[Cite as *State v. Littlejohn*, 2018-Ohio-1842.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 106033

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ROBERT A. LITTLEJOHN

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-16-611347-A

BEFORE: S. Gallagher, J., E.T. Gallagher, P.J., and Jones, J.

RELEASED AND JOURNALIZED: May 10, 2018

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SEAN C. GALLAGHER, J.:

{¶1} Appellant Robert A. Littlejohn appeals his convictions on counts of aggravated burglary and felonious assault with associated three-year firearm specifications. Upon review, we affirm.

{¶2} On November 15, 2016, appellant was charged under a complicity theory with one count of aggravated burglary with one- and three-year firearm specifications, seven counts of felonious assault with one- and three-year firearm specifications, and one count of having weapons while under disability. A codefendant, Rosario D. Robinson, was charged in the indictment as the principal offender. Although the indictment originally identified one victim, the trial court permitted the state to amend the indictment to reflect the names of six victims in the case. The counts otherwise remained the same. The case proceeded to a bench trial on June 5, 2017.

{¶3} The charges arose from an incident that occurred on November 2, 2016. Testimony at trial revealed that appellant drove Robinson and another unidentified male, known only as "Brick," to a residence in Bedford, Ohio. The victims' testimony reflected that three men entered the residence together and went into a bedroom where the victims were sitting. Appellant took "a wad" of money out of his pocket to pay for marijuana, and soon thereafter Robinson began firing multiple shots into the bedroom. Several of the victims identified Littlejohn as the second person to enter the room and the person who had the cash. They identified Robinson as the third person to enter the room, and described him as having dreadlocks and indicated he had a gun and shot multiple

bullets into the room. There was some testimony to suggest that Brick also may have had a gun.

{¶4} One of the victims who had been shot had a gun and returned fire. Appellant and Robinson were both shot. Appellant, Robinson, and Brick then left the house together, with Brick driving the two others to the hospital. Appellant directed Brick to take the vehicle to his place of work. Appellant lied to detectives about how and where he was shot, and he changed his story several times.

{¶5} Appellant testified that he was taking the other two men to a house they directed him to because they wanted to buy drugs, that they wanted to borrow $40 from him to buy marijuana, and that he did not see a gun on anyone with him. Appellant claimed that there was a fourth person who came to the door behind Robinson and pointed a gun at Robinson's face and shot Robinson. He stated multiple shots were fired and that he was shot on his way out of the room. Appellant maintained that he and Robinson were victims.

{¶6} Robinson also testified that a fourth person came to the door and pointed a gun at his face. He claimed that he grabbed the man's arm and was shot in the face. Robinson denied having a gun on his person and claimed that he was just there to buy marijuana.

{¶7} The trial court granted appellant's Crim.R. 29 motion for acquittal on Count 9 for having a weapon while under disability. The motion was denied as to the other counts. The trial court found appellant guilty of Counts 1-8, and guilty of the firearm

specifications attached to every count. Following merger of offenses, the trial court sentenced appellant to an aggregate prison term of 11 years.[1] Additionally, the court ordered a one-year prison term in Cuyahoga C.P. Nos. CR-15-596038-A, CR-15-596012-A, and CR-15-595441-A to be served consecutively to the 11-year term imposed in this case, for a total prison term of 12 years. The trial court also imposed fines and costs, and informed appellant of postrelease control.

{¶8} Appellant timely filed this appeal. He raises two assignments of error for our review. Under his first assignment of error, appellant claims the trial court erred when it denied his Crim.R. 29 motion for acquittal on Counts 1-8.

{¶9} A motion for judgment of acquittal under Crim.R. 29(A) requires a court to consider if the evidence is insufficient to sustain a conviction. "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." *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus.

