

[Cite as *State v. Hundley*, 2010-Ohio-4640.]

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

STATE OF OHIO,	:	APPEAL NOS. C-090760
		C-090761
Plaintiff-Appellee,	:	TRIAL NOS. B-0807069
		B-0807949
vs.	:	
		<i>DECISION.</i>
GREGORY J. HUNDLEY,	:	
Defendant-Appellant.	:	

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: September 30, 2010

Joseph T. Deters, Prosecuting Attorney, and *Scott M. Heenan*, Assistant Prosecuting Attorney, for Plaintiff-Appellee,

Roger W. Kirk, for Defendant-Appellant.

Please note: This case has been removed from the accelerated calendar.

WILLIAM L. MALLORY, JR., Judge.

{¶1} Defendant-appellant Gregory J. Hundley appeals from his convictions for theft, vandalism, possessing criminal tools, and two counts of receiving stolen property. He challenges on appeal the overruling of his motion to continue the trial and his motion for new counsel, the denial of his right to represent himself, the weight and sufficiency of the evidence to support his convictions, alleged instances of prosecutorial misconduct, and the trial court's imposition of excessive and improper sentences. Finding no merit to any of these challenges, we affirm his convictions.

1. Statement of Facts and Procedural Posture

{¶2} In the early-morning hours of August 29, 2008, an employee of the Colerain Avenue Home Depot store in Hamilton County, Ohio, observed a male in the store's parking lot ramming a Home Depot forklift into the side of a trailer belonging to Duke Energy. The back of the trailer contained large spools of electrical wiring. The forklift driver eventually succeeded in knocking the spools to the ground, loaded them onto the back of a trailer belonging to Home Depot, and, along with two female passengers, drove away in a truck towing the Home Depot trailer.

{¶3} Soon after, Colerain Township Police Officer Chris Phillips observed a truck towing a trailer containing unsecured spools of electrical wiring run a red light. Officer Phillips stopped the truck and observed that it contained three individuals, a male driver and two female passengers. The truck also contained bolt cutters with a distinctive mark on one of its handles. The truck's driver turned out to be defendant-appellant Gregory Hundley. Officer Phillips began questioning Hundley about the spools of wire. Finding Hundley's story to be extremely suspicious, Officer Phillips arrested Hundley.

{¶4} The police soon discovered that Hundley's truck had been the same truck observed earlier in the Home Depot store's parking lot, that the trailer had been stolen from the Home Depot store, and that the electrical wiring belonged to Duke Energy. The police eventually impounded Hundley's truck, which still contained the bolt cutters, and the stolen trailer.

{¶5} A short time later, someone broke into the police impound lot and stole Hundley's truck. Hundley was soon apprehended driving another truck with the license plates of the truck that had disappeared from the impound lot (which, in turn, was later recovered with no license plates). Along with Hundley, this new truck also contained the bolt cutters with the distinctive mark.

{¶6} Hundley was convicted following a jury trial, of two counts of receiving stolen property and one count each of theft, vandalism, and possessing criminal tools. The trial court sentenced him to an aggregate term of four years' incarceration. From his convictions and sentences, Hundley has appealed, asserting five assignments of error.

II. Motion to Continue Trial and Motion for New Counsel

{¶7} In his first assignment of error, Hundley argues that the trial court erred by denying his pretrial motions to continue the trial and his motion for new trial counsel. Specifically, Hundley alleges that his counsel was unprepared and could not, or would not, obtain further discovery from the state, take photographs of evidence in police custody, or review certain items of evidence.

{¶8} The decision whether to grant a motion for a continuance is committed to the sound discretion of the trial court and may be reversed on appeal only upon a showing of an abuse of discretion.¹ When ruling on a defendant's

¹ *State v. Bayless* (1976), 48 Ohio St.2d 73, 102, 357 N.E.2d 1035.

motion for a continuance, the trial court should consider (1) the length of the delay requested, (2) whether other continuances have been requested and received, (3) the inconvenience to litigants, witnesses, opposing counsel, and the court, (4) whether the requested delay is for legitimate reasons or whether it is dilatory, purposeful, or contrived, (5) whether the defendant contributed to the circumstance giving rise to the request for a continuance, and (6) other relevant factors, depending on the facts of each case.²

{¶9} Hundley’s trial had been previously continued 17 times. All but one continuance had been at Hundley’s request. At the time of trial, Hundley was on his fourth appointed trial counsel. The discovery that Hundley alleges that his attorney had failed to obtain did not exist. Under these circumstances, we cannot say that the trial court abused its discretion in overruling Hundley’s motions for a continuance or for new counsel. Hundley’s first assignment of error is overruled.

