

**IN THE SUPREME COURT OF OHIO
2015**

STATE OF OHIO,

Case No. 2014-2251

Plaintiff-Appellant/Cross-Appellee,

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

-vs-

MOHAMED NOOR,

Court of Appeals
Case No. 13AP-165

Defendant-Appellee/Cross-Appellant.

**MEMORANDUM OF PLAINTIFF-APPELLANT/CROSS-APPELLEE
OPPOSING JURISDICTION OF CROSS-APPEAL**

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EXPLANATION OF WHY THIS COURT SHOULD DECLINE JURISDICTION OF DEFENDANT’S CROSS-APPEAL

The defendant’s cross-appeal in the instant case does not present questions of such constitutional substance nor of such great public interest as would warrant further review by this Court. The first issue the defendant raises is an alleged jury instruction error, which he claims constitutes constitutional error. But jury instruction error does not constitute constitutional error unless the defendant demonstrates that the instruction “so infected the entire trial that the resulting conviction violates due process.” *Cupp v. Naughton*, 414 U.S. 141, 147, 94 S.Ct. 396 (1973). Here, the defendant requested that the jury be instructed that “an accomplice must share the intent of the principal,” but he never raised a constitutional claim in the trial court. The trial court refused the requested instruction. The court, however, instructed the jury on the definitions of all of the elements of the principal offenses, including purpose and knowledge, and defined aiding and abetting for the jury. In light of the evidence demonstrating that the defendant and his codefendant both acted as principal offenders, the defendant cannot possibly demonstrate constitutional error in the trial court’s instruction on complicity. The appellate court’s decision finding any purported error to be harmless does not warrant this Court’s review. Opinion, at ¶¶50-53.

The defendant also raises two claims which were not raised in the trial court in his second and third propositions of law. In his second proposition of law, the defendant challenges a purported failure to record testimony from Somalian witnesses who did not speak English, the translation of which was transcribed by the court reporter. The defendant never requested that a recording be made of the testimony of the non-English speaking witnesses, in addition to the court reporter’s transcription of the translation. As a result, he must demonstrate plain error. In his third proposition of law, the defendant challenges the admission of evidence, without

objection, of responding officers' initial investigation into the offense. Again, the defendant must demonstrate plain error. Here, the court of appeals properly found that no plain error was demonstrated in either instance, Opinion, at ¶¶59, 76, and this Court should decline to review these claims.

Because the defendant's cross-appeal involves legal standards that are well settled and fact-laden inquiries into whether error occurred, and presents issues that were not raised in the trial court, he presents no compelling reason for this Court to expend its scarce judicial resources to review his claims. These fact-intensive inquiries and case-specific issues would be unlikely to provide law of statewide interest that would be helpful to the bench and bar. It is therefore respectfully submitted that jurisdiction of the defendant's cross-appeal should be declined.

STATEMENT OF THE CASE AND FACTS

The State relies on the Statement of the Case and Facts contained in its previously filed Memorandum in Support of Jurisdiction.

ARGUMENT

RESPONSE TO DEFENDANT'S PROPOSITION OF LAW NO. ONE:

THE TRIAL COURT PROPERLY REFUSED THE DEFENDANT'S REQUESTED INSTRUCTION.

The defendant claims that the trial court erred when it refused to instruct the jury that "an accomplice had to share the intent of the principal." The defendant construes this purported omission as a failure to instruct the jury on the mental element of complicity. Here, the defendant and his codefendant both acted as principal offenders. In light of the evidence, the defendant's requested instruction was confusing and misleading. Additionally, the trial court instructed the jury on all of the elements of the principal offenses, including purpose and knowledge, instructed the jury on the definition of aiding and abetting, and instructed the jury on

the defendant's purported mere presence claim. Accordingly, the court of appeals properly rejected this claim.

At the outset, the trial court defined all of the elements of the principal offenses for the jury. While the instruction on aiding and abetting did not explicitly state that "no person acting with the kind of culpability required for the commission of an offense, shall [aid or abet the principal offender]," R.C. 2923.03(A), the trial court defined all of the elements of the principal offenses, including the requisite mental elements of purposely and knowingly, and correctly defined aiding and abetting. The trial court also restated the mere presence instruction after defining each offense, as requested by the defense. After defining each offense and all of the elements of each offense, the trial court instructed the jury that either defendant could only be convicted as an aider and abettor if the jury found that the defendant acted as an aider and abettor as to each individual offense and each firearm specification. And the trial court instructed the jury to consider each count separately as to each defendant.

