[Cite as *State v. Bennett,* 2010-Ohio-5247.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94428

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

EDDIE BENNETT, JR.

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-525309

BEFORE: Gallagher, A.J., McMonagle, J., and Sweeney, J.

RELEASED AND JOURNALIZED: October 28, 2010

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SEAN C. GALLAGHER, A.J.:

{¶ 1} Appellant Eddie Bennett, Jr., appeals his convictions for aggravated robbery from the Cuyahoga County Court of Common Pleas. For the reasons set forth herein, we affirm.

{¶ 2} On June 17, 2009, Bennett was indicted on two counts of aggravated robbery in violation of R.C. 2911.01. On October 19, 2009, a jury trial commenced. The state presented several law enforcement officers and one of the victims, DeVon Baldwin, as witnesses.[1]

[1] The other victim, Brandon McMillon, died between the date of the robberies and trial as a result of an unrelated illness.

{¶ 3} Baldwin testified that sometime near midnight on June 6, 2009, he and Brandon McMillon were in Superior Pizza on Superior Avenue in Cleveland, Ohio, ordering take-out pizza. While in the shop, Bennett and an unidentified man entered and spoke with them briefly. Baldwin testified he knew Bennett from high school, although Bennett had been in a different grade. He stated that Bennett's companion told McMillon he liked his shoes and asked him where he had gotten them. After Baldwin and McMillon got their pizza, they left the shop and crossed the street to sit at a covered bus stop. There was some discrepancy as to whether Bennett and his companion left just prior to Baldwin and McMillon's departure or just after. Baldwin testified he saw Bennett and the other man across the street sitting at a bus stop.

{¶ 4} At some point, the unidentified man called across the street to Baldwin and McMillon, asking whether they had a light. The man crossed toward the bus stop and sat between Baldwin and McMillon. Baldwin testified the man pulled out a gun and stuck it in Baldwin's side, demanding that Baldwin and McMillon hand over "all their stuff," including wallets, cell phones, cash, and their shoes. Bennett then crossed the street coming toward them on a bicycle. Bennett gave his bike to the other man and picked up Baldwin's and McMillon's belongings from the ground.

{¶ 5} Baldwin testified Bennett and his companion left the area with the unidentified man on the bike and Bennett running alongside. Baldwin and McMillon called the police, and Bennett was picked up 20 to 30 minutes after the robbery. Baldwin testified that he and McMillon both identified Bennett as one of the men that robbed them. Bennett was on the bike when he was arrested, but he had none of the victims' personal belongings on his person nor a weapon. The other assailant was never identified nor found.

{¶ 6} After Baldwin testified and left the courtroom, he encountered Bennett's mother (Mrs. Bennett), whom he knew from the neighborhood, in the hallway. He hugged her and told her that Bennett hadn't really done anything. Mrs. Bennett mentioned this to defense counsel, and defense counsel sought to impeach Baldwin with this statement. The trial court conducted an in camera hearing to determine whether Baldwin had testified honestly about his perception of Bennett's involvement; the court did not permit defense counsel to impeach Baldwin with the statement he made to Mrs. Bennett. Bennett moved for a mistrial, which the court denied.

{¶ 7} The state called Detective Stephen McGraw to testify about his investigation. During the course of the state's direct examination, the following exchange took place:

> **"Prosecutor: * * * What did you do next in the course of your investigation?**

"McGraw: I went to the city jail where the defendant was being housed. I approached the victim,[2] I read him his Miranda rights, I asked him if he wanted to make a statement. He declined to give a statement.

"Defense Counsel: Objection."

{¶ 8} No other mention was made throughout the remainder of the trial about Det. McGraw's comment regarding Bennett's decision not to give a statement.

{¶ 9} At the conclusion of the state's case, Bennett moved for a Crim.R. 29 acquittal, which the court denied. He renewed his motion when the defense rested; the trial court again denied his motion. The jury convicted Bennett on both counts of aggravated robbery and the firearm specifications. The trial court sentenced Bennett to three years on each aggravated robbery count to run concurrent. It sentenced him to three years on each firearm specification, which the court merged and ran consecutive and prior to the underlying sentence, for a total of six years in prison. Bennett timely appealed.

{¶ 10} Bennett raises four assignments of error for our review. We address his first two assigned errors together because they are related.

