ORIGINAL

NO. 2011-1785

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO
NO. 95807

STATE OF OHIO

Plaintiff-Appellee,

-vs-

RAYMOND BOLAN

Defendant-Appellant

MEMORANDUM IN RESPONSE OF APPELLEE STATE OF OHIO

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TABLE OF CONTENTS

WHY THIS FELONY CASE IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION 1

STATEMENT OF THE CASE AND FACTS 3

LAW AND ARGUMENT 6

Proposition Of Law I: A Defendant Waives His Sixth Amendment Right To A Public Trial When The Defense Agrees To The Closure Of The Courtroom On The Record, Gives Input As To How The Closure Should Be Conducted, And Agrees To Waive Any Prejudice. 6

1. Legal standard for a waiver of the right to a public trial 6

2. Any error resulting from the closure of the courtroom was invited by the defense. 7

Proposition Of Law II: A Trial Court Does Not Abuse Its Discretion By Denying A Defendant's Crim.R. 33 Motion For A New Trial Based On A Claim Of Newly Discovered Evidence Where The Evidence Was Known To Trial Counsel Prior To Trial And Where There Is Strong Reason To Doubt The Credibility Of The New Testimony 8

1. Legal standard for a Crim.R. 33 motion for new trial 8

2. The testimony proffered by Appellant is not credible and should be viewed with the utmost suspicion 10

3. If the witness' new statements were not a recantation, then they do not constitute new evidence justifying a Crim.R. 33 hearing 11

CONCLUSION 12

CERTIFICATE OF SERVICE 13

WHY THIS FELONY CASE IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION

Defendant-Appellant Raymond Bolan ("Appellant") has not demonstrated any compelling or meritorious reasons why his propositions of law rise to the level of substantial constitutional questions or issues of great public or general interest.

Appellant first argues that the trial court violated his Sixth Amendment right to a public trial by closing the courtroom for the testimony of two state's witnesses. Appellant claims that because the violation of the right to a public trial is considered structural error, and therefore not subject to harmless error analysis, it cannot be waived by a mere failure to object to the closure. Appellant claims that this Honorable Court's decision in *State v. Drummond*, 111 Ohio St.3d 14, 2006-Ohio-5084, confused the state of law regarding the waiver of structural error by holding that a defendant's failure to object to the closing of a courtroom constitutes a waiver of the right to a public trial. *Id.* at ¶ 59. Appellant argues that the trial court should be required to engage in a colloquy with a defendant regarding the validity of his waiver before any such closure is ordered.

An examination of the record makes clear, however, that this case not does involve a mere failure to object by Appellant. Defense counsel affirmatively agreed to the closure on the record, gave input as to how the closure should be conducted, and agreed to waive any prejudice that might result. The courtroom was also closed for the testimony of a second witness at Appellant's request. On the basis of these facts, it is clear that Appellant sought and benefitted from the closing of the

courtroom, and that there is no basis for him to now argue that his waiver was invalid. Nor is there any requirement in Ohio law that the trial court engage in any kind of colloquy with a defendant before accepting his request for the closing of a courtroom. Because the defendant waived his right to a public trial for the testimony of those two witnesses, Appellant's proposition of law lacks merit and should be overruled.

In his second proposition of law, Appellant argues that the trial court erred by denying his Crim.R. 33 motion for a new trial without holding an evidentiary hearing. Appellant points to the statements of Carlyeliea Benson as new evidence that should have mandated a hearing on his motion. Benson's original description of the shooter given to police was inconsistent with respect to some details with the description given by other state's witnesses, even though she had likewise identified the shooter as "Ray Ray." Two days after the jury returned a verdict of guilty, Benson called the prosecutor to say that Appellant was not the shooter.

