[Cite as *State v. Abercrombie*, 2009-Ohio-6098.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92160

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

BRANDON ABERCROMBIE

DEFENDANT-APPELLANT

JUDGMENT:
CONVICTION AFFIRMED AND REMANDED FOR CORRECTION OF SENTENCING ENTRY

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-498982

BEFORE: Boyle, J., McMonagle, P.J., and Celebrezze, J.

RELEASED: November 19, 2009

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

MARY J. BOYLE, J.:

{¶ 1} Defendant-appellant, Brandon Abercrombie, appeals his murder conviction. He raises three assignments of error for our review:

{¶ 2} "[1.] The state failed to produce sufficient evidence necessary to sustain a conviction against the defendant.

{¶ 3} "[2.] The defendant's convictions were against the manifest weight of the evidence.

{¶ 4} "[3.] The defendant's oral statements to police were taken in violation of his *Miranda* rights and trial counsel ought to have filed a motion to suppress these statements, failure of which to do so resulted in prejudice to the defendant and constituted ineffective assistance of counsel."

{¶ 5} Finding no merit to his appeal, we affirm his conviction. We remand, however, for correction of the sentencing entry.

Procedural History and Factual Background

{¶ 6} Abercrombie was indicted on two counts of aggravated murder with firearm and felony murder specifications, two counts of aggravated robbery with firearm specifications, and one count of aggravated burglary with firearm specifications. One of the counts of aggravated robbery was dismissed prior to trial. The following facts were presented at trial.

{¶ 7} On a clear day, in the middle of the afternoon on June 25, 2007, David Brown was shot three times in his home at 4106 East 138th Street,

Cleveland, Ohio. He was later pronounced dead at the hospital. Several witnesses testified as to the events that occurred that day and what they saw before and after they heard the shots.

{¶ 8} Robert Bryant lived at 4103 East 136th Street. He had known Abercrombie for about a year and saw him often because Abercrombie's grandmother lived two doors down from him, at 4111 East 136th Street. On June 25, he was riding his bike when he saw Abercrombie walking toward his grandmother's house. They said hello to each other. At that time, Bryant noticed a white car parked in front of his house. Approximately three to four minutes later, Bryant heard "three loud shots" from behind his house. The next thing he saw, "a minute or two" later, was Abercrombie "coming down the driveway next to [Bryant's] house" walking at a "normal to fast pace." Bryant saw Abercrombie get into the passenger side of the white car. Abercrombie was carrying a black book bag that he did not have when Bryant first saw him. Abercrombie told the driver, "let's roll." Bryant said that Abercrombie was wearing black jeans, a black shirt, and a black "do rag."

{¶ 9} Patricia Smith-Jennings lived on East 136th Street, across the street from Abercrombie's grandmother. She knew Abercrombie and Brown through her son, Julias; Abercrombie would purchase marijuana for Smith-Jennings from Brown. On June 25, Smith-Jennings asked her son to get her "some weed." Julias and her niece, Dana, talked to Abercrombie about buying the marijuana from Brown. Smith-Jennings said that Abercrombie left her house, and she saw

him walk down his grandmother's driveway, for what she thought was to cut through the yards to go to Brown's house to get her "weed." When she saw him again, he was walking down an abandoned driveway, next to his grandmother's house, and he was carrying a black bag that he did not have when she saw him earlier. She then saw him get into a white Ford Taurus and drive away. She admitted that she originally told police that he got into a "greenish car," but explained that she made a mistake. Smith-Jennings said that Abercrombie was wearing dark jeans and a dark shirt that day.

{¶ 10} Dana Curry lived with her aunt, Smith-Jennings, and her cousin, Julias. She said that on June 25, she was sitting on her front porch when Abercrombie asked her if she had talked to Brown. Abercrombie then used her cell phone to call Brown. He left and spoke to someone in a white Ford Taurus, parked down from his grandmother's house. Abercrombie returned to talk to Curry and used her cell phone again to call Brown. Abercrombie then left again, and Curry saw him cut through his grandmother's backyard and climb over the fence toward Brown's backyard. About five minutes later, she heard three gun shots. Soon after she heard the shots, she saw Abercrombie come from the backyard of his grandmother's neighbor's house. She saw him get into the white Taurus and leave. But before he left, she saw him lift up his shirt and tuck something in his pants. She asked him if he was going to come back and smoke, and he told her he would "chop it with us later." She said that

Abercrombie was wearing dark pants and a black "hoodie." The driver never got out of the car.

