

[Cite as *State v. Cotton*, 2010-Ohio-5003.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. **93779**

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

SYLVESTER COTTON

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-515038-A

BEFORE: Jones, J., Rocco, P.J., and Celebrezze, J.

RELEASED AND JOURNALIZED: October 14, 2010

ATTORNEY FOR APPELLANT

Patricia J. Smith
4403 St. Clair Avenue
The Brownhoist Building
Cleveland, Ohio 44103

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor

BY: Steven E. Gall
Assistant Prosecuting Attorney
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

LARRY A. JONES, J.:

{¶ 1} Defendant-appellant, Sylvester Cotton (“Cotton”), appeals his conviction for aggravated robbery and kidnapping. Finding no merit to the appeal, we affirm.

{¶ 2} In 2008, Cotton was charged in Cuyahoga County Juvenile Court with theft, breaking and entering, having a weapon while under a disability, and two counts each of aggravated robbery and kidnapping. Firearm specifications accompanied the aggravated robbery and kidnapping charges. Cotton was

charged as a juvenile, but he was bound over to stand trial as an adult. He was indicted on the above charges and an additional having a weapon while under a disability charge. The matter proceeded to a trial by jury. After the close of the state's evidence, the trial court dismissed the theft and breaking and entering charges and further dismissed one count of aggravated robbery and one count of kidnapping.

{¶ 3} The following pertinent facts were adduced at trial.¹

{¶ 4} On January 12, 2008, Lashawn Jackson ("Jackson") arrived at the Ace America's Cash Express ("Ace") store in East Cleveland. As the store's manager, Jackson was responsible for opening up the store for the day's business. Jackson drove around the block to make sure everything appeared safe and then pulled up to the store. As she got to the door, two masked youths approached her from either side, holding shotguns. The youths ordered her to open the store and threatened to kill her if she refused. After she entered the store, one of the assailants followed her while the other stayed outside. Jackson proceeded to open the safe, which had a ten minute time release lock on it. During the ten minutes, the armed assailant continued to threaten Jackson. Once the safe was opened, the assailant had Jackson fill a box with the contents of the safe, which was just under \$30,000. Jackson then ran from the store.

¹ The charges involved three events: breaking and entering into Ace on September 16, 2007, a robbery on November 13, 2007 at Ace, and the January 12, 2008 robbery at Ace. The trial court dismissed all charges stemming from the first two events; therefore, the facts of the case will center on the January 2008 robbery.

She saw her aunt pull up in a car and Jackson ran to the car. The aunt testified that she was the district manager of Ace and had received a call that the store had not opened on time. The aunt drove to Ace and saw her niece running from the store.

{¶ 5} The night before the robbery occurred, Cotton was sitting with his friends, David Sullivan (“Sullivan”) and Deandre Gordon (“Gordon”), in Anita Gibson’s (“Gibson”) house. Gordon dated Gibson’s daughter. Sullivan and Gordon were discussing breaking into Ace through the roof of the store. Sullivan, Cotton, and Gordon left to go survey the store. Cotton returned and spent the night at Gibson’s house. The next morning Sullivan and Gordon picked Cotton up and all three returned a short time later with a box of bundled money. Sullivan and Gordon divided the money and gave some to Cotton and some to Gibson.² Cotton then took Gibson to the auto repair shop to pay for repairs to his car and Gibson’s car. Cotton paid for the repairs in cash.

{¶ 6} The jury convicted Cotton of aggravated robbery and kidnapping, but acquitted him of the firearm specifications. The trial court acquitted Cotton of the having a weapon while under a disability charges and sentenced him to six years in prison.³

² Gibson accepted \$100 of the robbery proceeds and was later indicted for receiving stolen property.

³ Gordon and Sullivan both pled guilty to charges stemming from the January 2008 robbery.

{¶ 7} Cotton now appeals his conviction, raising the following three assignments of error for our review:

{¶ 8} “I. The trial court erred by allowing prejudicial other acts evidence to be introduced to the jury.

“II. When counsel fails to request severance of counts and/or object to such other acts evidence where it will unfairly prejudice the defendant, it is ineffective assistance of counsel.

