

[Cite as *State v. Holt*, 2012-Ohio-2326.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	No. 11AP-748
Plaintiff-Appellee,	:	(C.P.C. No. 09CR-07-3905)
v.	:	No. 11AP-749
	:	(C.P.C. No. 09CR-07-4534)
Dennis Holt,	:	
	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on May 24, 2012

Ron O'Brien, Prosecuting Attorney, and *Seth L. Gilbert*, for appellee.

Todd W. Barstow, for appellant.

APPEALS from the Franklin County Court of Common Pleas.

FRENCH, J.

{¶ 1} Defendant-appellant, Dennis Holt ("appellant"), appeals the judgments of the Franklin County Court of Common Pleas, which convicted him of charges pertaining to four robberies. For the following reasons, we (1) affirm the part of the judgments convicting appellant of those charges, (2) reverse the part of the judgments imposing separate prison terms on offenses that merge for purposes of sentencing, and (3) remand the matter to the trial court for resentencing.

I. BACKGROUND

{¶ 2} Appellant was indicted on nine counts of aggravated robbery and eight counts of kidnapping for his involvement in robberies that occurred in March 2009. He was also indicted on two counts of aggravated murder for killing Daud Osman during one of the robberies. All counts contained firearm specifications. Appellant was a juvenile when he committed the robberies, and he was indicted after the juvenile court bound him over to be tried as an adult under the trial court's jurisdiction. He pleaded not guilty to the charges filed against him, and a jury trial ensued.

{¶ 3} At trial, the prosecutor called Carlos Cox to testify. Cox participated in the March 2009 robberies, and he entered into a plea bargain in which he agreed to testify against his accomplices in exchange for the prosecutor amending his charge for Osman's death from murder to involuntary manslaughter. He refused to testify at appellant's trial, however. The trial court reminded him that his plea bargain required him to testify, and it indicated that the prosecutor could reinstate his murder charge if he did not testify. Cox said that he was "going to refuse to testify no matter what." (Tr. Vol. 4, 677.) Consequently, the prosecutor asked the trial court to admit into evidence Cox's testimony from appellant's bindover hearing. Appellant asserted that the testimony was inadmissible because of the difference between a bindover hearing and a trial. The court determined the testimony to be admissible because Cox was an unavailable witness. Cox testified as follows during the hearing.

{¶ 4} On March 7, 2009, Gabrielle Mansour drove Cox, appellant, and Delshaun Nix to a gas station. After the men entered the gas station, Nix pointed a gun at an employee, while Cox and appellant took money from behind the counter. On March 12, 2009, Mansour drove Cox, Nix, and appellant to a convenience store. The men stole from the store and a customer, Keith Walter. Later that day, Mansour drove the men to a restaurant. Inside the restaurant, appellant and Nix robbed customers Mohamed Maalin and Ahmed Olow. Meanwhile, Osman, an employee at the restaurant, chased Cox with a knife. Appellant shot Osman and took his wallet. Cox thanked appellant for shooting Osman, and appellant responded, " 'I got you, Bro.' " (Tr. Vol. 4, 728.) On

March 19, 2009, Mansour drove Cox and appellant to a convenience store. The men, carrying guns, stole from the store and a deliveryman, Frederick Sager.

{¶ 5} Cox admitted during his testimony that he initially refused to tell police the names of his accomplices. He said that he later provided that information because he wanted a plea bargain. Furthermore, he noted that his plea bargain required him to testify truthfully.

{¶ 6} Next, Mansour testified about appellant's participation in the robberies. She stated that appellant did not want her or the other accomplices to tell anyone that he shot Osman. She also admitted that she lied to police by claiming that she did not know about the robberies, but she indicated that she testified truthfully pursuant to her plea bargain.

{¶ 7} A forensic scientist with the Columbus Police Department testified that appellant's fingerprint was on the counter at the convenience store robbed on March 19, 2009. In addition, two police officers familiar with appellant identified him in a surveillance video of the March 7, 2009 robbery. Lastly, the coroner testified that Osman died from his gunshot wounds.

