[Cite as *State v. Shutes*, 2006-Ohio-1940.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

No. 86485

STATE OF OHIO	:	
	:	JOURNAL ENTRY
Plaintiff-Appellee	:	
	:	AND
vs.	:	
	:	OPINION
LESHAWN SHUTES	:	
	:	
Defendant-Appellant	:	
	:	
	:	
DATE OF ANNOUNCEMENT OF DECISION	:	APRIL 20, 2006
	:	
CHARACTER OF PROCEEDINGS	:	Criminal appeal from
	:	Common Pleas Court
	:	Case No. CR-458940
	:	
JUDGMENT	:	AFFIRMED.
DATE OF JOURNALIZATION	:	

APPEARANCES:

For plaintiff-appellee: WILLIAM D. MASON, ESQ.
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[Cite as *State v. Shutes*, 2006-Ohio-1940.]
FRANK D. CELEBREZZE, JR., P.J.:

{¶ 1} Appellant, Leshawn Shutes, appeals his conviction in the common pleas court following a bench trial. After review of the record and the arguments of the parties, we affirm his conviction.

{¶ 2} On November 18, 2004 the Cuyahoga County Grand Jury filed a multiple count indictment against Shutes and a codefendant, Paul Washington ("Washington"). The indictment charged Shutes with various counts of aggravated robbery, kidnapping, and felonious assault (all with firearm and repeat violent offender specifications), as well as one count of having a weapon while under disability. Both Shutes and Washington were represented by counsel. Both entered pleas of not guilty and elected to waive their rights to a jury trial and proceed to a joint bench trial.

{¶ 3} The incident giving rise to this indictment occurred on September 29, 2004. That night, Evelyn Martin ("Martin") was playing cards with two friends, Terri Carruthers ("Carruthers") and David Sandifer ("Sandifer") at her home on East 130th Street in Cleveland, Ohio. At approximately 10:00 p.m., two males broke into the house to commit a robbery. There was testimony from each of the victims (Martin, Carruthers, and Sandifer) providing their own perspective of the events at issue. Carruthers positively identified Shutes as one of the two men.

{¶ 4} The testimony of the victims established that the two men came into the house with at least one gun drawn and demanded money. At some point, Martin was struck in the head by one of the men with his weapon. The same man also placed his hands down Martin's bra and panties in search of money. The two men then vandalized the house in search of valuables. The robbery lasted approximately twenty minutes, after which time the men left. Martin subsequently called 911, and Cleveland police officers arrived on the scene.

{¶ 5} At the same time that these events were occurring, Cleveland Police Detective David Sims ("Det. Sims") was in the area pursuant to his involvement in an unrelated police operation. While waiting for his operation to commence, Det. Sims observed suspicious activity. He saw a car back into a driveway with its lights off; two males got out of the car and rushed into the house. A short time after, Sims observed the two males run out of the house and get into the car. They then fled the scene.

{¶ 6} Det. Sims began to pursue the car, and a police chase was instigated. The chase ended when the car crashed. Washington was the driver of the vehicle. Prior to the crash, three men other than the driver got out of the car and fled the scene. Det. Sims testified that, once Washington was detained, he was mirandized and made oral statements admitting his involvement in the robbery. Washington also provided the names of the other occupants of the car, including Shutes. Washington informed the police that during the chase a gun was thrown from the car. He gave the approximate location, and the weapon was retrieved. Det. Sims obtained a photograph of Shutes, and Washington positively identified him as one of the men involved. Det. Sims further testified that Shutes was arrested, mirandized, and made incriminating statements.

{¶ 7} On March 9, 2005, defense counsel for Washington brought a discovery issue to the attention of the trial court. Counsel indicated that nothing in writing had been made available to either defense attorney concerning any statements that had been made by the codefendants to Det. Sims At that hearing, the trial court made efforts to rectify any potential issues, and on March 21, 2005, the state filed a written response to Shutes's request for discovery. The record also indicates that Det. Sims was present and available to the defense for questioning at the March 9th hearing.

