[Cite as *State v. Stewart*, 2009-Ohio-2384.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91199

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DAVID STEWART

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART;
REVERSED IN PART

Criminal Appeal from the
Cuyahoga County Common Pleas Court
Case No. CR-503332

BEFORE: Sweeney, J., Rocco, P.J., and McMonagle, J.

RELEASED: May 21, 2009

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

JAMES J. SWEENEY, J.:

{¶1} Defendant-appellant, David Stewart ("defendant"), appeals his convictions for negligent homicide and receiving stolen property. After reviewing the facts of the case and pertinent law, we affirm in part and reverse in part.

{¶2} On October 8, 2007, defendant, his girlfriend Sherez Addison, Dontez Walker, and Don Luster (the victim) were at 10707 Crestwood Avenue in Cleveland, which is the house at which defendant, Addison, and five other people stayed. S.G.,[1] a 14-year-old acquaintance, arrived at the house with a Ruger 9mm semi-automatic handgun. Shortly after S.G. arrived, the victim got his handgun, an FEG 9mm Makarov. Defendant, the victim, Walker, and S.G. went into the backyard to shoot the Ruger and compare which gun was better. Eyewitness testimony is inconsistent as to what happened after the foursome went back into the house.

{¶3} According to S.G, they were sitting around talking, when the victim started kissing S.G.'s gun. Defendant tried to take the Ruger away from the victim. The victim resisted, the gun fired, and the victim fell to the floor.

{¶4} According to Addison, she was on the porch when she heard a gunshot. She went into the house and saw the victim lying on the floor bleeding with a gun in his hand. Addison testified that S.G. was in the room, but she did not see defendant or Walker.

{¶5} According to Walker, after the four of them went back inside, they began talking about guns and playing video games. A few minutes later, Walker went to the backyard to urinate. He heard a gunshot, went back inside, and saw the victim

[1]The child-witness is referred to herein by her initials or title in accordance with this Court's established policy regarding non-disclosure of identities of juveniles.

fall to his knees, with a gun in his left hand. S.G. and defendant were in the room; defendant was holding the Ruger in his hand. According to Walker, defendant handed him the Ruger, and Walker hid it off the scene. Eventually, defendant's uncle asked Walker for the gun, which was subsequently turned over to the police.

{¶6} David Luster testified that he was in his bedroom when he heard a gunshot. He went to the living room and saw that the victim, who had a gun in his hand, had been shot. Defendant had the Ruger in his hand. Walker and S.G. were also in the room. At some point, Walker put the Ruger in his pocket and left the scene. Luster took the FEG from the victim's hand and hid it in the basement furnace. Later that evening, Luster turned the gun over to the police.

{¶7} On November 14, 2007, defendant was charged with reckless homicide in violation of R.C. 2903.041, and receiving stolen property in violation of R.C. 2913.51. On February 1, 2008, a jury found defendant not guilty of reckless homicide, but guilty of negligent homicide in violation of R.C. 2903.05(A), which the court instructed the jury on as a lesser included offense of reckless homicide. The jury also found defendant guilty of receiving stolen property. On February 27, 2008, the court sentenced defendant to an aggregate of one year in prison.

{¶8} Defendant now appeals, raising two assignments of error for our review.

{¶9} "I. There was insufficient evidence to support the guilty [verdict] for [receiving stolen property], and appellant's conviction was against the manifest weight of the evidence."

{¶10} Specifically, defendant argues that the State failed to show that he "had cause to believe that the gun had been obtained by a theft offense."

{¶11} When reviewing sufficiency of the evidence, an appellate court must determine "[w]hether, 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. Jenks* (1991), 61 Ohio St.3d 259, at syllabus.

{¶12} The proper test for an appellate court reviewing a manifest weight of the evidence claim is as follows:

{¶13} "The appellate court sits as the 'thirteenth juror' and, reviewing the entire record, weighs all the reasonable inferences, considers the credibility of witnesses and determines whether, in resolving conflicts in evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387.

{¶14} R.C. 2913.51 governs receiving stolen property, and states as follows:

{¶15} "(A) No person shall receive, retain, or dispose of property of another knowing or having reasonable cause to believe that the property has been obtained through commission of a theft offense." This Court has set forth factors to be considered in determining whether a defendant knew or should have known property was stolen: "(a) the defendant's unexplained possession of the merchandise; (b) the nature of the merchandise; (c) the frequency with which such merchandise is stolen; (d) the nature of the defendant's commercial activities; and (e) the relatively limited time between the theft and the recovery of the merchandise." *State v. Prater*,

Cuyahoga App. No. 80678 , 2008-Ohio-5844, citing *State v. Davis* (1988), 49 Ohio App.3d 109.

