

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

:

07-2424

Appellee

:

-vs-

:

On Appeal from the
Cuyahoga County Court
of Appeals, Eighth
Appellate District Court
of Appeals
CA: 88895

MARCUS DAVIS

:

:

Appellant

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT MARCUS DAVIS

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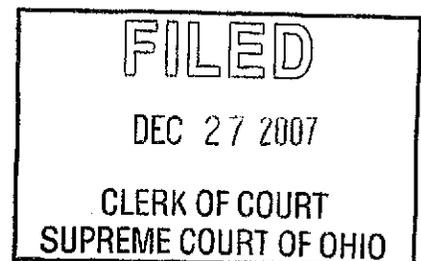


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Decision Eighth District Court of Appeals
State v. Marcus Davis (Nov. 1, 2007), Cuyahoga App. No. 88895, unreported, 2007-Ohio-5843A2

**EXPLANATION OF WHY THIS CASE INVOLVES A SUBSTANTIAL
CONSTITUTIONAL QUESTION AND AN ISSUE OF GREAT GENERAL
AND PUBLIC INTEREST:**

The Defendant-Appellant, Mr. Marcus Davis, respectfully requests that this Court accept jurisdiction over *State v. Davis*, Cuyahoga App. No. 88895, 2007 Ohio 5842 (“Opinion Below”) to consider questions of substantial import involving the omission of essential elements from the indictment and jury instructions. This issue was accepted for review by this Court on a conflict certified by the Eighth District Court of Appeals, *State v. Colon*, Case Number 2006-2139.

In the instant appeal, Mr. Davis challenges whether a conviction may be constitutionally obtained when all of the essential elements of the offense are not charged in the indictment, are not charged to the jury, and/or are not proven beyond a reasonable doubt. The Eighth District relied on its decision in *Colon*, supra, and rejected Mr. Davis’ challenge to indictment. Opinion Below at ¶¶ 34-38. In *Colon*, the Eighth District acknowledged that the crime of robbery consists of four elements: (1) knowingly; (2) committing or attempting to commit a theft offense; *while* (3) recklessly; (4) inflicting, attempting to inflict, or threatening to inflict physical harm. *Colon* at ¶ 17. Two of these essential elements—the *mens rea* elements of knowingly and recklessly—were omitted from the indictment. Notwithstanding this clear defect in the indictment, the Eighth District concluded that defendant waived any challenges to this defect because he had not raised them before the trial court. Opinion Below at ¶¶ 34-38. The Eighth District’s waiver ruling directly conflicts with the holdings of several other district courts of appeal and constitutes a marked departure from the reasoning employed by this Court in *State v. O’Brien* (1987), 30 Ohio St. 3d 122, 124-25. As noted above, Proposition of Law II which discusses this portion of the Eighth District’s decision is currently before this Court on a notice of certified conflict. Davis’ first and third propositions of law raise intrinsically related questions about the sufficiency of the

jury charge, the sufficiency of the evidence on the uncharged element, and the effectiveness of Mr. Davis' representation.

The unsettled questions raised by Mr. Davis' appeal implicate core protections afforded by the Ohio Constitution and the United States Constitution to every criminal defendant: the right to notice of all the elements of the offense charged; the right to a grand jury indictment; the right to effective counsel; and the right to be found not guilty if the State does not present legally sufficient evidence on all the elements of the offense. The propositions of law related to these fundamental rights are worthy of this Court's attention.

STATEMENT OF THE CASE

On November 8, 2005, the Cuyahoga County Grand Jury returned a three-count indictment against Mr. Marcus Davis. Count One alleged a violation of R.C. 2911.01 (aggravated robbery) and included a one and a three year firearm specification. Counts Two and Three alleged a violation of R.C. 2903.11 (felonious assault). Each count also contained one and three year firearm specifications.

Mr. Davis appears for his arraignment on November 7, 2005. At that time, he pleaded not guilty to the indictment in its entirety and the matter was assigned to the docket of the Honorable Brian J. Corrigan. The matter was pre-tried on several occasions and general discovery was exchanged. Defense counsel also filed three motions to suppress on December 1, 2005. The trial court never held hearings on any of Mr. Davis' motions to suppress.

