attempted to turn around in a driveway, they jumped out. He got out of the car too and tried to break up the argument, facing Mr. Wood. He eventually decided to just let them argue, but then saw gunshots go off a couple feet from Mr. Wood. He started to run away, but, looking back, saw Mr. Lollis shoot Mr. Wood with his gun while Mr. Wood was crawling on the ground. He decided to go back to his car so that he could drive away. He said that Mr. Lollis got in the car with him and told him to drop him off. Because he did not want to get shot, he dropped Mr.

Lollis off at Ms. Sommerville's house. According to Mr. Thompson, Mr. Lollis kept Mr. Thompson's gun when he got out of his car.

{¶8} According to Mr. Lollis, the four men had arrived at their destination and gotten out of the car, when Mr. Wood and Mr. Diggins started arguing because Mr. Wood wanted to buy cocaine. Mr. Diggins told him to "chill out," but Mr. Wood said that he would do what he wanted to do. He testified that Mr. Diggins punched Mr. Wood, but then Mr. Thompson stepped in and said, "I got him" and began shooting Mr. Wood. He said that he (Mr. Lollis) was standing by the car and got in the driver's seat when he saw what was happening. Mr. Thompson also got in the car, but Mr. Diggins refused to come with them. Mr. Lollis explained that he left the scene of the shooting because he did not want to be involved.

{¶9} The argument that the men were having outside Mr. Thompson's car caught the attention of the residents of one of the houses on the street where the car had stopped. According to Yolanda Edwards, she looked out the front door of her house and saw four men, two of them arguing. The two who were arguing did not have shirts. The other two were standing back, trying to stop the argument. She saw one of the men who was arguing take off his belt and wrap it around his hand. Because he no longer had a belt, his pants fell down. He tripped on his pants and fell to the ground. He got back up, but soon fell again. While he was getting up a second time, the other man who was arguing got something from a car. When the man who had removed his belt fell a third time, the man who had gotten something from the car shot him. She described the shooter as tall and thin. She said that, after the shooting, one of the men who had been trying to stop the argument began panicking. The other two men got in the car and drove away. The one that remained asked her family to call 911, which they did.

{¶10} Jerry Ramirez watched the argument from the front window of the house. He saw two men arguing and another trying to break them up. He said that one of the men's pants fell and that he saw that man trip. One of the other men told the man who had fallen to put his pants back on. He said that one of the men who was arguing went to a car and got something out of it. He said that the two men began arguing again and that the one who had gotten something out of the car shot the man who had fallen. He fired the gun three or four times. Mr. Ramirez then saw the car back down the street to pick up the shooter. He thought he saw the shooter get in the front driver's side door of the car. The shooter told the guy who had been trying to break up the fight to "[c]ome on," but that man refused. The shooter and the man who got shot were not wearing shirts. Mr. Ramirez described the shooter as tall with a stocky, muscular build.

{¶11} Ernest Sayre testified that he was looking out the front door and saw four men arguing. One of the men had a belt wrapped around one of his hands. That man was not wearing a shirt and his pants were down around his ankles. He saw one of the other men, "a bigger guy," knock the man with the belt around his hand to the ground. As the man who had been knocked down was crawling on the ground, one of the other men, who was big and muscular and also not wearing a shirt, walked over to a car. When he came back from the car, he shot the man who was on the ground. He said that the man who shot the man on the ground was not the same one who had knocked him to the ground in the first place. He saw the shooter get in the passenger side of the car. One of the men stayed with the man who had been shot until police arrived.

{¶12} Ms. Sommerville testified that, after Mr. Lollis got back to her house, he insisted that she drive him down a street near where the shooting occurred. Mr. Lollis testified that he had Ms. Sommerville take him back to the scene because he "wanted to check and see if [Mr.

Wood] was all right." By the time they got there, however, the police had the street closed off, so they returned to Ms. Sommerville's house.

