

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

State of Ohio

Court of Appeals No. L-08-1310

Appellee

Trial Court No. CR0200802222

v.

Henry Lee Reed

DECISION AND JUDGMENT

Appellant

Decided: January 29, 2010

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Ian B. English, Assistant Prosecuting Attorney, for appellee.

Neil S. McElroy, for appellant.

* * * * *

SINGER, J.

{¶ 1} Appellant, Henry Lee Reed, appeals from a judgment issued by the Lucas County Court of Common Pleas following a jury verdict finding him guilty of felonious assault. For the reasons that follow, we affirm.

{¶ 2} Appellant sets forth the following assignments of error:

{¶ 3} "I. Misapplication of the rules regarding hearsay resulted in a denial of Mr. Reed's constitutional rights to confront and cross-examine witnesses, his right to present a defense, and his right to a Fair Trial and Due Process of law, in violation of the U.S. Constitution's Fifth, Sixth and Fourteenth Amendments and Article I, § 10 and § 16 of the Ohio Constitution."

{¶ 4} "II. The appellant was denied his rights to Due Process and a Fair Trial when the prosecutor engaged in misconduct at trial. Such denial resulted in violations of the appellant's rights as guaranteed by the Fifth Amendment to the United States Constitution and Art. I, §10 of the Ohio Constitution."

{¶ 5} "III. The conviction for felonious assault was against the manifest weight of the evidence."

{¶ 6} We will initially consider appellant's third assignment of error wherein he argues that his conviction was against the manifest weight of the evidence.

{¶ 7} Following his indictment for felonious assault, a jury trial commenced on August 11, 2008. Toledo Police Officer Jeff Quigley testified that he was on duty on May 18, 2008, when he was dispatched to a home on Parkwood Avenue to investigate a possible stabbing. Once there he found a woman, identified as Tammy Nunn, sitting on the floor and bleeding. She had suffered a knife wound to her back. A man, identified as appellant, was holding her up by her wrists. Another man in the room, identified as appellant's uncle, Floyd Robinson, indicated to Quigley that appellant was the one who

had injured Nunn. Appellant was then taken into custody. Officer Quigley testified that he searched the house for a knife but was unable to find one.

{¶ 8} Tammy Nunn testified that on May 18, 2008, she was drinking alcohol and watching television with appellant, her boyfriend, at Floyd Robinson's house. At one point, Nunn testified, appellant walked out to the kitchen. She decided to follow appellant out to the kitchen but then changed her mind and turned around to go back where she had been sitting. Nunn testified that she immediately felt something hit her in the back. She fell to the ground and was unable to get up. Nunn testified that she was not fighting with appellant at the time and that she never saw a knife. As a result of the incident, Nunn sustained a spinal cord injury that has left her paralyzed.

{¶ 9} Floyd Robinson testified that he was upstairs in his Parkwood home on May 18, 2008, when he heard appellant and Nunn arguing downstairs. When he heard Nunn yell out, he went downstairs and saw that Nunn had been stabbed. He then called 911 and told the operator that appellant had stabbed Nunn (State's exhibit 1).

{¶ 10} Appellant took the stand in his own defense. He testified that he and Nunn were arguing on May 18, 2008. According to appellant, Nunn began hitting him in the head with a glass ash tray and attempted to attack him with a knife. Appellant testified that he stabbed Nunn in anger because she had attacked him. He also claimed to have acted in self defense.

{¶ 11} The "weight of the evidence" refers to the jury's resolution of conflicting testimony. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52. In determining

whether a verdict is against the manifest weight of the evidence, the appellate court sits as the "thirteenth juror" and "* * * 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 ." Id. An appellate court must defer to the factual findings of the jury regarding the weight to be given the evidence and credibility of the witnesses. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. When examining witness credibility, "[t]he choice between credible witnesses and their conflicting testimony rests solely with the finder of fact and an appellate court may not substitute its own judgment for that of the finder of fact." *State v. Awan* (1986), 22 Ohio St.3d 120, 123. The factfinder is free to believe all, part, or none of the testimony of each witness appearing before it. *State v. Brown*, 11th Dist. No. 2002-T-0077, 2003-Ohio-7183, ¶ 53.

{¶ 12} Appellant was convicted of felonious assault in violation of R.C. 2903.11(A)(1). The elements of the offense are as follows: "(A) No person shall knowingly do either of the following: (1) Cause serious physical harm to another or to another's unborn;"

{¶ 13} The trier of the facts, in this case the jury, heard evidence that appellant stabbed Nunn in the back with a knife and that she is now paralyzed due to his actions. Appellant, acknowledging that he did stab Nunn, claims he did it because he feared for his life. This is a matter of credibility within the province of the jury, not for this court

upon appeal. The jury in this case chose to believe the testimony of Tammy Nunn over appellant's testimony. On review, we cannot say that the jury clearly lost its way or perpetrated a manifest miscarriage of justice. Appellant's third assignment of error is found not well-taken.

