

[Cite as *State v. Wright*, 2010-Ohio-5106.]

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C.A. No. 25280

Appellee

v.

COURTLAND J. WRIGHT

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CR 08 07 2228

Appellant

DECISION AND JOURNAL ENTRY

Dated: October 20, 2010

WHITMORE, Judge.

{¶1} Defendant-Appellant, Courtland Wright, appeals from his convictions in the Summit County Court of Common Pleas. This Court affirms.

I

{¶2} On the morning of July 4, 2008, Wright and another man, Acea Smith (“Acea”), arrived at the home of Robert Smith. Smith sought to purchase drugs from Wright, but Wright indicated that he needed to get the drugs from his supplier first. According to Wright, Smith would not agree to wait until Wright returned, so Wright agreed to take Smith with him to meet with the supplier. Smith retrieved a gun from his couch cushions before he left the house. Wright, Acea, and Smith then rode in Acea’s van and stopped at the Circle K gas station on Market Street so that Wright could make a phone call. At approximately 11:00 a.m., Wright repeatedly shot Smith in the parking lot of the Circle K and fled the scene on foot. Smith died before the police arrived. Wright and Acea both later claimed that Smith displayed a gun and

pointed it at them. Wright specifically claimed that he shot Smith in self-defense because Smith was “advancing” on him with a gun. The police found a gun on the ground next to Smith’s body. Yet, none of the witnesses to the shooting saw Smith holding a gun when Wright shot him. After the police were able to identify Wright as the shooter, he contacted them and cooperated in his apprehension.

{¶3} On July 21, 2008, a grand jury indicted Wright on the following counts: (1) aggravated murder with the specific intent to cause death, in violation of R.C. 2903.01(B); (2) murder, in violation of R.C. 2903.02(A); (3) having weapons while under disability, in violation of R.C. 2923.13(A)(3); and (4) tampering with evidence, in violation of R.C. 2921.12(A)(1). Both Wright’s aggravated murder and murder counts also had attendant firearm specifications. A supplemental indictment was later issued, adding one count of aggravated murder with the specific intent to cause death, in violation of R.C. 2903.01(A), and another firearm specification. The matter proceeded to a jury trial, and the jury found Wright guilty of murder with a firearm, tampering with evidence, and having weapons while under disability.

{¶4} On November 7, 2008, Wright filed a motion for a new trial on the basis of prosecutorial misconduct. He supported his motion with an affidavit from one of the jurors at trial. The trial court denied Wright’s motion and later sentenced him to twenty-one years in prison. Wright filed an appeal, but this Court dismissed his appeal due to an invalid post-release control notification. See *State v. Wright*, 9th Dist. No. 24610, 2009-Ohio-6081, at ¶7. The trial court re-sentenced Wright after this Court’s dismissal.

{¶5} Wright now appeals from his convictions and raises three assignments of error for our review. We rearrange the assignments of error.

II

Assignment of Error Number Three

“APPELLANT WRIGHT’S CONVICTIONS FOR MURDER AND TAMPERING WITH EVIDENCE WERE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.”

{¶6} In his third assignment of error, Wright argues that his convictions for murder and tampering with evidence are against the manifest weight of the evidence. We disagree.

{¶7} When considering a manifest weight argument, the Court:

“[M]ust 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. Otten* (1986), 33 Ohio App.3d 339, 340.

A weight of the evidence challenge indicates that a greater amount of credible evidence supports one side of the issue than supports the other. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387. Further, when reversing a conviction on the basis that the conviction was against the manifest weight of the evidence, the appellate court sits as the “thirteenth juror” and disagrees with the factfinder’s resolution of the conflicting testimony. *Id.* Therefore, this Court’s “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, 175; see, also, *Otten*, 33 Ohio App.3d at 340.

Murder

“No person shall purposely cause the death of another[.]” R.C. 2903.02(A).

“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).

Whoever commits the foregoing offense is guilty of murder. R.C. 2903.02(D).

{¶8} Wright argues that his murder conviction is against the manifest weight of the evidence because the evidence tended to show that he shot Robert Smith in self-defense. He does not set forth any of the specific elements of self-defense, but generally argues that the evidence showed he had to shoot Smith after Smith advanced upon him with a gun.

