

[Cite as *State v. Williams*, 2010-Ohio-1879.]

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NO. C-081148
	:	TRIAL NO. B-0805119(C)
Plaintiff-Appellee,	:	
	:	<i>DECISION.</i>
vs.	:	
JULIUS WILLIAMS,	:	
	:	
Defendant-Appellant.	:	

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed and Cause Remanded

Date of Judgment Entry on Appeal: April 30, 2010

Joseph T. Deters, Hamilton County Prosecuting Attorney, and *William E. Breyer*,
Assistant Prosecuting Attorney, for Plaintiff-Appellee,

Michaela M. Stagnaro, for Defendant-Appellant.

Note: We have removed this case from the accelerated calendar.

Per Curiam.

{¶1} Defendant-appellant Julius Williams appeals from the convictions and sentences imposed following a jury trial for multiple counts of aggravated robbery and robbery, with accompanying firearm specifications. Williams and his three co-defendants had attempted the theft of several thousand dollars of cash from four victims. Williams had wielded a shotgun, and another co-defendant, armed with a .357 magnum revolver, had shot one of the victims during the attempted robbery. While we overrule each of Williams's assignments of error challenging the findings of guilt, because the trial court failed to notify Williams at the sentencing hearing that he would be subject to postrelease control, we must remand the case for sentencing under R.C. 2929.191.

{¶2} In the early morning of June 26, 2008, Williams, Joseph Dobbs, and James L. Hardin were approached by an individual known to them as "Dukie." Dukie asked them to rob four men. He told them that their victims were to be found near a car parked in the West End neighborhood of Cincinnati, and that they had the cash proceeds from drug sales in their possession. Dukie also provided Hardin with a revolver and Williams with a shotgun.

{¶3} Williams and his companions approached the victims, found them smoking marijuana, and attacked them without warning. Williams struck Leondre Bailey in the head with the shotgun, knocking Bailey to the ground. Dobbs beat another victim using his arm cast as a weapon. Hardin shot another victim in the chest and leg. At some point during the attack, the shotgun was fired. But no one was struck by its pellets. As the victims fought back, the perpetrators lost heart and fled without obtaining the cash.

{¶4} They fled to the nearby house of Hardin's girlfriend. As they ran, they discarded incriminating evidence. Hardin threw away the revolver. Williams removed his

shirt and hid the shotgun in nearby bushes. Police canine units located the discarded items and tracked the perpetrators. The three were quickly arrested. Police investigators identified gunshot residue on Williams's skin. And his DNA was found on the recovered shotgun.

{¶5} Williams also gave a statement to police investigators in which he admitted his presence at the crime scene. He stated that he might have accidentally struck one of the victims in the head with the shotgun. This recorded statement was ultimately played to the jury.

{¶6} Williams and his co-defendants were indicted on multiple counts of aggravated robbery and robbery, each with an accompanying firearm specification, and on two counts of felonious assault. The co-defendants were tried separately. At Williams's trial, Hardin testified for the state. The jury found Williams guilty of each aggravated-robbery and robbery charge, but returned not-guilty verdicts on the two felonious-assault counts, which related to Hardin's shooting of one of the victims. The trial court merged some, but not all, of the robbery charges with the aggravated-robbery charges and imposed an aggregate sentence of 18 years' imprisonment.

{¶7} In his first assignment of error, Williams argues that the trial court erred in permitting the in-court identification of Williams by victim Leondre Bailey. He contends that the in-court identification was not reliable. On direct examination by the assistant prosecutor, Bailey was asked, "Do you see somebody in this courtroom that you saw that night involved in this [robbery]?" Bailey pointed to Williams and responded, "Looks very similar, sir." The trial court acknowledged the state's request and stated for the record that Bailey had identified Williams.

