

[Cite as *State v. Daniels*, 2010-Ohio-3871.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93545

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MALCOLM DANIELS

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-521106

BEFORE: Kilbane, P.J., Celebrezze, J., and Sweeney, J.,

RELEASED AND JOURNALIZED: August 19, 2010

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MARY EILEEN KILBANE, P.J.:

{¶ 1} Appellant, Malcolm Daniels (“Daniels”), appeals his conviction on two counts of aggravated murder; two counts of aggravated robbery, each containing one- and three-year firearm specifications; and one count of carrying a concealed weapon. Daniels argues that the trial court erred by admitting his alleged confession into evidence, that his convictions were against the manifest weight of the evidence, and that the trial court erred when it failed to instruct the jury on the lesser-included offense of reckless homicide. After a review of the record and pertinent law, we affirm.

{¶ 2} On February 17, 2009, Daniels was indicted on five counts. Counts 1 and 2 charged Daniels with aggravated murder, in violation of R.C. 2903.01(A) and R.C. 2903.01(B), respectively, both felonies of the first degree. Counts 3 and 4 charged Daniels with aggravated robbery, in violation of R.C. 2911.01(A)(1) and R.C. 2911.01(A)(3), respectively, both felonies of the first degree. Counts 1 through 4 each contained one- and three-year firearm specifications. Count 5 charged Daniels with carrying a concealed weapon, in violation of R.C. 2923.12(A)(2), a felony of the fourth degree.

{¶ 3} On May 18, 2009, the matter proceeded to a jury trial.

{¶ 4} Mechelle Gooden (“Gooden”) testified that, shortly after midnight, on August 9, 2008, she and Kiana Jones (“Jones”) went to visit a friend, Jessica Fowler (“Fowler”), at an apartment building located at 7700 Woodland Avenue, in Cleveland, Ohio. As Fowler came out of the apartment building to get into Gooden’s car, she stopped to talk to two males sitting in a parked Dodge Intrepid. Rodney Williams (“Williams”) was sitting in the driver’s seat and Curtis Green (“Green”) was sitting in the passenger seat. Green testified that Williams had parked in that location to sell marijuana.

{¶ 5} Fowler began talking to Green and then realized that she had gone to school with Williams. Fowler talked with Williams for several minutes, and the two exchanged phone numbers. Fowler then got into Gooden’s car and left. Moments later Daniels got into the backseat of Williams’s car. Williams showed

Daniels a small portion of marijuana. Daniels told Williams he would be right back. Daniels got out of the vehicle and went back into the apartment building.

{¶ 6} Approximately three minutes later, Daniels returned and again got into the backseat of the vehicle. Green stated that Daniels demanded everything Williams had and pulled out a gun. Williams looked back at Daniels and reached for the gun, at which point Daniels shot Williams once in the head. Daniels then got out of the vehicle and ran.

{¶ 7} Green attempted to drive the vehicle while sitting on the center console. He was able to drive the vehicle from the parking lot to the driveway, at which point he stated that the vehicle broke down and he was unable to drive it further. Green then called Williams's name several times. Green stated that Williams's breathing was labored and he was unable to respond. Williams ultimately died from his wound.

{¶ 8} Green panicked and began running down East 79th Street. Green called his cousin, who picked him up and drove him home. When Green arrived at home, he immediately told his mother, Rhonda Frisco Green ("Rhonda"), that Williams had been shot. Green had Williams's cell phone and handed it to Rhonda. Rhonda was able to contact Williams's grandmother and tell her that Williams had been shot.

{¶ 9} Later that morning, Rhonda took Green to the police station to make a statement. In his statement, Green stated that he was not in the vehicle when

Williams was shot. Green did not mention that Williams had been selling drugs at the time of the shooting.

{¶ 10} Green testified that on August 15, 2008, he returned to the police station to make a second statement. In this statement, Green admitted that Williams was selling drugs the night that he was shot, and also stated that he was in the vehicle when Williams was killed. Police then gave Green a photo lineup to determine if he could name a suspect. Green was able to identify Daniels as the individual who shot Williams.

{¶ 11} On August 17, 2008, Daniels was arrested at a cousin's home in Rochester, New York. Rochester Police Officer Manuel Ortiz ("Officer Ortiz") testified that, while Daniels was seated in the back of the patrol car, he spontaneously stated, "[it] was self-defense, man. I had four pounds of weed, and he had a stack. He was gonna rob me, so I shot him out of my pocket."