{¶ 11} Geraldine Banks lived at 4104 East 138th Street. She had been neighbors with Brown for years. On June 25, she was at home watching television when she heard the three shots. She looked out her kitchen window and saw a man running through Brown's backyard, away from Brown's house. The man had on dark pants, a dark top, and a dark hat, and was carrying a dark duffle bag on his shoulder. She saw him jump the fence and run into the backyard of the house on the "next street." About a minute after she heard the shots, she heard a man yelling from Brown's house for someone to call 911, so she did. She walked over to Brown's house and two men and a woman were already there.

{¶ 12} Christopher Jones lived two houses down from Brown with his girlfriend, LaToya, and her brother, Robert Witcher. On June 25, he was on his porch when he heard three gunshots. About a minute or less later, he saw a man coming out of Brown's house. He then saw the man go "to the right-hand side, and jump over the railing *** and went to the back." The man was black, was wearing a black shirt and black hat, and was carrying a black book bag. He said after the man jumped off the porch, he did not see where he went, but explained the man could have only gone behind Brown's house. Jones went in Brown's house with his friend Aaron, who he saw coming down the street. Jones went in first and said Brown was the only person in the house at that time.

{¶ 13} Witcher testified that on June 25, he was standing on LaToya's front lawn when he heard the three shots. He said Jones and Aaron Hardy (LaToya's son's father) were there too. After he heard the gunshots, Witcher saw a man run out of Brown's house, look around, and then jump over the banister and run into the backyard. The man had on a black shirt, black jeans, and was carrying a black book bag. Jones and Hardy then went over to Brown's house, but Witcher remained outside.

{¶ 14} Police found two spent shell casings at the scene, and Brown's brother found the third spent casing a few days later. Three bullets were also recovered from Brown. Police experts later established that the three spent shell casings came from the same gun, a .45 caliber automatic gun. The bullets were determined to also come from the same gun and were "found to be consistent with .45 auto-type ammunition." All of the blood found at the scene and on the victim's clothing turned out only to be Brown's.

{¶ 15} Detective Henry Veverka testified that they learned Abercrombie's name as a possible suspect the same day Brown was shot. He said police created a photo array with Abercrombie's picture and five other men. Bryant and Curry were able to pick Abercrombie out of the photo array. Police then obtained a warrant for Abercrombie's arrest.

{¶ 16} Detective Veverka testified that a few days later police received a tip regarding the owner of the white Ford Taurus, that it was Audrey Jones, and that the name of the driver of the car was David Carroll. Audrey Jones was

Abercrombie's cousin, and she confirmed that Carroll, her boyfriend, was driving her car on June 25. Carroll then came to the police station with his attorney. Detective Veverka testified that he learned "from speaking with them" that Carroll was driving his girlfriend's car on June 25. After talking to Carroll and his attorney, Detective Veverka also contacted Atlantic Gun & Tackle and learned that Carroll purchased a .45 caliber Springfield automatic pistol on March 21, 2006.

{¶ 17} Abercrombie was arrested on July 13. Detective Veverka testified that he told Abercrombie that he was under arrest and Mirandized him. Abercrombie refused to give a written statement without an attorney (he did not initially request one though), but did give an oral statement. Abercrombie said that he knew Brown as the "weed man," but had never been in Brown's house and did not know that he had been killed. Abercrombie did admit to police that he had been to Brown's house on June 25, but said he did not go inside the house. He went there to "buy a sack," but said he waited outside while Brown got the "sack." Abercrombie explained that Carroll had driven him to Brown's house and waited for him while he "bought the sack." Detective Veverka asked Abercrombie where they parked the car, but Abercrombie would not answer. Detective Veverka also asked Abercrombie "how would he explain if we found his fingerprints in the kitchen." Abercrombie said "his fingerprints might be on the kitchen door, door handle." Detective Veverka then told Abercrombie that Carroll

had given a statement, and Abercrombie terminated the interview and said he wanted an attorney.

{¶ 18} The jury found Abercrombie guilty of two counts of the lesser included offense of murder with the firearm specifications. It found him not guilty of all other charges. The trial court merged the murder convictions and firearm specifications for purposes of sentencing. It then sentenced him to 15 years to life for murder and three years on the firearm specifications, for an aggregate prison term of 18 years to life in prison.

Sufficiency of the Evidence

{¶ 19} An appellate court's function in reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus. "In essence, sufficiency is a test of adequacy. Whether the evidence is legally sufficient to sustain a verdict is a question of law." *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386. 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. *Jenks* at 273.

{¶ 20} Abercrombie argues that the state failed to produce evidence that "he in fact was the person responsible for the shooting." He claims the most "troubling aspect of this case" is that no one's testimony puts him in the victim's house at the time of the murder. Therefore, he maintains that the state failed to prove the "essential element" of identity. We disagree.