{¶9} Three different witnesses testified that they saw Wright shoot Smith and that Smith was not pointing a gun at Wright at the time. Tyne James testified that she walked with her three children to the Circle K at approximately 11:00 a.m. on the morning of the shooting. James saw Wright draw a gun and shoot Smith multiple times before fleeing. She specified that she never saw Smith with a gun. Barry Hairston testified that he arrived at the Circle K around the same time to purchase some beer and saw Wright shoot Smith in the head. Hairston further testified that, although he saw a gun on the ground next to Smith after the shooting occurred, he never saw a gun in Smith's hand. Finally, Christina Fanizzi testified that she was a passenger in a car at one of the gas pumps during the shooting. Fanizzi testified that she saw Wright hold his gun to Smith's head and shoot him. She also specified that she never saw Smith with a gun.

{¶10} Dr. Dorothy Emma Dean, a deputy medical examiner at the Summit County Medical Examiner's Office, testified that she performed an autopsy on Smith. At the time of his death, Smith was sixty-two years of age. He was 5'5" and 194 pounds. Dr. Dean testified that Smith died as a result of five gunshot wounds. The gunshots entered Smith's face, his right cheek, the back of his neck, his right shoulder/arm, and the back of his torso. Dr. Dean could not determine the order in which the gunshots occurred. Based on the soot and stippling surrounding some of the gunshots, however, she was able to determine that both of the gunshots to Smith's face were fired at close range and the gunshot to his neck was fired at an intermediate range. The remaining shots were fired from an indeterminate range.

{¶11} Officer Frank Harrah testified that he received a phone call from Wright while on assignment at the Detective Bureau's desk on July 5, 2008. Wright told Officer Harrah that he was calling because "he had seen his picture all over the media and th[e] stories were saying he shot someone." Wright told Officer Harrah that "the other guy shot first." Yet, the gun that the police recovered from the scene of the shooting did not support Wright's statement. Although the police found a gun next to Smith's body, the gun had never been fired. Jonathan Gardner from the Ohio Bureau of Criminal Identification and Investigation examined the gun, which was a revolver, and testified that all of the bullets in the gun were still intact. Accordingly, the loaded gun contradicted Wright's claim that Smith had used the gun to shoot at him first.

{¶12} Wright testified in his own defense. According to Wright, Smith was "very high" when he and Acea brought Smith to the Circle K. Wright testified that Smith approached him in the gas station's parking lot while displaying a gun. At some point, Wright walked to the back of Acea's van and hid behind it "to get out of the line of fire." Wright testified that he still had his gun in his pocket while hiding behind Acea's van and thought about running away. Before he could do anything further, Acea started the engine in his van and sped away. Wright testified that when the van pulled away, Smith "advanced" on him and Wright removed his own gun from his pocket. When Smith reached Wright, Wright saw that Smith "was going to raise [his gun]," so Wright "pushed [Smith's] hand down" and shot him instead. According to Wright, he ran from the scene after he shot Smith because he did not know if Smith was dead and thought he might still shoot him. Wright admitted on direct examination that he had several prior convictions, one of which was for having a weapon while under disability.

{¶13} Although security camera footage from the Circle K depicts Wright standing behind Acea's van and the van quickly pulling away, it is not possible to see the interaction

between Wright and Smith in the video recording. The only eyewitnesses to the actual shooting who testified at trial were Wright, James, Hairston, and Fanizzi. Wright was the only witness who testified that Smith had a gun. The remaining witnesses all testified that Wright shot Smith and that they did not see Smith holding a gun. Despite Wright's statement to Officer Harrah that Smith shot first, all of the bullets in Smith's revolver were intact. Moreover, considering that Wright shot Smith five times before fleeing, the jury could have rejected Wright's testimony that the reason he fled the scene was that he was afraid Smith still might shoot him. Based on the foregoing, we cannot say that the jury lost its way in concluding that Wright murdered Smith and that he did not act in self-defense when he did so. Wright's argument that his murder conviction is against the manifest weight of the evidence lacks merit.

Tampering with Evidence

{¶14} R.C. 2921.12(A)(1) provides, in relevant part, as follows:

“No 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[.]”

Whoever commits the foregoing offense is guilty of tampering with evidence. R.C. 2921.12(B).

{¶15} Wright argues that his tampering conviction is against the manifest weight of the evidence because he did not dispose of the gun for the purpose of impairing its evidentiary value or availability. Wright testified that, after he fled the scene of the shooting, he threw his gun into a trash can alongside a nearby side street. According to Wright, he disposed of the gun because he did not want the police to consider him “armed and dangerous” if they found him. The police were never able to recover Wright's gun.

