

[Cite as *State v. Amore*, 2004-Ohio-958.]

STATE OF OHIO)
)ss:
COUNTY OF LORAIN)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

Appellee

v.

MARLENA F. AMORE

Appellant

C. A. No. 03 CA 008281

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF LORAIN, OHIO
CASE No. 02 CR 060923

DECISION AND JOURNAL ENTRY

Dated: March 3, 2004

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

BAIRD, Presiding Judge.

{¶1} Appellant, Marlena Amore, appeals from a jury conviction for attempted murder, conspiracy to commit murder, and felonious assault with a gun specification entered by the Lorain County Court of Common Pleas. We affirm.

I.

{¶2} Marlena Amore and the victim in this case, Cleman Bridges, resided together in a house owned by Bridges; the pair had been together for 22 years and considered themselves joined in a common law marriage. In 2000, Amore began a romance with her co-defendant, Laurence Coreno, Sr. Coreno proposed marriage to Amore; according to testimony at trial, Amore was concerned about losing access to Bridges' assets if she left him or if he removed her as a beneficiary from his will or as a joint tenant from his house and his bank accounts.

{¶3} On Tuesday, July 9, 2002, Bridges, as was his habit on Tuesday nights, returned home from the Moose Lodge between 10:00 and 11:00 pm. Bridges entered his garage from a side door; Bridges testified at trial that before he was able to turn on a light, Coreno grabbed him. Bridges stated that Coreno had a stun gun in one hand and a .38 revolver in the other hand. Bridges claimed that Coreno struck him in the side with the stun gun and then shot him in the left shoulder with the revolver. Bridges stated that the two men struggled and Bridges was able to flip Coreno to the ground. Bridges testified that he then ran from the garage to the front of the house; Coreno followed him and fired two more shots at Bridges. Bridges stated that a neighbor shouted that she had called the police; the same neighbor testified that she observed Coreno point and shoot

his gun in the direction of Bridges. Bridges said that he then climbed into his van and waited for the police to arrive.

{¶4} As a result of the events of the night of July 9, 2002, Coreno and Amore were indicted for attempted murder, conspiracy to commit murder and felonious assault; all charges carried a gun specification. Prior to trial, Amore moved to suppress a confession she had given to the police; the trial court denied the motion. Amore also moved for a severance of the trial; this, too was denied. The defendants were jointly tried before a jury; the jury returned guilty verdicts on all counts. Amore has timely appealed, raising two assignments of error.

II.

Assignment of Error No. 1

“THAT THE TRIAL COURT COMMITTED PREJUDICIAL ERROR WHEN IT FAILED TO GRANT [AMORE’S] MOTION TO SUPPRESS FILED ON DECEMBER 27, 2002 AND DECIDED ON JANUARY 24, 2003.”

{¶5} In the first assignment of error, Amore argues that the trial court’s failure to suppress her confession violated her *Miranda* rights.

{¶6} In reviewing a trial court’s ruling on a motion to suppress evidence, an appellate court engages in a two-step inquiry. *State v. Evans* (2001), 144 Ohio App.3d 539, 549, appeal not allowed (2001), 93 Ohio St.3d 1473. First, the appellate court reviews the trial court’s findings of fact only for clear error. *Id.*, 144 Ohio App. 3d at 359, citing *Ornelas v. United States* (1996), 517 U.S. 690, 699, 134 L.Ed.2d 911. “Then, we engage in a de novo review, without deference to the trial court’s conclusions, as to

whether those properly supported facts meet the applicable legal standards.” *Evans*, 144 Ohio App.3d at 549, citing *Ornelas*, 517 U.S. at 699.

{¶7} The Fifth Amendment to the United States Constitution provides persons with a privilege against compelled self-incrimination, which is applicable against the states through the Due Process Clause of the Fourteenth Amendment. *Malloy v. Hogan* (1964), 378 U.S. 1, 6, 12 L.Ed.2d 653. Pursuant to *Miranda v. Arizona* (1966), 384 U.S. 436, 471-472, 16 L.Ed.2d 694, an individual must be advised of certain constitutional rights when law enforcement officers initiate questioning after that person has been taken into custody or otherwise deprived of his freedom in any significant way. Specifically, once police begin a custodial interrogation, they must use procedures to warn the person in custody of his right to remain silent and his right to counsel. *Id.*

{¶8} The duty to provide *Miranda* warnings is only invoked when both custody and interrogation coincide. *State v. Wiles* (1991), 59 Ohio St.3d 71, 83, certiorari denied (1992), 506 U.S. 832, 121 L.Ed.2d 59. “Custody” for purposes of entitlement to *Miranda* rights exists only where there is a restraint on freedom of movement of the degree associated with a formal arrest. *California v. Beheler* (1983), 463 U.S. 1121, 1125, 77 L.Ed.2d 1275. Whether a suspect is in such custody depends on the facts and circumstances of each case. *State v. Warrell* (1987), 41 Ohio App.3d 286, 287. The test to be applied to each case is “whether, under the totality of the circumstances, a ‘reasonable person would have believed that he was not free to leave.’” *State v. Gumm* (1995), 73 Ohio St.3d 413, 429, certiorari denied (1996), 516 U.S. 1177, 134 L.Ed.2d

221, quoting *United States v. Mendenhall* (1980), 446 U.S. 544, 554, 64 L.Ed.2d 497 (plurality opinion).