On January 20, 2006, Mr. Davis filed a demand for discovery to produce the 911 call made in connection with this matter and compel disclosure of the medical records, if any, of the alleged victim. Three days latter, on January 23, 2006, Mr. Davis also filed a motion to compel discovery of the photo array alleged to have been used in the identification of Mr. Davis.

Trial was postponed at least twice before finally going forward on August 21, 2006. At that time, Mr. Davis executed a voluntary waiver of his right to a jury trial. The waiver was filed with the Clerk of Court and matter was called for trial.

At the conclusion of the trial, Mr. Davis was found guilty of all three counts of the indictment. At that time, Mr. Davis was referred for a pre-sentence investigation report and the matter was passed for sentencing.

At the sentencing hearing on September 21, 2006, Mr. Davis and his attorney spoke in mitigation. Defense counsel reiterated the fact that Mr. Davis was no prior felony record and asked the court to be lenient in its sentence. Mr. Davis maintained his innocence. Mr. Davis also told the court that he considered this case to be a wake-up call. Specifically, He explained:

First off, I want to start by apologizing. I'm not a bad person. I wasn't in jail and just now getting into God. I was already into God. It wasn't enough.

So I guess it's my wake-up call. I have a son, and my father, he passed away when I was 15. And I want to be there to raise my son and see his first report card.

He later told the court:

*** you're sending an innocent man to jail. This case, I'm not the type of person this case makes me look like. And everyone who knows me knows that that's not me.

Thank you for listening to what I got to say.

God bless.

The trial court then ordered Mr. Davis to serve a six-year term of imprisonment. This is the same amount of imprisonment received by Robert Johnson, the man who actually shot and wounded Mandy Soto.

STATEMENT OF FACTS

Mr. Davis' conviction is based almost exclusively on the testimony of an convicted co-defendant. The following facts give rise to this appeal.

On October 23, 2005, sometime between 2:00 and 3:00 in the afternoon, Mandy Soto was leaving work and driving down an alley near West 39th and Lucius Court. While driving through the alley Mr. Soto stopped when he noticed a box of tools. He stopped his car checked the box of tools and returned to his car.

After returning to his car, Mr. Soto noticed two men approximately ten feet away. Mr. Soto testified that one man was clearly older than the other, and, at trial, Mr. Soto referred to the two men as the "older" or the "younger" man. Mr. Soto identified Mr. Davis as the older man. Mr. Soto, using an interpreter, testified that he does not speak English.

Mr. Soto noticed that the older man, Mr. Davis, was talking to the younger man. Mr. Soto remembered that Mr. Davis appeared to be "telling [the younger man] maybe not to do anything to [Mr. Soto]." At trial, Mr. Soto had the following exchange with defense counsel:

Q. Okay. Now you testified for the prosecutor, you thought or you believed that the other [older] person was saying, "Don't do it," is that correct?

A. The body language he was using.

Q. Yes.

A. It looks that way.

Later, on re-direct, the prosecutor had the following exchange with Mr. Soto:

Q. Did the younger one look at the older one? Were they back and forth?

A. What I understand, okay, by my understanding, I think the older man was trying to tell him not to do anything, and - -

Q. Ask him - -

[Mr. Soto]. But let me finish.

[The Prosecutor]. I'm sorry, I thought you were.

A. I haven't finished.

Q. Oh, okay.

A. But the younger one did it anyway, but it looks to me like he was trying to stop him from doing it.

Nevertheless, the younger man approached and asked Mr. Soto for either "weed" or "gasoline."

The younger man then walked up to the car and touched the passenger door. The older man, Mr. Davis, remained approximately ten feet away from the car at all times.

The younger displayed a gun and then shot Mr. Soto in the shoulder. Mr. Soto did not see where either of the men went after the shooting.

The bullet went through Mr. Soto's shoulder, and the slug was later recovered from the door of Mr. Soto's car. Mr. Soto testified that he was not in pain after the shot, so he drove to his aunt's house. His aunt was not home, and Mr. Soto eventually saw a friend of his. The friend called an ambulance and the two waited for the ambulance on the street corner.

Mr. Soto was treated at the hospital and released. While at the hospital, the police conducted a cold stand involving five men, and Mr. Soto identified Mr. Davis and the gunman, Robert Johnson. Mr. Soto described the cold stand as follows:

They took me in a wheelchair, and they showed me about five guys there, and that's how it happened.