The Eighth District properly applied existing law to this question by holding that newly discovered evidence recanting testimony should be looked upon with the utmost suspicion. A new trial should be granted only when the court is reasonably satisfied that the trial testimony given by a material witness was false. *State v. Germany* (Sep. 30, 1993), 8th Dist. No. 63568, at 6, quoting *United States v. Lewis* (C.A.6, 1964), 338 F.2d 137, 139. There was strong reason for the trial court to conclude that Benson's new statements were not credible. Benson's statement only changed after she had notified prosecutors that she was frightened because she had

been chased by several of Appellant's relatives, one of whom had a gun. Her call to prosecutors came nearly two years after the shooting, and she was unwilling to come into court to testify.

Appellant argues in his memorandum in support of jurisdiction that Benson's statements were not recantations at all, but were rather consistent with her original description of the shooter that simply differed from that given by other witnesses. In that situation, however, Appellant's Crim.R. 33 motion must fail because of this Honorable Court's holding in *State v. Petro* (1947), 148 Ohio St. 505, 76 N.E.2d 370, that a motion for a new trial based upon a claim of newly discovered evidence requires the defendant to show that the new evidence was discovered after the trial, and that it could not in the exercise of due diligence have been discovered before the trial. Appellant was not only aware of Benson's testimony well in advance of trial, but he also attempted to call her to testify at trial as an exculpatory eyewitness. Through no fault of the trial court, Benson failed to appear to testify. This is not new evidence that would justify a Crim.R. 33 hearing.

The State therefore respectfully requests that this Honorable Court decline jurisdiction of the propositions of law raised by Appellant.

STATEMENT OF THE CASE AND FACTS

Appellant Raymond Bolan shot and killed Jerome Fears on November 4, 2008. The Cuyahoga County Grand Jury charged Bolan in a five-count indictment on the following counts: Aggravated Murder under R.C. 2901.01(A), purposeful killing with firearm and mass murder specifications, Murder under R.C. 2903.02(B),

proximate result of a felony with firearm specifications, Felonious Assault under R.C. 2903.11(A)(1), with firearm specifications, Attempted Murder under R.C. 2923.02/2903.02(A), with firearm specifications, and Felonious Assault under R.C. 2903.11(A)(2), with firearm specifications. The State voluntarily dismissed the capital specifications prior to trial.

The Eighth District's opinion in *State v. Bolan*, 8th Dist. No. 95807, 2011-Ohio-4501, set forth a statement of the case and relevant facts, which the State adopts as follows:

> On November 4, 2008, Fears and Wheeler were walking on Central Avenue in Cleveland, Ohio. They were in the CMHA housing projects on their way to Wheeler's brother's house, when they encountered a group of males gathered on the sidewalk. Bolan, who was one of the males in the group, told Fears to "take off his hoodie. Nobody can be walking with hoodies around here." Fears took his hoodie off and continued walking with Wheeler. Bolan then asked the group of males, "who got a hammer?" One of the males gave Bolan a gun. Wheeler looked back twice and observed Bolan pointing the gun at him and Fears, while they continued walking. Bolan then fired the gun at them six times. Wheeler ran to his brother's house and did not see what happened to Fears, who was shot in the back and died on the scene. Wheeler testified that he has seen Bolan many times before, but did not know his name. He testified that he described the shooter to Fears's girlfriend, who told him "that's Ray Ray."
>
> Shortly thereafter, Cleveland and CMHA police officers arrived on the scene. Detective William Higginbottham (Higginbottham) of the CMHA Police Department testified that he responded to a call of shots fired in the 2700 block area of Central Avenue. A female on the scene advised Higginbottham that Wheeler was with Fears when the shooting occurred. She then took Higginbottham to see Wheeler. Higginbottham spoke with Wheeler and relayed this information to Detective Joselito Sandoval (Sandoval) of the Cleveland Police Department.
>
> Sandoval testified that he initially interviewed Wheeler in a marked zone car on the night of the incident and took Wheeler's formal

