[Cite as *State v. DiCarlo*, 2004-Ohio-5118.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,	)	
	)	CASE NO. 02 CA 228
PLAINTIFF-APPELLEE,	)	
	)	
- VS -	)	O P I N I O N
	)	
JACOB DiCARLO,	)	
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from Common Pleas Court, Case No. 02CR359.

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiff-Appellee:

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

Dated: September 23, 2004

VUKOVICH, J.

{¶1} Defendant-appellant Jacob DiCarlo appeals from his conviction in the Mahoning County Common Pleas Court of aggravated robbery, a violation of R.C. 2911.01, and felonious assault, a violation of R.C. 2903.11. These crimes were committed with co-defendant Michael Kapsouris. DiCarlo and Kapsouris were tried together despite having moved for relief from joinder. DiCarlo raises two issues for this court's review. First, is whether the trial court erred in overruling the motion for relief from prejudicial joinder. Second, is whether the conviction for felonious assault was based on insufficient evidence. For the reasons stated below, we answer both questions in the negative and affirm the judgment of the trial court.

STATEMENT OF FACTS

{¶2} On July 30, 2001, at around 3:00 p.m., Debra Mitchell arrived at Key Bank in Austintown, Ohio to deposit approximately $6,000. (Tr. 330). After she pulled into the parking lot, she noticed a Pontiac Grand Am pulling into the parking space to her left. (Tr. 331). There were two men in this car, a driver and a passenger. When she exited her van, the passenger in the Grand Am exited the vehicle and grabbed the bag she had in her hand, which contained the $6,000. (Tr. 338, 399). Mitchell and the passenger struggled for approximately a minute. (Tr. 340). During the struggle Mitchell saw a small knife in the passenger's hand. (Tr. 339, 340). The passenger overpowered her, threw the bag with the money in the back seat of the car, and got into the car. (Tr. 342, 343). Mitchell reached through the open passenger window in pursuit of the passenger and the money. (Tr. 343). While Mitchell was still halfway in the passenger's window, the driver placed the car in reverse. (Tr. 344). Mitchell, however, was able to exit before the car moved too far. (Tr. 344). The assailants then fled the scene. (Tr. 344).

{¶3} Mitchell retreated to her van to follow the assailants. While in pursuit, she called 911 on her cell phone. Mitchell felt something wet at her side and noticed it was blood. She reported to the 911 operator that she thought she had been stabbed in the altercation. Mitchell was later taken to the hospital, where she gave a statement and identification of the assailants to the police. Mitchell described the passenger as being approximately six foot tall with a pierced eyebrow, light blue eyes and a shaved

head. (Tr. 361). She described the driver as a little heavier with a shaved head. (Tr. 361).

{¶4} Based upon the area where Mitchell stated the assailants fled to and based upon the physical description she gave of the assailants, Austintown police believed that DiCarlo and Kapsouris were involved in the crime. Eventually, both DiCarlo and Kapsouris were arrested and indicted. Prior to trial, both Kapsouris and DiCarlo each filed a motion to have separate trials, alleging prejudicial joinder. The trial court denied the motions. At trial, Mitchell positively identified Kapsouris as the passenger of the Grand Am and DiCarlo as the driver of the Grand Am. Also at trial, testimony from two informants implicated both DiCarlo and Kapsouris in the crime. The jury found them both guilty of the felonious assault and aggravated robbery. DiCarlo was sentenced to a total of 13 years. He timely appeals from his conviction.

ASSIGNMENT OF ERROR NUMBER ONE

{¶5} "THE TRIAL COURT ERRORED [SIC] WHEN IT OVERRULED DEFENDANT-APPELLANT'S MOTION FOR RELIEF FROM PREJUDICIAL JOINDER."

{¶6} DiCarlo moved for relief from prejudicial joinder prior to trial, but he did not renew the motion at trial. (Tr. 615-626, 639-654). It has been held that a motion for relief from prejudicial joinder must be timely raised *and renewed* at the close of the state's case or at the close of all the evidence. *State v. Owens* (1975), 51 Ohio App.2d 132, 146. Failure to renew the motion waives all but plain error. *State v. Boyd*, 8th Dist. Nos. 82921, 82922, 82923, 2004-Ohio-368, at ¶18 (joinder of indictments); *State v. Williams*, 10th Dist. Nos. 02AP-730, 02AP-731, 2003-Ohio-5204 (sever counts); *State v. Scott*, 6th Dist. No. S-02-026, 2003-Ohio-2797.

{¶7} Hence, all arguments as to the joinder will be reviewed under a plain error analysis. An error does not amount to plain error unless the accused's substantial rights are so adversely affected as to undermine the fairness of the guilt determination. Crim.R. 52(B). Plain error occurs when, but for the error, the outcome of the trial clearly would have been otherwise. *State v. Cooperrider* (1983), 4 Ohio St.3d 226.

{¶8} Crim.R. 14 mandates when severing trials is necessary by stating, in pertinent part:

{¶9} "If it appears that a defendant or the state is prejudiced by a joinder of offenses or of defendants in an indictment * * * or by such joinder for trial together of indictments * * * the court shall order an election or separate trial of counts, grant a severance of defendants, or provide such other relief as justice requires."

