

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
SANDUSKY COUNTY

State of Ohio

Court of Appeals No. S-08-034

Appellee

Trial Court No. 08CR208

v.

Marquise I. Jones

DECISION AND JUDGMENT

Appellant

Decided: April 23, 2010

* * * * *

Thomas L. Stierwalt, Sandusky County Prosecuting Attorney,
and Norman P. Solze, Assistant Prosecuting Attorney, for appellee.

Ron Nisch, for appellant.

* * * * *

OSOWIK, P.J.

{¶ 1} This is an appeal from a judgment of the Sandusky County Court of Common Pleas which, following a jury trial, found appellant guilty of 17 felony offenses in connection with an orchestrated, armed assault and robbery of a group of men in

Fremont, Ohio. Appellant was sentenced to a total term of incarceration of 21 years. For the reasons set forth below, this court affirms the judgment of the trial court.

{¶ 2} Appellant, Marquise Jones, sets forth the following five assignments of error:

{¶ 3} "I. The trial court erred in allowing the prosecutor to continue to question a witness after the assertion by the witness of his 5th Amendment right not to incriminate himself, and by allowing into evidence a prior statement of such witness without the appellant being able to cross-examine the witness regarding such statement.

{¶ 4} "II. The trial court erred by allowing an amendment of jury instructions after acceptance of the instructions by the prosecutor and after the closing argument of appellant's trial counsel.

{¶ 5} "III. Cumulative errors by the trial court denied the appellant a fair trial.

{¶ 6} "IV. The State presented insufficient evidence on which a jury could base convictions as to all counts of the indictment, and the verdict of the jury was against the manifest weight of the evidence.

{¶ 7} "V. The imposition by the trial court of consecutive sentences on Counts One through Six violated the legislative policy of R.C. Sec. 2929.14 (E)(4) and was an abuse of discretion."

{¶ 8} The following undisputed facts are relevant to the issues raised on appeal. This case stems from an incident wherein several groups of collaborating criminals

conspired to trap, assault, and rob a group of men at a home in Fremont, Ohio, on December 31, 2007.

{¶ 9} On December 31, 2007, a group of men met several females at an establishment known as the Copper Penny Bar. Later in the evening, the group traveled on to Shellukes Bar and continued drinking and partying. Unbeknownst to the men, all of whom were Hispanic and possessed limited English language skills, the women whom they had met were part of a ploy in which the men were being set up to be crime targets. Throughout the evening, the women were furnishing information regarding the targeted men via cellular phones and texting with another group of men surreptitiously planning to later assault and rob the targeted victims.

{¶ 10} The co-conspirators who acted as lures ultimately left with the victims and went to the home of one of the victims to continue partying. Appellant was covertly notified by one of the female co-conspirators of the address of the home in Fremont where the male victims could be found, as well as other information regarding the victims and their property which was being targeted for theft.

{¶ 11} Appellant, his brother, and others arrived at the home, and alerted the females who had acted as lures to vacate the premises now that they had successfully led the perpetrators to their prey. They stormed the home armed with guns and severely beat and robbed the men. The men suffered varying degrees of physical injury during the armed assault and robbery. One of the men was beaten so severely that he had to be transported to Toledo Hospital via life flight.

{¶ 12} In the wake of these crimes, those responsible initially denied any and all involvement. During the course of the investigation, the police obtained information to identify and investigate the culpable parties. On February 19, 2008, appellant was indicted on 17 counts including aggravated robbery with firearm specification, robbery with firearm specification, felonious assault with firearm specification, theft, and aggravated burglary with firearm specification. While many of the co-perpetrators entered voluntary plea agreements, appellant did not. On October 20, 2008, appellant's jury trial commenced. Appellant was found guilty on all counts and sentenced to a total term incarceration of 21 years. Timely notice of appeal was filed.

{¶ 13} In his first assignment of error, appellant asserts the trial court abused its discretion in its questioning of a witness who invoked his Fifth Amendment right against self-incrimination. In support, appellant argues that because the witness (appellant's brother and a convicted co-defendant) invoked his right against self-incrimination, the trial court's questioning of the witness about his prior allocution in his criminal case and the admission of his statement made in allocution in connection to same case was an abuse of discretion.