{¶ 8} On March 28, 2005, a joint bench trial of Shutes and Washington began. At its conclusion, the trial court found Shutes guilty of three counts of aggravated burglary, in violation of R.C. 2911.11, with one- and three-year firearm specifications, all felonies of the first degree. He was also found guilty of one count of kidnapping, in violation of R.C. 2905.01, with one- and three-year firearm specifications, also a felony of the first degree. Washington was also found guilty of numerous charges. Shutes was sentenced to a total of seven years in prison; four years for each offense to run concurrent with each other and, per statute, consecutive to the three years under the firearm specifications.

{¶ 9} Shutes appeals his conviction citing four assignments of error. His first two assignments of error challenge both the sufficiency and the manifest weight of the evidence presented in sustaining his conviction. Because these assignments of error are substantially interrelated, they will be addressed together.

{¶ 10} "I. THE STATE FAILED TO PRESENT SUFFICIENT EVIDENCE TO SUSTAIN A CONVICTION.

{¶ 11} "II. APPELLANT'S CONVICTION IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶ 12} "An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of defendant's guilt beyond a reasonable doubt. The relevant inquiry 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. (*Jackson v. Virginia* [1979], 443, U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d

560, followed.)" *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, at paragraph 2 of the syllabus. See, also, *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52, 678 N.E.2d 541.

{¶ 13} Here, the trial court had before it the testimony of three victims and three officers of the Cleveland Police Department. All of the victims recalled two men breaking into the house, and they all testified to at least one gun being brandished from the time of entry. While there was differing testimony as to the identities of the two men, victim Carruthers affirmatively identified Shutes as one of the two men. That testimony alone, if believed, is sufficient to sustain his conviction. Furthermore, the testimony of the police also placed Shutes at the scene. There was a police pursuit of the get-away car, and, once detained, the driver of the car admitted his involvement in the crime and identified the others, including Shutes. There is further evidence that Shutes incriminated himself as a participant in this crime.

{¶ 14} Viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could have found Shutes guilty beyond a reasonable doubt of the crimes for which he was convicted. Thus, the conviction was supported by sufficient evidence, and appellant's first assignment of error fails.

{¶ 15} The above-stated facts are also adequate to defeat appellant's second assignment of error, wherein he contends that the verdict was against the manifest weight of the evidence.

{¶ 16} Article IV, Section 3(B)(3) of the Ohio Constitution authorizes appellate courts to assess the weight of the evidence independently of the fact-finder. When a claim is assigned concerning the manifest weight of the evidence, an appellate court "has the authority and the duty to weigh the evidence and determine whether the findings of *** the trier of fact were so against the

weight of the evidence as to require a reversal and a remanding of the case for retrial." *State ex rel. Squire v. City of Cleveland* (1948), 150 Ohio St. 303, 345.

{¶ 17} The standard of review employed when reviewing a claim based upon the weight of the evidence is not the same standard to be used when considering a claim based upon the sufficiency of the evidence. The United States Supreme Court recognized these distinctions in *Tibbs v. Florida* (1982), 457 U.S. 31, where the court held that unlike a reversal based upon the insufficiency of the evidence, an appellate court's disagreement with the [factfinders'] weighing of the evidence does not require special deference accorded verdicts of acquittal, i.e., invocation of the double jeopardy clause as a bar to relitigation. Id. at 43.

{¶ 18} Upon application of the standards enunciated in *Tibbs*, the court in *State v. Martin* (1983), 20 Ohio App.3d 172, has set forth the proper test to be utilized when addressing the issue of manifest weight of the evidence. The *Martin* court stated:

{¶ 19} "There being sufficient evidence to support the conviction as a matter of law, we next consider the claim that the judgment was against the manifest weight of the evidence. Here, the test is much broader. The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of the witnesses and determines whether in resolving conflicts in the evidence, the [factfinder] clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered."

{¶ 20} It is important to note that the weight of the evidence and the credibility of the witnesses are issues primarily for the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230. Hence we must accord due deference to those determinations made by the trier of fact. A reviewing court will not reverse a verdict where the trier of fact could reasonably conclude from substantial

evidence that the state has proved the offense beyond a reasonable doubt. *State v. Eley* (1978), 56 Ohio St.2d 169.

