[Cite as *In re Jones*, 2010-Ohio-3994.]

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

IN RE: TIMOTHY JONES	:	APPEAL NOS. C-090497[1] C-090498 C-090499
	:	TRIAL NOS. 9-4348X 9-4355X 9-4354X
	:	*D E C I S I O N.*

Criminal Appeal From: Hamilton County Juvenile Court

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: August 27, 2010

Joseph T. Deters, Hamilton County Prosecutor, and *Rachel Lipman Curran*, Assistant Prosecutor, for Plaintiff-Appellee,

Elizabeth D. Gillespie and *Raymond T. Faller, Co., LPA*, for Defendant-Appellant.

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

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[1] These appeals have been consolidated under the case number C-090497.

CUNNINGHAM, Presiding Judge.

{¶1} Timothy Jones appeals the judgment of the Hamilton County Juvenile Court adjudicating him delinquent for having committed acts that, if he were an adult, would have constituted three aggravated robberies with a firearm specification. Jones contends (1) that his constitutional right to confront the witnesses against him was violated when the court admitted evidence of his nontestifying codefendants' inculpatory statements at their joint trial, and when those statements were used against him, and (2) that his adjudications were not supported by sufficient evidence and were against the manifest weight of the evidence.

I.

{¶2} While on patrol in the early morning hours of April 28, 2009, Cincinnati Police Officer Bryant Stewart heard a police radio broadcast concerning a small, red Neon automobile that had allegedly been involved in a robbery and that was dented on one side. Stewart saw a red Neon travelling northbound on Montgomery Road at a high rate of speed. He followed the Neon until it stopped in a parking lot. When he saw the damage to the side of the car, Stewart activated his cruiser's emergency lights and ordered the four occupants of the Neon to raise their hands in the car until Stewart received backup assistance at the scene.

{¶3} When other officers arrived, the police removed the occupants from the Neon. Jones and his codefendant Fredrick Harris were removed from the back seat of the vehicle. Both African-American males were dressed in black, and Harris was wearing a necklace. Another codefendant, Shantavia McLean, was removed from the driver's seat. Desiree Bollins was removed from the front passenger seat.

Both of the front-seat occupants were African-American females. A loaded .22-caliber revolver and a box of ammunition were found in the back seat of the Neon, and a blue jacket, cellular phones, wallets, and identification cards not belonging to the occupants were also found inside the Neon. The student identification card of Kenneth Maye, a recent robbery victim, was found in Jones's pocket.

{¶4} All four occupants of the red Neon were taken into custody and photographed. The police interviewed Jones, Harris, and McLean separately. During his interview, Jones admitted to Cincinnati Police Investigator Marcus McNeil that he had been driving around with the other individuals, but he claimed no knowledge of the robberies that the police were investigating. Jones added, however, that "if I go down, they all go down."

{¶5} In an interview with Cincinnati Police Investigator Jeff McKinney, McLean told the police that she and Bollins had picked up "Tim" and "Fred" and had offered to give them a ride in the red Neon in exchange for gas money. Bollins had driven, and McLean had sat in the front passenger seat. From the back seat, Tim and Fred had directed them to stop at various locations on Reading Road where Tim and Fred had exited from the car and had emptied the pockets of victims.

{¶6} McLean stated also that she had taken over the driving after a car had backed into the Neon in a parking lot while she and the three others were leaving the scene of the last robbery. McLean denied that she had seen a gun during any of the robberies. McLean's statement was later recorded on a cassette tape.

{¶7} McKinney also interviewed Harris. Harris said that he and "Tim" had participated in the robberies at each location. He acknowledged the presence of the gun in the red Neon and admitted that he had touched it at one point. But he denied

having used a gun during the robberies or having seen Jones use a gun during the robberies. Harris declined to give a taped statement.

{¶8} Because of their ages, Jones, Harris, and McLean were tried in juvenile court. At a joint trial before a magistrate, the state presented testimony that Jones had participated in armed robberies at two locations in the early morning of March 31, 2009.

