

[Cite as *State v. Robinson*, 2015-Ohio-773.]

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

STATE OF OHIO,	:	APPEAL NO. C-140043
	:	TRIAL NO. B-1306382B
Plaintiff-Appellee,	:	
vs.	:	<i>OPINION.</i>
NATHANIEL ROBINSON,	:	
Defendant-Appellant.	:	

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: March 6, 2015

Joseph T. Deters, Hamilton County Prosecuting Attorney, and *Sean M. Donovan*,
Assistant Prosecuting Attorney, for Plaintiff-Appellee,

Bryan R. Perkins, for Defendant-Appellant.

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

SYLVIA S. HENDON, Presiding Judge.

{¶1} Defendant-appellant Nathaniel Robinson has appealed from the trial court's entry convicting him of aggravated robbery and sentencing him to a term of 11 years' imprisonment. He contends in seven assignments of error that the trial court erred by permitting the prosecutor to use a peremptory challenge to dismiss a prospective African-American juror; that the trial court erred by admitting into evidence statements attributable to Robinson that had not been disclosed prior to trial; that the trial court erred by failing to grant a mistrial and order separate trials for Robinson and his codefendant; that he was prejudiced by numerous instances of prosecutorial misconduct; that his conviction was not supported by sufficient evidence and was against the manifest weight of the evidence; and that the trial court erred by imposing a maximum sentence.

{¶2} Finding his arguments to be without merit, we affirm the trial court's judgment.

Facts and Procedure

{¶3} On October 20, 2013, Adam Brinkman was accosted by two assailants, Robinson and his codefendant Kenny Powe, as he walked home from a bar in Corryville at approximately 3:00 a.m.

{¶4} Just before his encounter with Robinson and Powe, Brinkman had passed a group of rowdy college students that had gathered on the balcony of a nearby condominium. As he walked past, Brinkman shouted at the group of students to "shut up." Robinson immediately approached Brinkman asking, "What did you say?" As Brinkman attempted to explain that his comments had not been directed at

Robinson, Powe approached him from the other side. Robinson and Powe demanded that he turn over his money and cellular telephone. When Brinkman refused, Robinson took Brinkman's glasses and threw them into the street. Robinson then produced a large knife and proceeded to swipe at Brinkman's face. Brinkman took off running down the street, with Robinson and Powe in pursuit. A fire engine approached the group from the opposite direction, and its occupants witnessed Robinson and Powe attempting to slash Brinkman with the knife as they chased him. Robinson and Powe fled as the fire engine activated its lights and siren.

{¶5} Lieutenant Steven Kathmann, with the Cincinnati Fire Department's Corryville station, called dispatch to report the incident, and stayed with Brinkman until the police arrived. Cincinnati Police Specialists Michael Harper and Jeremy Howard responded to the dispatch, which included a description of Robinson and Powe and referenced that a knife had been involved. As Specialists Harper and Howard canvassed nearby streets in their cruiser, they saw two subjects matching the broadcast description. The spotted subjects, Robinson and Powe, were stopped by the officers. Robinson and Powe initially refused to stop and were visibly nervous. A pat-down of the two did not reveal any weapons. Robinson and Powe were transported back to where Brinkman waited with the fire engine. Brinkman identified them as his attackers. They were then transported to the Corryville Fire Station and identified by Lieutenant Kathmann and fireman Aaron Turner, who had also witnessed the incident from the fire engine.

{¶6} After transporting Robinson and Powe to the justice center, Specialists Harper and Howard canvassed for the knife that had been used in the attack on Brinkman. They found it between two vacant houses near where Robinson and Powe

had been stopped. Brinkman identified the knife found by the officers as the knife that had been used by his assailant.