{¶ 21} As discussed above, the evidence presented in this case was legally sufficient to support appellant's conviction. The facts also demonstrate that the trial court did not lose its way in convicting him. The record further indicates that the trial court properly weighed the credibility of all the testimony before it. It should also be noted that the trial court found Shutes not guilty of several of the charges contained in the original indictment. This further illustrates the seriousness with which the trial court analyzed the evidence at bar. Thus, appellant's conviction was not against the manifest weight of the evidence, and his second assignment of error is also without merit.

{¶ 22} "III. THE TRIAL COURT DENIED APPELLANT'S RIGHTS TO DUE PROCESS AND TO A FAIR TRIAL BY ALLOWING INTRODUCTION OF CERTAIN EVIDENCE IN SPITE OF DISCOVERY VIOLATIONS BY THE PROSECUTOR'S OFFICE."

{¶ 23} Appellant contends that the trial court erred by permitting testimony concerning oral statements made by him and Washington and in permitting the entire testimony of Sergeant Frederick Mone ("Mone"). He argues that the state violated the criminal rules of discovery in admitting the above evidence. We disagree.

{¶ 24} "The purpose of discovery rules is to prevent surprise and the secreting of evidence favorable to one party. The overall purpose is to produce a fair trial." *Lakewood v. Papadelis* (1987), 32 Ohio St.3d 1, 3.

{¶ 25} Under Crim.R. 16(B)(1)(a), the prosecution is obliged:

{¶ 26} "*** to permit the defendant to inspect and copy or photograph any of the following which are available to, or within the possession, custody or control of the state, the existence of which is known or by the exercise of due diligence may become known to the prosecuting attorney:

{¶ 27} "(i) Relevant written or recorded statements made by the defendant or co-defendant, or copies thereof;

{¶ 28} "(ii) Written summaries of any oral statement or copies thereof made by the defendant or co-defendant to a prosecuting attorney or any law enforcement officer."

{¶ 29} Furthermore, pursuant to Crim.R. 16(B)(1)(e), the prosecution has the obligation of making known to the defense prior to trial the names and addresses of all witnesses the prosecution intends to call.

{¶ 30} Finally, Crim.R. 16(E)(3) grants the trial court broad discretion for discovery non-compliance:

{¶ 31} "The court may order such [non-complying] party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may make such other order as it deems just under the circumstances ***."

{¶ 32} When a party fails to follow the proper discovery procedures, the trial court is vested with a certain amount of discretion in determining the sanction to be imposed upon a party's non-disclosure of materials. *State v. Parson* (1983), 6 Ohio St.3d 422, 445. "The court is not bound to exclude such material at trial although it may do so at its option." Id. at 445. The standard of review for discovery non-compliance is whether the trial court abused its discretion in determining the sanction imposed. Id. at 445; *State v. Wiles* (1991), 59 Ohio St.3d 71, 78. To constitute an abuse of

discretion, the ruling must be more than legal error; it must be unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 50 OBR 481, 450 N.E.2d 1140.

{¶ 33} In exercising its discretion, "a trial court must inquire into the circumstances surrounding a discovery rule violation and, when deciding whether to impose a sanction, must impose the least severe sanction that is consistent with the purpose of the rules of discovery." *Lakewood v. Papadelis*, supra at 5. Moreover, "where, in a criminal trial, the prosecution fails to comply with Crim.R. 16(B)(1)(a)(ii) by informing the accused of an oral statement made by a co-defendant to a law enforcement officer, and the record does not demonstrate (1) that the prosecution's failure to disclose was a willful violation of Crim.R. 16, (2) that foreknowledge of the statement would have benefitted the accused in the preparation of his defense, or (3) that the accused was prejudiced by admission of the statement, the trial court does not abuse its discretion under Crim.R. 16(E)(3) by permitting such evidence to be admitted." *Parson*, supra, at syllabus.

