[Cite as *State v. Lewis*, 2009-Ohio-5075.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO	)	CASE NO. 07 MA 199
	)	
PLAINTIFF-APPELLEE	)	
	)	
VS.	)	OPINION
	)	
ERIC LEWIS	)	
	)	
DEFENDANT-APPELLANT	)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from the Court of Common Pleas of Mahoning County, Ohio
Case No. 06 CR 1294 A

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiff-Appellee:

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Mahoning County Prosecutor
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JUDGES:

Hon. Cheryl L. Waite
Hon. Gene Donofrio
Hon. Joseph J. Vukovich

Dated: September 22, 2009

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WAITE, J.

{¶1} Counsel for Appellant has filed a motion to withdraw from representation with supporting memorandum in this criminal appeal, pursuant to *Anders v. California* (1967), 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493. Although Appellant was originally charged with aggravated murder, he was convicted of the lesser-included offense of complicity to commit aggravated murder, in violation of R.C. 2903.01(A)(F) and 2923.03(A)(2)(F), a felony of the first degree, and of having a firearm on or about his person while committing the offense, in violation of R.C. 2941.145. Appellant was sentenced to life imprisonment with parole eligibility after serving 30 years, plus three years for the gun specification to be served prior and consecutive to the life sentence.

{¶2} Appellant's counsel states in his memorandum in support that he read the trial transcript twice and has considered all of the possible areas of appeal. (Memo. in Support, p. 2.) Appellant was given 30 days to file additional pro se assignments of error. Although he filed a motion for extension of time to file a pro se brief, no such brief was filed. While Appellant's counsel raises one possible issue in his brief, the trial court's jury instruction on accomplice testimony, he correctly concludes that the trial court did not commit prejudicial error. Therefore, Appellant's conviction and sentence are affirmed.

{¶3} "It is well settled that an attorney appointed to represent an indigent criminal defendant on his or her first appeal as of right may seek permission to withdraw upon a showing that the appellant's claims have no merit." *State v. Odorizzi* (1998), 126 Ohio App.3d 512, 515, 710 N.E.2d 1142. "To support such a

request, appellate counsel must undertake a conscientious examination of the case and accompany his or her request for withdrawal with a brief referring to anything in the record that might arguably support the appeal." Id. The reviewing court must then undertake a full examination of the proceedings to determine whether the case is wholly frivolous. Id.

{¶4} In *State v. Toney* (1970), 23 Ohio App.2d 203, 262 N.Ed.2d 419, we set forth the procedure to be used when counsel of record determines that an indigent's appeal is frivolous:

{¶5} "3. Where a court-appointed counsel, with long and extensive experience in criminal practice, concludes that the indigent's appeal is frivolous and that there is no assignment of error which could be arguably supported on appeal, he should so advise the appointing court by brief and request that he be permitted to withdraw as counsel of record.

{¶6} "4. Court-appointed counsel's conclusions and motion to withdraw as counsel of record should be transmitted forthwith to the indigent, and the indigent should be granted time to raise any points that he chooses, *pro se*.

{¶7} "5. It is the duty of the Court of Appeals to fully examine the proceedings in the trial court, the brief of appointed counsel, the arguments *pro se* of the indigent, and then determine whether or not the appeal is wholly frivolous.

{¶8} "6. Where the Court of Appeals makes such an examination and concludes that the appeal is wholly frivolous, the motion of an indigent appellant for the appointment of new counsel for the purposes of appeal should be denied.

{¶9} "7. Where the Court of Appeals determines that an indigent's appeal is wholly frivolous, the motion of court-appointed counsel to withdraw as counsel of record should be allowed, and the judgment of the trial court should be affirmed." Id. at syllabus.

