[Cite as *In re B.T.B.*, 2015-Ohio-2729.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

IN THE MATTER OF:	:	
B.T.B.	:	CASE NO. CA2014-10-199
	:	O P I N I O N 7/6/2015
	:	
	:	

APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
JUVENILE DIVISION
Case No. JV2014-0761

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RINGLAND, J.

{¶ 1} Appellant, B.T.B., appeals from a decision of the Butler County Court of Common Pleas, Juvenile Division, adjudicating him delinquent for complicity to aggravated robbery. For the reasons discussed below, we affirm in part, reverse in part, and remand for the sole purpose of requiring the juvenile court to hold a hearing on the issue of restitution.

{¶ 2} Shortly after midnight on April 18, 2014, two males wearing dark clothing with bandanas covering their faces robbed Yuting Shen, a student at Miami University, at

gunpoint in the parking lot of the apartment where she lived. The following night, on April 19, 2014, a second robbery occurred in the same area.

{¶ 3} A few days after the robberies, the police received a tip that persons of interest, Nathaniel Nickel and Carson Buell, were at a hospital after Nickel had shot himself in the hand. Detective Geoffrey Robinson with the Oxford Police Department went to the hospital to interview Nickel and Buell. During the course of the interviews, appellant and a second juvenile, A.L., were mentioned. As a result of the investigation, Nickel and Buell were indicted and pled guilty to aggravated robbery charges relating to both the first and second robberies. Additionally, appellant was charged in the first robbery and A.L. was charged in the second robbery.

{¶ 4} Appellant was charged with delinquency for committing acts that would constitute aggravated robbery in violation of R.C. 2911.01(A)(1), if committed by an adult. The complaint alleged appellant, along with Nickel, who had a weapon, robbed Shen in the parking lot of Oxford Commons on April 18, 2014, at approximately 1:30 a.m., by taking a purse and iPhone.

{¶ 5} On September 4, 2014, a hearing on the delinquency complaint was held in front of a juvenile judge. A.L. agreed to testify against appellant, placing appellant near the scene of the first robbery, in exchange for the state's promise not to bind A.L. over to be tried as an adult for his involvement in the second robbery. Shen and Detective Robinson also testified at appellant's hearing.

{¶ 6} Shen testified that at approximately 1:30 a.m. on April 18, 2014, she was walking in the parking lot outside of her apartment when she heard a noise behind her. As she turned around, Shen testified she saw two "guys" with one pointing a gun at her head, and she then gave her purse and phone to the man with the gun. Shen testified the second person, while he "did not do anything," remained "side-by-side" with the armed man during

the course of the robbery and later fled with the armed man. According to Shen's testimony, she was unable to identify the offenders because they both wore bandanas across their faces. Shen also testified both offenders wore black jackets, dark colored pants, and hats.

{¶ 7} Detective Robinson testified regarding the course of the investigation. Based on information obtained from interviews of Nickel and Buell at the hospital, police picked up appellant and took him to the police station for questioning. Detective Robinson testified that during the interview, appellant denied knowing anything about either robbery. Appellant maintained he was home the entire night of the first robbery and he did not know Nickel or Buell. Appellant later admitted he picked up Nickel, Buell, and A.L. from A.L.'s uncle's house and dropped them off at a fast food restaurant a short time before the second robbery. Regarding the first robbery, however, Detective Robinson testified appellant remained adamant he was home the entire night.

{¶ 8} A.L. testified that on April 18, 2014, the night of the first robbery, he, Nickel, and Buell drove to Cincinnati to pick up drugs and then returned to Oxford to use them. According to A.L., appellant later joined them in Oxford, but did not partake in the drugs. A.L. testified they parked at a fast food restaurant where Nickel and appellant left the vehicle while he and Buell remained. A.L. testified that approximately five to ten minutes after leaving the vehicle, Nickel came running towards them screaming and holding a pocket book or purse, and then he and appellant got into the vehicle where money was taken out of the purse and they "took off." A.L. testified while he did not remember what appellant was doing at this point, he had no doubt appellant was there that night, left the vehicle with Nickel, and returned to the vehicle with Nickel. Additionally, A.L. testified Nickel carried a gun with him on the night of the first robbery.