{¶13} According to the detectives who investigated Mr. Wood's death, they spoke with Mr. Diggins and Mr. Thompson within a few days of the shooting, but were unable to find Mr. Lollis. About a year later, they learned that he was living in Houston under a different name. When the Houston police went to where Mr. Lollis was living, he jumped out a second-story window and ran from them. During the chase that followed, he broke into a neighbor's apartment and crashed through one of her windows. The police eventually found him hiding on a patio under a pile of toys.

{¶14} Mr. Lollis testified that he moved to Houston shortly after the incident and began living under another name because he had never been in a murder situation before and had never snitched on anyone. He said that, when the police found him in Houston, he ran from them because he did not want to have to tell his story in court. According to Mr. Lollis, in his neighborhood, if "[y]ou tell, you die."

PROSECUTORIAL MISCONDUCT

{¶15} Mr. Lollis's first assignment of error is that the prosecutor's misconduct deprived him of a fair trial. His fourth assignment of error is that the trial court incorrectly failed to declare a mistrial because of the misconduct. Because these assignments of error are related, this Court will consider them together.

{¶16} "The test for prosecutorial misconduct is whether the remarks were improper and, if so, whether they prejudicially affected the accused's substantial rights." *State v. Diar*, 120 Ohio St. 3d 460, 2008-Ohio-6266, at ¶140. "The touchstone of the analysis 'is the fairness of the

trial, not the culpability of the prosecutor.'" *Id*. (quoting *Smith v. Phillips*, 455 U.S. 209, 219 (1982)).

{¶17} Mr. Lollis has argued that the prosecutor asked him an improper question on cross-examination. On direct examination, Mr. Lollis's lawyer asked Mr. Lollis about his prior convictions and whether he had "take[n] responsibility" for them. He answered that he had pleaded guilty to a felonious assault charge in 1991 and, more recently, to cocaine and criminal gang charges. On cross-examination, the prosecutor inquired about his convictions, asking: "And -- well, fair to say that's not a murder charge. I mean, you're not looking at as much time as you are in this case?" Mr. Lollis's lawyer objected, and the trial court sustained the objection. Mr. Lollis's lawyer also moved for a mistrial, but the trial court denied her motion.

{¶18} If a defendant implies on direct examination that, if he had committed the offense, he would have pleaded guilty, the State may rebut the inference by demonstrating that he had another motivation for his plea, other than his "overriding compulsion to be truthful." *State v. Greer*, 39 Ohio St. 3d 236, 242 (1988). "[If] defense counsel ha[s] opened the door to this line of questioning[,] there [is] no error in the state's pursuing it." *State v. Hood*, 9th Dist. Nos. 12875, 12885, 1987 WL 11532 at *1 (May 20, 1987). The prosecutor's question was an attempt to rebut the implication that Mr. Lollis made regarding the fact that he had "take[n] responsibility" for the crimes he committed. The question was proper under *Greer* and *Hood*. This Court, therefore, concludes that there was no misconduct. The trial court properly refused to declare a mistrial.

{¶19} Mr. Lollis has also argued that the prosecutor committed misconduct when he pointed at him during closing argument and said "[y]ou did it." The prosecutor had been discussing the way Mr. Wood had been shot, saying: "Ladies and gentlemen, those three men

were friends. Go back to this murder. Think about it. You might get in an argument, a gun might get pulled but, my God, a friend does not shoot his friend in the back three times as he's crawling away. Only one man in this crowd is capable of doing that, and it's you Thomas Lollis. You did it. (Indicating.)" Mr. Lollis replied: "I didn't do it. No, I didn't." The prosecutor again stated "[y]ou did it" and Mr. Lollis responded "[n]o, I didn't." Mr. Lollis's lawyer did not object. Mr. Lollis has argued that the prosecutor's declaration and antagonistic gesture were an inappropriate attempt to engage him in argument and were "intended to provoke a response [from him] during a segment of the trial when testimony is not allowed."