{¶16} In analyzing whether defendant, in the instant case, knew or should have known that the Ruger was stolen, we take into consideration that "absent an admission by a defendant, whether there was reasonable cause for a defendant to know if an item was stolen can only be shown by circumstantial evidence." *State v. Hankerson* (1982), 70 Ohio St.2d 87, 92.

{¶17} Testimony at trial showed that S.G., who was 14 years old at the time of the incident, brought a gun to the house on Crestwood. S.G. testified that she stole the gun from an ex-boyfriend, but there is no evidence that she told anyone that on the day in question. Walker testified that although he did not know where S.G. got the gun, he was thinking of purchasing it from her.

{¶18} We apply the five factors discussed above to the evidence in the case at hand. Defendant's possession of the merchandise is explained -- he got the gun from S.G. Furthermore, the parties stipulated that the gun was stolen from a third party between July 29 and July 31, 2007. The State, however, presented no evidence of the remaining factors, namely, the frequency with which guns are stolen, and the nature of defendant's commercial activities.

{¶19} Looking at this evidence in a light most favorable to the State, we find that this is insufficient to show that defendant committed the offense of receiving stolen property. The circumstantial evidence simply does not permit a reasonable inference that defendant knew or should have known the gun was stolen.

{¶20} Defendant's first assignment of error is sustained.

{¶21} "II. The trial court erred in giving an instruction for negligent homicide *** because it is not a lesser included offense of reckless homicide *** and defendant was never on notice that he stood accused of negligent homicide, which violated his rights to a fair trial."

{¶22} It is undisputed that defendant was found guilty of negligent homicide in violation of R.C. 2903.05, although he was not indicted for this offense. However, a jury may be instructed "on a particular offense for which the defendant was not indicted as a lesser offense of the crime for which the defendant was indicted, pursuant to R.C. 2945.74 and Crim.R. 31(C)." *State v. Deem* (1988), 40 Ohio St.3d 205, 207. Additionally, the parties agree that negligent homicide is not a lesser included offense of reckless homicide. See *State v. Smith*, Greene App. No. 2006 CA 68, 2007-Ohio-2969; *State v. Koss* (1990), 49 Ohio St.3d 213.

{¶23} Defendant's argument ends here: because he was not indicted for negligent homicide, and because that offense is not a lesser included offense of reckless homicide, for which he was indicted, his conviction must be vacated. The State, on the other hand, argues that defendant waived his right to object to the instruction on negligent homicide when he agreed with the State on the negligent homicide instruction.

{¶24} A review of the record in the instant case shows that after the close of the State's evidence, defense counsel, the State, and the court engaged in a discussion regarding reckless homicide, negligent homicide, and accidental death. The court asked defense counsel if he would object to a negligent homicide charge. Defense counsel replied, "It's kind of hard not to. *** Could I talk to my client about

that, Judge?" After a brief recess, defense counsel stated on the record, "Yes, Your Honor, after conferring with my client, we would agree with the Prosecutor on a negligent homicide instruction."

{¶25} In *State ex rel. Fowler v. Smith* (1994), 68 Ohio St.3d 357, 359, the Ohio Supreme Court held that "[u]nder the invited-error doctrine, a party will not be permitted to take advantage of an error which he himself invited or induced the trial court to make." In *State v. Gabarik* (Mar. 14, 2001), Summit App. No. 20047, the Ninth District Court of Appeals of Ohio held that the trial court did not err in instructing the jury on corruption of a minor charges because the defendant was given notice that he could be convicted of this charge when he requested it. "[T]he parties may agree that the defendant may be convicted of a lesser offense not necessarily included in the original charge. When the parties consent to such procedure, with or without formal amendment of the pleadings, neither can claim unfairness, and the prosecution's role in determining charges is not improperly compromised. Indeed, there may be many cases in which both parties are persuaded that their best interests lie in such procedure." See, also, *State v. Jeffries* (Mar. 22, 2001), Cuyahoga App. No. 76880 (holding that when the defendant did not object to an amended indictment, "[s]tating that he believed the reduced charges were lesser included offenses of the original charges," he is precluded from raising the error of insufficient indictment on appeal"); *State v. Wente*, Cuyahoga App. No. 81850, 2003-Ohio-3661 (noting that the defendant requested a jury instruction on unlawful sexual conduct, which is not a lesser included offense of rape; however, the

defendant "waived any error with respect to the indictment by requesting the instructions").

{¶26} Accordingly, because defendant consented to the court instructing the jury on the negligent homicide charge, he waived this issue on appeal, and his second assignment of error is overruled.

{¶27} Judgment affirmed in part and reversed in part. Conviction of negligent homicide is affirmed; receiving stolen property conviction is reversed.

It is ordered that appellant and appellee shall each pay their respective 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. Case remanded to the trial court for further proceedings.

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

JAMES J. SWEENEY, JUDGE

KENNETH A. ROCCO, P.J., CONCURS
CHRISTINE T. McMONAGLE, J., CONCURS
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