In its ruling, the court stated that Amore:

“arrived at the police department under her own power to give a statement as a victim of a crime. Therefore there was no requirement that *** Amore be provided with Miranda Warnings before she began making her statement. However, the State of Ohio concedes that at the point of the tape where the police tell [Amore] that she is not free to go and then continue to ask her questions without a Miranda warning her statement should be suppressed.”

{¶9} Therefore, the trial court denied in part and granted in part the motion to suppress. In the portion of its order denying the motion to suppress, the trial court determined that Amore’s statements at the police station were not made in a custodial interrogation. Whether an individual is “in custody” is a mixed question of law and fact entitled to independent review. *Thompson v. Keohane* (1995), 516 U.S. 99, 112-113, 133 L.Ed.2d 383. As stated earlier, “[a]n appellate court must review the trial court’s findings of historical fact only for clear error, giving due weight to inferences drawn from those facts by the trial court. The trial court’s legal conclusions, however, are afforded no deference, but are reviewed *de novo*.” *State v. Russell* (1998), 127 Ohio App.3d 414, 416, citing *Ornelas v. United States* (1996), 517 U.S. 690, 699 (Emphasis sic). On the matter of law in a *Miranda* case such as this, the reviewing court must independently determine whether, given the properly supported historical facts, a reasonable person would have felt at liberty to terminate the interrogation and leave. *Thompson*, 516 U.S. at 112.

{¶10} At the suppression hearing, the trial court heard from Lt. Barry Accorti of the North Ridgeville Police Department. The following facts are taken from his testimony: On the night of July 9, 2002, Lt. Accorti was dispatched to Elyria Memorial Hospital to speak with Bridges and Amore. Bridges was at the hospital to be treated for a gunshot wound; Amore was there also. While at the hospital, Amore told Lt. Accorti that she had a relationship with Coreno, but the relationship was over and Coreno refused to accept that fact. Amore said that Coreno had broken into the house and held her hostage until Bridges arrived home; at that time Coreno attacked Bridges in the garage and shot him. Lt. Accorti testified that, at the time, he considered Amore to be a crime victim along with Bridges. Upon Bridge's release from the hospital, Lt. Accorti drove both Bridges and Amore to the police station to give a written statement. Bridges was unable to write because he lost his glasses during the assault; Amore refused to give a written statement because she was too upset. Meanwhile, Lt. Accorti drove Amore back to the scene of the assault, because Coreno was still inside and the police hoped that Amore could talk him into surrendering. Lt. Accorti stated that he still believed Amore to be a victim and uninvolved in the assault.

{¶11} Lt. Accorti stopped at Bridges' house again on July 11, 2002 and again asked Bridges and Amore to return to the police station to complete a written statement. All parties returned to the police station; Bridges drove his own vehicle and Amore rode with him. Once at the station, when Lt. Accorti questioned Amore about what happened, she:

“started making statements that implicated her in the crime, such as providing Mr. Coreno transportation to the crime scene, being aware that he was armed, about she had a conversation with him on the 1st of July plotting the murder of Mr. Bridges. So these things happened during this interview.”

{¶12} Lt. Accorti then testified, “After she made the admission that she was involved in this thing[,] [s]he put on her coat like she was leaving, and I said, ‘Well now, you’re not free to leave.’” Lt. Accorti said that he did not give Amore a *Miranda* warning because Amore was reporting to be a crime victim and was at the police station voluntarily and the interview was non-custodial. On cross-examination, Lt. Accorti testified that Amore was free to leave at any time prior to the admission that she had provided transportation for Coreno, and she had plotted to kill Bridges. Lt. Accorti felt that he did not need to give a *Miranda* warning because “[t]he admissions were already made. She voluntarily came there. She admitted to parts of the crime.”

{¶13} Lt. Accorti testified that he was unaware that the interview was videotaped until later in the interview, and he believed that a detective turned on the recorder before joining Lt. Accorti and Amore in the interrogation room. The transcript of the suppression hearing demonstrates that the prosecutor gave a copy of the videotape to the trial court for review as an exhibit; however, the tape is not included with the record upon appeal. Pursuant App.R. 9 and Loc.R. 5, an appellant bears the burden of ensuring that the record necessary to determine the appeal is before the appellate court. *State v. McCowan*, 9th Dist. No. 02CA008124, 2003-Ohio-1797, at ¶6. If the record is incomplete, a reviewing court must presume that the trial court acted with regularity and

with sufficient evidence to support its findings. *Id.* Therefore, we proceed under the presumption that the videotape supports the trial court's findings.