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[2] We believe that Det. McGraw either misspoke in referring to Bennett as the victim instead of the defendant, or that it was an error in the court reporter's transcription.

{¶ 11} In his first assignment of error, Bennett argues there was insufficient evidence to support his convictions for aggravated robbery. Specifically, Bennett argues that the state has not proven that he aided and abetted the other assailant in committing the aggravated robberies against Baldwin and McMillon.

{¶ 12} A motion for acquittal under Crim.R. 29(A) is governed by the same standard used for determining whether a verdict is supported by sufficient evidence. *State v. Tenace*, 109 Ohio St.3d 255, 2006-Ohio-2417, 847 N.E.2d 386, ¶ 37. "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. The weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts." (Citations and quotations omitted.) Id.

{¶ 13} R.C. 2911.01(A) states in relevant part: "No person, in attempting or committing a theft offense, as defined in section 2913.01 of the Revised Code, or in fleeing immediately after the attempt or offense, shall do any of the following: (1) Have a deadly weapon on or about the offender's person or under the offender's control and either display the weapon, brandish it, indicate that the offender possesses it, or use it * * *."

{¶ 14} Bennett does not challenge whether the state presented sufficient evidence of all elements of the aggravated robbery charges; instead he argues that there was insufficient evidence that he aided or abetted the unidentified man in committing aggravated robbery. We find there was sufficient evidence that Bennett was complicit in the aggravated robberies of Baldwin and McMillon.

{¶ 15} Pursuant to R.C. 2923.03(A)(2), a person who aids and abets another in the commission of an offense shall be prosecuted and punished as if he were a principal offender. "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. Johnson* (1991), 93 Ohio St.3d 240, 245, 754 N.E.2d 796. Aiding and abetting may be established by overt acts of assistance such as * * * serving as a lookout." (Internal citations omitted.) *State v. Cardamone*, Cuyahoga App. No. 92235, 2009-Ohio-5361.

{¶ 16} The state presented evidence that Bennett accompanied the unidentified man into the pizza shop and was party to the conversation about McMillon's shoes. Bennett, while not the person holding the gun, served as a

lookout, joined his companion, gave his companion his bicycle, and assisted in taking the victims' personal belongings, including their shoes, before he and the other man fled the scene.

{¶ 17} The circumstances are sufficient to find that Bennett shared the criminal intent of the other assailant. We find the state presented sufficient facts to support Bennett's conviction for aiding and abetting in the commission of aggravated robbery. Bennett's first assignment of error is overruled.

{¶ 18} In his second assignment of error, Bennett appears to challenge his convictions as being against the manifest weight of the evidence, arguing again that he played no role in the commission of aggravated robbery perpetrated by his companion. We disagree.

{¶ 19} In reviewing a claim challenging the manifest weight of the evidence, the question to be answered is whether "there is substantial evidence upon which a jury could reasonably conclude that all the elements have been proved beyond a reasonable doubt. In conducting this review, we must examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and determine whether 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." (Internal

citations and quotations omitted.) *State v. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235, 818 N.E.2d 229, ¶ 81.

{¶ 20} Bennett relies primarily on his argument under his first assignment of error to contest the jury's verdict. He contends the evidence shows that it was not Bennett who asked for a light, not Bennett who held a gun, not Bennett who demanded the victims' personal belongings, and Bennett was not found with any of the victims' possessions when he was arrested a short time later. While these facts are true, there is undisputed evidence that Bennett and the other assailant were together when they first approached the victims at the pizza shop, that Bennett gave his bike to his companion, and that he picked up the victims' belongings and took them when he fled the scene accompanied by the other assailant.

{¶ 21} Relying upon these facts, we cannot say the jury lost its way in convicting Bennett of aggravated robbery. Bennett's second assignment of error is overruled.

{¶ 22} In his third assignment of error, Bennett argues that the trial court erred in denying appellant's motion for mistrial because the state commented at trial on his post-arrest silence.

{¶ 23} "The grant or denial of a mistrial lies within the sound discretion of the trial court. However, a trial court need not declare a mistrial unless

'the ends of justice so require and a fair trial is no longer possible.'" *State v. Trimble*, 122 Ohio St.3d 297, 321, 2009-Ohio-2961, 911 N.E.2d 242.

