

[Cite as *State v. Livingston*, 2011-Ohio-1665.]

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

STATE OF OHIO,	:	APPEAL NO. C-090235
	:	TRIAL NO. B-0800258B
Plaintiff-Appellee,	:	
	:	<i>DECISION.</i>
vs.	:	
MARTY LEVINGSTON,	:	
	:	
Defendant-Appellant.	:	

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Sentences Vacated in Part and Cause Remanded.

Date of Judgment Entry on Appeal: April 8, 2011

Joseph T. Deters, Hamilton County Prosecutor, and *Philip R. Cummings*, Assistant Prosecuting Attorney, for Plaintiff-Appellee,

Robert R. Hastings, for Defendant-Appellant.

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

FISCHER, Judge.

{¶1} Marty Levingston appeals his convictions for murder, felonious assault, and tampering with evidence. Because we conclude, as the state concedes, that the trial court should have merged the offenses of murder and felonious assault as allied offenses of similar import under the facts of this case, we vacate only the sentences for those offenses and remand this case to the trial court for resentencing in accordance with this decision. In all other respects, the judgment of the trial court is affirmed.

{¶2} Levingston was indicted for two counts of murder with specifications, felonious assault with specifications, and tampering with evidence. At trial, Carlos Mayo testified that he and his friend Michael Grace had driven to the Hawaiian Terrace apartment complex on December 28, 2007. When Grace left the car, a man approached him and pulled out a gun. As the two fought, a second gunman approached the car and began firing shots at Mayo. When Mayo attempted to return fire with a gun from the car, his gun jammed, so he fled from the scene. Grace fell in the parking lot and later died from two gunshot wounds.

{¶3} Savana Sorrells witnessed the melee from an apartment that overlooked the parking lot. At trial, she was called as a court's witness and identified David Johnson as the first gunman. Sorrells also testified that although she had named Levingston as the second gunman before trial, she doubted her identification. The state challenged her uncertainty by asking whether she had identified Levingston as the second gunman to police on January 7, 2008, and to the grand jury. Sorrells conceded that she had done so, and that before the shooting she had known both men from the apartment complex.

{¶4} The state also called Detective Matt Thompson, who testified that Sorrells had named “David and Marty” as the shooters during her police interview.¹ Detective Thompson confirmed that she was referring to Levingston and Johnson by showing her photographs of both men. The jury heard an audio recording of this interview.

{¶5} In addition, Robert Taylor, an inmate in the Hamilton County Justice Center, claimed that Levingston had admitted that he had killed Grace. According to Taylor, Levingston and Grace had been members of rival gangs who had been fighting over stolen guns before the shooting.

{¶6} At the conclusion of the trial, the jury found Levingston guilty as charged. The trial court merged the two counts of murder and sentenced Johnson to consecutive terms of confinement of 15 years to life for murder in violation of R.C. 2903.02(A), eight years for felonious assault in violation of R.C. 2903.11(A)(2), and five years for tampering with evidence in violation of R.C. 2921.12(A)(1), for an aggregate sentence of 31 years to life incarceration. This appeal followed.

{¶7} In his first assignment of error, Levingston contends that the trial court erred in overruling his motion to suppress Sorrells’s pretrial identification of him as the second gunman. He argues that the police failed to follow their own internal identification procedures by showing Sorrells only one photograph to confirm his identity, and that this procedure was impermissibly suggestive.

{¶8} The admissibility of a pretrial identification of a suspect is evaluated in two steps: (1) the trial court must determine whether the identification process was

¹ T.p. 1089.

unduly suggestive, and (2) if so, the trial court must determine if there was a substantial likelihood of irreparable misidentification.²

{¶9} Ten days after the shooting, Sorrells told police that “Marty” had shot Grace. She had known Levingston from the apartment complex and confirmed that she was referring to Levingston when detectives showed her a single photograph of him. Although one-photograph identification procedures are generally suggestive, we conclude that there was not a substantial likelihood of irreparable misidentification in this case because Sorrells had known Levingston before the shooting and identified him by name before she saw his photograph.³

{¶10} Additionally, testimony was presented that this method did not violate any internal police procedure because Sorrells had known Levingston. We, therefore, hold that this assignment of error is without merit.

