

[Cite as *State v. Carte*, 2009-Ohio-4193.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91534

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

SANDRA M. CARTE

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-508855

BEFORE: Jones, J., Cooney, A.J., and Celebrezze, J.

RELEASED: August 20, 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).

LARRY A. JONES, J.:

{¶ 1} Defendant-appellant, Sandra Carte (hereinafter “Carte”), appeals her conviction for misdemeanor assault. Having reviewed the arguments of the parties and the pertinent law, we hereby affirm the judgment of the lower court.

STATEMENT OF THE CASE

{¶ 2} Carte and codefendants, Efrain Ortiz (“Ortiz”) and Alonszo Lewis (“Lewis”), were originally charged in Case No. CR-501739 in a three-count indictment on October 9, 2007. Count 1 of the indictment was attempted murder, a violation of R.C. 2923.02 and 2903.02(B); Count 2 was felonious assault, a violation of R.C. 2903.11(A)(1); and Count 3 was felonious assault, a violation of R.C. 2903.11(A)(2).

{¶ 3} According to the record, the prosecutor reindicted Carte on April 2, 2008. The prosecutor approached the court and explained that there was a mistake made—specifically, that the indictment had a defect with respect to the mens rea. Carte was then reindicted on the same allegations of criminal conduct in Case No. CR-508855, which contained another three-count indictment. The only change from the first indictment to the second indictment was with respect to Count 1. Count 1 was attempted murder under R.C. 2923.02 and 2903.02(A). Counts 2 and 3 remained the same as in CR-501739—felonious assault, a violation of R.C. 2903.11(A)(1), and felonious assault, a violation of R.C. 2903.11(A)(2).

{¶ 4} All three offenders were charged with being the principal offender in both indictments. However, at trial, the State presented evidence that Carte was complicit with Ortiz, who was the principal offender with regard to the near-fatal stabbing of Nathaniel Morris ("Morris"). On April 8, 2008, the court held the first pretrial in the new case and set the trial date in both cases for May 7, 2008.

{¶ 5} Carte filed several pretrial motions in both cases; however, only those motions pertinent to this appeal will be discussed. On April 7, 2008, Carte filed a motion to obtain a copy of the grand jury transcripts in both CR-501739 and CR-508855, motions to transcribe those grand jury proceedings, and for disclosure of the names of the grand jury witnesses. On May 7, 2008, the prosecutor filed a brief in opposition to the motion for grand jury transcripts.

{¶ 6} On the morning of May 7, 2008, the trial court held an oral hearing wherein it addressed several pretrial motions filed by both Carte and Ortiz. The court granted Carte's motion, in part, by ordering a copy of the grand jury transcripts in both matters to be delivered to the courtroom for an in camera inspection.

{¶ 7} Additionally, on May 7, 2008, the trial court held a hearing on the grand jury transcripts. The court reviewed the transcripts in camera to determine whether there was a need to give the transcripts to Carte and Ortiz. The court stated its findings, "This court did review the Grand Jury proceedings as to both cases 501739 and 508855. I did not find any exculpatory evidence and/or any material inconsistencies there with regard to the mens rea." After hearing this

explanation, both Ortiz and Carte moved to dismiss the cases against them based on their understanding that the prosecutor who presented both matters failed to instruct the grand jury with regard to the applicable mens rea.

{¶ 8} On May 8, 2008, the court held another hearing with regard to pretrial motions. At that time, Carte's trial counsel moved to dismiss the cases against her for lack of probable cause presented to the grand jury. The judge responded by stating that she did not review the transcripts with regard to probable cause, but only with regard to mens rea, as raised by defense counsel. The court allowed defense counsel until Monday, May 12, 2008 to brief the grand jury issues, and thereby continued the trial at defense request until May 12, 2008.

{¶ 9} On May 12, 2008, Carte filed a motion to dismiss the cases for lack of probable cause presented at the grand jury. The State filed a brief in opposition to the oral motions to dismiss previously made by defense counsel at the May 8, 2008 hearing. On May 12, 2008, the court held another hearing on the pretrial motions. Arguments were heard from both parties, and the matter was continued to the next day to allow the court to make its ruling on the motions to dismiss. On May 13, 2008, the trial court held another hearing regarding the motions to dismiss. The court found that there was no structural defect with regard to the indictments filed by the grand jury and that the court will presume regularity of the proceedings regarding the legal instructions to be given to the grand jury. Neither counsel requested the court to expand its ruling regarding the probable cause given to the grand jury. The State then dismissed the indictment in CR-501739,

and on May 14, 2008, the case proceeded to trial on the three-count indictment against Carte and Ortiz in CR-508855.

{¶ 10} On May 21, 2008, the State rested, and the motions for acquittal were denied. On May 22, 2008, the jury returned verdicts of guilty for Ortiz as to all three counts as indicted. The jury then returned verdicts of not guilty with respect to Carte for all three counts; however, the jury did find Carte guilty of misdemeanor assault, the lesser included offense of Count 2, stated as, “knowingly caused or attempted to cause physical harm to Nathaniel Morris.” That same date, the court sentenced Carte to 180 days in jail, noting that Carte served 226 days prior to trial, thus she was sentenced to time served.

{¶ 11} Carte now appeals her misdemeanor conviction.

STATEMENT OF THE FACTS

{¶ 12} Nathaniel Morris testified that on September 29, 2007, he observed Carte walking down the street with her boyfriend, Lewis. Lewis was hitting Carte in the head. Morris went down the street to tell Lewis to stop hitting Carte before he got into trouble because there were police nearby. Later that day, Morris went over to a house on an adjoining street, Willard Avenue, to talk to his friend Ortiz (a.k.a. “E”). Morris testified that when he and his live-in fiancé, Michelle Brannon, are fighting, he goes to Ortiz’s house. When Morris arrived at Ortiz’s house, Lewis came out onto the porch. Morris asked Lewis whether or not Ortiz was home. Lewis then insulted Morris and hit Morris in the face with a gun. Around that time, Ortiz and his wife arrived home.

{¶ 13} Morris left Ortiz's house to go back home, and that is when Lewis and Carte followed him and started hitting him. At the time Carte was punching Morris in the face, Morris's fiancé came outside and confronted him, asking Morris why he was allowing Carte to hit him. While Carte was punching Morris in the face, Lewis came out of the crowd that had gathered and knocked Morris to the ground. After Morris was on the ground, Ortiz also began fighting with Morris.

{¶ 14} It was after the onslaught by Ortiz that Morris realized that he had been stabbed. Even as Morris turned to go back to his house, Ortiz continued to pursue Morris, repeatedly stabbing him. Police and EMS were called to the scene, and Morris was taken to Metro Hospital where he required surgery. Morris's injuries were severe. He was hospitalized from September 29, 2007 to November 1, 2007.

ASSIGNMENTS OF ERROR

{¶ 15} Carte assigns four assignments of error on appeal:

{¶ 16} “[1.] The trial court erred and violated Ms. Carte's State and Federal Due Process rights and her right to a grand jury indictment when it instructed the jury on conspiracy despite the omission of any allegations relating to a conspiracy in the indictment.

{¶ 17} “[2.] The trial court erred in refusing to disclose the grand jury testimony.

{¶ 18} “[3.] Appellant's conviction for assault was against the manifest weight of the evidence.

{¶ 19} “[4.] The Appellant’s Constitutional rights were violated when the trial court failed to dismiss the indictment for failure to establish probable cause at the grand jury proceedings and when the trial court failed to disclose grand jury testimony.”

LEGAL ANALYSIS

Conspiracy Jury Instruction

{¶ 20} Carte argues in her first assignment of error that the lower court erred when it instructed the jury on conspiracy despite the omission of any allegations relating to a conspiracy in the indictment.

{¶ 21} R.C. 2923.03, Complicity, provides the following:

“(A) No person, acting with the kind of culpability required for the commission of an offense, shall do any of the following:

“* * *

“(3) Conspire with another to commit the offense in violation of section 2923.01 of the Revised Code;

“* * *

“(F) Whoever violates this section is guilty of complicity in the commission of an offense, and shall be prosecuted and punished as if he were a principal offender. *A charge of complicity may be stated in terms of this section, or in terms of the principal offense.*”

(Emphasis added.)

