

[Cite as *State v. Manns*, 2009-Ohio-3262.]

COURT OF APPEALS  
RICHLAND COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

FRED MANN, JR.

Defendant-Appellant

JUDGES:

Hon. W. Scott Gwin, P. J.

Hon. William B. Hoffman, J.

Hon. John W. Wise, J.

Case No. 08 CA 101

O P I N I O N

CHARACTER OF PROCEEDING:

Criminal Appeal from the Court of Common  
Pleas, Case No. 08 CR 145D

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

June 29, 2009

APPEARANCES:

For Plaintiff-Appellee

JAMES J. MAYER, JR.  
PROSECUTING ATTORNEY  
KIRSTEN L. PSCHOLKA-GARTNER  
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For Defendant-Appellant

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*Wise, J.*

{¶1} Defendant-Appellant Fred Manns, Jr. appeals his conviction and sentence on two counts of having weapons while under disability entered in the Richland County Court of Common Pleas following a trial by jury.

{¶2} Plaintiff-Appellee is the State of Ohio.

### **STATEMENT OF THE FACTS AND CASE**

{¶3} On February 15, 2008, the Metrich Drug Enforcement Agency obtained a search warrant to search Appellant's residence as a result of numerous complaints from neighbors, as well as patrol officers, about drug activity taking place at said residence. While no drugs were discovered during execution of the warrant, two handguns were found. The police ran a check of Appellant's criminal history and found that he was under disability prohibiting him from possessing firearms as a result of a prior drug conviction, and seized the two handguns. Appellant was arrested and was subsequently indicted on one count of receiving stolen property, i.e. a firearm, and two counts of having weapons while under disability.

{¶4} On September 18, 2008, a jury trial commenced in this matter. Testifying for the State of Ohio were neighbors Eddie Rose, Jr. and Joni Retton, Metrich Detectives Perry Wheeler, Keith Porch and Steve Blust, William Adams and Anthony Tambasco from the Mansfield Police Crime Laboratory, Mansfield Police Officers Jeffrey McKinley and Jason Bamman, and Patrick Blackshire, the owner of the stolen gun.

{¶5} The defense called Appellant's mother, Bobbie Manns and Appellant's girlfriend, Shaquida Perdue. Appellant also testified in his own defense.

{¶16} At the conclusion of the trial, following deliberations, the jury returned verdicts of guilty on both counts of having weapons while under disability and not guilty in the charge of receiving stolen property.

{¶17} On September 22, 2008, the trial court sentenced Appellant to five (5) years on each count of having weapons while under disability to run consecutively for an aggregated term of ten (10) years in prison. The trial court also ordered the two guns to be forfeited to the State of Ohio.

{¶18} Defendant-Appellant now appeals, raising the following sole assignment of error:

**ASSIGNMENT OF ERROR**

{¶19} “I. PROSECUTORIAL MISCONDUCT OCCURRED THROUGHOUT THE TRIAL BY THE PROSECUTOR PRESENTING EVIDENCE OF ALLEGED DRUG TRAFFICKING BY APPELLANT WHEN APPELLANT WAS NOT CHARGED WITH ANY DRUG RELATED OFFENSE.”

**I.**

{¶110} In his sole assignment of error, Appellant contends that prosecutorial misconduct resulted in reversible error. We disagree.

{¶111} The prosecutor's duty in a criminal trial is two-fold. The prosecutor is to present the case for the State as its advocate and the prosecutor is responsible to ensure that an accused receives a fair trial. *Berger v. U.S.* (1935), 295 U.S. 78; *State v. Staten* (1984), 14 Ohio App.3d 197.

{¶112} Determining whether improper remarks constitute prosecutorial misconduct requires analysis as to (1) whether the remarks were improper and (2), if so,

whether the remarks prejudicially affected the accused's substantial rights. *State v. Tenace* (2006), 109 Ohio St.3d 255, 847 N.E.2d 386, citing *State v. Smith* (1984), 14 Ohio St.3d 13, 14, 14 OBR 317, 470 N.E.2d 883. The touchstone of analysis “is the fairness of the trial, not the culpability of the prosecutor.” *Smith v. Phillips* (1982), 455 U.S. 209, 219, 102 S.Ct. 940, 71 L.Ed.2d 78. We will not deem a trial unfair if, in the context of the entire trial, it appears clear beyond a reasonable doubt that the jury would have found the defendant guilty even without the improper comments. *State v. Treesh* (2001), 90 Ohio St.3d 460, 464, 739 N.E.2d 749.