{¶11} In his second assignment of error, Levingston argues that his convictions for murder and felonious assault should have been merged for sentencing as allied offenses of similar import under R.C. 2941.25. The state concedes the error, and based on the defendant’s conduct in this case, we agree.⁴ Accordingly, we sustain this assignment of error.

{¶12} In his third assignment of error, Levingston argues that the trial court erred in overruling his motion for a new trial based on newly discovered evidence. His motion was supported by the affidavit of Sorrells’s cousin, Suriyah Dukes, who claimed that she had witnessed the shooting and that Levingston had not been involved.

² *State v. Johnson*, 1st Dist. No. C-090413, 2010-Ohio-3861, at ¶21.

³ See *State v. Huff* (2001), 145 Ohio App.3d 555, 564-565, 763 N.E.2d 695.

⁴ See *State v. Johnson*, ___ Ohio St.3d ___, 2010-Ohio-6314, ___ N.E.2d ___, syllabus.

{¶13} The decision whether to grant a new trial on the ground of newly discovered evidence lies within the discretion of the trial court.⁵ To warrant the granting of a new trial based on newly discovered evidence in a criminal case, the defendant must show that the new evidence “(1) discloses a strong probability that it will change the result if a new trial is granted; (2) has been discovered since the trial; (3) is such as could not in the exercise of due diligence have been discovered before the trial; (4) is material to the issues; (5) is not merely cumulative to former evidence; and (6) does not merely impeach or contradict the former evidence.”⁶

{¶14} With the exercise of due diligence, Dukes’s testimony could have been discovered before trial. Dukes indicated that Levingston had called her on the night of the shooting. Furthermore, Sorrells testified at a suppression hearing that she had been with her cousin during the shootout. Therefore, the trial court did not abuse its discretion in denying the motion for a new trial. We overrule this assignment of error.

{¶15} In his fourth assignment of error, Levingston maintains that the trial court erred in denying his motion for a mistrial and his motion to strike Sorrells’s testimony.

{¶16} Levingston first argues that the trial court should have declared a mistrial after the state had showed Sorrells a diagram during her testimony that the trial court had just excluded. However, at the time, it was apparently unclear whether the court had simply declined to admit the exhibit as evidence or to exclude its use even to refresh Sorrells’s recollection. The trial court clarified that it had intended the latter, and there is no indication that the exhibit either was seen by the jury or influenced Sorrells’s testimony.

⁵ *State v. Marshall*, 175 Ohio App.3d 488, 2008-Ohio-955, 887 N.E.2d 1227, at ¶72.

⁶ *Id.* (quoting *State v. Petro* [1947], 148 Ohio St. 505, 76 N.E.2d 370, syllabus).

{¶17} The decision whether to declare a mistrial lies within the discretion of the trial court, and having thoroughly reviewed the record, we find no abuse of discretion.⁷

{¶18} Levingston next argues that the trial court should have stricken Sorrells's testimony regarding her pretrial identification of Levingston. Sorrells, however, had been called as a court's witness, leaving the state free to impeach her testimony with prior inconsistent statements.⁸ The trial court instructed the jury on this use of impeachment, and we, therefore, find no abuse of discretion. Accordingly, we hold that this assignment of error is without merit.

{¶19} In his fifth assignment of error, Levingston maintains that he was denied a fair trial and due process of law because of prosecutorial misconduct. The test for prosecutorial misconduct is whether the prosecutor's questions or remarks were improper and, if so, whether they prejudicially affected the defendant's substantial rights.⁹ The central element of prosecutorial-misconduct analysis is whether the conduct complained of deprived the defendant of a fair trial.¹⁰

{¶20} Levingston specifically argues that the state improperly: (1) attempted to introduce the exhibit mentioned in the fourth assignment of error, which had not been provided during discovery; (2) introduced evidence regarding gang disputes and membership through hearsay during Mayo's testimony; and (3) relied on excluded testimony during closing arguments to suggest that Levingston had intimidated Sorrells into doubting her pretrial identification of him to police and the grand jury.

⁷ *State v. Brown*, 100 Ohio St.3d 51, 2003-Ohio-5059, 796 N.E.2d 506, at ¶42.

