

[Cite as *State v. Seay*, 2010-Ohio-896.]

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

STATE OF OHIO,	:	APPEAL NO. C-090233
	:	TRIAL NO. B-0707695
Plaintiff-Appellee,	:	
vs.	:	<i>DECISION.</i>
WILLIE SEAY,	:	
Defendant-Appellant.	:	

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed as Modified

Date of Judgment Entry on Appeal: March 12, 2010

Joseph T. Deters, Hamilton County Prosecuting Attorney, and *Judith Anton Lapp*, Assistant Prosecuting Attorney, for Appellee,

Roger W. Kirk, for Appellant.

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

HILDEBRANDT, Presiding Judge.

{¶1} Defendant-appellant, Willie Seay, appeals the judgment of the Hamilton County Court of Common Pleas convicting him of one count of aggravated burglary and three counts of aggravated robbery with accompanying firearm specifications. He was convicted after a jury trial.

{¶2} One afternoon, Latreshia Walters and Dionna Alexander were visiting Dominique Hariston at her home. They heard someone kicking the door in, and two men entered the house. The men demanded to know where in the house the money was kept.

{¶3} As one man held the women at gunpoint, the other ransacked the house in an attempt to find money. During the search, the victims had an unobstructed view of the gunman for approximately ten minutes. When the search for money proved to be fruitless, the men demanded the money that the women had on their persons. The intruders left with cash and other property.

{¶4} The victims called the police and gave a description of the intruders. At some point soon after the crimes, the victims informed the police that the gunman had a noticeably red or inflamed eye.

{¶5} On the same evening as the offenses, Hariston and Walters recalled that the gunman was a person whom they had known from the Madisonville neighborhood of Cincinnati. The gunman's street name was "Ill-Wil," and the women were able to discover from Madisonville residents that his real name was Willie Seay.

{¶6} Meanwhile, soon after the home-invasion robberies, Seay was arrested on unrelated charges. When the victims learned that Seay had been arrested,

Walters searched for his photograph on the Hamilton County Justice Center's Internet website. When the women saw Seay's photograph, it confirmed for them that he had been the man who had held them at gunpoint.

{¶7} Armed with this information, the victims informed the police that Seay was the gunman, and each victim identified him in a photographic lineup.

{¶8} The police secured a warrant to retrieve telephone numbers from Seay's cellular phone, which had been confiscated during his arrest. Detective Eric Karaguleff then used those numbers to record Seay's telephone calls from jail.

{¶9} Detective Karaguleff was able to identify Seay's voice in the taped telephone calls from a conversation he had had with him while Seay had been incarcerated. In the taped calls, Seay indicated his involvement in the crimes and revealed the location of the gun, which he had hidden. After the police had retrieved the gun, the victims identified it as the weapon that had been used in the offenses.

{¶10} The jury found Seay guilty, and the trial court sentenced him to 10 years' incarceration for each of the offenses.

Allied Offenses of Similar Import

{¶11} In his first assignment of error, Seay now argues that the trial court erred in imposing sentences for both aggravated robbery and robbery. This assignment is not well taken. Although the jury found Seay guilty of three counts of robbery, the trial court merged the offenses with the aggravated-robbery counts for purposes of sentencing. We overrule the first assignment of error.

The Indictment and *Colon*

{¶12} In his second assignment of error, Seay argues that his convictions were improper because the indictment and jury instructions failed to include mens rea

allegations for aggravated robbery and robbery. Because the robbery offenses were merged into the convictions for aggravated robbery, we address only the latter.

{¶13} In *State v. Colon (Colon I)*, the Supreme Court of Ohio held that the omission of a mens rea allegation in the indictment was a structural defect that rendered the conviction improper.¹ But in *State v. Colon (Colon II)*, the court held that the holding in *Colon I* was confined to its specific facts, noting that rarely would the absence of a mens rea allegation in the indictment permeate the proceedings to such an extent that a conviction would be invalid.²

{¶14} In this case, the absence of mens rea allegations in the original indictment did not permeate the proceedings. Prior to trial, the state amended the indictment to include the mens rea allegations, and that amendment was proper under Crim.R. 7(D). And contrary to Seay's argument, the jury instructions also included the correct mens rea allegations and definitions. Under these circumstances, there was no structural error in the proceedings, and we overrule the second assignment of error.