{¶13} Misconduct of a prosecutor at trial will not be considered grounds for reversal unless the conduct deprives the defendant of a fair trial. *State v. Apanovitch* (1987), 33 Ohio St.3d 19, 514 N.E.2d 394; *State v. Maurer* (1984), 15 Ohio St.3d 239, 15 OBR 379, 473 N.E.2d 768.

{¶14} An appellate court should also consider whether the misconduct was an isolated incident in an otherwise properly tried case. *State v. Keenan* (1993), 66 Ohio St.3d 402, 410, 613 N.E.2d 203, 209-210; *Darden v. Wainwright* (1986), 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144.

{¶15} In the instant case, Appellant did not object to the comments to which he now claims constitute error. Therefore, for those instances, we must find plain error in order to reverse.

{¶16} The defendant bears the burden of demonstrating that a plain error affected his substantial rights. *United States v. Olano* (1993), 507 U.S. at 725,734, 113 S.Ct. 1770; *State v. Perry* (2004), 101 Ohio St.3d 118, 120 802 N.E.2d 643, 646. “Even if the defendant satisfies this burden, an appellate court has discretion to disregard the

error and should correct it only to 'prevent a manifest miscarriage of justice.' ” *State v. Barnes* (2002), 94 Ohio St.3d 21, 27, 759 N.E.2d 1240, quoting *State v. Long* (1978), 53 Ohio St.2d 91, 372 N.E.2d 804, paragraph three of the syllabus. *Perry*, supra, at 118, 802 N.E.2d at 646.

{¶17} Appellant cites this Court to a number of instances in the trial transcript where the State elicited testimony concerning Appellant’s alleged participation in drug-related activities which he claims were both irrelevant and prejudicial.

{¶18} Upon review, we find that the alleged drug activity in this case was relevant as such was the basis for the search warrant. We further find that in addition to the testimony elicited by the State, defense counsel also asked numerous questions of the witnesses related to the drug activity which was alleged to have occurred at Appellant’s residence in an attempt to challenge the search warrant. (T. at 124, 147-148, 185, 188, 254-55, 274-275, 297-298).

{¶19} Appellant also argues that prosecutorial misconduct occurred when, in closing statements, the prosecutor stated that one of the defense witnesses lied in her testimony.

{¶20} “A prosecutor may comment upon the testimony and suggest the conclusion to be drawn by it, but a prosecutor cannot express his personal belief or opinion as to the credibility of a witness or as to the guilt of an accused, or go beyond the evidence which is before the jury when arguing for conviction.” *State v. Smith*, Butler App. No. CA2007-05-133, 2008-Ohio-2499, at paragraph 7.

{¶21} Upon review of the prosecutor’s closing statements, we find that he stated that Ms. Perdue herself admitted upon cross-examination that she had lied. The

prosecutor stated that it was clear from her testimony that she continued to lie. Defense counsel also stated in his closing arguments that Ms. Perdue was not truthful in her testimony.

{¶22} “Generally the credibility of various witnesses will now have been put in issue by the argument of the defense. Considerable additional latitude is due the prosecutor at this juncture, either on fair play grounds or because the comments are invited by the defense. The prosecutor should be allowed to go as far as defense counsel. Thus, if the defense accuses witnesses of lying, the prosecutor should have the same right. *United States v. Solivan* (C.A.6, 1991), 937 F.2d 1146”. Id. at 670-71, 602 N.E.2d at 793.

{¶23} Based upon the context of the argument as a whole, we do not find the prosecutor's comments to be prejudicial. Within the context of the argument, the prosecutor encouraged the jury to rely on the facts in evidence to reach their conclusion.

{¶24} Upon review, we find no error plain or otherwise. No misconduct occurred because of the prosecutor's comments. Under these circumstances, there is nothing in the record to show that the jury would have found Appellant not guilty had the comments not been made on the part of the prosecution. *State v. Benge*, 75 Ohio St .3d 136, 141, 1996-Ohio-227.

{¶25} Appellant's sole assignment of error is overruled.

{¶26} For the foregoing reasons, the judgment of the Court of Common Pleas, Richland County, Ohio, is affirmed.

By: Wise, J.

Gwin, P. J., and

Hoffman, J., concur.

/S/ JOHN W. WISE

/S/ W. SCOTT GWIN

/S/ WILLIAM B. HOFFMAN

JUDGES

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