

IN THE SUPREME COURT OF OHIO
2009

STATE OF OHIO,

Plaintiff-Appellee,

-vs-

MENTAE HUMPHREY,

Defendant-Appellant.

Case No. 2009-129

On Appeal from the
Franklin County Court
of Appeals, Tenth
Appellate District

Court of Appeals
Case No. 07AP-837

MEMORANDUM OF PLAINTIFF-APPELLEE OPPOSING JURISDICTION

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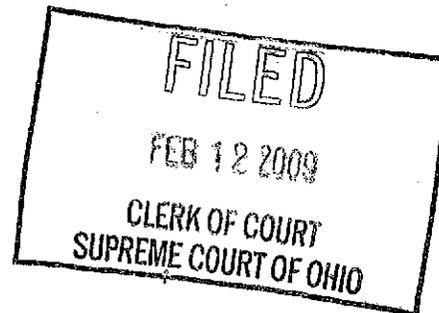


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EXPLANATION OF WHY THIS COURT SHOULD DECLINE JURISDICTION

Defendant's two propositions of law present no questions of such constitutional substance or of such great public interest as would warrant further review by this Court. Defendant does not seek to expand, overrule, or extend existing law, but rather raises run-of-the-mill hearsay and sufficiency-of-the-evidence claims. Thus, any ruling from this Court on either proposition of law would have minimal impact beyond the narrow facts of this case.

Even if this Court was inclined to review defendant's hearsay argument, this case would be a poor vehicle to do so. The Tenth District concluded that the detective's testimony regarding the Crime Stopper's tip was harmless, because "there was overwhelming evidence of appellant's guilt." Opinion, at ¶¶15-16. On this issue, the Tenth District ultimately held that "even if the trial court erred by permitting Detective McCoskey to read the contents of the crimestoppers report to the jury, such error was harmless, as there was overwhelming evidence of appellant's guilt, and there was no reasonable probability that the error contributed to appellant's conviction." Id. at ¶22.

Although he does not fully develop the argument, defendant's memorandum references in passing the detective's testimony regarding defendant's involvement in other crimes. (Memo, 7) But on this issue, the Tenth District noted that defendant raised no objection at trial, thereby forfeiting all but plain error. Id. at ¶25. The Court again concluded that "there was overwhelming evidence of [defendant's] guilt." Id. at ¶26.

Accordingly, the State respectfully submitted that jurisdiction should be declined.

STATEMENT OF THE CASE AND FACTS

Defendant was indicted on one count of aggravated murder, one count of murder, one count of aggravated robbery, one count of attempted murder, and one count of improperly discharging a weapon into or at a habitation or school. All counts carried a firearm specification. The case proceeded to trial, where the following evidence was adduced:

On April 13, 2006, Kenyatta Banks, his friend Javon Redman, and several others were playing football in a field on Matuka Drive. At some point that afternoon, an unidentified individual came to the field looking to sell a gun. Javon testified that the gun was small—either a .22 or a .25 caliber. Kenyatta testified that the gun was a .25 caliber semi-automatic and was chrome.

The individual eventually hid the gun in some nearby bushes and joined the football game. As the individual was playing football, Kenyatta—without the individual's knowledge—called defendant and told him to come to the field and retrieve the gun from the bushes, which defendant did. Defendant agreed to give Kenyatta \$30 for the gun.

Later that evening, Milagros Munguia and her brother Juan arrived at their home on Chaumonte Avenue. The two had returned from operating the family's mobile taco stand. After Juan parked the taco stand in front of the house, Milagros walked to the front door and started talking to her other brother Rigoberto, at which point both Milagros and Rigoberto heard Juan scream for help. Milagros could hear that Juan was in pain—"he was desperate."

Rigoberto ran toward Juan and saw two African-American individuals fighting with him on the sidewalk. As Rigoberto approached, one of the individuals fled, while

the other continued fighting with Juan. Rigoberto joined in the affray, and the individual still fighting with Juan punched Rigoberto in the face. Juan started to overpower this individual—but the individual pulled out a gun, shot Juan in the chest, and ran away. While running, the individual fired at Milagros, who by that point had come outside through the garage door. The bullet missed Milagros, but went through the garage door and struck a mirror hanging on a wall inside the house.

Rigoberto was shown a photo array in mid-September 2006 and stated that defendant's photograph "looks like" the individual who shot Juan but was "not sure." But at trial, after seeing defendant's entire body in person—as opposed to the small black-and-white photograph in the array—Rigoberto was "a hundred percent" and "totally" sure that defendant was the shooter. Rigoberto was shown another photo array that included a photograph of Kenyatta but did not identify Kenyatta as being involved in the shooting.