{¶9} The first robbery had occurred at 3602 Reading Road. Antwan Holman testified that he had been robbed by two men and that his assailants had worn black clothing and black masks. During the robbery, after ordering him to give them his "stuff," one man had held a small black gun on him while the other had gone through his pockets. Holman further testified that the men had exited from the back seat of a small red car. He identified a photograph of the red Neon that Jones had been found in as the vehicle from which his assailants had exited. The police recovered Holman's Ohio identification card and his jacket inside the red Neon.

{¶10} The second incident had occurred between 2:30 and 3:00 a.m. at 4040 Reading Road in the parking lot of Sonny's Bar. Kenneth Maye, Gregory Spencer, Andre Gamble, and Dwight Pritoe testified that they had been accosted by individuals dressed in black, including black masks, who had exited from a small red vehicle. At trial, all four men identified the photograph of the red Neon as the vehicle from which the assailants had exited. Additionally, all four testified that at least one handgun had been used to facilitate the robbery. But the witnesses' testimony conflicted on the number of guns (one or two) and the color of any weapon.

{¶11} Maye testified that his assailants had taken his wallet and his identification card. The police later recovered Maye's wallet in the red Neon and his identification card in Jones's pocket. Maye's testimony conflicted in part with the testimony of the other witnesses to the second incident because he claimed that there had been three assailants instead of two.

{¶12} Spencer testified that he had seen the face of the driver's-side rear passenger from the eyes down before he had pulled a mask over his face. He described the man as having a dark complexion and a skinny face. Additionally, he testified that his assailants had taken his wallet, cellular phone, and insurance card. The police recovered all three items in the red Neon.

{¶13} Gamble and Pritoe testified that they had been able to escape and call the police before any of their property could be taken. They both testified that they had seen the red Neon circle around the parking lot three times before the robbery, and that they had observed two females in the front and two dark-skinned males in the back of the Neon. They agreed that the men had worn black clothing and masks. Gamble added that one of the men had worn a necklace.

{¶14} Neither Jones nor his codefendants, Harris and McLean, testified at trial. But Harris's and McLean's statements to the police that had inculpated Jones were presented at trial through the testimony of Investigator Jeff McKinney. McLean's taped statement was also played for the jury.

{¶15} Before McKinney testified about McLean's statement, Jones joined in a Confrontation Clause objection by Harris that McLean's incriminating statement could not be used as substantive evidence against the other defendants. The prosecutor argued that McLean's statement could be used against the other

defendants under the co-conspirator exception to the hearsay rule. The magistrate did not clearly overrule or sustain Harris and Jones's objection. Jones did not raise the same objection when McKinney testified about Harris's statement.

{¶16} The magistrate issued a decision that adjudicated Jones delinquent. The decision included factual findings. At least one finding—that the Neon had been damaged as it "left the scene"—was based on McKinney's testimony about McLean's statement, because that information had not otherwise been admitted at trial. This fact was important because the police had found Jones in a damaged red Neon.

{¶17} Jones filed a Juv.R. 40 objection to the magistrate's decision. In his sole objection, he contended, without any supporting argument, that the magistrate's decision was against the manifest weight of the evidence. He also filed a transcript of the proceedings before the magistrate. At the hearing before the trial court on his objection, Jones orally contended without any specificity that the magistrate had consciously or unconsciously relied on McLean's statement in violation of his Confrontation Clause rights. He also challenged the sufficiency of the evidence. The trial court dismissed the Confrontation Clause argument on the ground that it could be presumed that the magistrate had separated the evidence that applied to each defendant. But in addressing Jones's challenge to the sufficiency of the evidence, the trial court, like the magistrate, specifically referred to information about the car accident that would have been found only in McLean's statement. Thereafter, the court adopted the magistrate's decision, adjudicated Jones delinquent, and committed him to the Department of Youth Services. This appeal followed.

II.

{¶18} This case involves the joint trial of three nontestifying codefendants who had each given a statement to the police during interrogation. Jones did not object to the joint trial or to the state's general admission of the statements at the joint trial. But he did join in an objection presented by Harris's lawyer that McLean's incriminating statement could not be used as substantive evidence against the other defendants.