{¶10} DiCarlo claims the trial court erred when it failed to grant him relief from the joinder. His argument is based upon the United States Supreme Court case *Bruton v. United States* (1968), 391 U.S. 123.

{¶11} "In *Bruton*, the Supreme Court held that in a joint trial of two defendants, a confession of one co-defendant who did not testify could not be admitted into evidence even with a limiting instruction that the confession could only be used against the confessing defendant. The rationale of *Bruton* was that the instruction of a potentially unreliable confession of one defendant which implicates another defendant without being subject to cross-examination deprives the latter defendant of his right to confrontation guaranteed by the Sixth Amendment." *State v. Moritz* (1980), 63 Ohio St.2d 150, 153, quoting *United States v. Fleming* (C.A.7, 1979), 594 F.2d 598, 602.

{¶12} DiCarlo claims that a statement made by Kapsouris to Daniel Farah which implicated both Kapsouris and DiCarlo in the robbery and assault could not be introduced at trial without violating *Bruton*. Farah testified that Kapsouris told him that he and DiCarlo robbed a fat or pregnant woman, that he (Kapsouris) stabbed her, and they got approximately $6,000. (Tr. 444, 446). Farah also testified that when he asked DiCarlo what had happened, DiCarlo denied ever being involved in the robbery or assault. (Tr. 462).

{¶13} Kapsouris' statement to Farah does create a *Bruton* problem because Kapsouris did not testify and thus, DiCarlo has no opportunity to cross-examine him. However, this violation does not per se amount to reversible error. In *Moritz*, the Ohio Supreme Court stated, "A violation of an accused's right to confrontation and cross-examination is not prejudicial where there is sufficient independent evidence of an accused's guilt to render improperly admitted statements harmless beyond a reasonable doubt." *Moritz,* 63 Ohio St.2d 150, paragraph two of the syllabus. See also, *Chapman v. California* (1967), 386 U.S. 18 and *Schneble v. Florida* (1972), 405 U.S. 427. Farah's testimony was not the only evidence to implicate DiCarlo.

{¶14} Yuschak, who was convicted of federal charges, acted as an informant in this case. Moreover, it is uncontroverted that he agreed to cooperate to get a lighter

sentence. (Tr. 584). In the presence of an agent from the Bureau of Alcohol, Tobacco and Firearms, Yuschak telephoned DiCarlo. The conversation was taped and played at trial. (Tr. 585, 587). During this conversation, DiCarlo implicated himself in the robbery and acknowledged that he received proceeds from the robbery. Pursuant to the rationale set forth in *Moritz*, we find that Kapsouris' statement to Farah did not constitute reversible error because DiCarlo's statement to Yuschak rendered the Kapsouris statement harmless beyond a reasonable doubt.

{¶15} Furthermore, testimony at trial indicated that Mitchell was able to identify DiCarlo as the driver of the Grand Am. Shortly after the robbery, Mitchell was shown a photo line up with DiCarlo's picture in it. (Tr. 353). She identified his picture and said it "kind of looked like him," but she was not 100% sure. (Tr. 354). However, when she saw a story on television about the arrest of Jacob DiCarlo for stabbing her and taking the money, she said she recognized him as the driver of the car, not the man who stabbed her. (Tr. 357). She testified that the day after seeing that news report she called the detective working on the case and told him that DiCarlo was not the man that stabbed her, but he was the man who drove the car. (Tr. 347). Furthermore, at trial, she positively identified DiCarlo as the driver of the car. (Tr. 353). Her identification was independent evidence that also implicated DiCarlo in the crime. Accordingly, DiCarlo's arguments fail because no prejudice resulted from Farah's testimony.

{¶16} DiCarlo also claims under this assignment of error that he was prejudiced by the state showing a picture of Kapsouris with a shaved head. He claims that this photo was not provided in discovery, and it was not authenticated. DiCarlo does correctly state that he has no standing to argue prosecutorial misconduct or lack of authentication because it was a photo of Kapsouris and it was offered against Kapsouris to show that he could look like the description given by Mitchell of the man who took the money and stabbed her. However, DiCarlo states that his inability to argue on this point exemplifies how the cases should have been severed because of the *Bruton* problem.

{¶17} While he is correct that he could not argue against the photograph, his own statement is more damaging than any statement made by Kapsouris or picture of Kapsouris. Accordingly, this assignment of error lacks merit for all of the above stated reasons.

ASSIGNMENT OF ERROR NUMBER TWO

{¶18} "APPELLANT'S CONVICTION OF FELONIOUS ASSAULT WAS BASED ON EVIDENCE NOT LEGALLY SUFFICIENT TO SUSTAIN A VERDICT OF GUILTY AS A MATTER OF LAW."