{¶ 9} After hearing the evidence, the juvenile court found appellant was in fact the second person who robbed Shen with Nickel as the testimony of A.L. corroborated Shen's

testimony regarding the gun, purse, location, and time. The juvenile court found as the fact-finder, it had the authority to believe or disbelieve a witness, and it believed A.L. The juvenile court adjudicated appellant a delinquent child for committing acts that if charged as an adult would constitute complicity to aggravated robbery.

{¶ 10} Appellant now appeals, asserting five assignments of error for review. For ease of discussion, we will address appellant's first and second assignments of error together.

{¶ 11} Assignment of Error No. 1:

{¶ 12} THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE ADJUDICATION FOR AGGRAVATED ROBBERY.

{¶ 13} Assignment of Error No. 2:

{¶ 14} THE ADJUDICATION FOR AGGRAVATED ROBBERY WAS CONTRARY TO THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶ 15} In his first assignment of error, appellant argues his delinquency adjudication was not supported by sufficient evidence. Appellant asserts the evidence failed to show he was one of two individuals at the scene of the robbery. Even if he was at the scene of the robbery, appellant contends the evidence failed to show he aided and abetted the principal offender. Additionally, given the agreement not to bind A.L. over as an adult in exchange for his testimony against appellant, appellant asserts A.L.'s strong motivation to fabricate his testimony made him an unreliable witness. As such, in his second assignment of error, appellant argues his delinquency adjudication was against the manifest weight of the evidence because the juvenile court lost its way when it believed the testimony of A.L. We disagree.

{¶ 16} In reviewing a whether a juvenile's delinquency adjudication is supported by sufficient evidence and not against the manifest weight of the evidence, the standard of review is the same as the standard used in adult criminal cases. *In re Washington*, 81 Ohio

St.3d 337, 339 (1998); *In re M.J.C.*, 12th Dist. Butler No. CA2014-05-124, 2015-Ohio-820, ¶ 27. The relevant inquiry in reviewing a claim of insufficient evidence is whether "'after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.'" *State v. McKnight*, 107 Ohio St.3d 101, 2005-Ohio-6046, ¶ 70, quoting *State v. Jenks*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus. If a juvenile court's delinquency finding is supported by the manifest weight of the evidence, then the finding is also supported by sufficient evidence. *In re D.L.B.*, 12th Dist. Fayette No. CA2011-09-019, 2012-Ohio-3045, ¶ 3.

{¶ 17} Considering whether a conviction is against the manifest weight of the evidence, "a reviewing court must examine the entire record, weigh all of the evidence and reasonable inferences, consider the credibility of witnesses and determine whether in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *In re M.J.C.* at ¶ 28; *State v. Thompkins*, 78 Ohio St.3d 380, 387 (1997). Granting a new trial through use of discretionary power should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction. *In re N.J.M.*, 12th Dist. Warren No. CA2010-03-026, 2010-Ohio-5526, ¶ 35; *Thompkins* at 387.

{¶ 18} Appellant was adjudicated delinquent for committing acts that constitute complicity to aggravated robbery. R.C. 2911.01(A)(1) defines aggravated robbery:

> No person, in attempting or committing a theft offense * * * or in fleeing immediately after * * *, shall do any of the following: * * * Have a deadly weapon on or about the offender's person or under the offender's control and either display the weapon, brandish it, indicate that the offender possesses it, or use it * * * [.]

According to the complicity statute, "No person, acting with the kind of culpability required for

the commission of an offense, shall * * * [a]id or abet another in committing the offense [.]" R.C. 2923.03(A)(2). A person must act "knowingly" to commit a theft offense such as aggravated robbery. *State v. Salyer*, 12th Dist. Warren No. CA2006-03-039, 2007-Ohio-1659, ¶ 27. "A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature." R.C. 2901.22.

{¶ 19} In order to be complicit to a crime by aiding and abetting, "the evidence must show that the defendant supported, assisted, encouraged, cooperated with, advised, or incited the principal in the commission of the crime, and that the defendant shared the criminal intent of the principal." *State v. Johnson*, 93 Ohio St.3d 240 (2001), syllabus. "[T]he mere presence of an accused at the scene of a crime is not sufficient to prove, in and of itself, that the accused was an aider and abettor." *State v. Widner*, 69 Ohio St.2d 267, 269 (1982). Accordingly, the accused must actively participate in some way and contribute to the unlawful act to aid or abet. *Salyer* at ¶ 27. Nevertheless, aiding and abetting may be shown through either direct or circumstantial evidence, "and participation in criminal intent may be inferred from presence, companionship, and conduct before and after the offense is committed." *State v. Lett*, 160 Ohio App.3d 46, 2005-Ohio-1308, ¶ 29 (8th Dist.); *State v. Mota*, 12th Dist. Warren No. CA2007-06-082, 2008-Ohio-4163, ¶ 20.