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{¶8} “An in-court identification is admissible * * * if the identification comes from ‘some independent recollection and observation of the accused by the witness’ as established under the totality of the circumstances.”¹ In this case, Williams made no objection to the identification; he has therefore waived the issue absent a showing of plain error.² An error rises to the level of plain error only where it is both obvious and outcome-determinative.³

{¶9} Even if the admission of Bailey’s in-court identification of Williams as the perpetrator who had wielded the shotgun and who had struck him was an obvious error, it did not rise to the level of plain error. Williams’s cross-examination of Bailey highlighted both the inconsistencies in his recollection of the events and the limitations in Bailey’s view of Williams. The jury was able to evaluate the conditions at the robbery scene and the basis of Bailey’s identification. And in light of Williams’s admission that he had been present at the robbery and might have accidentally struck someone with the shotgun, as well as the presence of gunshot residue on his hands and of his DNA on the shotgun, we cannot say that but for Bailey’s in-court identification the outcome of the trial would have been different. The first assignment of error is overruled.

{¶10} Williams next challenges the weight and the sufficiency of the evidence adduced to support his convictions for robbery and for aggravated robbery. Williams was indicted for multiple counts of aggravated robbery. R.C. 2911.01(A)(1) provides, in part, that “[n]o person, in attempting or committing a theft offense, * * * or in fleeing

¹ *State v. Norman* (1999), 137 Ohio App.3d 184, 201, 738 N.E.2d 403, quoting *State v. Jackson* (1971), 26 Ohio St.2d 74, 76, 269 N.E.2d 118.

² See *State v. Were*, 118 Ohio St.3d 448, 2008-Ohio-2762, 890 N.E.2d 263, ¶60; see, also, *State v. Norman*, 137 Ohio App.3d at 199, 738 N.E.2d 403.

³ See Evid.R. 103(A)(1) and 103(D); Crim.R. 52(B); see, also, *State v. Lewis*, 1st Dist. Nos. C-050989 and C-060010, 2007-Ohio-1485, ¶39.

immediately after the attempt or offense, shall * * * [h]ave a deadly weapon * * * and either display the weapon, brandish it, indicate that the offender possesses it, or use it.”

{¶11} Williams was also indicted for multiple counts of robbery. The state maintains that each robbery conviction was merged into the corresponding aggravated-robbery conviction at sentencing.⁴ But the trial court’s judgment entry indicates that it imposed a five-year, unmerged sentence of incarceration for count three of the indictment, which charged Williams with the robbery of victim Johnathan Williams, in violation of R.C. 2911.02(A)(1).⁵ Because Williams has challenged the weight and the sufficiency of the evidence for each conviction, we must address the conviction for robbery contained in count three. The robbery statute at issue declares that “[n]o person, in attempting or committing a theft offense or in fleeing immediately after the attempt or offense, shall * * * [h]ave a deadly weapon on or about [his] person or under [his] control.”

{¶12} A review of the record fails to persuade us that the jury clearly lost its way and created such a manifest miscarriage of justice that the convictions must be reversed and a new trial ordered.⁶ The jury was entitled to reject Williams’s view of the case that only circumstantial evidence linked him to the robberies, that no witnesses testified about his involvement save a co-defendant, and that Williams had abandoned these offenses when he ran away before the robberies had been completed.

{¶13} The state presented ample evidence to support the convictions, including co-defendant Hardin’s testimony that the perpetrators, including Williams, had attempted to rob the victims, Williams’s own statement that he had been present at the robbery scene

⁴ See Appellee’s Brief at 1 and 6.

⁵ See T.d. 72.

⁶ See *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541.

and might have hit one of the victims in the head with a shotgun, and the physical evidence linking Williams to the shotgun discovered by the police canine unit.

{¶14} We note that “circumstantial evidence and direct evidence inherently possess the same probative value and should therefore be subjected to the same standard of proof.”⁷ And the weight to be given the evidence in this case, whether direct or circumstantial, and the credibility of the witnesses were for the jury, sitting as the trier of fact, to determine.⁸ In resolving conflicts and limitations in the testimony, the jury could have found that Williams had participated in the attempted theft of the victims’ money, and that he had possessed, brandished, and used a shotgun during the attempt.

