[Cite as *State v. Davis* , 2010-Ohio-5125.]

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

STATE OF OHIO,	:	APPEAL NO. C-090220 TRIAL NO. B-0804934-B
Plaintiff-Appellee,	:	*D E C I S I O N.*
vs.	:	
JOVON DAVIS,	:	
Defendant-Appellant.	:	

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From is: Affirmed

Date of Judgment Entry on Appeal: October 22, 2010

Joseph T. Deters, Hamilton County Prosecuting Attorney, and *James Michael Keelling*, Assistant Prosecuting Attorney, for Plaintiff-Appellee,

Robert Hastings, Jr., for Defendant-Appellant.

Please note: This case has been removed from the accelerated calendar.

HILDEBRANDT, Judge.

{¶1} Defendant-appellant Jovan Davis appeals his convictions for murder and aggravated robbery. For the following reasons, we affirm.

Robbery Gone Bad

{¶2} Reginald Rolland was shot and killed in the early morning hours of June 18, 2008. As a result, Davis was indicted for aggravated murder,[1] murder,[2] and aggravated robbery,[3] with accompanying gun specifications. Three other people, Antwan Glenn, Nikkia Sullivan, and James Johnson, were also charged with the same crimes. Sullivan and Johnson agreed to testify for the state in exchange for a plea bargain. Davis and Glenn maintained their innocence and opted for a jury trial.

{¶3} At trial, Sullivan testified that on the night of June 17, 2008, she, Davis, and Glenn developed a plan to rob people in the Avondale neighborhood of Cincinnati. In its simplest terms, Sullivan would call or send a text message to men whom she knew and entice them to meet her with the promise of sex. Once the men arrived, Davis and Glenn would rob the victims at gunpoint.

{¶4} Sullivan testified that the group had first robbed a man named Chris. She contacted Chris and told him to meet her at the Commodore Apartments on Reading Road. Davis had instructed Sullivan to lure Chris into the hallway of the apartment building where it was dark. After Sullivan had done so, Davis and Glen robbed Chris at gunpoint. Sullivan's cellular phone records showed that she was communicating with a person named Chris, as well as with Davis, around 12:30 a.m.

[1] R.C. 2903.01(B).
[2] R.C. 2903.02(B).
[3] R.C. 2911.01(A)(1).

on June 18, 2008. Next, Sullivan testified, the group had attempted to rob a man who was to meet her at "Lexington Park," but the man refused to get out of his car and walk to the park with Sullivan. When Sullivan contacted Davis to inform him that the man would not get out of the car, Davis replied, "Let the dude go."

{¶5} In the early morning hours of June 18, 2008, Johnson testified, Davis had contacted him to see if he wanted to help rob Rolland. Johnson agreed and drove to meet Davis, Glenn, and Sullivan. Johnson was driving a Ford Contour that belonged to Jasmain Grier, the girlfriend of one of Johnson's friends. Grier testified that she had not given Johnson permission to use her car and that she did not know Davis, Glenn, or Sullivan.

{¶6} Davis, Glenn, Sullivan, and Johnson all met at a White Castle restaurant. At that time, they decided to go to the next robbery location in the Ford Contour. Davis drove the car to a house located at 848 Hutchins Avenue, where Rolland had agreed to meet Sullivan. When they arrived, Sullivan waited for Rolland in front of the house, while Davis, Glenn, and Johnson hid around the house. Sullivan testified that she had seen Davis, Glenn, and Johnson with guns while they were in the car. Johnson testified that Davis had given him a .40-caliber Smith & Wesson handgun.

{¶7} Once Rolland arrived, Sullivan led him to the porch, where Johnson approached Rolland to rob him. But Rolland pulled out a handgun and shot Johnson. Johnson fired back and fled. Johnson testified that, after he had been shot, he could hear Davis and Glen begin to fire their guns and that there were approximately four to five shots fired as he was leaving the scene. Police Officer Gil Thompson, who happened to be nearby the scene, testified that he had heard six to seven shots fired. Sullivan testified that Johnson, Davis, and Glenn had all left the

scene on foot after the gunfire ended. Rolland had been shot twice and lay dying on the porch.