{¶14} Based on the foregoing testimony, we conclude that there is no clear error in the trial court's determination that Amore was not entitled to a *Miranda* warning because she was not in custody. Furthermore, we find that based on all the facts and circumstances as demonstrated by the record, a reasonable person in Amore's position would have felt at liberty to terminate the interview and leave if she desired to do so. As shown by the record, Amore arrived at the police station voluntarily, she spoke with police officers voluntarily, she felt free to leave, and she attempted to do so. All statements made subsequent to her detainment were suppressed. Amore's first assignment of error is overruled.

Assignment of Error No. 2

“THAT THE COURT COMMITTED PREJUDICIAL ERROR WHEN IT FAILED TO SEPARATE THE TRIALS OF THE CO-DEFENDANTS, [AMORE] AND LAURENCE J. CORENO, SR. THEREBY VIOLATING [AMORE'S] RIGHT OF CROSS-EXAMINATION SECURED BY THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT AND OHIO CRIM.R. 14.”

{¶15} In this assignment of error, Amore argues that her right to confront witnesses was violated when the trial court refused to sever her trial from Coreno's, because Coreno testified at the joint trial and “placed [Amore] clearly in the middle of the alleged conspiracy and plot to kill Cleman C. Bridges.” Amore argues, therefore, that “[c]learly the denial by the trial [c]ourt to separate the trials of the co-defendants was

highly prejudicial to [Amore] because it violated her Sixth Amendment rights secured by the Confrontation Clause.” This argument is without merit.

{¶16} Ohio Crim.R. 14 states that, “If it appears that a defendant or the state is prejudiced by a joinder of *** defendants*** the court shall *** grant a severance of defendants, or provide such other relief as justice requires.” Joinder of defendants and the avoidance of multiple trials is favored in the law, as it conserves judicial and prosecutorial time, lessens the expense of multiple trials, diminishes inconvenience to witnesses, and minimizes the possibility of incongruous results and successive trials before different juries. *State v. Daniels* (1993), 92 Ohio App.3d 473, 484, citing *State v. Thomas* (1980), 61 Ohio St.2d 223. Absent a clear showing of abuse of discretion, a trial court’s decision regarding severance will not be disturbed. *Id.*, citing *State v. Torres* (1981), 66 Ohio St.2d 340. A defendant claiming error in the trial court’s denial of a motion to sever has the burden of affirmatively showing that his rights were prejudiced. *Fletcher v. Northwest Mechanical Contr., Inc.* (1991), 75 Ohio App.3d 466, 484-485.

{¶17} The right of cross-examination of witnesses is included in the right of an accused in a criminal case to confront the witnesses against him secured by the Sixth Amendment. *Pointer v. Texas* (1965), 380 U.S. 400, 404. In the case of multiple defendants, Crim.R 14 allows for severance of trials where a co-defendant will not testify, because:

“[a] defendant may be prejudiced by the admission in evidence against a co-defendant of a statement or confession made by that co-defendant [and] [t]his prejudice cannot be dispelled by cross-examination if the co-defendant does not

take the stand.” *Bruton v. United States* (1968), 391 U.S. 123, 132, 20 L.Ed 2d 476. 13 L.Ed.2d 923.¹

{¶18} Where a co-defendant does not testify in a joint trial, an instruction to the jury to apply the co-defendant’s out-of-court statement or confession solely to the case against the co-defendant is not “an adequate substitute for petitioner’s constitutional right of cross-examination.” *Id.* at 137. The *Bruton* rule, however, applies only if the co-defendant does not testify at the trial. *In re: Marlena Taylor* (Mar. 29, 1995), 9th Dist. No. 93CA005650, at 10-11; *Nelson v. O’Neil* (1971), 402 US. 622, 29 L.Ed.2d 222. “[I]f a co-defendant testifies, he is subject to cross-examination and the admission of his out-of-court statement does not create a constitutional confrontation problem.” *In re Taylor*, at 11. Thus, the constitutional right to confront and cross-examine witnesses as construed in *Bruton* is violated only where a hearsay statement is that of a co-defendant who is unavailable at the trial for full and effective cross examination. *Id.*

{¶19} In this case, Coreno testified and was available for cross-examination by Amore’s counsel. Furthermore, Amore does not argue that the trial court admitted any out-of-court statement or confession made by Coreno, but argues only that his in-court sworn testimony implicated her in the crimes and, therefore, her right to confront witnesses was violated when the trials were not severed. Pursuant to the holding in *O’Neill*, the *Bruton* rule does not apply under these circumstances.

¹ *Bruton* applied the Federal Crim.R. 14; however, the federal rule is analogous to Ohio Crim.R. 14.

{¶20} Furthermore, Amore did not renew the motion to sever. Where a motion to sever is not renewed either after the close of the state's evidence or at the conclusion of all the evidence, it is waived. *State v. McIntyre* (Jan. 22, 1986), 9th Dist. No. 12241. Amore's second assignment of error is overruled.

III.

{¶21} Amore's two assignments of error are overruled. The judgment of the Lorain County Court of Common Pleas is affirmed.

Judgment affirmed.

WILLIAM R. BAIRD
FOR THE COURT

CARR, J.
WHITMORE, J.
CONCUR

APPEARANCES:

JOHN S. HAYNES, Attorney at Law, 134 Middle Avenue, Elyria, Ohio 44035, for Appellant.

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