> statement at the police station in December 2008. On the night of the incident, Wheeler told Sandoval that he did not know the names of any of the males in the group. He described the shooter as a black male in his mid to upper 20's, approximately 5'9", "thin build but cocky," wearing a white hoodie, blue jeans, and prescription glasses. At the station, he described the shooter as "a black male about 21 years old. He is about 5 foot 9 inches tall, and has a muscular build. He has a low haircut, and his face is clean shaven. I think he has tattoos on his arms, and wears prescription glasses every time I've seen him. He was wearing blue jeans, a pullover type white hoodie, with gold lettering on the front, and I think boots." Sandoval testified that Wheeler identified "Ray Ray" (Bolan) as the shooter from the photo array given to him.
>
> Helen Ogletree (Ogletree), who testified outside the presence of the public, stated that on the night of November 4, 2008, she heard gunshots, so she looked out her window and noticed someone laying on the ground. She then went outside and observed Fears's body on the ground and Bolan standing near him, with a gun in his hand. She also observed another unknown male standing with Bolan, but she did not know who he was. Ogletree further testified that she told Fears's girlfriend that Bolan killed Fears. Ogletree did not speak with the police on the night of the incident. During his investigation, Sandoval obtained Ogletree's name and contacted her. Ogletree gave her statement to the police in July 2009. She described Bolan as "a black male, * * * in his 20s * * * big and husky and musclebound, like he just got out of the joint. He wears dark framed glasses and has brush waves in his short hair. He has a lot of tattoos on his arms and chest." Sandoval testified that Ogletree identified "Ray Ray" as the shooter from the photo array given to her.
>
> DNA testing on six shell casings found at the scene revealed a mixture of DNA, which meant that more than one person's DNA was on the casings. The DNA expert testified that "Bolan cannot be excluded as a possible contributor to the partial mixture profile obtained from [the shell casings.]"

Id. at ¶¶ 3-7. The jury returned a verdict of guilty of all charges and specifications. The trial court sentenced Appellant to an aggregate of 36 years to life imprisonment. On direct appeal, the Eighth District rejected Appellant's

assignments of error and affirmed his convictions, remanding to the trial court for resentencing on an issue of allied offenses.

LAW AND ARGUMENT

Proposition Of Law No. I: A Defendant Waives His Sixth Amendment Right To A Public Trial When The Defense Agrees To The Closure Of The Courtroom On The Record, Gives Input As To How The Closure Should Be Conducted, And Agrees To Waive Any Prejudice.

In his first proposition of law, Appellant argues that his Sixth Amendment right to a public trial was violated when the trial court closed the courtroom for the testimony of two state's witnesses. Specifically, he argues that trial counsel's agreement to waive his right to a public trial was not sufficient because a violation of the right to a public trial is structural error that requires certain findings to be made on the record.

1. Legal standard for a waiver of the right to a public trial.

It is not necessary for this Honorable Court to resolve any issue with regards to whether a defendant's failure to object constitutes a valid waiver of the right to a public trial. Ohio law is clear that the right to a public trial cannot be waived by a defendant's silence. *State v. Bethel*, 111 Ohio St.3d 416, 2006-Ohio-4853, at ¶ 81. But this is not a case involving silence or a mere failure to object. Defense counsel affirmatively agreed to the closure on the record, gave input as to how the closure should be conducted, and agreed to waive any prejudice that might result. (Tr. 632-633). "Such circumstances dispel any reasonable claim of prejudice to this defendant and strongly indicate that this order was made for the benefit of the

defense and with its active support." *State v. Bayless* (1976), 48 Ohio St.2d 73, 110, 357 N.E.2d 1035. The issue of whether a court-ordered closure in the face of defendant's silence is sufficient to waive his Sixth Amendment right is not before this Court in this case. This case involves an explicit waiver given on the record that was sufficient to waive the Sixth Amendment right to a public trial during Ogletree and Smiley's testimony.

While *Bethel* holds that the right to a public trial cannot be waived by silence, this Honorable Court also indicated in *Bethel* that nothing in that case showed that the defense consented to the closure. *Bethel*, at ¶ 81, citing *State v. Bayless*, supra (closure of the courtroom "which the judge stated, without contradiction, to have been made with the consent of counsel, stands on a very different footing from one which was merely not objected to. It comes near to being an order on the defendant's own motion."). Additionally, defense counsel further requested that the courtroom be closed during the testimony of another witness, Arthur Smiley. *Bolan*, at ¶ 63. In light of the full record, the facts in this case establish the defendant's waiver of his right to a public trial.

