[Cite as *State v. Wade*, 2007-Ohio-6611.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
CLARK COUNTY

STATE OF OHIO	:	
	:	Appellate Case No. 06-CA-108
Plaintiff-Appellee	:	
	:	Trial Court Case No. 05-CR-373
v.	:	
	:	(Criminal Appeal from
JOSHUA WADE	:	Common Pleas Court)
	:	
Defendant-Appellant	:	

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O P I N I O N

Rendered on the 7th day of December, 2007.

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BROGAN, J.

{¶ 1} Joshua L. Wade appeals from his convictions and sentence in the Court of Common Pleas of Clark County, wherein a jury found him guilty of two counts of complicity to commit attempted murder, including a firearm specification on each count; one count of complicity to commit aggravated robbery, including a firearm specification;

two counts of discharging a firearm at or into a habitation; four counts of attempted murder, including a firearm specification on each count; two counts of aggravated murder, including a firearm specification on each count; and one count of aggravated robbery, including a firearm specification. Wade was sentenced to life in prison with the eligibility for parole after 56 years.

{¶ 2} The record in the present matter reveals that Wade and co-defendant, Jason Dean, were involved in a series of crimes between April 11 and 13, 2005 in Springfield, Ohio that included (1) an attempted robbery and attempted murder of two individuals outside a Mini Mart convenience store on Selma Road; (2) firing into residences at 604 and 609 Dibert Avenue, which also included attempted murders of four individuals; and (3) the shooting death of Titus Arnold as he was leaving the Visions for Youth center on West High Street. Wade has filed a timely notice of appeal in which he advances the following assignments of error for our review:

{¶ 3} "I. The Trial Court erred in denying Defendant's motion to dismiss or motion to strike a witnesses' [sic] testimony after new evidence was presented that was exculpatory and which pointed to the unreliability of said witness.

{¶ 4} "II. The Trier of fact erred in finding that there was sufficient evidence to convict the defendant of complicity to commit aggravated [sic] murder and complicity to commit aggravated robbery."[1]

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[1]Wade's counsel has put forth an additional issue for our consideration not included in his assignments of error but under the heading, *Statement of Issues Presented for Review*, which provides: "Whether reversible error was committed during the portions of the trial where evidence was presented as to the aggravated murder of Titus Arnold and aggravated robbery of Mr. Arnold." Pursuant to this inquiry, however, appellate counsel admitted that the record does not demonstrate that the trial court

{¶ 5} Upon review, we find that the trial court did not err in denying Wade's motion to dismiss or strike a witness's testimony, where the alleged exculpatory evidence was discovered during trial, and the court allowed such evidence to be admitted and the witness to be cross-examined. Furthermore, the record demonstrates that there is sufficient evidence to support Wade's conviction for complicity to commit attempted murder and complicity to commit aggravated robbery. Accordingly, the judgment of the trial court will be affirmed.

I

{¶ 6} Under his first assignment of error, Wade contends that the State knowingly failed to disclose exculpatory evidence involving the State's witness, Devon Williams, that was sufficiently material to constitute a violation per *Brady v. Maryland* (1963), 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215.

{¶ 7} During the trial, counsel for Appellant Wade learned for the first time that Devon Williams was unable to identify Wade as the shooter at 604 and 609 Dibert Avenue in a photo spread submitted to Williams by Detective Darwin Hicks immediately following the shootings. Counsel learned this through Williams' grand jury testimony, in which he stated the following: " * * * when Detective Hicks brought in the mug shots for me to pick out, I couldn't say that it's him because I never seen any of those people that he presented to me." (Tr., Def.'s Ex. F.) This testimony, however, had not been included as part of the discovery package produced by the State; instead, Wade's

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committed reversible error. Having independently reviewed the record in this matter, we agree with appellate counsel. Thus, we find no reversible error pertaining to Wade's convictions for the aggravated murder and aggravated robbery of Titus Arnold.

counsel was only permitted access to it at the time of the trial.

{¶ 8} On the stand, Williams testified that he had "most definitely" been able to see "the face of the person who was sitting in the driver's seat and firing the gun at the house." (Tr. at 1145.) Williams identified the appellant in court as that man.