Prosecutorial Misconduct

{¶15} In his third and fourth assignments of error, Seay argues that he was denied a fair trial as a result of prosecutorial misconduct. Seay argues the assignments together, and we address them in like fashion.

{¶16} Seay first contends that he was deprived of a fair trial by the state's failure to disclose that it had obtained a warrant to retrieve the contents of his cellular telephone. He argues that, had he received notice of the warrant in discovery, he would have prevailed on a motion to suppress the evidence obtained as a result of the warrant.

¹ 118 Ohio St.3d 26, 2008-Ohio-1624, 885 N.E.2d 917, ¶38.

² 119 Ohio St.3d 204, 2008-Ohio-3749, 893 N.E.2d 169, ¶8.

{¶17} We find no merit in this argument. The state provided notice that it intended to use the statements Seay had made in the telephone conversations made from jail. The defense was thus provided an opportunity to challenge the propriety of the state's possession and use of those statements.

{¶18} Moreover, Seay has not proffered a basis for concluding that the search warrant was invalid, and he has therefore not demonstrated any prejudice to have resulted from the failure of the state to disclose the existence of the warrant in discovery. Under these circumstances, we cannot say that the state's acts or omissions deprived Seay of a fair trial.

{¶19} Seay next argues that the state failed to inform him of the statement he had made during the interview with Detective Karaguleff while he was incarcerated.

{¶20} Crim.R. 16(B)(1)(a)(ii) requires the state to disclose any oral statement made by the defendant to a law enforcement officer.³

{¶21} In this case, the record indicates that the state had made a summary of the contested statement available to Seay. In that statement, Seay merely asserted his innocence and refused further comment without the presence of an attorney. Moreover, at trial, the state did not use the statement made to Karaguleff for its contents; it was used merely to establish that Karaguleff had been able to identify Seay's voice in the taped telephone calls. Seay has thus failed to demonstrate any violation of the discovery rules.

{¶22} Seay also argues that he was unfairly prejudiced by a number of improper comments by the prosecutor during closing arguments. He argues that the prosecutor denigrated defense counsel and misstated the evidence.

³ See *State v. Matthews*, 1st Dist. Nos. C-060669 and C-060692, 2007-Ohio-4881, ¶16.

{¶23} To obtain a reversal on the ground of improper remarks made during closing argument, the defendant must demonstrate not only that the comments were improper, but also that they deprived the defendant of a fair trial.⁴ Seay objected to only one of the comments, and we review the remainder under a plain-error standard. Under the plain-error standard, an appellate court will reverse a judgment only where the outcome clearly would have been different absent the alleged error.⁵

{¶24} In this case, there was no plain error. Our review of the prosecutor's argument convinces us that the remarks were fair comments on the evidence and were not intended to denigrate the defense or to mislead the jury.

{¶25} The single remark that drew an objection was the prosecutor's statement that certain evidence missing from the state's case was "CSI stuff" that the police could not have been expected to produce. The trial court immediately instructed the prosecutor to "comment [on] what's in evidence." In the context of the entire proceedings, the comment was inconsequential and did not deprive Seay of a fair trial. We overrule the third and fourth assignments of error.

Voice Identification

{¶26} In his fifth assignment of error, Seay argues that the trial court erred in permitting Detective Karaguleff to identify Seay's voice on the taped telephone calls from the Hamilton County Justice Center. He argues that, absent evidence that Karaguleff was an expert in voice recognition, he was incompetent to authenticate the tapes.

{¶27} This assignment is without merit. There is no requirement that a witness authenticating a voice in a taped statement be an expert in voice

⁴ *State v. Pearson* (Dec. 1, 2000), 1st Dist. No. C-990860.

⁵ *State v. Miller*, 1st Dist. No. C-070691, 2008-Ohio-5899, ¶22.

recognition.⁶ In this case, there was evidence that Karaguleff had engaged in sufficient conversation with Seay to have recognized his voice, and we find no error in the admission of his testimony. Accordingly we overrule the fifth assignment of error.