{¶ 12} On May 26, 2009, the jury convicted Daniels on all counts.

{¶ 13} On June 4, 2009, the trial court held a sentencing hearing. The trial court merged Counts 1 and 2, aggravated murder, and sentenced Daniels to 25 years to life. The trial court also merged Counts 3 and 4, aggravated robbery, and sentenced Daniels to five years of imprisonment, to run concurrent to the sentence on Counts 1 and 2. In addition, the trial court merged the one- and three-year firearm specifications on Counts 1, 2, 3, and 4, for an additional three

years of imprisonment to be served consecutively, for an aggregate sentence of 28 years of imprisonment.

{¶ 14} Daniels appealed, asserting three assignments of error for our review.

ASSIGNMENT OF ERROR NUMBER ONE

“MALCOLM DANIEL’S [SIC] DUE PROCESS RIGHTS WERE VIOLATED WHEN HIS ALLEGED CONFESSION WAS ADMITTED INTO EVIDENCE.”

{¶ 15} Daniels argues that the trial court erred when it allowed Officer Ortiz to testify regarding the statements Daniels made in the back seat of the patrol car after being arrested. After a review of the record, we find that this argument is without merit.

{¶ 16} On May 15, 2009, the State filed its response to Daniels’s request for discovery. The State specifically acknowledged that Daniels made an oral statement. Daniels never filed a motion to suppress this evidence. Further, during the direct examination of Rochester Police Officer Ortiz, the State specifically questioned Officer Ortiz regarding Daniels’s statements, and Daniels failed to object. (Tr. 418.)

{¶ 17} This court has previously held that, “[a] motion to suppress is the proper avenue for invoking challenges to exclude evidence that is the product of police conduct that results in a constitutional violation.” *State v. Freeman*, 8th Dist. No. 92286, 2009-Ohio-5226, at ¶23, citing *State v. French*, 72 Ohio St.3d

446, 1995-Ohio-32, 650 N.E.2d 887. Crim.R. 12(C)(3) requires a criminal defendant to file a motion to suppress his statement prior to trial, or waive any objection to it being admitted.

{¶ 18} As the record indicates that Daniels never filed a motion to suppress with the trial court, Daniels has waived this issue. This assignment of error is overruled.

ASSIGNMENT OF ERROR NUMBER TWO

“THE CONVICTION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.”

{¶ 19} Weight of the evidence concerns, “the inclination of the greater amount of credible evidence offered in a trial, to support one side of the issue rather than the other.” *State v. Hines*, 8th Dist. No. 90871, 2009-Ohio-2118, at ¶28, quoting *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541. In order to determine if the conviction was against the manifest weight of the evidence, this court “weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.” *Id.*

{¶ 20} When an appellate court reverses a conviction as being against the manifest weight of the evidence, it acts as the thirteenth juror and disagrees

with the factfinder's resolution of the testimony. *Thompkins* at 387, citing *Tibbs v. Florida* (1982), 457 U.S. 31, 42, 102 S.Ct. 2211, 72 L.Ed.2d 652. Appellate courts should only reverse a conviction as being against the manifest weight of the evidence in an exceptional case, "where the evidence weighs heavily against the conviction." *Id.*

{¶ 21} Daniels argues that his conviction is against the manifest weight of the evidence because Green's testimony was crucial to the State's case and Green's testimony was not credible. We disagree.

{¶ 22} This court should not simply substitute its judgment for that of the jury. *State v. Jackson*, 8th Dist. No. 88028, 2007-Ohio-823, at ¶15, citing *Thompkins*. The jury is in the best position to see the witnesses and assess their credibility. *Hines* at ¶31, citing *State v. Norman*, 8th Dist. No. 85903, 2005-Ohio-5979.

{¶ 23} In the instant case, the jury was in the best position to assess whether Green's testimony was credible. Green did admit that he gave two separate statements to the police, the first on August 9, 2008, and the second on August 15, 2008. In his first statement Green did not mention that Williams was selling marijuana when he was shot, and Green also stated he was not in the vehicle at the time of the shooting. On August 15, 2008, Green contacted police and asked to make a second statement. In the second statement, Green admitted that Williams had been selling marijuana when he was shot, and also

stated that he was in the vehicle, sitting in the passenger seat when Williams was shot.

