

[Cite as *State v. Norvett*, 2011-Ohio-6563.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 11AP-215 (C.P.C. No. 10CR-04-2640)
Timothy R. Norvett,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	
	:	
State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 11AP-223 (C.P.C. No. 10CR-04-2641)
Quinton L. Lawrence,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	
	:	

D E C I S I O N

Rendered on December 20, 2011

Ron O'Brien, Prosecuting Attorney, and *Sarah W. Creedon*,
for appellee.

Robert D. Essex, for appellant Timothy R. Norvett.

Clark Law Office, and *Toki Michelle Clark*, for appellant
Quinton L. Lawrence.

APPEALS from the Franklin County Court of Common Pleas.

FRENCH, J.

{¶1} Defendants-appellants, Timothy R. Norvett ("Norvett") and Quinton L. Lawrence ("Lawrence"), appeal the judgments of the Franklin County Court of Common Pleas, which convicted them of charges pertaining to an April 22, 2010 shooting. For the following reasons, we affirm.

I. BACKGROUND

{¶2} Norvett and Lawrence were jointly indicted on the following charges after the shooting: (1) one count of improperly discharging a firearm at or into a habitation with a firearm specification, (2) two counts of felonious assault with firearm specifications, and (3) one count of having a weapon while under disability. They pleaded not guilty to the charges, and a joint trial was scheduled. Lawrence moved to sever the joint trial, and the trial court denied the motion.

{¶3} Before trial, the court told the jury, "I think some of you may have come to the conclusion that [Norvett and Lawrence] are in custody. * * * That is not evidence of anything. * * * [Y]ou may not consider it or discuss it." (Tr. Vol. I, 9-10.)

{¶4} Eddie Williamson testified as follows. On April 22, 2010, he was in his apartment when he heard gunshots. He went outside and saw Norvett with a gun. Williamson and Norvett argued briefly until Norvett walked away. Williamson told some people nearby that he wanted to fight Norvett. Lawrence approached and said, " 'You're not gonna do nothing to my boy.' " (Tr. Vol. I, 112.) Williamson and Lawrence started to argue, but Lawrence walked off and said that he was going to get Norvett. When Norvett and Lawrence returned, Williamson confronted them. Within seconds,

Lawrence fired a gun, and Williamson ran into his apartment. Williamson was inside the apartment when he heard bullets strike through two windows. Norvett had been walking toward one of the windows. Williamson went outside and started to chase Norvett and Lawrence, but police caught them first. On cross-examination, Williamson admitted that he has felony convictions for possession of drugs and domestic violence. He also said that he has two convictions for carrying a concealed weapon.

{¶5} Brandon White testified that he was standing outside when he saw Norvett shoot at one window of Williamson's apartment and Lawrence shoot at the other window. The police arrived five minutes after the shooting. A police officer showed White two men she had in custody. The officer asked if they were the shooters, and White said, "'Yes.'" (Tr. Vol. I, 62.) White testified that those two men were Norvett and Lawrence. Lawrence objected to the identification, and the trial court overruled it. On cross-examination, White said that he had been convicted of falsification and receiving stolen property. He also admitted to using a fake name when he spoke to police about the shooting.

{¶6} Anita Watkins lived with Williamson. She testified that she saw Norvett and Lawrence carrying guns outside her apartment. Moments later, bullets were fired through two windows of the apartment while she was inside. On cross-examination, defense counsel asked, "Any reason you have an attitude?" Watkins responded, "Yes, I do." (Tr. Vol. I, 183.)

{¶7} Columbus Police Officer Deryl Kowalski testified that he heard multiple gunshots while on patrol on April 22, 2010. He drove toward the direction of the gunshots and saw two men standing in a yard. Other officers arrived and apprehended

one of the men, later identified as Norvett. The other man, later identified as Lawrence, ran away, but Kowalski caught him. Columbus Police Officer Scott Plate testified that he arrived on the scene after Norvett and Lawrence were apprehended. He found a gun with empty shell casings in the area where Lawrence had run.

{¶8} Before the prosecution rested its case-in-chief, two separate confrontations between witnesses and friends of Norvett and Lawrence occurred outside the courtroom in front of some of the jurors. After both incidents, the court asked all of the jurors whether they could remain fair and impartial if they saw any of the confrontations, and none of them noted any concerns. Because the jurors agreed to remain fair and impartial, the court denied the motions for a mistrial that Norvett and Lawrence raised after the second incident.

{¶9} After the prosecution rested its case-in-chief, Norvett and Lawrence moved for an acquittal pursuant to Crim.R. 29(A). The court denied their motions.