Johnson, as part of a plea agreement with the state, testified as a state's witness. At trial, Johnson testified that he met Mr. Davis through a mutual friend, Donald Whitby. Johnson explained that he met Mr. Whitby while the two were in lock-up in juvenile court.

Johnson testified that on October 23, 2005, he was at Mr. Davis' home along with Mr. Whitby and "a couple of more people." He told the prosecutor that they were sitting around "plotting to rob somebody." He then testified:

I was over there. I said I wanted to make some money. Me and Marcus was equal, the same decision. He gave me a gun. I went and robbed somebody.

Johnson explained that he and Mr. Davis walked down an alleyway where they noticed a man in a car. According to Johnson, the two men walked passed the car, looked inside, turned around and approached the passenger side of the car. According to Johnson, he and Mr. Davis were "real close" to the car and Mr. Davis was near the rear of the car "looking in the back window." Johnson also testified that he and Mr. Davis were standing immediately next to one another. Johnson then described the alleged robbery as follows:

I was on – I was on – we was both on the passenger's side. He was standing by the back window. We were standing real close, though.

I asked him [Mr. Soto] if he sold weed.

He said something in Spanish.

I put my hand in the car with the gun. I asked the dude to get to get out of the car. He wouldn't get out the car. He pulled off. And I shot him.

When asked why he shot Mr. Soto, Johnson testified, "It was a reaction. When he pulled off, my hand hit the car and it went off."

Johnson testified that, after the gunshot, he and Mr. Davis walked off and did not say a word to one another. Johnson ultimately hid the gun before returning to Mr. Whitby's house. According to Johnson, the only thing said by Mr. Davis was "[t]hat's a good lick right there."

Donald Whitby testified on behalf of Mr. Davis. Mr. Whitby testified that he was friends with both Mr. Davis and Johnson. Mr. Whitby testified that he was on the front porch while Johnson, Mr. Davis and Whitby's brother were talking. Mr. Whitby testified that he never heard any conversation about "hitting a lick," slang for committing a robbery.

Mr. Whitby and Mr. Davis lived together at Whitby's Aunt's house. Mr. Whitby never knew Mr. Davis to own or carry a gun. In fact, Mr. Whitby testified that his Aunt had a very strict policy about bringing any illicit items in to the house. In fact, Mr. Whitby was certain that if Mr. Davis ever brought a gun into the house, "[his Aunt] would find out about it."

At the close of evidence, the following facts were clear: the younger person, Johnson, was the shooter; Johnson was the only person talking or attempting to talk to Mr. Soto; and according to Mr. Soto, Mr. Davis never approached the car and appeared to stop Johnson from approaching Mr. Soto.

The trial court announced its verdict several days after the close of evidence. At that time, the court made the following factual finding:

The Court has had the opportunity now to review the evidence and its notes in this case; and notwithstanding the interpretation of the body language by the victim, the Court is going to find the testimony of the juvenile to be persuasive and find the defendant guilty of all three counts.

Relative to the firearm specification, because the state of the law with the co-actor being responsible for all the other actions of the co-actor, it becomes a three-year firearm specification.

A timely appeal was perfected. On appeal, Mr. Davis raised four assignments of error challenging the sufficiency of the evidence, the manifest weight of the evidence and the sufficiency of the indictment. The Eighth District Court of Appeals rejected all of Mr. Davis' assignments of error. This appeal follows.

LAW AND ARGUMENT

Proposition of Law I: The two judicially interpreted mens rea elements of robbery are essential elements which must be charged in the indictment, proven beyond a reasonable doubt, and found by a properly instructed jury.

Proposition of Law II: An indictment which fails to include an essential element is fatally defective, is voidable for lack of subject matter jurisdiction or for the failure to charge an offense, and may be challenged for the first time on appeal.

Proposition of Law III: A defendant receives the ineffective assistance of counsel when his attorney fails to challenge an indictment and/or object to jury instructions which omit essential elements of the offense.

With these interrelated propositions of law, Mr. Davis maintains that his indictment was fatally defective as it omitted two essential elements of robbery, that the jury instructions were defective because they did not include instructions on one of the essential elements of robbery, and that his counsel was ineffective for failing to raise objections to such deficiencies.