{¶ 20} In this instance, appellant's delinquency adjudication was not against the manifest weight of the evidence, and thus was supported by sufficient evidence. Circumstantial evidence shows appellant was the second person at the scene of the robbery, and his presence, companionship, and conduct before and after the offense shows appellant aided and abetted Nickel in the commission of the robbery. Based upon A.L.'s testimony, it can be inferred appellant was one of the two people present at the scene of the first robbery. A.L.'s testimony places appellant near the scene both before and after the robbery. A.L.

testified appellant left the vehicle located in a fast food parking lot in Oxford with Nickel who had a gun. A.L. testified that approximately five to ten minutes later, appellant came back to the vehicle with Nickel who was screaming and carrying a purse. After appellant and Nickel got into the vehicle, according to A.L.'s testimony, the vehicle "took off" and money was removed from the purse. Shen's testimony corroborated A.L.'s testimony regarding the gun, purse, location, and time.

{¶ 21} Additionally, based upon Shen's testimony, the person without the gun at the scene of the robbery aided and abetted the armed man. Shen testified two guys stood side-by-side wearing dark clothing with bandanas covering their faces as the armed man demanded her purse and phone. After taking her purse and phone, the two fled the scene at the same time. The actions of the unarmed man before and after the robbery of concealing his identity and running away with the armed man, along with his unwavering presence, shows he aided and abetted the armed man in the commission of the robbery. A.L.'s testimony, as corroborated by Shen's testimony, places appellant near the scene of the offense, and Shen's testimony shows the unarmed man was complicit in the aggravated robbery.

{¶ 22} Furthermore, the juvenile court was aware the state agreed not to bind A.L. over as an adult for his participation in the second robbery in exchange for A.L.'s testimony against appellant. The role of the trier of fact to evaluate witness credibility does not diminish simply because the witness receives a plea bargain in exchange for his testimony. *State v. Mays*, 12th Dist. Clermont No. CA2012-05-038, 2013-Ohio-1952, ¶ 27; *see State v. DeHass*, 10 Ohio St.2d 230, 231 (1967). As such, the juvenile court was free to believe A.L.'s testimony.

{¶ 23} By believing A.L.'s testimony as corroborated by Shen's testimony, the juvenile court did not clearly lose its way or create a manifest miscarriage of justice by adjudicating

appellant delinquent based on actions that constitute complicity to aggravated robbery. As appellant's delinquency adjudication was not against the manifest weight of the evidence, it was also supported by sufficient evidence. Consequently, appellant's first and second assignments of error are overruled.

{¶ 24} Assignment of Error No. 3:

{¶ 25} THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT IN THE ADMISSION OF PREJUDICIAL HEARSAY TESTIMONY IN VIOLATION OF APPELLANT'S RIGHT OF CONFRONTATION.

{¶ 26} In his third assignment of error, appellant argues certain statements made by Detective Robinson were impermissible hearsay. Appellant argues the admission of the statements violated the Confrontation Clause as he did not have an opportunity to cross-examine the declarants. Furthermore, appellant argues the improper admission of the hearsay statements was not harmless because the statements impacted the outcome. We disagree.

{¶ 27} The admission or exclusion of relevant evidence lies within the sound discretion of the trial court. *State v. Robb*, 88 Ohio St.3d 59, 68 (2000). Consequently, a trial court's ruling as to the admissibility of evidence will not be reversed absent an abuse of discretion. *State v. Sage*, 31 Ohio St.3d 173 (1987), paragraph two of the syllabus. More than an error of law or judgment, an abuse of discretion connotes that the trial court's attitude was unreasonable, arbitrary, or capricious. *State v. Adams*, 62 Ohio St.2d 151, 157 (1980).