Kenyatta also testified about the events surrounding the shooting. He and his friend Zack were walking in the area to meet Zack's brother, who was going to drive them to a girl's house. While walking toward Fox Chapel Drive, Kenyatta called defendant and asked if he had the \$30 he owed for the gun. Defendant answered that he had the money and that he was walking down Fox Chapel. The two agreed to meet on Fox Chapel.

Once Kenyatta turned on Fox Chapel, he saw defendant and four or five other individuals. At this point, defendant and another individual ran across a field adjacent to the house on the corner of Fox Chapel and Chaumonte. Defendant then started "wrestling" with a Hispanic individual, but Kenyatta thought they were just "playing

around.” Defendant shot the Hispanic individual, then fired at a group of people who had run out of the house. Defendant and his companions ran away.

Kenyatta saw the gun in defendant’s hand and saw defendant pull the trigger. The gun appeared to be the same .25 caliber gun that defendant retrieved earlier that day from the bushes at the football game.

At this point, Zack’s brother had arrived at the scene, and Kenyatta and Zack got into his car and left the area. In the car, Kenyatta called defendant. Defendant told Kenyatta that he had “popped someone” and that he had “seen the Mexican with a pouch of money” but was unable to get any of the money. Kenyatta told defendant that he no longer wanted the \$30 for the gun.

Javon was also in the area at the time of the shooting. Javon testified that he was walking on Fox Chapel when he saw a group of five or six men, one of whom was defendant. Defendant and another individual in the group ran toward a taco stand parked in the street. Javon heard someone yelling in a foreign language, followed by gunshots. Although Javon did not see who fired the shots, he saw defendant with a chrome gun in his hand.

Juan eventually died of a gunshot wound to the chest. The two spent shell casings found at the scene were both .25 caliber. Two bullet fragments were also found—one was .25 caliber, while the caliber of the other was undeterminable.

The next morning, Kenyatta heard on the news that Juan had died. Kenyatta called defendant, who had also learned about Juan’s death and was “salty” (angry) and scared. Defendant told Kenyatta that he wanted to get rid of the gun by selling it. So Kenyatta called Javon, figuring that Javon could arrange a sale with someone on the

North Side—far enough away that the gun would not be linked to the shooting. Kenyatta and defendant went to Javon's house, and, after making some phone calls, Javon found someone on the North Side willing to buy the gun. Defendant sold the gun to the buyer later that day.

Sometime after this point, Javon heard defendant bragging about the shooting to other people in the neighborhood.

Detective James McCoskey testified that in mid-July 2006 police received a Crime Stoppers tip stating that "Minte" and another individual were involved in the shooting. McCoskey then contacted the police department's gang unit to establish an identity for "Minte"—the gang unit recognized the name as possibly referring to defendant.

Later, McCoskey learned about a Whitehall robbery in which both defendant and Kenyatta were suspects. McCoskey believed that the Whitehall robbery and Juan's death were related, because he received information that "they were targeting Mexicans or Hispanics because they knew that most of them were illegal and they would not contact the police."

Despite these two leads, McCoskey lacked enough evidence to file charges against anyone. In September 2006, however, the Prosecutor's Office approached Kenyatta—who was charged as a juvenile and was facing a bindover for the Whitehall robbery—to see if he knew anything about the shooting. Although Kenyatta initially refused to cooperate, he later agreed after learning that defendant had "snitched" on him for the Whitehall robbery. In exchange for Kenyatta's cooperation, the State agreed not to seek the bindover. Kenyatta also explained Javon's role in selling the gun. The

Prosecutor's Office approached Javon, who was awaiting sentencing after having pleaded guilty to third-degree-felony robbery (apparently not the Whitehall robbery). In exchange for Javon's cooperation, the State agreed to recommend community control.

It was not until after speaking to Kenyatta in September 2006 that McCoskey felt he had probable cause to obtain an arrest warrant for defendant. Kenyatta's assistance also prompted McCoskey to show Rigoberto the photo arrays with defendant's and Kenyatta's photographs.

Defendant was convicted of murder, aggravated robbery, attempted murder, and improperly discharging a firearm at or into a habitation or school, along with all accompanying firearm specifications. The trial court sentenced defendant to a total of 26 years to life in prison. The Tenth District affirmed the trial court's judgment in a decision released December 4, 2008. Defendant now seeks discretionary review.

ARGUMENT

Proposition of Law No. I: Error is harmless beyond a reasonable doubt if the remaining evidence, standing alone, constitutes overwhelming proof of the defendant's guilt.

Detective's McCoskey's testimony regarding the Crime Stoppers tip was admissible for a non-hearsay purpose—that is, to explain how defendant became a suspect in the shooting. See, generally, *State v. Blevins* (1987), 36 Ohio App.3d 147.

