

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

State of Ohio

Court of Appeals No. L-14-1067

Appellee

Trial Court No. CR201302506

v.

Jerome Williams

DECISION AND JUDGMENT

Appellant

Decided: May 1, 2015

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Brenda J. Majdalani, Assistant Prosecuting Attorney, for appellee.

Patricia Horner, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Defendant-appellant, Jerome Williams, appeals the March 27, 2014 judgment of the Lucas County Court of Common Pleas which, following a jury trial convicting him of improper handling of a firearm in a motor vehicle, sentenced him to

four years of community control with several conditions. For the reasons that follow, we affirm.

{¶ 2} Following a traffic stop on August 27, 2013, appellant was indicted on one count of carrying a concealed weapon, R.C. 2923.12(A)(2) and (F), and one count of improperly handling a firearm in a motor vehicle, R.C. 2923.16(B) and (I), both fourth degree felonies. Appellant was appointed counsel and entered not guilty pleas to the charges. On February 4, 2014, following appellant's request, appointed counsel was permitted to withdraw and new counsel was appointed. New counsel filed a request for discovery on February 6, 2014. A discovery packet was provided the following day.

{¶ 3} On March 18, 2014, the matter proceeded to a jury trial. Toledo Police Officers Scott Mills and Matthew Slaman testified that they are part of the SRB (Special Response Bureau) of the SWAT unit. On August 27, 2013, at approximately 2:00 a.m., they and Officer Santibanez (who did not testify at trial) were engaged in a traffic stop at Michigan and Walnut Streets in central Toledo, Lucas County, Ohio, when they believe they heard a gunshot coming from the direction of the nearby Cherrywood Apartments. They observed a dark-colored vehicle leaving the area of the apartments at a high rate of speed, "blow" through a stop sign, and proceed northbound on Cherry Street. Officer Mills testified that they immediately terminated their traffic stop and pursued the vehicle. Once they caught up, they activated the overhead lights and sirens. Both officers stated that at that point, they noticed that the back seat passenger completely disappeared from view and that there were a lot of "furtive" movements in the vehicle.

{¶ 4} Officer Mills acknowledged that the vehicle stopped soon after the lights were activated and that, once stopped, they removed the three occupants and performed a pat-down of the two males and one female. They conducted a visual search of the vehicle, a pickup truck with a full back seat, and then Officer Slaman discovered a handgun under the middle of the back bench seat. At that point, the trio was separated and transported to Toledo Police headquarters. Officers Mills and Slaman identified appellant as the operator of the vehicle.

{¶ 5} Officer Slaman testified that he secured the weapon, removed the magazine which contained five 9 millimeter rounds of ammunition. Slaman explained the procedures for preserving and identifying the evidence.

{¶ 6} Sergeant Wayne Phillips testified that he was called to the scene and photographed the evidence. Photographs of the handgun as it was found in the bench seat compartment were admitted into evidence. Toledo Police Criminalist Chadwyck Douglass testified that the gun was operable.

{¶ 7} Toledo Police Detective Jason Lenhardt conducted a fingerprint analysis of the handgun. Just prior to his testimony, objections were raised regarding the state's compliance with the Crim.R. 16 discovery rules. Defense counsel argued that appellant had not been provided with Detective Lenhardt's report or the identifying fingerprint evidence and that neither his testimony nor his report should be admissible during trial. Defense counsel acknowledged that Detective Lenhardt was disclosed as a fingerprint

expert. Defense counsel ultimately argued that he did not object to Lenhardt's testimony, but the supporting materials which were not received in discovery should be excluded. The court excluded the report.

{¶ 8} Detective Lenhardt testified that he examined the handgun at issue for fingerprints and that he found a latent fingerprint on the gun's magazine. Detective Lenhardt explained his findings using fingerprint cards showing the latent print and appellant's fingerprint. The exhibits were objected to by defense counsel. The objection was overruled. Lenhardt testified that the fingerprint taken from the handgun's magazine matched the right index finger of appellant. Detective Lenhardt acknowledged that he had no way of determining how long the fingerprint had been on the magazine.

