

[Cite as *State v. Williams*, 2010-Ohio-5484.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94242

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

TERRANCE WILLIAMS

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-510792

BEFORE: Gallagher, A.J., Kilbane, J., and Jones, J.

RELEASED AND JOURNALIZED: November 10, 2010
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SEAN C. GALLAGHER, A.J.:

{¶ 1} Appellant Terrance Williams appeals his convictions from the Cuyahoga County Court of Common Pleas for aggravated murder, murder, and aggravated burglary. For the reasons stated herein, we reverse and remand for a new trial.

{¶ 2} On May 20, 2008, the Cuyahoga County grand jury indicted Williams on five counts: two counts of aggravated murder, one count of murder, and two counts of aggravated burglary. The counts included firearm

and death penalty specifications. On February 19, 2009, the state dropped the death penalty specifications. On July 14, 2009, a jury trial commenced.

{¶ 3} The state presented several witnesses who testified about what happened on April 28, 2008, the day D'Andrea Flake was fatally shot. The only eyewitness to the shooting was Monika Reeves, who other witnesses testified had a reputation for being drunk all the time and was drunk that morning. Reeves testified that on April 28, seven or eight people, mostly juveniles, were in her apartment on E. 64th Street in Cleveland, Ohio, drinking alcohol and smoking marijuana. She also stated that Flake and Williams were at her apartment that morning, but that Williams had not been drinking or getting high.

{¶ 4} Reeves testified that at some point, she and Williams exchanged some angry words over the fact that he had eaten some of her food and had not paid her for it. Prior to noon, Williams left the apartment, and was seen riding away from the apartment building on a bicycle. The remaining individuals were in an attic room, drinking and smoking marijuana.

{¶ 5} Reeves testified that Flake seemed very anxious that morning, after she had set up a drug deal between Flake's brother and some men Reeves knew. According to Reeves, Flake was desperate to leave her apartment, and she and Flake went into her kitchen. Reeves testified she was standing behind Flake with her arms around his waist when he opened

the door from the kitchen to the outer hallway. She saw a masked gunman, wearing jeans and a brown Carhartt-style jacket; the gunman shot Flake, and Flake fell forward into the hallway. The gunman entered the kitchen and asked Reeves where “the others” were, to which Reeves replied “upstairs.” Reeves testified that she recognized the masked gunman as Williams by his voice, his eyes, and the clothes he was wearing, despite the fact that she testified she turned her head and ducked for cover when she saw the shooter.

{¶ 6} The gunman left the apartment immediately thereafter. The remaining individuals in the attic, after hearing the gunshot, jumped out of the window and ran from the building. Dawn Cherni, who lives on E. 66th Street, was in her home at the time of the shooting. Cherni testified that she saw two masked individuals run from between the houses on E. 64th Street; she described one of them as wearing jeans and a brown Carhartt-style jacket. Cherni also testified that she saw both individuals get into a white van with a purple or green stripe.

{¶ 7} Detective Joselito Sandoval testified that he was the lead detective investigating the Flake homicide. He testified as to how he proceeded with his investigation, including the arrest of Williams outside Flake’s funeral. Specifically he testified that there were video surveillance and still photos taken of traffic on E. 64th Street on April 28. The images

showed the van described by Cherni driving up and down E. 64th Street three times between 11 a.m. and noon on April 28.

{¶ 8} The state then asked Det. Sandoval if he was able to connect Williams with this van, and he replied that he was. At this point, defense counsel objected, asserting that the state had failed to provide them with the information and manner of connecting Williams to the van. The jury was dismissed, and the trial court listened to arguments by the parties on defense counsel's objection. The next morning, the court gave the jury a curative instruction to disregard the final question and answer from the day before, and the trial continued.

{¶ 9} There was witness testimony that Williams was not present when Flake's brother returned from the drug buy earlier that morning, that Williams did not have a cell phone on him when he was at Reeves's apartment, and that somewhere between 15 and 20 minutes elapsed between Williams leaving the apartment and the gunman shooting Flake.