{¶ 24} Although Green's initial statement to police was inconsistent with his testimony at trial, Green explained why he was not completely forthcoming at the beginning of the investigation. Green stated that he was in shock over Williams's death, and that he was hesitant to get involved in the police investigation. Green's mother corroborated Green's testimony, stating that Green was in shock when he arrived home on August 9, 2008, and could barely articulate what had happened. However, Green said that after he had time to think about it, he decided that he wanted to tell police the truth, with the hope that police would be able to find who killed Williams. (Tr. 172-180.)

{¶ 25} Further, Daniels argues that Green's testimony was not credible because Green did not seek help from anyone standing nearby immediately after Williams was shot. However, Green explained that he had never met Daniels prior to that evening and did not know who Daniels may have been affiliated with in that area. Therefore, Green was leery of asking anyone nearby for help. (Tr. 188.)

{¶ 26} As Green offered explanations for any inconsistencies in his testimony, we cannot find that Daniels's convictions were against the manifest weight of the evidence. Therefore, this assignment of error is overruled.

ASSIGNMENT OF ERROR NUMBER THREE

**“THE COURT PREJUDICED MALCOLM DANIELS BY
NEGLECTING TO INSTRUCT THE JURY ON THE LESSER
INCLUDED OFFENSE OF AGGRAVATED MURDER.”**

{¶ 27} Daniels argues that the trial court erred in failing to instruct the jury on reckless homicide, a lesser-included offense of aggravated murder. After a review of the record, we disagree.

{¶ 28} In *State v. Kidder* (1987), 32 Ohio St.3d 279, 280-281, 513 N.E.2d 311, the Ohio Supreme Court established a two-part test for determining if the trial court should have provided a jury instruction on a lesser-included offense. First, the trial court must determine if the requested charge is a lesser-included offense of the charged crime. Second, the trial court must determine if the evidence adduced at trial supports an instruction on the lesser-included offense. *Id.* at 281.

{¶ 29} This court has previously determined that reckless homicide is a lesser-included offense of aggravated murder. *State v. Hill*, 8th Dist. No. 87645, 2006-Ohio-6425. Aggravated murder requires that the defendant kill another purposefully, with prior calculation and design, while reckless homicide only requires that the defendant kills another recklessly. R.C. 2903.01(A); R.C. 2903.041.

{¶ 30} However, a trial court is required to instruct a jury on a lesser-included offense, “only where the evidence presented at trial would reasonably support both an acquittal on the crime charged and a conviction upon the lesser-

included offense.” *State v. Benson*, 8th Dist. No. 87655, 2007-Ohio-830, citing *State v. Thomas* (1988), 40 Ohio St.3d 213, 216, 533 N.E.2d 286. A trial court must review the record and determine if sufficient evidence exists to support a jury instruction on the lesser-included offense. *State v. Henderson*, 8th Dist. No. 89377, 2008-Ohio-1631, citing *State v. Wright*, 4th Dist No. 01CA2781, 2002-Ohio-1462. The trial court’s determination on this issue should be reversed only where it abused its discretion. *Id.*

{¶ 31} Daniels argues that the testimony of Officer Ortiz supports a reckless homicide instruction to the jury. Officer Ortiz testified that while in the back of the patrol car, Daniels stated that he shot Williams in self-defense because he believed Williams was going to steal his marijuana. (Tr. 418.)

{¶ 32} Even where a defendant’s own testimony supports a lesser-included offense, a jury instruction on the lesser-included offense is not required when the totality of the evidence does not reasonably support an acquittal on the greater offense and a conviction on the lesser charge. *Henderson* at ¶10, citing *State v. McCurdy*, 1st Dist. No. C-020808. In the instant case, Daniels only cites to the statement he made in the back of a patrol car in support of his claim that the jury should have received an instruction on reckless homicide. This testimony may arguably support an instruction for self-defense but not one for reckless homicide.

{¶ 33} Further, the jury was instructed on murder, a lesser-included offense of aggravated murder, and still convicted Daniels of the aggravated murder, evidencing the fact that a jury instruction on a lesser-included offense was not warranted.

{¶ 34} We cannot conclude that the trial court abused its discretion in failing to instruct the jury on reckless homicide; therefore, this assignment of error is overruled.

Judgment affirmed.

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

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated.

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

MARY EILEEN KILBANE, PRESIDING JUDGE

FRANK D. CELEBREZZE, JR., J., and
JAMES J. SWEENEY, J., CONCUR