{¶15} The test for the sufficiency of the evidence required to sustain a conviction was enunciated by the United States Supreme Court in *Jackson v. Virginia*.⁹ The relevant question 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 charged crimes beyond a reasonable doubt.¹⁰ The record in this case reflects substantial, credible evidence from which the jury could have reasonably concluded that all the elements of the charged crimes had been proved beyond a reasonable doubt. Therefore, the second assignment of error is overruled.

{¶16} In his third assignment of error, Williams contends that the trial court erred by failing to instruct the jury concerning the testimony of an accomplice, as required under R.C. 2923.03(D). That statute mandates that the trial court caution a jury that the testimony of an accomplice, like Hardin, is not inadmissible, but that “the admitted or

⁷ *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph one of the syllabus.

⁸ See *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, paragraph one of the syllabus.

⁹ (1979), 443 U.S. 307, 99 S.Ct. 2781.

¹⁰ See *id.* at 319; see, also, *State v. Conway*, 108 Ohio St.3d 214, 2006-Ohio-791, 842 N.E.2d 996, ¶36.

claimed complicity of a witness may affect his credibility and make his testimony subject to grave suspicion, and require that it be weighed with great caution.”¹¹

{¶17} Williams did not request this instruction or object in a timely manner to the instructions actually given. The failure to object to the jury instructions at a time when an error could have been avoided or corrected by the trial court waives consideration of any error on appeal, unless, but for that error, the outcome of the trial clearly would have been otherwise.¹² Even if we assume that the trial court was required to give the instruction, its failure to give it did not amount to plain error. Williams’s own statement corroborated much of Hardin’s testimony. And the trial court provided the jury with a lengthy general instruction on witness credibility that informed the jury to consider any witness’s interest and bias, as well as the facts and circumstances surrounding the witness’s testimony, in deciding matters of weight and credibility.¹³ The assignment of error is overruled.

{¶18} In his fourth assignment, Williams asserts that he was improperly sentenced by the trial court. Williams first argues that the trial court imposed an excessive sentence of incarceration in violation of the purposes and principles of felony sentencing. We conduct a two-part review of Williams’s sentences of imprisonment.¹⁴ First we must determine whether the sentences were contrary to law.¹⁵ Then, if the sentences were not contrary to law, we must review each to determine whether the trial court abused its discretion in imposing them.¹⁶

¹¹ R.C. 2923.03(D).

¹² See Crim.R. 30(A); see, also, *State v. Underwood* (1983), 3 Ohio St.3d 12, 13, 444 N.E.2d 1332.

¹³ See *State v. Hinkston* (Sept. 29, 2000), 1st Dist. No. C-000024; see, also, *State v. Mathis* (Dec. 31, 1996), 1st Dist. No. C-950837.

¹⁴ See *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124.

¹⁵ See *id.* at ¶14.

¹⁶ See *id.* at ¶17.

{¶19} Here, the sentences were within the range provided by statute.¹⁷ Williams was an active participant in a violent crime. He faced over 40 years' imprisonment if the court had imposed the maximum sentences possible. Despite his confession to police, Williams minimized his involvement in the attack. On the state of this record, which includes evidence of Williams's lengthy juvenile record, we cannot say that the trial court acted unreasonably, arbitrarily, or unconscionably in imposing these sentences.¹⁸

{¶20} But, as the state concedes, the trial court failed to properly inform Williams at the sentencing hearing that he would be subject to postrelease control upon the completion of his period of incarceration. Under R.C. 2967.28, a sentencing court imposing a prison term on a first-degree-felony offender must include in the sentence a term of mandatory postrelease control. R.C. 2929.19(B)(3)(c) requires that the sentencing court notify the offender at the sentencing hearing that he will be supervised pursuant to R.C. 2967.28 and that the parole board may impose a prison term of up to one-half of the prison term originally imposed on the offender if he violates supervision or a condition of his postrelease control. Where the sentencing court fails to advise an offender about postrelease control at the sentencing hearing, the court has violated a "statutory duty" and "any sentence imposed without such notification is contrary to law" and void.¹⁹

