

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. **93513**

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JAMES ADAMS

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-517318

BEFORE: Boyle, J., Blackmon, P.J., and Cooney, J.

RELEASED AND JOURNALIZED: September 23, 2010

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MARY J. BOYLE, J.:

{¶ 1} Defendant-appellant, James Adams, appeals his convictions for aggravated robbery with attendant firearm specifications and having a weapon while under a disability. He raises four assignments of error for our review.

{¶ 2} “[1.] Whether the court erred finding the defendant guilty of having a weapon while under a disability where the evidence demonstrated that the

defendant did not possess any weapon personally, nor did it show that he aided and abetted anyone else in the possession of a weapon.

{¶ 3} “[2.] Whether appellant’s state and constitutional right to a grand jury indictment and state and federal constitutional rights to due process were violated when his indictment omitted an element of the offense of aggravated robbery.

{¶ 4} “[3.] Whether appellant’s state constitutional right to a grand jury indictment and state and federal constitutional rights to due process were violated when his indictment omitted an element of the offense of having a weapon while under disability.

{¶ 5} “[4.] Whether Mr. Adams was denied due process of law when the trial court failed to present a jury question to counsel and formulated and presented a response to the jury.”

{¶ 6} Finding no merit to his appeal, we affirm.

Procedural History and Factual Background

{¶ 7} In October 2008, Adams was indicted on four counts: two counts of aggravated robbery relating to two victims, in violation of R.C. 2911.01(A)(1), with one- and three-year firearm specifications; one count of having a weapon while under a disability, in violation of R.C. 2923.13(A)(3); and one count of gross sexual imposition, in violation of R.C. 2907.05(A)(1). He waived his right to a jury on the weapons while under disability count, but the remaining counts were tried to a jury, where the following evidence was presented.

{¶ 8} Monique Jones, Simeon Davis, and their friend Al were in a store when they saw Adams and two other men, Lionel Rankin and an unidentified individual. Just a short time later, Adams, Rankin, and the unidentified man approached Jones, Davis, and Al in a parking lot. While Adams began talking to Jones, Rankin came out from behind a dumpster with a gun and said, “[I]ay that shit down.” Rankin cocked the gun, and Jones put her hands up. At that point, Adams put his arms around Jones and began “rubbing [her] shoulder.” She told him that she did not have anything, and he said, “Baby, I don’t even want to rob you.” But Adams continued to “rub” Jones and began looking in her pockets. Jones said that Adams took between \$800 and \$1,000 from the pocket of her jeans. She further stated that while Adams was searching her for money, he felt her breasts and her “private.” While Adams was searching Jones, Rankin searched Davis and Al. Adams, Rankin, and the other man fled in a black car. Jones and Davis identified Adams and Rankin through a photo array.

{¶ 9} The jury found Adams guilty of both counts of aggravated robbery with the firearm specifications, but not guilty of gross sexual imposition. The trial court found him guilty of having a weapon while under a disability. The trial court then sentenced Adams to six years in prison; three years on the merged firearm specifications, to be served prior to and consecutive to three years on each aggravated robbery count, and one year for having a weapon while under a disability (all to be served concurrent to each other). It then informed Adams that

he would be subject to five years of postrelease control upon his release from prison and ordered him to pay \$800 in restitution to Jones.

Aiding and Abetting Another in
Having a Weapon While Under Disability

{¶ 10} In his first assignment of error, Adams argues that the state did not present sufficient evidence to convict him of having a weapon while under disability. We disagree.

{¶ 11} When an appellate court reviews a record upon a sufficiency challenge, “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. Leonard, 104 Ohio St.3d 54, 67, 2004-Ohio-6235, 818 N.E.2d 229, quoting *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus.

{¶ 12} It is undisputed that Adams had a prior conviction for drug possession and therefore under R.C. 2923.13(A)(3), could not acquire, have, carry, or use a firearm. But he maintains that he could not be convicted of having a weapon while under disability because (1) he was not the one who possessed the firearm, and (2) there was no evidence that Rankin, the one who did possess the firearm, had a disability.