{¶ 10} At the close of the state's case, Williams made a Crim.R. 29 motion, which the court denied. The defense did not put on a case-in-chief. The jury acquitted Williams of one count of aggravated murder, but it found him guilty of the remaining four counts, including aggravated murder in violation of R.C. 2903.01(B); one count of murder in violation of R.C. 2903.02; one count of aggravated burglary in violation of R.C. 2911.11(A)(1); one count

of aggravated burglary in violation of R.C. 2911.11(A)(2), and all firearm specifications.

{¶ 11} The trial court sentenced Williams to 20 years to life on the murder convictions, three years on the burglary convictions, and three years on the firearm specifications, all to run consecutive, for a total of 26 years to life in prison.

{¶ 12} Williams filed the instant appeal, raising six assignments of error for our review. Since we find Williams's second and third assignments of error dispositive of the case, we address them first.

{¶ 13} In his second assignment of error, Williams contends that "the trial court erred in denying appellant's motion for a mistrial after the prosecutor intentionally caused the jury to hear that appellant was linked to the vehicle used by the masked gunmen, when that was known by the prosecutor to be untrue." In his third assignment of error, Williams argues that he was denied due process by the prosecutor's misconduct. Specifically, he argues that it was a violation of his Sixth Amendment right not to be able to confront the person who could allegedly link him to the white van, and that the court's delay in giving a vague curative instruction to the jury was insufficient to undo the prejudice caused by the testimony of the state's witness.

{¶ 14} The decision whether to grant a mistrial rests within the sound discretion of the trial court and will not be disturbed absent an abuse of discretion. *State v. Treesh*, 90 Ohio St.3d 460, 480, 2001-Ohio-4, 739 N.E.2d 749; Crim.R. 33. “A mistrial should not be ordered in a criminal case merely because some error or irregularity has intervened * * *.” *State v. Reynolds* (1988), 49 Ohio App.3d 27, 33, 550 N.E.2d 490. The granting of a mistrial is necessary only when a fair trial is no longer possible. *State v. Franklin* (1991), 62 Ohio St.3d 118, 127, 580 N.E.2d 1.

{¶ 15} The record reflects that during the direct examination of Detective Sandoval, the prosecutor asked: “The following’s a yes or no question, Detective. Were you able to establish a connection between the defendant * * * Terrance Williams, and this van?” Detective Sandoval responded, “Yes.” Defense counsel moved for a mistrial, stating that they had not received this information from the prosecution prior to trial. Sandoval’s testimony was elicited at the end of the third day of trial, and the court dismissed the jury for the day.

{¶ 16} When the court addressed counsel for the parties, defense counsel argued his motion for a mistrial, stating that Sandoval’s testimony was hearsay upon hearsay because he obtained the information that Williams was in the van the day of the murder from a narcotics detective who received the information from a suspect in a narcotics investigation. Defense counsel also

claimed that the state had not provided them with this evidence prior to trial.

The state disputed this claim saying that it had told one of Williams's attorneys about the suspect, but it acknowledged that it had made no attempt to find this suspect and have him testify in Williams's case.

{¶ 17} The crux of defense counsel's argument was that the prejudice to Williams warranted a mistrial because the jury now had the necessary link that positively identified the masked gunman witnesses saw get into the van after the shooting as Williams.

{¶ 18} When the trial resumed in the morning, the trial court explained to the parties that Det. Sandoval's testimony connected Williams to the van by virtue of hearsay testimony from an alleged witness who the state failed to show was unavailable, and that this testimony was unfairly prejudicial to Williams. Nonetheless, the trial court determined that a curative instruction would be sufficient to undo the prejudice to Williams.

{¶ 19} Therefore the trial court gave the following instruction to the jury: "Yesterday, at the close of the testimony, a question was put to Detective Sandoval, the last question. The jury is to totally disregard that last question and the response of Detective Sandoval. The Court instructs you to put the question and the response out of your minds and not give it any weight whatsoever. You are to do this in accordance with your oath as jurors to follow the instructions of this Court."