Motion to Suppress

{¶28} In his sixth assignment of error, Seay contends that the trial court erred in denying his motion to suppress the victims' out-of-court identification. He argues that, because his was the only photograph to depict a person with a noticeably red eye, the identification procedure was impermissibly suggestive. He also argues that the identification procedure was flawed because the police had used the same photograph in the lineup that the victims had seen on the Justice Center's website.

{¶29} To suppress identification testimony, the trial court must find that "the procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."⁷ Reliability is the linchpin in determining the admissibility of identification testimony.⁸ Thus, even if the identification procedure was suggestive, so long as the challenged identification was reliable, it is admissible.⁹

{¶30} In this case, the identification was reliable. The victims knew Seay from the neighborhood, and they had an unobstructed view of his face for approximately ten minutes. Each of the victims expressed complete certainty that Seay was the person who had held them at gunpoint. Accordingly, any

⁶ See, e.g., *State v. Wackenthaler*, 1st Dist. No. C-030901, 2004-Ohio-5501, ¶24 (evidence that police officer recognized the defendant's voice was sufficient to authenticate telephone conversation).

⁷ *Neil v. Biggers* (1972), 409 U.S. 188, 197, 93 S.Ct. 375, quoting *Simmons v. United States* (1968), 390 U.S. 377, 384, 88 S.Ct. 967; *State v. Green* (1996), 117 Ohio App.3d 644, 652, 691 N.E.2d 316.

⁸ *Manson v. Brathwaite* (1977), 432 U.S. 98, 114, 97 S.Ct. 2243.

⁹ *Id.*

suggestiveness in the lineup procedure was harmless, and we overrule the sixth assignment of error.

Sufficiency and Weight of the Evidence

{¶31} In his seventh and final assignment of error, Seay maintains that his convictions were based on insufficient evidence and were against the manifest weight of the evidence.

{¶32} In the review of the sufficiency of the evidence to support a conviction, 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.”¹⁰ To reverse a conviction on the manifest weight of the evidence, a reviewing 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 evidence, the trier of fact clearly lost its way and created a manifest miscarriage of justice.¹¹

{¶33} The aggravated-burglary statute, R.C. 2911.11(A)(2), provides that “[n]o person, by force, stealth, or deception, shall trespass in an occupied structure * * * when another person other than an accomplice of the offender is present, with purpose to commit in the structure * * * any criminal offense, if * * * [t]he offender has a deadly weapon or dangerous ordnance on or about the offender’s person or under the offender’s control.” R.C. 2911.01(A)(1), the aggravated-robbery statute, states that “[n]o person, in attempting or committing a theft offense * * * shall * * * [h]ave a deadly weapon on or about the offender’s person or under the offender’s

¹⁰ *State v. Waddy* (1992), 63 Ohio St.3d 424, 430, 588 N.E.2d 819.

¹¹ *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541.

control and either display the weapon, brandish it, indicate that the offender possesses it, or use it.”

{¶34} In this case, the state presented overwhelming evidence of Seay’s guilt. The state presented evidence that two men had broken into Hariston’s house demanding money and that one of the men had held the victims at gunpoint before taking cash and other property. The victims were able to positively identify Seay as the gunman after having observed him for approximately ten minutes on the day of the offenses. Seay’s statements recorded from the telephone calls confirmed his involvement in the crimes and led the police to the weapon used in the offenses. Although Seay points to certain alleged weaknesses in the state’s case, including claimed deficiencies in the identification testimony, the evidence was sufficient to support the convictions, and we cannot say that the jury lost its way in finding him guilty. We overrule the seventh assignment of error.

{¶35} We do note, though, that the trial court made a clerical error in its judgment entry with respect to count two of the indictment, listing the incorrect Revised Code section for which Seay had been found guilty. We hereby modify the judgment to reflect that Seay was convicted of aggravated robbery under R.C. 2911.01(A)(1).

{¶36} In all other respects, we affirm the judgment of the trial court.

Judgment affirmed as modified.

SUNDERMANN and HENDON, JJ., concur.

Please Note:

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