{¶19} In his first assignment of error, Jones now argues that both McLean's and Harris's statements incriminating him were so prejudicial that the trial court's admission of the statements necessarily violated his Sixth Amendment right to confront witnesses. He argues also that the record affirmatively demonstrates that the trial court used McLean's statement as evidence against him, citing the magistrate's factual findings as adopted by the trial court.

{¶20} In response, the state contends that Jones's claim is without merit because the case was not tried to a jury, and because the trial court must be presumed to have followed the law and to have disregarded the codefendants' statements in determining Jones's guilt. The state has wisely abandoned its argument that the statements were admissible against Jones under the co-conspirator exception to the hearsay rule.

A.

{¶21} The Confrontation Clause of the Sixth Amendment, as applied to the states by the Fourteenth Amendment, guarantees the right of a criminal defendant

"to be confronted with the witnesses against him."[2] This guarantee includes the right of a criminal defendant to cross-examine witnesses.[3]

{¶22} A witness is generally considered to be "against" a defendant for Confrontation Clause purposes only "if his testimony is part of the body of evidence that the jury may consider in assessing his guilt."[4] And ordinarily a jury is presumed to be able to follow an instruction limiting the evidence to consider in assessing guilt.[5] But the United States Supreme Court has recognized a narrow exception to this principle.[6] In *Bruton v. United States*, the court held that a defendant is denied his Sixth Amendment right of confrontation when a nontestifying codefendant's confession that powerfully incriminates the defendant is introduced at their joint trial, even if the jury is instructed to consider the confession only against the codefendant.[7] The Court explained that in this context the risk of the jury's inability to follow the instruction is so great, and the consequence to the defendant so vital, that "the limitations of the jury system cannot be ignored."[8]

{¶23} In *Richardson v. Marsh*, the Supreme Court limited *Bruton* to facially incriminating statements, holding that "the Confrontation Clause is not violated by the admission of a nontestifying codefendant's confession with a proper limiting instruction when * * * the confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence."[9]

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[2] *Cruz v. New York* (1987), 481 U.S. 186, 189, 107 S.Ct. 1714.
[3] Id.
[4] Id. at 190.
[5] *Richardson v. Marsh* (1987), 481 U.S. 200, 206, 107 S.Ct. 1702.
[6] Id. at 207.
[7] (1968), 391 U.S. 123, 88 S.Ct. 1620.
[8] Id. at 135-136.
[9] *Richardson*, 481 U.S. at 211.

{¶24} Jones argues that *Bruton* applies to bench trials. Although the Supreme Court has never addressed the issue, the Sixth Circuit Court of Appeals has rejected this argument in *Rogers v. McMackin*.[10] In holding that *Bruton* does not apply to bench trials, the court in *Rogers* noted that nothing in *Bruton* suggests that judges, like jurors, may be incapable of separating evidence properly admitted against one defendant from evidence admitted against another.[11] Likewise, the Ohio Supreme Court has distinguished bench trials from jury trials in applying *Bruton*.[12] Thus, we conclude that *Bruton* does not govern Jones's claim because he was not tried by a jury.

{¶25} In reviewing Jones's claim, we apply the rebuttable presumption that the trial court was capable of disregarding inadmissible extrajudicial statements implicating Jones.[13]

{¶26} As we have noted previously, at trial Jones did not object to the challenged testimony on the basis that it could not be received into evidence at the joint trial. Rather, his position at that time was that the statement of a nontestifying codefendant could not be used as evidence against him. In responding to this argument, the magistrate stated, "What I expect to hear is one defendant's description of what occurred." * * * Are you saying that [McLean] cannot testify as for the res gestae occurring—everything that occurred and everything that she observed including what she saw specific individuals do? * * * I'm going to permit the officer to testify as to statements, those made—made by McLean, what she observed