2. Any error resulting from the closure of the courtroom was invited by the defense.

Even if the record were not sufficient to establish waiver, Appellant's argument that these actions violated his right to a public trial could only be considered invited error. Under the doctrine of invited error, "[a] party cannot take advantage of an error he invited or induced." *State v. Cassano*, 96 Ohio St.3d 94, 105, 2002-Ohio-3751, at ¶ 64 (reversal not required where the trial court closed the

courtroom for a suppression hearing upon request of defense counsel), quoting *State v. Seiber* (1990), 56 Ohio St.3d 4, 17, 564 N.E.2d 408. For defense counsel to agree to the closure of the courtroom, give active input as to how the closure should be conducted, and agree to waive prejudice, only to then argue that this violated his Sixth Amendment right to a public trial, would be the epitome of attempting to benefit from an error that he himself invited or induced. Having pushed this rock all the way to the top of the hill, Appellant cannot now complain that he is alone at the summit.

Based on the foregoing, Appellant's first proposition of law lacks merit and warrants no further review by this Honorable Court.

Proposition Of Law No. II: A Trial Court Does Not Abuse Its Discretion By Denying A Defendant's Crim.R. 33 Motion For A New Trial Based On A Claim Of Newly Discovered Evidence Where The Evidence Was Known To Trial Counsel Prior To Trial And Where There Is Strong Reason To Doubt The Credibility Of The New Testimony.

In his second proposition of law, Appellant argues that the trial court erred by refusing to hold an evidentiary hearing on Appellant's motion for a new trial under Crim.R. 33(A)(6). Specifically, Appellant argues that newly discovered evidence from a witness who came forward after trial claiming Appellant was not the shooter mandated that the trial court conduct the evidentiary hearing to assess the credibility of this witness.

1. Legal standard for a Crim.R. 33 motion for new trial.

This Honorable Court held in *State v. Petro* (1947), 148 Ohio St. 505, 76 N.E.2d 370, that in order to obtain a new trial based upon newly discovered

evidence, a defendant must show that the new evidence (1) discloses a strong probability that it will change the result if a new trial is granted, (2) was discovered after the trial, (3) is such as could not in the exercise of due diligence have been discovered before the trial, (4) is material to the issues, (5) is not merely cumulative to the former evidence, and (6) does not merely impeach or contradict the former evidence. *Id.* at 507-508. It is not enough for a trial court to conclude that newly discovered evidence discloses a possibility that it will change the result in a new trial if the jury believes that the new evidence is more persuasive than testimony given by eyewitnesses. *State v. Luckett* (July 17, 2001), 8th Dist. No. 77527, 144 Ohio App.3d 648, 656, 761 N.E.2d 105. Rather, there must be a "strong probability" that a new trial "would result" in a different outcome. *Id.*

"A reviewing court will not disturb a trial court's decision granting or denying a Crim.R. 33 motion for new trial absent an abuse of discretion." *State v. LaMar*, 95 Ohio St.3d 181, 201, 2002-Ohio-2128, 767 N.E.2d 166. Contrary to appellant's assertion, the decision whether to hold an evidentiary hearing is discretionary and not mandatory. *State v. Holmes*, 9th Dist. No. 05CA008711, 2006-Ohio-1310, at ¶ 16 (hearing not required to determine the validity of newly discovered evidence consisting of a letter written by the victim to state public defender and notes allegedly written by the county prosecutor); *State v. Johnson*, 8th Dist. No. 82229, 2003-Ohio-5637, at ¶ 18 (defendant was not entitled to hearing on motion for new trial where he presented an affidavit from another person claiming responsibility for the crime); *State v. Starling*, 10th Dist. No. 01AP-1344, 2002-Ohio-3683, at ¶ 10

(hearing on motion for a new trial was not required where the defendant submitted affidavits post-conviction from witnesses recanting their testimony). Nothing in Crim.R. 33 requires the trial court to hold an evidentiary hearing merely because the defendant claims to have found new exculpatory evidence.