{¶10} Martin Lewis, a forensic scientist, testified for the defense that he found no gunshot residue on Lawrence's hands after the shooting. He also noted, however, that the lack of gunshot residue on a person's hands does not preclude the possibility that the individual did in fact fire a gun. Next, for purposes of the weapons under disability charges, the parties stipulated that Norvett was previously convicted of aggravated possession of drugs and that Lawrence was previously convicted of possession of cocaine. At the close of all the evidence, the court asked if the jurors could remain fair and impartial despite recent publicity about a shooting in Arizona, and none of the jurors expressed any concerns.

{¶11} During closing argument, defense counsel suggested that Lawrence planned to be involved in a fistfight, but not the shooting that actually occurred. The prosecutor responded, "[Defense counsel] stated all the evidence suggests that Mr. Lawrence thought there would be a fistfight. * * * Now, Defendants have no obligation to testify, and you can't consider it for any reason. But you have no evidence to make you believe that Mr. Lawrence coming up here felt that this was going to be a fistfight." (Tr. Vol. III, 415.)

{¶12} Before deliberations, the court instructed the jury, "It is not necessary that either Defendant take the witness stand in his own defense. * * * The fact that the Defendants did not testify must not be considered for any purpose." (Tr. Vol. III, 427.) The court also instructed the jury to "evaluate the evidence separately against each Defendant" and to "not use your conclusion as to * * * one Defendant * * * in the consideration * * * with regard to another Defendant." (Tr. Vol. III, 429.) The jury found Norvett and Lawrence guilty of all charges, and the court sentenced them to prison. They have appealed their convictions, and this court consolidated the appeals.

II. ASSIGNMENTS OF ERROR

{¶13} Norvett raises the following assignments of error:

[1.] The evidence was legally insufficient to support appellant's convictions for Improper Discharge of a Firearm into a Habitation, Felonious Assault and Having a Weapon under Disability.

[2.] The court erroneously overruled appellant's motion for acquittal pursuant to Criminal Rule 29.

[3.] Appellant's convictions were against the manifest weight of the evidence.

{¶14} Lawrence raises the following assignments of error:

[1.] THE TRIAL COURT ERRS WHEN IT OVERRULES A DEFENDANT'S REQUEST FOR SEPARATE TRIALS WHERE THE EVIDENCE PERTAINING TO ONE DEFENDANT IS PREJUDICIAL TO THE OTHER DEFENDANT.

[2.] THE TRIAL COURT ERRS AND A CRIMINAL DEFENDANT FAILS TO GET A FAIR TRIAL WHERE THE TRIAL COURT ANNOUNCES TO A JURY THAT THE DEFENDANT IS IN CUSTODY.

[3.] THE TRIAL COURT ERRS WHEN IT OVERRULES A REQUEST TO SUPPRESS EVIDENCE OF AN IDENTIFICATION RESULTING FROM A SHOW-UP.

[4.] THE CONVICTION OF APPELLANT IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

[5.] THE TRIAL COURT ERRED WHEN IT FAILED TO GRANT THE DEFENDANT'S MOTIONS FOR ACQUITTAL.

[6.] THE CRIMINAL DEFENDANT FAILS TO GET A FAIR TRIAL WHEN A PROSECUTOR UNFAIRLY COMMENTS ON THE ACCUSED'S DECISION NOT TO TESTIFY AT TRIAL.

[7.] A CRIMINAL DEFENDANT IN A CASE INVOLVING THE DISCHARGE OF A FIREARM FAILS TO GET A FAIR TRIAL WHERE THREE FIGHTS OCCUR DURING TRIAL AND A MATTER OF NATIONAL IMPORTANCE INVOLVES A SHOOTING.

III. DISCUSSION

A. Norvett's First and Second and Lawrence's Fifth Assignments of Error

{¶15} We address together Norvett's first and second assignments of error and Lawrence's fifth assignment of error, in which they argue that their convictions are based on insufficient evidence and that the trial court erred by denying their Crim.R. 29(A) motions for acquittal. We disagree.

{¶16} A motion for acquittal under Crim.R. 29(A) is governed by the same standard as the one for determining whether a verdict is supported by sufficient evidence. *State v. Tenace*, 109 Ohio St.3d 255, 2006-Ohio-2417, ¶37. That standard tests whether the evidence introduced at trial is legally sufficient to support a verdict. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52. We examine the evidence in the light most favorable to the state and conclude whether any rational trier of fact could have found that the state proved beyond a reasonable doubt the essential elements of the crime. *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus; *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, ¶78. We will not disturb the verdict unless we determine that reasonable minds could not arrive at the conclusion reached by the trier of fact. *Jenks* at 273. In determining whether a conviction is based on sufficient evidence, we do not assess whether the evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction. See *Jenks*, paragraph two of the syllabus; *Yarbrough* at ¶79 (noting that courts do not evaluate witness credibility when reviewing a sufficiency of the evidence claim).