{¶8} Sullivan had also been shot. Once the gunfire ceased, she grabbed Rolland's gun and left the porch in an attempt to escape. She testified that she had called and sent two text messages to Davis, asking for his assistance because she had been shot. The text message history from Sullivan's cellular phone corroborated this testimony. When Sullivan realized that Davis and Glenn were not going to return for her, she called 911. The police arrived and found both her bleeding on the sidewalk and Rolland dying on the porch. The officers also recovered Rolland's 9-mm handgun that Sullivan had thrown into the neighboring yard.

{¶9} Johnson testified that he had been shot also. He went to his grandmother's house, and from there, his aunt and cousin drove him to the hospital. On the drive to the hospital, Johnson gave his gun, the .40-caliber Smith & Wesson, to his cousin, who hid it in her purse. But police officers eventually recovered the gun from her.

{¶10} Although a gun expert testified at trial that the two bullets found in Rolland's body were from a .40-caliber Smith & Wesson handgun, the bullets could not be tied specifically to Johnson's gun. But the expert was able to determine, based on an analysis of the bullets and the guns recovered, that Rolland had shot Johnson and that Johnson had shot Sullivan.

{¶11} The police searched the Ford Contour that had been left at the scene. They found a pack of cigarettes with Glenn's fingerprints on them, Sullivan's purse, Johnson's red cellular phone, and two cellular phones located in the console between the driver's seat and the passenger's seat. The subscriber for those two phones was Sheila Coulter-Davis, the mother of Jovon Davis. One of the phones had a

photograph of Davis and Sullivan as the screen saver, and the other phone's screen saver had written on it "Montana Davis." (Sullivan testified that Davis's nickname was "Montana.")

{¶12} A Verizon representative testified that the two phones found in the console of the car were reported lost, by someone named Jovan, and that the numbers were transferred to new phones on June 18, 2008, at 5:00 a.m., two hours after Rolland had been shot and killed. When Davis was arrested, a cellular phone was found on his person, and it had the same phone number as one of the phones that had been found in the Ford Contour.

{¶13} A review of the call and text history of the cellular phones recovered by police demonstrated that there were calls and texts between Glenn, Sullivan, Davis, and Johnson during the early morning hours of June 18, 2008. There was testimony presented that when these calls and texts were made, the cellular phones were "pinging" off the cellular phone tower located in Avondale, where the murder and robbery took place.

{¶14} Detective Eric Karaguleff testified that initially both Sullivan and Johnson had lied about their part in the robbery and murder of Rolland, but that they had eventually confessed.

{¶15} The trial lasted longer than the parties anticipated, which caused the trial court to dismiss two jurors and replace them with the two alternates prior to the jury's deliberations. To speed up the process, the trial court had the jurors come in on a court holiday to deliberate. Prior to the jurors leaving that evening, they asked whether the 911 tape could be replayed and what the difference was between murder and aggravated murder. The trial court informed the jury that those questions would be answered the following morning when trial counsel was present. After getting this

response, the jurors asked the bailiff if they could take the jury instructions home with them to review. The bailiff spoke with the trial court, which agreed that the written jury instructions could be taken home. A few of the jurors took the instructions home. Apparently the trial court informed the state and defense counsel by phone that evening that it had allowed the jurors to take the instructions home. Defense counsel objected.

{¶16} The next morning, the trial court, in the presence of Davis and trial counsel, questioned the jury and determined that no juror had taken home any evidence or conducted any independent investigation, and that no juror had discussed the case with anyone outside the jury room. Defense counsel did not request to conduct a voir dire of the jury at that time.

{¶17} The jury acquitted Davis of aggravated murder, but it found him guilty of murder, aggravated robbery and two accompanying gun specifications. The trial court deferred sentencing for the completion of a presentence-investigation report.