{¶ 8} The jury found appellant guilty of two counts of murder as lesser-included offenses of aggravated murder. It also found him guilty on all other counts except the aggravated robbery count pertaining to Osman. And, it acquitted him on all firearm specifications except those related to the March 19, 2009 robbery. At sentencing, appellant argued that the aggravated robbery counts pertaining to Olow, Maalin, Walter, and Sager merge with their corresponding kidnapping counts. The trial court rejected that argument and imposed separate prison terms for those counts.

II. ASSIGNMENTS OF ERROR

{¶ 9} Appellant filed a timely notice of appeal and now assigns the following as error:

I. THE TRIAL COURT ERRED AND DEPRIVED APPELLANT OF DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE ONE[,] SECTION TEN OF THE OHIO CONSTITUTION BY FINDING HIM GUILTY OF MURDER[,] AGGRAVATED

ROBBERY AND KIDNAPPING AS THOSE VERDICTS WERE NOT SUPPORTED BY SUFFICIENT EVIDENCE AND WERE ALSO AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

II. THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT BY IMPOSING SENTENCES FOR AGGRAVATED ROBBERY AND KIDNAPPING AS THOSE OFFENSES ARE ALLIED OFFENSES OF SIMILAR IMPORT COMMITTED WITH A SINGLE ANIMUS. THE TRIAL COURT FURTHER ERRED TO THE PREJUDICE OF APPELLANT BY NOT DIRECTING THE STATE TO ELECT ON WHICH OFFENSES CONVICTIONS WOULD BE ENTERED AND SENTENCES PRONOUNCED.

III. THE TRIAL COURT ERRED IN DECLARING A STATE'S WITNESS AS UNAVAILABLE TO TESTIFY, THEREBY VIOLATING APPELLANT'S RIGHT TO CONFRONT WITNESSES AS GUARANTEED BY THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE ONE, SECTION TEN OF THE OHIO CONSTITUTION.

III. DISCUSSION

A. First Assignment of Error: Sufficiency and Manifest Weight of the Evidence

{¶ 10} In his first assignment of error, appellant initially contends that his convictions are based on insufficient evidence. We disagree.

{¶ 11} Sufficiency of the evidence is a legal standard that tests whether the evidence introduced at trial is legally sufficient to support a verdict. *State v. Drummond*, 111 Ohio St.3d 14, 2006-Ohio-5084, ¶ 192. We examine the evidence in the light most favorable to the state and conclude whether any rational trier of fact could have found that the state proved beyond a reasonable doubt the essential elements of the crime. *State v. Robinson*, 124 Ohio St.3d 76, 2009-Ohio-5937, ¶ 34. We will not disturb the verdict unless we determine that reasonable minds could not arrive at the conclusion reached by the trier of fact. *State v. Treesh*, 90 Ohio St.3d 460, 484 (2001). In determining whether a conviction is based on sufficient evidence, we do not assess whether the evidence is to be believed, but whether, if believed, the evidence against a

defendant would support a conviction. *State v. Lindsey*, 190 Ohio App.3d 595, 2010-Ohio-5859, ¶ 35 (10th Dist.). *See also State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, ¶ 79 (noting that courts do not evaluate witness credibility when reviewing a sufficiency of the evidence claim).

{¶ 12} Appellant contends that the evidence fails to establish that he was involved in the March 2009 robberies. The testimony of Cox and Mansour linked him to those incidents. In addition, two police officers identified him in a surveillance video of the March 7, 2009 robbery, and his fingerprint was on the counter of the convenience store robbed on March 19, 2009. Accordingly, we conclude that appellant's convictions are based on sufficient evidence.

{¶ 13} Next, appellant argues that his convictions are against the manifest weight of the evidence. We disagree.

{¶ 14} When presented with a manifest weight challenge, we weigh the evidence to determine whether the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. *State v. Lang*, 129 Ohio St.3d 512, 2011-Ohio-4215, ¶ 220. The trier of fact is afforded great deference in our review. *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, ¶ 26. And we reverse a conviction on manifest weight grounds for only the most exceptional case in which the evidence weighs heavily against a conviction. *Lang* at ¶ 220.