{¶17} Norvett and Lawrence contend that their convictions cannot stand because the evidence failed to establish that they were involved in the April 22, 2010 shooting. The prosecution presented eyewitness testimony connecting them to the shooting, however. White testified that Norvett shot through one window of an apartment and that Lawrence shot through another. Williamson was inside the apartment during the shooting, and he saw Norvett move toward one of the windows

before someone shot at it. Watkins was also inside the apartment, and she testified that she saw Norvett and Lawrence with guns immediately before the shooting.

{¶18} Norvett and Lawrence assert that no physical evidence connects them to the shooting. Although there is no physical evidence tied to Norvett, the jury could have reasonably inferred that Lawrence used the gun Plate found after the shooting. And, in any event, the eyewitness testimony was sufficient to support Norvett and Lawrence's convictions. See *State v. Humberto*, 10th Dist. No. 10AP-527, 2011-Ohio-3080, ¶10. While Norvett and Lawrence challenge the credibility of that testimony, questions of credibility are irrelevant to the issue of whether there is sufficient evidence to support a conviction. *State v. Ruark*, 10th Dist. No. 10AP-50, 2011-Ohio-2225, ¶21. Accordingly, we conclude that Norvett and Lawrence's convictions are based on sufficient evidence and that the trial court did not err by denying their Crim.R. 29(A) motions for acquittal. Therefore, we overrule Norvett's first and second assignments of error and Lawrence's fifth assignment of error.

B. Norvett's Third and Lawrence's Fourth Assignments of Error

{¶19} Next, we address Norvett's third assignment of error and Lawrence's fourth assignment of error, in which they contend that their convictions are against the manifest weight of the evidence. We disagree.

{¶20} In determining whether a verdict is against the manifest weight of the evidence, we sit as a " 'thirteenth juror.' " *Thompkins* at 387. Thus, we review the entire record, weigh the evidence and all reasonable inferences, and consider the credibility of witnesses. *Id.* Additionally, we 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." *Id.*, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175. We reverse a conviction on manifest weight grounds for only the most " 'exceptional case in which the evidence weighs heavily against the conviction.' " *Thompkins* at 387, quoting *Martin* at 175. Moreover, " 'it is inappropriate for a reviewing court to interfere with factual findings of the trier of fact * * * unless the reviewing court finds that a reasonable juror could not find the testimony of the witness to be credible.' " *State v. Brown*, 10th Dist. No. 02AP-11, 2002-Ohio-5345, ¶10, quoting *State v. Long* (Feb. 6, 1997), 10th Dist. No. 96APA04-511.

{¶21} Norvett and Lawrence contend that White is not credible because of his criminal background and because he used a fake name when talking to police about the shooting. They also argue that Williamson is not credible because of his criminal background and that Watkins is not credible because she had an "attitude" during her testimony. (Tr. Vol. I, 183.) But the witnesses provided corroborating testimony implicating Norvett and Lawrence in the shooting, and therefore, it was reasonable for the jury to believe their testimony.

{¶22} Next, Norvett claims that testimony from those witnesses carries little weight because no physical evidence connects him to the shooting. Testimonial evidence has the same probative value as physical evidence, however. *State v. Cameron*, 10th Dist. No. 10AP-240, 2010-Ohio-6042, ¶36. Lawrence notes that there was no gunshot residue on his hands, but Lewis testified that the lack of gunshot residue on a person's hands does not preclude the possibility that an individual did in fact fire a gun. Also, as above, the jury could have reasonably inferred that Lawrence

used the gun Plate found after the shooting. Lastly, Norvett and Lawrence's flight after the shooting is a factor weighing in favor of their convictions because it is evidence of a consciousness of guilt. See *State v. Myers*, 10th Dist. No. 09AP-926, 2010-Ohio-4602, ¶17.

{¶23} The trier of fact is in the best position to determine witness credibility. *Cameron* at ¶43. The jury accepted evidence proving that Norvett and Lawrence were the shooters on April 22, 2010, and we find no basis for disturbing the jury's conclusion. Accordingly, we hold that Norvett and Lawrence's convictions are not against the manifest weight of the evidence. Therefore, we overrule Norvett's third assignment of error and Lawrence's fourth assignment of error.

C. Lawrence's First Assignment of Error

{¶24} Having addressed all of Norvett's assignments of error, we now turn to Lawrence's remaining assignments of error. In his first assignment of error, Lawrence argues that the trial court abused its discretion by denying his motion for a separate trial from Norvett. We disagree.