Facts

{¶10} The events leading to the death of Martwain Dill were established at trial based almost exclusively on the testimony of Keith Tillis, who was indicted separately and also charged with aggravated murder for Dill's death. According to Tillis, he asked Bertrum Moore (who was charged with complicity to commit aggravated murder in the indictment in this case) for a ride home after the two men attended classes at Life Skills on November 3, 2006. (Tr., pp. 486-487.) As they left the school, Tillis discovered that Moore had also promised to drive Appellant home. (Tr., p. 488.) The three men were captured by video surveillance equipment at Life Skills leaving the school and entering Moore's green four-door Pontiac Bonneville. (Tr., p. 500.) Appellant was in the front passenger seat, and Tillis was in the back passenger seat.

{¶11} Moore, Tillis, and Appellant first travelled to the east side of Youngstown to visit Moore's girlfriend. (Tr., p. 507.) Next, the men drove around Youngstown while they smoked marijuana. (Tr., p. 509.) At some point, on returning to the south side, Appellant spotted a pickup truck on Glenwood Avenue. (Tr., p. 510.) Appellant immediately used his cellular phone to call an unnamed person. In this call, he related that he had seen the pickup truck, and that he was "on his way."

(Tr., pp. 511-512.) Following the call, Appellant directed Moore to John Street. (Tr., p. 512.)

{¶12} When they arrived on John Street, a fourth man entered the car and sat in the rear driver's-side seat. (Tr., p. 514.) The man (later identified as Gary Crockett, who was also charged with aggravated murder in this case) had a black trash bag. Although Tillis could not see its contents, he testified that he thought that it contained a "big gun." (Tr., pp. 515-516.) Crockett also had a handgun, which he handed to Appellant. (Tr., pp. 516-517.) Crockett and Appellant told Moore to return to Glenwood Avenue. (Tr., pp. 517-518.)

{¶13} On encountering the pickup truck at the intersection of Glenwood Avenue and Earle Avenue, Crockett and Appellant ordered Moore to stop the car. (Tr., pp. 520-521.) Tillis testified that he jumped out of the car and attempted to run, but lost his footing and fell. (Tr., p. 523.) Crockett and Appellant also exited the car. Tillis struggled to his feet. As he fled, he heard gunshots. (Tr., p. 525.)

{¶14} The foregoing events were corroborated by the testimony of another eyewitness, Lacreshia May, however, May could not specifically identify any of the men. (Tr., p. 477.) She and her mother-in-law were in a van traveling directly behind what she described as a two-toned dark-colored four-door Bonneville on Glenwood Avenue just prior to the shooting. (Tr., pp. 438, 441.) She also saw a pickup truck stopped on Earle Avenue. (Tr., p. 442.)

{¶15} According to May, the Bonneville stopped at the intersection of Glenwood Avenue and Earle Avenue, the doors opened, and three men exited the

car. (Tr., p. 439.) The man in the rear driver's-side seat was carrying a "large trash bag." (Tr., p. 443.) Two men exited the from the passenger side of the car, and one of them walked to the back bumper and started shooting a handgun at the pickup truck. (Tr., p. 444.) May could not distinguish the man in the front passenger seat from the man in the back passenger seat. (Tr., p. 455.) When the shooting started, May realized that the black trash bag concealed an assault weapon. The man in the rear driver's-side seat fired the assault weapon at the pickup truck. (Tr., pp. 443-444.)

{¶16} May testified that she saw the third man on the ground. She assumed that he had been shot, but then he jumped up and fled the scene. (Tr., p. 447.) She never saw the man on the ground brandish a gun, but she conceded on cross-examination that she was not certain whether he had emerged from the front or back passenger side of the Bonneville. (Tr., p. 470.) May testified that the man who was on the ground obtained his footing and ran toward Linwood Avenue, where the Bonneville was parked. (Tr., p. 447.) She said that both of the men who emerged from the passenger side of the car ran toward a street that leads into Mill Creek Park. (Tr., p. 458.) May conceded that, in her written statement to the police immediately following the incident, she originally said that all three of the men who jumped out of the car "started shooting" at the pickup truck. (Tr., p. 453.)

