

[Cite as *State v. Lozada*, 2011-Ohio-823.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94902

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

EDWIN LOZADA

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-523795-A

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

RELEASED AND JOURNALIZED: February 24, 2011
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JAMES J. SWEENEY, J.:

{¶ 1} Defendant-appellant, Edwin Lozada, (“defendant”) appeals following his convictions for aggravated murder, felonious assault and tampering with evidence. For the reasons that follow, we affirm.

{¶ 2} Defendant was charged with attempted murder, felonious assault, tampering with evidence, and two counts of aggravated murder; along with one, three, and five year firearm specifications.

{¶ 3} Defendant entered a guilty plea that the trial court subsequently permitted him to withdraw. Defendant also filed a motion to disqualify his counsel. After a

hearing, the trial court denied that motion and referred defendant for a competency evaluation. Defendant was found competent.

{¶ 4} On the day of trial, defendant expressed his continued dissatisfaction with his legal representation and requested new counsel. The court inquired into the basis of this oral request and defendant said he did not feel like he had a “strong enough defense” and felt like his lawyers wanted him to enter a guilty plea based on their alleged belief that he was “going to lose.” When the court declined to appoint new counsel, defendant asked, “I can’t do it by myself; I can’t represent myself in this matter?” This inquiry prompted a recess during which the court examined the issue of self representation at that stage of the proceedings. The trial court denied the request for self-representation as being untimely and also considered it to be “simply a tactic for delay.” The trial court explained that the case had already gone through excessive delays, including defendant’s guilty plea, the withdrawal of that plea, defendant’s multiple motions to disqualify counsel, continuances, and defendant’s oral inquiry regarding self-representation on the day of trial with a jury waiting.

{¶ 5} The matter proceeded to a jury trial where the State presented numerous witnesses. The evidence is summarized as follows: On April 10, 2010, Richard S. Santiago died as a result of a fatal gunshot wound he sustained while riding as a passenger in his friend Danny Torres’s vehicle. Torres testified that the night of April 9, 2010, he and Santiago were drinking and went to a bar on Broadview Road.¹ Almost

¹ Video surveillance reflects that they arrived at the Broadview bar around 1 a.m.

immediately upon entering the bar, a fight erupted between Santiago and defendant in the restroom. Torres identified defendant as “Pup,” a person whom Torres had gone to school with and someone whom he believed had “carjacked” Santiago’s good friend. The bar bouncer pushed Santiago out of the bar.

{¶ 6} The State introduced video surveillance that recorded defendant and others chasing Santiago around outside of the bar. Witnesses identified Santiago, Torres, and defendant in the video. Santiago tried, but was unable, to re-enter the bar. Instead, Santiago got into Torres’s car and they drove down Broadview Road towards W. 25th Street. Soon after, the video shows defendant entering his car and driving in the same direction. By all accounts, defendant was driving a light blue car without a front grill.

{¶ 7} Torres said defendant pulled up alongside his vehicle and fired a gun into the car. Santiago said he was hit. Torres drove directly to MetroHealth Hospital and arrived shortly after 1 a.m. on April 10, 2010. Santiago died a few hours later. Torres spoke with police officers at the hospital. The reporting officer broadcast a description of the shooter as “Hispanic male, about five-seven, 130 pounds, black hair, brown eyes, curly hair * * *.” The suspect vehicle was described as “baby blue in color, possibly a Lincoln, and * * * front grill of the vehicle was missing * * *.”

{¶ 8} Although Torres believed defendant’s name was Edwin, he was not sure since he knew him as “Pup.” Torres also maintained that he did not know defendant’s last name. Torres identified the shooter to police as “Pup.” Torres further identified

defendant as the shooter from a photograph. Other witnesses provided defendant's name to police officers in an independent interview with detective assigned to this case. They confirmed that defendant's nickname is "Pup."

{¶ 9} Torres acknowledged that he knew what kind of car defendant drove before the shooting occurred but denied using this information to falsely accuse defendant.

