[Cite as *State v. Clement*, 2011-Ohio-1555.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94869

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

REGINALD CLEMENT

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-518986

BEFORE: Kilbane, A.J., Sweeney, J., and Keough, J.

RELEASED AND JOURNALIZED: March 31, 2011

ATTORNEY FOR APPELLANT

Michael P. Maloney
24441 Detroit Road
Suite 300
Westlake, Ohio 44145

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor
Steven E. Gall
Brad S. Meyer
Assistant County Prosecutors
The Justice Center - 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113

MARY EILEEN KILBANE, A.J.:

{¶ 1} Defendant-appellant, Reginald Clement, appeals his convictions. Finding no merit to the appeal, we affirm.

{¶ 2} In December 2008, Reginald was charged in an eight-count indictment. Counts 1 and 2 charged him with aggravated murder, Counts 3, 4, and 5 charged him with aggravated robbery, Counts 6 and 7 charged him with kidnapping, and Count 8 charged him with having a weapon while

under disability.[1] The matter proceeded to a jury trial, at which he was found guilty of the lesser included offense of murder in Count 1, aggravated murder (Count 2), aggravated robbery (Counts 3 and 4), and kidnapping (Counts 6 and 7). The jury also found Reginald guilty of all firearm specifications. The jury found Reginald not guilty of aggravated robbery as charged in Count 5. The trial court entered a judgment of acquittal pursuant to Crim.R. 29 on the having a weapon while under disability charge (Count 8).

{¶ 3} At the mitigation phase, the jury recommended 30 years to life on the aggravated murder conviction (Count 2). The trial court sentenced him to 15 years in prison on Count 1, ten years each on Counts 3, 4, and 6, and three years on Count 7. The court merged Counts 1, 3, 4, and 6 with Count 2 and ordered that Count 7 be served concurrent to Count 2. The court also merged all firearm specifications in Counts 1, 2, 3, 4, 6, and 7, for a total of three years in prison, to be served consecutive to Count 2, for a total of sentence of 33 years to life in prison.

{¶ 4} The facts of this case were previously set forth by this court in *State v. Green*, Cuyahoga App. No. 94634, 2011-Ohio-329.[2]

---

[1]Counts 1 and 2 carried a felony murder specification and one- and three-year firearm specifications. Counts 3-7 each carried one- and three-year firearm specifications.

[2]In *Green*, Clement's codefendant Lavonte Green ("Lavonte") appealed his

"On November 30, 2008, Dominic Rodgers ('Dominic'), Alfred Rodgers ('Alfred'), and their cousin Demetrius Williams ('Demetrius') were together at the Rodgers' house located on South Green Road in South Euclid. They wanted to buy some marijuana, so Dominic called Gregory Williams ('Gregory'), a known marijuana dealer. The men decided to rob Gregory to get his money and marijuana. Demetrius invited Reginald Clement ('Reginald') to the Rodgers' house and together they picked up Lavonte and returned to the Rodgers' house. Reginald and Lavonte both had guns.

"When Gregory and his friend Tramel Wallace ('Tramel') pulled into the Rodgers' driveway to deliver the marijuana, Alfred, Demetrius, Reginald, and Lavonte came out of the house to meet them. Gregory, who was seated in the front passenger seat, opened his window. Tramel testified that one of the men, later identified as Lavonte, hopped into the backseat of the car, pointed a gun at Gregory, and said: 'You know what this is?' Gregory grabbed the gun as he climbed into the backseat and struggled with Lavonte to get the gun from him. Reginald, who also held a gun, stood at the open passenger window. As Lavonte and Gregory were wrestling in the backseat, Lavonte's gun discharged, shattering the rear window. Tramel backed the vehicle out of the driveway, and Reginald followed them on foot. When Tramel stopped to drive forward, Reginald stuck his arm in the open window and shot Gregory.

"Reginald fired five or six more shots at the car as Tramel drove away. Lavonte and Gregory continued fighting in the backseat despite Gregory's wound. Moments later, Lavonte jumped out of the moving car, leaving his gun behind, and Tramel drove to the nearest police station. An ambulance transported Gregory to the hospital where he died from a gunshot wound to his chest.

---

convictions.

> **"Tramel was unable to identify Lavonte or Reginald as the gunmen. However, Alfred testified that Lavonte and Reginald approached Gregory's car with guns, that Lavonte got into the backseat, and that Reginald pointed a gun through the passenger window." Id. at ¶3-6.**

{¶ 5} Reginald now appeals, raising four assignments of error for review, which shall be discussed together where appropriate.

ASSIGNMENT OF ERROR ONE

> **"The trial court erred in admitting [Reginald's] statement into evidence as the statement was involuntary in violation of due process of [the] law."**

{¶ 6} Reginald argues that the statement he made to the police was involuntary and should not have been admissible against him at trial.