{¶ 28} The Confrontation Clause of the Sixth Amendment bars the admission of "testimonial hearsay" unless the declarant is unavailable and the accused had a prior opportunity to cross-examine the declarant. *State v. Primo*, 12th Dist. Butler No. CA2004-09-237, 2005-Ohio-3903, ¶ 12, citing *Crawford v. Washington*, 541 U.S. 36, 68, 124 S.Ct. 1354 (2004). Testimonial statements exist where there was no ongoing emergency and the

statements resulted from a police interrogation whose "'primary purpose [was] to establish or prove past events potentially relevant to later criminal prosecution.'" *State v. Ricks*, 136 Ohio St.3d 356, 2013-Ohio-3712, ¶ 17, quoting *Davis v. Washington*, 547 U.S. 813, 822, 126 S.Ct. 2266 (2006). The Confrontation Clause "'does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.'" *Ricks* at ¶ 18, quoting *Crawford* at 59.

{¶ 29} "Hearsay" is defined as, "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Evid.R. 801(C). Thus, two elements are required to constitute hearsay: (1) an out of court statement (2) offered for the truth of the matter asserted. Evid.R. 801(C). Testimony is not hearsay if either is missing. *State v. Maurer*, 15 Ohio St.3d 239, 262 (1984). "Statement" is defined as, "an oral or written assertion or * * * nonverbal conduct of a person, if it is intended by the person as an assertion." Evid.R. 801(A).

{¶ 30} Generally, statements offered to explain an officer's conduct during an investigation of a crime are not hearsay as the statements are not offered for their truth. *State v. Echavarria*, 12th Dist. Butler CA2003-11-300, 2004-Ohio-7044, ¶ 9; *In re T.G.*, 12th Dist. Butler Nos. CA2007-07-158 and CA2007-07-171, 2008-Ohio-1795, ¶ 13. However, due to the potential for abuse of admitting statements to explain an officer's conduct during an investigation, such testimony must meet three requirements to be admissible even if not offered for the truth of the statement. *Ricks* at ¶ 22. First, "the conduct to be explained should be relevant, equivocal, and contemporaneous with the statements." *Id.* at ¶ 27. Second, "the probative value of statements must not be substantially outweighed by the danger of unfair prejudice." *Id.* Third, "the statements cannot connect the accused with the crime charged." *Id.* Nevertheless, as noted in a concurrence by Justice French, "[i]t is usually possible to explain the course of an investigation without relating historical aspects of

the case, and in most cases, testimony that the officer acted 'upon information received,' or words to that effect, will suffice." *Id.* at ¶ 51, citing 2 McCormick, *Evidence*, Section 249, at 193-195 (7th Ed.2013). *See State v. Jones*, 1st Dist. Hamilton No. C-130359, 2014-Ohio-3110, ¶ 21.

{¶ 31} In this instance, appellant argues the juvenile court improperly admitted three instances of hearsay over the objection of defense counsel during Detective Robinson's testimony. First, Detective Robinson was asked if there was "some implication" appellant was involved with the robbery and inquired as to how police decided to talk to appellant. Detective Robinson stated the police decided to talk to appellant after interviewing Buell and A.L. Second, when asked why Buell was charged, Detective Robinson testified, based on the information in the investigation, Buell was driving the vehicle that night, but was not actually at the scene of the robbery. Later, Detective Robinson expanded upon this statement and said, "our investigation led us to * * * believe that Carson Buell was driving the vehicle during the first robbery and * * * provided a firearm to [appellant] for that robbery." Third, when asked whether there was any evidence outside of physical evidence linking appellant to the robbery, Detective Robinson testified, "statements from other people."

{¶ 32} We note at the outset, the alleged statements are not hearsay. The alleged statements do not fall within the definition of "statement" in Evid.R. 801 as there were no identified oral or written assertions made by an out-of-court declarant. Furthermore, the testimony was couched in the general terms of "based on the investigation."

{¶ 33} Even by construing the testimony as statements, they were not offered for the truth of the matter asserted. Instead, the alleged statements were offered to explain Detective Robinson's conduct during the course of the investigation, and are subject to the Ohio Supreme Court's test outlined in *Ricks*. By applying the *Ricks*' test, some statements impermissibly connect appellant to the robbery. Nevertheless, any error in admitting these

statements without allowing appellant to cross-examine the witness was harmless. *See Primo*, 2005-Ohio-3903, at ¶ 12.

{¶ 34} When determining whether erroneously admitted evidence affected a defendant's substantial rights as to require a new trial or whether such an admission was harmless under Crim.R. 52(A), a reviewing court must make three determinations. *State v. Harris*, 142 Ohio St.3d 211, 2015-Ohio-166, ¶ 37, citing *State v. Morris*, 141 Ohio St.3d 399, 2014-Ohio-5052.