{¶20} Because Mr. Lollis's lawyer did not object to the prosecutor's statements, Mr. Lollis has forfeited all but plain error. *State v. Payne*, 114 Ohio St. 3d 502, 2007-Ohio-4642, at ¶23. Rule 52(B) of the Ohio Rules Criminal Procedure permits appellate courts to take notice of plain errors, but such notice is to be taken "with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *State v. Long*, 53 Ohio St. 2d 91, 97 (1978). In order to prevail on a claim of plain error, the defendant must show that, "but for the error, the outcome of the trial clearly would have been otherwise." *State v. Murphy*, 91 Ohio St. 3d 516, 532 (2001) (quoting *State v. Campbell*, 69 Ohio St.3d 38, 41 (1994)); see *State v. Johnson*, 46 Ohio St. 3d 96, 102 (1989) ("In examining the comment made by the prosecutor, the issue is whether but for the prosecutor's misconduct the verdict would have been otherwise.").

{¶21} "The prosecution is normally entitled to a certain degree of latitude in its concluding remarks." *State v. Smith*, 14 Ohio St. 3d 13, 13 (1984). "A prosecutor is at liberty to prosecute with earnestness and vigor, striking hard blows, but may not strike foul ones." *Id*. at 14. "The prosecutor is a servant of the law whose interest in a prosecution is not merely to

emerge victorious but to see that justice shall be done." *Id*. "It is a prosecutor's duty in closing arguments to avoid efforts to obtain a conviction by going beyond the evidence which is before the jury." *Id*. "[T]he prosecution must avoid insinuations and assertions which are calculated to mislead the jury." *Id*.

{¶22} The Ohio Supreme Court has held that "[i]t is improper for an attorney to express his personal belief or opinion as to the credibility of a witness or as to the guilt of the accused." *State v. Smith*, 14 Ohio St. 3d 13, 14 (1984). The prosecution, however, "is not precluded from urging its theory of what the evidence shows, so long as the jury is not misled by this view of the evidence." *State v. Malone*, 9th Dist. Nos. 12533, 12542, 1986 WL 10586 at *2 (Sept. 24, 1986). "[I]t is perfectly appropriate for a prosecutor, in closing argument, to remark that the evidence supported a finding that the accused was guilty." *State v. Hayes*, 2d Dist. No. 2929, 1993 WL 333650 at *7 (Aug. 31, 1993); See Prof. Cond. R. 3.4(e) cmt. 3A (providing that, although a lawyer may not state a personal opinion as to the guilt or innocence of an accused, he may argue "for any position or conclusion" "based on [his] analysis of the evidence.").

{¶23} The testimony established that either Mr. Lollis or Mr. Thompson shot Mr. Wood. The prosecutor made the challenged statements during rebuttal, in response to Mr. Lollis's lawyer's argument that, although "[t]here was a killer here today or yesterday . . . [it] [w]asn't [Mr. Lollis]. It was Brooke Thompson." His statements and gestures, however, did more than simply remark that the evidence supported a finding that Mr. Lollis was guilty. It improperly expressed his personal belief as to Mr. Lollis's guilt.

{¶24} Although the prosecutor's conduct was improper, Mr. Lollis has not established that, but for his remarks and gestures, the jury would not have convicted him. *State v. Johnson*, 46 Ohio St. 3d 96, 102 (1989). The trial court instructed the jury both before and after

the closing arguments that the lawyers' arguments were not evidence. There was also eyewitness testimony establishing that Mr. Lollis was the shooter. Accordingly, we conclude that Mr. Lollis has not demonstrated the exceptional circumstances required to prevail on a claim of plain error. His first and fourth assignments of error are overruled.