{¶16} “In determining whether a defendant acted purposely, ‘[a] defendant's state of mind may be inferred from the totality of the surrounding circumstances.’” *State v. Patel*, 9th

Dist. No. 24030, 2008-Ohio-4693, at ¶34, quoting *State v. Sullivan*, 9th Dist. No. 07CA0076-M, 2008-Ohio-2390, at ¶10. Here, the jury could have believed that Wright disposed of his gun solely because he did not want to be in possession of a weapon if the police found him. Conversely, the jury could have believed that Wright disposed of the gun to impair its availability in the investigation of Smith's murder. Given that Wright took Smith to the Circle K to facilitate a drug sale, shot Wright five times, fled the scene after the shooting, and threw the gun into a trash can, we cannot say that it was unreasonable for the jury to believe the latter. Wright's tampering conviction is not against the manifest weight of the evidence simply because the jury refused to believe the reason he gave for disposing of his gun. See, e.g., *State v. Green*, 9th Dist. No. 21795, 2004-Ohio-3944, at ¶24 ("The jury was entitled to disbelieve Appellant's testimony and find that he tampered with evidence.").

{¶17} Wright further argues that the gun he used to murder Smith "was of no actual evidentiary value" because the State was able to convict him without the gun. This Court does not agree with Wright's unsupported, hindsight-based assertion. It is true that the State was able to find and convict Wright in the absence of a murder weapon. Yet, that does not mean the gun had no evidentiary value or that Wright's actions did not impair its availability. Officer Richard Morrison testified that the police were able to locate Wright after they found and interviewed Acea, he identified Wright by a nickname, and they searched several databases for similar monikers. Although Wright eventually contacted the police to admit to the shooting, he only did so after they identified him as a suspect. Had the investigation taken a different course, the gun might have been a critical piece of evidence. Because Wright's actions impaired the murder weapon's availability, it is impossible to know what evidentiary value it possessed. See R.C.

2921.12(A)(1). Wright's argument that he did not tamper with evidence lacks merit. His third assignment of error is overruled.

Assignment of Error Number Two

“THE TRIAL COURT ABUSED ITS DISCRETION AND ERRED AS A MATTER OF LAW, IN DEROGATION OF APPELLANT WRIGHT’S CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A FAIR TRIAL, WHEN IT APPLIED OHIO EVIDENCE RULE 606(B) TO JUSTIFY ITS REFUSAL TO CONSIDER THE AFFIDAVIT OF A JUROR UPON MOTION FOR A NEW TRIAL, AND IN DENYING WRIGHT’S MOTION FOR A NEW TRIAL.”

{¶18} In his second assignment of error, Wright argues that the trial court erred by refusing to consider a juror’s affidavit as evidence in support his motion for a new trial and by denying the motion. We disagree.

{¶19} Evid.R. 606(B) provides, in part, as follows:

“Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury’s deliberations or to the effect of anything upon that or any other juror’s mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror’s mental processes in connection therewith.”

In contrast to certain exceptions that may apply when external influences have allegedly tainted the jury’s verdict, Evid.R. 606(B) explicitly prohibits jurors from offering “internal evidence of the jury’s deliberations in order to impeach the sentencing recommendations.” *State v. Hessler* (2000), 90 Ohio St.3d 108, 124. The Ohio Supreme Court has specifically recognized that a juror may not offer an affidavit to attest to an internal influence upon the jury’s deliberations. *Id.*

{¶20} Wright relied upon an affidavit from one of the jurors in this matter, who attested to the impact that the prosecutor’s statements had upon the jury. The trial court refused to consider the affidavit, citing Evid.R. 606(B). Wright argues that the trial court’s decision infringed upon his due process rights. Yet, the juror’s affidavit in this matter “do[es] not offer

evidence of any improper extraneous influence (i.e., threats, bribes, or attempted threats or bribes or improprieties by a court officer); hence, the exceptions to Evid.R. 606(B) do not apply.” *Id.* Because the affidavit in this matter constitutes “internal evidence of the jury’s deliberations in order to impeach the sentencing recommendations,” the trial court did not err by refusing to consider it in light of Evid.R. 606(B). *Id.* Accord *Herald v. Hood* (July 21, 1993), 9th Dist. No. 15986, at *4. Wright’s second assignment of error lacks merit.

