

[Cite as *State v. Stokes*, 2009-Ohio-4820.]
STATE OF OHIO, MAHONING COUNTY

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IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,)

PLAINTIFF-APPELLEE,)

VS.)

VS.) CASE NO. 08-MA-39

MARCUS STOKES,

MARCUS STOKES,) OPINION

DEFENDANT-APPELLANT.)

CHARACTER OF PROCEEDINGS: Criminal Appeal from Court of Common
Pleas of Mahoning County, Ohio
Case No. 07CR856

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JUDGMENT: Affirmed

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JUDGES:

Hon. Gene Donofrio
Hon. Joseph J. Vukovich
Hon. Cheryl L. Waite

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Hon. Joseph J. Vukovich
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Dated: September 9, 2009

{¶1} Defendant-appellant Marcus Stokes appeals his jury trial conviction in the Mahoning County Common Pleas Court for carrying a concealed weapon. He contends his conviction was against the manifest weight of the evidence and that the trial court improperly instructed the jury on the relation between flight and guilt.

{¶2} On June 17, 2007, Youngstown Police Officers Patrick Mulligan and Malik Mostella were working the Street Crimes Unit when they observed a truck pull into the drive of a known drug house, then depart a few minutes later. In their unmarked car, Officers Mulligan and Mostella followed the truck until it stopped in the middle of the street and a pedestrian approached the passenger side of the truck and began talking with the occupants. The officers stopped behind the vehicle to investigate further. Officer Mostella approached the driver's side and Officer Mulligan approached the passenger's side. As Officer Mulligan approached, the pedestrian turned and began to walk away. Officer Mulligan asked him to stop and he did. Officer Mulligan then asked him for identification. He reached to his pocket area then took off running. As he was running away he continued to reach towards his pocket or waistband area and a handgun fell to the street. The gun was cocked and as it hit the street it slid across the street to the curb.

{¶3} Officer Mulligan continued his foot pursuit, but after his radio dropped to the ground he was forced to stop and was unable to apprehend the subject. Officer Mulligan headed back to the truck and stopped to retrieve the handgun along the way. One round of ammunition was chambered, the hammer was cocked, and the magazine contained twelve rounds. Officer Mulligan disarmed and secured the firearm for evidence. Officer Mostella took the cruiser and circled the block in an unsuccessful attempt to locate the fleeing subject. Officers Mulligan and Mostella arrested a passenger of the vehicle, Charlie Stokes, for possession of two rocks of crack cocaine. They learned from him that the pedestrian was his nephew, defendant-appellant Marcus Stokes. When the officers processed Charlie Stokes at the county jail, jail staff provided a video image of Marcus Stokes which they were able to view to confirm that the pedestrian that fled was indeed Marcus Stokes. Stokes was arrested days later, charged with carrying a concealed weapon in

violation of R.C. 2923.12(A)(2)(F)(1), a fourth-degree felony because the weapon was a loaded firearm.

{¶14} Stokes pleaded not guilty and the case proceeded to discovery and other pretrial matters, including a motion to suppress filed by Stokes asserting that the officers did not have reasonable suspicion to stop him. Following a hearing, the trial court overruled Stokes' motion to suppress. Stokes has not raised any error with the trial court's overruling of his motion to suppress. The case then went to jury trial on December 11, 2007. Two days later, the jury returned a guilty verdict. A sentencing hearing was held on February 6, 2008, and in an entry filed February 15, 2008, the trial court sentenced Stokes to an eighteen-month term of imprisonment. This appeal followed.

{¶15} Stokes raises two assignments of error, the first of which states:

{¶16} "THE JURY VERDICT IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶17} A weight-of-the-evidence challenge requires an appellate court to review the entire record, weigh the evidence and all reasonable inferences, and consider the credibility of the witnesses. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387, 678 N.E.2d 541. In weighing the evidence and the reasonable inferences that can be drawn therefrom, if there exists two fairly reasonable views of the evidence, the reviewing court cannot simply substitute its judgment for the jury and choose the one it finds more persuasive or believable. *State v. Gore* (1999), 131 Ohio App.3d 197, 201, 722 N.E.2d 125 (7th Dist.). In assessing the credibility of the witnesses, the reviewing court is guided by the principle that the credibility of the witnesses is primarily the responsibility and province of the jury. *State v. DeHass* (1967), 10 Ohio St.2d 230, 39 O.O. 366, 227 N.E.2d 212. This is because the jury is in the best position to assess the credibility of a trial witness based on their observations of the witnesses' demeanor, gestures, and voice inflections. *Gore*, 131 Ohio App.3d at 201, 722 N.E.2d 125, citing *Seasons Coal Co., Inc. v. Cleveland* (1984), 10 Ohio St.3d 77, 80, 10 OBR 408, 410, 461 N.E.2d 1273, 1276. In reviewing all of the evidence, a weight-of-the-evidence challenge requires the reviewing court to

determine if the greater amount of credible evidence supported the jury's finding of guilt. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387, 678 N.E.2d 541.