{¶ 21} Three witnesses, Bryant, Smith-Jennings, and Curry, lived beside and across the street from Abercrombie's grandmother, knew Abercrombie, and saw him near Brown's house immediately before and after the gunshots. All three described Abercrombie's clothes the same, namely, dark. All three saw him return to their street soon after the shots were fired with a black bag that he did not have minutes before, get into a white car, and leave.

{¶ 22} Three other witnesses who lived beside Brown, Banks, Jones, and Witcher, heard the gunshots and immediately after, saw a man jump off Brown's porch and take off running through Brown's backyard, dressed exactly as Bryant, Smith-Jennings, and Curry had described Abercrombie, and saw the man carrying a black bag.

{¶ 23} We find that the state's evidence, if believed, is more than sufficient to prove beyond a reasonable doubt the "essential element" of identity.

{¶ 24} Abercrombie's first assignment of error is overruled.

Manifest Weight of the Evidence

{¶ 25} The *Thompkins* court further "distinguished between sufficiency of the evidence and manifest weight of the evidence, finding that these

concepts differ both qualitatively and quantitatively. Id. at 386. The court held that sufficiency of the evidence is a test of adequacy as to whether the evidence is legally sufficient to support a verdict as a matter of law, but weight of the evidence addresses the evidence's effect of inducing belief. Id. at 386-387. In other words, a reviewing court asks whose evidence is more persuasive — the state's or the defendant's? [The court] went on to hold that although there may be sufficient evidence to support a judgment, it could nevertheless be against the manifest weight of the evidence. Id. at 387. 'When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a "thirteenth juror" and disagrees with the factfinder's resolution of the conflicting testimony.' Id. at 387, citing *Tibbs v. Florida* (1982), 457 U.S. 31, 42." *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, ¶25.

{¶ 26} Abercrombie contends that the jury lost its way in convicting him of murder. He maintains that (1) the police did not find his fingerprints in Brown's home; (2) the police did not check the cell phone records of Smith-Jennings or Curry to verify that Abercrombie used their phones to call Brown; (3) Bryant, Smith-Jennings, and Curry were not credible witnesses because Bryant was a convicted felon; Curry admitted she had been smoking marijuana in the afternoon of June 25; and Smith-Jennings was searching for marijuana that day; and (4)

Brown was a known drug dealer who feared for his life and any number of people could have killed him. We find Abercrombie's arguments to be unpersuasive.

{¶ 27} Abercrombie's defense counsel did an excellent job at trial cross-examining the state's witnesses and pointing out the frailties in the state's case. He made sure that the jury was well aware of exactly what the police did and, more importantly, did not do in its investigation, as well any issues regarding the witnesses' credibility and discrepancies in their testimony, especially Bryant, Smith-Jennings, and Curry. Indeed, the jury knew of Bryant's felony record, Smith-Jennings' desire for marijuana, and the fact that Curry was high on June 25, 2007.

{¶ 28} When assessing witness credibility, "[t]he choice between credible witnesses and their conflicting testimony rests solely with the finder of fact and an appellate court may not substitute its own judgment for that of the finder of fact." *State v. Awan* (1986), 22 Ohio St.3d 120, 123. "Indeed, the factfinder is free to believe all, part, or none of the testimony of each witness appearing before it." *Warren v. Simpson* (Mar. 17, 2000), 11th Dist. No. 98-T-0183.

{¶ 29} After reviewing the record on appeal, we cannot find that the jury lost its way in convicting Abercrombie of murder. This is clearly not the exceptional case where the evidence weighs heavily against conviction. Indeed, we find the state's evidence overwhelmingly proved — albeit

circumstantially — that Abercrombie shot Brown three times, causing his death. Accordingly, Abercrombie's second assignment of error is overruled.

Ineffective Assistance of Counsel

{¶ 30} In his third assignment of error, Abercrombie contends that his trial counsel was ineffective because he failed to move to suppress oral statements that Abercrombie gave to police after he was arrested. He argues that because he told the police that he would not give a written statement without an attorney present, that proves he did not understand that oral statements could be used against him at trial. Abercrombie's arguments are without merit.

{¶ 31} To succeed on a claim of ineffective assistance, a defendant must establish that counsel's performance was deficient and that the defendant was prejudiced by the deficient performance. *Strickland v. Washington* (1984), 466 U.S. 668, 687; *State v. Bradley* (1989), 42 Ohio St.3d 136. Counsel will only be considered deficient if his or her conduct fell below an objective standard of reasonableness. *Strickland* at 688. When reviewing counsel's performance, this court must be highly deferential and "must indulge a strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance." Id. at 689. To establish resulting prejudice, a defendant must show that the outcome of the proceedings would have been different but for counsel's deficient performance. Id. at 694.