{¶19} The state argues that DiCarlo did not preserve the issue as to the sufficiency of the evidence for review on appeal because he did not renew his motion for acquittal after the close of the state's case. Previously we have stated, as have other courts, that the failure to move for an acquittal at trial does not waive an appellant's right to raise a sufficiency of the evidence argument on appeal. *State v. Jones*, 91 Ohio St.3d 335, 346, 2001-Ohio-57; *State v. Carter*, 64 Ohio St.3d 218, 1992-Ohio-127; *New Middletown v. Yeager*, 7th Dist. No. 03MA104, 2004-Ohio-1549, at ¶7; *State v. Casto*, 4th Dist. No. 01CA25, 2002-Ohio-6255, at ¶9. It has been explained that a defendant preserves his right to object to any alleged insufficiency of the evidence when he enters his "not guilty" plea. *Jones*, 91 Ohio St.3d at 346. Additionally, it has been explained that a conviction based on insufficient evidence would usually amount to plain error. *Perrysburg v. Miller*, 153 Ohio App.3d 665, 2003-Ohio-4221, at ¶57. As such, DiCarlo's failure to renew his Crim.R. 29 motion for acquittal does not waive his sufficiency of the evidence argument on appeal.

{¶20} In viewing a sufficiency of the evidence argument, a conviction will not be reversed unless the reviewing court holds that no rational trier of fact could have found that the elements of the offense were proven beyond a reasonable doubt. *State v. Goff*, 82 Ohio St.3d 123, 138, 1998-Ohio-369. The court must view the evidence in the light most favorable to the prosecution. Id. Whether or not the state presented sufficient evidence is a question of law dealing with adequacy. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52.

{¶21} DiCarlo was convicted of felonious assault and aggravated robbery. He argues that the facts introduced at trial may support a conviction for aggravated robbery, but they do not support a conviction for felonious assault. Thus, this assignment of error solely addresses the felonious assault conviction.

{¶22} During the jury instruction, the trial court instructed the jury on complicity. The uncontroverted testimony established that DiCarlo did not stab Mitchell. Thus, he was not the principal offender on the felonious assault and was, accordingly, convicted of complicity to commit felonious assault.

{¶23} R.C. 2923.03(A) specifies that a person is only guilty of complicity when he acts with the kind of culpability required for the commission of the offense. As the Ohio Supreme Court has explained, this means that the aider and abettor must share the criminal intent of the principal. *State v. Johnson*, 93 Ohio St.3d 240, 2001-Ohio-1335, syllabus.

{¶24} Felonious assault as defined by R.C. 2903.11(A)(2) states that no person shall knowingly cause or attempt to cause physical harm to another by means of a deadly weapon or dangerous ordnance. Therefore, the evidence when viewed in the light most favorable to the prosecution, must show that DiCarlo knowingly caused or attempted to cause physical harm to Mitchell by means of a deadly weapon or dangerous ordnance.

{¶25} It has been held that aiding and abetting contains two basic elements: (1) an act on the part of a defendant contributing to the execution of a crime, and (2) the intent to aid in the commission. *State v. Davidson*, 3d Dist. No. 9-2000-106, 2001-Ohio-2163. As the Ohio Supreme Court has stated, in order to prove that a person aided or abetted another in committing a crime, "the evidence must show that the defendant supported, assisted, encouraged, cooperated with, advised, or incited the principal in the commission of the crime." *Johnson*, 93 Ohio St.3d 240. "The mere presence of an accused at the scene of a crime is not sufficient to prove, in and of itself that the accused was an aider or abettor." *State v. Widner* (1982), 69 Ohio St.2d 267, 269. Rather, the evidence must demonstrate that the defendant expressed concurrence with the unlawful act or intentionally did something to contribute to an unlawful act. *State v. Stepp* (1997), 117 Ohio App.3d 561, 568. The fact that the defendant shares the criminal intent of the principal may be inferred from the circumstances surrounding the crime, which may include the defendant's presence, companionship and conduct before and after the offense is committed. *Johnson*, 93 Ohio St.3d at 245-246.

{¶26} The evidence adduced at trial, when viewed in the light most favorable to the prosecution, supports the felonious assault conviction. By his own admission, DiCarlo knew when he went out with Kapsouris that they were going to commit a robbery. (Statement to informant Yuschak.) He also knew that to accomplish the robbery they were waiting for a woman entering or leaving the bank with a large sum of money. (Statement to informant Yuschak.) Logically, it can be concluded that to

accomplish this type of robbery, DiCarlo knew some force would have to be used. Moreover, DiCarlo was the getaway driver and watched as the whole offense happened. He even began to pull out of the parking space once Kapsouris got back into the car, despite the fact that Mitchell was hanging out of the car's passenger window. (Tr. 344). After the commission of the offense, DiCarlo hid out with Kapsouris (for a short period of time) and accepted half of the proceeds from the offense. (Statement to informant Yuschak.) All of this information taken together indicates that DiCarlo was more than a mere presence at the commission of the offense; it indicates that he knew physical harm would occur to the victim of the crime. When viewed in the light most favorable to the prosecution, any rational trier of fact could have found that the elements of the offense were proven beyond a reasonable doubt. As such, this assignment of error is without merit.

{¶27} For the foregoing reasons, the judgment of the trial court is hereby affirmed.

Waite, P.J., concurs.
Donofrio, J., concurs.