A. **Essential Elements of Robbery (R.C. 2911.02(A)(2))**

Mr. Davis was charged with robbery in violation of R.C. 2911.02(A)(2). This crime is comprised of four basic elements, consisting of two combinations of an *actus rea* and a *mens rea*. First, the State must prove, beyond a reasonable doubt, that the defendant *knowingly* committed or attempted to commit a theft offense. *State v. McSwain* (1992), 79 Ohio App. 3d 600, 606 (explaining that R.C. 2911.01(A)(2) incorporates the culpability requirement of the theft statute, R.C. 2913.03); *State v. Crawford* (1983), 10 Ohio App. 3d 207, paragraph one of the syllabus (same). Second, the State must prove, beyond a reasonable doubt, that the defendant *recklessly* inflicted, attempted to inflict, or threatened to inflict physical harm. *McSwain*, 79 Ohio App. 3d at 606; *Crawford*, 10 Ohio App. 3d at paragraph one of the syllabus and 209 (construing the requisite mental state in the context of aggravated robbery, R.C. 2911.01(A)).

B. Defective Indictment

Mr. Davis's robbery indictment was defective because it failed to include the *mens rea* elements of robbery. This omission deprives the trial court of jurisdiction, violates Davis's due process right to be adequately advised of the charges against him as secured by Article I, Section 16 of the Ohio Constitution and the Fourteenth Amendment of the United States Constitution, and violates his state constitutional right to a grand jury indictment under Article I, Section 10 of the Ohio Constitution.

In its opinion, the Eighth District did not disagree about the defects of the indictment. Indeed, this Court has previously made clear that an indictment charging an offense solely in the language of a statute is insufficient when a *mens rea* element has been judicially interpreted for that offense. *State v. O'Brien* (1987), 30 Ohio St. 3d 122, 124. Rather, the Eighth District concluded that such defects were waived because they were not raised before the trial court. It is this holding which is squarely before this Court in the pending notice of certified conflict.

C. Defective Jury Instruction

Although the trial court instructed the jury that the State must prove that Davis inflicted, attempted to inflict, or threatened physical harm, it failed to instruct the jury that the State must also prove that Davis acted with the culpable mental state of recklessness. The court's failure to instruct the jury on this critical element of the offense violates Davis's Sixth Amendment right to trial by jury and Fourteenth Amendment Due Process right to have all of the elements of the charge proven beyond a reasonable doubt, *Mullaney v. Wilbur* (1975), 421 U.S. 684, 704 and *Sandstrom v. Montana* (1979), 442 U.S. 510, 520-21, as well as Davis's similar rights under Sections 10 and 16, Article I of the Ohio Constitution. Because Davis's counsel failed to object

to this erroneous instruction, it is subject to plain error review. *State v. Williford* (1990), 49 Ohio St. 3d 247, 251.

The trial court's failure to instruct the jury on the essential element of recklessness was an obvious error affecting Mr. Davis's substantial rights because it lessened the State's burden and permitted a conviction regardless of whether Davis acted with the requisite mental state. In essence, the trial court incorrectly transformed the physical harm-portion of the robbery statute into a strict liability offense. Rather than having to prove that Mr. Davis recklessly inflicted physical harm, the State only had to prove Davis "inflicted harm." Given the dearth of evidence that Davis acted with the culpable mental state of recklessness, the trial court's failure to instruct on that element severely prejudiced him. A reasonable, and properly instructed, jury would have concluded that Davis actions did not manifest a "perverse disregard" of a known risk of physical harm to Woodie and that Woodie's injuries, if any, occurred when Woodie, Harris, and Davis became accidentally entangled.

D. Ineffective Assistance of Counsel

Mr. Davis received the ineffective assistance of counsel when his trial attorney failed to object to the indictment and the jury charge which omitted material elements of the offense of robbery.

Both the Sixth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution guarantee all criminal defendants the right to effective assistance of counsel. See *Gideon v. Wainwright* (1963), 372 U.S. 335; *State v. Bradley* (1989), 42 Ohio St.3d 137, 141-42. Fundamentally, "[t]he right to the effective assistance of counsel is . . . the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing." *Id.* at 656. To prevail on an ineffective assistance of counsel claim, a defendant must

establish both that counsel's performance was deficient and that such deficient performance prejudiced him so as to deprive him of a fair trial. *Strickland*, 466 U.S. at 687.