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[1] We note that the court found that Count 1, the aggravated burglary offense, merged with Counts 2 through 8, the felonious assault offenses, and the state elected to proceed with sentencing on Counts 2 through 8. The parties stipulated to merger of Counts 2 and 3, and the state elected to proceed under Count 2. Because of the merger, any claimed error with regard to Counts 1 or 3 would be harmless error. *State v. Worley*, 8th Dist. Cuyahoga No. 103105, 2016-Ohio-2722, ¶ 23, citing *State v. Powell*, 49 Ohio St.3d 255, 263, 552 N.E.2d 191 (1990).

{¶10} Appellant claims there was insufficient evidence to show he was guilty of complicity in committing the offenses of aggravated burglary and felonious assault. R.C. 2923.03, the complicity statute, provides in relevant part as follows:

> (A) No person, acting with the kind of culpability required for the commission of the offense, shall do any of the following:
>
> (1) Solicit or procure another to commit the offense;
>
> (2) Aid or abet another in committing the offense;
>
> (3) Conspire with another to commit the offense in violation of section 2923.01 of the Revised Code;
>
> (4) Cause an innocent or irresponsible person to commit the offense.
>
> * * *
>
> (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.

R.C. 2923.03(A) and (F).

{¶11} When culpability is premised on aiding and abetting under R.C. 2923.02(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.'" *State v. Shabazz*, 146 Ohio St.3d 404, 2016-Ohio-1055, 57 N.E.3d 1119, ¶ 21, quoting *State v. Johnson*, 93 Ohio St.3d 240, 2001-Ohio-1336, 754 N.E.2d 796, syllabus. The shared

criminal intent required for aiding and abetting "may be inferred from the circumstances surrounding the crime." *Johnson* at 246. "When an individual acts to aid or abet a principal in the commission of an offense, the individual and principal are equally guilty and the individual is prosecuted and punished as if he were a principal offender. *See* R.C. 2923.03(F)." *Shabazz* at ¶ 21.

{¶12} Appellant argues that his intention was to purchase marijuana and that the state failed to produce any evidence that he participated in any plan to commit aggravated burglary or felonious assault. He argues that most of the victims testified he displayed a wad of money and there was no testimony that he had a weapon. He states he was merely present when his codefendant committed aggravated burglary and felonious assault.

{¶13} Appellant claims that the state has not presented sufficient evidence to prove the crimes charged, and instead has "stacked inferences" to suggest appellant aided and abetted Robinson in committing the offenses. Appellant cites *State v. Robinson*, 8th Dist. Cuyahoga No. 96463, 2011-Ohio-6077, wherein this court recognized that in order to constitute aiding and abetting, the accused must have taken some level of active participation in the commission of the offense and that criminal intent cannot be inferred from the mere stacking of inferences. He asserts that although he was Robinson's associate, he did not participate in the commission of the offenses.

{¶14} Appellant also cites to the test for manifest weight of the evidence set forth in *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, wherein the

court set forth the distinction between sufficiency of the evidence and manifest weight of the evidence. In *Wilson*, the court recognized that "sufficiency of the evidence is a test of adequacy as to whether the evidence is legally sufficient to support a verdict as a matter of law," while "the weight of the evidence addresses the evidence's effect of inducing belief. * * * In other words, a reviewing court asks whose evidence is more persuasive -- the state's or the defendant's?" *Wilson* at ¶ 25, citing *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52, 678 N.E.2d 541.

{¶15} Appellant claims the evidence in this case shows he was merely present when the crimes were committed. It is true that "'the mere presence of an accused at the scene of a crime is not sufficient to prove, in and of itself, that the accused was an aider and abettor.'" *Johnson*, 93 Ohio St.3d 240, 2001-Ohio-1336, 754 N.E.2d 796, at 243, quoting *State v. Widner*, 69 Ohio St.2d 267, 269, 431 N.E.2d 1025 (1982). However, "[t]his rule is to protect innocent bystanders who have no connection to the crime other than simply being present at the time of its commission." *Johnson* at 243. In determining whether appellant aided and abetted the principal offender, we must consider the circumstances surrounding the crime. *See id*. at 246. "'[P]articipation in criminal intent may be inferred from presence, companionship and conduct before and after the offense is committed.'" *Id*. at 245, quoting *State v. Pruett*, 28 Ohio App.2d 29, 34, 273 N.E.2d 884 (4th Dist.1971).