{¶ 9} Upon reviewing the grand jury testimony, Wade's counsel brought it to the attention of the court that he had not been provided the photo spread in which Williams had been unable to identify Wade as the shooter. The court allowed the prosecutor to confirm with Detective Hicks that such photo spread did indeed exist, and it was subsequently admitted into evidence as Defendant's Exhibit D. The portion of the grand jury testimony in which Williams testified that he could not identify anyone from the photo spread as the shooter was also admitted into evidence as Defendant's Exhibit E. Wade's counsel asserted that the State knew about this exculpatory evidence yet allowed Williams to take the stand and falsely testify as to Wade's identity. In opposition, the State argued that defense counsel was aware of Williams' inconsistent testimony, for counsel had been provided the transcript from Wade's bindover hearing in which Williams again testified that he could not identify Wade as the shooter. In addition, the State contended that defense counsel had been present during co-defendant Dean's trial, at which Williams testified for the first time that *he could identify* Wade. Omission of the grand jury testimony, according to the State, was a mere oversight lacking any prejudicial effect, where Wade's counsel was put on notice of Williams' testimonies and could have questioned him or Detective Hicks prior to trial. Furthermore, the State claimed that it, too, had not been provided a copy of the initial photo spread by the police department.

{¶ 10} Wade's counsel moved for a mistrial. The trial court overruled the motion, noting that there was no mistrial where examination of the grand jury documents after the testimony of the witness had revealed the inconsistencies, but counsel was still permitted to cross-examine the witness. Wade's counsel then moved to have the counts relating to the Dibert shootings dismissed and to instruct the jury to disregard Williams' testimony. Both of these motions were also overruled.

{¶ 11} Thereafter, cross-examination of Williams ensued. Williams testified that he tried to give the officers all of the information that he had regarding the alleged suspects on the night the shootings took place. The incident report indicated that Williams identified the shooter as a white male with brown hair. Williams also testified that he was shown a photo spread of possible suspects, including the appellant, by Detective Hicks, but that he was unable to identify "anyone in those pictures as the person that was in that car shooting at the house." (Tr. at 1183.) He further provided that he offered the same testimony at a grand jury proceeding and at Wade's bind-over hearing, all taking place in 2005, and that he did not testify again until Dean's trial in May of 2006, where, for the first time, he identified the shooter as the "younger fellow." (Tr. at 1197.)

{¶ 12} In *Brady*, supra, the United States Supreme Court held that "[t]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Id. at 87. Thus, in order to establish a *Brady* violation, the petitioner must demonstrate that (1) the prosecution failed to disclose evidence upon request; (2) the evidence was favorable to the

defendant; and (3) the evidence was material. *State v. Aldridge* (1997), 120 Ohio App.3d 122, 145, 697 N.E.2d 228.

{¶ 13} The Supreme Court of Ohio, however, has held that where the alleged exculpatory evidence is presented *during* trial, there exists no *Brady* violation that would require a new trial. *State v. Wickline* (1990), 50 Ohio St.3d 114, 116, 552 N.E.2d 913, citing *United States v. Agurs* (1976), 427 U.S. 97, 103, 96 S.Ct. 2392, 49 L.Ed.2d 342. See, also, *State v. Brown* (Sept. 30, 1992), Montgomery App. No. 12949, 1992 WL 302445, at *6. In *Wickline*, the court rejected the defendant's claim that the discovery during trial of undisclosed police records relating to the alleged crime constituted a violation under *Brady*. According to the court, the proper remedy in a situation where undisclosed exculpatory evidence is discovered during trial is set forth in Crim. R. 16(E)(3), which provides:

{¶ 14} "If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may make such order as it deems just under the circumstances."

{¶ 15} Although the defendant in *Wickline* failed to invoke protection under Crim. R. 16(E)(3), the court found that this rule's "remedial powers were sufficient under the circumstances to ensure [the defendant] was fairly tried." Id. Moreover, the court was not persuaded that the outcome of the trial would have been different had the records been disclosed prior to trial because they were admitted into evidence and reviewed by

the three-judge panel presiding over the trial before reaching its verdict. Id. at 118.

{¶ 16} In the present matter, we cannot find that the State's failure to produce Williams' grand jury testimony or the undisclosed photo spread and results so prejudiced Wade that the court's permitting the discovery and admission of this evidence during trial was an insufficient remedy. We further find that Wade's counsel had adequate opportunity to cross-examine Williams about his inconsistent statements, and that by doing so, counsel properly put the issue of the credibility of Williams' testimony before the jury. Finally, the record demonstrates that Wade's counsel was provided with a number of discovery materials that put him on notice of Williams' inconsistent statements arising during the investigation and throughout various proceedings. The police incident report and the transcripts from Wade's bind-over hearing both indicated that Williams was unable to identify Wade as the shooter, whereas Williams' testimony at co-defendant Dean's trial suggested the opposite. While we do not condone the State's "oversight," we do not believe that its omission of the grand jury testimony, in conjunction with the aforementioned photo spread, resulted in a violation of Wade's right to due process. Accordingly, the first assignment of error is overruled.

