[Cite as *State v. Ramos-Aquino*, 2010-Ohio-2732.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 09AP-975
v.	:	(C.P.C. No. 09CR-02-1162)
Lucio Ramos-Aquino,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on June 15, 2010

Ron O'Brien, Prosecuting Attorney, and *Barbara A. Farnbacher*, for appellee.

David J. Graeff, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

FRENCH, J.

{¶1} Defendant-appellant, Lucio Ramos-Aquino ("appellant"), appeals the judgment of the Franklin County Court of Common Pleas, which convicted him of robbery. For the following reasons, we reverse the trial court's judgment and remand the matter for further proceedings.

{¶2} The Franklin County Grand Jury indicted appellant for two counts of robbery and single counts of kidnapping and aggravated robbery. Appellant pleaded

not guilty, and a jury trial ensued. During opening statements, the prosecution claimed that Reynaldo Lozano, wearing a red bandana, demanded money from Robert Dennis outside a convenience store while appellant and several other men pounded on Dennis' car to terrorize him.

{¶3} Dennis testified to the following regarding this incident. One evening, he went to a convenience store and noticed four or five Hispanic men standing around a red truck. One of them was wearing a red bandana on his face, and it appeared he had a gun under his sleeve. The man approached him and demanded money while the others pounded on his car. Dennis said that he did not have any money and called the police on his cell phone, prompting the men to get in the truck and flee. The police arrived about ten minutes later. They drove Dennis to a nearby street, where he saw the red truck and several apprehended individuals. The police asked him if he could identify whether these individuals were involved in the robbery. He identified the man who demanded money from him, and he identified others he recognized, but he did not incriminate anyone that he was uncertain about. During the trial, he could not recall whether appellant was one of the offenders. Defense counsel cross-examined him about his testimony that he previously identified the offenders, and he confirmed that he identified them based on his recollection at the time of who was involved in the crime and not "because they were there" with police. (Vol. I Tr. 71.)

{¶4} Officer William Kiser apprehended the men in the red truck near the convenience store and testified as follows. Kiser presented each man to Dennis individually for purposes of identification. Kiser could not see whom Dennis identified because a second officer standing next to Dennis pointed a bright light toward Kiser and

the man being identified. Rather, the second officer conveyed the information from Dennis to Kiser through hand signals. Over defense counsel's objection, Kiser testified that the second officer made a signal indicating that Dennis had identified appellant as an individual involved in the robbery. Next, according to Kiser, appellant was arrested. After the driver of the red truck was also positively identified, police searched the vehicle, but did not find a gun.

{¶5} Officer James Null interviewed appellant after his arrest and testified that appellant confessed to the following. Appellant and three friends drove to a store to buy beer. He stayed in the vehicle while two of his friends went inside the store. He fell asleep while waiting, but woke up hearing one of his friends speaking to a stranger. This friend wore a red bandana, and his first name was "Reynaldo." (Vol. I Tr. 140.) Appellant did not understand what they were saying, and he never exited the vehicle.

{¶6} During closing argument, the prosecution noted that, at trial, "Kiser recognized [appellant] and said, 'Yes, this is the guy that was identified by the victim.' " (Vol. II Tr. 183.) During rebuttal argument, the prosecution reiterated that, according to Officer Kiser, Dennis " 'positively identified' " appellant as an offender in the robbery. (Vol. II Tr. 210.) While considering appellant's case, the jury could not come to a unanimous decision on all of the charges, and the court instructed it to deliberate further. Afterward, the jury found appellant guilty of one count of robbery, but not guilty on the remaining charges. Before sentencing, defense counsel filed a motion for acquittal after two jurors told the court that they "regret" agreeing to the guilty verdict. (Sept. 16, 2009 Tr. 11.) The court denied the motion and sentenced appellant to community control.

{¶7} Appellant appeals, raising four assignments of error:

Assignment of Error One

PREJUDICIAL ERROR OCCURS IN THE JURY INSTRUCTION GIVEN ON COMPLICITY WHEN THE JURY WAS NOT INSTRUCTED THAT INTENT REGARDING COMPLICITY HAS TO BE THE SAME AS THE PRINCIPAL OFFENSE, I.E., ROBBERY, CONTRA THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION.