{¶21} The remedy available to correct a void sentence depends on whether the flawed sentence was imposed before or after the July 11, 2006, effective date of Am.Sub.H.B. No. 137, now codified as R.C. 2929.191. In *State v. Singleton*, the Ohio Supreme Court noted that "prior to the enactment of R.C. 2929.191 * * * no statutory

¹⁷ See *State v. Boggs*, 1st Dist. No. C-050946, 2006-Ohio-5899, ¶6; see, also, *State v. Hairston*, 118 Ohio St.3d 289, 2008-Ohio-2338, 888 N.E.2d 1073, syllabus.

¹⁸ See *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 404 N.E.2d 144.

¹⁹ *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, 817 N.E.2d 864, ¶23; see, also, *State v. Beasley* (1984), 14 Ohio St.3d 74, 75, 471 N.E.2d 774; *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, 868 N.E.2d 961, ¶12; *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, 884 N.E.2d 568, ¶6.

mechanism existed to correct a sentence which failed to comport with these statutory requirements. We determined such sentencing judgments to be contrary to law, thereby rendering them subject to de novo sentencing.”²⁰ The bill could not “retrospectively alter the character of sentencing entries issued prior to its effective date that were nullities at their inception, in order to render them valid judgments subject to correction.”²¹ Thus “[f]or criminal sentences imposed prior to July 11, 2006, in which a trial court failed to properly impose postrelease control, trial courts shall conduct a de novo sentencing hearing in accordance with [the rule of *State v. Jordan* and its progeny].”²²

{¶22} But for criminal sentences imposed on or after the July 11, 2006, effective date, a trial court is not required to “resentence the offender as if there had been no original sentence.”²³ Rather “trial courts shall apply the procedures set forth in R.C. 2929.191” to correct postrelease-control sentencing errors.²⁴ Those procedures contemplate only a correction of the postrelease-control defect and not a de novo resentencing.²⁵

{¶23} Because the trial court imposed Williams’s sentences after the July 11, 2006, effective date of R.C. 2929.191 and failed to properly impose postrelease control, we agree with Williams that the trial court erred in imposing the sentences in this case. The fourth assignment of error is sustained in part.

²⁰ See 124 Ohio St.3d 173, 2009-Ohio-6434, 920 N.E.2d 958, ¶22 (citations omitted); see, also, *State v. Bezak*, syllabus; *State v. Harmon*, 1st Dist. No. C-070585, 2008-Ohio-4378, ¶6.

²¹ *Id.* at ¶26.

²² *Id.* at paragraph one of the syllabus.

²³ *State v. Bezak* at ¶16.

²⁴ *State v. Singleton* at paragraph two of the syllabus.

²⁵ *Id.* at ¶23 and ¶27 et seq.

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{¶24} Accordingly, we remand this case to the trial court for it to correct its judgment by “employ[ing] the sentence-correction mechanism of R.C. 2929.191.”²⁶ The trial court’s judgment is affirmed in all other respects.

Judgment accordingly.

HILDEBRANDT, P.J., SUNDERMANN and CUNNINGHAM, JJ.

Please Note:

The court has recorded its own entry on the date of the release of this decision.

²⁶ *State v. Wilson*, 8th Dist. No. 92148, 2010-Ohio-550, ¶57, citing *State v. Singleton* at paragraph two of the syllabus; see, also, *State v. Riggans*, 3rd Dist. No. 1-09-56, 2010-Ohio-1254, ¶16; *State v. Addis*, 12th Dist. No. CA2009-05-019, 2010-Ohio-1008, ¶24.