{¶18} Davis then filed a motion for a new trial, arguing that the trial court's erroneous act of allowing the jurors to take home the written jury instructions had caused juror misconduct because it allowed some jurors to deliberate outside the presence of the other jurors. Further, Davis contended that it was error for the trial court to address the jury's verbal question outside the presence of Davis and his counsel. Davis then asked to question Cheryl Vest, the trial court's bailiff who had, with the trial court's permission, told the jurors that they could take the jury instructions home. The trial court overruled the motion for a new trial, indicating in open court that the matters discussed between the jury and the court outside the

presence of Davis dealt with procedural rather than substantive issues. Further, the trial court denied Davis's counsel's request to question Vest.

{¶19} The trial court imposed a 15-year-to-life prison term for murder, an eight-year prison term for aggravated robbery, and a one-year prison term for the gun specifications. The aggregate prison term was 24 years to life.

{¶20} Following the imposition of the sentence, the trial court held another hearing a few days later, at which time the court agreed to preserve the written jury instructions for the record and to allow Vest, the court's bailiff, to put on the record her conversation with the jurors regarding the jury instructions. Vest was not under oath. This appeal followed.

Defective Indictment?

{¶21} In his first assignment of error, Davis argues that, under *State v. Colon* ("*Colon I*"),[4] the omission of a mens rea allegation in the indictment for aggravated robbery rendered the indictment defective and mandates the reversal of his aggravated-robbery conviction. This assignment of error is not well taken.

{¶22} In *Colon I*, the Ohio Supreme Court held that the omission of a mens rea allegation in the indictment was a structural defect that rendered the conviction improper.[5] But in *State v. Horner*,[6] the court overruled *Colon I*, holding that "[a]n indictment that charges an offense by tracking the language of the criminal statute is not defective for failure to identify a culpable mental state when the statute itself fails to specify a mental state." Here, Davis was convicted of aggravated robbery in violation of R.C. 2911.01(A)(1), and a review of the indictment reveals that it tracked the language of R.C. 2911.01(A)(1). Therefore, the indictment was not defective.

[4] 118 Ohio St.3d 26, 2008-Ohio-1624, 885 N.E.2d 917.
[5] Id. at ¶38.
[6] ___ Ohio St.3d ___, 2010-Ohio-3830, ___ N.E.2d ___.

Accordingly, based on the Ohio Supreme Court's holding in *Horner*, Davis's first assignment of error is overruled.

Prior Bad Acts

{¶23} In the second assignment of error, Davis maintains that the trial court erred to his prejudice in admitting evidence of prior acts through the testimony concerning the prior alleged aggravated robbery and attempted aggravated robbery that had occurred just hours before Rolland was robbed and murdered. Sullivan testified that she, Davis, and Glenn had lured a man named Chris to some apartments to rob him at gunpoint, and Sullivan also testified about an attempted aggravated robbery of another man who met Sullivan near a park, but refused to get out of his car and accompany her to the park where Davis and Glenn had been planning to rob him.

{¶24} Evidentiary rulings generally lie within the broad discretion of the trial court and will form the basis for reversal on appeal only upon an abuse of that discretion amounting to prejudicial error.[7] In reviewing the trial court's exercise of discretion in admitting the challenged testimony, we are guided by Evid.R. 404(B) and R.C. 2945.59.

{¶25} Evid.R. 404(B) sets forth the common-law rule regarding the admissibility of evidence of previous or subsequent criminal acts that are wholly independent of the offense for which a defendant is on trial. The rule provides that "evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith." The rule then incorporates a nonexhaustive list of exceptions to the common-law exclusion on

[7] Evid.R. 103(A); *State v. Lowe*, 69 Ohio St.3d 527, 532, 1994-Ohio-345, 643 N.E.2d 616.

