

IN THE COURT OF APPEALS  
TWELFTH APPELLATE DISTRICT OF OHIO  
BUTLER COUNTY

STATE OF OHIO, :  
 :  
 Plaintiff-Appellee, : CASE NO. CA2011-11-213  
 :  
 - vs - : OPINION  
 : 7/16/2012  
 :  
 MICHAEL L. LANDERS III, :  
 :  
 Defendant-Appellant. :

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS  
Case No. CR2011-07-0959

Michael T. Gmoser, Butler County Prosecuting Attorney, Michael A. Oster, Jr., Government Services Center, 315 High Street, 11th Floor, Hamilton, Ohio 45011, for plaintiff-appellee

John T. Willard, P.O. Box 35, Hamilton, Ohio 45012, for defendant-appellant

**PIPER, J.**

{¶ 1} Defendant-appellant, Michael Landers, appeals his convictions and sentence in the Butler County Court of Common Pleas for aggravated robbery, felonious assault, and having weapons while under disability.

{¶ 2} In the early morning hours of June 14, 2011, Zachary Parsons left the Grub Pup, a bar near his home. Parsons encountered his friend, who asked him to purchase crack cocaine for him. Parsons agreed, and began walking again until he came upon several

people on the porch of a near-by house, some of whom he knew. Parsons approached the people on the porch and offered to sell his cell phone for \$40 in order to purchase the cocaine for his friend. One of the men took the phone and began to toss it around to the others, and eventually Landers had the phone.

{¶ 3} Once Landers had possession of the phone, he began walking away from the porch and down the street. Parsons followed Landers, pleading for his phone to be returned. Landers returned to the porch, retrieved a gun from another person on the porch, and told Parson's that he was going to give him a chance to run. However, Landers immediately began shooting at Parsons, wounding him four times. Landers laughed to his friends that he had just shot Parsons.

{¶ 4} Parsons made it to his home before he collapsed, where his girlfriend called for emergency assistance. Parsons received treatment for gunshot wounds to his right lower leg, left lower leg, left thigh, and lower back. Detectives with the Hamilton Police Department went to interview Parsons at the hospital, and showed him a photographic "line-up" of possible suspects. Parsons identified one of the men from the porch in the first line-up, but did not see his shooter. Detectives then received information that Landers shot Parsons, and detectives returned to the hospital with another photographic line-up, this time, including Landers' photograph. Parsons immediately identified Landers as his shooter.

{¶ 5} Landers was indicted on one count of aggravated robbery, two counts of felonious assault, and one count of having weapons while under disability. Landers pled not guilty, and his case was heard before a jury during a two-day trial. Landers was tried jointly with Daryl Wallace, the person on the porch who gave Landers the gun. Wallace was tried for complicity to aggravated robbery and felonious assault, but entered an *Alford* guilty plea after the state presented its case-in-chief. Landers did not plead, and his case was submitted to the jury.

{¶ 6} During deliberations, the jury posed a question to the trial court specific to Landers. Without objection, the trial court answered the jury's question through a typed answer signed by the trial court, the prosecutor, and Landers' trial counsel. The jury returned guilty verdicts, and the trial court sentenced Landers to an aggregate prison sentence of 12 and one-half years. Landers now appeals his convictions and sentence, raising the following assignments of error.

{¶ 7} Assignment of Error No. 1:

{¶ 8} IT WAS ERROR FOR THE COURT TO OVERRULE THE CRIMINAL RULE 29 MOTION TO DISMISS BY THE APPELLANT AT THE END OF THE STATES [SIC] CASE SPECIFICALLY IN REGARD TO THE AGGRAVATED ROBBERY COUNT AS THERE WAS INSUFFICIENT EVIDENCE TO GO TO THE JURY ON SAID COUNT.

{¶ 9} Landers argues in his first assignment of error that the trial court erred in denying his Crim.R. 29 motion to dismiss because there was insufficient evidence to demonstrate that he committed a theft offense or possessed a gun during the theft offense.

{¶ 10} Pursuant to Crim.R. 29(A), "[t]he court on motion of a defendant or on its own motion, after the evidence on either side is closed, shall order the entry of a judgment of acquittal of one or more offenses charged \* \* \*, if the evidence is insufficient to sustain a conviction of such offense or offenses." On review, "an appellate court 'will not reverse the trial court's judgment unless reasonable minds could only reach the conclusion that the evidence failed to prove all elements of the crime beyond a reasonable doubt.'" *State v. Adams*, 12th Dist. No. CA2006-07-160, 2007-Ohio-2583, ¶ 19, quoting *State v. Miley*, 114 Ohio App.3d 738, 742 (4th Dist.1996).

{¶ 11} In order to affirm the denial of a Crim.R. 29 motion, we need only find that there was legally sufficient evidence to sustain the guilty verdict. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52. When reviewing the sufficiency of the evidence underlying a

criminal conviction, an appellate court examines the evidence in order to determine whether such evidence, if believed, would support a conviction. *State v. Wilson*, 12th Dist. No. CA2006-01-007, 2007-Ohio-2298. "The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Jenks*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus, superseded on other grounds.

