[Cite as *State v. Cotton*, 2010-Ohio-804.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio — Court of Appeals No. L-09-1050

Appellee — Trial Court No. CR0200803493

v.

Marc A. Cotton — **DECISION AND JUDGMENT**

Appellant — Decided: March 5, 2010

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Claudia A. Ford, Assistant Prosecuting Attorney, for appellee.

Diana L. Bittner, for appellant.

* * * * *

HANDWORK, J.

{¶ 1} This case is before the court on appeal from a judgment of the Lucas County Court of Common Pleas wherein appellant, Marc A. Cotton, was found guilty on one count of robbery, a violation of R.C. 2911.02(A)(2), a felony of the second degree.

The trial court sentenced appellant to three years in prison. Appellant appeals his conviction and asserts that the following errors occurred in the proceedings below:

{¶ 2} "1. The trial court's admission of hearsay evidence violated defendant-appellant's Sixth Amendment right of confrontation.

{¶ 3} "2. The trial court committed error in instructing the jury on a defective element of the indictment regarding the requisite mental state for the act of robbery.

{¶ 4} "3. The trial court erred in failing to provide the jury with an instruction regarding the offense of theft, a lesser included offense of robbery.

{¶ 5} "4. The jury's verdict finding defendant-appellant guilty of robbery in violation of R.C. 2911.02(A)(2) was not sufficiently supported by the evidence in the case.

{¶ 6} "5. The jury's verdict finding defendant-appellant guilty of robbery in violation of R.C. 2911.02(A)(2) was against the manifest weight of the evidence."

{¶ 7} Initially, appellant was indicted on one count of domestic violence, a violation of R.C. 2919.25(A) and (D)(4), a felony of the third degree, with a stipulation of two prior convictions for domestic violence, and the count of robbery set forth above. The following evidence relevant to these charges was adduced at appellant's trial through the testimony of police officers who investigated this incident and the victim's mother, Mary Parker. The victim, Peachyes Parker, refused to testify on the ground that she might incriminate herself.

{¶ 8} At approximately 11:00 p.m. on the night of February 13, 2008, Officers William Windnagle and Patrick Bergman, and Sergeant Detective Kevin Korsog of the Toledo Police Department were investigating an alleged robbery at the Cherry Street Mission in Toledo, Lucas County, Ohio. Officers Windnagle and Bergman were outside the mission when a woman pulled up to the curb and "jumped" out of her automobile.

{¶ 9} At appellant's trial, Officer Windnagle described the woman, who identified herself as herself as Peachyes Parker, as being "[v]ery frazzled, watery eye [sic], kind of puffy, what I would call as upset, emotional." Officer Bergman testified that Peachyes drove her vehicle "quickly" and parked facing the officers' police cruiser. According to Bergman, Parker was "visibly shaken," crying, and in distress. The officers saw a small child in the back seat of Parker's automobile.

{¶ 10} Peachyes told the officers that she went to the home of Marc Cotton, her child's father, to pick up her son. According to Peachyes, Cotton grabbed her cell phone and smashed it. He also took the keys to her apartment and the keys to her mother's home. Parker claimed that he then "mugged" her in the face, and spit on her. When asked how long it would have taken the victim to drive from appellant's residence to the mission, Bergman, who, along with Windnagle, usually patrolled that area, replied, "Yeah, it would be about five minutes." Windnagle estimated that it would take about five to ten minutes to drive from appellant's residence to the mission. While one of the officers was speaking with Peachyes, the other went into the Cherry Street Mission and asked Sergeant Detective Korsog to come outside and talk to her.

{¶ 11} At trial, Korsog testified that Parker was "disheveled, agitated, upset," and crying when he approached. She indicated that she had been in an altercation with appellant and that he had taken her property. Peachyes also told Detective Korsog that she made a "keep the peace[1]" call to 911 before going to pick up her child from Cotton's residence, but then cancelled it because she did not want to "wait." Korsog asked Peachyes twice whether she needed medical attention, and she replied in the negative. Korsog ordered the two officers to accompany Parker to her "destination." Windnagle and Bergman then escorted Peachyes to her mother's home so that she could obtain the spare keys to her apartment, and followed her to her own apartment to ensure her safety.