{¶8} Reversal based on a successful weight-of-evidence challenge is reserved only for the exceptional case in which the evidence weighed so heavily against conviction that the jury clearly must have lost its way, creating a manifest miscarriage of justice. *Id.* Indeed, reversing on weight of the evidence after a jury trial is so extreme that it requires the unanimous vote of all three appellate judges rather than a mere majority vote. *Thompkins*, 78 Ohio St.3d at 389, 678 N.E.2d 541, citing Section 3(B)(3), Article IV of the Ohio Constitution (noting that the power of the court of appeals is limited in order to preserve the jury's role with respect to issues surrounding the credibility of witnesses).

{¶9} Stokes' argument that the jury's verdict was against the manifest weight of the evidence is three-fold. First, he points to Officer Mulligan's testimony that he never actually saw him in possession of the gun. Second, he asserts that Officer Mostella's testimony that he saw him drop the gun contradicted his police report. Third, Stokes' fingerprints were not found on the gun.

{¶10} The carrying a concealed weapon provision Stokes was charged with provides that no person shall knowingly carry or have, concealed on the person's person or concealed ready at hand, a handgun other than a dangerous ordnance. R.C. 2923.12(A)(2). The focus of Stokes' argument is his alleged lack of possession.

{¶11} Officer Mulligan was the officer who approached Stokes on the passenger side of the truck he and Officer Mostella had stopped. Concerning possession, he testified on direct examination as follows:

{¶12} "Q What happens next?

{¶13} "A I asked him if he had any ID on him, and he started, like, reaching for his pocket area, and then he took off running.

{¶14} "* * *

{¶15} "Q Okay. What happens next?

{¶16} "A He started running like northbound, but also eastbound because he was cutting back towards the street. Once he hit the street, he did like a zig-zag

motion. He cut one way and then the other, and his hand, I couldn't see if it was going into --

{¶17} “* * *

{¶18} “A I couldn't tell because he was running away from me whether his hand was going into a pocket or into his waistband area, but it was that general area. At that time, a gun fell out onto the roadway, slid all the way across the street because of how fast he was running, he had momentum. It slid all the way across the street and hit the curb. I was close enough to Mr. Stokes that when I saw the gun, I saw that the gun was cocked back and -- I couldn't tell if it was loaded, but it was cocked back. The hammer was cocked back. It slid all the way across the street and hit the curb, and I saw where it landed while I was running.

{¶19} “* * *

{¶20} “Q Okay. The individual that you -- had you seen the gun up to that point on the defendant?

{¶21} “* * *

{¶22} “A No, sir.

{¶23} “Q So it wasn't until after as you testified it dropped out?

{¶24} “A Right.” (Tr. 275-277.)

{¶25} On cross-examination, Officer Mulligan explained, “I did not see exactly where his hand was or where the weapon came from, but he was reaching towards the front of his body, in that area.” (Tr. 300.)

{¶26} Officer Mostella approached the driver's side of the truck and had a slightly different angle of view. On direction examination, he testified as follows:

{¶27} “Q Okay. You go up to the car. Officer Mulligan's approaching this individual outside of the car. What happens next?

{¶28} “A Well, Marcus runs. Marcus runs back -- he comes from the grass, off the grass down towards the street. As he's running down towards the street --

{¶29} “* * *

{¶30} “A He's reaching into his waistband area. At this point he's running

you might as well say northeast with his body facing towards me. As I look back, he's reaching into his waistband area. For us normally that's indication that you're carrying a gun on you. You're reaching to grab something. Normally in that area it's a weapon.

{¶31} "Q Were you watching him as he was running?

{¶32} "A Yes.

{¶33} "Q What happened next?

{¶34} "A At that point I don't know if he was trying to hold onto the weapon or throw it away, but the weapon came out of his waistband, came out --

{¶35} "* * *

{¶36} "A Hit the ground and slid across the street as my partner continued to chase him.