{¶ 34} Here, the record clearly demonstrates that the state's failure to disclose written summaries of pertinent oral statements that were made to Det. Sims was not willful. The record indicates that there was nothing in writing or anything in the police report that gave the state prior notice of the oral statements testified to by Det. Sims. Furthermore, the record indicates that the state attempted to proffer all information it received to the defense in a timely fashion.

{¶ 35} In addition, Det. Sims was present and available at the March 9, 2005 hearing, at which time the defense had an opportunity to obtain any information from him that might be pertinent to their defense. Thus, there does not appear to be prejudicial surprise in this case. As to the testimony of Mone, his testimony was offered to tie up loose ends in the state's case, and the state did list "Representative, Cleveland Police Department" in its response to discovery provided to

the defense. The trial court properly found no prejudice in admitting his testimony as well. As such, the trial court's discovery rulings did not rise to the level of an abuse of discretion. Appellant's third assignment of error, therefore, is without merit.

{¶ 36} "IV. THE TRIAL COURT DENIED APPELLANT'S RIGHTS TO DUE PROCESS AND A FAIR TRIAL BY ALLOWING INTRODUCTION OF STATEMENTS MADE BY THE CODEFENDANT IMPLICATING APPELLANT."

{¶ 37} In his final assignment of error, appellant argues that the trial court erred in allowing Det. Sims to testify to statements made by Washington that implicated Shutes. He contends that by allowing such testimony, the trial court violated his constitutional rights as described by the United States Supreme Court in *Bruton v. United States* (1968), 391 U.S. 123, 88 S.Ct. 1620. Upon close examination of the record, we find this final contention to be without merit.

{¶ 38} In general, an accused's right of cross-examination secured by the Confrontation Clause of the Sixth Amendment is violated in a joint trial with a non-testifying codefendant by the admission of extrajudicial statements made by the codefendant inculpating the accused. *State v. Moritz* (1980), 63 Ohio St.2d 150, paragraph one of the syllabus, 407 N.E.2d 1268, following *Bruton,* supra. Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is confrontation. *Crawford v. Washington* (2004), 124 S.Ct. 1354, 158 L.Ed.2d 177, syllabus. But, "'[t]he mere finding of a violation of the *Bruton* rule in the course of the trial, however, does not automatically require reversal of the ensuing criminal conviction. In some cases the properly admitted evidence of guilt is so overwhelming, and the prejudicial effect of the codefendant's admission is so insignificant by comparison, that it is clear beyond a reasonable doubt that the improper use of the admission was harmless error.' See, also, *Harrington v. California*

(1969), 395 U.S. 250; *Parker v. Randolph* (1979), 442 U.S. 62, 60 L.Ed.2d 713; and *Elliott v. Thompson* (C.A.6, 1979), 599 F.2d 767, certiorari denied 62 L.Ed.2d 190." *State v. Merriweather*, (Mar. 28, 1991), Cuyahoga App. No. 58089, at 13-14.

{¶ 39} In light of the facts presented in the record, we find that Shutes's conviction in this case should not be reversed pursuant to the admittance of Washington's statements. Viewing the evidence in exclusion of statements made by Washington specifically inculpating Shutes, there is still overwhelming evidence to sustain his conviction. There was eye-witness testimony from a victim that positively identified Shutes as one of the two men that broke into the house. Editing Det. Sims' testimony would still allow for the divulgence that his investigation lead to the questioning of Shutes. During that questioning, Shutes himself made statements admitting his involvement with the crime. Therefore, any error arising from statements made by Washington about Shutes are found to be harmless. Thus, appellant's final assignment of error also fails.

Judgment affirmed.

[Cite as *State v. Shutes*, 2006-Ohio-1940.]

It is ordered that appellee recover from appellant 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. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

FRANK D. CELEBREZZE, JR.
PRESIDING JUDGE

MICHAEL J. CORRIGAN, J., CONCURS;

SEAN C. GALLAGHER, J., CONCURS AS TO ASSIGNMENTS OF ERROR I AND II, AND CONCURS IN JUDGMENT ONLY AS TO ASSIGNMENTS OF ERROR III AND IV.