⁸ Evid.R. 607 and 614(A); *State v. Dubose*, 1st Dist. No. C-070397, 2008-Ohio-4983, at ¶59.

⁹ *State v. Glenn*, 1st Dist. No. C-090205, 2011-Ohio-829, at ¶52.

¹⁰ *State v. Finley*, 1st Dist. No. C-061052, 2010-Ohio-5203, at ¶48.

{¶21} On this record, we are not persuaded that any allegedly improper conduct by the prosecutor denied Levingston a fair trial. With respect to the diagram exhibit, there is no indication that the jury saw this evidence or that it influenced Sorrells's testimony. Also, the trial court allowed the jury to hear Mayo's gang-related testimony over defense counsel's objections, and Levingston does not argue how this ruling was incorrect. Finally, Taylor testified that Levingston was trying to intimidate Sorrells, and the prosecutor was, therefore, merely summarizing previous testimony.

{¶22} Therefore, we overrule this assignment of error.

{¶23} In his sixth assignment of error, Levingston argues that the trial court erred in instructing the jurors that they could consider the testimony of Detective Thompson regarding Sorrells's statement to police and the recording of that statement as substantive evidence.

{¶24} Evid.R. 801(D)(1)(c) specifically allows statements identifying a person soon after that person is perceived to be considered as substantive evidence if (1) the declarant testifies at trial and is subject to cross-examination concerning the statement, and (2) circumstances demonstrate the reliability of the prior identification.

{¶25} Sorrells identified Levingston as the second gunman to police ten days after the shooting, and in light of her detailed account at the time, the circumstances demonstrated the reliability of her statement. Additionally, Sorrells testified at trial, and Levingston was free to cross-examine her regarding the statement. We, therefore, hold that this assignment of error is without merit.

{¶26} In his seventh assignment of error, Levingston argues that the trial court erred in not giving the jury Levingston's requested instruction to consider the testimony of Robert Taylor scrupulously and with grave suspicion.

{¶27} A trial court should ordinarily provide a jury instruction requested by the defendant when the instruction contains a correct and relevant statement of the law and is appropriate to the facts of the case.¹¹ We review a trial court’s decision whether to provide a requested instruction for abuse of discretion.¹²

{¶28} No abuse of discretion occurred here because the requested instruction was not appropriate under the facts of the case. Levingston sought an instruction provided under R.C. 2923.03(D), which applies only when an alleged accomplice of the defendant testifies. Taylor, however, was clearly not an accomplice to the offenses charged in this case.¹³ Accordingly, we overrule this assignment of error.

{¶29} In his eighth assignment of error, Levingston essentially argues that his convictions were contrary to the manifest weight of the evidence and supported by insufficient evidence. To reverse a conviction for insufficient evidence, we must conclude that no rational trier of fact, after viewing the evidence in a light most favorable to the prosecution, could have found that the state had proved all elements of the crimes beyond a reasonable doubt.¹⁴ Appellate review of the weight of the evidence puts the appellate court in the role of a “thirteenth juror.”¹⁵ Thus, we must view the entire record, weigh the evidence, consider the credibility of the witnesses, and determine whether the trier of fact clearly lost its way and created a manifest miscarriage of justice in finding the defendant guilty.¹⁶

{¶30} Based upon the facts we have already noted, the other evidence presented at trial, and a thorough review of the record, we cannot say that no rational trier of fact could have found Levingston guilty beyond a reasonable doubt of

¹¹ *State v. Gary*, 1st Dist. No. C-090643, 2010-Ohio-5321, at ¶23.

¹² *Id.*

¹³ See R.C. 2923.03(A).

¹⁴ *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus.

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

¹⁶ *Id.*

murder, felonious assault, and tampering with evidence. Furthermore, we cannot say that the jury clearly lost its way and created a manifest miscarriage of justice in finding Levingston guilty on these counts. Accordingly, Levingston's eighth assignment of error is overruled.

{¶31} Therefore, the separate sentences imposed for murder and felonious assault are vacated, and this cause is remanded for the imposition of only one sentence for either of the two offenses consistent with this decision and the law. In all other respects, the trial court's judgment is affirmed.

Sentences vacated in part and cause remanded.

DINKELACKER, P.J., and HENDON, J., concur.

Please Note:

The court has recorded its own entry this date.