{¶7} Robinson and Powe were indicted for aggravated robbery pursuant to R.C. 2911.01(A)(1) and robbery pursuant to R.C. 2911.02(A)(2). They were tried together before a jury, and both testified on their own behalf. Robinson's testimony initially corroborated that offered by Brinkman, as he stated that he had approached Brinkman after hearing Brinkman say "shut up," because he believed that the comment had been directed at him. But, in contrast to Brinkman's version of events, Robinson testified that he only produced his knife after Brinkman began to threaten him. Robinson testified that Powe, whom he did not personally know, witnessed the confrontation and approached to help. Robinson stated that neither he nor Powe had ever demanded that Brinkman turn over any money or phone, and he also denied slashing the knife at Brinkman. Robinson testified that after Brinkman had fled, he and Powe had walked down the street together, passing the fire truck. Robinson admitted to dropping the knife between the two vacant houses because he did not want to get caught with it. He further admitted that he had given the police a fictitious name upon arrest.

{¶8} Powe testified that he had witnessed Robinson and Brinkman arguing as he was walking home on October 20, 2013, and he approached to see if he could help. According to Powe, Brinkman became very confrontational and threatened to harm Robinson, so he and Robinson ran off. Powe never saw a knife throughout the confrontation.

{¶9} Robinson was found guilty as charged, but the two offenses merged for the purposes of sentencing. The trial court sentenced Robinson to a term of 11 years' imprisonment.

Batson Challenge

{¶10} In his first assignment of error, Robinson contends that the trial court erred by permitting the prosecutor to use a peremptory challenge to dismiss a prospective African-American juror in violation of *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

{¶11} *Batson* reaffirmed the principle that the Equal Protection Clause prohibits a prosecutor from exercising a peremptory challenge to excuse a potential juror solely on the basis of the juror's race. *Id.* at 89. In *Batson*, the United States Supreme Court established a three-step procedure to review a claim that a peremptory challenge was motivated by racial discrimination. *Id.* at 97-98. First, the opponent of the peremptory strike must make a prima facie showing of racial discrimination. Next, the proponent of the peremptory strike must provide a race-neutral explanation for the strike. Last, the trial court must evaluate the explanation provided and determine if the opponent of the strike proved purposeful discrimination. *Id.*; *See State v. Sweeting*, 1st Dist. Hamilton No. C-120733, 2013-Ohio-5097, ¶ 10, citing *State v. Were*, 118 Ohio St.3d 448, 2008-Ohio-2762, 890 N.E.2d 263, ¶ 61. A reviewing court will only reverse a trial court's finding that no discriminatory intent existed if that finding is clearly erroneous. *Sweeting* at ¶ 10.

{¶12} Here, Robinson raised a *Batson* challenge after the state used a peremptory challenge to excuse an African-American juror from the panel over Robinson's objection. Although Robinson only raised the challenge with respect to

one juror, he noted that the juror at issue was the second African-American to be excused by the state. In response to Robinson's prima facie showing, the state cited the juror's comments during voir dire as a race-neutral explanation for the strike. During voir dire, the state questioned the juror on a statement that she had provided on her juror questionnaire indicating that she felt that police officers abuse their powers. In response, the juror stated that "I don't think I indicated that all police do, but that is what I don't like about police officers, those that do abuse their powers. And that's just based on stories, the news." The state expressed concern over the juror's view of police officers. In reviewing the state's explanation, the trial court found that the state had provided a reasonable, race-neutral explanation.

{¶13} The trial court's finding that the state had not been motivated by a discriminatory intent was not clearly erroneous. Robinson argues that further questioning of the juror showed that she would be a fair and impartial juror. But the explanation provided to justify a peremptory challenge need not rise to the level necessary to justify the exercise of a challenge for cause. *State v. Thomas*, 1st Dist. Hamilton No. C-120561, 2013-Ohio-5386, ¶ 18. The state's concern that the juror would not be able to abandon her prior views of police officers when evaluating the state's case constituted a legitimate race-neutral explanation. The first assignment of error is overruled.