{¶ 12} At trial, Peachyes' mother, Mary Parker, testified that Peachyes, accompanied by two police officers, came to her home during the early morning hours of February 14, 2008. Parker said that her daughter "came there banging on the door" and was "screaming, crying, and upset of what Marc [appellant] had done to her."

{¶ 13} Peachyes obtained her spare set of keys from her mother and left with the police officers. Mary indicated that appellant called her later that morning and said he would "drop off" Peachyes cell phone and her keys, as well as Mary's key.

{¶ 14} In his first assignment of error, appellant contends that his right to confront all witnesses against him pursuant to the Sixth Amendment to the United States Constitution was violated because Peachyes Parker refused to testify at his trial. He,

[1]A "keep the peace call" is one in which the caller requests a police crew to stand by at a location where the parties are meeting in order to prevent an altercation between those parties.

therefore, argues that his conviction is based totally upon impermissible testimonial hearsay.

{¶ 15} At trial, appellant objected to the testimony of witnesses who testified as to what Peachyes told them about the incident underlying the charges against him. The common pleas judge determined, however, that these statements were an exception to the hearsay rule, that is, they were an excited utterance, and, therefore, ruled that he did not have to address the Confrontation Clause issue. We disagree. Even though Peachyes' statements are excited utterances, the trial court was still required to determine whether they should have been excluded under the Confrontation Clause. See *State v. Pettway*, 8th Dist. No. 91716, 2009-Ohio-4544, ¶ 66 (Citations omitted.). However, for the following reason, we conclude that the trial court's failure to consider this question was harmless error under Crim.R. 52(A).

{¶ 16} The Confrontation Clause of the Sixth Amendment to the United States Constitution grants a criminal defendant the right to confront any witnesses against him. In *Crawford v. Washington* (2004), 541 U.S. 36, 42, the United States Supreme Court held that in determining whether out-of-court statements violate a criminal defendant's right to confront witnesses against him depends upon whether those statements are testimonial. If "testimonial evidence is at issue, * * * the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." Id. at 68. The court again addressed the question of what constitutes a

testimonial statement made to police officers in *Davis v. Washington* (2006), 547 U.S. 813, 822, and determined:

{¶ 17} "Statements are nontestimonial when made in the course of a police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no ongoing emergency, and that the primary purpose of the interrogation is to prove past events potentially relevant to later criminal prosecution." See, also, *State v. Siler*, 116 Ohio St.3d 39, 2007-Ohio-5637, paragraph one of the syllabus (adopting the objective "primary purpose" standard set forth in *Davis* for cases involving statements to police officials).

{¶ 18} In the case before us, the officers' testimony revealed that appellant struck[2] Peachyes and not only took her cell phone, but also both the keys to her apartment and to her mother's residence, thereby creating the possibility that he might be waiting for Peachyes when she returned home and the potential for further attacks either against her or her mother. All of the statements made by Parker, were thus part of an investigation into an ongoing emergency. Accordingly, we conclude that the evidence offered by the police officers was nontestimonial, and, as a result, the trial court's failure to address the issue of a possible violation of the Confrontation Clause of the United States Constitution

[2]To "mug" means "to assault usually with the intent to rob." See "mug" Merriam-Webster Online Dictionary. 2010. http://www.merriam-webster.com (15 Feb. 2010). "Assault" is defined, inter alia, as "a violent physical attack." Id.

did not affect a substantial right, that is, it was harmless error beyond a reasonable doubt under Crim.R. 52(A). Appellant's first assignment of error is found not well-taken.

{¶ 19} In his second assignment of error, appellant argues that the indictment and jury instruction in this case set forth the incorrect mental culpability in defining the offense of robbery. R.C. 2911.02(A)(2) reads, in relevant part: "(A) No person in attempting or committing a theft offense * * * shall * * * [i]nflict, attempt to inflict, or threaten to inflict physical harm on another." Both the indictment and the jury instruction given in the present case insert the mental culpability of "knowingly" before "inflict, attempt to inflict, or threaten to inflict physical harm on another." Appellant asserts that because no mens rea is set forth in the statute, the indictment and jury instructions should have contained the "catchall" mental state of recklessness rather than knowingly. He, therefore, contends that "the jury was erroneously instructed as to an essential element of the crime" and his conviction should be reversed.