CRIMINAL RULE 29(A)

{¶25} Mr. Lollis's third assignment of error is that the trial court incorrectly denied his motion for judgment of acquittal. Under Rule 29(A) of the Ohio Rules of Criminal Procedure, a defendant is entitled to a judgment of acquittal on a charge against him "if the evidence is insufficient to sustain a conviction . . . ." Whether a conviction is supported by sufficient evidence is a question of law that this Court reviews de novo. *State v. Thompkins*, 78 Ohio St. 3d 380, 386 (1997); *State v. West*, 9th Dist. No. 04CA008554, 2005-Ohio-990, at ¶33. This Court must determine whether, viewing the evidence in a light most favorable to the prosecution, it could have convinced an average juror of Mr. Lollis's guilt beyond a reasonable doubt. *State v. Jenks*, 61 Ohio St. 3d 259, paragraph two of the syllabus (1991).

{¶26} The jury convicted Mr. Lollis of murder, having weapons while under disability, and tampering with evidence. Regarding the murder conviction, under Section 2903.02(A) of the Ohio Revised Code, "[n]o person shall purposely cause the death of another . . . ." "A person acts purposely when it is his specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature." R.C. 2901.22(A).

{¶27} Ms. Edwards and Mr. Ramirez testified that, while watching the argument outside their home, they saw one of the men who was arguing go to a car and get something out of it.

They said that the man who got something out of the car was the man who shot Mr. Wood. Although they could not identify who it was who shot Mr. Wood, Mr. Thompson testified that Mr. Lollis was the shooter and that he saw Mr. Lollis shoot Mr. Wood while Mr. Wood was crawling on the ground. The coroner testified that Mr. Wood was shot four times and that he died from bleeding caused by the gunshots. Viewing the evidence in a light most favorable to the prosecution, it established that Mr. Lollis was having an argument with Mr. Wood, that he walked over to Mr. Thompson's car to retrieve a gun, and that he shot Mr. Wood multiple times after returning with the gun. It also established that Mr. Lollis shot Mr. Wood in the back, even after Mr. Wood tried getting away from him. Accordingly, there was sufficient evidence that Mr. Lollis purposely caused Mr. Wood's death.

{¶28} Regarding the having weapons while under disability conviction, under Section 2923.13(A)(2) of the Ohio Revised Code, "no person shall knowingly acquire, have, carry, or use any firearm . . . if . . . [t]he person . . . has been convicted of any felony offense of violence . . . ." The State presented a journal entry establishing that Mr. Lollis had been convicted of felonious assault. Combined with Mr. Thompson's testimony that Mr. Lollis shot Mr. Wood with Mr. Thompson's gun, there was sufficient evidence that Mr. Lollis used a gun despite having been convicted of a felony.

{¶29} Regarding the tampering with evidence conviction, under Section 2921.12(A)(1) of the Ohio Revised Code, "[n]o person, knowing that an official proceeding or investigation is in progress, or is about to be or likely to be instituted, shall . . . [a]lter, destroy, conceal, or remove any record, document, or thing, with purpose to impair its value or availability as evidence in such proceeding or investigation." The State argued to the jury that there was evidence that Mr. Lollis destroyed or concealed Mr. Thompson's gun.

{¶30} This Court has held that "the fact that the police looked a few places for the gun and could not find it does not necessarily show that the appellant tampered with it." *State v. Wooden*, 86 Ohio App. 3d 23, 27 (1993). The mere fact that a gun was removed from a crime scene does not support an inference that it was taken to impair its value or availability as evidence.