III. Hundley’s Right to Represent Himself

{¶10} In his second assignment of error, Hundley argues that the trial court erred in not adequately reviewing, and in ultimately denying, his request to represent himself. This challenge is untenable.

{¶11} Although a defendant has the right to defend himself without counsel when he voluntarily and intelligently elects to do so,³ this right is not unlimited.⁴ “Once a trial has begun, it is within the trial court’s discretion whether to grant a defendant’s request for self-representation. In exercising this discretion, the court should consider the reasons given for the request, the quality of the present

² *State v. Unger* (1981), 67 Ohio St.2d 65, 67-68, 423 N.E.2d 1078.

³ *Faretta v. California* (1975), 422 U.S. 806, 814, 95 S.Ct. 2525; *State v. Gibson* (1976), 45 Ohio St.2d 366, 378, 345 N.E.2d 399.

⁴ *State v. Tucker*, 1st Dist. No. C-020821, 2003-Ohio-6056.

attorney's representation, and the defendant's 'prior proclivity to substitute counsel.' ”⁵

{¶12} After reviewing the record, we hold that the trial court did not abuse its discretion when it refused Hundley's request to represent himself. Hundley made the request after the jury had been empanelled, and he admitted, at a hearing on his request, to being mostly illiterate and unfamiliar with courtroom procedure. Under the circumstances, the trial court did not err in rejecting Hundley's oral motion to represent himself at trial. Hundley's second assignment of error is overruled.

IV. Weight and Sufficiency of the Evidence

{¶13} In his third assignment of error, Hundley argues that his convictions were based upon insufficient evidence and were contrary to the manifest weight of the evidence. Both of Hundley's arguments fail.

{¶14} “The test [for the sufficiency of the evidence] is whether after viewing the probative evidence and inferences reasonably drawn therefrom in the light most favorable to the prosecution, any rational trier of fact could have found all the essential elements of the offense beyond a reasonable doubt.”⁶ But even if a reviewing court determines that a conviction is sustained by sufficient evidence, the conviction may still be against the manifest weight of the evidence. When examining a challenge to the manifest weight of the evidence, a reviewing court “review[s] the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses, and determines whether, in resolving conflicts in the

⁵ Id. at ¶16, citing *State v. Vrabel*, 99 Ohio St.3d 184, 2003-Ohio-3193, 790 N.E.2d 303, ¶53, and *State v. Reed* (Nov. 6, 1996), 1st Dist. Nos. C-940315 and C-940322.

⁶ *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717.

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.”⁷

{¶15} Reviewing the record under these standards, we hold that Hundley’s convictions were supported by sufficient evidence and were not against the manifest weight of the evidence. Therefore, Hundley’s third assignment of error is overruled.

V. Prosecutorial Misconduct

{¶16} In his fourth assignment of error, Hundley alleges prejudicial prosecutorial misconduct during the trial and in closing argument. Specifically, Hundley argues that the assistant prosecuting attorney improperly solicited testimony concerning his invocation of his *Miranda* rights and his involvement in other bad acts. And he insists that the assistant prosecuting attorney, in his closing argument, improperly implied that Hundley had been the person who had stolen the truck from the impound lot, even though Hundley had not been charged with this crime. Finally, Hundley argues that the assistant prosecuting attorney made disparaging comments about his defense counsel during closing arguments.