Assignment of Error Number One

“APPELLANT COURTLAND WRIGHT WAS DENIED HIS CONSTITUTIONAL RIGHT TO DUE PROCESS AND A FAIR TRIAL BY VIRTUE OF INFLAMMATORY AND PREJUDICIAL COMMENTS BY THE PROSECUTOR THAT CONSTITUTED PROSECUTORIAL MISCONDUCT IN CLOSING ARGUMENT.”

{¶21} In his first assignment of error, Wright argues that he was denied his right to a fair trial because the prosecutor engaged in misconduct during closing argument. We disagree.

{¶22} Initially, we note that the absence of a sustaining affidavit is not detrimental to Wright’s first assignment of error because it does not arise from the denial of his Crim.R. 33 motion. See Crim.R. 33(C) (requiring affidavit in support of motion for new trial on the basis of prosecutorial misconduct). In deciding whether a prosecutor’s conduct rises to the level of prosecutorial misconduct, a court determines if the prosecutor’s actions were improper, and, if so, whether the defendant’s substantial rights were actually prejudiced. *State v. Smith* (1984), 14 Ohio St.3d 13, 14. “[A] judgment may only be reversed for prosecutorial misconduct when the improper conduct deprives the defendant of a fair trial.” *State v. Knight*, 9th Dist. No. 03CA008239, 2004-Ohio-1227, at ¶6, citing *State v. Carter* (1995), 72 Ohio St.3d 545, 557. The defendant must show that, but for the prosecutor’s misconduct, the jury would not have convicted him. *State v. Lollis*, 9th Dist. No. 24826, 2010-Ohio-4457, at ¶24. This Court applies

an abuse of discretion standard of review to a trial court's ultimate decision to grant or deny a motion for a new trial on the basis of prosecutorial misconduct. *State v. Heru*, 9th Dist. No. 24756, 2010-Ohio-635, at ¶2.

{¶23} Wright argues that the prosecutor engaged in misconduct during closing argument. In particular, he argues that the following statements amounted to prosecutorial misconduct:

“[Acea Smith] has people like Courtland Wright who will run his drugs for him and he has a good friend who is a high-ranking detective on the Akron Police Department who he has on speed dial *** who he can call whenever he thinks he's going to get in trouble. And he has a detective, Bertina King, who will come in here and throw her fellow detectives and me under the bus in order to protect a convicted gang member. Well, ladies and gentlemen, you should have seen through what was going on there.”

He also argues that the prosecutor engaged in misconduct when he stated that Wright: “cannot be completely honest with you”; “can't be forthright”; “fudges his story”; and “knows he's wrong and he's trying to talk his way out of it.”

{¶24} In the State's case-in-chief, the prosecutor focused on the testimony of the eyewitnesses to the shooting, the autopsy results, the firearm analysis, and the testimony of the officers who conducted the investigation. The only witness who testified in any detail about Acea in the State's case-in-chief was Officer Morrison. Officer Morrison testified that he interviewed Acea along with Detective King. Officer Morrison specified that Detective King informed him of Acea's involvement in the incident. Although Officer Morrison saw Acea in the security camera footage from the Circle K, he could not identify Acea by name until Detective King provided that information. Officer Morrison testified that Acea identified the shooter by the nickname “CV” or “CJ” and that nickname helped the police identify Wright.

{¶25} Wright depended upon his own testimony and the testimony of Acea to support his claim of self-defense at trial. Both testified that Smith displayed a gun at the Circle K and pointed it at them directly before Acea drove away and Wright shot Smith. A part of the defense's theory at trial was that the State failed to fully investigate Smith's murder and wrongfully ignored evidence that might have aided Wright's claim of self-defense. Detective King testified for the defense. She admitted that she knew Acea "from the neighborhood," that they attended the same church, and that they were "close." On the day of the shooting, Acea called Detective King's personal cell phone and left a message. Detective King spoke with Acea shortly thereafter and arranged an interview with him at the police station that same day. She and Officer Morrison interviewed Acea for approximately one hour. According to Detective King, Acea cooperated in the investigation and helped the police identify the individuals in the security camera footage from the Circle K. Detective King did not know whether the prosecutor ever followed up on her interview with Acea. She did testify, however, that she gave all of her written reports to the prosecutor and he never subpoenaed her to testify at trial. She further testified that she personally told the prosecutor, whom she identified by name, that she had saved Acea's voicemail on her cell phone, but that he never listened to it. Defense counsel's line of questioning implied that the State, and in particular the prosecutor, deliberately chose not to explore a possible source of exculpatory information.