{¶17} Tara Rust, the mother of Appellant's child and Crockett's live-in girlfriend at the time of the shooting, also testified at trial. The trial court permitted the state to treat Rust as an adverse witness. Throughout her testimony, which

essentially tracked her videotaped statement following the shooting, she contended that the statement was the product of police coercion. (Tr., pp. 635-637.)

{¶18} Rust conceded on direct examination that she provided the following facts to police in her videotaped statement: Crockett left their home at 700 John Street in a green four-door automobile at around 10:30 a.m. with a gun with a wooden stock concealed in a trash bag. (Tr., pp. 629-631.) Crockett returned approximately 45 minutes later. (Tr., p. 634.) When he returned, Crockett instructed Rust to open the garage door to allow him to back the green car into the garage. (Tr., p. 635.) Rust testified that he removed an assault weapon from the trunk and put it on her bed. (Tr., p. 638.)

{¶19} Appellant arrived at 700 John Street approximately 45 minutes later. According to Rust, he appeared to have walked to the house. (Tr., p. 640.) Appellant told Rust that he was at his girlfriend's house and that he had lost his cellular phone. (Tr., p. 640.) Rust then took Crockett, Appellant, and the assault weapon to a housing project on the east side of Youngstown. (Tr., p. 642.)

{¶20} The driver of the pickup truck, Dill, died from gunshot wounds he sustained that day. The handgun used in the crime was recovered several months later as part of an unrelated criminal investigation. (Tr., p. 755.) The owner of the gun, identified at trial as "Mr. Veal," was never linked to Dill's murder. (Tr., p. 756.) The assault weapon was never found.

{¶21} Appellant's cellular phone was recovered on the west side of Earle Avenue. (Tr., p. 746.) In his statement to police, Appellant claimed that he walked

home from Life Skills that day, and, that after visiting his girlfriend, he was standing near a pickup truck on Earle Avenue when a tall black man dressed in black started shooting a handgun at the truck. (Tr., p. 745.)

Analysis

{¶22} The trial court gave the following jury instruction on accomplice testimony:

{¶23} "You have heard in this case the testimony from Keith Tillis, another person who is accused of the same crime as charged in this case, and he is said to be an accomplice. An accomplice is one who knowingly assists another in the commission of a crime. Whether Keith Tillis was indeed an accomplice and the weight to be given to his testimony are matters for you to determine." (Tr., pp. 904-905.)

{¶24} At the conclusion of the jury charge, the trial court asked counsel for comment on the charge. Appellant's trial counsel stated, "I would ask that you would include the additional indication that the jury is to -- if they determine Mr. Tillis to be an accomplice, they're to take any testimony that he gives with grave suspicion. I believe that is necessary to properly charge this." (Tr., pp. 925-926.)

{¶25} The trial court responded that Section 405.41 of the Ohio Jury Instructions offers two alternative instructions on accomplice testimony and instructs that only one is to be given. The trial court chose to give Alternative No. 1. According to the trial court, Alternative No. 2 includes the "grave suspicion" and "great caution" language. Because the trial court gave the first instruction, it refused

to give the other, pursuant to the suggestion in OJI. The trial court then recognized the objection. (Tr., pp. 926-927.)

{¶26} In fact, Alternative No. 1 of 4 Ohio Jury Instructions Section 405.41, renumbered 409.17, reads, in its entirety:

{¶27} "ALTERNATIVE NO. 1

{¶28} "(A) You have heard testimony from _____, another person who (pleaded guilty to) (is accused of) the same crime charged in this case and is said to be an accomplice. An accomplice is one who (purposely) (knowingly) (assists) (joins) another in the commission of a crime. Whether _____ was an accomplice and the weight to give his testimony are matters for you to determine.

{¶29} "(B) Testimony of a person who you find to be an accomplice should be viewed with grave suspicion and weighed with great caution."

