

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

STATE OF OHIO,	:	APPEAL NO. C-170430
	:	TRIAL NO. B-1602484
Plaintiff-Appellee,	:	
	:	<i>JUDGMENT ENTRY.</i>
vs.	:	
KIRMAREY ELLINGTON,	:	
	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court. *See* Rep.Op.R. 3.1; App.R. 11.1(E); 1st Dist. Loc.R. 11.1.1.

Following a jury trial, Kirmarey Ellington was found guilty of one count of aggravated burglary with a firearm specification, in violation of R.C. 2911.11(A)(2), two counts of aggravated robbery with firearm specifications, in violation of R.C. 2911.01(A)(1), and one count of having a weapon while under a disability, in violation of R.C. 2923.13(A)(2). The trial court sentenced him to 22 years in prison. Ellington now appeals, asserting six assignments of error.

Three eyewitnesses—Frank Bryant, Deon Johnson, and Randall Johnson—identified Ellington as the robber who held them at gunpoint while he searched their home for money and drugs. During the robbery, Ellington maintained a phone conversation with an accomplice, who instructed Ellington to search for recent gambling proceeds supposedly won by one of the home’s occupants.

In his first assignment of error, Ellington argues that the use of a juvenile adjudication as the basis for a conviction for having a weapon while under disability is unconstitutional. It is not. We overrule Ellington's first assignment of error on the authority of *State v. Carnes*, Slip Opinion No. 2018-Ohio-3256.

In his second assignment of error, Ellington argues that the trial court erred by allowing the prosecutor to engage in improper conduct during trial and closing argument. The standard of review for prosecutorial misconduct is whether the comments and/or questions by the prosecution were improper and, if so, whether they prejudiced appellant's substantial rights. *State v. Treesh*, 90 Ohio St.3d 460, 465, 739 N.E.2d 749 (2001). "To reverse a conviction based on prosecutorial misconduct, the alleged misconduct must have deprived the defendant of a fair trial." *State v. Lee*, 1st Dist. Hamilton No. C-160294, 2017-Ohio-7377, ¶ 17, citing *State v. Diar*, 120 Ohio St.3d 460, 2008-Ohio-6266, 900 N.E.2d 565, ¶ 140.

Ellington claims that the prosecutor's misconduct occurred during trial, when the prosecutor asked leading questions of a witness on direct examination and informed the jury that Ellington had previously served a sentence in the Hamilton County Justice Center, and during closing argument, when the prosecutor allegedly misrepresented evidence regarding Ellington's alibi argument, misstated Ellington's statements in jailhouse phone calls, and denigrated Ellington's defense counsel. Ellington objected to the prosecutor's mention of his previous jail sentence, but failed to object to the prosecutor's leading questions at trial and closing argument, and thus forfeited all but plain error on those issues. *State v. Dean*, 146 Ohio St.3d 106, 2015-Ohio-4347, 54 N.E.3d 80, ¶ 191. After reviewing the entire record, including the trial transcripts, we do not agree with Ellington that the prosecutor's

conduct in these instances was improper. We overrule Ellington's second assignment of error.

In his third assignment of error, Ellington contends that he was denied the effective assistance of counsel guaranteed under the Sixth Amendment to the United States Constitution. To establish ineffective assistance of counsel, the defendant must demonstrate that he was prejudiced by counsel's deficient performance. *See Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 143, 538 N.E.2d 373 (1989). To show prejudice, Ellington must prove that "there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different." *Bradley* at 143. Ellington claims his trial counsel was ineffective by failing to object to the prosecutor's statements during closing argument, failing to move for an acquittal under Crim.R. 29 at the close of the state's case, failing to pursue the defendant's pro se motion to suppress, and failing to move to dismiss the weapons-under-disability count. These arguments are unpersuasive.

Failing to move for an acquittal is not ineffective assistance of counsel "where the evidence in the state's case demonstrates that reasonable minds can reach different conclusions as to whether the elements of the charged offense have been proved beyond a reasonable doubt, and that such a motion would have been fruitless." *State v. Blake*, 1st Dist. Hamilton No. C-010337, 2001-Ohio-8747. Here, the state's evidence, which consisted of the testimony of three eyewitnesses and text messages from Ellington's cell phone, showed that reasonable minds could have reached different conclusions as to whether the elements of the charged offenses had been proved beyond a reasonable doubt, and that a motion for an acquittal would

have been properly overruled. Defense counsel's failure to make a Crim.R. 29 motion was not error.

