

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

STATE OF OHIO,	:	APPEAL NO. C-090204
	:	TRIAL NO. B-0808757(B)
Plaintiff-Appellee,	:	
	:	<i>JUDGMENT ENTRY.</i>
vs.	:	
KORTNEY MAXBERRY,	:	
	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.¹

Following a jury trial, defendant-appellant, Kortney Maxberry, was convicted of robbery, in violation of R.C. 2911.02(A)(2).

The state presented the following evidence at trial. Fred Simmons testified that, as he was walking home one night on Prentice Street in Cincinnati, Maxberry drove past him and then quickly backed up to the curb next to him. Maxberry's passenger, Kolon Carter, jumped out of the car, stuck a pistol in Simmons' face, and demanded money. When Simmons said that he had no money, Carter roughly spun him around and searched through his pants. Finding no money, Carter told Simmons to "get on up the street." When Simmons protested that he was standing in front of his own home, Maxberry jumped out of the car and demanded to know if Simmons had heard what Carter had told him. When Simmons began to walk away, he was struck in the back of the head by an object. Simmons stumbled up the steps to his front porch and sat down. Maxberry and Carter drove away.

¹ See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

A short time later, Simmons heard nearby gunshots and soon saw police responding to the area because a person had been shot. Simmons walked over to the police and reported that he had been robbed.

Cincinnati Police Officer William Kinney testified that Carter was the victim of the shooting that had occurred shortly after the Simmons robbery. Officer Kinney interviewed Maxberry, ostensibly about the shooting of his friend Carter. In the interview, Maxberry stated that, just before the shooting, he had been driving his girlfriend's car on Prentice Street when Carter got out of the car to speak to someone. Then the two of them drove a short distance away, and Carter got out of the car to speak to another friend. Maxberry said that, a few minutes later, he heard four gunshots and saw Carter crawling on the ground with three men standing over him. Maxberry drove away when he heard that the police were coming.

In his first assignment of error, Maxberry argues that the trial court erred by admitting improper "other acts" testimony. Maxberry contends that the court should not have allowed Officer Kinney to testify that his co-defendant, Carter, had been shot while he tried to rob someone else shortly after the Simmons robbery, or that Carter's gun had been recovered by police at a later date from another person. The testimony was elicited during the cross-examination of Officer Kinney by counsel for Carter. Maxberry's counsel did not object to the testimony or request a limiting instruction.

Because Maxberry's counsel did not object, we review the admission of the evidence under a plain-error standard.² Plain error does not exist unless, but for the error, the outcome of the trial clearly would have been different.³ Notice of plain error is to be taken with the utmost caution, under exceptional circumstances.⁴

² See Crim.R. 52(B).

³ See *State v. Long* (1978), 53 Ohio St.2d 91, 372 N.E.2d 804.

⁴ *Id.*

Our review of the record convinces us that no plain error occurred. There was no evidence to indicate Maxberry's involvement in the second incident. Therefore, any character evidence related to Carter cannot be said to have prejudiced Maxberry. Moreover, the evidence of Maxberry's guilt was overwhelming, so on this record, we cannot conclude that the outcome of the trial would have been different if the testimony had been excluded. We overrule the first assignment of error.

In his second assignment of error, Maxberry argues that prosecutorial misconduct during closing argument deprived him of a fair trial. He contends that the prosecutor misstated the evidence, denigrated defense counsel, and improperly vouched for the credibility of a witness. Because Maxberry failed to object to any of the comments, he has waived all but plain error.⁵

After reviewing the challenged comments, we conclude that only one was improper. The prosecutor's brief remark that the victim's testimony "was extremely credible" was improper, but in the context of the entire closing argument, we are confident that the outcome of the trial would not have been otherwise, but for the remark. We overrule the second assignment of error.

In his third assignment of error, Maxberry argues that his conviction was based upon insufficient evidence and was against the manifest weight of the evidence. He points to the lack of physical evidence, such as a gun or any medical records to support the victim's claim of an injury. But the victim's testimony about the gun and his injury did not need to be further corroborated.

Maxberry also complains that the state's witnesses were not credible, but their credibility was for the jury to determine. After reviewing the entire record, we hold that the trier of fact did not lose its way or create a manifest miscarriage of

⁵ *State v. Tenace*, 109 Ohio St.3d 255, 2006-Ohio-2417, 847 N.E.2d 386, at ¶49, citing *State v. Clemons*, 82 Ohio St.3d 438, 451, 1998-Ohio-406, 696 N.E.2d 1009.

justice.⁶ And our review of the record shows that a rational trier of fact, after viewing the evidence in a light most favorable to the prosecution, could have found that the state had proved beyond a reasonable doubt all the elements of robbery under R.C. 2911.02(A)(2). Therefore, the evidence was sufficient to support the conviction.⁷

Consequently, we overrule the third assignment of error and affirm the judgment of the trial court.

Further, 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., SUNDERMANN and HENDON, JJ.

To the Clerk:

Enter upon the Journal of the Court on March 24, 2010

per order of the Court _____
Presiding Judge

⁶ *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541.

⁷ *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus.