[Cite as *State v. McKnight*, 2010-Ohio-3865.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93134

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DARRYL McKNIGHT

DEFENDANT-APPELLANT

JUDGMENT:
CONVICTIONS AFFIRMED;
REVERSED IN PART AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-495162

BEFORE: Celebrezze, J., Stewart, P.J., and Dyke, J.

RELEASED AND JOURNALIZED: August 19, 2010

ATTORNEY FOR APPELLANT

Steve W. Canfil
1370 Ontario Street
2000 Standard Building
Cleveland, Ohio 44113

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor
BY: John Hanley
Assistant Prosecuting Attorney
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

FRANK D. CELEBREZZE, JR., J.:

{¶ 1} Appellant, Darryl McKnight, appeals his convictions for aggravated robbery and felonious assault stemming from the robbery and shooting of Alioune Diop. Appellant argues that the trial court erred when it did not conduct a hearing regarding his wish to represent himself, that his convictions are against the manifest weight of the evidence, and that two of his convictions should have merged. After a thorough review of the record and case law, we affirm appellant's convictions in part, but remand for resentencing.

{¶ 2} Alioune Diop, a Senegalese immigrant, operated a business selling clothes out of his van. On April 7 or 8, 2007, appellant and co-defendant Ulysses Johnson met with Diop at East 77th Street and St. Clair Avenue in Cleveland to view clothes Diop was selling. Appellant stated he had no money, and Diop gave appellant his phone number and told him to call him when he had some money.

{¶ 3} On April 10, 2007, appellant phoned Diop and arranged to meet him near the previous location because appellant wanted to buy some clothes. Diop arrived and began showing appellant clothes and shoes. Diop testified that appellant kept looking around as if waiting for something to happen. Approximately ten to fifteen minutes after Diop arrived, a masked man with a handgun approached him from behind and instructed him not to turn around. Diop did turn around and the masked man, later identified as Johnson, shoved a gun in his face. Appellant reached inside Diop's van, grabbed a bag of clothes, and ran off. Johnson, still holding the gun in Diop's face, attempted to reach inside the van for a bag of clothes. While Johnson's attention was focused elsewhere, Diop attempted to wrestle the gun away from him. During the resulting struggle, the gun went off five times, with the last bullet hitting Diop in the leg. By this time, Johnson had dropped the bag of clothes he had taken from the van, and the mask covering his face had

been removed. Johnson fled without any of Diop's clothes. Diop recognized Johnson as the man who had been with appellant at their previous meeting.

{¶ 4} Appellant and Johnson were arrested by the police a short distance away. Diop was taken to the hospital for treatment of his gunshot wound. On April 11, 2007, Detective John Vinson of the Cleveland police department showed Diop two photo arrays in an effort to identify the perpetrators of the robbery. The array involving appellant contained photographs of poor quality, and Diop stated that the images were too small for him to see and he could not make an identification. On April 13, 2007, Det. Vinson showed Diop a photo array with better photos, and Diop was able to identify appellant with no hesitation.

{¶ 5} Appellant was indicted on April 20, 2007 on two counts of aggravated robbery and two counts of felonious assault, all with one- and three-year firearm specifications. On October 23, 2007, after psychiatric evaluation, it was determined that appellant was not competent to stand trial, and he was referred to the North Coast Behavioral Health Clinic for psychiatric restoration of competency. After successful treatment, trial commenced on March 5, 2009, where Diop and Det. Vinson testified. After appellant's Crim.R. 29 motion, the court dismissed the second count of aggravated robbery for failing to state a mens rea in the indictment. Appellant rested, and the court found him guilty of the remaining counts.

{¶ 6} Appellant was sentenced to six years incarceration — three years for aggravated robbery and two years for each count of felonious assault, all to run concurrently, but consecutively to a three-year term for the firearm specification. Appellant appeals, assigning three errors for review.

Law and Analysis

Right to Self Representation

{¶ 7} In appellant's first assigned error, he argues that "[t]he trial court erred in failing to conduct a hearing when appellant indicated he wished to represent himself."

{¶ 8} The right to representation in a criminal matter is a quintessential constitutional right that must be observed and protected. In some cases, defendants choose to forego that right and represent their own interests before a criminal tribunal. That is also their right under the constitutions of this state and this nation. *State v. Reed*, 74 Ohio St.3d 534, 535, 1996-Ohio-21, 660 N.E.2d 456. This is because "[u]nless the accused has acquiesced in [representation through counsel], the defense presented is not the defense guaranteed him by the Constitution, for, in a very real sense, it is not his defense." *Faretta v. California* (1975), 422 U.S. 806, 821, 95 S.Ct. 2525, 45 L.Ed.2d 562. "If a trial court denies the right to self-representation, when properly invoked, the denial is per se reversible error." *State v. Cassano*, 96 Ohio St.3d 94, 2002-Ohio-3751, 772 N.E.2d 81,

¶32, citing *Reed*. However, because the dangers involved in waiving the right to representation are significant, and because this right can be used as a tactic to delay trial and disrupt otherwise orderly proceedings, it must be clearly and unequivocally asserted in a timely manner or it will be waived. *Cassano* at ¶41-42.

{¶ 9} On the day of trial while the court was addressing the waiver of trial by jury, appellant stated, "I want to present my case myself. I could have her [defense counsel] as my attorney, and there's things that can be asked and get this case over with.

{¶ 10} "I was wondering if I was — I would be able to present that — to now talk directly to you?"

{¶ 11} The court answered, "Okay. But you have to understand that if you want to represent yourself with the assistance of your lawyer, we're going to have a — we'll have to have a specific hearing on that?"

{¶ 12} The defendant then responded, "[n]evermind."

{¶ 13} This oral motion, made for the first time the day of trial, was not timely. Appellant argues this was the earliest possible time that he could have made such a motion given his mental state. However, appellant was deemed competent to stand trial on October 23, 2008. Trial did not commence until March 5, 2009. During that time, appellant made no motion to the court for self-representation. Instead, he chose to petition the court for

self-representation only moments before trial was to begin. This is not a timely invocation of this right. *Cassano* at ¶41.

{¶ 14} Further, it was not an unequivocal assertion of his right to self-representation since appellant clearly abandoned his motion. "A request is not unequivocal if it is a 'momentary caprice,' 'the result of thinking out loud,' or an 'emotional response.'" *State v. Steele*, 155 Ohio App.3d 659, 2003-Ohio-7103, 802 N.E.2d 1127, ¶13, quoting *Lacy v. Lewis* (C.D.Cal.2000), 123 F.Supp.2d 533, 548, quoting *Adams v. Carroll* (C.A.9, 1989), 875 F.2d 1441, 1444-1445, and *Jackson v. Ylst* (C.A.9, 1990), 921 F.2d 882, 888. Appellant abandoned his request when he stated he did not wish to have a hearing on the motion. For these reasons, appellant's first assignment of error is overruled.

Manifest Weight

{¶ 15} Appellant next alleges that his convictions are against the manifest weight of the evidence, arguing that the state's evidence was insufficient to show that he aided and abetted Johnson in the robbery of Diop.

{¶ 16} In *State v. Martin* (1983), 20 Ohio App.3d 172, 485 N.E.2d 717, the court set forth the proper test to be utilized when addressing the issue of manifest weight of the evidence. The *Martin* court stated: "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 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." *Martin* at 175. Moreover, 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, 227 N.E.2d 212, paragraph one of the syllabus. The power to reverse a judgment of conviction as against the manifest weight must be exercised with caution and in only the rare case in which the evidence weighs heavily against the conviction. *Martin*, supra.

{¶ 17} 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, 383 N.E.2d 132.

{¶ 18} "To support a conviction for complicity by aiding and abetting pursuant to R.C. 2923.03(A)(2), 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. Such intent may be inferred from the

circumstances surrounding the crime." *State v. Widner* (1982), 69 Ohio St.2d 267, 269, 431 N.E.2d 1025, 1027.

{¶ 19} Appellant argues that no evidence exists to show that he aided or cooperated in the robbery of Diop. However, the act of bringing Diop to a location where Johnson could rob him is sufficient. "Conspiracy and common purpose, among two or more persons, to commit crime need not be shown by positive evidence but may be inferred from circumstances surrounding the act and from defendant's subsequent conduct." *State v. Pruett* (1971), 28 Ohio App.2d 29, 34, 273 N.E.2d 884.

{¶ 20} Diop testified that he observed appellant and Johnson together at their first meeting. Diop was at the location of the robbery at the behest of appellant, lured there under the pretense that appellant wished to buy some clothes. Diop also testified that appellant kept looking around as if he expected something to happen while Diop was showing him the clothes. Instead of remaining still or fleeing while Johnson was robbing Diop at gunpoint, appellant reached into Diop's van, removed a bag of clothes, and ran off. Appellant would have been unlikely to take the very things the gunman was stealing unless the two had some understanding. Circumstantial evidence demonstrates that appellant aided Johnson; therefore, appellant's second assignment of error is overruled.

Allied Offenses

{¶ 21} Finally, appellant argues that his "conviction on count four [felonious assault] constituted plain error pursuant to R.C. 2941.25(A)."

{¶ 22} The state concedes that being convicted and sentenced on two counts of felonious assault when there was only one victim and one single occurrence or event constituted error. Therefore, this case must be remanded to the trial court for resentencing where the state shall elect the charge on which appellant should be convicted and sentenced. *State v. Williams*, 124 Ohio St.3d 381, 2010-Ohio-147, 922 N.E.2d 937, paragraph three of the syllabus.

{¶ 23} Convictions affirmed; cause reversed in part and remanded to the lower court for further proceedings consistent with this opinion.

It is ordered that appellant and appellee share the 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 convictions 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., JUDGE

MELODY J. STEWART, P.J., and
ANN DYKE, J., CONCUR