{¶37} "Q When was the first time that you saw what you believe was a gun that dropped off his person?

{¶38} "A When his hand moved away from his waistband and the gun began to drop to the ground.

{¶39} "Q To that point, though, had you seen any gun on him?

{¶40} "A. No." (Tr. 315-316.)

{¶41} Weighing Officer Mulligan and Mostella's testimony and the reasonable inferences that can be drawn therefrom, the greater amount of credible evidence proved that Stokes was carrying a concealed weapon. Implicit in Stokes' argument is the notion that only direct evidence can be used to prove a charge. He seems dissatisfied that neither Officer Mulligan nor Officer Mostella actually saw the gun in his hand.

{¶42} Stokes' myopic view of the evidence ignores two important points. First, R.C. 2923.12(A)(2) requires only that a handgun be concealed on the person's person or concealed ready at hand. Second, even if Officer Mulligan and Officer Mostella's testimony is construed as only circumstantial evidence of possession, it is evidence of possession nonetheless. "It is * * * well-settled under Ohio law that a defendant may be convicted solely on the basis of circumstantial evidence. [P]roof of guilt may be made by circumstantial evidence as well as by real evidence and direct

or testimonial evidence, or any combination of these three classes of evidence. All three classes have equal probative value, and circumstantial evidence has no less value than the others. Circumstantial evidence is not less probative than direct evidence, and, in some instances, is even more reliable.” (Internal citations and quotations omitted.) *State v. Nicely* (1988), 39 Ohio St.3d 147, 151, 529 N.E.2d 1236.

{¶43} As the state points out, this case is much like one from the Eighth District where the court affirmed a carrying concealed weapon conviction despite the arresting officer never seeing the defendant in possession of the gun. *State v. Fryerson*, 8th Dist. 82940, 2003-Ohio-6041. The circumstances surrounding the offense in *Fryerson* went as follows:

{¶44} “[Officer] Strollo stated appellant was in the driver’s seat and made a movement as though placing something from his right hand into the center console of the auto. As Strollo came nearer, moreover, he could tell the item mostly covered by the center armrest had a handle, but he could not ascertain it was a firearm until appellant had been removed from the auto.” *Id.* at ¶30.

{¶45} The Eighth District found this testimony alone to be sufficient to support the appellant’s conviction for carrying a concealed weapon and not against the manifest weight of the evidence.

{¶46} Upon review of all the evidence in this case, and according due deference to the jury’s credibility determinations and resolution of any perceived inconsistencies in the testimony, a rational jury could have reasonably concluded that Stokes is guilty beyond a reasonable doubt of carrying a concealed weapon. Thus, Stokes’ conviction was not against the manifest weight of the evidence.

{¶47} Accordingly, Stokes’ first assignment of error is without merit.

{¶48} Stokes’ second assignment of error states:

{¶49} “THE TRIAL COURT ABUSED ITS DISCRETION BY GIVING AN INADEQUATE, INCOMPLETE, AND MISLEADING JURY INSTRUCTION OF FLIGHT.”

{¶50} The trial court instructed the jury on flight as follows:

{¶51} “In this case there was evidence that the defendant fled from the vicinity of the crime. The fleeing from the vicinity of a crime does not in and of itself raise a presumption of guilt or guilty in connection with the crime. That is, you’re instructed that you may not presume the defendant guilty from such evidence. You may, however, infer a consciousness of guilt regarding the evidence of the defendant’s alleged flight. A defendant’s flight and related conduct can be considered as evidence of consciousness of guilty, and thus of guilt itself.” (Tr. 377.)

{¶52} Stokes acknowledges that a flight instruction is proper if supported by evidence in the record. However, Stokes maintains that the instruction is improper if it conveys a mandatory presumption of guilt or requires the defendant to satisfactorily explain flight. Stokes cites the Ohio Jury Instruction on consciousness of guilt which states:

{¶53} “1. CONSCIOUSNESS OF GUILT. Testimony has been admitted indicating that the defendant (fled the [scene] [*describe jurisdiction*]) (escaped from custody) (resisted arrest) (falsified his/her identity) (changed appearance) (intimidated a witness) (attempted to conceal a crime) (*describe other conduct*). You are instructed that (*describe defendant's conduct*) alone does not raise a presumption of guilt, but it may tend to indicate the defendant’s (consciousness) (awareness) of guilt. If you find that the facts do not support that the defendant (*describe defendant's conduct*), or if you find that some other motive prompted the defendant’s conduct, or if you are unable to decide what the defendant’s motivation was, then you should not consider this evidence for any purpose. However, if you find that the facts support that the defendant engaged in such conduct and if you decide that the defendant was motivated by (a consciousness) (an awareness) of guilt, you may, but are not required to, consider that evidence in deciding whether the defendant is guilty of the crime(s) charged. You alone will determine what weight, if any, to give to this evidence.” 4 Ohio Jury Instructions (2005) Section 409.13.