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[10] *Rogers v. McMackin* (C.A.6, 1989), 884 F.2d 252. Accord *United States v. Castro* (C.A.1, 1969), 413 F.2d 891, 894-895; *Johnson v. Tennis* (C.A.3, 2008), 549 F.3d 296, 300-301; *United States v. Cardenas* (C.A.5, 1993), 9 F.3d 1139, 1154-1155; *United States ex rel. Faulisi v. Pinkney* (C.A.7, 1979), 611 F.2d 176, 178; *Cockrell v. Oberhauser* (C.A.9, 1969), 413 F.2d 256, 257-258.
[11] *Rogers* at 253.
[12] *In re Watson* (1989), 47 Ohio St.3d 86, 91, 548 N.E.2d 210.
[13] Id. See, also, R*ogers*, supra; *Cardenas*, supra.

as to the res gestae of everything. But * * * I'm not going to permit her [McLean] to testify to anything that one of her co-defendants has said, but she can certainly testify to what she observed."

{¶27} But McLean did not testify at all. The magistrate's comment can be interpreted to support Jones's position that the magistrate considered his codefendants' out-of-court statements incriminating him as substantive evidence in support of his delinquency adjudication.

{¶28} Further, as Jones has noted in his brief, one of the magistrate's factual findings relied upon information found only in McLean's statement as recounted at trial by Officer McKinney. Specifically, the magistrate found that the red Neon had been damaged as it left the scene of the robbery outside Sonny's Bar. This information was only in McLean's statement. And although the trial court's review of the magistrate's decision was an opportunity to correct the error, the trial court referred to the same inadmissible testimony as evidence at the objection hearing.

{¶29} On this record, Jones has rebutted the presumption that the juvenile court considered only the relevant, material, and competent evidence in arriving at its judgment. The record demonstrates that the court erroneously relied upon McLean's statement as substantive evidence of Jones's guilt. We conclude that the same error occurred with regard to Harris's statement because the Confrontation Clause issue was the same even though neither the magistrate's decision nor the trial court's oral comments contained factual findings unique to Harris's statement. Thus, we hold that the trial court used McLean's and Harris's statements as

substantive evidence against Jones in violation of his Confrontation Clause rights under the Sixth Amendment.[14]

B.

{¶30} Generally, violations of the Confrontation Clause are reviewed under a harmless-error analysis.[15] But Jones's proceedings in the juvenile court were subject to Juv.R. 40.

{¶31} Juv.R. 40(D)(3)(b)(i) requires a party to file timely, written objections to a magistrate's factual findings and legal conclusions. In addition, the objections must be specific.[16] "Except for plain error, a party shall not assign as error on appeal the court's adoption of a factual finding or legal conclusion * * * unless the party has objected to that finding or conclusion as required by Juv.R. 40(D)(3)(b)."[17]

{¶32} In his filed objection, Jones challenged the manifest weight of the evidence to support his adjudication. He did not raise the Confrontation Clause issue, and he did not challenge any of the specific factual findings of the magistrate except the finding of delinquency. While Jones presented the Confrontation Clause issue at the hearing on his filed objection, this method did not comply with the requirements of Juv.R. 40 because it did not involve an objection that was timely, specific, or in writing. Under these circumstances, Jones has waived all but plain error.

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[14] See, e.g., *Lee v. Illinois* (1986), 476 U.S. 530, 106 S.Ct. 2056 (trial court's express reliance on nontestifying codefendant's confession as substantive evidence demonstrates a Confrontation Clause violation).
[15] *United States v. Martinez* (C.A.6, 2009), 588 F.3d 301, 313.
[16] Juv.R. 40(D)(3)(b)(ii).
[17] Juv.R. 40(D)(3)(b)(iv).

{¶33} Our plain-error review is governed by Crim.R. 52(B), and our authority to correct error under that rule is limited.[18] Three criteria must be met.[19] First, there must be "error"—a deviation from a legal rule.[20] Second, the error must be an obvious defect in the trial proceedings such that it is "plain."[21] Third, the error must have affected substantial rights, which means in these circumstances that it affected the outcome of the proceedings.[22]

{¶34} The first two requirements have been met in this case, as the juvenile court's consideration of Harris's and McLean's statements as substantive evidence against Jones was both an error and plain. But after reviewing the abundant admissible evidence of delinquency, we conclude that the use of the statements against Jones did not rise to the level of plain error.