{¶31} The State did not present any evidence that Mr. Lollis destroyed or concealed Mr. Thompson's gun. The only evidence it presented about what happened to the gun after the shooting was Mr. Thompson's testimony that Mr. Lollis took it with him when Mr. Thompson dropped him off at Ms. Sommerville's house and that he never saw the gun again. Although a police detective testified that his department was unable to recover the gun, there was no evidence that they searched for it at Mr. Lollis's or Ms. Sommerville's homes. Accordingly, the evidence did not support an inference that Mr. Lollis tampered with the gun. "[I]t is just as likely that [he] took the weapon back to his home and placed it in a location where it could have easily been found." *State v. Sims*, 2d Dist. No. 2008 CA 92, 2009-Ohio-5875, at ¶26. This Court, therefore, concludes that Mr. Lollis's conviction for tampering with evidence was not supported by sufficient evidence. See *State v. Beard*, 6th Dist. No. WD-08-037, 2009-Ohio-4412, at ¶20 (concluding that mere fact that gun used in shooting was not found can not lead to an inference that defendant tampered with it). The trial court incorrectly denied his motion for judgment of acquittal on that offense. Mr. Lollis's third assignment of error is sustained regarding his conviction for tampering with evidence, but overruled regarding his murder and having a weapon while under disability convictions.

MANIFEST WEIGHT

{¶32} Mr. Lollis's second assignment of error is that his convictions are against the manifest weight of the evidence. If a defendant argues that his convictions are against the manifest weight of the evidence, this 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[s] must be reversed and a new trial ordered." *State v. Otten*, 33 Ohio App. 3d 339, 340 (1986).

{¶33} Mr. Lollis has focused his arguments on his murder conviction. He has argued that Mr. Thompson was the one with the gun, that Mr. Thompson was the one who drove them and stopped the car where he did, that Mr. Thompson ran to the car after the shooting, and that he identified Mr. Thompson as the shooter. He has also argued that there were no credible witnesses who identified him as the shooter.

{¶34} The three independent witnesses gave conflicting accounts of the shooter, describing him as tall, thin, big, stocky, muscular, dark-skinned, bald, and wearing a "do rag." They were consistent, however, about the fact that the shooter was not wearing a shirt. Mr. Diggins testified that Mr. Thompson was wearing a shirt, but Mr. Wood and Mr. Lollis were not. Although Mr. Diggins was inebriated at the time of the shooting and gave conflicting statements to the police after it, the jury was entitled to believe the part of his testimony in which he said that Mr. Lollis was not wearing a shirt. It was also entitled to believe his testimony that he, Mr. Thompson, and Mr. Wood were all friends and did not have any problems with each other. Acea Wood confirmed that he, Mr. Thompson, Mr. Diggins, and his brother were friends. The jury was further entitled to take into account that, while Mr. Diggins and Mr. Thompson cooperated

with the police after the incident, Mr. Lollis moved to Houston, assumed a false identity, and ran from the police when they found him. See *State v. Hand*, 107 Ohio St. 3d 378, 2006-Ohio-18, at ¶167 ("flight, escape from custody, resistance to arrest, concealment, assumption of a false name, and related conduct, are . . . evidence of consciousness of guilt, and thus of guilt itself.") (quoting *State v. Eaton*, 19 Ohio St. 2d 145, 160 (1969), vacated in part on other grounds, 408 U.S. 935 (1972)).

{¶35} The jury did not lose its way when it convicted Mr. Lollis of murder and having weapons while under disability. Mr. Lollis's second assignment of error is overruled.

CONCLUSION

{¶36} The prosecutor's misconduct was not plain error. Mr. Lollis's convictions for murder and having weapons while under disability were supported by sufficient evidence and are not against the manifest weight of the evidence, but the trial court should have granted Mr. Lollis's motion for judgment of acquittal on the tampering with evidence charge. The judgment of the Summit County Common Pleas Court is affirmed in part and reversed in part.

Judgment affirmed in part,
and reversed in part.

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 both parties equally.

CLAIR E. DICKINSON
FOR THE COURT

BELFANCE, J.
BAIRD, J.
CONCUR

(Baird, J., retired, of the Ninth District Court of Appeals, sitting by assignment pursuant to §6(C), Article IV, Constitution.)

APPEARANCES:

DONALD R. HICKS, attorney at law, for appellant

SHERRI BEVAN WALSH, prosecuting attorney, and RICHARD S. KASAY, assistant prosecuting attorney, for appellee.