{¶25} As a general rule, the law favors joint trials for co-defendants. *State v. Walters*, 10th Dist. No. 06AP-693, 2007-Ohio-5554, ¶21. Crim.R. 14, however, allows a trial court to sever a joint trial if there would be prejudice to one of the defendants. We review the trial court's decision to deny Lawrence's motion for severance under an abuse of discretion standard. See *State v. Williams*, 10th Dist. No. 02AP-730, 2003-Ohio-5204, ¶27. An abuse of discretion connotes more than an error of law or judgment; it entails a decision that is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶26} Lawrence contends that he was entitled to the severance remedy because he was prejudiced by evidence of Norvett's prior conviction for aggravated possession of drugs. We discern no prejudice, however, given that the evidence was limited and had no connection to Lawrence. Lawrence also claims that he was prejudiced by evidence of Norvett's involvement in the shooting. But the jury was able to consider the acts of Norvett and Lawrence in segregation given that evidence of the shooting was straightforward. See *Williams* at ¶31. The trial court also instructed the jury to "evaluate the evidence separately against each Defendant" and to "not use your conclusion as to * * * one Defendant * * * in the consideration * * * with regard to another Defendant." (Tr. Vol. III, 429.) Finally, Lawrence's claim of prejudice fails because he does not indicate how he would have defended his case differently if he had not been tried with Norvett. See *Williams* at ¶32. For all these reasons, the trial court did not abuse its discretion by denying Lawrence's motion for severance. We overrule Lawrence's first assignment of error.

D. Lawrence's Second Assignment of Error

{¶27} In his second assignment of error, Lawrence claims that we must reverse his convictions because the trial court noted to the jury that he was in custody. We disagree.

{¶28} Lawrence did not object to the trial court's comment and, therefore, forfeited all but plain error. "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Crim.R. 52(B). Plain error exists when there is error, the error is an obvious defect in the trial proceedings, and the error affects the outcome of the trial. *State v. Barnes*, 94 Ohio

St.3d 21, 27, 2002-Ohio-68. A court recognizes plain error with the utmost caution, under exceptional circumstances, and only to prevent a manifest miscarriage of justice. *Id.*

{¶29} The trial court said to the jury, "I think some of you may have come to the conclusion that the Defendants are in custody." (Tr. Vol. I, 9.) The record is silent as to why the jury would reach that conclusion, and we need not speculate as to why the court raised the issue. See *State v. Chatman*, 10th Dist. No. 08AP-803, 2009-Ohio-2504, ¶55 (recognizing that this court does not speculate on matters not in the record). In any event, Lawrence cannot establish prejudice from the trial court's comment because it admonished the jury not to consider the fact that he was in custody. Accordingly, the trial court did not commit plain error through its comments about Lawrence being in custody. We overrule Lawrence's second assignment of error.

E. Lawrence's Third Assignment of Error

{¶30} In his third assignment of error, Lawrence contends that the trial court abused its discretion by admitting evidence that, before trial, White identified him as one of the shooters. We disagree.

{¶31} A two-step analysis applies to a trial court's decision on whether to admit a pre-trial identification. *Neil v. Biggers* (1972), 409 U.S. 188, 199-200, 93 S.Ct. 375, 382. The trial court initially determines whether the identification procedure was impermissibly suggestive. *Id.*, 409 U.S. at 196-97, 93 S.Ct. at 381. If so, the court must determine if the identification was nevertheless reliable. *Id.*, 409 U.S. at 199, 93 S.Ct. at 382. In determining the reliability of the identification, the court considers the following factors: (1) the witness's opportunity to view the suspect at the time of the crime, (2) the

witness's degree of attention, (3) the accuracy of the witness's prior description of the suspect, (4) the level of certainty expressed by the witness at the time of the identification, and (5) the length of time between the crime and the confrontation. *State v. Broom* (1988), 40 Ohio St.3d 277, 284. We apply the abuse of discretion standard to a court's decision to admit a pre-trial identification. *Cameron* at ¶30. We now determine whether the trial court abused its discretion by admitting White's pre-trial identification of Lawrence.

{¶32} Although Lawrence contends that White identified him in a suggestive procedure, we need not reach that issue because the identification was nevertheless reliable. For instance, White saw the shooting, and therefore, he was able to take a good look at Lawrence. In addition, he made the identification soon after the shooting, and he did not equivocate when he did so. Accordingly, the trial court did not abuse its discretion by admitting White's pre-trial identification of Lawrence. We overrule Lawrence's third assignment of error.