Assignment of Error Two

THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT IS VIOLATED WHEN AN OFFICER, WHO DID NOT MAKE THE IDENTIFICATION, TESTIFIES AS TO WHAT A NON-TESTIFYING OFFICER TOLD HIM, CONTRA THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION.

Assignment of Error Three

(a) WHEN THE PRIMARY ISSUE AT TRIAL IS IDENTIFICATION, ONCE THE JURY MAKES AN INITIAL FACTUAL DETERMINATION EXONERATING THE ACCUSED, UNDER APPRENDI v. NEW JERSEY, AND ASHE v. SWENSON, THE TRIAL COURT IS PRECLUDED FROM SENTENCING.

(b) THE EVIDENCE IS INSUFFICIENT AS A MATTER OF LAW.

Assignment of Error Four

WHEN A JURY DELIBERATES AN EXTENDED AMOUNT OF TIME BEFORE ARRIVING AT A GUILTY VERDICT, IS GIVEN THE HOWARD CHARGE, ACQUITS THE ACCUSED ON THREE OF FOUR COUNTS, AND AT LEAST TWO OF THE PANEL INFORM THE JUDGE LATER ON THEY MADE A MISTAKE AND WOULD HAVE VOTED NOT GUILTY, DUE PROCESS REQUIRES A REMMER HEARING CONSISTENT WITH THE SIXTH AND FOURTEENTH AMENDMENTS.

{¶8} We begin with appellant's second assignment of error, in which he argues that the trial court erroneously allowed testimony that contained inadmissible hearsay. We agree.

{¶9} Appellant argues that Officer Kiser relayed inadmissible hearsay by testifying that the second officer indicated through a hand signal that Dennis identified appellant as one of the offenders. Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. Evid.R. 801(C). Hearsay is inadmissible unless an exception applies. Evid.R. 802. Conversely, "[s]tatements that are not intended to prove the truth of what was said are not hearsay." *State v. Banks*, 10th Dist. No. 03AP-1286, 2004-Ohio-6522, ¶18, citing *State v. Davis* (1991), 62 Ohio St.3d 326, 343. The evidence rules exclude from the definition of "hearsay" certain prior witness statements and admissions by a party-opponent. Evid.R. 801(D).

{¶10} The trial court concluded that Officer Kiser's testimony did not contain inadmissible hearsay, and we apply an abuse of discretion standard to that decision. *State v. Robb*, 88 Ohio St.3d 59, 68, 2000-Ohio-275; *State v. Dever*, 64 Ohio St.3d 401, 410, 1992-Ohio-41. 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* (1983), 5 Ohio St.3d 217, 219.

{¶11} Dennis' identification of appellant as an offender was an out-of-court statement that requires us to decide whether it was inadmissible hearsay. *State v. Ingram*, 10th Dist. No. 06AP-984, 2007-Ohio-7136, ¶63. Under Evid.R. 801(D)(1)(c), a statement is not hearsay if (1) the declarant testifies at trial or a hearing and is subject to cross-examination on that statement, (2) it identifies a person soon after perceiving

him, and (3) the circumstances demonstrate the reliability of that identification. Dennis testified at trial and was subject to cross-examination on his prior identification. He identified appellant soon after perceiving him, and there has been no suggestion on appeal that the identification was unreliable. In fact, Dennis testified that he identified the perpetrators based on his recollection of who was involved in the crime and not "because they were there" with police. (Vol. I Tr. 71.) And, Dennis emphasized that he was "certain" of those he identified as offenders. (Vol. I Tr. 66.) Dennis' inability to identify appellant in court is irrelevant to the issue of admissibility of his prior identification. See *State v. Vanatter* (June 11, 1987), 10th Dist. No. 86AP-1043. Instead, the record establishes that Dennis' prior identification satisfied the factors for admissibility under Evid.R. 801(D)(1)(c), and this rule allowed it to be admitted for the truth of the matter asserted. *Vanatter*.