{¶ 14} In his first assignment of error, appellant contends the court erred in sustaining an objection made by the state on hearsay grounds. "The admission or exclusion of relevant evidence rests within the sound discretion of the trial court." *State v. Sage* (1987), 31 Ohio St.3d 173. Hearsay is defined as, "[a] statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Evid.R. 801(C). Generally, hearsay is not admissible except as authorized by constitution, statute, or rules prescribed by the Ohio Supreme Court. Evid.R. 802.

{¶ 15} During Officer Quigley's cross-examination, he was asked about statements made to him by Floyd Robinson. The state objected and the court sustained the objection. Appellant now contends that Quigley's testimony was admissible pursuant to Evid.R. 801(D)(1)(b), which provides that a prior statement by a witness is not hearsay if it is consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive * * *."

{¶ 16} Appellant was seeking to admit Robinson's statements that appellant and Nunn were arguing before the stabbing. Later, Robinson testified that the two were arguing. However, this was after Officer Quigley's testimony. Thus, at the time of

Officer Quigley's testimony, there was no prior consistent statement from Robinson. Accordingly, Evid.R. 801(D)(1)(b) does not apply here. Finding no abuse of discretion, appellant's first assignment of error is found not well-taken.

{¶ 17} In his second assignment of error, appellant alleges prosecutorial misconduct. In analyzing claims of prosecutorial misconduct, the test is "whether remarks were improper and, if so, whether they prejudicially affected substantial rights of the accused." *State v. Jones* (2000), 90 Ohio St.3d 403, 421. "The touchstone of analysis 'is the fairness of the trial, not the culpability of the prosecutor.'" *Id.*, quoting *Smith v. Phillips* (1982), 455 U.S. 209, 219, 102 S.Ct. 940, 947, 71 L.Ed.2d 78. In making this determination, an appellate court should consider several factors: (1) the nature of the remarks; (2) whether an objection was made by counsel; (3) whether corrective instructions were given by the court; and (4) the strength of the evidence against the defendant. *State v. Barnes* (Oct. 27, 1988), 8th Dist. No. 54527; *State v. Heredia* (Sep. 24, 1987), 8th Dist. No. 52705; *State v. Hill* (1977), 52 Ohio App.2d 393, 396. Where it is clear beyond a reasonable doubt that a jury would have found the defendant guilty even absent the alleged misconduct, the defendant has not been prejudiced, and his conviction will not be reversed. See *State v. Loza* (1994), 71 Ohio St.3d 61, 78.

{¶ 18} Appellant first contends that the prosecutor made several prejudicial comments during his cross-examination of appellant. First, the prosecutor began his cross-examination by stating "[W]ell, Mr. Reed, now you get to testify in your own words, not [your lawyer's]."

{¶ 19} Appellant did not object to this comment. An appellate court generally will not consider as error any issue a party was aware of but failed to bring to the trial court's attention. Failure to object at the trial court level, when the issue is apparent at that time, generally constitutes a waiver of that issue, and therefore the issue need not be heard for the first time on appeal. *State v. Awan*, supra. Accordingly, we will not review this statement for purposes of determining prosecutorial misconduct.

{¶ 20} Next, the prosecutor accused appellant of "making things up to answer my question." Appellant objected to this comment and the trial court overruled the objection. We find no misconduct in this statement as it followed a line of questioning in which appellant gave inconsistent answers.

{¶ 21} Later, the prosecutor once again attacked appellant's credibility when he stated "[Y]ou can't remember anything except what [your lawyer] said to you." Appellant objected to this statement and the trial court sustained the objection. We find no misconduct here as "[E]rror cannot be predicated on objections which have been sustained by the trial court." *State v. Austin* (Dec. 17, 1986), 1st Dist. No. C-860148.

{¶ 22} Appellant also cites numerous instances of alleged misconduct in the prosecutor's closing argument. In sum, the prosecutor told the jury that Tammy Nunn was a credible witness while appellant was not, the prosecutor made several references to Nunn's debilitating injuries and, the prosecutor told the jury that the nature of her injuries suggest that appellant did not accidentally stab Nunn.

{¶ 23} Generally, prosecutors are entitled to considerable latitude in closing argument. *State v. Ballew* (1996), 76 Ohio St.3d 244, 255. In closing argument, a prosecutor may comment freely on "what the evidence has shown and what reasonable inferences may be drawn therefrom." *State v. Lott* (1990), 51 Ohio St.3d 160, 165. Prosecutors may not, however, invade the realm of the jury by rendering their personal beliefs regarding guilt and credibility. *State v. Smith* (1984), 14 Ohio St.3d 13, 14.

{¶ 24} Here, appellant did not object to the prosecutor's comments regarding credibility so he has waived the argument. As far as the prosecutor's comments regarding the nature of Nunn's injuries, we find no error. Nunn herself testified to the extent and nature of her injuries and the jury was able to view her in a wheel chair and see the discomfort she suffered from her injuries. Finally, the prosecutor's comment pertaining to the appearance of the stab wound itself was relevant as appellant, at one point in his testimony, suggested that Nunn had merely fell on the knife.

{¶ 25} Viewing all of the alleged instances of prosecutorial misconduct in the context of the entire trial, we cannot say that appellant's right to a fair trial was prejudicially affected. Appellant's second assignment of error is found not well-taken.

{¶ 26} On consideration whereof, the judgment of the Lucas 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

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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