The instructions as a whole clearly required the jury to conclude that the mental element for the underlying offenses was required to convict the defendant of each charge. "A single instruction to a jury may not be judged in artificial isolation but must be viewed in the context of the overall charge." *State v. Price*, 60 Ohio St. 2d 136, 398 N.E.2d 772 (1979), paragraph four of syllabus, following *Cupp v. Naughten*, 414 U.S. at 147. Here, viewing the instructions as a whole, no error was demonstrated, and the court of appeals properly affirmed the trial court's decision. See *State v. Graggs*, 10th Dist. No. 09AP-339, 2009-Ohio-5975, ¶¶29, 31-32; *State v. Philpot*, 10th Dist. No. 03AP-758, 2004-Ohio-5063, ¶¶22-301 *State v. Gibbs*, 8th Dist. No. 86126, 2006-Ohio-175. In *Gibbs*, 2006-Ohio-175, ¶24, the appellate court found no error when the trial court instructed the jury on the culpable mental states necessary to convict the defendant

of the principal offenses. “Courts that have addressed this issue held that a defendant is not prejudiced when a complicity instruction does not refer specifically to the culpable mental state if the instructions for the underlying offenses include the requisite mental state.” *Id.* (citations omitted).

In this case, the evidence demonstrated that the defendant and codefendant entered the victim’s apartment together, wearing masks, and that both proceeded to assault and rob the victims. The defendant was fully participating in all of the acts of his armed codefendant, including yelling at the victims and demanding their money and property, kicking the victims, ordering the armed codefendant around, and encouraging the armed codefendant to shoot everyone in the apartment. Under these circumstances, the trial court properly refused the defendant’s requested instruction which was confusing and misleading when considered in the factual context of this case. *See State v. Thompson*, 10th Dist. No. 10AP-593, 2011-Ohio-6725, ¶22 (liability of accomplice arises from active promotion of crime, regardless of prior knowledge of codefendant’s possession of weapon); *see also State v. Chapman*, 21 Ohio St.3d 41, 487 N.E.2d 455 (1986) (unarmed accomplice guilty of aggravated robbery and firearm specification). All of the victims testified that the masked men entered the apartment together and started yelling at the victims to get down and hand over their money and property. Nearly all of the victims testified that the defendant took their money or property. Two of the victims testified that the defendant kicked them. One of the victims testified that the defendant told his codefendant to shoot everyone in the apartment, while another testified that she believed the intruders planned to kill everyone in the apartment that night. Two of the victims testified that the defendant knocked the television over, while one testified that he was giving orders to the codefendant.

Under these circumstances, any purported deficiency regarding the jury instructions on the mental element for complicity was not prejudicial.

Accordingly, viewing the instructions as a whole, there was no prejudicial deficiency in the trial court's instructions, because the jury was properly instructed on all of the elements of the principal offenses, on the definition of aiding and abetting, on the burden of proof, and on mere presence, and because the jury was instructed to consider each count for each defendant separately, and because the requested instruction that an aider and abettor must share the intent of the principal was misleading, in light of the facts of the case. The court of appeals' conclusion that any purported error was harmless does not warrant this Court's review.

RESPONSE TO DEFENDANT'S PROPOSITION OF LAW NO. TWO:

NO PLAIN ERROR IS DEMONSTRATED IN THE
TRANSCRIPTION OF THE INTERPRETER'S TRANSLATION
OF TESTIMONY.

The defendant claims that the trial court committed plain error when it did not record testimony of non-English speaking witnesses, but the defendant never requested that the trial court record the testimony of the non-English speaking witnesses, where the court reporter transcribed the interpreter's translation. Because the defendant failed to raise this issue in the trial court, he has waived all but plain error, and he cannot demonstrate plain error.

The standard for showing plain error is high. Although an issue is waived/forfeited through lack of objection, the Criminal Rules provide that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Crim.R. 52(B). But plain error will be recognized only when, "but for the error, the outcome of the trial clearly would have been otherwise." *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978), paragraph two of the syllabus. "Notice of plain error under Crim.R. 52(B) is to be taken with the utmost

caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.” *Id.* at paragraph three of the syllabus. “The power afforded to notice plain error, whether on a court’s own motion or at the request of counsel, is one which courts exercise only in exceptional circumstances, and exercise cautiously even then.” *Id.* at 94. Here, no plain error is demonstrated, as there was no obvious deviation from a legal rule that affected the defendant’s substantial rights and determined the outcome of the trial. *State v. Barnes*, 94 Ohio St.3d 21, 27, 759 N.E.2d 1240 (2002).