{¶ 7} In *Miranda v. Arizona* (1966), 384 U.S. 436, 444, 479, 86 S.Ct. 1602, 16 L.Ed.2d 694, the United States Supreme Court held that:

> **"[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. * * * Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the**

> **presence of an attorney, either retained or appointed. * * ***
>
> *** * ***
>
> **After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him."**

{¶ 8} Reginald does not claim that he failed to understand the *Miranda* warnings. Instead he contends that his waiver was involuntary because at the time he was a patient in the hospital, he was under arrest and under police guard, he had no attorney, he was on narcotics, and he had an open gunshot wound in his leg.

{¶ 9} In *State v. Dailey* (1990), 53 Ohio St.3d 88, 91, 559 N.E.2d 459, the Ohio Supreme court explained that:

> **"The inquiry whether a waiver is coerced has two distinct dimensions. 'First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.' [*Moran v . Burbine* (1986)], 475 U.S. at 421, 106 S.Ct. at 1141; *Colorado v. Spring* (1987), 479 U.S. 564, 573, 107 S.Ct. 851, 857, 93 L.Ed.2d 954. 'Once it is determined that a suspect's decision not to rely on his rights was uncoerced, that he at all times knew he could stand mute and request a lawyer, and that he was aware of the State's intention to use his statements to secure a**

> **conviction, the analysis is complete and the waiver is valid as a matter of law.' *Moran*, supra, 475 U.S. at 422-423."**

{¶ 10} In the present case, there is no evidence of any coercive activity by the police. South Euclid Police Detective David Volek ("Volek") testified that he received permission from the nurses prior to speaking with Reginald. Reginald's family was in the room at the time and the officers asked them to step outside. Volek testified that Reginald appeared "alert, coherent. Not * * * under the influence of heavy narcotics." Reginald engaged in normal conversation with Volek, which gave Volek the impression that Reginald was not under the influence of narcotics.

{¶ 11} Volek then gave Reginald a *Miranda* waiver form and read Reginald his *Miranda* rights. Reginald responded that he understood his rights and that he did not have any questions. Reginald then read the waiver portion on the bottom of the form and signed it. Volek asked Reginald who shot him and how he ended up in the hospital. Reginald made a written statement. Prior to his written statement, Reginald read and signed another form advising him of his *Miranda* rights. He indicated and initialed on the form that he understood those rights. The form also asked if he was "under the influence of alcohol, drugs, and/or narcotics?" Reginald answered "no" and put his initials next to same. Furthermore, Reginald's written statement was legible, neat, and coherent. Thus, there is nothing in

the circumstances surrounding Reginald's statement to support a finding that it was involuntary or made without full awareness.

{¶ 12} Accordingly, the first assignment of error is overruled.

ASSIGNMENT OF ERROR TWO

"The trial court erred in allowing the State to offer evidence of prior inconsistent statements of the State's own witness."

{¶ 13} In the instant case, the State called Alfred as a witness. When the State began to question him about the events leading up to Gregory's arrival at his house and Reginald's participation in these events, Alfred's responses were mostly "I don't remember" or "I don't know." Six weeks earlier, however, Alfred testified for the State at Lavonte's trial and his testimony was significantly different. As a result, the State requested the trial court's permission to treat Alfred as a hostile witness. The trial court allowed the State's request over defense counsel's objection. Subsequently, the State asked Alfred if he recalled testifying under oath on a prior occasion. Alfred replied, "[y]eah." The State then read portions of Alfred's testimony from Lavonte's trial, which indicated that Reginald came to Alfred's house with Lavonte before Gregory returned. Reginald and Lavonte each had a gun and went outside with Alfred before Gregory returned. Tramel drove Gregory to Alfred's house. Gregory sat in the front passenger seat. While

Tramel and Gregory were still in the car, Reginald ran up to the passenger side and fired his gun into the open window.

{¶ 14} Reginald claims that the State was improperly permitted to impeach its own witness, improperly used hearsay statements on direct examination of its own witness, and improperly used prior inconsistent statements as substantive evidence. Reginald further claims this evidence was admitted in error because it was the only evidence identifying him as the shooter and this impeachment evidence went to the jury as substantive evidence. This argument is flawed.

{¶ 15} Reginald's argument disregards the difference between using a prior statement to impeach its maker and using it as substantive evidence, i.e., to prove the truth of the matter asserted in the statement under Evid.R. 801(D)(1)(a). See *State v. Laboy*, Cuyahoga App. No. 87616, 2006-Ohio-5927, ¶19. See, also, *State v. Bethel*, 110 Ohio St.3d 416, 2006-Ohio-4853, 854 N.E.2d 150.