{¶ 10} On the date of the incident, defendant was living with his father and his father's girlfriend, Margie. At that time, Margie was employed with the Cleveland Clinic Police Department. On April 10, 2010, Margie reported to her employer her suspicions that defendant had shot someone the previous night. Margie stated she was taking medications and was confused. Nonetheless, she remembered defendant saying that he got in a bar fight and shot somebody. Margie also made a written statement to the Cleveland Police. Margie stated that when she awoke on April 10, 2010, defendant was gone. She believed he went to Chicago to visit relatives. There was some testimony that this visit was pre-planned.

{¶ 11} The investigating detective was able to contact defendant by phone and learned he was in Chicago visiting his grandmother. Defendant stated he would surrender but not for a few days. Defendant would not give the detective his specific whereabouts. Therefore, the detective issued a warrant for defendant's arrest. When defendant did return to Cleveland he no longer had his vehicle; which he claimed to have sold while in Chicago. In May, police located the car in Illinois and in the possession of defendant's relatives. The FBI processed the vehicle, including photographing it. Torres

identified the vehicle from those photographs as the one used by defendant during the drive-by shooting on April 10, 2010.

{¶ 12} Multiple other witnesses testified as to defendant's presence at various bars the evening of April 9-10, 2010. Evidence was also presented that police initially identified a light green vehicle as being the suspect vehicle and had detained an African American male in connection with Santiago's death. However, neither matched the descriptions of the car or the suspect involved in the incident. Additional facts, to the extent relevant, will be addressed in connection with the assigned error(s) to which they relate.

{¶ 13} Upon the jury's guilty verdicts, the trial court merged the aggravated murder convictions. For the remaining convictions, the trial court imposed an aggregate sentence of thirty-six years to life in prison.

{¶ 14} "Assignment of Error No. I: The Trial Court erred in instructing the jury on Defendant's flight."

{¶ 15} "The decision whether to issue an instruction on 'flight' rests within the sound discretion of the trial court. Absent an abuse of discretion, the trial court's decision will not be reversed on appeal.

{¶ 16} "A reviewing court may not judge a single instruction to the jury in artificial isolation. Rather, in determining whether a jury instruction constituted prejudicial error, an appellate court must determine, from the record, whether such instruction may have resulted in a manifest miscarriage of justice.

{¶ 17} “Flight from justice ‘means some escape or affirmative attempt to avoid apprehension.’ It is well established that evidence of flight is admissible as tending to show consciousness of guilt. Thus, a trial court does not abuse its discretion by issuing an instruction on flight if sufficient evidence exists in the record to support the charge.” *State v. Benjamin*, Cuyahoga App. No. 80654, 2003-Ohio-281, ¶¶ 29-31, internal citations omitted.

{¶ 18} The record reflects that defense counsel objected to the provision of a flight instruction. On appeal, defendant contests error occurred for two reasons: (1) the form of the instruction did not track the language of the instruction prescribed by the Ohio Judicial Conference; and (2) a belief that the evidence was insufficient to support the charge.

{¶ 19} With respect to the first issue defendant cites an excerpt from the instruction where the trial court informed the jurors that “the fact that defendant fled the scene does not raise a presumption of guilt, but it may tend to indicate the defendant’s consciousness of guilt.” Defendant asserts that the trial court should have instead instructed the jurors with language to the effect that “testimony has been admitted indicating that the defendant fled the scene.” While the defendant objected in general to the provision of a flight instruction, we note that he did not raise an objection to the form of the instruction that was given, the balance of which provided:

{¶ 20} “If you find that the facts do not support that the defendant fled the scene or, if you find that some other motive prompted the defendant’s conduct, or if you’re

unable to decide what the defendant's motivation was, then — this is kind of messed up. I will have to correct this.

{¶ 21} “If you find — if you decide that the defendant was motivated by a consciousness of guilt, you may, but are not required to, consider that evidence in deciding whether the defendant is guilty of the crimes charged. You alone will determine what weight, if any, to give to this evidence.”

{¶ 22} While we agree that the above-quoted excerpt is somewhat confusing, this was not the form of the flight instruction that was given to the jury during its deliberation.

