[Cite as *State v. Mallory*, 2018-Ohio-1846.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 106052

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DELVONTA L. MALLORY

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART; VACATED IN PART;
REMANDED FOR RESENTENCING

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-15-602117-A

BEFORE: Stewart, P.J., Boyle, J., and Celebrezze, J.

RELEASED AND JOURNALIZED: May 10, 2018

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MELODY J. STEWART, P.J.:

{¶1} Defendant-appellant Delvonta Mallory appeals from a judgment of conviction, entered after a trial to the court, finding him guilty of felonious assault, improperly discharging a firearm into a habitation, aggravated menacing, having a weapon while under disability, vandalism, and theft. The state charged that Mallory, after being accused of taking the victim's car keys, threatened the victim and later fired shots into the victim's house. On appeal, Mallory complains that the court, having barred an identification of the defendant made by the victim as a discovery sanction, improperly allowed a police officer to detail the substance of the victim's identification; that the state engaged in misconduct by eliciting hearsay from the police officer and otherwise misstated the evidence in its closing argument; and that the court's judgment of conviction was not supported by sufficient evidence or by the weight of the evidence.

I. Sufficiency of the Evidence

{¶2} We first address Mallory's claim that there was insufficient evidence to prove that the state established his identity as the person who shot into the victim's house. He also argues that the state failed to show that he made any specific threat sufficient to prove aggravated menacing, that there was insufficient evidence of the cost of any damage to the house sufficient to prove vandalism, and that there was no physical evidence that he took the victim's car keys.

{¶3} The evidence shows that Mallory, whom the victim knew casually, went to the victim's house to borrow movies. While there, Mallory received permission to take a slice of the victim's pizza. Not long after Mallory left, the victim realized that both his car keys and his car were missing. A few hours later, the victim found his car parked two blocks away. Later that evening, the victim and a friend were on their way to a store when they saw Mallory in the parking lot of the victim's housing complex. At that point, it dawned on the victim that his car keys, which had been placed on a chair near the pizza box, disappeared after Mallory had asked for a slice of pizza. The victim confronted Mallory, saying that he heard car keys jingling in Mallory's pants. Mallory said that the keys belonged to his sister. The victim had a friend with him, and the friend started choking Mallory. Mallory threw the victim's keys into some leaves. The victim returned to his apartment to watch television and later heard gunshots from outside the house. The victim saw a person wearing a "hoodie sweatshirt" similar to that worn by Mallory running down the street. The police found several bullet holes inside the victim's house.

{¶4} Three of the counts for which Mallory was found guilty were related to the shooting: improperly discharging a firearm into a habitation; felonious assault; and having a weapon while under disability. Mallory argues that none of those counts were supported by sufficient evidence because the victim failed to identify Mallory.

{¶5} When reviewing the legal sufficiency of the evidence, we view the facts and inferences most favorable to the state to determine whether any reasonable trier of fact could have found the essential elements of an offense proven beyond a reasonable doubt. *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus.

{¶6} The victim testified that when he first confronted Mallory about stealing his car keys, Mallory was wearing "a hoodie sweatshirt" and "brown slippers." When asked if he recognized any of the people who ran from his apartment after the shooting, the victim testified, "I thought I did because of [sic] he had a hoodie sweatshirt on and the incident had just happened so I didn't never see his face." The victim said that "[b]uild, looked like it could have been him, but I can't say that it was him exactly because I didn't see his face." But when asked if the person he saw running from the apartment was wearing the same outfit as earlier, the victim replied, "[a]s far as the hoodie sweatshirt, yes." On redirect examination, the state asked the victim if he recognized the hoodie:

> A. Yeah. Well, I didn't recognize it, but I know he wore — I can't lie and say that was 100 percent knew that it was him. I was still like — because what happened and I had been drinking at that point. I was talking about seeing the hoodie and I seen him running. I just put it together and assumed it was him.

{¶7} "The general rule is that to warrant conviction the evidence must establish beyond a reasonable doubt the identity of the accused as the person who committed the crime." *State v. Scott*, 3 Ohio App.2d 239, 244, 210 N.E.2d 289 (11th Dist.1965). Although the victim candidly testified that he did not see the face of the person he saw running from his house after shots were fired, "[t]here is no requirement that a victim state she is making an identification with 100 percent certainty." *State v. Gallagher*, 6th Dist. Lucas No. L-15-1102, 2016-Ohio-8524, ¶ 9. Even where an eyewitness does not see the perpetrator's face, identification can be based on circumstantial evidence of peculiarities such as clothing. *See, e.g., In re A.W.*, 8th Dist. Cuyahoga No. 103269, 2016-Ohio-7297, ¶ 31; *State v. Merriweather*, 2017-Ohio-421, 84 N.E.3d 72, ¶ 30 (12th Dist.). For identification purposes, whether the clothing is distinctive or not goes to the weight, not the sufficiency, of the evidence. *State v. Rudd*, 8th Dist. Cuyahoga No. 102754, 2016-Ohio-106, ¶ 73, citing *State v. Roper*, 9th Dist. Summit No. 20836, 2002-Ohio-7321, ¶ 55.