{¶30} Paragraph (A) of Alternative No. 2 is identical to the first paragraph of Alternative No. 1, however, the remainder of Alternative No. 2, reads, in its entirety:

{¶31} "(B) 'The testimony of an accomplice [that is supported by other evidence] does not become inadmissible because of his complicity, moral turpitude, or self-interest, but the admitted or claimed complicity of a witness may affect his credibility and make his testimony subject to grave suspicion, and require that it be weighed with great caution.'

{¶32} " 'It is for you, as jurors, in the light of all of the facts presented to you and from the witness stand, to evaluate such testimony and to determine its quality and worth or its lack of quality and worth.'

{¶33} "**COMMENT**

{¶34} *"Include the phrase in brackets in the first paragraph only in a conspiracy trial. Do not include it in any other trial. R.C. 2923.01(H)(2) and 2923.03(D).*

{¶35} "(C) An accomplice may have special motives in testifying, and you should carefully examine an accomplice's testimony and use it with great caution and view it with grave suspicion." (Emphasis in original.)

{¶36} When reviewing a trial court's jury instructions, an appellate court must determine whether the trial court's refusal to give a requested instruction constituted an abuse of discretion under the facts and circumstances of the case. *State v. Wolons* (1989), 44 Ohio St.3d 64, 68, 541 N.E.2d 443. However, trial courts are required by statute to give a special jury instruction in situations where there is some evidence of complicity and an accomplice testifies against the defendant. *State v. Moritz* (1980), 63 Ohio St.2d 150, 407 N.E.2d 1268.

{¶37} R.C. 2923.03(D) reads, in its entirety:

{¶38} "If an alleged accomplice of the defendant testifies against the defendant in a case in which the defendant is charged with complicity in the commission of or an attempt to commit an offense, an attempt to commit an offense, or an offense, the court, when it charges the jury, shall state substantially the following:

{¶39} " 'The testimony of an accomplice does not become inadmissible because of his complicity, moral turpitude, or self-interest, but the admitted or

claimed complicity of a witness may affect his credibility and make his testimony subject to grave suspicion, and require that it be weighed with great caution.

{¶40} "It is for you, as jurors, in the light of all the facts presented to you from the witness stand, to evaluate such testimony and to determine its quality and worth or its lack of quality and worth.' "

{¶41} Previously, R.C. 2923.03(D) required that the testimony of accomplices be corroborated. *State v. Evans* (1992), 63 Ohio St.3d 231, 240-241, 586 N.E.2d 1042. The statute was amended to its current form on September 17, 1986, replacing the corroboration requirement with a requirement that a cautionary jury instruction be given when accomplice testimony is presented. Id. The purpose of the cautionary instruction requirement is to ensure that juries are informed that the testimony of an accomplice is inherently suspect because an accomplice is likely to have a motive to conceal the truth or otherwise falsely inculpate the defendant. *State v. Santine* (June 26, 1998), 11th Dist. No. 97-A-0025, *5.

{¶42} Based on the statute, the trial court erred as a matter of law by omitting the final sentence of alternative one provided by OJI. Without the final sentence, the jury instruction given in this case does not substantially comply with the plain language or the spirit of R.C. 2923.03(D).

{¶43} Following the amendment, several districts concluded that the failure to give this mandated cautionary instruction amounts to plain error because the accomplice instruction is required to be given by law. See *State v. Pope*, 8th Dist. No. 81321, 2003-Ohio-3647, ¶39; see also *State v. Burkhammer* (Jan. 11, 1991),

11th Dist. No. 89-L-14-096, citing *State v. McKinney* (Mar. 6, 1990), 10th Dist. Nos. 89AP-466, 89AP-467, 89AP-468, and 89AP-469; *State v. Ferguson* (1986), 30 Ohio App.3d 171, 174, 507 N.E.2d 388. However, the Eighth District found the failure to give the accomplice instruction to be harmless error where defense counsel failed to request the instruction in the trial court and significant other evidence introduced at trial supported the defendant's conviction. *Cleveland Heights v. Riley* (May 20, 1999), 8th Dist. No. 74101; *State v. Cardwell* (Sept. 2, 1999), 8th Dist. Nos. 74496, 74497, 74498.