“III. The jury erroneously found the defendant guilty of aggravated robbery and kidnapping where there was no physical or scientific evidence linking defendant to the crimes and where the witnesses were unable to identify the assailants.”

Other Acts Evidence

{¶ 9} First, Cotton claims that the trial court erred in allowing other acts evidence to be introduced to the jury. We disagree.

{¶ 10} Evid.R. 404(B) provides that “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.”

{¶ 11} Cotton argues that the state impermissibly introduced evidence of the September and November 2007 incidents to help prove he was guilty of the January 2008 robbery.

{¶ 12} We find that the state did not introduce evidence of Cotton’s other acts pursuant to Evid.R. 404(B). The state presented evidence of Cotton’s involvement in the other offenses because he was charged with those other

crimes in the same indictment. It was the state's duty to attempt to prove each element of the crimes it had indicted Cotton with. The state failed, and the trial court dismissed those charges against Cotton pursuant to his Civ.R. 29 motion for acquittal.

{¶ 13} We find no error in the trial court's admission of the evidence relating to the September and November 2007 crimes. The first assignment of error is overruled.

Severance

{¶ 14} In the second assignment of error, Cotton argues that his counsel was ineffective for failing to request that the charges be severed or for failing to object to other acts evidence.

{¶ 15} In order to substantiate a claim of ineffective assistance of counsel, the appellant is required to demonstrate that (1) the performance of defense counsel was seriously flawed and deficient and (2) the result of the appellant's trial or legal proceeding would have been different had defense counsel provided proper representation. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Brooks* (1986), 25 Ohio St.3d 144, 495 N.E.2d 407.

Judicial scrutiny of defense counsel's performance must be highly deferential. *Strickland*. In Ohio, there is a presumption that a properly licensed attorney is competent. *State v. Calhoun*, 86 Ohio St.3d 279, 1999-Ohio-102, 714 N.E.2d 905.

{¶ 16} Cotton first claims that counsel was ineffective for not requesting that the charges relating to each crime be severed. Crim.R. 8 allows for the joinder of two or more offenses when the offenses “are of the same or similar character, or are based on the same act or transaction, or are based on two or more acts or transactions connected together or constituting parts of a common scheme or plan, or are part of a course of criminal conduct.” Generally, the law favors joining multiple offenses in a single trial under Crim.R. 8(A) if the offenses charged are of the same or similar character. *State v. Lott* (1990), 51 Ohio St.3d 160, 163, 555 N.E.2d 293. Joinder and the avoidance of multiple trials is favored for many reasons, among which are conserving time and expense, diminishing the inconvenience to witnesses, and minimizing the possibility of incongruous results in successive trials before different juries. *State v. Torres* (1981), 66 Ohio St.2d 340, 421 N.E.2d 1288.

{¶ 17} An accused may move to sever the charges under Crim.R. 14, but he has the burden to affirmatively demonstrate that his rights will be prejudiced by the joinder. *Lott*. A showing by the state that the evidence relating to each crime is simple and direct negates any claims of prejudice and renders joinder proper. *Lott*, supra; *State v. Roberts* (1980), 62 Ohio St.2d 170, 405 N.E.2d 247; *State v. Torres* (1981), 66 Ohio St.2d 340, 421 N.E.2d 1288. It is the defendant who bears the burden of demonstrating prejudice and that the trial court abused its discretion in denying severance. *State v. Hill*, Cuyahoga App. No. 80582,

2002-Ohio-4585, citing *State v. Coley*, 93 Ohio St.3d 253, 2001-Ohio-1340, 754 N.E.2d 1129.

{¶ 18} In this case, Cotton has failed to demonstrate that his rights were prejudiced by the joinder. Further, he has not shown that there was a reasonable possibility that the trial court would have granted a motion to sever had his attorney filed one. The record reflects that the evidence relating to each crime, as presented by the state, was simple and direct, and would not confuse the jury or cause the jury to improperly cumulate the evidence of the various crimes. See *Torres; Lott*. Moreover, the trial court dismissed the charges relating to the first two offenses and instructed the jury that they were only to proceed on the January 2008 robbery.

{¶ 19} Cotton further argues that his counsel was ineffective for failing to object to the state's introduction of other acts evidence. But as we discussed under the first assignment of error, the state introduced evidence of the other crimes because they were charged in the indictment.