> First, it must be determined whether the defendant was prejudiced by the error, i.e., whether the error had an impact on the verdict. Second, it must be determined whether the error was not harmless beyond a reasonable doubt. Lastly, once the prejudicial evidence is excised, the remaining evidence is weighed to determine whether it establishes the defendant's guilt beyond a reasonable doubt.

Id.

{¶ 35} In applying the harmless error analysis, appellant was not prejudiced because if any error occurred, it did not have an impact on the verdict. As appellant was subjected to a bench trial, it is presumed the juvenile court only considered admissible evidence. *See State v. Barnes*, 12th Dist. Brown No. CA2010-06-009, 2011-Ohio-5226, ¶ 23. Additionally, while alleged statements made by Buell and A.L. as testified to by Detective Robinson, specifically connected appellant to the robbery, A.L. testified at trial connecting appellant to the robbery. Without any alleged statements made by Buell, the testimony of A.L., if believed, was more than sufficient to establish appellant's guilt beyond a reasonable doubt. The juvenile court stated when it looked into A.L.'s eyes, it believed him. Consequently, any error in admitting the alleged hearsay statements without allowing appellant to cross-examine the declarant was harmless. Appellant's third assignment of error is overruled.

{¶ 36} Assignment of Error No. 4:

{¶ 37} THE PURSUIT OF AN INCONSISTENT THEORY OF GUILT VIOLATED

APPELLANT'S RIGHT TO DUE PROCESS AND A FAIR TRIAL PURSUANT TO THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ART. I, SECTION 16 OF THE OHIO CONSTITUTION.

{¶ 38} In his fourth assignment of error, appellant argues because the state pursued prosecutions against him, Nickel, and Buell for a crime committed by two people, the state's theories of prosecution were inconsistent and in violation of appellant's constitutional rights. Specifically, appellant asserts he cannot be pursued for aggravated robbery because two individuals, Nickel and Buell, already pled guilty to the offense. We disagree.

{¶ 39} Whether a person is a principal offender or complicit to a crime, the complicity statute provides a charge of complicity may be stated either in terms of the complicity statute or in terms of the principal offense. R.C. 2923.03(F). This statute provides adequate notice of complicity may be contemplated even where the indictment is phrased as if the defendant were the principal offender. *State v. Herring*, 94 Ohio St.3d 246, 251 (2002). Furthermore, the same is true for the judgment entry, so it can be stated in terms of the complicity statute or the principal offense. *State v. Lang*, 12th Dist. Clermont No. 87-10-080, 1988 WL 37610, *2 (Apr. 11, 1988).

{¶ 40} In this instance, Nickel and Buell were indicted for aggravated robbery and pled guilty in terms of the principal offense. The complaint filed against appellant charged him with delinquency for committing aggravated robbery. While Shen testified only two individuals robbed her at gunpoint, A.L. testified four people, he, Buell, Nickel, and appellant, were together that night in Oxford before and after Nickel and appellant left and returned with a purse. The remaining two individuals could have been complicit to the aggravated robbery in some way. *See, e.g., State v. Gaither*, 8th Dist. Cuyahoga No. 85023, 2005-Ohio-2619 (a getaway driver can be a willing participant to an aggravated robbery and found guilty of complicity). As such, charging three individuals with aggravated robbery, whether in terms of

the principal offense or the complicity statute, is consistent. Consequently, the state did not pursue inconsistent theories of guilt against multiple defendants. Appellant's fourth assignment of error is overruled.

{¶ 41} Assignment of Error No. 5:

{¶ 42} THE TRIAL COURT ERRED IN ORDERING RESTITUTION.

{¶ 43} In his fifth assignment of error, appellant argues, and the state concedes, that the juvenile court erred by failing to order a specific amount of restitution. As such, this matter must be remanded to the juvenile court to hold a hearing on restitution. *In re D.E.*, 12th Dist. Butler Nos. CA2009-03-086, CA2009-03-087, and CA2009-06-161, 2010-Ohio-209, ¶ 21. Appellant's fifth assignment of error is sustained.

{¶ 44} Judgment affirmed in part, reversed in part, and remanded for the sole purpose of requiring the juvenile court to hold a hearing on restitution.

S. POWELL, P.J., and HENDRICKSON, J., concur.