admissibility, stating that "evidence of other crimes, wrongs, or acts * * * may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident." R.C. 2945.59 provides for the admission of other-act evidence under similar circumstances. Essentially, however, "[a]n accused cannot be convicted of one crime by proving he committed other crimes or is a bad person."[8]

{¶26} Pursuant to Evid.R. 404(B) and R.C. 2945.59, other-act evidence may be admitted in a criminal proceeding if (1) there is substantial proof that the alleged other acts were committed by the defendant, and (2) the evidence tends to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.[9] Both prongs must be satisfied for the evidence to be admissible.[10]

{¶27} The evidence of the prior robberies was properly admitted in this case since they were probative of the preparation and planning involved in the final robbery, which ended with the shooting death of Rolland. Further, the other acts had occurred within hours of Rolland's death and tended to show that all the robberies were a part of a common scheme or plan. Davis argues that there was no proof that these other acts had occurred because the state did not present the testimony of the supposed victims. But Sullivan testified about the details of the prior acts, and her cellular phone records corroborated her testimony. Accordingly, there was proof that these other acts had been committed by Davis. Therefore, we cannot say that the trial court abused its discretion in admitting the prior-acts

[8] *State v. Jeffers*, 10th Dist. No. 06AP-358, 2007-Ohio-3213, at ¶16.
[9] *Lowe*, 69 Ohio St.3d at 530.
[10] See *State v. Echols* (1998), 128 Ohio App.3d 677, 692, 716 N.E.2d 728.

evidence and overruling Davis's motion in limine. The second assignment of error is overruled.

Closing Argument

{¶28} Davis maintains in his third assignment of error that he was denied a fair trial by the prosecuting attorney's improper remarks during closing argument. This assignment of error is not well taken.

{¶29} To demonstrate prosecutorial misconduct in closing arguments, the defendant must show that the remarks were improper and that the remarks prejudicially affected substantial rights of the defendant.[11] Because there were no objections to the remarks that Davis now challenges, we review the record for plain error. Under the plain-error standard, we will not reverse a conviction unless, but for the error, the outcome of the proceedings clearly would have been different.[12]

{¶30} First, Davis challenges the prosecutor's remarks regarding letters in which Sullivan and Johnson discussed the crime while they were in jail. We note that these letters were not discovered until the middle of trial. Davis's trial counsel believed that the letters were important and asked for time to review them prior to continuing the questioning of witnesses. During closing arguments, when discussing the letters, the prosecutor stated, "Take a look at State's Exhibit 106. This is another Sullivan letter to Mr. Johnson. *Again, a letter that the defense had to stop the whole proceedings and ask for in trial.* And again, it is a letter that supports the State's evidence."

{¶31} When this comment is considered in its proper context, it is apparent that the state was merely pointing out that there was evidence that the defense

[11] See *State v. Hessler*, 90 Ohio St.3d 108, 2000-Ohio-30, 734 N.E.2d 1237; *State v. Smith* (1984), 14 Ohio St.3d 13, 470 N.E.2d 883.
[12] See, e.g., *State v. Reid*, 1st Dist. No. C-050465, 2006-Ohio-6450, ¶16.

thought was important, but that actually supported the state's case. The prosecutor did not appear to be denigrating defense counsel, but even if the remark could be considered improper, the trial court, sua sponte, gave a curative instruction by stating that "the Defense in this case, nor has the Sate for that matter, delayed the proceedings to discover new evidence or anything else. If there had been any delay in the case, any time this case adjourned is entirely up to me. It has nothing to do with Defense or the State."

{¶32} Second, Davis challenges the prosecutor's remark that defense counsel should not have been surprised that Sullivan and Johnson had initially lied to the police officers about the robbery and murder. This remark was in response to defense counsel's assertion during closing arguments that the state's case was based on "two liars." In context, it is clear that the prosecutor was attempting to rebut defense counsel's statement by pointing out that everyone knew that the state's two witnesses had initially lied to police about the cause of Rolland's death. Defense counsel learned this during the discovery period prior to trial, and the jury learned this during voir dire. We cannot say that this remark was improper.