Moreover, the Tenth District correctly concluded that McCoskey's testimony—even if error—was harmless beyond a reasonable doubt. Error in a criminal proceeding is harmless if there is no reasonable possibility that the error may have contributed to the accused's conviction. *Chapman v. California* (1967), 386 U.S. 18, 23-24. In order to hold an error harmless, a reviewing court must be able to conclude that the error was

harmless beyond a reasonable doubt. *Id.* at 24. Error is harmless beyond a reasonable doubt if the remaining evidence, standing alone, constitutes overwhelming proof of the defendant's guilt. *State v. Williams* (1983), 6 Ohio St.3d 281, paragraph five of the syllabus.

Here, the evidence of defendant's guilt was overwhelming. Both Kenyatta and Rigoberto identified defendant as the one who shot Juan. Rigoberto's identification was especially compelling evidence. Rigoberto received no consideration from the State in exchange for his testimony. Also, having joined in the affray between defendant and Juan, Rigoberto was only one or two feet away from defendant and had ample opportunity to observe him. *State v. Satterwhite*, 10th Dist. Nos. 04AP-964, 965, 2005-Ohio-2823, ¶35 (noting that witnesses came in close contact with the defendant and gave descriptive accounts of their encounter with the defendant).

At trial, Rigoberto was "a hundred percent" and "totally" sure that defendant was the shooter. Although he was not certain at the time, Rigoberto identified defendant in the photo array. Rigoberto's unwillingness to conclusively identify defendant from the black-and-white photo array does nothing to undermine his unequivocal in-court identification. *Satterwhite*, at ¶38 (witness's inability to identify defendant from black-and-white photo array does not discount in-court identification). Rather, by qualifying his photo-array identification, Rigoberto was being a conscientious witness who was withholding final judgment until she saw the shooter in person. When Rigoberto viewed defendant in person at trial, he "was confident in [his] identification." *State v. Johnson*, 163 Ohio App.3d 132, 2005-Ohio-4243, ¶57.

Furthermore, Javon's testimony corroborated Kenyatta's and Rigoberto's identifications. Although Javon did not see defendant shoot Juan, he saw defendant with a chrome gun in his hand immediately after the shooting. And while unable to identify the shooter, Milagros testified that the shooter was wearing black pants and a white shirt—the same clothing description that Rigoberto gave.

In addition, both Kenyatta and Javon testified that defendant made incriminating statements after the shooting. Plus, both witnesses testified regarding their efforts to help defendant sell the gun the next day. Given all this evidence, defendant fails to show that the outcome of the trial clearly would have been different without McCoskey's testimony that defendant became a suspect as a result of the Crime Stoppers tip.

To the extent defendant's first proposition of law challenges McCoskey's testimony regarding defendant's involvement in other crimes, defendant failed object to this testimony, thereby forfeiting all but plain error. Crim.R. 52(B). Defendant cannot show plain error, because the testimony was admissible under Evid.R. 404(B) to prove motive and identity, and because—as explained above—the evidence of defendant's guilt was overwhelming.

For the foregoing reasons, defendant's first proposition of law warrants no further review.

Proposition of Law No. II: 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.

Defendant's second proposition of law claims that the evidence was insufficient to convict him of murder and attempted murder. The issue of sufficiency of the evidence presents a purely legal question for the court regarding the adequacy of the evidence.

State v. Thompkins (1997), 78 Ohio St.3d 380, 386. In judging the sufficiency of the evidence, the following test applies:

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, following *Jackson v. Virginia* (1979), 443 U.S. 307. "This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson*, 443 U.S. at 319. The standard of review for a Crim.R. 29 motion is identical to the standard used in testing the sufficiency of the evidence. *State v. Ready* (2001), 143 Ohio App.3d 748, 759.

Construing the evidence in a light most favorable to the State—particularly Kenyatta's and Rigoberto's identifications of defendant as the one who shot Juan—a rational trier of fact could have found defendant guilty of murdering Juan. A rational jury

also could have found that defendant attempted to kill Milagros. *State v. Sevilla*, 10th Dist. No. 06AP-954, 2007-Ohio-2789, ¶10 (jury may infer purpose to kill when a defendant points a firearm and fires it in the direction of another person).

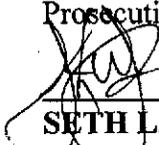
For the foregoing reasons, defendant's second proposition of law warrants no further review.

CONCLUSION

For the foregoing reasons, the State respectfully submits that the within appeal presents no questions of such constitutional substance or of such great public interest as would warrant further review by this Court. It is respectfully submitted that jurisdiction should be declined.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent by regular U.S. Mail, this day, February 12, 2009, to Mentae Humphrey, #559-055, Ross Correctional Institution, P.O. Box 7010, Chillicothe, Ohio 45601.



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