Undisclosed Statements

{¶14} In his second assignment of error, Robinson argues that the trial court erred to his prejudice by admitting into evidence statements attributable to him that had not been disclosed prior to trial. And in his third assignment of error, he contends that the trial court erred by failing to grant a mistrial and order separate

trials for Powe and him based on the state's failure to disclose these same statements. He argues these assignments together. We first consider whether the trial court erred by admitting the statements into evidence.

{¶15} Just prior to opening statements, after the jury had been selected, the prosecutor informed all parties that she had just become aware that Robinson and Powe had made statements in the back of the police cruiser following their arrest. The prosecutor indicated that Robinson and Powe had discussed amongst themselves what they were being charged with and how they would beat the charge. Counsel for both Robinson and Powe objected to admission of these statements. The trial court determined that the statements were admissible, and it offered Robinson and Powe a continuance until the following day. Both defendants declined the offered continuance. Specialist Harper then explained to all parties the nature of the statements that the defendants had made in the back of the cruiser.

{¶16} During trial, over the defendants' renewed objections, the prosecutor questioned both Specialists Harper and Howard on the statements that the defendants had made in the back of the cruiser. Specialist Harper testified that the defendants had first asked him and Specialist Howard what they were going to be charged with. After the officers responded with "aggravated robbery," the defendants said that they believed they would beat that charge. The officers overheard the defendants saying to each other that no property had been found on their persons, and that they did not have a weapon. Neither officer could attribute any particular to statement to either Robinson or Powe. They indicated that they had overheard the conversation, but did not know which defendant had made which statement.

{¶17} Robinson contends on appeal that the trial court should have excluded the statements as a sanction for a discovery violation pursuant to Crim.R. 16. Robinson is correct in his assertion that the state's failure to disclose these statements prior to trial constituted a discovery violation, as the statements were discoverable under Crim.R. 16(B)(1). Although the record contains no indication that the state had knowledge of these statements prior to trial, Specialists Harper and Howard were clearly aware of the statements, and the law is well-settled that knowledge on the part of a law enforcement official is imputed to the state. *See State v. Wiles*, 59 Ohio St.3d 71, 78, 571 N.E.2d 97 (1991).

{¶18} The trial court has authority to regulate discovery pursuant to Crim.R. 16(L). This rule provides that, if the trial court becomes aware that a party has failed to comply with a discovery order, the court may order the noncomplying party to comply, grant a continuance, or prohibit the noncomplying party from introducing into evidence the material that had not been disclosed. *See* Crim.R. 16(L)(1). Here, the trial court offered Robinson and Powe a continuance. But Robinson contends that exclusion of the statements was the proper remedy for the state's discovery violation. We will not reverse the trial court absent an abuse of discretion. *Wiles* at 78. A trial court does not abuse its discretion in admitting evidence following a discovery violation when (1) the state's failure to disclose was not willful, (2) foreknowledge of the statements would not have benefitted the defendant in preparation of his defense, and (3) the defendant was not prejudiced by admission of the statement. *Id.* at 79, quoting *State v. Parson*, 6 Ohio St.3d 442, 453 N.E.2d 689 (1983), syllabus.

{¶19} Here, there was no indication that the failure to disclose was willful. The record indicates that the prosecutor made both opposing counsel and the court aware of the statements as soon as she learned of them. With respect to whether foreknowledge of these statements would have benefitted Robinson in preparation of his defense, the Ohio Supreme Court has held that a defendant must make more than a bald assertion that foreknowledge would have assisted in defense preparation. *Id.* at 79. Other than a general objection, Robinson failed to offer the trial court any particularized reasons as to how he would have prepared his defense differently with foreknowledge of these statements.