{¶33} Third, Davis challenges the prosecutor's statement urging the jurors not to let Davis "get away with that. Do not let [him] walk. Let Reginald have the justice that he deserves and convict [Davis]." For this type of remark to be reversible error, it must be "so inflammatory as to render the jury's decision a product solely of passion and prejudice."[13] We cannot say that the remark was improper or prejudicial where it was only an isolated portion of a long closing argument, and where the jury

[13] *Williams*, supra, at 20.

acquitted Davis of aggravated murder, the most serious charge against him, which demonstrated that its decision was not based solely on passion and prejudice.

{¶34} Fourth, Davis asserts that the prosecutor vouched for the truthfulness of the state's witnesses, but this is not demonstrated in the record. Finally, Davis challenges the prosecutor's statement that defense counsel's argument was "absurd" and "ridiculous." The state used those terms when challenging defense counsel's assertion that Sullivan had shot Johnson with Rolland's gun. In this instance, the state inartfully was attempting to point out that that argument was not based on any evidence presented at trial. Even if the prosecutor's choice of words was ill-advised, we cannot say that Davis was prejudiced by the statement or that it affected the jury's deliberations. The jury was able to sift through the evidence and find Davis guilty of murder and aggravated robbery, but acquit him of aggravated murder.

{¶35} Accordingly, the third assignment of error is overruled.

Sufficiency and Weight of the Evidence

{¶36} In his fourth assignment of error, Davis contests the sufficiency and weight of the evidence underlying his convictions.

{¶37} In the review of a sufficiency-of-the-evidence claim, the relevant inquiry for the appellate court "is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."[14] To reverse a conviction on the manifest weight of the evidence, an appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and conclude that, in resolving the conflicts in the

[14] *State v. Waddy* (1992), 63 Ohio St.3d 424, 430, 588 N.E.2d 819.

evidence, the trier of fact clearly lost its way and created a manifest miscarriage of justice in finding the defendant guilty.[15]

{¶38} The applicable murder statute, R.C. 2903.02(B), provides that "no person shall cause the death of another as a proximate result of the offender's committing or attempting to commit an offense of violence that is a felony of the first or second degree."

{¶39} The aggravated-robbery statute under which Davis was convicted of a felony of the first degree, R.C. 2911.01(A)(1), provides that "[n]o person in attempting or committing a theft offense * * * or in fleeing immediately after the attempt or offense, shall do any of the following: (1) [h]ave a deadly weapon on or about the offender's person or under the offender's control and either display the weapon, brandish it, indicate the offender possesses it, or use it."

{¶40} Here, Davis argues that there were no objective eyewitnesses to the crimes and that there was no physical evidence tying him to the crimes. But it does not matter that there were no "objective" eyewitnesses to the crime. Sullivan and Johnson testified that Davis was one of the four individuals who had robbed Rolland at gunpoint and killed him. Further, although physical evidence tying Davis to the crimes was not necessary to convict him, the jury could have inferred from the evidence that the two cellular phones found in the console of the Ford Contour were Davis's phones. Accordingly, after reviewing the record, we hold that there was sufficient evidence, based on Sullivan and Johnson's testimony and the cellular phones found in the car, that Davis was one of the four individuals who had robbed and killed Rolland. Further, despite Davis's argument that the testimony of Sullivan

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

and Johnson was not credible, we cannot say that the jury lost its way and created a manifest miscarriage of justice by finding Davis guilty of aggravated robbery and murder. Matters as to the credibility of evidence are for the trier of fact to decide.[16] This is particularly true regarding the evaluation of witness testimony.[17] The fourth assignment of error is overruled.