{¶16} Here, the evidence demonstrates more than "mere presence" and reflects appellant was not an innocent bystander. There was ample testimony to establish the

three men arrived together, came into the house together, and left together. Appellant acknowledged he went to the house to purchase drugs. Although the testimony reflects that appellant did not show a weapon, the testimony from the victims reflects that appellant stood in the room while Robinson drew a weapon and fired multiple rounds into the bedroom where the six victims were located, and only left when shots were returned. After leaving with the other assailants and heading to the hospital, appellant directed Brick to take his vehicle to his place of work. He also lied to detectives about how and where he was shot, and changed his story several times. That appellant shared the criminal intent of the principal could be inferred from the circumstances surrounding the crime. The evidence established appellant intended to assist with the offenses.

{¶17} Upon the evidence presented, any rational trier of fact could have found that appellant acted to aid or abet the principal in the commission of the offenses and could have inferred from the surrounding circumstances that appellant shared the criminal intent of the principal. Therefore, it was not error for the trial court to deny appellant's motion for acquittal. Appellant's first assignment of error is overruled.

{¶18} Under his second assignment of error, appellant claims his trial counsel provided ineffective assistance of counsel by failing to renew his objection to allowing the state to amend Counts 4 through 8 of the indictment to add the names of the victims under Crim.R. 7(D), which he asserts increased the concurrent penalties on each count of felonious assault.

{¶19} In order to substantiate a claim of ineffective assistance of counsel, the appellant must show "(1) deficient performance by counsel, i.e., performance falling below an objective standard of reasonable representation, and (2) prejudice, i.e., a reasonable probability that but for counsel's errors, the proceeding's result would have been different." *State v. Perez*, 124 Ohio St.3d 122, 2009-Ohio-6179, 920 N.E.2d 104, ¶ 200, citing *Strickland v. Washington*, 466 U.S. 668, 687-688, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraphs two and three of the syllabus. The defendant has the burden of proving his counsel rendered ineffective assistance. *Perez* at ¶ 223.

{¶20} We find that trial counsel did not provide ineffective assistance of counsel to appellant when he refrained from insisting that the case be sent back to the grand jury for reindictment. Pursuant to Crim.R. 7(D), an indictment may be amended by the trial court at any time "provided no change is made in the name or identity of the crime charged." Here, the number of counts against appellant and the offenses charged were not changed. The only change was to include the names of the victims. It has been recognized that an amendment to an indictment that changes the name of the victim changes neither the substance nor the identity of the crime charged. *State v. Henley*, 8th Dist. Cuyahoga No. 86591, 2006-Ohio-2728, ¶ 20; *see also State v. Thompson*, 8th Dist. Cuyahoga No. 85843, 2006-Ohio-3162, ¶ 15 (recognizing the victim is not an element of the offense), citing *Dye v. Sacks*, 173 Ohio St. 422, 425, 183 N.E.2d 380 (1962).

{¶21} Accordingly, no ineffective assistance of counsel has been shown since the trial court's amendment of the indictment to include the names of additional victims was permitted under Crim.R. 7(D) because it did not change the name or identity of the crimes charged. Furthermore, appellant cannot establish any surprise or prejudice from the amendment since the pretrial discovery reflected the identity of the victims. *See Henley* at ¶ 21. Finally, even if trial counsel had insisted on presentment to the grand jury for the change in the victims' names, appellant cannot demonstrate a reasonable probability that the outcome would have been any different. Appellant's second assignment of error is overruled.

{¶22} 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, JUDGE

EILEEN T. GALLAGHER, P.J., and
LARRY A. JONES, SR., J., CONCUR