F. Lawrence's Sixth Assignment of Error

{¶33} In his sixth assignment of error, Lawrence argues that the prosecutor committed misconduct. We disagree.

{¶34} During closing argument, the prosecutor said, "[Defense counsel] stated all the evidence suggests that Mr. Lawrence thought there would be a fistfight. * * * Now, Defendants have no obligation to testify, and you can't consider it for any reason. But you have no evidence to make you believe that Mr. Lawrence coming up here felt that this was going to be a fistfight." (Tr. Vol. III, 415.) Lawrence claims that this

argument constitutes an improper comment on his decision not to testify, in violation of *Griffin v. Cal.* (1965), 380 U.S. 609, 85 S.Ct. 1229.

{¶35} The test for prosecutorial misconduct is, first, whether the conduct is improper, and second, whether the conduct prejudicially affected the substantial rights of the accused. *State v. Saleh*, 10th Dist. No. 07AP-431, 2009-Ohio-1542, ¶66. Lawrence did not raise prosecutorial misconduct at trial and, therefore, forfeited all but plain error. See *State v. Dillon*, 10th Dist. No. 04AP-1211, 2005-Ohio-4124, ¶49. Prosecutorial misconduct allows for a reversal under the plain error standard if it is clear that the defendant would not have been convicted in absence of the improper conduct. *Saleh* at ¶68. With this standard in mind, we now turn to the merits of Lawrence's prosecutorial misconduct claim.

{¶36} A prosecutor is permitted to argue "the defendant's failure to provide evidence to support proffered theories of excuse or innocence." *State v. Collins*, 89 Ohio St.3d 524, 528, 2000-Ohio-231. Here, the prosecutor was commenting on the lack of evidence to support defense counsel's claim that Lawrence intended to engage in a fistfight rather than the shooting that actually occurred. When the prosecutor noted that a defendant is not obligated to testify, he was simply restating the fundamental constitutional principle on the right against self-incrimination in order to make it clear that he was not suggesting that Lawrence should have testified. In fact, the trial court repeated that constitutional principle in its general instructions in order to prevent the jury from making improper conclusions from Lawrence's decision not to testify. Therefore, we conclude, under plain error, that the prosecutor did not commit

misconduct during closing argument. We overrule Lawrence's sixth assignment of error.

G. Lawrence's Seventh Assignment of Error

{¶37} In his seventh assignment of error, Lawrence argues that we must reverse his convictions because the trial court failed to declare a mistrial. We disagree.

{¶38} A mistrial should not be ordered merely because of some error or irregularity at trial. *State v. Sidibeh*, 192 Ohio App.3d 256, 2011-Ohio-712, ¶44. A mistrial is an extreme remedy, declared only when a fair trial is no longer possible. *Id.* The trial court is in the best position to determine whether a mistrial should be declared. *State v. Ahmed*, 103 Ohio St.3d 27, 2004-Ohio-4190, ¶92. Thus, the decision whether to grant a mistrial is within the discretion of the trial court, and we will not disturb that decision on appeal absent an abuse of discretion. *Id.* Lawrence asserts that the trial court abused its discretion when it denied his request for a mistrial after multiple confrontations involving witnesses occurred in front of jurors. But after both incidents, the court asked whether the jurors could remain fair and impartial if they saw any of the confrontations, and none of them noted any concerns. Therefore, the trial court did not abuse its discretion by declining to declare a mistrial after the multiple confrontations outside the courtroom.

{¶39} Next, Lawrence claims that he was entitled to a mistrial because of the publicity regarding a shooting in Arizona. Lawrence did not request a mistrial when the court addressed the shooting at trial, however. Nevertheless, a court can declare a mistrial sua sponte when there is a manifest necessity for that remedy or when the ends

of public justice would be defeated without it. *State v. Johnson*, 10th Dist. No. 08AP-652, 2009-Ohio-3383, ¶30. The plain error standard applies to a trial court's failure to declare a mistrial sua sponte. *Id.*

{¶40} Here, the trial court asked if the jurors could remain fair and impartial despite recent publicity about the Arizona shooting, and none of the jurors expressed any concerns. Accordingly, the trial court did not commit plain error by failing to declare a mistrial sua sponte because there was no manifest necessity for that remedy and the ends of public justice have not been defeated without it. For all these reasons, we overrule Lawrence's seventh assignment of error.

IV. CONCLUSION

{¶41} In summary, we overrule Norvett's three assignments of error and Lawrence's seven assignments of error. We affirm the judgments of the Franklin County Court of Common Pleas.

Judgments affirmed.

TYACK and CONNOR, JJ., concur.