{¶ 20} In a likely effort to avoid reinforcing the prejudicial testimony, the trial court did not indicate to the jury the substance or context of the last question and Sandoval's response. Here, Williams argues that the overnight delay in giving a curative instruction, as well as the court's decision not to reference the substance of the testimony, left the jury with the inference that Williams was the masked gunman who then escaped in the van. He argues that this inference was unfair, and in light of the fact that the state did not produce the suspect to testify, was so unfairly prejudicial that he could no longer receive a fair trial. We agree.

{¶ 21} Curative instructions have been recognized as an effective means of remedying errors or irregularities that occur during trial. *State v. Ghaster*, Cuyahoga App. No. 91576, 2009-Ohio-2134, citing *State v. Zuern* (1987), 32 Ohio St.3d 56, 61, 512 N.E.2d 585. A jury is presumed to follow the instructions, including curative instructions, given it by a trial judge. *State v. Henderson* (1988), 39 Ohio St.3d 24, 33, 528 N.E.2d 1237.

{¶ 22} We agree with the trial court's qualification of Det. Sandoval's testimony connecting Williams to the van as hearsay. Hearsay is generally not admissible. See Evid.R. 802. Rule 801(C) of the Ohio Rules of Evidence defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Testimonial out-of-court statements presented in a

criminal trial also “violate the Confrontation Clause unless the witness was unavailable to testify at trial and the defendant had a prior opportunity to cross-examine the witness.” *State v. Crager*, 116 Ohio St.3d 369, 2007-Ohio-6840, 879 N.E.2d 745, at ¶ 41, citing *Crawford v. Washington* (2004), 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177.

{¶ 23} Regardless of Reeves’s testimony that she recognized Williams as the shooter and Cherni’s testimony that two masked gunmen got into the van, a critical link in the case came from Det. Sandoval who testified that he could connect Williams himself to the van when in fact that was not true. We find the trial court’s curative instruction given out-of-context and the following day was not sufficient to erase the prejudice to Williams. The jury heard brief but critical evidence at the end of a day of testimony and was able to consider it overnight; thus we find the curative instruction was insufficient in this case to provide Williams with a fair trial. The trial court’s decision not to act until the next day to address improper prejudicial testimony makes granting a mistrial the only effective remedy for Williams.

{¶ 24} We do not agree, however, that double jeopardy attached, preventing the state from retrying Williams. When a trial court declares a mistrial at the defense’s request, the Double Jeopardy Clause generally does not bar a retrial. *Oregon v. Kennedy* (1982), 456 U.S. 667, 102 S.Ct. 2083, 72 L.Ed.2d 416. We find that any misconduct on the part of the prosecutor by

eliciting this information, when the prosecutor arguably provided this evidence to the defense in advance of trial, was not calculated to invite a mistrial. See *id.* (prosecutorial misconduct will bar a second trial only when such behavior was “intentionally” calculated to cause or invite mistrial).

{¶ 25} Williams’s second assignment of error is sustained, and this matter is remanded to the trial court for retrial. We also find that Williams’s third assignment of error is sustained because his Sixth Amendment right to confrontation was denied.

{¶ 26} Having determined that the trial court erred by denying Williams’s motion for a mistrial, we find that his remaining assignments of error are moot.¹

Judgment reversed and cause remanded for a new trial.

It is ordered that appellant recover from appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

¹ Williams’s remaining assignments of error are:

“I. The jury’s decision finding appellant guilty of the charges was against the manifest weight of the evidence.”

“IV. The appellant was denied his right under the Sixth and Fourteenth Amendments to the effective assistance of counsel when defense counsel failed to protect his rights during trial.”

“V. The appellant was denied his rights to due process and a fair trial under the Fifth, Sixth, and Fourteenth Amendments when the court erred by admitting a great amount of enormously prejudicial testimony against him at trial.”

“VI. The trial court erred and violated appellant’s Fifth Amendment right to be free from double jeopardy when it ordered consecutive service for allied offenses.”

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

SEAN C. GALLAGHER, ADMINISTRATIVE JUDGE

MARY EILEEN KILBANE, J., and
LARRY A. JONES, J., CONCUR