{¶ 22} Accordingly, R.C. 2923.03 allows for an indictment for complicity to commit an offense to be stated in terms of the principal offender. Therefore, Carte’s right to an indictment was not violated.

{¶ 23} Carte argues that *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, 885 N.E.2d 917, applies; however, Carte's argument is misplaced. *Colon* does not relate to R.C. 2923.03 as the statute applies in the case at bar. R.C. 2923.03 only applies when a judicially determined mens rea, not contained in the statute, is omitted from the indictment, thereby resulting in structural errors. Moreover, *Colon* does not apply to the grand jury indictment process and it does not alter the plain language of R.C. 2923.03(F).

{¶ 24} Accordingly, R.C. 2923.03(F) governs the application of complicity and conspiracy through which complicity may be proved.

{¶ 25} Therefore, Carte's first assignment of error is overruled.

Grand Jury Testimony

{¶ 26} Carte argues in her second assignment of error that the lower court erred in failing to disclose the grand jury testimony. Carte argues that there was a second indictment against her alleging a different section of attempted murder. Therefore, she argues, there must have been differing testimony as to her culpable mental state, thereby necessitating the need for the disclosure of the transcript. Grand jury testimony may be released if a defendant can show particularized need. *State v. CECOS Internatl. Inc.* (1988), 38 Ohio St.3d 120, 526 N.E.2d 802. However, in the case at bar, the trial court held an in camera inspection and determined that there was no particularized need for disclosure.

{¶ 27} "A person charged with crime is not entitled, *before, or at the time of trial*, to the minutes of the evidence taken before the grand jury, on which the

indictment was found against him, nor to an inspection of a transcript of such evidence * * *.” (Emphasis added.) *State v. Laskey* (1970), 21 Ohio St.2d 187, 257 N.E.2d 65.

{¶ 28} In the case at bar, Carte sought discovery of the grand jury transcript before trial for purposes of preparation. Generally, proceedings before a grand jury are secret, and an accused is not entitled to inspect grand jury minutes before trial for the purpose of preparation or for purposes of discovery in general. This rule is relaxed only when the ends of justice require it, such as when the defense shows that a particularized need exists for the minutes that outweighs the policy of secrecy. *Pittsburgh Plate Glass Co. v. U.S.* (1959), 360 U.S. 395, 400, 79 S.Ct. 1237, 3 L.Ed.2d 1323, rehearing denied, 361 U.S. 855, 80 S.Ct. 42, 4 L.Ed.2d 94. See 1 Antieau, *Modern Constitutional Law*, 300; 20 A.L.R.3d 7, 19. See *Laskey*. Also, see, *State v. Herrera*, Ottawa App. No. OT-05-039, 2006-Ohio-3053.

{¶ 29} It is also well settled that the allowance or overruling of various discovery motions in a criminal case rests within the sound discretion of the trial court, and only in cases of clear abuse will that discretion be disturbed upon review. See, for example, *State v. Hill* (1967), 12 Ohio St.2d 88, 232 N.E.2d 394.

{¶ 30} The Ohio Supreme Court has held that there was no “particularized need” established in cases where there were allegations that (1) the charges were “elevated,” *State v. Benge*, 75 Ohio St.3d 136, 145, 1996-Ohio-227, 661 N.E.2d 1019; (2) the indictment was issued on inadequate evidence, *State v. Brown* (1988), 38 Ohio St.3d 305, 316, 528 N.E.2d 523, 537; or (3) the indictment was

based on “illegal and incompetent evidence,” *State v. Davis* (1988), 38 Ohio St.3d 361, 365, 528 N.E.2d 925. See, also, *State v. Stojetz*, 84 Ohio St.3d 452, 459-460, 1999-Ohio-464, 705 N.E.2d 329. In fact, “an indictment valid on its face is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence.” *U.S. v. Calandra* (1974), 414 U.S. 338, 345, 94 S.Ct. 613, 38 L.Ed.2d 561. Consequently, “a challenge to the grand jury’s finding of probable cause does not demonstrate a particularized need for disclosure of the testimony.” *State v. Blalock*, Cuyahoga App. Nos. 80419 and 80420, 2002-Ohio-4580, at ¶24.