{¶ 12} Landers was charged with aggravated robbery in violation of R.C. 2911.01(A)(1), which states, "no person, in attempting or committing a theft offense, \* \* \*, or in fleeing immediately after the attempt or offense, shall do any of the following: have a deadly weapon on or about the offender's person or under the offender's control and either display the weapon, brandish it, indicate that the offender possesses it, or use it."

{¶ 13} During the trial, the jury heard evidence that Landers used a gun during the commission of a theft offense, i.e., stealing Parsons' phone. The jury heard testimony that Parsons was able to identify Landers from a photograph that police showed him, and that Landers had several identifying characteristics that set him apart from the other men on the porch such as permanent gold teeth, and "scruffy" hair.

{¶ 14} Parsons testified that Landers was the man who began walking away from the porch with his phone, and that he began following Landers while saying, "give me my phone back, come on man, let me have my phone back." Parsons also testified that he told Landers, "you ain't just going to take my phone." Landers responded to Parsons by asking him if he was "jumping red, dog," which Parsons testified meant "getting attitude."

{¶ 15} Landers argues that there was insufficient evidence that he committed a theft offense because when Parsons was asked by the state, and on cross-examination, whether he actually saw Landers with the phone, Parsons responded, "no." However, Parsons also

stated that he saw Landers with the phone while Landers was on the porch, and that he "believed" that Landers had his phone when he quickly walked away from the porch. Parsons also stated that he followed Landers because he was under the assumption that he had the phone, and that when confronted, Landers returned to the porch and retrieved a gun in order to shoot Parsons.

{¶ 16} While there was no direct testimony that Landers had Parsons' phone at the time he fired the gun, there exists circumstantial evidence to indicate that Landers committed a theft offense by stealing Parsons' phone. As the Ohio Supreme Court stated, "circumstantial evidence and direct evidence inherently possess the same probative value." *Jenks* at paragraph one of the syllabus.

{¶ 17} After viewing the evidence in a light most favorable to the prosecution, the jury could have found the essential elements of the theft offense proven beyond a reasonable doubt. Landers' first assignment of error is overruled.

{¶ 18} Assignment of Error No. 2:

{¶ 19} IT WAS ERROR FOR THE COURT TO INSTRUCT THE JURY IN RESPONSE TO A QUESTION FROM THE JURY RELATIVE TO GUILT OF ALL PERSONS ON THE PORCH THAT THERE WAS INSUFFICIENT EVIDENCE TO CONVICT ANYONE BUT THE APPELLANT.

{¶ 20} Landers argues in his second assignment of error that the trial court erred in responding to a question from the jury.

{¶ 21} During deliberations, the jury sent the following question to the trial court: "If in the presence of a theft being committed by either the defendant or someone else, does the pulling of a gun make the defendant part of the theft even if not the original person committing the robbery[?]" The trial court responded, "In response to question number one, as the Court understands the question, the answer is 'no.' There is insufficient evidence as a

matter of law to find that any of the individuals who were allegedly located on the porch (excluding the Defendant Landers) committed a 'theft' or a 'robbery'"

{¶ 22} First, we note that trial counsel did not object to the question, and instead, signed the trial court's response to the jury's question. Absent an objection at the trial level, an appellant waives **all but plain error**. *Crim.R. 52*. An alleged error does not constitute plain error unless, but for the error, the outcome of the trial clearly would have been otherwise. *State v. Stojetz*, 84 Ohio St.3d 452, 455, 1999-Ohio-464. Notice of plain error must be taken with utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice. *State v. D'Ambrosio*, 73 Ohio St.3d 141, 144, 1995-Ohio-129.

{¶ 23} After reviewing the record, we cannot say that the trial court's answer to the jury's question rises to the level of plain error because the result of Landers' trial would not have been different had the trial court not responded as it did. The jury's question seems to indicate that the jurors were considering whether Landers could be found guilty in either a complicity or conspiracy situation. However, the state never charged Landers with anything but being the principal offender in the robbery and felonious assault charges. Therefore, the trial court was correct in stating that Landers' act of pulling a gun did not make him a complicitor or conspirator. Nor does the trial court's answer indicate that Landers was guilty. Instead, the trial court was merely establishing that Landers could not be found guilty of a crime for which he was not charged.

{¶ 24} The fact that Landers' trial counsel signed off on the answer seems to indicate his belief that the jury was contemplating an all-or-nothing situation. Landers' trial counsel could have read the jury's question and decided that the jury would acquit Landers if told that there was insufficient evidence to indicate that someone else on the porch committed the robbery. Defense counsel could reasonably believe, from the jury question, that the jury was considering that Landers was not the instigator of the theft. While counsel's trial strategy did

not come to fruition, we cannot say that Landers would have been found not guilty absent the trial court's answer.

{¶ 25} Having found no plain error, Landers' second assignment of error is overruled.

{¶ 26} Judgment affirmed.

POWELL, P.J., and RINGLAND, J., concur.