{¶ 20} "Knowingly" is a higher degree of culpability than "recklessly." *State v. Ullman*, 12th Dist. No. CA2002-10-110, 2003-Ohio-4003, ¶ 23. See, also, *State v. Crawford* (1983), 10 Ohio App.3d 207, 209 (The culpable mental state of "knowingly" subsumes the mental state of "recklessly.") Thus, because the state was required to demonstrate a higher degree of culpability, the charge of "knowingly" was more beneficial to appellant rather than being prejudicial to him. *State v. Ullman*, supra. Accordingly, the use of "knowingly" in the indictment and the jury instruction was also harmless error, and appellant's second assignment of error is found not well-taken.

{¶ 21} Appellant's third assignment of error asserts that the trial court erred in failing to give an instruction on the lesser included offense of theft. At trial, appellant failed to present the trial court with any requested jury instructions. Moreover, the court expressly asked appellant whether he wanted a lesser included charge, and appellant's counsel replied, "No."

{¶ 22} Theft is a lesser included offense of robbery. *State v. Smith*, 117 Ohio St.3d 447, 2008-Ohio-1260, paragraph two of the syllabus. Nevertheless, appellant failed to ask the court to include an instruction on theft, thereby waiving all but plain error in the trial court's jury instructions. See Crim.R. 30; *State v. Underwood* (1983), 3 Ohio St.3d 12, syllabus. Our review of the trial court's jury instructions reveals no plain error. Moreover, even if we would determine that the court did commit plain error in its jury instructions, appellant invited such error by expressly rejecting the inclusion of a lesser included offense charge. *State v. Campbell*, 90 Ohio St.3d 320, 324, citing *Hal Artz Lincoln-Mercury, Inc. v. Ford Motor Co.* (1986), 28 Ohio St.3d 20, paragraph one of the syllabus (A party "cannot take advantage of an error which he himself has invited or induced.") For these reasons, appellant's third assignment of error is found not well-taken.

{¶ 23} In his fourth assignment of error, appellant first urges that the jury's verdict finding appellant guilty of robbery was not supported by sufficient evidence to establish venue, that is, that the robbery occurred in Lucas County, Ohio. In determining whether a sufficiency of the evidence exists, a court must, in viewing the evidence in a light most

favorable to the prosecution, ascertain whether the evidence submitted is legally sufficient to support all of the essential elements of the offense charged. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386-387; *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus.

{¶ 24} Section 10, Article 1, Ohio Constitution, guarantees its citizens "a speedy trial by an impartial jury of the county in which the offense is alleged to have been committed." The primary purpose of this constitutional provision is to fix the place of trial. *State v. Fendrick* (1907), 77 Ohio St. 298, 300. Thus, Ohio's general criminal venue statute vests power to hear a criminal case in any court that has subject matter jurisdiction and is situated in the county wherein the offense occurred. R.C. 2901.12(A). Although venue is not a material element of any crime it is, unless waived, a fact that must be proven at trial beyond a reasonable doubt. *State v. Headley* (1983), 6 Ohio St.3d 475, 477. "[A] defendant waives the right to challenge venue when the issue is raised for the first time on appeal except for plain error." *State v. Wheat*, 10th Dist. No. 05AP-30, 2005-Ohio-6958, at ¶ 10.

{¶ 25} A plain error is any error that affects substantial rights and may be noticed even if it is "not brought to the attention of the court." Crim.R. 52(B). Finding plain error is taken with great caution and only applied "to prevent a manifest miscarriage of justice." *State v. Long* (1978), 53 Ohio St.2d 91, 95. Accordingly, an error does not rise to the level of a plain error unless, but for the error, the outcome of the trial would have been different. *State v. Stojetz* (1999), 84 Ohio St.3d 452, 455 (Citation omitted.).