{¶35} Jones's identity as an assailant and whether a gun was used to facilitate the robberies were at issue at trial. Harris and McLean both stated that a gun was not used. Because their statements exculpated Jones on the gun issue, we conclude that the court's consideration of the statements on this issue did not affect the outcome of the trial.

{¶36} But both Harris and McLean had identified Jones as one of the assailants. Even so, the state presented much stronger evidence of Jones's identity than the inadmissible statements of his codefendants.

{¶37} The state's evidence of identity, though primarily circumstantial, was substantial. Jones was apprehended in a red Neon that five witnesses had

[18] *State v. Hill*, 92 Ohio St.3d 191, 196, 2001-Ohio-141, 749 N.E.2d 274, quoting *State v. Long* (1978), 53 Ohio St.2d 91, 372 N.E.2d 804, paragraph three of the syllabus.
[19] *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68, 759 N.E.2d 1240.
[20] Id., citing *State v. Hill* at 200.
[21] Id., citing *State v. Sanders*, 92 Ohio St.3d 245, 257, 2001-Ohio-189, 750 N.E.2d 90.
[22] Id., citing *State v. Hill* at 205.

unequivocally identified as having transported the individuals involved in the robberies. Photographs of Jones, Harris, Bollins, and McLean taken at the police station matched the victims' and the witnesses' descriptions of the assailants. One victim's stolen property was found in Jones's pocket, and several other stolen items were found in the Neon. Although the state never established the precise amount of time that had elapsed between the last robbery and Officer Stewart's apprehension of Jones in the red Neon, the interval could have been no longer than two hours because McLean signed her notification-of-rights form at the police station at 4:51 a.m.

{¶38} Moreover, during the police interrogation, Jones admitted to travelling with the others that morning in the red Neon and claimed that "if I go down, they all go down."

{¶39} Because of this abundant evidence of delinquency, we conclude that the trial court's error did not affect the outcome of the trial. Thus, Jones has failed to meet the standard for plain error. Accordingly, we overrule the first assignment of error.

III.

{¶40} In his second assignment of error, Jones contends that his adjudications were not supported by sufficient evidence and were against the manifest weight of the evidence. After consideration of the admissible evidence, we find no merit to this contention.

{¶41} As we have already discussed, the state presented abundant evidence of Jones's identity as an assailant at both robberies. Although the victims were not able to specifically identify Jones as an assailant because he was wearing a mask, the

circumstantial evidence of Jones's identity was damning. And circumstantial evidence inherently possesses the same probative value as direct evidence.[23] Further, all the victims testified that at least one gun was used to facilitate the offenses, and the police testified that they had recovered an operable gun in the back of the vehicle that was used in the robberies. Thus, we conclude that the state presented more than sufficient evidence to support Jones's adjudications of delinquency for three aggravated robberies with firearm specifications.[24]

{¶42} Finally, after our review of the evidence, we conclude that the trier of fact did not lose its way in adjudicating Jones delinquent. Thus, we hold that Jones's adjudication was not against the manifest weight of the evidence.[25] Accordingly, we overrule the second assignment of error.

IV.

{¶43} The magistrate did not err by admitting the facially incriminating statements of the nontestifying codefendants at Jones's joint trial before the magistrate. But the magistrate did err by using the statements of the nontestifying codefendants as substantive evidence in support of Jones's guilt in violation of Jones's Confrontation Clause rights. Where Jones did not object to the magistrate's decision on this ground, in accordance with Juv.R. 40, he waived all but plain error in the trial court's adoption of the magistrate's decision. The plain-error standard has not been met in light of the abundant, admissible evidence that supported the delinquency adjudication. Because of this abundant evidence, Jones's challenges to

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[23] *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph one of the syllabus, limited by statute on other grounds.
[24] *Jenks*, 61 Ohio St.3d 259, paragraph two of the syllabus, following *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781.
[25] *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541.

the sufficiency and weight of the evidence in support of his adjudications are meritless.

{¶44} We affirm the trial court's judgment.

Judgment affirmed.

SUNDERMANN and **HENDON, JJ.**, concur.

Please Note:

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