

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
WARREN COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2009-07-102
- vs -	:	<u>OPINION</u>
	:	4/5/2010
DANNY E. SHORT,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
Case No. 08CR25152

Rachel A. Hutzell, Warren County Prosecuting Attorney, Michael Greer, 500 Justice Drive, Lebanon, Ohio 45036, for plaintiff-appellee

Terrence M. McNamara, P.O. Box 984, Union, KY 41091, for defendant-appellant

POWELL, J.

{¶1} Defendant-appellant, Danny E. Short, appeals from a judgment of the Warren County Court of Common Pleas convicting him of theft and sentencing him to 12 months in prison.

{¶2} On June 26, 2008, Rob Witman saw a four-door automobile pull up to a construction site at 3101 West Tech Road in Warren County, Ohio. Witman watched two men get out of the vehicle, grab a concrete tamper from the site and put it in the vehicle's trunk, and then speed away in the vehicle. Witman called 911 and gave a

description of the men, the vehicle, its license plate number, and the direction in which the vehicle headed. The information was relayed to Warren County Deputy Sheriff Christopher Brombaugh, who, eight minutes later, spotted a vehicle matching the description provided. The vehicle's trunk lid was up, and Deputy Brombaugh saw "some type of a heavy-duty piece of equipment with handles on it and large motor lying inside the trunk." Deputy Brombaugh stopped the vehicle and arrested the two men and two women inside. One of the men was Danny Short. It was later discovered that the equipment stolen, later identified as a "plate compactor," but referred to by many of the persons involved in the case as a "concrete tamper," had an estimated value of between \$1,500 and \$1,600.

{¶13} Short was indicted on one count of theft, a felony of the fifth degree, in violation of R.C. 2913.02(A)(1). He was tried by a jury and convicted as charged, and the trial court sentenced him to 12 months in prison.

{¶14} Short now appeals, assigning the following as error:

{¶15} Assignment of Error No. 1:

{¶16} "THE TRIAL COURT ERRED WHEN IT ALLOWED THE STATE TO CROSS EXAMINE THE DEFENDANT AS TO HOW AND WHEN HE DISCLOSED HIS ALIBI WITNESSES."

{¶17} Short argues the trial court committed reversible error by allowing the state to cross-examine him as to how and when he disclosed his "alibi theory," thus implying it was a fabrication. He also argues the trial court erred by permitting the state to adduce evidence that he filed a notice of alibi prior to trial, but failed to present an alibi defense at trial. We find these arguments unpersuasive.

{¶18} "Alibi is defined as '[a] defense based on the physical impossibility of a defendant's guilt by placing the defendant in a location other than the scene of the

crime." *State v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2, ¶296, fn. 1, quoting Black's Law Dictionary (8th Ed.2004) 79. Crim.R. 12.1 requires a defendant who wishes to raise an alibi defense to file a notice of alibi not less than seven days before trial.

{¶9} A prosecuting attorney may not adduce evidence of the date that a defendant filed his notice of alibi because the defendant's failure to file the notice of alibi promptly is not probative of his guilt and because "it is tantamount to adducing evidence about the defendant's silence." *State v. Hirsch* (1998), 129 Ohio App.3d 294, 311, citing *State v. Tolbert* (1990), 70 Ohio App.3d 372, 380-381 and *State v. Sims* (1982), 3 Ohio App.3d 331, 331-334 (*Sims II*). See, also, *State v. Elersic*, Lake App. No. 2000-L-145, 2002-Ohio-2945, ¶27-29. However, a prosecutor may bring to the jury's attention a defendant's failure to file his notice of alibi at an earlier date where the failure to file the notice of alibi promptly is "highly probative" of the defendant's guilt. *State v. Sims* (1981), 3 Ohio App.3d 321, 327-328 (*Sims I*).

{¶10} Approximately six weeks prior to trial, Short filed a notice of alibi stating that "on the possible date and time of the alleged offense, the Defendant was in another location." However, on the morning of trial, Short's defense counsel informed the trial court that he had just learned there may have been a fifth person in the vehicle at the time the concrete tamper was stolen, and that it was this fifth person and another man in the vehicle, not Short, who grabbed the concrete tamper and put it in the vehicle's trunk. When the trial court asked defense counsel, "So is the alibi defense being withdrawn?" defense counsel replied, "Your Honor, it will be, yes. Simply put, yes."