II

{¶ 17} Wade contends under his second assignment of error that the evidence presented at trial was insufficient to convict him of complicity to commit attempted murder of Yolanda Lyles and Andre Piersol and complicity to commit aggravated robbery of Ms. Lyles. For the following reasons, we find that this argument lacks merit.

{¶ 18} " ' "Sufficiency" is a term of art meaning that legal standard which is applied to determine whether the case may go to the jury or whether the evidence is legally sufficient to support the jury verdict as a matter of law.' " *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386, 678 N.E.2d 541, citing Black's Law Dictionary (6th Ed.1990) 1433. The relevant inquiry when examining an appeal based on the sufficiency of the evidence is whether, afer viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *State v. Dennis* (1997), 79 Ohio St.3d 421, 430, 683 N.E.2d 1096. A guilty verdict will not be disturbed on appeal unless "reasonable minds could not reach the conclusion reached by the trier-of-fact." Id.

{¶ 19} Wade was convicted of complicity to commit attempted murder and complicity to commit aggravated robbery. With respect to the former, the State was required to prove that Wade purposefully aided or abetted another in engaging in conduct that, if successful, would have constituted or resulted in the deaths of Andre Piersoll and Yolanda Lyles. See R.C. 2903.02(A); R.C. 2923.02(A); R.C. 2923.03(A)(2). Regarding the charge of complicity to commit aggravated robbery, the State was required to prove that Wade knowingly aided or abetted another in attempting to obtain control over Yolanda Lyles' property without her consent, for the purpose of depriving her of that property, and that the person aided or abetted had a deadly weapon on or about his person or under his control and either displayed the weapon, brandished it, indicated that he possessed it, or used it. See R.C. 2911.01(A)(1); R.C. 2913.02(A)(1); R.C. 2923.03(A)(2).

{¶ 20} If a person acting with the kind of culpability required for the commission of an offense aids or abets another in committing the offense, that person is guilty of complicity in the commission of the offense, and shall be prosecuted and punished as if he were a principal offender. R.C. 2923.03(A)(2) and (F). "To aid or abet" means to support, assist, encourage, cooperate with, advise, or incite the principal in the commission of the crime. *State v. Johnson* (2001), 93 Ohio St.3d 240, 245, 754 N.E.2d 796. Consequently, to support a conviction for complicity by aiding and abetting pursuant to R.C. 2923.03(A)(2), the Supreme Court of Ohio has held that "the evidence must show that the defendant supported, assisted, encouraged, cooperated with, advised, or incited the principal in the commission of the crime, and that the defendant shared the criminal intent of the principal." Id. Furthermore, Ohio courts have recognized that "[e]vidence of aiding and abetting another in the commission of crime may be demonstrated by both direct and circumstantial evidence. Thus, 'participation in criminal intent may be inferred from presence, companionship, and conduct before and after the offense is committed.' " *State v. Cartellone* (1981), 3 Ohio App.3d 145, 150, 3 OBR 163, 444 N.E.2d 68, quoting *State v. Pruett* (1971), 28 Ohio App.2d 29, 34, 57 O.O.2d 38, 273 N.E.2d 884.

{¶ 21} Wade argues that the State failed to present any evidence that he was at the Mini Mart on Selma Road when the shootings actually occurred. According to Wade, the State's theory of culpability is based primarily on the relationship he had with co-defendant Dean instead of any credible witness testimony that he was present during or after the crime was committed.

{¶ 22} At trial, Wade testified that he had gone to the Mini Mart with Dean to

purchase rolling paper normally used for cigars but intended, at this instance, to be used to roll marijuana. After making his purchase, Wade stated that he returned to Dean's car, a gold Buick Riviera, and waited by the passenger side while Dean remained in the store talking to Andre Piersoll. Dean and Piersoll exited the store together and continued their conversation at Piersoll's car. Wade testified that he believed Dean was negotiating a drug transaction with Piersoll. A few moments later, Dean walked back to his car, at which time Wade stated that he handed Dean a bag of pills from the glove compartment. Dean returned to Piersoll's car, indicated that he was leaving, and then went back to his own car. At this point, Wade provided that Dean told him to drive, whereupon he complied, and the two men left the parking lot. According to Wade, they drove to Wade's residence at 502 Liberty Street, which is several blocks from the Mini Mart. Wade testified that he went into his house and did not see Dean the rest of the night. He further asserted that he did not return to the Mini Mart that evening, and that he was unaware of Dean's plan to rob Piersoll and Lyles.

{¶ 23} State's witness Brad Chaney, a close friend of Wade for several years, testified that Wade told him he had been at the Mini Mart on the night the incident occurred; however, Wade did not tell Chaney that he had been involved in the robbery. Instead, Chaney testified that Wade told him he "had gotten into a situation" at the convenience store, which Chaney characterized as a "deal gone bad." (Tr. at 595.)