{¶44} More recently, the Fourth, Tenth and Eleventh Districts have held that three factors should be considered in order to determine whether a trial court's failure to give the accomplice instruction constitutes plain error: (1) whether the accomplice's testimony was corroborated by other evidence introduced at trial; (2) whether the jury was aware from the accomplice's testimony that he benefited from agreeing to testify against the defendant; and/or (3) whether the jury was instructed generally regarding its duty to evaluate the credibility of the witnesses and its province to determine what testimony is worthy of belief. *State v. Johnson*, 4th Dist. No. 06CA650, 2007-Ohio-2176, ¶38; *State v. Bentley*, 11th Dist. No 2004-P-0053, 2005-Ohio-4648, ¶58, quoting *State v. Woodson*, 10th Dist. No. 03AP-736, 2004-Ohio-5713, ¶18.

{¶45} Here, May's testimony confirmed a number of facts included in Tillis' account of the day's events, but she was unable to determine whether the man with the handgun emerged from the front or the back passenger side of the car. May's

testimony, standing alone, would have been insufficient to convict Appellant of complicity to commit murder with a firearms specification.

{¶46} However, the Fourth District recognized that, in interpreting the previous version of R.C. 2923.03, Ohio courts held that corroborative evidence need only be, "some evidence, independent of the statement by the accomplice, that 'tends to connect the defendant' [citation omitted] with the crime charged." *Johnson* at ¶39, citing *State v. Allsup* (1980), 67 Ohio App.2d 131, 135-136. The *Allsup* Court held, "[i]t would appear that this 'other evidence' need not be necessarily of sufficient strength to, by itself, constitute proof beyond a reasonable doubt, but must directly, or by reasonable inference, connect the defendant with the crime." Id., see also *State v. Beverly* (Mar. 8, 1983), 2nd Dist. No. 1787.

{¶47} Rust testified that Appellant appeared at John Street after the shooting and accompanied Crockett to the east side where they presumably disposed of the assault weapon. This additional piece of evidence, by reasonable inference, connects Appellant to the crime. First, Rust's testimony contradicts Appellant's statement to police that he was merely an innocent bystander at the scene. Second, the testimony corroborates Tillis' testimony that Appellant, not Tillis, was the second gunman. Therefore, the first factor of the test is satisfied.

{¶48} Turning to the second factor, Appellant's trial counsel elicited on cross-examination that the case against Tillis would be discharged if he provided testimony against Appellant. (Tr., p. 604.) Defense counsel asked Tillis, "[i]f you don't say what [the prosecution] want[s] to hear, what you agreed to say here, do you believe you

will be released today?" Tillis answered, "[n]o. If I tell the truth I would." (Tr., p. 605.) Appellant's trial counsel also underscored Tillis' self-interest in his closing argument stating, "[h]e told a story that was in his best interest. He got a get-out-of-jail-free card." (Tr., p. 880.) Appellant's trial counsel further argued, "[b]ut he started not to cooperate. We indict him. Now he's cooperating. Isn't that wonderful?" (Tr., p. 881.)

{¶49} Finally, the trial court properly charged the jury regarding credibility and the testimony of witnesses at trial. Appellant does not challenge the trial court's instruction on witness testimony.

{¶50} Based upon the three-part test articulated by the Tenth District in *Woodson*, supra, the trial court committed harmless error in failing to substantially comply with R.C. 2923.03(D). In this case, the accomplice testimony was corroborated by the testimony of other witnesses at trial, the jury was aware that the state had agreed to dismiss the aggravated murder charge pending against Tillis in exchange for his truthful testimony, and the trial court properly instructed the jury on credibility and witness testimony. Accordingly, counsel is permitted to withdraw and Appellant's conviction and sentence on the complicity charge are affirmed.

Donofrio, J., concurs.

Vukovich, P.J., concurs.