{¶11} At trial, Short testified that, on the day in question, he and his girlfriend Haley Poffenberger were being driven to his home in Middletown, Ohio by his sister Angela and her husband Mark Price. Short testified that Angela was driving, Price was in the front passenger seat, and Short, Poffenberger, and a fifth person named Mark

Martin were in the back seat. Short testified that when they drove past the construction site on West Tech Boulevard and saw the concrete tamper, Angela drove up to it, Price and Martin got out of the vehicle, grabbed the concrete tamper and put it in the vehicle's trunk, and then Angela drove off after Price and Martin got back inside. Short testified that, five minutes after Price and Martin stole the concrete tamper, Martin was dropped off at his house, and shortly thereafter, the police stopped their vehicle.

{¶12} On cross-examination, the prosecutor asked Short if he was aware that an alibi had been filed in the case or if he had previously stated he was not present when the theft occurred but instead was with his probation officer. Defense counsel objected to both of these questions, and the trial court sustained those objections.

{¶13} When the prosecutor asked Short if, immediately prior to trial, he had admitted in open court that he "lied" to his defense counsel about his alibi, defense counsel objected on the grounds that "That's not what happened[,] and "That's not what he said." The trial court sustained those objections, and after the court and the parties examined the court reporter's transcription of the proceedings, the prosecutor rephrased his question by asking Short if he had said, "I may have been less than honest on the alibi thing?" and Short admitted he had. Defense counsel did not object to this question, and therefore it appears his concerns were addressed when the prosecutor used the phrase, "less than honest," rather than the word, "lied."

{¶14} While Short has alleged that the trial court erred when it permitted the state to question him about how and when he disclosed his alibi defense, a review of the record shows that the state did not attempt to adduce evidence of *when* Short disclosed his alibi defense; rather, the state simply pointed out that Short, by his own admission, had been "less than honest" with his defense counsel about his alibi defense. Cf., *Tolbert*, 70 Ohio App.3d at 380-381 and *Elersic*, 2002-Ohio-2945 at ¶27 – 29.

Therefore, Short is actually arguing the trial court erred by allowing the state to adduce evidence that he filed a notice of alibi prior to trial, but subsequently failed to present an alibi defense at trial.

{¶15} However, a careful review of the record shows that Short failed to raise this specific argument at trial. In order to preserve for appellate review any error concerning the trial court's admission of evidence, a party must make a timely objection at trial to the claimed error, "stating the specific ground of objection, if the specific ground was not apparent from the context[.]" Evid.R. 103(A)(1).

{¶16} In this case, Short objected to the prosecutor's questions asking if he was aware that an alibi had been filed in the case or if he had previously stated he was not present when the theft occurred but instead was with his probation officer, and the trial court sustained those objections. "An appellant cannot predicate error on objections the trial court sustained." *State v. Hale*, 119 Ohio St.3d 118, 2008-Ohio-3426, ¶162.

{¶17} When the prosecutor asked Short if, immediately prior to trial, he had admitted in open court that he *lied* to his defense counsel about his alibi, Short objected on the ground that he had not used the word "lied," but rather, the phrase, "less than honest." However, Short failed to object to that question on the ground that he is now raising on appeal, i.e., it was impermissible for the state to present evidence showing that he filed a notice of alibi prior to trial, but failed to present an alibi defense at trial.

{¶18} A party's failure to raise a timely and specific objection to evidence waives all but plain error regarding its admission. See Evid.R. 103(A) and (D). Crim.R. 52(B) states, "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." For plain error to exist there must be (1) a deviation from a legal rule; (2) the deviation must be an obvious defect in the trial proceedings; and (3) the deviation must have affected the defendant's "substantial

rights," meaning the outcome of the defendant's trial would have been different absent the alleged error. *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, ¶15-16.