2. The testimony proffered by Appellant is not credible and should be viewed with the utmost suspicion.

A review of the record reveals that the only new evidence proffered by Appellant are the statements of Carlyeliea Benson, who offered some details in her description of the shooter that were inconsistent with details given by other state's witnesses. Benson's original statement identified the shooter as "Ray Ray," just as Wheeler and Ogletree had claimed in their statements. She further described the shooter as 5'6" or 5'7" tall, around 20 years of age, clean-shaven, and with tattoos on his arms. While all of this was consistent with the descriptions given by the other state's witnesses, other details of her description differed. On August 29, 2010, two days after the jury had returned its verdict, Benson called the prosecutor to say that Appellant was not the person she had seen shoot Fears almost two years earlier.

The Eighth District correctly applied existing law in the state of Ohio on this point when it held that newly discovered evidence recanting testimony should be looked upon with the utmost suspicion. A new trial should be granted only when the court is reasonably satisfied that the trial testimony given by a material witness was false. *State v. Germany* (Sep. 30, 1993), 8th Dist. No. 63568, at 6, quoting *United States v. Lewis* (C.A.6, 1964), 338 F.2d 137, 139.

The Eighth District found that there was strong reason for the trial court to conclude that Benson's new statements were not credible. Benson's statement only changed after she had notified prosecutors that she was frightened because she had been chased by several of Appellant's relatives, one of whom had a gun. *Bolan* at ¶ 56. In addition, another witness, Arthur Smiley, had likewise changed his statement originally implicating Appellant as the shooter only after being placed in the same holding cell as Appellant. *Id.* The facts indicate that there was substantial reason to doubt the credibility of Benson's statements on the grounds that she may have been coerced. The Eighth District's conclusion was further supported by the extreme delay in Benson's decision to amend her previous statement to implicate someone other than Appellant.

3. If the witness' new statements were not a recantation, then they do not constitute new evidence justifying a Crim.R. 33 hearing.

Appellant now argues that Benson's statement was not a recantation, but rather was consistent with her original description given prior to trial that was exculpatory in nature. But this characterization of Benson's statements means that Appellant's argument would then fail the second and third prongs of the *Petro* test. The defendant must show that the new evidence was discovered after the trial, and that it could not in the exercise of due diligence have been discovered before the trial. *State v. Petro*, supra at 505. If Benson was merely repeating a previously-given description of the shooter inconsistent with the description given by the other state's witnesses, this was not new evidence, and it should have been discovered in the exercise of due diligence based upon her original statement to police. In fact, it

was discovered prior to the trial, which is why defense counsel included Benson on their preliminary witness list and attempted to call her at trial. (Tr. 974), *Bolan* at ¶ 42. Despite extensive efforts by the prosecution, defense attorneys, and trial court, Benson failed to appear in response to a bench warrant and never testified. There is thus no basis on which to label Benson's statements as newly discovered evidence that could be used in support of a Crim.R. 33 hearing.

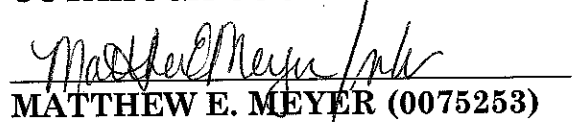
Based on the foregoing, Appellant's second proposition of law lacks merit and warrants no further review by this Honorable Court.

CONCLUSION

The State of Ohio respectfully submits that Appellant's Memorandum in Support of Jurisdiction fails to present a substantial constitutional question or an issue of public or great general interest. The Eighth District properly rejected Appellant's claims based on the particular facts of this case and reasoned application of established precedent. As such, this Honorable Court's discretionary jurisdiction is not warranted.

Respectfully submitted,

WILLIAM D. MASON
CUYAHOGA COUNTY PROSECUTOR



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CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum in Response of Appellee State of Ohio has been mailed by regular U.S. mail this 4th day of November, 2011, to Peter Galyardt, Attorney for Appellant, 250 East Broad Street – Suite 1400, Columbus, Ohio 43215.

Assistant Prosecuting Attorney