

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

:

Plaintiff,

:

-vs-

:

Case No. 13-1706

JAYCE WOODARD,

:

First Dist. Nos. C120823 and C1200847

Defendant.

:

MEMORANDUM IN SUPPORT OF JURISDICTION

FOR APPELLANT:

Jayce Woodard, #A675-896
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London, Ohio 43140-0069

Appellant, in pro se

FOR APPELLEE:

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FILED
OCT 30 2013
CLERK OF COURT
SUPREME COURT OF OHIO

RECEIVED
OCT 30 2013
CLERK OF COURT
SUPREME COURT OF OHIO

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JURISDICTIONAL STATEMENT

This case is a classic example of the justice system gone wrong. The evidence presented at trial is conflicting and clearly fulfills all of the elements of a manifest weight of the evidence” case.

In addition, the errors of counsel in promising the trier of fact that the defendant would testify, and then not presenting the testimony, has long been established to constitute constitutional ineffectiveness, all the moreso where the only evidence that existed was the testimony of the complaining witness, and that of the defendant to rebut it..

Moreover, the decision of the court of appeals regarding the permissible inference to attempt to gloss over the absolute and complete lack of evidence of operability for the firearm specification is contrary to clearly established case law and in conflict therewith.

This Court should accept jurisdiction over this case, conduct full briefing and, ultimately, reverse.

STATEMENT OF THE CASE

Appellant was charged with aggravated robbery with a firearm specification, and robbery, all stemming from a single alleged incident, in Hamilton County Common Pleas Court Case No. B1203031. A bench trial was conducted wherein the state presented the internally irreconcilable testimony of the complaining witness and where counsel refused to permit Appellant to testify to rebut the allegations. Appellant was convicted of all charges and sentenced to a total stated prison term of nine (9) years.

Timely direct appeal was taken to the First District Court of Appeals in Case No. C1200847 raising three Assignments of Error. On September 20, 2013 the Court of Appeals affirmed the lower court. This timely appeal follows.

STATEMENT OF FACTS

On April 26, 2012, Appellant was driving a friend, Julisa Wooten, to her workplace across the river in Kentucky. He did not want to take the gun that was in his car along with him, so he left it with a friend, Steven Young, to hold. Upon returning, he observed Young attempting to sell his gun to a man who turned out to be the complaining witness in this case, Scotty Williams. Appellant snatched his gun back and returned to his car. Apparently, Williams had already paid for the gun, as he ran up to Appellant's car and demanded either the return of his money or the gun. Appellant refused, and Williams took out a knife and repeatedly stabbed Appellant, cutting his own hand in the process. Appellant eventually got away from Williams and, with Young's help, went to the hospital for treatment for his wounds. While Appellant was at the hospital, Williams trashed his car.

At trial, Williams' testimony claimed that he was at a party, and had gone outside to make a phone call when Appellant came up behind him out of nowhere and hit him in the back of the head and demanded money. He claimed several different amounts of money which he had allegedly turned over to Appellant (Tr. 39, 47, 73) and then he claimed that Appellant ran to his car, Williams followed him,

the clip “somehow” fell out of the gun, a bullet fell out of the clip to the ground, and Appellant picked the clip up and got into his car, whereupon Williams then described the physical confrontation within the car, claiming that Appellant cut him with a box cutter before he pulled his own knife out and repeatedly stabbed Appellant. Williams also claimed that Appellant attempted to cock the gun after re-inserting the clip, but a bullet lodged sideways, rendering the gun inoperable, and then Appellant fled. (Tr. 34, 41-42) Notably, Williams slipped in his testimony by admitting that Young had, in fact, offered to sell him the gun, though he recovered and denied buying it. (Tr. 53-55)

The police testified that Williams was extremely intoxicated and confirmed that Appellant's car was trashed, including four slashed tires. (Tr. 68)

Nobody witnessed the alleged hollering to which Williams testified was occurring during the alleged robbery, (Tr. 60-62) and no other corroboration of his allegations was elicited, despite it being broad daylight and a plethora of witnesses being present. (Tr. 48-49, 140, 143, 144)

Defendant's version of the events was proffered during closing arguments, but not offered in testimony where counsel refused to let him testify.

PROPOSITION OF LAW NO. I:

WHERE THE JURY CLEARLY LOSES ITS WAY DURING THE FACT-FINDING PROCESS, A RESULTING CONVICTION IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND VIOLATES DUE PROCESS OF LAW.

LAW AND ARGUMENT

In contract to a claim of sufficiency of the evidence, a claim of a conviction being against the manifest weight of the evidence requires a reviewing court to sit as the “thirteenth juror” to determine whether the evidence adduced at trial was such that the jury lost its way during the fact finding process.