{¶ 9} The state's final witness was Toledo Police Detective Steve Applin who was involved in the investigation following the stop of the suspects. Detective Applin explained that the configuration of the pickup truck's seats leaves only 10 to 12 inches between the front and back bench seats. He further stated that there is a space between the bottom of the bench seat and storage compartment of four to five inches where the seat does not need to be lifted up for access. Applin explained that his knowledge was based on his ownership of the same make and model pickup (though a different model year).

{¶ 10} Detective Applin testified that he interviewed passengers Jalon Colbert and Shatoya Goetz and then brought appellant in to question. Applin stated that appellant exercised his right to have an attorney so the questioning ceased. At that point, the court

halted the trial and met with the parties in chambers. The court explained that it would grant a mistrial, if requested, due to the violation of appellant's Fifth Amendment right to remain silent. The alleviation of the discovery issues, including the opportunity for an independent fingerprint analysis, was also discussed. Appellant rejected the option, wishing to proceed. The court then gave a cautionary instruction to the jury.

{¶ 11} Detective Applin next testified regarding the supplemental crime report he prepared. He was extensively cross-examined regarding his interview with Jalon Colbert; Colbert had entered a guilty plea to carrying a concealed weapon. According to Applin, during the interview Colbert stated that appellant handed the gun back to him and he placed it under the seat.

{¶ 12} At the conclusion of the state's case, appellant made a motion for acquittal pursuant to Crim.R. 29. The motion was denied.

{¶ 13} Following the close of the evidence, the jury found appellant not guilty of carrying a concealed weapon and guilty of improperly handling a firearm in a motor vehicle. Following the court's March 27, 2014 sentencing judgment entry, appellant timely appealed and raises the following assignments of error:

I. Discovery misconduct by state violated appellant's constitutional right to a fair trial.

II. The trial court abused its discretion by denying appellant's motion for continuance.

III. Appellant's conviction was against the manifest weight of the evidence.

{¶ 14} In appellant's first assignment of error, he argues that he suffered prejudice by the state's failure to provide a copy of the fingerprint expert's report. Appellant contends that the untimely notice prevented him from retaining an independent expert or conducting a thorough cross-examination. In general, the test for prosecutorial misconduct is whether the prosecutor's conduct at trial was improper and prejudicially affected the substantial rights of the defendant. *State v. Lott*, 51 Ohio St.3d 160, 165, 555 N.E.2d 293 (1990). A prosecutor's conduct during trial cannot be grounds for error unless the conduct deprives the defendant of a fair trial. *State v. Apanovitch*, 33 Ohio St.3d 19, 24, 514 N.E.2d 394 (1987).

{¶ 15} Crim.R. 16(K) provides:

Expert Witnesses; Reports. An expert witness for either side shall prepare a written report summarizing the expert witness's testimony, findings, analysis, conclusions, or opinion, and shall include a summary of the expert's qualifications. The written report and summary of qualifications shall be subject to disclosure under this rule no later than twenty-one days prior to trial, which period may be modified by the court for good cause shown, which does not prejudice any other party. Failure to disclose the written report to opposing counsel shall preclude the expert's testimony at trial.

{¶ 16} Crim.R. 16(L) further provides:

(1) The trial court may make orders regulating discovery not inconsistent with this rule. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may make such other order as it deems just under the circumstances.

{¶ 17} In the present case, just prior to Detective Lenhardt's testimony, the parties addressed the fact that defense counsel had just received the evidence technician report the morning of the second day of trial, clearly in violation of Crim.R. 16(K). Further, counsel had not received the identifying fingerprint photos. The state explained that on February 7, 2014, two days following counsel's appointment, it provided defense counsel with a discovery packet which contained notice that the gun had been fingerprinted and that a latent print had been recovered. Defense counsel admitted some prior knowledge that Detective Lenhardt was going to be called as an expert. Counsel further acknowledged that the state's failure to provide the report was "inadvertent error."

{¶ 18} Counsel then indicated that he had no objection to Detective Lenhardt testifying but requested that the report be excluded. The court then allowed Lenhardt's

testimony and photograph fingerprint evidence (the fingerprint card) but excluded the report.

{¶ 19} Appellant now argues that because counsel did not have the requisite 21-day notice of Detective Lenhardt's report and fingerprint card, the court erred by not excluding all the evidence of the fingerprint identification. Appellant contends he was prejudiced because he was not given the opportunity to properly challenge Detective Lenhardt's testimony or explore the possibility of hiring a defense expert.