{¶ 14} We have carefully reviewed and considered the trial transcript, paying particular attention to the portion pertaining to the disputed testimony of appellant's brother. The record reflects that the trial court went to great lengths to explain, preserve and protect the witness's right against self-incrimination. The record demonstrates this witness refused any cooperation beyond confirming that he was appellant's brother and

that he was presently serving a prison sentence in connection to the same case. In response to this stance, the trial judge ultimately advised the witness, "So you can continue to invoke your Fifth Amendment rights and I'll tell you when it applies and when it doesn't apply." The witness's refusal to cooperate continued. The witness stated, "I took a plea not to testify to nobody. That was my plea agreement." There is no evidence in the record in conformity with that representation. The witness implausibly claimed to not recall whether or not he made a statement to the court when pleading guilty in connection to the same case. He stated, "I don't remember the statement. I don't remember nothing that day."

{¶ 15} Ultimately, portions of the witness's allocution statement from his case transcript were read into the record. As most specifically pertinent to this case, the allocution statement read, "My brother called me. He picked me up. We went to Charlotte Duke's house. I went in the opposite room. They was all discussing. My brother had ski masks. I didn't know he had no guns on him. I knew he had ski masks. I didn't know he had no guns."

{¶ 16} In response to the position of the witness, the trial court ultimately went to the length of taking a recess and securing the physical presence of the witness's trial counsel to protect his rights and serve as an advocate on behalf of the witness. Significantly, counsel for the witness prevailed in having the entirety of the testimony stricken but for the transcript of the witness's plea allocution.

{¶ 17} A plea allocution is conducted only after the individual has been fully apprised of and waived a litany of constitutional rights, including Fifth Amendment rights. As such, the allocution statement was unprotected as a matter of law and thereby admissible. In conformity with this legal truism, Evid.R. 804 (B) (3) establishes that a statement against interest is admissible when the declarant, "(1) was unavailable to testify at trial; (2) the confession tended to subject them to criminal liability such that a reasonable person in their position would not have made the confession unless they believed it to be true; and (3) collaborating circumstances clearly indicate the trustworthiness of the confession."

{¶ 18} We find that given the witness's refusal to cooperate in questioning, even when limited in scope to the making of the plea allocution statement in conjunction with the fact that the allocution statement rendered the witness criminally liable and led to his conviction and incarceration, the allocution statement is admissible pursuant to the criteria set forth in Evid.R. 804 (B)(3). We further note that the court undertook significant measures in protecting the rights of the witness, including securing the presence of his trial counsel to independently represent his interests, and the success of counsel for the witness in having the entirety of the testimony stricken but for the unprotected plea allocution statement. Based upon the foregoing, we find appellant's first assignment of error not well-taken.

{¶ 19} In appellant's second assignment of error, he contends that the trial court erred by permitting an amendment to the jury instructions following closing arguments so as to include a complicity instruction.

{¶ 20} It is well-established that determinations on which jury instructions to include lie well within the sound discretion of the trial court. *State v. Germany*, 6th Dist. No. L-07-1087, 2008-Ohio-374, citing *State v. Guster* (1981), 66 Ohio St.2d 266, 271. As applied to the case at hand, we note it is undisputed that appellant's indictments included complicity offenses. In addition, the record reflects ample testimony and evidence offered at trial clearly and directly pertaining to complicity offenses. As such, the amendment to jury instructions incorporating complicity instructions fully conformed to the offenses charged and to the evidence presented. The record is devoid of any evidence in support of the notion that amending the jury instructions to incorporate complicity was arbitrary, unreasonable or unconscionable. We find appellant's second assignment of error not well- taken.

{¶ 21} In appellant's third assignment of error, he asserts that he was denied a fair trial due to alleged cumulative errors of the trial court. In support, appellant contends the alleged improper testimony from the witness that formed the basis of the first assignment of error, and the alleged improper complicity amendment to the jury instructions that formed the basis of the second assignment of error, while perhaps individually harmless, conjunctively should be deemed to constitute prejudicial error.