{¶ 24} In *State v. Tolliver*, Cuyahoga App. No. 86121, 2006-Ohio-2312, this court recognized that "the Miranda decision precludes the substantive use of a defendant's silence during police interrogation to prove his guilt"; however, the Ohio Supreme Court has recognized "where evidence has been improperly admitted in derogation of a criminal defendant's constitutional rights, the admission is harmless 'beyond a reasonable doubt' if the remaining evidence alone comprises 'overwhelming' proof of defendant's guilt." *State v. Williams* (1983), 6 Ohio St.3d 281, 452 N.E.2d 1323, citing *Harrington v. California* (1969), 395 U.S. 250, 254, 89 S.Ct. 1726, 23 L.Ed.2d 284.

{¶ 25} In *State v. Ervin*, Cuyahoga App. No. 80473, 2002-Ohio-4093, this court held that "a single isolated reference to [defendant's] post-arrest silence is not reversible error." The facts in *Ervin* are similar to the facts in this case; the police officer testified that Ervin refused to discuss the matter with him, and nothing additional was said on the matter for the remainder of the trial. Id. On appeal, this court found no reversible error in allowing the police officer's single reference to Ervin's post-arrest silence. Specifically, this court found that "the State did not use the witness' post-silence comment in any prejudicial manner. The State did not use defendant's post-arrest silence for impeachment purposes in cross-examination or in closing

argument. The State did not make evidentiary use of defendant's silence as evidence of defendant's guilt. In fact, defendant's post-arrest silence was never mentioned again in any context throughout the trial." Id. See, also, *State v. Kelly* (July 12, 2001), Cuyahoga App. No. 78422; *State v. Lute* (Nov. 22, 2000), Lorain App. No. 99CA007431.

{¶ 26} Furthermore, we find that if there were any error, it was harmless beyond a reasonable doubt. See *State v. Vrona* (1988), 47 Ohio App.3d 145, 547 N.E.2d 1189. The evidence presented at trial through the victim's testimony was enough to establish Bennett's guilt. Bennett's third assignment of error is overruled.

{¶ 27} In his fourth assignment of error, Bennett argues that the trial court erred by not allowing evidence which impeached the victim's testimony. He cites specifically a comment Baldwin made to Bennett's mother with regard to Bennett's involvement in the robbery.

{¶ 28} "Generally, evidentiary rulings made at trial rest within the sound discretion of the trial court. We give substantial deference to the trial court unless we determine that the court's ruling was an abuse of discretion." (Internal citations omitted). *State v. Darkenwald*, Cuyahoga App. No. 83440, 2004-Ohio-2693. "The term abuse of discretion connotes more than error of law or judgment. It implies that the court's attitude is unreasonable, arbitrary, or unconscionable." *Nielson v. Meeker* (1996), 112 Ohio App.3d

448, 679 N.E.2d 28. "An abuse of discretion * * * implies a decision which is without a reasonable basis or one which is clearly wrong." *Angelkovski v. Buckeye Potato Chips Co.* (1983), 11 Ohio App.3d 159, 463 N.E.2d 1280.

{¶ 29} After it was brought to the court's attention that Baldwin spoke with Mrs. Bennett about Bennett's involvement in the robbery, the trial court held an in camera hearing to question Baldwin about his testimony. At the hearing, Baldwin admitted that he spoke with Mrs. Bennett after he had testified. He admitted he told her that "in my opinion [Bennett] really didn't do nothing; he was just there for the most part." Baldwin told the court he had not fabricated any of his testimony on the stand. When asked what he meant by his statement to Mrs. Bennett, Baldwin stated, "I mean [Bennett] didn't pull the gun out, he wasn't the one who demanded the property, he really didn't do nothing. If anything, I would say he was a lookout."

{¶ 30} On the basis of Baldwin's responses, the trial court did not allow defense counsel to impeach him on his statement to Mrs. Bennett; the court found that Baldwin testified truthfully as to his perception of what happened that evening.

{¶ 31} We find it was not error for the court to disallow defense counsel from impeaching Baldwin with his statement to Mrs. Bennett. Accordingly, Bennett's fourth assignment of error is overruled.

Judgment affirmed.

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.

SEAN C. GALLAGHER, ADMINISTRATIVE JUDGE

CHRISTINE T. McMONAGLE, J., and
JAMES J. SWEENEY, J., CONCUR