{¶ 13} R.C. 2923.13(A)(3) provides in relevant part that: “Unless relieved from disability ***, no person shall knowingly acquire, have, carry, or use any firearm or dangerous ordnance, if *** [t]he person *** has been convicted of any offense involving the illegal possession, use, sale, administration, distribution, or trafficking in any drug of abuse[.]”

{¶ 14} R.C. 2923.03(A)(2) prohibits complicity with others to commit crimes and provides in part that “[n]o person, acting with the kind of culpability required for the commission of an offense, shall *** [a]id or abet another in committing the offense.”

{¶ 15} “A person aids and abets another when he assists another in the accomplishment of a common design or purpose.” *State v. Worley*, 8th Dist. No. 85791, 2005-Ohio-6356, ¶18, citing *State v. Minor* (Mar. 2, 2000), 5th Dist. No. 99CA63. “In order to constitute aiding and abetting, the accused must have taken some role in causing the commission of the offense.” *Id.* at ¶20, citing *State v. Sims* (1983), 10 Ohio App.3d 56, 460 N.E.2d 672. Further, “[a] person who is complicit in an offense may be charged and punished as if he were the principal offender, and a charge of complicity may be stated under R.C. 2923.03 or in terms of the principal offense. R.C. 2923.03(F).” *State v. Ousley*, 2d Dist. Nos. 23496 and 23506, 2010-Ohio-3116, ¶18.

{¶ 16} This court has held that in order to “have” a firearm or dangerous ordnance within the meaning of R.C. 2923.13, an individual must either actually

or constructively possess it. *State v. Hardy* (1978), 60 Ohio App.2d 325, 327, 397 N.E.2d 773. Actual possession requires ownership and, or, physical control; constructive possession may be achieved by means of an agent. *Id.*

{¶ 17} Here, although Rankin physically possessed the gun, the evidence established that Adams actively participated in the robbery. The victims saw Rankin and Jones together just prior to the robbery. While Rankin pointed the gun at Jones and the others, Adams searched Jones and ultimately stole \$800 to \$1,000 from her. Rankin and Jones then fled together in a black car. From this evidence, viewed in a light most favorable to the prosecutor, a reasonable fact finder could conclude beyond a reasonable doubt that Adams was an accomplice of Rankin, the one who actually possessed the gun.

{¶ 18} Adams further maintains that he could not be convicted of having a weapon while under disability because the indictment did not specify that Rankin, the one who possessed the firearm, had a disability; the indictment only charged that Adams had a disability. We disagree.

{¶ 19} As we explained, the evidence was sufficient to prove beyond a reasonable doubt that Adams aided and abetted Rankin, the one who actually possessed and brandished the gun. Accordingly, through Rankin, Adams constructively possessed a firearm within the meaning of R.C. 2923.13(A)(3). See *State v. Lewis*, 8th Dist. No. 81957, 2003-Ohio-3673 (evidence sufficient to prove having a weapon while under disability when only codefendant pointed the

gun at victims during robbery); *State v. Reed*, 8th Dist. No. 93346, 2010-Ohio-1866 (conviction for having a weapon while under disability upheld despite defendant not being the shooter, but being an active participant in the crimes). See, also, *In re R.G.*, 8th Dist. No. 90389, 2008-Ohio-6469, ¶82; *State v. Williams*, 8th Dist. No. 85327, 2005-Ohio-3715 (in an analogous argument, this court rejected the defendant's contention that the evidence was insufficient to convict on the firearm specifications because the defendant did not actually have the weapon where the evidence demonstrated that defendant aided and abetted the assailant who was in actual possession of the firearm).

{¶ 20} To the extent that Adams relies on *State v. Lewis* (Apr. 4, 1997), 2d Dist. No. 96CA12, for the proposition that the state had to prove that Rankin had a disability and not Adams, we disagree with *Lewis*. In *Lewis*, the defendant was convicted of five counts of “complicity to have a weapon while under a disability.” The court found it significant that the defendant was convicted of “*complicity* to have a weapon while under a disability, *rather than* having a weapon while under disability.” (Emphasis added.) The court reasoned: “in order to aid and abet another in committing the offense of having a weapon under disability, the disability must belong to the person being aided and abetted, not the aider and abetter.” *Id.*

{¶ 21} But since under R.C. 2923.03(F), “[a] charge of complicity may be stated in terms of this section, or in terms of the principal offense,” we disagree

with *Lewis*. Adams was not convicted of aiding and abetting Rankin “in committing the offense of having a weapon under disability.” He was convicted of having a weapon, which he constructively possessed through Rankin, while under a disability — his own disability, which was his previous conviction for drug possession.