In making this determination, the court must consider whether the evidence was conflicting, credible, uncontradicted, whether a witness was impeached or their testimony was self-serving, and whether they

had an interest to advance or protect by their testimony, and the certainty, reliability and inherent logic to the evidence. **State v Mattison** (1985) 23 Ohio App. 3d 10. A conviction that is against the manifest weight of the evidence violates due process of law and mandates reversal. **Tibbs v Florida** (1982) 457 U.S. 31.

In this case, a review of the record demonstrates that the only inculpatory evidence adduced at trial was the incoherent, inconsistent, uncertain and inherently unreliable testimony of the complaining witness who tried to buy Appellant's gun from Steven Young who did not have authority to sell it. This was implicitly admitted in his testimony, and completely corroborates the entire defense theory of the case, even though Appellant's testimony was not presented to the trier of fact.

The complaining witnesses version of events was inconsistent even as to the amount of money he allegedly had with him as well as to the expenditures and beginning amounts he used for the calculation to arrive at the three different numbers.

The claims that he did not trash Appellant's car were belied by the responding officers and other testimony, which further demonstrates the inherent lack of credibility of Scotty Williams, despite the generic and unspecific statement from the trial court following the bench trial that "I did find the testimony of the victim in this case to be credible in most respects, that it the testimony of Scotty Williams." (Tr. 191-2)

It is clear from a review of the record that the majority of the claims of Williams were actively contradicted by both his own inconsistencies and the testimony of other, impartial witnesses. This determination by the trial court clearly demonstrates that the trial court, as the trier of fact at a bench trial, clearly lost its way during the fact-finding process. The instant conviction must be reversed and a new trial conducted.

This Court should accept jurisdiction, conduct full briefing and, ultimately, reverse.

PROPOSITION OF LAW NO. II:

WHERE THE RECORD IS DEVOID OF ANY EVIDENCE TO SUGGEST OPERABILITY OF A FIREARM, ANY RESULTING FIREARM SPECIFICATION CONVICTION IS VIOLATIVE OF DUE PROCESS FOR INSUFFICIENT EVIDENCE.

LAW AND ARGUMENT

It is well settled that competent and credible evidence must be adduced at trial to establish each and every essential element of a charged offense in a criminal case beyond a reasonable doubt for a resulting conviction to pass Due Process scrutiny. **In re: Winship** (1970) 397 U.S. 358. This requirement applies to the elements of a firearm specification. **State v Gaines** (1989) 46 Ohio St. 3d 65. This includes the essential element of “operability”. (*id*) Mere brandishing of a gun does not *ipso facto* render it a firearm. **State v Kovacik**, 2003-Ohio-5219. Moreover, a trial court commits plain error when convicting a defendant of a firearm specification where, as here, there is absolutely no evidence adduced at trial that the weapon was operable during the robbery. **State v Koren** (1995) 100 Ohio App. 3d 358.

Conversely, all of the evidence adduced at trial demonstrated that the gun was *not* operable, even including the testimony from the complaining witness, that the clip kept falling out of the gun, the bullet fell out of the clip, when attempted to cycle, the bullet lodged sideways, jamming the gun. (Tr. 34, 41-42)

The trial court was presented no evidence at all from which any reasonable inference of operability could be made in order to enter a finding of guilty on the firearm specification in this case and, as such, the lack of sufficient evidence mandates reversal and vacation of the specification.

This Court should accept jurisdiction to regularize the decisions of the various Ohio Courts, conduct full briefing and, ultimately, reverse.

PROPOSITION OF LAW NO. III:

WHERE TRIAL COUNSEL IN A CRIMINAL CASE TELLS THE TRIER OF FACT THAT THE DEFENDANT WILL TESTIFY AND THEN FAILS TO PERMIT HIM TO DO SO, SUCH COUNSEL IS CONSTITUTIONALLY INEFFECTIVE WITHIN THE MEANING OF THE SIXTH AND FOURTEENTH AMENDMENTS.

LAW AND ARGUMENT

It is well settled that a defendant in a criminal case is constitutionally entitled to the effective assistance of counsel at all critical stages of the proceedings. **Gideon v Wainwright** (1963) 372 U.S. 353 Where counsel makes serious errors that render his assistance ineffective, and such errors prejudice the outcome of the proceedings, such counsel is constitutionally ineffective. **Strickland v Washington** (1984) 466 U.S. 668. The “prejudice prong” of the **Strickland** analysis is met where counsel's errors had a substantial and injurious effect on the verdict. **Lockhart v Fretwell** (1993) 506 U.S. 364.

In this case, the only evidence that could be adduced at trial to rebut the claims of the complaining witness was that of Appellant. Counsel acknowledged this in his opening arguments wherein he laid out the actual facts of the case to the trier of fact. Counsel then advised the trier of fact that this testimony would come directly from Appellant. (Tr. 26) Counsel ultimately refused to present Appellant's testimony. (Tr. 180-181) This despite the fact that counsel had already volunteered Appellant's prior criminal history to the court. (Tr.25-26, 50)

Notably, the trial court thus disallowed any mention of the evidence in closing argument because it had not come from Appellant. (Tr. 187) This virtually insured a conviction.