{¶54} Compared to this instruction, Stokes argues that the trial court’s instruction failed to instruct the jury on other motives for the defendant’s conduct or whether the jury should not consider it at all. In addition, Stokes takes issue with the

trial court's wording that the defendant "fled the vicinity of the crime." He argues that the officers did not observe any crime until *after* he fled and they observed the dropped gun. Stokes also takes issue with the trial court's instruction that flight "can be considered as evidence of consciousness of guilt, and thus guilt itself."

{¶55} Assuming a timely objection has been made to the jury instructions pursuant to Crim.R. 30, a reviewing court will not reverse the trial court's decision not to give a requested jury instruction or to the charge actually given absent an abuse of discretion. *State v. Wolons* (1989), 44 Ohio St.3d 64, 68, 541 N.E.2d 443. "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable." *State v. Clark* (1994), 71 Ohio St.3d 466, 470, 644 N.E.2d 731. The record indicates that Stokes' counsel did present a timely objection to the flight instruction. (Tr. 353.)

{¶56} "It is today universally conceded that the fact of an accused's flight, escape from custody, resistance to arrest, concealment, assumption of a false name, and related conduct, are admissible as evidence of consciousness of guilt, and thus of guilt itself." *State v. Eaton* (1969), 19 Ohio St.2d 145, 160, 48 O.O.2d 188, 249 N.E.2d 897, vacated on other grounds (1972), 408 U.S. 935, 92 S.Ct. 2857, 33 L.Ed.2d 750, quoting 2 Wigmore, Evidence (3 Ed.) 111, Section 276; holding reaffirmed in *State v. Williams* (1997), 79 Ohio St.3d 1, 11, 679 N.E.2d 646.

{¶57} In this case, the trial court's instruction on flight was not unreasonable, arbitrary, or unconscionable. The trial court's instruction did not include the Ohio Jury Instruction's reference to motive that stated, "If you find that the facts do not support that the defendant (*describe defendant's conduct*), or if you find that some other motive prompted the defendant's conduct, or if you are unable to decide what the defendant's motivation was, then you should not consider this evidence for any purpose." Stokes' aforementioned arguments are unfounded. Stokes does not explain how omitting the reference to some other motive amounts to error. In this case, the timing of when Stokes fled and when the officers saw the gun drop to the street are irrelevant to the issue of other motive. Just because the officers were not immediately aware that Stokes was carrying a concealed weapon does not remove

the fact that a crime was nonetheless occurring. Additionally, the evidence supported that Stokes fled because he was carrying a concealed weapon and Stokes' counsel never offered or suggested at trial what other motive caused him to flee. A jury instruction must conform to the law *and* to the evidence presented at trial. As the Ohio Supreme Court observed in *State v. Guster* (1981) 66 Ohio St.2d 266, 271, 421 N.E.2d 157, "a court's instructions to the jury should be addressed to the actual issues in the case as posited by the evidence and the pleadings. Abstract rules of law or general propositions, even though correct, ought not to be given unless specifically applicable to facts in issue." (Internal citations omitted.) That is why the trial court retains the discretion on how to conform the jury instructions to the evidence presented at trial. *State v. Condon* (2003), 152 Ohio App.3d 629, 2003-Ohio-2335, 789 N.E.2d 696, ¶90.

{¶58} Lastly, the court's statement that flight "can be considered as evidence of consciousness of guilt, and thus guilt itself" is an accurate statement of the law, taken verbatim from the Ohio Supreme Court's decision in *Eaton*, *supra*. In sum, based on the evidence presented at trial and applicable case law, the trial court did not abuse its discretion in instructing the jury of flight.

{¶59} Accordingly, Stokes' second assignment of error is without merit.

{¶60} The judgment of the trial court is hereby affirmed.

Vukovich, P.J., concurs.

Waite, J., concurs.