In this case, mid-way through the trial an interpreter was duly sworn. After the first non-English speaking witness completed his testimony, the defendant claimed that “some of the interpretation was off.” Counsel also indicated there was some unintentional misunderstanding regarding whether the interpreter was certified by the Ohio Supreme Court. Counsel for the codefendant articulated a concern that the translation be word for word.

The trial court inquired of the interpreter, who stated that he had been through all the training and had interpreted previously in both state and federal court. The court interpreter also provided a letter from his employer regarding his proficiency. The trial court thereafter instructed that the interpretation should be word for word to the extent possible. No subsequent objection was raised at any time, and four more non-English speaking witnesses testified. No one ever requested that any of the testimony be recorded.

There is no requirement that the court reporter transcribe non-English versions of testimony. *State v. Vu*, 10th Dist. No. 09AP-616, 2010-Ohio-4019, ¶27. Because the defendant never requested that non-English testimony be recorded, in addition to the court reporter’s transcription of the English translation, this claim fails. Also, the testimony of all of the non-English speaking victims demonstrates that they answered queries appropriately, questions were repeated when

necessary, and there was no basis on which to conclude that the court interpreter encountered any difficulty in translating the testimony or that the court reporter encountered difficulty transcribing the translation. Also, critically, the testimony of the five non-English speaking victims was largely consistent with and corroborated by the testimony of the other four English speaking victims, and was consistent with and corroborated by the photographs, the responding officers' testimony, and the physical and scientific evidence collected and presented. No plain error was demonstrated, as there was not an obvious deviation from a legal rule that affected the defendant's substantial rights and affected the outcome of the trial. This Court should decline to review this claim.

RESPONSE TO DEFENDANT'S PROPOSITION OF LAW NO. THREE:

**NO PLAIN ERROR IS DEMONSTRATED IN THE
ADMISSION OF EVIDENCE.**

The defendant asserts that the trial court erred when it admitted testimony from two detectives regarding their initial interviews of the victims, because the evidence improperly bolstered the testimony of the victims. The defendant did not object to this testimony, and he failed to demonstrate plain error. Thus, the appellate court properly rejected this claim.

A trial court has broad discretion in admitting or excluding evidence, and unless the trial court has clearly abused its discretion and the defendant has been materially prejudiced thereby, an appellate court will not disturb the trial court's decision. *State v. Issa*, 93 Ohio St.3d 49, 64, 752 N.E.2d 904 (2001). An abuse of discretion connotes a decision that was arbitrary, unconscionable, or unreasonable. *State v. Adams*, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980). When the defendant fails to object to the admission of evidence, he has waived all but plain error. *State v. Allen*, 73 Ohio St.3d 626, 634, 653 N.E.2d 675 (1995). Here, the defendant did not demonstrate any error, let alone plain error.

At the outset, the defendant incorrectly characterizes the question asked during cross examination as improper bolstering evidence. Rather, the question asked of Detective Hughes and Detective Cress regarding conversations with the victims is more appropriately characterized as an inquiry into police evidence-gathering procedures than an expressed opinion on veracity. *See State v. Nicodemus*, 10th Dist. No. 96APA10-1359, 1997 WL 254095, *6 (May 15, 1997). “Certainly the decision of a police detective to file charges in a given situation involves some assessment of credibility by the detective * * * .” *Id.* *See also State v. Lee*, 10th Dist. No. 02AP-1340, 2003-Ohio-4059, ¶14. Here, the very limited inquiry into the detectives’ assessments regarding whether the victims had been robbed did not constitute improper bolstering. Rather, it was simply an inquiry into the police evidence-gathering process. Defendant’s claim to the contrary lacked merit. And no abuse of discretion was demonstrated.

Also, no plain error was demonstrated, as there was no prejudice from the admission of this evidence. Here, there was overwhelming evidence establishing the defendant’s guilt, including the largely consistent testimony of nine of the victims, along with the lack of any evidence of illegal drugs or drug usage found in the apartment immediately after the armed home invasion to support the defendant’s claim, and the physical and scientific evidence establishing that the armed assailant and the defendant were wearing masks and carrying a gun when they committed these offenses. Under these circumstances, any purported error in the admission of this very limited evidence was not prejudicial. This Court should decline to review this claim.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the within cross-appeal does not present questions of such constitutional substance nor of such great public interest as would warrant further review by this Court. It is respectfully submitted that jurisdiction of the defendant's cross-appeal should be declined.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was delivered via electronic mail, this day, February 5th, 2015, to JOHN W. KEELING, 373 South High Street-12th Fl., Columbus, Ohio 43215, at jwkeeling@franklincountyohio.gov; Counsel for Defendant-Appellee/Cross-Appellant.

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