{¶20} We further find that Robinson was not prejudiced by the admission of these statements. The trial court provided Robinson's counsel an opportunity to hear Specialist Harper explain the statements prior to trial. With respect to the content of the statements, neither officer could attribute any particular statement directly to Robinson. And both Robinson and Powe testified at trial regarding the statements. Robinson testified that he had asked the arresting officer what he was being charged with, but he denied making any of the other statements that the officers had overheard. *See State v. Johnson*, 134 Ohio App.3d 586, 593, 731 N.E.2d 1149 (1st Dist.1999). Further, Robinson's and Powe's testimony eliminated any potential confrontation clause violation. *See In re Jones*, 1st Dist. Hamilton Nos. C-090497, C-090498 and C-090499, 2010-Ohio-3994, ¶ 22 (explaining that "a defendant is denied his Sixth Amendment right of confrontation when a nontestifying codefendant's confession that powerfully incriminates the defendant is introduced at their joint trial.").

{¶21} The trial court did not commit reversible error by failing to exclude these statements. The second assignment of error is overruled.

{¶22} We now consider Robinson's third assignment of error, in which he contends that the trial court erred by failing to grant a mistrial and order separate trials for Powe and him based on the state's failure to disclose the defendants' statements prior to trial.

{¶23} Although Powe's counsel requested a mistrial and separate trials, counsel for Robinson failed to do so. Consequently, Robinson has waived the issue and we review only for plain error. *See State v. Crawford*, 1st Dist. Hamilton No. C-070816, 2008-Ohio-5764, ¶ 49. Plain error is only established where it is demonstrated that the outcome of the proceedings would have been different but for the trial court's error. *See State v. Waddell*, 75 Ohio St.3d 163, 166, 661 N.E.2d 1043 (1996). Robinson has offered no explanation as to why admission of the defendants' statements would require that the defendants be tried separately, and we have already held that Robinson was not prejudiced by admission of the statements. Consequently, we cannot say that the outcome of the proceedings would have been different had the statements not been admitted.

{¶24} The third assignment of error is overruled.

Prosecutorial Misconduct

{¶25} In his fourth assignment of error, Robinson argues that the trial court erred in allowing the state to engage in numerous instances of prosecutorial misconduct. To establish prosecutorial misconduct, Robinson must show that the prosecutor's remarks were improper and that the comments prejudicially affected his

substantial rights. *See State v. Smith*, 130 Ohio App.3d 360, 366, 720 N.E.2d 149 (1st Dist.1998).

{¶26} Robinson first argues that the prosecutor improperly commented on his post-arrest silence by questioning him during cross-examination about why he had never informed the police upon his arrest that he had been acting in self-defense. Robinson has mischaracterized the prosecutor's action. The record reveals that the prosecutor was not commenting on Robinson's post-arrest silence, but rather was attempting to impeach his testimony that he had acted in self-defense. This was not improper.

{¶27} Robinson next contends that the prosecutor made multiple improper comments during closing argument. We are cognizant that the prosecutor is normally entitled to a certain degree of latitude in closing argument. *See State v. Smith*, 14 Ohio St.3d 13, 470 N.E.2d 883 (1984). The prosecutor's statements must not be evaluated in isolation, but in light of the entire closing argument. *See State v. Kelly*, 1st Dist. Hamilton No. C-010639, 2002-Ohio-6246, ¶ 22.

{¶28} Robinson asserts that the prosecutor improperly referred to Robinson's knife as a "ginormous Crocodile Dundee type knife." We do not find this comment to be improper. The jury heard ample testimony about the size of Robinson's knife, and the jury members were able to view the knife and determine if the prosecutor's description was accurate.

{¶29} Robinson next takes issue with the prosecutor's insinuation that he and Powe had committed other robberies around the Corryville area the evening of their arrest. The prosecutor first stated that "[b]ottom line is these two were out robbing people that night. They found yet another victim." She followed by stating

How does Mr. Robinson have money? He doesn't work. He doesn't go to school. * * * Well, I have a suggestion. He and his buddy rob people at knife point. Gotten in trouble for a gun before as he's talked about so they use a knife. They rob people. That's how they get money. That's what they were doing for hours in this area.