Jury Instructions

{¶41} In his final assignment of error, Davis asserts that the trial court erred by overruling his motion for a new trial under Crim.R. 33(A)(1). We review the decision of the trial court to grant or deny a motion for a new trial pursuant to Crim.R. 33 under an abuse-of-discretion standard.[18] An abuse of discretion connotes more than an error of judgment; it implies that the court's attitude was unreasonable, arbitrary, or unconscionable.[19]

{¶42} Under this assignment of error, Davis first argues that he was denied a fair trial when the trial court and the bailiff communicated with the jury outside his presence, and when the trial court permitted the jurors to take home copies of the jury instructions.

{¶43} It is well established that a criminal defendant has a right to be present at all stages of the proceedings against him, including "when, pursuant to a request from the jury during its deliberations, the judge communicates with the jury regarding his instructions."[20] Further, "any communication between judge and jury that takes place outside the presence of the defendant or parties to a case is error

[16] *State v. Bryan*, 101 Ohio St.3d 272, 2004-Ohio-971, 804 N.E.2d 433, ¶116.
[17] *State v. Williams*, 1st Dist. Nos. C-060631 and C-060668, 2007-Ohio-5577, ¶45, citing *Bryan*, supra, and *State v. Russ*, 1st Dist. No. C-050797, 2006-Ohio-6824, ¶23.
[18] *State v. Schiebel* (1990), 55 Ohio St.3d 71, 564 N.E.2d 54.
[19] *State v. Xie* (1992), 62 Ohio St.3d 521, 584 N.E.2d 715.
[20] *State v. Abrams* (1974), 39 Ohio St.2d 53, 313 N.E.2d 823, syllabus.

which may warrant * * * a new trial.[21] But impermissible communication between the judge and the jury does not always constitute reversible error. To qualify as reversible error, the communication must have been of a "substantive nature and in some way prejudicial to the party complaining."[22]

{¶44} Here, at the end of deliberations one day, the jurors asked the trial court if they could take home the jury instructions to review. The trial court, outside the presence of Davis and trial counsel, permitted the jurors to take the instructions home. After reviewing the record, we hold that the trial court's communication with the jury that culminated in permitting the jurors to take home copies of the jury instructions was harmless error. First, the communication was not of a substantive nature. The trial court did not give new or additional instructions to the jurors, but only allowed them to take home copies of the jury instructions that had already been approved by both the state and defense counsel.[23] Second, Davis was not prejudiced by the jurors taking home copies of the instructions to review. It is apparent from the record that the jurors wanted to take home the instructions in an attempt to determine what the difference was between aggravated murder and murder. The jury acquitted Davis of aggravated murder, demonstrating that a review of the instructions most likely benefited Davis. Further, the trial court questioned the jurors the following day and determined that no one had discussed the instructions or had deliberated outside the jury room. Although Davis argues that defense counsel asked for a voir dire of the jury at that time, that is not demonstrated in the record.

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[21] *Bostic v. Connor* (1988), 37 Ohio St.3d 144, 149, 524 N.E.2d 881.
[22] *Schiebel*, supra, at 84.
[23] See *Abrams*, supra, at 56 (where a judge merely restates previously given instructions and neither gives the jury additional instructions or explains those already given, the communication between the judge and jury outside of the defendant's presence is harmless error).

{¶45} Finally, Davis argues that the balilff's communication with the jury was improper. According to the bailiff's proffered statements, she communicated to the jurors that they could take home the instructions, but reminded them not to engage in any independent research or allow anyone else who might question them see them with the jury instructions. Although the bailiff should not have relayed to the jury any information beyond what the trial court had asked her to convey, her admonitions cannot be said to have prejudiced Davis. The admonitions would have been proper if they had been given by the trial court in the presence of Davis and trial counsel. Jurors are not to engage in independent investigation or to discuss the case with anyone else outside the jury room. Therefore, we cannot say that the bailiff's communication with the jury gave rise to reversible error.

{¶46} Based on the foregoing, we hold that the trial court did not abuse its discretion in denying Davis's motion for a new trial. The fifth assignment of error is overruled, and the judgment of the trial court is affirmed.

Judgment affirmed.

CUNNINGHAM, P.J., and **DINKELACKER, J.,** concur.

Please Note:

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