{¶ 23} Following its charge to the jury, the court noted it would correct the instructions before sending the written version to the jury. The written version of the jury instructions that are contained in the record, provide the following flight instruction:

{¶ 24} “Testimony has been admitted indicating that the defendant fled the scene. You are instructed that the fact that defendant fled the scene does not raise a presumption of guilt, but it may tend to indicate the defendant's consciousness of guilt. If you find that the facts do not support that defendant fled the scene or, if you find that some other motive prompted the defendant's conduct, or if you are unable to decide what the defendant's motivation was, then you should not consider this evidence for any purpose. However, if you find that the facts support that the defendant engaged in such conduct and if you decide that the defendant was motivated by a consciousness of guilt, you may, but are not required to, consider that evidence in deciding whether the defendant is guilty

of the crimes charged. You alone will determine what weight, if any, to give to this evidence.”

{¶ 25} At the close of the charge, the trial court advised the jurors that they would have the written instructions of law to reference during deliberations. Specifically, the court stated, “You will have these with you back in the jury room. I know that you might forget some of these things over the weekend * * * you’ll have the instructions in written form with you * * * when you go back to deliberate.”

{¶ 26} Considering the record as a whole, we do not find error in the form of the flight instruction submitted to the jury. The jury was instructed that it could find that the facts did not support a conclusion that defendant fled the scene or they could find that his departure was motivated by some other reason.

{¶ 27} Secondly, there was sufficient evidence to support the charge. It was undisputed that defendant left town almost immediately after Santiago’s death. While in Chicago he sold the car that was reportedly used during the shooting. Conversely, there was some evidence that defendant’s trip to Chicago was a pre-planned visit to relatives. And, police did find defendant’s vehicle in the possession of his relatives. Police officers testified that defendant would not immediately surrender and they had to issue a warrant for his arrest. Defendant later voluntarily turned himself in to the authorities. Ultimately, it was within the province of the jury to determine whether defendant’s conduct exhibited a consciousness of guilt or not. The trial court did not abuse its discretion by giving a flight instruction in this case. The first assignment of error is overruled.

{¶ 28} “Assignment of Error No. II: The Trial Court erred in failing to conduct a hearing to determine the basis for Defendant's *pro se* motion to disqualify counsel.”

{¶ 29} When an indigent accused moves to disqualify his or her counsel, it is the duty of the trial court to inquire into the complaint and make it a part of the record. *State v. Ketterer*, 111 Ohio St.3d 70, 2006-Ohio-5283, 855 N.E.2d 48, ¶139, citing, *State v. Deal* (1969), 17 Ohio St.2d 17, 46 O.O.2d 154, 244 N.E.2d 742, syllabus. The inquiry need only be brief and minimal. *Id.*, citing, *State v. King* (1995), 104 Ohio App.3d 434, 437, 662 N.E.2d 389.

{¶ 30} Defendant filed two *pro se* motions to discharge his appointed attorneys prior to trial. The trial court addressed the first motion, along with defendant's separate motion to withdraw his guilty plea, on the record on December 30, 2009. Defendant's dissatisfaction with his counsel was premised on their alleged inability to obtain a better plea bargain for him. Defense counsel addressed the motion to disqualify and explained defendant was being represented by three attorneys who all actively participated in the defense, including jail visits and extensive discussions with defendant. Further, defense counsel re-asserted a concern as to defendant's competency that was discussed during this hearing. At the conclusion of the hearing on defendant's multiple motions, the trial court granted defendant's motion to withdraw his plea and referred him for a competency evaluation. The trial court denied defendant's motion to discharge his attorneys stating it was “not convinced that, based on the allegations made in [the] motion, that [defendant] is at all underrepresented or there has been such a rift between him and his attorneys that

would prevent him from getting a fair trial. [Defendant] actually has the benefit of having three attorneys * * * If [the court] appoint[ed] new attorneys, [defendant] would only get two.”

{¶ 31} With respect to defendant’s second motion to discharge his attorneys, the trial court held a separate hearing, inquiring specifically of defendant the facts in support of it. Defendant expressed his feeling that he did not have “a strong enough defense,” that he felt “like [his] lawyers don’t care about [him] and [his] life, that they just want [him] to take the plea bargain * * * That’s about it.” The court probed further asking what was making defendant feel that way. To which he responded, “it’s the way they talk to me, verbally. They tell me that, you know, I’m going to lose; that, you know, there’s just no hope.” The court continued to inquire of defendant for “anything that [he] could point to that would tell [the court] that [defense counsel was] somehow not competent to represent [defendant] in this case.” To which defendant responded, “No, Your Honor.” Following this colloquy, the trial court denied defendant’s motion.