Ellington also fails to demonstrate prejudice as a result of his counsel's failure to object to the prosecutor's statements during closing argument. As stated above, the prosecutor's conduct in this instance was not improper and did not deprive Ellington of a fair trial. A motion to dismiss the weapons-under-disability count would have been futile, as this court had already ruled that such a count is constitutionally permissible, a holding which has now been affirmed by the Ohio Supreme Court. *See Carnes*. Pursuit of Ellington's motion to suppress would have been likewise unsuccessful, as the motion was not a proper motion to suppress where it asserted in one sentence that the state has no evidence and "they have the wrong person." Accordingly, we overrule Ellington's third assignment of error.

In his fourth assignment of error, Ellington challenges the weight and sufficiency of the evidence used to convict him. Specifically, Ellington argues that the state's case was based on flawed eyewitness testimony and no forensic evidence. In reviewing a challenge to the weight of the evidence, we must review the entire record, weigh the evidence, consider the credibility of the witnesses, and determine whether the trier of fact clearly lost its way and thereby created a manifest miscarriage of justice. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). "Both 'the weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts.'" *State v. McMullen*, 1st Dist. Hamilton No. C-960088, 1997 WL 5183, *1 (Jan. 8, 1997), quoting *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus. In a challenge to the sufficiency of the evidence, the question is whether after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found all the essential elements of the

crime beyond a reasonable doubt. *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus.

Here, Ellington's convictions were based on eyewitness testimony, which is sufficient. See *State v. Johnson*, 195 Ohio App.3d 59, 2011-Ohio-3143, 958 N.E.2d 977, ¶ 71 (1st Dist.); see also *State v. Humberto*, 196 Ohio App.3d 230, 2011-Ohio-3080, 963 N.E.2d 162 (10th Dist.). Although no weapon or forensic evidence tied Ellington to the crimes, Frank Bryant, Deon Johnson, and Randall Johnson all were present at the scene, saw the robber, heard his voice during phone conversations with his accomplice, and identified Ellington as the robber. The jury heard all of the evidence, including inconsistent eyewitness testimony regarding the robber's gun and physical description, but nonetheless found the eyewitnesses credible. Their testimonies are of sufficient weight, especially when considered together, to support a finding of Ellington's guilt beyond a reasonable doubt. Therefore, the verdict is not against the manifest weight of the evidence.

Ellington does not separately challenge the sufficiency of the elements for any of the crimes for which he was convicted. After reviewing the evidence, we hold that the state presented sufficient evidence to prove Ellington guilty of aggravated burglary, aggravated robbery, and having a weapon while under disability. Therefore, Ellington's fourth assignment of error is overruled.

In his fifth assignment of error, Ellington argues that the trial court abused its discretion by admitting into evidence text messages between Ellington and his girlfriend. Ellington contends that the text messages, which related to the possession of a gun, were inadmissible under Evid.R. 403 and 404(B). The trial court has broad discretion in the admission of evidence and will not be reversed unless it has clearly abused its discretion and materially prejudiced the defendant. (Internal citation

omitted.) *State v. Maurer*, 15 Ohio St.3d 239, 265, 473 N.E.2d 768, 791 (1984). Here, Ellington has failed to demonstrate either an abuse of discretion by the trial court or material prejudice. Outside of the presence of the jury, the trial court parsed through each text message, briefly explaining the reasons for a text message's exclusion. The trial court then, in the presence of the jury, excluded additional text messages upon objections by defense counsel. The admitted text messages appear to have probative value concerning the state's inability to locate the gun used in the robberies. On balance, we find that the trial court properly considered whether the relevancy and probative value substantially outweighed the danger of unfair prejudice to Ellington. Therefore, we overrule Ellington's fifth assignment of error.

In his sixth assignment of error, Ellington contends that the trial court erred as a matter of law in sentencing him to an excessive prison sentence. An appellate court may modify a sentence if it clearly and convincingly finds that the record does not support the sentencing court's findings, or that the sentence is otherwise contrary to law. R.C. 2953.08(G)(2); *see, e.g., State v. White*, 2013-Ohio-4225, 997 N.E.2d 629 (1st Dist.). Here, the trial court imposed prison terms within the ranges prescribed by R.C. 2929.14(A) and imposed mandatory consecutive terms pursuant to R.C. 2929.14 (D) and (E), which amounted to an aggregate sentence of 22 years. The trial court was not required to make findings on the sentences, and the sentences are not contrary to law. Accordingly, Ellington's sixth assignment of error is overruled.

The judgment of the trial court is affirmed.

A certified copy of this judgment entry shall constitute the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

CUNNINGHAM, P.J., MILLER and DETERS, JJ.

To the clerk:

OHIO FIRST DISTRICT COURT OF APPEALS

Enter upon the journal of the court on September 19, 2018
per order of the court _____.
Presiding Judge