By failing to object to an indictment and a jury charge which omitted material elements of the offense, trial counsel's representation "fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. Such deficient performance prejudiced Davis because, absent counsel's errors, there is a "reasonable probability" that the result of the proceeding would have been different. *Strickland*, 466 U.S. 687-88; *State v. Hutton* (2003), 100 Ohio St. 3d 176, 183. Given the lack of evidence demonstrating that Davis's alleged infliction of harm was done with the requisite mental state, defense counsel's failure to hold the State to its burden of proving *all* the elements of the charged offense may well have led to Davis's conviction. In other words, counsel's deficiencies undermined confidence in the outcome of the trial. *See Harries v. Bell* (C.A. 6 2005), 417 F.3d 631, 639.

Proposition of Law IV: The evidence is insufficient to sustain a conviction for robbery when the record does not demonstrate that a suspected accomplice advised, hired, incited, commended or counseled the principle offender.

The Due Process Clause requires the State to prove every element of the crime charged beyond a reasonable doubt. *In re Winship* (1970), 397 U.S. 358, 364; see also *State v. McGee* (1997), 79 Ohio St. 3d 193, 196-97; *State v. Robinson* (1976), 47 Ohio St. 2d 103, 108. In this case, the State failed to prove, beyond a reasonable doubt, that Davis advised, hired, incited, commended or counseled the principle offender.

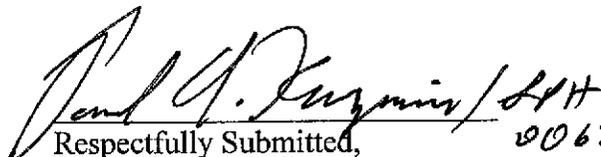
At trial, the victim maintained that Mr. Davis never tried to talk to the victim, Mr. Soto. The victim also acknowledged that Mr. Davis never even approached or attempted to approach the car. In fact, Mr. Davis was never closer than 10 feet to Mr. Soto. Further, the victim was unwavering in his insistence that Mr. Davis was trying to talk Johnson out-of the alleged

robbery. According to the victim, Mr. Davis actually tried to stop Johnson from approaching and robbing Mr. Soto. While Davis, may have used poor judgment this poor judgment does not amount to criminal activity. Here, Mr. Davis was a bystander, merely along for the ride, and his presence at the scene of the crime or association with the offender is not sufficient to prove that he was an aider and abettor. See *Sims*, supra. "This rule is to protect innocent bystanders who have no connection to the crime other than simply being present at the time of its commission." *Langford*, supra, quoting, *State v. Johnson*, 93 Ohio St. 3d 240, 2001 Ohio 1336.

As such, this Court should vacate the convictions and discharge Mr. Davis from the State's custody. Viewing the evidence in the light most favorable to the prosecution, a fact finder could find that Davis aided and abetted the principle offender. At most, it illustrates that Davis was negligent regarding the consequences of his actions.

CONCLUSION

For the foregoing reasons, Defendant-Appellant Mr. Marcus Davis respectfully asks this Court to accept jurisdiction over this matter as it presents substantial constitutional questions for review.


Respectfully Submitted, 0062932
PAUL A. KUZMINS, ESQ.

CERTIFICATE OF SERVICE

A copy of the foregoing Motion was hand-delivered upon William Mason, Cuyahoga County Prosecutor and or a member of his staff, The Justice Center - 9th Floor, 1200 Ontario Street, Cleveland, Ohio 44113 this 27th day of December, 2007.


PAUL A. KUZMINS, ESQ.
Assistant Public Defender

NOV 13 2007

Judge B. Corrigan

Court of Appeals of Ohio

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EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

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GERALD E. FUERST
CLERK OF COURTS
CUYAHOGA COUNTY

JOURNAL ENTRY AND OPINION
No. 88895

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STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MARCUS DAVIS

A514580

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-472530

BEFORE: Sweeney, P.J., Rocco, J., and Dyke, J.

RELEASED: November 1, 2007

JOURNALIZED: NOV 13 2007

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**FILED AND JOURNALIZED
PER APP. R. 22(E)**

NOV 13 2007

**GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY: [Signature] DCP.**

**ANNOUNCEMENT OF DECISION
PER APP. R. 22(B), 22(D) AND 26(A)
RECEIVED**

NOV - 1 2007

**GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY: [Signature] DCP.**

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this Court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

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**NOTICE MAILED TO COUNSEL
FOR ALL PARTIES-COSTS TAXED**

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JAMES J. SWEENEY, P.J.:

Defendant-appellant, Marcus Davis ("defendant"), appeals following his convictions and sentence for aggravated robbery and two counts of felonious assault with a three-year firearm specification. Defendant asserts that his convictions are not supported by sufficient evidence and are against the manifest weight of the evidence. Defendant also maintains he was denied due process due to an alleged defect in the indictment. For the reasons that follow, we affirm.