{¶ 16} Under Evid.R. 801(D)(1)(a), a prior inconsistent statement is not hearsay if it "was given under oath subject to cross-examination by the party against whom the statement is offered and subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition[.]" Evid.R. 801(D)(1)(a). This court has found that "[s]uch statements may be used as substantive evidence." *State v. Adams*, Cuyahoga App. No. 89919,

2008-Ohio-3136, ¶28. See, also, *State v. Anderson* (March 23, 1994), Montgomery App. No. C.A. 13003.

{¶ 17} These "statements are admissible because of several procedural guarantees of trustworthiness. The prior inconsistent statement was made under oath and was subject to cross-examination at the time it was made. It is also subject to delayed cross-examination and evaluation for demeanor at the trial at which the statement is offered for the purpose of impeachment." *State v. White* (June 25, 1997), Hamilton App. No. C-960506.

{¶ 18} Here, it is apparent that all of the threshold criteria of Evid.R. 801(D)(1)(a) were met: Alfred's testimony at Reginald's trial was inconsistent with his testimony as a witness at Lavonte's trial; Alfred's testimony at Lavonte's trial was under oath and subject to cross-examination, and his testimony was subject to the penalty of perjury. Therefore, we find that this testimony was not hearsay, under Evid.R. 801(D)(1)(a), and as a result, could be admitted as substantive evidence upon which the jury could predicate its verdict.

{¶ 19} Accordingly, the second assignment of error is overruled.

ASSIGNMENT OF ERROR THREE

"The trial court erred in denying [Reginald's Crim.R. 29] motion for acquittal on all counts as there was insufficient evidence to prove identity."

ASSIGNMENT OF ERROR FOUR

"[Reginald's] convictions were against the manifest weight of the evidence as there was no adequate evidence of identification."

{¶ 20} In reviewing a sufficiency of the evidence challenge, "'[t]he 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.' *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, at paragraph two of the syllabus, following *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560." *State v. Diar*, 120 Ohio St.3d 460, 2008-Ohio-6266, 900 N.E.2d 565, ¶113.

{¶ 21} With regard to a manifest weight challenge, the "reviewing court asks whose evidence is more persuasive — the state's or the defendant's? * * * 'When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a "thirteenth juror" and disagrees with the factfinder's resolution of the conflicting testimony.' [*State v. Thompkins* (1997), 78 Ohio St.3d 380, 387, 678 N.E.2d 541], citing *Tibbs v. Florida* (1982), 457 U.S. 31, 42, 102 S.Ct. 2211, 72 L.Ed.2d 652." *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, ¶25.

{¶ 22} Moreover, an appellate court may not merely substitute its view for that of the jury, but must find that "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." *Thompkins* at 387. Accordingly, reversal on manifest weight grounds is reserved for "'the exceptional case in which the evidence weighs heavily against the conviction.'" Id., quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717.

{¶ 23} Reginald was convicted of murder, aggravated murder, aggravated robbery, and kidnapping. He argues that there was insufficient evidence of identification. He claims the State failed to prove that he was the perpetrator, and as a result, the jury "lost its way" when it found him guilty of these crimes. We disagree.

{¶ 24} The testimony at trial established that Alfred, Dominic, Reginald, Demetrius, and Lavonte planned to rob Gregory to get his money and marijuana. Dominic testified that Reginald, Alfred, and Lavonte were waiting outside for Gregory, who returned with Tramel. Tramel was driving the car and Gregory was in the front passenger seat. Dominic observed Reginald running outside next to Gregory's car. Alfred observed Reginald run up to the car and fire shots into the front passenger side window. Although Tramel could not identify who the shooter was, his testimony was

consistent with Alfred's testimony that Reginald pointed his gun through the open window and shot Gregory. In addition, the forensic evidence revealed gunshot residue on Reginald's clothes.

{¶ 25} Furthermore, the court properly instructed the jury that: "a person, who acts in concert with the principal with the intent to aid the principal in the crime is regarded as the aider and abettor. Whoever aids, abets or assists in procuring with another to commit an offense may be prosecuted as if he were the principal offender." R.C. 2923.03(F).

{¶ 26} Here, the evidence at trial revealed that Reginald conspired with the codefendants to rob Gregory and that Gregory was killed during the robbery. Thus, we find there was sufficient evidence to support Reginald's convictions. We further find that this is not the extraordinary case where the "jury lost its way" and created a manifest miscarriage of justice.

{¶ 27} Accordingly, the third and fourth assignments of error are overruled.

{¶ 28} Judgment is 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.

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

MARY EILEEN KILBANE, ADMINISTRATIVE JUDGE

JAMES J. SWEENEY, J., and
KATHLEEN A. KEOUGH, J., CONCUR