{¶8} The evidence in this case barely meets the threshold of proving identity. The victim testified that the person he saw running from the house was wearing the same "hoodie sweatshirt" that he saw Mallory wearing earlier in the day. That single statement was, standing alone, sufficient evidence from which the trial judge could rationally find that Mallory was the person seen leaving the victim's house.

{¶9} Mallory next argues that the state failed to present sufficient evidence of aggravated menacing. The state charged Mallory under R.C. 2903.21(A), alleging that he knowingly caused the victim to believe that Mallory "will cause serious physical harm" to the victim or his property. The term "serious physical harm" is defined in R.C. 2901.01(A)(5) to include any of the following: (a) any mental illness or condition of such gravity as would normally require hospitalization or prolonged psychiatric treatment; (b) any physical harm that carries a substantial risk of death; (c) any physical harm that involves some permanent incapacity, whether partial or total, or that involves some temporary, substantial incapacity; (d) any physical harm that involves some permanent disfigurement or that involves some temporary, serious disfigurement; (e) any physical harm that involves acute pain of such duration as to result in substantial suffering or that involves any degree of prolonged or intractable pain.

{¶10} The victim testified that when he and his companion were retrieving his car keys from Mallory, "that he was just yelling at me in a threatening manner." The victim described Mallory as "angry" and "kind of physical, a little bit, not much."

{¶11} The victim testified only that Mallory yelled in a "threatening manner." He did not say what words Mallory actually used, so we have no objective means of verifying whether an actual threat had been made. And although the offense of aggravated menacing can be proved by evidence that the victim, in the moment, believed the defendant to be in earnest and capable of acting, *Cleveland v. Reynolds*, 8th Dist. Cuyahoga No. 105546, 2018-Ohio-97, ¶ 6, the victim did not testify that he subjectively believed Mallory would cause him serious physical harm. *State v. Thomas*, 8th Dist. Cuyahoga No. 104174, 2017-Ohio-957, ¶ 22 ("In order to prove aggravated menacing, the state must show that the victim had a subjective belief of fear of serious physical harm."). The testimony was insufficient to establish the elements of aggravated menacing.[1] We sustain this portion of the assignment of error and vacate the conviction for aggravated menacing.

{¶12} The state also charged Mallory with vandalism under R.C. 2909.05(A) for shooting into the victim's house. That section states that "[n]o person shall knowingly cause serious physical harm to an occupied structure or any of its contents." For purposes of R.C. 2909.05, "serious physical harm" means "physical harm to property that results in loss to the value of the property of one thousand dollars or more." R.C. 2909.05(F)(2).

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[1] During opening statement, the state told the court that "a threat was made to [the victim] at that time by the defendant about him getting shot." Opening statement is not evidence, *State v. Frazier*, 73 Ohio St.3d 323, 338, 652 N.E.2d 1000 (1995), so we cannot consider the content of the state's opening statement as establishing the content of Mallory's threat.

{¶13} There was no direct evidence to establish the dollar value of damage caused to the victim's house, nor could the dollar value of damage be reasonably inferred from the facts. We note that the state does not make any argument that it proved this element of vandalism apart from the blanket statement that "[t]he evidence presented was legally sufficient to support the jury verdicts as a matter of law." We sustain this portion of the assignment of error and vacate the conviction for vandalism.

{¶14} Finally, Mallory argues that there was insufficient evidence to prove that he stole the victim's car keys. The state charged the theft of the car keys under R.C. 2913.02(A)(1), which states that no person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property without the consent of the owner.

{¶15} The court could rationally view the circumstantial evidence as proving that Mallory took the victim's car keys. The victim had last seen his keys on a chair, near a pizza box. The keys disappeared after Mallory asked the victim if he could have a slice of pizza. The victim testified that when he later confronted Mallory about the missing keys, Mallory pulled a set of keys from his pocket and threw them into some leaves. The victim testified that the keys Mallory threw belonged to him. This was sufficient circumstantial evidence of theft.