{¶ 22} Adams’s first assignment of error is overruled.

Aggravated Robbery Indictment

{¶ 23} In his second assignment of error, Adams maintains that his aggravated robbery indictment was defective because it failed to include the mens rea elements for the aggravated robbery counts.

{¶ 24} We note at the outset that Adams failed to raise an objection to the trial court regarding any defect in his indictment. Under Crim.R. 12(C)(2), he has waived all but plain error. *State v. Horner*, Slip Op. No. 2010-Ohio-3830, ¶46 (explicitly overruling *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, 885 N.E.2d 917).

{¶ 25} The grand jury returned an indictment against Adams charging him with two counts of aggravated robbery for two victims under R.C. 2911.01(A)(1). The indictment charged that Adams “did, in attempting or committing a theft offense, as defined in Section 2913.01 of the Revised Code, or in fleeing immediately after the attempt or offense upon [victim] *** have a deadly weapon

to-wit: firearm, on or about [his] person or under [his] control and either displayed the weapon, brandished it, indicated that [he] possessed it, or used it.”

{¶ 26} R.C. 2911.01(A)(1) provides in relevant part:

{¶ 27} “(A) No person, in attempting or committing a theft offense, as defined in section 2913.01 of the Revised Code, or in fleeing immediately after the attempt or offense, shall do any of the following:

{¶ 28} “(1) 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[.]”

{¶ 29} We must reject Adams’s contention in light of the recent Ohio Supreme Court’s ruling in *Horner*, supra. In *Horner*, the Supreme Court overruled *Colon*, holding that “[a]n indictment that charges an offense by tracking the language of the criminal statute is not defective for failure to identify a culpable mental state when the statute itself fails to specify a mental state.” *Id.* at paragraph one of the syllabus. This is because the defendant is provided with adequate notice of the charges against him, which has always been the purpose of a grand jury indictment. *Id.* at ¶10-11.

{¶ 30} Adams’s indictment charging aggravated robbery mirrors the language of the statute and thus, under *Horner*, is not defective.

{¶ 31} Adams’s second assignment of error is overruled.

Having a Weapon While Under a Disability Indictment

{¶ 32} In his third assignment of error, he argues that the indictment charging R.C. 2923.13(A)(3), having a weapon while under a disability, was defective because it lacked the essential element of recklessness.

{¶ 33} Count 3 of Adams's indictment charged that he "unlawfully and knowingly acquired, had, carried, or used a firearm or dangerous ordnance while being under indictment for or having been convicted of an offense involving the illegal possession, use, sale, administration, distribution or trafficking in any drug of abuse, to-wit: the said James Adams, with counsel, on or about the 11th day of May 2007, in the Court of Common Pleas, Cuyahoga County, Ohio, Case No. CR 491831, having been convicted of the crime of possession of drugs, in violation of Revised Code Section 2925.11 of the State of Ohio."

{¶ 34} R.C. 2923.13 provides in pertinent part:

{¶ 35} "(A) Unless relieved from disability as provided in section 2923.14 of the Revised Code, no person shall knowingly acquire, have, carry, or use any firearm or dangerous ordnance, if any of the following apply:

{¶ 36} "***

{¶ 37} "(3) The person is under indictment for or has been convicted of any offense involving the illegal possession, use, sale, administration, distribution, or trafficking in any drug of abuse ***."

{¶ 38} Adams's indictment for having a weapon while under a disability tracked the language of applicable statute. Thus, the indictment was not defective.

{¶ 39} Adams's third assignment of error is overruled.

Judge's Ex Parte Communication with Jury

{¶ 40} In his fourth assignment of error, Adams argues that his due process rights were violated because the trial court answered three questions posed by the jury, without conferring with defense counsel and without placing the jury's questions on the record until after the jury rendered its verdict.