Robinson failed to object to either of these comments. As a result, we review for plain error. *Id.* These comments were clearly improper. Prosecutors “must avoid insinuations and assertions calculated to mislead,” and must not allude to matters outside of the record. *State v. Lott*, 51 Ohio St.3d 160, 166, 555 N.E.2d 293 (1990). The record contains absolutely no evidence that Robinson and Powe had committed additional robberies. Specialist Howard testified that there had been another robbery at knife point earlier that same evening, but that the description of the knife used in that crime was in no way similar to the knife used by Robinson. There was no additional testimony about this other robbery, and Specialist Howard never stated or even insinuated that Robinson was a suspect in that crime.

{¶30} Robinson last contends that the prosecutor denigrated defense counsel during closing argument. The prosecutor first discussed the various ways in which defense counsel had challenged the evidence presented, including defense counsel's extensive questioning of the state's witnesses regarding the description of the suspects, the description of the knife, and why the knife had not been tested for DNA. The prosecutor then stated that defense counsel had wasted everyone's time with these questions, and that counsel had raised such issues just to distract the jury.

{¶31} While the prosecutor was entitled to argue flaws in defense counsel's strategy and to explain how the evidence presented did not support the defense's

arguments, she was not permitted to “denigrate the role of defense counsel by injecting [her] personal frustrations with defense tactics.” *See State v. Bradshaw*, 1st Dist. Hamilton No. C-930654, 1994 Ohio App. LEXIS 4311, *12 (Sept. 21, 1994), quoting *State v. Hart*, 94 Ohio App.3d 665, 674, 641 N.E. 2d 755 (1st Dist.1994). We find that the prosecutor’s comments, while unartful, when taken in context did not rise to the level of improper denigration of defense counsel.

{¶32} While the prosecutor’s comments about Robinson’s commission of other robberies were improper, there was no objection to these comments, and they did not constitute plain error. Overwhelming evidence of Robinson’s guilt was presented at trial, and the outcome of the proceedings would not have been different but for these comments. *See State v. Waddell*, 75 Ohio St.3d 163, 166, 661 N.E.2d 1043 (1996).

{¶33} The fourth assignment of error is overruled.

Sufficiency and Weight

{¶34} In his fifth and sixth assignments of error, Robinson argues that his conviction was not supported by sufficient evidence and was against the manifest weight of the evidence.

{¶35} Robinson was convicted of aggravated robbery under R.C. 2911.01(A)(1). Following our review of the record, we conclude that, after viewing all the probative evidence and inferences reasonably drawn therefrom in the light most favorable to the prosecution, the jury could reasonably have found all the elements of aggravated robbery proven beyond a reasonable doubt. *See State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983). Robinson’s conviction was supported by sufficient evidence.

{¶36} With respect to the manifest weight of the evidence, we cannot find that this was the rare case in which the jury lost its way and committed a manifest miscarriage of justice in convicting Robinson. *See State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). The jury clearly found the testimony offered by Brinkman, the arresting officers, and the responding firefighters to be more credible than that offered by Robinson and Powe. The jury was in the best position to judge the credibility of the witnesses, and we will not second guess its credibility determination. The fifth and sixth assignments of error are overruled.

Sentencing

{¶37} In his seventh assignment of error, Robinson contends that the trial court erred by imposing a maximum sentence.

{¶38} Pursuant to R.C. 2953.08(G), a reviewing court may only vacate or modify a sentence imposed by the trial court if the record does not support the mandatory sentencing findings or the sentence is otherwise contrary to law. *See* R.C. 2953.08(G)(2); *State v. White*, 2013-Ohio-4225, 997 N.E.2d 629, ¶ 11 (1st Dist.). Robinson has not alleged that the trial court failed to make any mandatory sentencing findings. His sentence fell within the available statutory range and was not otherwise contrary to law. The trial court did not err in imposing the maximum sentence of 11 years' imprisonment.

{¶39} Robinson's assignment of error is overruled, and the judgment of the trial court is affirmed.

Judgment affirmed.

CUNNINGHAM and DEWINE, JJ., concur.

Please note:

The court has recorded its own entry on the date of the release of this opinion.