{¶12} Our analysis does not end here, however, because we must decide whether the second officer's hand signal to Officer Kiser qualifies as an out-of-court statement. According to Evid.R. 801(A)(2), a "statement" includes "nonverbal conduct of a person, if it is intended by the person as an assertion." This definition covers " '[m]any non-verbal signals' " that " 'are obviously the equivalent of words for the purposes of communication.' " See *State v. Dancy* (July 24, 1992), 2d Dist. No. 13023, quoting Weissenberger, Ohio Evidence, Vol. I, Section 801.2. For instance, in *State v. Wagner* (1986), 30 Ohio App.3d 261, 262, a child informed a detective how he was sexually abused by acting out the offense through dolls, instead of explaining it through words. The court characterized the non-verbal conduct as a statement under Evid.R. 801(A)(2) and analyzed whether it constituted inadmissible hearsay. Id. Here, the

second officer used a hand signal to communicate to Kiser that Dennis identified appellant as an offender. Therefore, this signal was a statement under Evid.R. 801(A)(2), and we consider whether it was inadmissible hearsay.

{¶13} As an initial matter, statements offered to explain a police officer's conduct while investigating a crime are not hearsay because they are not offered for the truth of the matter asserted. *State v. Thomas* (1980), 61 Ohio St.2d 223, 232. Here, however, the record establishes that the second officer's hand signal was admitted for its truth, instead of for the limited purpose of explaining police conduct, given that (1) there was no jury instruction limiting the evidence in this manner, and (2) the prosecution relied on it as substantive evidence of appellant's guilt during closing argument and rebuttal. Therefore, the second officer's hand signal was not admissible under *Thomas*. Likewise, we find that no other hearsay exception applied to this evidence. In fact, plaintiff-appellee, the state of Ohio, has provided no argument to support its admission. Accordingly, we conclude that the hand signal constituted inadmissible hearsay.

{¶14} Because Officer Kiser's testimony actually contained two out-of-court statements—Dennis' statement identifying appellant as an offender and the second officer's hand signal to Kiser—its admissibility was dependent upon each statement being separately admissible as non-hearsay or through an exception to the rule against the admissibility of hearsay. See *Mowery v. Columbus*, 10th Dist. No. 05AP-266, 2006-Ohio-1153, ¶60, fn. 3. To repeat, although Dennis' prior identification satisfied the factors for admissibility under Evid.R. 801(D)(1)(c), the second officer's hand signal conveying this identification to Kiser constituted inadmissible hearsay. Consequently,

the trial court abused its discretion in permitting Kiser's testimony pertaining to Dennis' prior identification of appellant as an offender.

{¶15} We need not disturb appellant's conviction if the trial court committed harmless error, however. See Crim.R. 52(A); *State v. Perry*, 101 Ohio St.3d 118, 2004-Ohio-297, ¶15. Under this review, "[e]rror in the admission or exclusion of evidence in a criminal trial must be considered prejudicial unless the court can declare, beyond a reasonable doubt, that the error was harmless, and unless there is no reasonable possibility that the evidence, or the exclusion of evidence, may have contributed to the accused's conviction." *State v. Jones*, 10th Dist. No. 07AP-771, 2008-Ohio-3565, ¶13, citing *State v. Bayless* (1976), 48 Ohio St.2d 73, 106, vacated on other grounds (1978), 438 U.S. 911, 98 S.Ct. 3135. " 'Whether [the] error was harmless beyond a reasonable doubt is not simply an inquiry into the sufficiency of the remaining evidence. Instead, the question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction.' " (Bracketed word sic.) Id., quoting *State v. Conway*, 108 Ohio St.3d 214, 2006-Ohio-791, ¶78. See also *State v. Haines*, 112 Ohio St.3d 393, 2006-Ohio-6711, ¶62-64 (applying the harmless-error standard to the improper allowance of inadmissible evidence and determining whether there was a reasonable possibility that the evidence complained of might have contributed to the defendant's conviction). The prosecution bears the burden of demonstrating harmless error; if the prosecution fails to meet its burden, we must correct the error. *Perry* at ¶15.