{¶ 41} It is well established that a defendant in a criminal case has a right to be present when, pursuant to a request from the jury during its deliberations, the judge communicates with the jury regarding his instructions. *State v. Abrams* (1974), 39 Ohio St.2d 53, 313 N.E.2d 823. Consequently, any communication between the court and the jury outside the presence of a defendant is error and may be grounds for a new trial. *Bostic v. Connor* (1988), 37 Ohio St.3d 144, 149, 524 N.E.2d 881.

{¶ 42} The Supreme Court has made clear, however, that erroneous communications between the judge and jury constitute good cause for a new trial only if the communications prejudiced the defendant's right to a fair trial. *Abrams*, 39 Ohio St.2d at 56; *State v. Jenkins* (1984), 15 Ohio St.3d 164, 233-237, 473 N.E.2d 264. Where the communications are substantive, such as when the

judge elaborates on an instruction or provides an additional instruction to the jury, courts have found that the error is prejudicial. See *State v. Alvarado* (Sept. 13, 2001), 8th Dist. No. 78629. Conversely, where the judge merely restates previously given instructions, the communication between the judge and jury outside of the defendant's presence has been found to be harmless. See *Abrams*, 39 Ohio St.2d 53 (ex parte communication was harmless when the judge offered to reread his original instruction).

{¶ 43} “Examples of prejudicial conduct include giving the jury additional instructions, explaining previously given instructions to the jury, or advising the jury that a verdict one way or another is required.” *State v. Ambler* (Aug. 31, 2000), 8th Dist. No. 77103, citing *Bostic* at fn. 6.

{¶ 44} During deliberations here, the jury in this case posed the following written questions to the judge:

{¶ 45} “Do the words ‘aiding and abetting’ need to be specifically stated on the indictment for us to include their implicit meaning in the charges?”

{¶ 46} “If the jury is deadlocked on one count of the indictment will the entire proceedings be considered a mistrial or will the verdicts on the other counts be accepted?”

{¶ 47} Without consulting the prosecutor or defense counsel, the trial court answered “no” to both questions. After the jury returned its verdict, the trial court read the questions into the record. Adams did not object or file a motion for a

new trial. Accordingly, Adams waived all but plain error. See *State v. Bryan*, 101 Ohio St.3d 272, 2004-Ohio-971, 804 N.E.2d 433, ¶83, citing *State v. Hessler* (2000), 90 Ohio St.3d 108, 121, 734 N.E.2d 1237.

{¶ 48} The judge's answers were clearly ex parte communications with the jury, and the state concedes that the "correspondence" was not proper. But the state argues that Adams was not prejudiced by the judge's ex parte communications. We agree.

{¶ 49} In answering the first question, the judge provided a brief and correct answer to the question. Had the parties been present, the answer would have been the same.

{¶ 50} As to the second question, the judge answered "no" to a compound question, where no was the correct answer to the first part of the question, but incorrect regarding the second part of the question. The answer was no that the entire proceeding would not be a mistrial if the jury could not reach a unanimous verdict on all counts. But the answer was yes that the verdicts on the other counts would be accepted. Nonetheless, Adams was not prejudiced by this apparent confusion — because the jury acquitted him of one of the counts charged, gross sexual imposition.

{¶ 51} Thus, we find the judge's improper ex parte communications with the jury did not rise to the level of plain error. In order to prevail under a plain error analysis, Adams bears the burden of demonstrating that the outcome of trial

clearly would have been different but for the errors. *State v. Long* (1978), 53 Ohio St.2d 91, 372 N.E.2d 804; Crim.R. 52(B). The outcome of Adams's trial would not have been different had defense counsel been consulted or been present when the jury posed its questions.

{¶ 52} Adams's fourth assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover of 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. Case remanded to the trial court for execution of sentence.

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

MARY J. BOYLE, JUDGE

PATRICIA ANN BLACKMON, P.J., CONCURS;
COLLEEN CONWAY COONEY, J., CONCURS IN JUDGMENT ONLY