{¶26} "The prosecution is normally entitled to a certain degree of latitude in its concluding remarks." *Smith*, 14 Ohio St.3d at 13. At least one witness who testified at trial stated that Acea was a drug dealer, and Acea himself admitted that he had multiple prior convictions, including one for criminal gang activity. Wright also admitted that he met with Smith on the day of the shooting to sell him drugs. To the extent the prosecutor referred to Acea

as a convicted gang member and argued that Wright was conducting a drug transaction for Acea on the day of the murder, we cannot say that he exceeded the degree of latitude afforded him in closing argument. See *id.* Similarly, we cannot say that the prosecutor engaged in misconduct when he argued that Wright was being untruthful. “[I]t is not prosecutorial misconduct to characterize a witness as a liar or a claim as a lie if the evidence reasonably supports the characterization.” *State v. Johnson*, 9th Dist. No. 06CA0074, 2007-Ohio-5604, at ¶12, quoting *State v. Baker*, 2d Dist. No. 2004CA29, 2005-Ohio-45, at ¶19. Wright’s statement to Officer Harrah that Smith shot first was not supported by the evidence. Further, the testimony that Wright offered in support of his claim of self-defense did not match the testimony of the other eyewitnesses to the shooting, all of whom testified that they did not see Smith holding a gun. There was evidence in the record to justify the prosecutor’s statements about Wright being untruthful. We do not agree with Wright’s assertion that those statements amounted to misconduct. Conversely, we do agree that the prosecutor’s statements about Detective King were improper.

{¶27} While a prosecutor may characterize a witness as being untruthful when the evidence reasonably supports such a conclusion, he “may not invade the realm of the jury by, for example, stating [his] personal beliefs regarding guilt and credibility, or alluding to matters outside the record.” *Johnson* at ¶12, quoting *Baker* at ¶19. “It is improper for an attorney to express his personal belief or opinion as to the credibility of a witness[.]” *Smith*, 14 Ohio St.3d at 14. Moreover, “[i]t 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.* The prosecutor failed to adhere to these principles when he suggested that Acea had Detective King on “speed dial” and accused Detective King of “throw[ing] her fellow detectives and me under the bus.” While Acea

clearly had Detective King's personal cell phone number, there was no evidence he had her on "speed dial." Further, even if the prosecutor was personally offended by Detective King's testimony, it was improper for him to express his personal opinion as to that testimony. See, e.g., *Lollis* at ¶22. Those statements went beyond the bounds of principled advocacy. The only remaining inquiry is whether they prejudiced Wright's trial. See *Smith*, 14 Ohio St.3d at 14.

{¶28} Wright argues that the prosecutor's statements prejudiced him because they impugned Detective King's credibility, and consequently, impugned Acea's credibility as well. Because the credibility of his witnesses was key to his claim of self-defense, Wright argues, the prosecutor deprived him of a fair trial. We disagree with Wright's argument. Both Wright and Acea testified at trial, so the jury had the opportunity to assess their credibility. Given that Wright and Acea had multiple prior convictions, Wright admitted he met with Smith to sell him drugs, Wright shot Smith five times, and both Wright and Acea fled from the scene of the shooting, it was not unreasonable for the jury to reject their version of the events. Three different eyewitnesses testified that Wright shot Smith and that Smith was not holding a gun at the time. The jury simply chose to believe the testimony of those eyewitnesses. Moreover, the trial court instructed the jury that closing arguments are not evidence, and this Court presumes that the jury followed that instruction. *State v. Thornton*, 9th Dist. No. 23417, 2007-Ohio-3743, at ¶7. Because Wright did not demonstrate that the prosecutor's statements prejudiced him, the trial court did not abuse its discretion by denying his motion for a new trial. Wright's first assignment of error is overruled.

III

{¶29} Wright's 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.

BETH WHITMORE
FOR THE COURT

DICKINSON, P. J.
CONCURS

BELFANCE, J.
CONCURS IN JUDGMENT ONLY

APPEARANCES:

NICHOLAS SWYRYDENKO, Attorney at Law, for Appellant.

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