{¶ 20} Thus, Cotton did not receive ineffective assistance of counsel.

{¶ 21} The second assignment of error is overruled.

Manifest Weight of the Evidence

{¶ 22} In the third assignment of error, Cotton argues that his convictions for aggravated robbery and kidnapping were against the manifest weight of the evidence.

{¶ 23} In reviewing a claim challenging the manifest weight of the evidence, we look at whether “there is substantial evidence upon which a jury could reasonably conclude that all the elements have been proved beyond a reasonable doubt. In conducting this review, we must examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and determine whether 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.” (Internal citations and quotations omitted.) *State v. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235, 818 N.E.2d 229, ¶81.

{¶ 24} Cotton maintains that the evidence the state presented at trial supports, at best, a conviction for receiving stolen property and that there was no evidence that he aided and abetted Sullivan and Gordon with the robbery and kidnapping.

{¶ 25} “To support a conviction for complicity by aiding and abetting pursuant to R.C. 2923.03(A)(2), the evidence must show that the defendant supported, assisted, encouraged, cooperated with, advised, or incited the principal in the commission of the crime, and that the defendant shared the criminal intent of the principal. Such intent may be inferred from the circumstances surrounding the crime.” *State v. Johnson*, 93 Ohio St.3d 240, 2001-Ohio-1336, 754 N.E.2d 796, syllabus. “Participation in criminal intent may be inferred from presence, companionship and conduct before and after the offense is committed.” *Id.* at 245, quoting *State v. Pruett* (1971), 28 Ohio App.2d 29, 34, 273 N.E.2d 884.

Aiding and abetting may be established by both direct and circumstantial evidence, and participation may be inferred from presence, companionship, and conduct before and after the offense is committed. *State v. Cartellone* (1981), 3 Ohio App.3d 145, 150, 444 N.E.2d 68, citing *Pruett* at 34. The mere presence of an accused at the scene of a crime, however, is not sufficient to prove, in and of itself, that the accused was an aider and abettor. *Johnson* at 243, quoting *State v. Widner* (1982), 69 Ohio St.2d 267, 269, 431 N.E.2d 1025.

{¶ 26} A review of the trial record shows that the state presented evidence that Cotton was more than an innocent bystander. Although Cotton argues that there was no physical or scientific evidence to connect him to the robbery, proof of guilt may be made by circumstantial evidence, real evidence, and direct evidence, or any combination of the three, and all three have equal probative value. *State v. Hines*, Cuyahoga App. No. 90871, 2009-Ohio-2118, citing *State v. Nicely* (1988), 39 Ohio St.3d 147, 529 N.E.2d 1236. Gibson and her niece each testified that Cotton was with Sullivan and Gordon the night before the robbery and Sullivan and Gordon discussed how to complete the robbery. Gibson's niece also testified that Cotton spent the night and that Sullivan and Gordon arrived early the next morning at the house to get him. The three youths returned an hour and a half later with one youth carrying a box of money. The niece testified she saw Cotton carry the box of money around inside the house. Sullivan and Gordon split up the money into three piles with Cotton sitting off to one side on a

barstool. Cotton then took one pile of money and took Gibson to the auto repair shop to fix their respective cars.

{¶ 27} Gordon's girlfriend, who had previously stated to police that Cotton drove the "getaway" car, testified that she had lied to the police about that fact so that she herself would not be charged with any crimes. She admitted, however, that she had put in her written statement to police that Cotton stayed in the car and waited at the corner for Gordon and Sullivan. Her testimony that she only told police what her mother had told them was rebutted by the detective's testimony that he had not shared information with the daughter about what her mother had told him about the crimes and surrounding events.

{¶ 28} The jury was in the best position to determine the credibility of the witnesses, and we will not usurp its important role in this case. We do not find that this is the case in which the jury lost its way in convicting the defendant.

{¶ 29} Therefore, the third assignment of error is overruled.

{¶ 30} Accordingly, judgment is 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.

LARRY A. JONES, JUDGE

KENNETH A. ROCCO, P.J., and
FRANK D. CELEBREZZE, JR., J., CONCUR