{¶ 15} Appellant claims that the jury lost its way in believing the testimony of Cox and Mansour because they were evasive when talking to the police. At trial, however, those witnesses corroborated each other in connecting appellant to the March 2009 robberies. And, as above, their testimonies are supported by the discovery of appellant's fingerprint at the scene of the March 19, 2009 robbery and by officers identifying appellant in a surveillance video of the March 7, 2009 robbery. Also supporting their testimonies is that appellant engaged in furtive conduct reflective of a consciousness of guilt when he told his accomplices not to disclose his criminal activity. *See State v. Saleh*, 10th Dist. No. 07AP-431, 2009-Ohio-1542, ¶ 86. It was within the jury's province to believe Cox and Mansour.

{¶ 16} Next, appellant contends that the testimony of Cox and Mansour carries little weight because they entered into plea bargains with the prosecutor. The jury need not have reached that conclusion because those witnesses were required to testify truthfully as part of their plea bargains. *See State v. Mitchell*, 10th Dist. No. 10AP-756, 2011-Ohio-3818, ¶ 35.

{¶ 17} For all these reasons, we hold that appellant's convictions are not against the manifest weight of the evidence. Having already rejected appellant's insufficiency claim, we overrule his first assignment of error.

B. Second Assignment of Error: Merger

{¶ 18} In his second assignment of error, appellant argues that the aggravated robbery offenses pertaining to Olow, Maalin, Walter, and Sager merge with their corresponding kidnapping offenses. Plaintiff-appellee, the state of Ohio ("the state"), concedes that those offenses merge, and we agree. *See State v. Sidibeh*, 192 Ohio App.3d 256, 2011-Ohio-712, ¶ 54-61 (10th Dist.). We sustain appellant's second assignment of error.

C. Third Assignment of Error: Evid.R. 804(A)(2)

{¶ 19} In his third assignment of error, appellant argues that the trial court incorrectly determined that Cox was unavailable. We disagree.

{¶ 20} A witness is unavailable if he "persists in refusing to testify * * * despite an order of the court to do so." Evid.R. 804(A)(2). If Cox was unavailable, then his bindover hearing testimony was admissible at appellant's trial. *See State v. Strickland*, 10th Dist. No. 06AP-1269, 2008-Ohio-1104, ¶ 46-47. Typically, we would determine whether the trial court abused its discretion in concluding that a witness was unavailable. *See Banks v. D'Andrea*, 10th Dist. No. 97APG03-321 (Sept. 23, 1997). An abuse of discretion connotes more than an error of law or judgment; it entails a decision that is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983). The state, however, claims that appellant forfeited all but plain error because he did not object to the trial court finding Cox unavailable. Plain error exists when there is error, the error is an obvious defect in the trial proceedings, and the error affects the outcome of the trial. *State v. Barnes*, 94 Ohio St.3d 21, 27 (2002). A

court recognizes plain error with the utmost caution, under exceptional circumstances, and only to prevent a manifest miscarriage of justice. *Id.* We conclude, nevertheless, that appellant cannot prevail under either standard.

{¶ 21} Appellant argues that the trial court was required to order Cox to testify before finding him unavailable. But a court need not explicitly order a witness to testify for Evid.R. 804(A)(2) to apply. *State v. Issa*, 93 Ohio St.3d 49, 59 (2001). Instead, the rule requires the court to "attempt to compel" a witness to testify. *Id.* Here, the trial court attempted to compel Cox to testify before finding him unavailable. In particular, it reminded him that his plea bargain required him to testify. And, it indicated that if he refused to testify, the prosecutor could reinstate the murder charge he faced before his plea bargain. Cox repeatedly refused to testify, however. In fact, he indicated that he was "going to refuse to testify no matter what." (Tr. Vol. 4, 677.) Under these circumstances, the trial court did not abuse its discretion or commit plain error when it found Cox unavailable. We overrule appellant's third assignment of error.

IV. CONCLUSION

{¶ 22} In summary, we overrule appellant's first and third assignments of error and sustain his second assignment of error. We (1) affirm the part of the judgments of the Franklin County Court of Common Pleas convicting appellant of charges pertaining to the March 2009 robberies, (2) reverse the part of the judgments imposing separate prison terms on offenses that merge for purposes of sentencing, and (3) remand the matter to the trial court for resentencing on those offenses.

*Judgments affirmed in part, reversed in part;
cause remanded.*

SADLER and DORRIAN, JJ., concur.