{¶ 20} Several Ohio courts have determined that the language of Crim.R. 16(K), although "compulsory as to the parties," retains the court's discretion over the imposition of sanctions for violations of that division. *State v. Opp*, 3d Dist. Seneca No. 13-13-33, 2014-Ohio-1138, ¶ 9. The *Opp* court surveyed the Ohio Appellate Districts, including this court, which have held similarly. *Id.* at ¶ 10-14. *See State v. Swain*, 6th Dist. Erie No. E-11-087, 2013-Ohio-5900, ¶ 85-86.

{¶ 21} Reviewing the facts presented in this case, we cannot find that the trial court abused its discretion when it allowed Detective Lenhardt's testimony and admission of the fingerprint card into evidence. The discovery received by defense counsel included the information that appellant's latent fingerprint was found on the magazine of the handgun. Further, counsel did not object to Lenhardt's testimony, just the admission of the report and fingerprint identification card. The court did exclude the report. Moreover, appellant's counsel acknowledged that the violation was inadvertent. Based on the foregoing, we find appellant's first assignment of error not well-taken.

{¶ 22} Appellant argues in his second assignment of error that the trial court abused its discretion when it denied appellant's request for a continuance. A trial court has broad discretion in deciding whether to grant a continuance. *State v. Galloway*, 6th Dist. Lucas Nos. L-00-1362, L-00-1328, 2003-Ohio-5681, ¶ 20, citing *State v. Unger*, 67 Ohio St.2d 65, 67, 423 N.E.2d 1078 (1981). In evaluating the merits of a motion for continuance:

“a court should note, inter alia: the length of the delay requested; whether other continuances have been requested and received; the inconvenience to litigants, witnesses, opposing counsel and the court; whether the requested delay is for legitimate reasons or whether it is dilatory, purposeful, or contrived; whether the defendant contributed to the circumstance which gives rise to the request for a continuance; and other relevant factors, depending on the unique facts of each case.” (Citations omitted). *Id.* at ¶ 21, quoting *Unger* at 67-68.

{¶ 23} In the present case, on the morning of trial defense counsel informed the court that appellant wished to continue the trial date. Counsel explained that appellant wanted five motions to be filed of the “constitutional violation variety.” Also, counsel informed the court that appellant was in custody on a new charge, with different counsel, and that he was desirous of a joint resolution.

{¶ 24} The court then addressed appellant ensuring that he was informed of and rejected a plea offer. The court then noted that the time for filing motions had passed and

that the case would proceed. Reviewing the proceedings, we cannot say that the court abused its discretion when it denied appellant's request for a continuance. Appellant's second assignment of error is not well-taken.

{¶ 25} Appellant's third assignment of error asserts that the jury's verdict was against the manifest weight of the evidence presented at trial. A manifest weight of the evidence challenge questions whether the state has met its burden of persuasion. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). In making this determination, the appellate court sits as a "thirteenth juror," and:

“reviewing the entire record, 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. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction.” *Id.*, quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983).

{¶ 26} Appellant was convicted of improper handling of a firearm in a motor vehicle, R.C. 2923.16(B), which required the state to prove that appellant knowingly transported or had a loaded firearm in a motor vehicle in such a manner that the firearm was accessible to him or any passenger without leaving the vehicle.

{¶ 27} At trial, Detective Applin testified that based on his investigation, he surmised that appellant and Jalon Colbert handled the weapon while they were in appellant's vehicle. Applin further testified that based on the configuration of the pickup's cab, and the location of the handgun, appellant could have easily reached back and accessed the weapon. Further, appellant's fingerprint was found on the magazine of the handgun. Based on the foregoing, we find that appellant's conviction was supported by the weight of the evidence. Appellant's third assignment of error is not well-taken.

{¶ 28} On consideration whereof, we find that appellant was not prejudiced or prevented from having a fair trial and the judgment of the Lucas County Court of Common Pleas is affirmed. Pursuant to App.R. 24, appellant is ordered to pay the costs of this appeal.

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.

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, J.

JUDGE

Stephen A. Yarbrough, P.J.
CONCUR.

JUDGE

<p>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: http://www.sconet.state.oh.us/rod/newpdf/?source=6.</p>