Defendant waived his right to a jury trial in open court and the matter proceeded to a bench trial. Defendant was indicted, along with Robert Johnson, for aggravated robbery, and two counts of felonious assault, all counts included firearm specifications. The charges stemmed from an incident on October 23, 2005, where Johnson shot Mandy Soto in an alley in Cleveland.

Mr. Soto does not speak English and his testimony was obtained through the use of an interpreter. Soto testified that on October 23, 2005 he was driving home from work when he stopped in an alley to look at a tool box. He noticed an older and a younger man. He identified defendant as the older man and Johnson as the younger man.

Soto saw defendant talking to Johnson. Although he thought defendant might have been telling Johnson "maybe not to do anything to" him, he also noticed that defendant was relaxed or calm and Johnson was nervous. Because

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Soto does not understand English, he based his impressions on the body language the men were using.

Johnson walked up to the car, Soto accelerated the car, Johnson's gun then fired and hit Soto in the shoulder. Soto drove away and was later taken to the hospital by ambulance. Soto identified Johnson and defendant from a cold stand.

Johnson testified at trial and stated that he was at defendant's home on October 23, 2005. He and defendant were plotting to rob somebody. He stated that he and defendant were "equal" in their decision to commit a robbery. Johnson claimed that defendant gave him a gun and they went to rob someone. Johnson stated that defendant referred to the victim, Mr. Soto, as "that's a good lick right there." Johnson then proceeded to ask Soto if he sold weed. Soto responded by saying something in Spanish. Johnson told Soto to get out of the car but Soto drove off and Johnson shot him.

Donald Whitby testified on behalf of the defense. Whitby lived with defendant and was friends with both Johnson and defendant. He confirmed that both were present at his aunt's house (where Whitby and defendant lived) on October 23, 2005. He did not hear any conversation about robbery and never knew defendant to own or carry a gun.

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Defendant was found guilty of all counts and the three-year gun specification.

We will address defendant's assignments of error in the order asserted and together where it is appropriate for discussion.

"I. The trial court's verdict is not supported by sufficient evidence where the State failed to present any credible evidence that Mr. Davis advised, hired, incited, commanded or counseled the principle [sic] offender."

"An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. 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* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus.

Defendant maintains that the record lacks any evidence that he assisted, incited, or encouraged Johnson to commit the offenses. The State argued that defendant acted in complicity with Johnson.

R.C. 2923.03 prohibits complicity with others to commit crimes and provides as follows:

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"(A) No person, acting with the kind of culpability required for the commission of an offense, shall do any of the following:

"(2) Aid or abet another in committing 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 the principal offender. A charge of complicity may be stated in terms of this section, or in the terms of the principal offense."

A person aids and abets another when he supports, assists, encourages, cooperates with, advises, or incites the principal in the commission of the crime, and shares the criminal intent of the principal. *State v. Johnson* (2001), 93 Ohio St.3d 240, 245-246, 2001-Ohio-1336. Such intent may be inferred from the circumstances surrounding the crime. *Id.*

Contrary to defendant's assertion, the record does not reflect his mere presence at the scene. Rather, the testimony of the witnesses establishes some evidence that he supported, encouraged, advised, and incited Johnson in the commission of the crimes. At trial, the State presented evidence that defendant planned to rob someone with Johnson. Johnson testified that defendant gave him the gun and informed him that Soto would be a good "lick," i.e., robbery

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victim. Although Soto believed defendant might have been trying to stop Johnson, he could not understand what they were saying. Defendant did not stop Johnson who proceeded to shoot Soto. When Soto drove off, defendant was still with Johnson.

When viewed in the light most favorable to the State, the record contains sufficient evidence that defendant aided and abetted Johnson in the robbery and felonious assault with gun specifications of Mandy Soto and the trial court properly denied his motion for judgment of acquittal.

Assignment of Error I is overruled.

"II. The trial court's verdict is against the manifest weight of the evidence where he relies almost exclusively on the testimony of the co-offender.