In **Ouber v Guarino** (CA 1, 2002) 293 F3d 19, the Court, faced with a virtually identical factual scenario, held that counsel's express promise to present the testimony of the defendant to the trier of fact in opening arguments constituted ineffective assistance of counsel and required reversal. The Court noted that there, as here, there were no “unexpected developments warranting changes in previously

announced trial strategies” so as to excuse the ineffectiveness of counsel, citing **Phoenix v Matesanz** (CA 1, 2000) 233 F3d 77.

In this case, as in **Ouber**, *supra*, counsel outlined the evidence in opening arguments that could only come from the defendant's testimony and told the trier of fact that the defendant would testify, as is his absolute right under the Constitution. **Green v U.S.** (1961) 365 U.S. 301. Counsel's “advice” to waive the absolute personal right to testify was not based upon a reasoned decision or rational basis and had a demonstrable adverse effect on the outcome of the proceedings, from the closing arguments where the trial court disallowed and disregarded the defense arguments for the sole reason that counsel had failed to make any evidence supporting the argument a part of the record at trial via Appellant's testimony.

In this case, counsel's erroneous advise which abrogated Appellant's absolute personal right to testify substantially and materially affected the verdict and, moreover, adversely affected the adversarial testing process, which renders the prejudice prong of **Strickland** to be presumed. **U.S. v Cronic** (1984) 466 U.S. 648.

This Court should accept jurisdiction, conduct full briefing, and ultimately reverse.

CONCLUSION

For any or all of the foregoing reasons, this Court should accept jurisdiction, conduct full briefing, and ultimately reverse, and Appellant so prays.

Respectfully submitted,

Jayce Woodard
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London Corr. Inst.
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London, Ohio 43140-0069
Appellant, in pro se

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was sent to the office of the Hamilton County Prosecutor, 230 E. 9th St., Cincinnati, Ohio 45202, via regular U.S. Mail, on this 25 day of October, 2013.

Jayne Woodard
Jayce Woodard
Appellant, in pro se

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NOS. C-120823
		C-120847
Plaintiff-Appellee,	:	TRIAL NO. B-1203031
vs.	:	<i>JUDGMENT ENTRY.</i>
JAYCE WOODARD,	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court. *See* S.Ct.R.Rep.Op. 2; App.R. 11.1(E); 1st Dist. Loc.R. 11.1.1.

Following a bench trial, defendant-appellant Jayce Woodard was found guilty of aggravated robbery with a firearm specification and robbery. Woodward subsequently pleaded guilty to one count of having a weapon while under a disability and to possession of cocaine. The trial court merged the aggravated robbery and robbery charges. It sentenced Woodard to a total of nine years' in prison. Woodard now appeals.

In his first assignment of error, Woodard claims that his conviction for aggravated robbery was against the manifest weight of the evidence. It was not. Victim Scotty Williams testified that Woodard struck him in the back of the head with a gun, then pointed the gun in Williams's face and demanded his money. Williams testified that Woodard stole over \$300 from him. The defense attempted to argue that no robbery had occurred and that Williams and Woodard had been in a fight over the sale of a gun. The trial court indicated that it found Williams's

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testimony to be credible. And there is no indication that the court “lost its way” in believing the state’s version of events over the defendant’s. This assignment of error is overruled on the authority of *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983).

In his second assignment of error, Woodard argues that the state did not prove that the gun he had used was “operable” as defined in R.C. 2923.11(B)(1). Therefore, Woodard argues, there was insufficient evidence to support his conviction for the gun specification. This argument has no merit. When determining whether a firearm is operable, “the trier of fact may rely upon circumstantial evidence, including, but not limited to, the representations and actions of the individual exercising control over the firearm.” R.C. 2923.11(B)(2). Here, Woodard brandished a gun and implicitly threaten to shoot Williams if Williams did not give Woodard his money. This was sufficient circumstantial evidence to prove the gun’s operability. *State v. Thompkins*, 78 Ohio St.3d 380, 385, 678 N.E.2d 541 (1997). We overrule this assignment of error on the authority of *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus.

In his third assignment of error, Woodard asserts that his trial attorney was ineffective for failing to call him to testify in his own defense. But Woodard affirmatively represented on the record that he did not wish to testify. And Woodard has failed to demonstrate how counsel’s performance fell below an objective standard of reasonableness. This assignment of error is overruled. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) and *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989).

The trial court’s judgment is affirmed.

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Further, a certified copy of this judgment entry shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

HENDON, P.J., CUNNINGHAM and DEWINE, JJ.

To the clerk:

Enter upon the journal of the court on September 20, 2013

per order of the court _____
Presiding Judge