{¶ 32} Although defendant complains that the trial court’s inquiry into his basis for seeking the disqualification of his counsel was not longer, the fact remains that it was defendant who failed to articulate a valid basis for removing his court appointed counsel despite being given ample opportunity to do so. The trial court’s inquiry into defendant’s complaints regarding his legal representation was sufficient and complied with its duty to address them on the record. The second assignment of error is overruled.

{¶ 33} “Assignment of Error No. III: The Trial Court erred in failing to conduct a hearing on Defendant’s pro se motion to represent himself.”

{¶ 34} After the trial court denied defendant’s motion to remove his attorneys and appoint new counsel, defendant inquired, “I can’t do it by myself; I can’t represent myself in this matter?” This inquiry was made on the day of trial and when the court was prepared to begin jury voir dire.

{¶ 35} “‘The constitutional right of self-representation is waived if it is not timely and unequivocally asserted.’” *State v. Cassano*, 96 Ohio St.2d 94, 2002-Ohio-3751, 772 N.E.2d 81, ¶38, quoting, *Jackson v. Ylst* (C.A.9, 1990), 921 F.2d 882, 888. See, e.g., *Reese v. Nix* (C.A.8, 1991), 942 F.2d 1276, 1281 (“I don’t want no counsel then” was not a clear and unequivocal pro se demand requiring Faretta inquiry); *United States v. Frazier-El* (C.A.4, 2000), 204 F.3d 553, 558 (assertion of the right of self-representation “must be * * * clear and unequivocal”).

{¶ 36} Similar to this case, the defendant in *Cassano* inquired, “Is there any possibility I could represent myself?” *Id.* at ¶35. The Ohio Supreme Court determined that this “was not a clear and not an explicit and unequivocal demand for self-representation” and, therefore, the trial court had not improperly denied Cassano the right to self representation. The same result is warranted here. In this case, defendant did not make a clear, explicit and unequivocal demand for self-representation and, therefore, the trial court did not deny him this right.

{¶ 37} Additionally, defendant’s inquiry regarding the possibility of

self-representation was untimely. In *Cassano*, the Ohio Supreme Court determined that a request for self-representation made three days before trial was untimely. *Id.* at ¶40. In this case, the inquiry was made on the day of trial and was, therefore, untimely; particularly considering the history of delays as detailed by the trial court in this case.

{¶ 38} The third assignment of error is overruled.

{¶ 39} “Assignment of Error No. IV: The Defendant’s conviction is against the manifest weight of the evidence, in violation of his rights under the 14th Amendment to the Constitution of the United States.”

{¶ 40} To warrant reversal of a verdict under a manifest weight of the evidence claim, this Court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses, and determine whether, in resolving conflicts in evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the judgment must be reversed and a new trial ordered. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541.

{¶ 41} The basis of this assignment of error, is defendant’s belief that the only evidence against him was Torres’ testimony. Defendant essentially contends that Torres was not credible and that the record supports the conclusion that Torres framed defendant for the murder because of bad blood between them. Perhaps the jury could have reached that conclusion, however, the guilty verdicts were not against the manifest weight of the evidence and were supported by ample evidence in the record. For example, much of Torres’ testimony was corroborated by other witnesses as well as video surveillance.

Defendant is seen leaving the bar parking lot in his car, heading in the same direction Torres was driving shortly before. A few minutes later, medical records confirm that Santiago arrived at the hospital with gunshot wounds. Additionally, Margie, who lived with defendant and was dating his father, reported to police on April 10, 2010 her suspicions that defendant had shot somebody the night before after a bar fight. Although Torres identified defendant as “Pup” and not his real name, the evidence established that “Pup” is defendant’s nickname. Accordingly, Torres consistently identified defendant as the shooter.

{¶ 42} The jury did not clearly lose its way in returning guilty verdicts against defendant based on this record, nor does defendant’s convictions constitute a miscarriage of justice.

{¶ 43} The 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.

JAMES J. SWEENEY, JUDGE

MARY EILEEN KILBANE, A.J., and
PATRICIA ANN BLACKMON, J., CONCUR