{¶ 22} The Ohio Supreme Court has delineated the cumulative error doctrine as, "although violations of the rules of evidence during trial, singularly, may not rise to the level of prejudicial error, a conviction will be reversed where the cumulative effect of the errors deprives a defendant of the constitutional right to a fair trial." *State v. DeMarco* (1987), 31 Ohio St.3d 191.

{¶ 23} In this case, we previously found no instances of error in our determinations in response to the first two assignments of error. Accordingly, the cumulative error doctrine is inapplicable. We find appellant's third assignment of error not well-taken.

{¶ 24} In his fourth assignment of error, appellant asserts his convictions were not supported by sufficient evidence and the guilty verdicts were against the manifest weight of the evidence. In support, appellant again determinatively relies upon the claimed improper handling of his brother's testimony that was the basis of the first assignment of error.

{¶ 25} A criminal conviction may be overturned on appeal if there is insufficient evidence, or if the conviction is against the manifest weight of the evidence. In considering a challenge based upon the sufficiency of the evidence, we must determine whether the evidence submitted to the trial court was legally sufficient to establish the elements of the offense. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387. In resolving the sufficiency question, we must determine whether the evidence presented, if believed,

would satisfy an average person of the defendant's guilt beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus.

{¶ 26} In conjunction with the above analysis, it must also be considered whether the verdict was against the manifest weight of the evidence. When examining whether a conviction was contrary to the manifest weight of the evidence, the appellate court serves as a "thirteenth juror" to conclude whether the trial court lost its way so significantly as to result in a manifest miscarriage of justice, necessitating that the conviction be overturned. *Thompkins* at 387. In reaching this decision, we grant substantial deference to the trial court's determination given its unique opportunity to closely observe and assess the demeanor and credibility of the witnesses and of the evidence presented. *State v. Mickles*, 6th Dist. No. L-05-1206, 2006-Ohio-3803.

{¶ 27} In applying these principles to this case, we note the record establishes that one of appellee's witnesses, Raymond Jones, clearly testified regarding appellant's active criminal participation in the entirety of the offenses for which appellant was charged. Jones testified that appellant was contacted regarding the pending criminal plan, arrived with ski masks, traveled with the group of criminals to the premises where the crimes occurred, and went inside armed with a pistol and participated in the crimes.

{¶ 28} Consistent with the above testimony, appellee presented the testimony of one of the female lures, Rochelle Moreno. Moreno consistently testified to appellant's presence, involvement, and post-crime discussion with some of the other perpetrators regarding the crimes.

{¶ 29} In further collaboration of the above, the admissible plea allocution statement of appellant's brother was clearly further reflective of appellant's criminal conduct consistent with the offenses charged.

{¶ 30} In applying the requisite legal principles to the record of evidence in this case, we find the record possessed evidence sufficient to satisfy an average person of appellant's guilt beyond a reasonable doubt. The record is devoid of evidence establishing the trial court lost its way so as to cause a manifest miscarriage of justice. We find appellant's fourth assignment of error not well-taken.

{¶ 31} In appellant's fifth assignment of error, he contends the trial court erred in imposing consecutive sentencing on the first six counts. While appellant concedes that pursuant to *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, former statutory sentencing factors are now "advisory" and sentencing courts are not required to state any type of requisite findings prior to consecutive sentencing, he contends that the trial court nevertheless abused its discretion in imposing consecutive sentences within the statutory range.

{¶ 32} Given appellant's commission of 17 felony-level criminal offenses utilizing a firearm in the course of the severe beating and robbery of six victims who were purposefully set-up to be criminalized as the result of an orchestrated, surreptitious "gravy lick," we cannot say that the trial court acted unreasonably, arbitrarily or unconscionable in its statutorily compliant sentencing of appellant. Appellant's sentence

is in conformity with the controlling sentencing principles of *Foster*. We find appellant's fifth assignment of error not well-taken.

{¶ 33} On consideration whereof, we find that substantial justices been done in this matter. The judgment of the Sandusky County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

JUDGE

Mark L. Pietrykowski, J.

JUDGE

Thomas J. Osowik, P.J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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