{¶ 26} In the present cause, appellant stipulated to the audiotape and transcript of Peachyes making her "Keep the Peace" call to "Lucas County 911" as a business record. Dawn Dupree who works at the Toledo 911 dispatch center also testified that Peachyes made her "Keep the Peace" call at 11:21 p.m. requesting a police escort to pick up her son at 556 Mettler, but cancelled that service at 11:41 p.m. Dupree testified, without objection from appellant, that 556 Mettler is located in Toledo, Lucas County, Ohio. Accordingly, we conclude that sufficient evidence was offered to establish that the Lucas County Court of Common Pleas was the appropriate venue for this case. Therefore, even if the trial court had addressed the question of proper venue, the outcome of this cause would not have been different, and the first argument raised in appellant's fourth assignment of error lacks merit.

{¶ 27} Appellant also argues that insufficient evidence was offered to establish, beyond a reasonable doubt, every element of robbery. As set forth above, R.C. 2911.02(A)(2) provides, in relevant part, that no person in attempting or committing a theft offense * * * shall * * * [i]nflict, attempt to inflict, or threaten to inflict physical harm on another." Here, appellant argues that no evidence of the infliction, attempt to inflict, or threat to inflict physical harm to Peachyes was proven beyond a reasonable doubt.

{¶ 28} Again, Peachyes was described as very frazzled, watery-eyed, upset, emotional, very shaken, crying, and in distress. She told the officers that appellant not only took her cell phone, but also smashed it, mugged her, and spit on her. Officer

Windnagle testified that "mugged in the face" means to smack or hit in the face. To repeat, the commonly understood meaning of "to mug" a person is to assault, i.e. physically attack, another, "usually with the intent to rob." Merriam-Webster Online Dictionary, supra. Accordingly, we conclude that, in viewing the evidence in a light most favorable to the prosecution, the evidence submitted in the case before us is legally sufficient to support all of the essential elements of the offense charged. Appellant's fourth assignment of error is found not well-taken.

{¶ 29} In his fifth and final assignment of error, appellant asserts that the trial court's judgment is against the manifest weight of the evidence.

{¶ 30} A verdict may be overturned on appeal as being against the manifest weight of the evidence if the appeals court, acting as a "thirteenth juror," determines that the jury lost its way and created such a manifest miscarriage of justice that the conviction must be overturned and a new trial ordered. *Thompkins*, supra, 387. In making this decision, an appellate court "weighs the evidence and all reasonable inferences, and considers the credibility of the evidence." Id.

{¶ 31} Appellant claims that: (1) no eyewitnesses were offered to place him at the alleged scene of the incident; (2) most of the evidence was based upon the hearsay statements of Peachyes; (3) there was no evidence of physical harm to the alleged victim; and (4) defense counsel impeached the testimony of the officers on cross-examination.

{¶ 32} We start with the proposition that much of this case was proved, beyond a reasonable doubt, through circumstantial evidence. Circumstantial and direct evidence

possess the same probative value. *Jenks*, supra, paragraph one of the syllabus. "Circumstantial evidence * * * may also be more certain, satisfying and persuasive than direct evidence." *State v. Lott* (1990), 51 Ohio St.3d 160, 167, quoting *Michalic v. Cleveland Tankers, Inc.* (1960), 364 U.S. 325, 330. We, therefore, find that no eyewitness testimony was required to place appellant at the scene of the robbery. Moreover, Peachyes' hearsay statements were admitted as excited utterances by the trial court. Appellant does not challenge this finding on appeal. In addition, the definition of robbery as found in R.C. 2911.02(A) does not require that a victim be physically harmed in proving that offense. Finally, even though appellant attempted to impeach the testimony of the witnesses in this cause, determinations of credibility and weight of the testimony remained within the province of the trier of fact. See *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. Based upon our own review of the evidence offered in this case, we find the jury could reasonably conclude that the state proved the offense of robbery beyond a reasonable doubt. *State v. Eley* (1978), 56 Ohio St.2d 169, syllabus. Appellant's fifth assignment of error contending that the trial court's judgment is against the manifest weight of the evidence is not well-taken.

{¶ 33} The judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24(A).

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
CONCUR.
JUDGE