"III. Appellant's convictions for the gun specifications are against the manifest weight of the evidence where the State failed to present evidence that the appellant shared the same mens rea as the principal offender."

A manifest weight challenge questions whether the State has met its burden of persuasion. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 390. When a defendant asserts that his conviction is against the manifest weight of the evidence, an appellate 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 the evidence, the fact finder clearly

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lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. *Id.* at 387.

Defendant believes that the trial court erred by accepting the testimony of co-defendant Johnson.

The fact finder, here the trial court, was free to accept or reject any or all of the testimony of the witnesses and assess the credibility of those witnesses. *State v. DeHass* (1967), 10 Ohio St.2d 230. "Moreover, the law presumes that in a bench trial the court considers only relevant, material, and competent evidence." *State v. Bays*, 87 Ohio St.3d 15, 27, citing *State v. Post* (1987), 32 Ohio St.3d 380, 384. Accordingly, we presume the trial court was well aware of the fact that the testimony of co-offenders is subject to grave suspicion and is required to be weighed with great caution. E.g., R.C. 2923.03. The trial court's explanation of its findings are both reasonable and supported by evidence in the record.

Contrary to defendant's opinion, Johnson's testimony is not in conflict with the victim's. Although Soto thought defendant might be trying to stop, he admittedly does not comprehend English. Soto confirmed that the men were talking but did not know what they were saying. Soto merely relayed his interpretation of the men's body language. To that end, Soto also testified that Johnson seemed nervous, while defendant appeared calm.

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Secondly, defendant maintains that the manifest weight of the evidence establishes that he abandoned any criminal purpose, which is an affirmative defense to complicity.

R.C. 2923.03(E) provides:

"It is an affirmative defense to a charge under this section that, prior to the commission of or attempt to commit the offense, the actor terminated his complicity, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose."

To support his position, defendant again relies on Soto's interpretation of the men's body language. Because Soto thought defendant might have been trying to stop Johnson, defendant believes this establishes that defendant had abandoned any involvement in the offenses. This evidence, standing alone, is too tenuous to establish a complete and voluntary renunciation of criminal purpose. Primarily, Soto does not know for a fact that defendant did or said anything to try and stop Johnson. Soto does not understand English and could only confirm that the two men were talking. Even if defendant did tell Johnson not to do anything to Soto, this is not enough. Simply telling someone not to commit a crime does not satisfy the degree of proof required to establish the affirmative defense of abandonment. E.g., *State v. Washington* (May 31, 1991), Lucas App. No. L-90-199.

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Assignments of Error II and III are overruled.

"IV. Appellant's State Constitutional right to a Grand Jury indictment and State and Federal Constitutional rights to due process were violated when his indictment omitted an element of the offense."

Defendant concedes that he did not raise this issue below. This Court has held that a failure to raise this issue at the trial court level constitutes a waiver of it for purposes of appeal. *State v. Colon*, Cuyahoga App. 87499, 2006-Ohio-5335, ¶¶ 19-20, which provides in relevant part as follows:

"[A]n indictment charging an offense solely in the language of a statute is insufficient when a specific intent element has been judicially interpreted for that offense.' *State v. O'Brien* (1987), 30 Ohio St.3d 122, 124.

"Under Crim.R. 12(C)(2), defects in an indictment are waived if not raised before trial, except failure to show jurisdiction in the court or to charge an offense, which may be raised at any time during the pendency of the proceeding. Appellant here did not raise this issue at any time during the pendency of the proceedings before the trial court. Had he raised the issue in the trial court, the state could have amended the indictment to include the mens rea elements. Crim.R. 7(D); *O'Brien*, 32 Ohio St.3d at 125-26. Therefore, he has waived this argument on appeal. *State v. Davis*, Ashland App. No. 03COA016, 2004-Ohio-2255, at 48." *Id.*

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Adhering to our precedent in *Colon*, we overrule this assignment of error on the basis that defendant has waived this argument by not raising it below.

Assignment of Error IV is overruled.

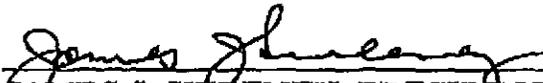
Judgment affirmed.

It is ordered that appellee recover from appellant its 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 Court of Common Pleas 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, PRESIDING JUDGE

KENNETH A. ROCCO, J., and
ANN DYKE, J., CONCUR

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