{¶ 24} The State also offered the testimony of both Yolanda Lyles and Andre Piersoll in an attempt to reconstruct what happened after Dean and Wade had left the parking lot. Lyles corroborated the portion of Wade's testimony placing him at the scene prior to the robbery. She testified that she saw Wade standing next to a two-

door, metallic peach colored vehicle with tinted windows. She also stated that at some point Dean approached her car in order to sell her drugs while she was handing money to Piersoll, and that her purse was open exposing approximately two hundred dollars. Lyles further testified that she eventually witnessed Wade move from the passenger side of the vehicle to the driver's seat before pulling away. According to Lyles, she and Piersoll were engaged in a brief conversation at that point with Neil Scott in the parking lot. Lyles provided that seconds after Scott walked away from their vehicle, Dean reappeared from around a corner, shooting at the car and demanding money. Lyles' testimony indicated that less than five minutes had passed from the time Dean and Wade pulled out of the parking lot to the time Dean returned with a gun.

{¶ 25} Furthermore, Lyles testified that upon seeing Dean and hearing the gun fire, she quickly backed out of the parking lot and headed west on Selma Road toward Limestone and Mercy Hospital because Piersoll had been shot. Lyles admitted that she reached speeds of up to 125 miles per hour. En route to the hospital, Lyles stated that the car associated with Wade and Dean that she had previously seen in the Mini Mart parking lot was following her, except that the color of the car appeared to be silver. She could not, however, see how many occupants were in the vehicle. According to Lyles, the car ceased following her one block from Mercy Hospital.

{¶ 26} Andre Piersoll reiterated the majority of Lyles' testimony regarding the events that transpired at the Mini Mart on the night of the shooting, with the exception of several facts. First, Piersoll testified that Dean's car was a gray two-door with a busted window. Piersoll stated that he saw this car following him and Lyles to Mercy Hospital. Unlike Lyles, however, Piersoll testified that he was able to identify Dean and Wade as

the vehicle's occupants, even though the windows were tinted and the lights were off, and that Dean was the person driving. Next, Piersoll provided that the conversation he had with Neil Scott lasted approximately ten minutes during which time Dean came from around the building and began shooting at his vehicle. His testimony was unclear as to whether Dean and Wade had left the parking lot at the beginning of or within this span of time.

{¶ 27} Finally, Detective Darwin Hicks of the Springfield Police Department testified that he assembled a photo spread in connection with the shooting of Piersoll that included co-defendant Dean as one of the possible suspects. According to Hicks, he presented the photo spread to Piersoll on April 21, 2005, 10 days after the incident occurred, and Piersoll identified Dean as the shooter. Hicks further admitted, however, that he had not encountered anyone during his investigation of this incident who claimed that Wade was at the scene *at the time of the shooting*.

{¶ 28} Viewing the foregoing evidence in a light most favorable to the State, we conclude that reasonable minds could find that the essential elements of the charges against Wade had been proven beyond a reasonable doubt. From the evidence, it is certainly reasonable for the jury to believe that Wade was in the vehicle when co-defendant Dean committed the aggravated robbery and when the vehicle was seen following Piersoll and Lyles en route to Mercy Hospital. The time frame established by both Lyles and Piersoll does not support Wade's statement that the pair traveled to Wade's house on Liberty Street, dropped Wade off at home, and then alone Dean returned to the Mini Mart to commit the shooting and robbery. The improbability of this alibi essentially challenges the credibility of Wade's testimony. Furthermore, there is

ample support from the record suggesting that Wade and Dean acted in association at the Mini Mart, as this was a companionship based on illegal conduct. Wade himself testified that following Dean's release from prison in April 2005, the two men quickly joined forces to sell drugs around Springfield. This relationship is evidenced by the attempted drug transaction with Piersoll prior to the shooting. We find it reasonable for the jury to conclude that the robbery was in connection with the drug transaction, and that Wade was as active a participant in the former as he was in perpetuating the drug deal. In short, the record contains the necessary evidence to support Wade's convictions for complicity to commit attempted murder and complicity to commit aggravated robbery. Finally, we note that Wade's firearm specifications were appropriate, even though he merely aided and abetted the actual shooter, Dean. See, e.g., *State v. Gist*, Montgomery App. No. 21436, 2007-Ohio-5571, at ¶13; *State v. Rhubert* (Oct. 12, 2001), Greene App. No. 2001 CA 62, 2001 WL 1203411, at *2. Wade's second assignment of error is overruled.

{¶ 29} Having overruled each of Wade's assignments of error, we hereby affirm the judgment of the Clark County Common Pleas Court.

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GRADY, J., and DONOVAN, J., concur.

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