{¶ 31} Accordingly, upon reviewing the record and evidence in the case at bar, we find no indication that the trial court abused its discretion in not allowing Carte to review the grand jury testimony.

{¶ 32} Carte also argues in her fourth assignment of error that the lower court erred when it failed to dismiss the indictment based on the failure of the grand jury to find probable cause established at the grand jury proceedings. Carte alleges a lack of probable cause; however, she fails to point to any evidence. She simply argues that because there were two indictments, there must have been a lack of probable cause. Contrary to Carte’s assertions, the lower court reviewed the grand jury transcripts and found them to be in order.¹

{¶ 33} Moreover, Carte failed to demonstrate exactly how she was prejudiced by the lower court’s decision to review the evidence via an in camera

¹Tr. 108-109.

inspection rather than the full disclosure she wanted. In addition, counsel did not cross-examine the witnesses regarding their testimony before the grand jury and did not explore that avenue at trial.

{¶ 34} As previously mentioned, the mere possibility of cross-examination material in a grand jury transcript is not a particularized need that overrides the secrecy of the grand jury proceedings. Carte failed to show error on the part of the lower court in this case.

{¶ 35} Accordingly, Carte's second and fourth assignments of error are overruled.

Manifest Weight of the Evidence

{¶ 36} Carte argues in her third assignment of error that her conviction for assault was against the manifest weight of the evidence. In evaluating a challenge to the verdict based on manifest weight of the evidence, a court sits as the thirteenth juror and intrudes its judgment into proceedings that it finds to be fatally flawed through misrepresentation or misapplication of the evidence by a trier of fact which has "lost its way." *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52, 678 N.E.2d 541. As the Ohio Supreme Court declared:

"Weight of the evidence concerns 'the inclination of the *greater amount of credible evidence* offered in a trial, to support one side of the issue rather than the other. It indicates clearly to the jury that the party having the burden of proof will be entitled to their verdict, if, on weighing the evidence in their minds, they shall find the *greater amount of credible evidence* sustains the issue which is to be established before them. Weight is not a question of mathematics, but depends on its *effect in inducing belief*.'"

“* * * ‘The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the 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. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction.’” (Internal citations omitted.) *Id.* at 387.

{¶ 37} This court should be mindful that the weight of the evidence and the credibility of witnesses are matters primarily for the trier of fact, and a reviewing court must not reverse a verdict where the trier of fact could reasonably conclude from substantial evidence that the state has proven the offense beyond a reasonable doubt. *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, at paragraphs one and two of the syllabus.

{¶ 38} Here, Carte argues that her conviction was against the manifest weight of the evidence because the victim was intoxicated, attacked by multiple people, and therefore, unable to correctly identify his attackers. Carte also argues that Ms. Rolling was not wearing her glasses that night and was therefore unable to properly identify Carte as an attacker and as the person who ran into the house to get the knife used in the attack.

{¶ 39} Contrary to Carte’s assertions, the witnesses were entirely competent to testify. Substantial significant testimony supporting the jury’s verdict was presented at trial. Nathaniel Morris, Michelle Brannon, and Michelle Rolling all testified that Carte hit Morris in the face more than once prior to his being stabbed by Ortiz.

{¶ 40} Michelle Brannon testified that she lived with Morris for three years on West 85th Street in Cleveland, Ohio. At the time of trial, Brannon knew Ortiz but did not know Carte. Brannon testified that on September 29, 2007, at approximately 1:30 a.m., she was sleeping on the couch and heard someone telling Morris to go home. Brannon looked outside and saw Ortiz between Carte and Morris. Brannon ran outside and asked Morris why Carte was punching him in the face. At that time, Carte stopped hitting Morris, and Brannon then saw Ortiz and Morris taking off their shirts as if to begin fighting each other. A crowd had gathered, and Lewis emerged from the crowd and punched Morris in the face causing him to fall to the ground. Brannon further testified that at the time of the attack, Morris was not hitting anyone, provoking anyone, and was only standing there while Carte was hitting him in the face.