{¶17} “The test regarding prosecutorial misconduct in closing arguments is whether the remarks were improper and, if so, whether they prejudicially affected substantial rights of the defendant.”⁸ Further, “it is not enough that there be sufficient other evidence to sustain a conviction in order to excuse the prosecution’s improper remarks. Instead, it must be clear beyond a reasonable doubt that, absent the prosecutor’s comments, the jury would have found defendant guilty.”⁹

⁷ *State v. Thompkins* (1977), 78 Ohio St.3d 380, 387, 678 N.E.2d 541, quoting *Martin*, 20 Ohio App.3d at 175.

⁸ *State v. Smith* (1984), 14 Ohio St.3d 13, 14, 470 N.E.2d 883, citing *United States v. Dorr* (C.A. 5, 1981), 636 F.2d 117, 120.

⁹ *Id.* at 15, citing *United States v. Hastings* (1983), 461 U.S. 499, 510, 103 S.Ct. 1974.

{¶18} The testimony by a police officer that referred to Hundley invoking his *Miranda* rights was unsolicited and was not commented upon any further by the assistant prosecutor, and the jury was given a curative instruction by the court. “A single comment by a police officer as to a suspect’s silence without any suggestion that the jury infer guilt from the silence constitutes harmless error.”¹⁰ Additionally, the police officer who testified that she had had prior contact with Hundley did not testify to the nature of that prior contact.

{¶19} Turning to the assistant prosecuting attorney’s closing argument, the comments about the theft of Hundley’s truck from the impound lot were made after Hundley’s counsel’s closing argument, during which defense counsel had implied that the police had been at fault for the truck’s disappearance. The assistant prosecuting attorney simply responded by reminding the jury that Hundley was not on trial for the truck’s disappearance. Finally, the record does not support Hundley’s charge that the assistant prosecuting attorney had, in closing argument, made disparaging comments directed toward defense counsel. The comments were clearly aimed at counsel’s arguments, not counsel. Hundley’s fourth assignment of error is overruled.

VI. Maximum and Consecutive Sentences

{¶20} Hundley’s fifth assignment of error asserts that the trial court abused its discretion by imposing an excessive and improper sentence on him. Specifically, Hundley argues that the trial court did not comply with R.C. 2929.11, which is Ohio’s sentencing statute, and that the court abused its discretion by giving Hundley maximum sentences. Hundley also argues that the United States Supreme Court’s

¹⁰ *State v. Treesh*, 90 Ohio St.3d 460, 480, 2001-Ohio-4, 739 N.E.2d 749, citing *Meeks v. Havener* (C.A.6, 1976), 545 F.2d 9, 10.

ruling in *Oregon v. Ice*¹¹ has effectively overruled the Ohio Supreme Court's decision in *State v. Foster*,¹² and thus that a trial court must once again make specific factual findings before imposing consecutive sentences. But Hundley concedes that the Ohio Supreme Court has yet to determine the effect of *Ice* on *Foster*.

{¶21} “In applying *Foster* to the existing statutes, appellate courts must apply a two-step approach. First, they must examine the sentencing court's compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law. If this first prong is satisfied, the trial court's decision shall be reviewed under an abuse-of-discretion standard.”¹³ The five 12 month sentences imposed on Hundley were all within the statutory guidelines, so they were not contrary to law. Additionally, we cannot say under the facts of this case, that the trial court abused its discretion with Hundley's sentence. And because the Ohio Supreme Court has not directly addressed the effect of *Ice* on Ohio's sentencing law, we remain bound by the Ohio Supreme Court's decision in *Foster*.¹⁴ For these reasons, Hundley's fifth assignment of error is overruled.

VII. Conclusion

{¶22} We find no merit to Hundley's five assignments of error, and we affirm the judgment of the trial court.

Judgment affirmed.

HILDEBRANDT, P.J., and DINKELACKER, J., concur.

Please Note:

The court has recorded its own entry this date.

¹¹ (2009), ___ U.S. ___, 129 S.Ct. 711.

¹² 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470.

¹³ *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, ¶4.

¹⁴ See *State v. McCrary*, 1st Dist. No. C-080860, 2009-Ohio-4390, ¶35; accord *State v. Long*, 1st Dist. Nos. C-090248 and C-090249, 2010-Ohio-1062, ¶36.