{¶19} Even if the error Short is alleging constitutes a deviation from a legal rule and the deviation represents an obvious defect in the trial proceedings, the alleged error still did not constitute plain error because it did not affect Short's substantial rights, since the outcome of his trial would not have been different absent the alleged error. *Payne*, 2007-Ohio-4642, at ¶15-16. Short's testimony that the crime was committed, not by him, but by Price and Martin, and that Martin was dropped off at his residence moments *after* the theft but moments *before* their vehicle was stopped by police, was not credible. This is particularly true since Short admitted on cross-examination that he told the police on the day of the offense that he did not know who took the concrete tamper, and that he did not tell anyone about Martin's alleged involvement until the day of trial.

{¶20} Therefore, Short's first assignment of error is overruled.

{¶21} Assignment of Error No. 2:

{¶22} "THE TRIAL COURT ERRED WHEN IT REFUSED DEFENDANT'S REQUEST FOR A CONTINUANCE TO OBTAIN CIVILIAN CLOTHES."

{¶23} Short argues the trial court erred when it refused his request for a continuance to allow him to obtain civilian clothing for his trial. We disagree.

{¶24} "A trial court has broad discretion in determining whether to grant or deny a continuance. *State v. Unger* (1981), 67 Ohio St.2d 65, 67. When evaluating a motion for a continuance, the court may consider the length of the delay requested, prior continuances, inconvenience, the reason for the delay, whether the defendant contributed to the delay, and any other relevant factors. *Id.* at 67-68. An appellate court may not reverse the denial of a continuance absent an abuse of discretion. *Id.* at 67." *State v. Wells*, Warren App. Nos. CA2009-08-105, CA2008-09-108, 2009-Ohio-1305,

¶27.

{¶25} On the morning of trial, the prosecutor stated for the record that Short was wearing jail clothes, and therefore the jury would be observing him in that attire. Defense counsel stated that he would like for Short "to not be sitting here in jail clothes." When the trial court asked if one of Short's family members could bring him civilian clothes, Short stated that when he was arrested on the theft charge, all of his "clothes and personal effects were lost or stolen." When the trial court asked Short if he could obtain civilian clothing if the trial were delayed to early afternoon, Short responded that he could not, but could do so if he were given one week. When the trial court asked Short why he needed one week, he responded that his mother was close to 70. However, Short admitted he had spoken to his mother the previous Saturday but had not asked her to bring him clothes for his upcoming trial.

{¶26} The trial court instructed defense counsel to make one more call to Short's mother. Defense counsel made several attempts to contact Short's mother by phone but was unable to reach her. After defense counsel told the trial court about his unsuccessful efforts to reach Short's mother, the following exchange took place between defense counsel and the trial court:

{¶27} "[Defense counsel:] So at this point, we have no [civilian] clothes, we have no access, and the only backup plan would be relying upon, again, a family friend. And that is not in the works.

{¶28} "THE COURT: So no matter how much time I give you at this point, he couldn't come up with clothes?

{¶29} "[Defense counsel]: It doesn't sound like it. That's correct."

{¶30} The record shows that Short had at least a week to obtain civilian clothing for his trial, yet he waited until the day of trial to make an effort to obtain such clothing.

Thus, Short's actions were dilatory despite his contentions to the contrary. Additionally, at the close of evidence, the trial court instructed the jury, as follows:

{¶31} "The fact that the Defendant is here in other than civilian clothing should not be considered by you for any purpose whatsoever. The Defendant started this trial as any other defendant starts a trial, with the presumption of innocence. And that remains with him at all times regardless of the clothing he wears or the nature of how he may look."

{¶32} A jury is presumed to follow the instructions the trial court gives them, see *State v. Ahmed*, 103 Ohio St.3d 27, 2004-Ohio-4190, ¶93, and there is nothing in the record to show that the jury in this case did not follow the trial court's instruction regarding Short's clothing. In light of these circumstances, the trial court did not abuse its discretion in ruling on this matter.

{¶33} Accordingly, Short's second assignment of error is overruled.

{¶34} Judgment affirmed.

YOUNG, P.J., and RINGLAND, J., concur.