{¶ 41} In addition to Brannon's testimony, Brian Kazy testified that he lived two houses away from Morris and Brannon. Kazy went outside at 1:00 a.m. to see what was happening on the street because the noise had gotten so loud. Kazy remembered seeing Morris, Ortiz, and four or five other people in the street. Kazy saw Ortiz and Morris fighting in the street and went inside to call 911. He went inside, but before he could call 911, he heard someone yell, "they stabbed him!" He turned around to see what was happening and saw Morris stumbling toward his house. Morris was bleeding profusely, and while Morris was walking toward his house, Kazy saw Ortiz run toward Lorain Avenue and then along Willard in the direction of Ortiz's house.

{¶ 42} Michelle Rolling, a 17-year-old female, who lived at 8708 Willard for six years with her mother and brother, testified that she had a friend, Carol Nicholson, over her house that night. They heard a loud argument and went outside. They saw Morris and Ortiz fighting. Later, they saw Lewis jump in and punch Morris, dropping him to the ground, followed by Carte joining in the attack. Rolling saw Morris get up and charge at Carte. Rolling then saw Carte get a knife and give it to Ortiz, and then Ortiz stabbed Morris.

{¶ 43} In addition to Rolling's testimony, Dr. Jon Schrock, M.D., testified that life-saving efforts were undertaken to save Morris's life after he was admitted to Metro Hospital at 1:51 a.m. Dr. Schrock testified that Morris had been stabbed in the heart causing a three-centimeter laceration to his heart, his lung had collapsed, and he needed emergency surgery to save his life. Dr. Schrock testified that the injuries could have killed him without the life-saving efforts performed at Metro Hospital.

{¶ 44} Patrolman Haist, a Cleveland police officer, testified that he and his partner, Patrolman Kazimer, arrived on the scene and spoke to Nicholson, Rolling, and Carte. When the officers arrived, Carte was loud and belligerent and appeared highly intoxicated. Based on the information they received, they arrested Carte on the scene. Ortiz, who had dried blood in between his fingers, was belligerent and appeared intoxicated as well, was also arrested at the scene.

{¶ 45} Carey Martin Baucher, a laboratory technician with the Cuyahoga County Coroner's Office, testified that she tested cuttings taken from Carte's shirt

and found the presence of Ortiz's blood on them. Baucher also tested the blood swabs taken from Ortiz's right hand and found the blood matched the victim, Morris.

{¶ 46} Detective Michael Gibbs of the Cleveland Police Scientific Investigation Unit testified that he took various photographs of the street and crime scene area and also swabbed various areas of the street as well as Ortiz's hand at the time of Ortiz's arrest. Detective Gibbs further testified that the cut over Ortiz's eye was the only visible injury.

{¶ 47} In addition, Carte's own trial counsel admitted to the misdemeanor assault. Carte's attorney, in closing argument, argued for the jury to not find that Carte was complicit in the stabbing of Morris. Carte's counsel argued that, if the jury believed Morris and Brannon, they should find Carte guilty of assault, the lesser offense of the two counts of felonious assault, stating, "I will not deny that she struck Nate Morris four, five, six, maybe up to five times, but less than ten as the witness said. I'm not going to sit here and dispute that with you. That happened. No ifs or buts about it. But that's what she did. Assault. And nothing more." Carte's trial counsel may have done this because he wanted the jury to believe that Carte was involved, but not to the extent that the State alleged. Indeed, trial counsel's strategy was arguably successful because the jury convicted Carte only of misdemeanor assault.

{¶ 48} Accordingly, there is nothing in the record to suggest that the trial court "clearly lost its way" and created such a manifest miscarriage of justice as to

require a reversal of appellant's conviction. The judge found beyond a reasonable doubt that Carte committed the crime of assault. The evidence supports this conviction and, as such, this is not an "exceptional case" warranting a new trial or a judgment of acquittal.

{¶ 49} Carte's third assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

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.

LARRY A. JONES, JUDGE

COLLEEN CONWAY COONEY, A.J., CONCURS
IN JUDGMENT ONLY;
FRANK D. CELEBREZZE, JR., J., CONCURS