{¶ 32} "'[F]ailure to file a motion to suppress is not per se ineffective assistance of counsel.'" *State v. Madrigal*, 87 Ohio St.3d 378, 389,

2000-Ohio-448, quoting *Kimmelman v. Morrison* (1986), 477 U.S. 365, 384. "Failure to file a motion to suppress constitutes ineffective assistance of counsel only if, based upon the record, the motion would have been granted." *State v. Kuhn*, 9th Dist. No. 05CA008859, 2006-Ohio-4416, at ¶ 11, citing *State v. Robinson* (1996), 108 Ohio App.3d 428, 433.

{¶ 33} Thus, we must determine from the record whether a motion to suppress would have been granted. If so, Abercrombie's counsel was ineffective for failing to file the motion.

{¶ 34} A suspect may waive his *Miranda* rights only if that waiver is done knowingly, intelligently, and voluntarily. *State v. Myers*, 2d Dist. No. 1643, 2006-Ohio-1604, at ¶65. A confession is voluntary if it is the product of an essentially free and unconstrained choice by its maker. *State v. Wiles* (1991), 59 Ohio St.3d 71, 81. The state bears the burden of proving, by a preponderance of the evidence, that a confession was voluntary. *Colorado v. Connelly* (1986), 479 U.S. 157, 167-168. Whether a suspect voluntarily waives his *Miranda* rights is based on the totality of the circumstances. *State v. Clark* (1988), 38 Ohio St.3d 252, 261.

{¶ 35} An accused who requests an attorney is not subject to further questioning until counsel is present, unless the accused initiates further communications. *State v. Treesh* (2001), 90 Ohio St.3d 460, 473. For the interrogation to cease, however, the accused must clearly invoke his constitutional right to counsel. *Davis v. United States* (1994), 512 U.S. 452, 459,

114 S.Ct. 2350. In order to do this, an accused "must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." Id. No cessation of questioning is required if the request is ambiguous.

{¶ 36} The record establishes that Abercrombie was Mirandized prior to being questioned by police. Indeed, the record reveals that Abercrombie understood his *Miranda* rights. He refused to give a written statement without an attorney, but did not initially request one. Abercrombie then requested an attorney only after he learned that Carroll had given a statement. He then refused to talk, stating only at that point that he wanted an attorney. All questioning immediately ceased once he asked for an attorney. There is no evidence that the police held him for long periods of time or coerced him in any way, nor does Abercrombie even argue that the police were somehow coercive. Thus, we find his oral statements were voluntarily given and as such, we cannot find that Abercrombie's trial counsel was defective for not filing a motion to suppress.

{¶ 37} Even if we were to find that his trial counsel should have moved to suppress his oral statements, Abercrombie was not prejudiced by their admission. As we stated previously, the state's evidence — excluding Abercrombie's oral statements — overwhelmingly proved that he was near Brown's house minutes before and after the shooting, and that a man dressed

exactly like Abercrombie jumped off Brown's porch immediately after the shots were fired and took off running toward Brown's backyard.

{¶ 38} Abercrombie's third assignment of error is overruled.

Sentencing Issues

{¶ 39} The trial court properly merged Abercrombie's murder convictions at the sentencing hearing, however, it failed to note that it merged them on the sentencing entry. Thus, on its face, the sentencing entry appears as if Abercrombie was convicted of two counts of murder, when (as the trial court properly found at the sentencing hearing) he could not have been because the offenses were allied.

{¶ 40} Further, the trial court incorrectly stated that five years of postrelease control was part of Abercrombie's sentence. Abercrombie was convicted of murder, which is an unclassified felony and thus, postrelease control does not apply. See R.C. 2967.28; *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, ¶36; *State v. Cochran*, 8th Dist. Nos. 91768, 91826, and 92171, 2009-Ohio-1693, ¶26. Rather, Abercrombie is subject to an indefinite term of 18 years to life in prison. Therefore, under R.C. 2967.13(A)(1), he will become eligible for parole after he has served his minimum term of 18 years in prison.

{¶ 41} Although we affirm Abercrombie's conviction, we remand this case to the trial court to correct its sentencing entry. Upon remand, the trial court is instructed to correct the sentencing entry so that it reflects what it actually did at the sentencing hearing, i.e., properly merged the murder convictions and the

firearm specifications. Further, we instruct the trial court to remove postrelease control from Abercrombie's sentence.

Judgment affirmed but remanded for further proceedings consistent with this opinion.

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

CHRISTINE T. McMONAGLE, P.J., and
FRANK D. CELEBREZZE, JR., J., CONCUR