II. Hearsay

{¶16} The state tried to refresh the victim's recollection about the clothing worn by the person he saw fleeing the scene by using his police statement. Upon defense objection, the court determined that the state had not provided the statement to the defense during the discovery and barred the state from using it. Instead, the state asked the police officer who investigated the case if he received a description of the person leaving the scene. The officer testified that "[i]t was — he said he saw a figure, black hooded, brown pants, and I believe it was house shoes." Mallory argues that this was inadmissible hearsay.

{¶17} Mallory did not object to the police officer's testimony, so we review it for plain error under Crim.R. 52(B). *State v. Obermiller*, 147 Ohio St.3d 175, 2016-Ohio-1594, 63 N.E.3d 93, ¶ 72. "Notice of plain error under Crim.R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *State v. Long*, 53 Ohio St.2d 91, 93, 372 N.E.2d 804 (1978), paragraph two of the syllabus.

{¶18} Although the rules of evidence prohibit hearsay — an out-of-court statement used to prove the truth of the matter asserted, *see* Evid.R. 801(C) — the hearsay rule does not ordinarily apply to statements that provide context. It is well established that a police officer relating an out-of-court statement to explain the course of an investigation is not hearsay. *State v. Thomas*, 61 Ohio St.2d 223, 232, 400 N.E.2d 401 (1980); *State v. Warren*, 8th Dist. Cuyahoga No. 83823, 2004-Ohio-5599, ¶ 46. And because this case was tried to the court, we presume, unless affirmatively shown otherwise, that the court only considered the evidence for that purpose. *State v. Colegrove*, 8th Dist. Cuyahoga No. 102173, 2015-Ohio-3476, ¶ 22. There being no indication that the court considered the police officer's statement for any improper purpose, we cannot find that the police officer's testimony resulted in a manifest miscarriage of justice sufficient to constitute plain error.

{¶19} Mallory also raises a constitutional issue — that he was denied the right to confrontation because the state offered the statement for a testimonial purpose.

{¶20} The Confrontation Clause to the Sixth Amendment to the United States Constitution states that "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him." The Confrontation Clause prohibits testimonial statements from being admitted unless the witness who made the statements is available to testify or the defendant has previously had an opportunity to cross-examine the witness. *Crawford v. Washington*, 541 U.S. 36, 53-54, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). The victim was present and testified at trial, so no Confrontation Clause violation occurred.

III. Manifest Weight of the Evidence

{¶21} Mallory claims that his conviction was against the manifest weight of the evidence, but he makes no independent argument as required by App.R. 16(A)(7). He incorporates the arguments he made with respect to his claim that there was insufficient evidence to support his convictions. We have repeatedly noted that the difference between the sufficiency of the evidence and the weight of the evidence standards of review requires an independent argument under both standards. *See, e.g., State v. Thompson*, 8th Dist. Cuyahoga No. 99628, 2014-Ohio-202, ¶ 16; *State v. Thigpen*, 2016-Ohio-1374, 62 N.E.3d 1019, ¶ 7 (8th Dist.). For us to review this assignment of error on the merits "would be to ignore the separate and distinct nature of arguments going to the sufficiency and weight of the evidence." *State v. Forte*, 8th Dist. Cuyahoga No. 99573, 2013-Ohio-5126, ¶ 12. We decline to do so.

IV. Prosecutorial Misconduct

{¶22} During closing argument, the state summarized the victim's testimony as indicating that the person he saw running from his house after shots were fired was wearing "a black hoodie and brown pants and house shoes." Mallory claims that this was willful misconduct by the prosecutor because the victim did not testify with such specificity, stating only that the person running from the house was wearing the same "hoodie sweatshirt" that he saw Mallory wearing earlier that evening. Mallory also complains that the state improperly referenced the victim's police statement, even though the court had excluded that statement.

{¶23} The state has "wide" latitude in closing argument, *State v. Dean*, 146 Ohio St.3d 106, 2015-Ohio-4347, 54 N.E.3d 80, ¶ 244, but not so wide as to permit it to misstate evidence. *State v. Williams*, 1st Dist. Hamilton No. C-040747, 2005-Ohio-6772, ¶ 28. Nevertheless, Mallory failed to object and thus forfeited all but plain error. We decline to find any plain error because we presume that the trial judge considered only relevant, admissible evidence during its deliberations.

{¶24} Judgment affirmed in part, reversed in part, and remanded to the trial court for instructions to vacate consistent with this opinion.

It is ordered that appellant and appellee share the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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MELODY J. STEWART, PRESIDING JUDGE

MARY J. BOYLE, J., and
FRANK D. CELEBREZZE, JR., J., CONCUR