{¶16} Appellee argues that the admission of Officer Kiser's testimony constituted harmless error because appellant told police that he was present when the robbery occurred. Appellant denied participating in the offense, however, and claimed it

happened while he was waking up from a nap in his friend's truck. Thus, appellant's statement to police did not amount to an admission of guilt. Also problematic for the prosecution was that Dennis could not identify appellant in court as one of the offenders in the robbery, and there was no physical evidence that incriminated him. Kiser's testimony provided key evidence connecting appellant to the robbery, and it offset weaknesses in the prosecution's case. Thus, there was a reasonable possibility that the jury convicted appellant because of Kiser's inadmissible testimony, and we conclude that the trial court did not commit harmless error by admitting it into evidence. Given this conclusion, we need not consider appellant's argument that admission of Kiser's testimony violated his constitutional right to confront witnesses.

{¶17} In reaching our decision, we do not criticize the identification procedure the police officers used to investigate the robbery. In fact, we recognize that hearsay rules would not have barred the second officer from testifying that Dennis identified appellant as an offender because the testimony would have contained only one out-of-court statement admissible under Evid.R. 801(D)(1)(c). Given the unique circumstances of appellant's case, we conclude that the trial court abused its discretion by allowing Kiser to testify that the second officer indicated through a hand signal that Dennis identified appellant as one of the offenders, and the error was not harmless. Consequently, we sustain appellant's second assignment of error.

{¶18} As a result of our disposition on appellant's second assignment of error, his conviction cannot stand, and, therefore, we need not address his first and fourth assignments of error because they are now moot. App.R. 12(A)(1)(c). Appellant's third assignment of error, in which he asserts that his robbery conviction is based on

insufficient evidence, is not moot because retrial is barred when there is insufficient evidence to support a conviction. *State v. Jamhour*, 10th Dist. No. 06AP-20, 2006-Ohio-4987, ¶8; *State v. Firouzmandi*, 10th Dist. No. 03AP-1128, 2004-Ohio-4043, ¶20.

{¶19} 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. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52. 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. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus; *State v. Yarbrough,* 95 Ohio St.3d 227, 2002-Ohio-2126, ¶78. We will not disturb the verdict unless we determine that reasonable minds could not arrive at the conclusion reached by the trier of fact. *Jenks* at 273. 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. See *Jenks,* paragraph two of the syllabus; *Yarbrough* at ¶79 (noting that courts do not evaluate witness credibility when reviewing a sufficiency of the evidence claim).

{¶20} Appellant argues that the jury's decision to acquit him of the other robbery and aggravated robbery counts indicated its finding that he was not the individual involved in the crimes against Dennis. But a jury could reach its verdict for a variety of reasons, and this court will not speculate on the basis behind a verdict. See *State v. Trewartha*, 165 Ohio App.3d 91, 2005-Ohio-5697, ¶15-16. Next, appellant argues that the evidence failed to establish that he was involved in the robbery offense for which he was convicted. In reviewing this issue, we consider all of the evidence, properly

admitted or not. *State v. Brewer*, 121 Ohio St.3d 202, 2009-Ohio-593, ¶14-26. Accord *State v. Blanton*, 10th Dist. No. 08AP-844, 2009-Ohio-5334, ¶50-53. Here, Officer Kiser testified that Dennis identified appellant as one of the offenders in the robbery, and this evidence was admitted for its truth. Given this testimony, which we consider in a light most favorable to the prosecution and despite our decision that it was improperly admitted, we conclude that sufficient evidence established that appellant participated in the robbery against Dennis. Consequently, we overrule appellant's third assignment of error.

{¶21} In summary, we sustain appellant's second assignment of error, overrule his third assignment of error, and render moot his first and fourth assignments of error. Accordingly, we reverse the judgment of the Franklin County Court of Common Pleas and remand this cause to that court for proceedings consistent with this decision.

Judgment reversed and cause remanded.

SADLER and CONNOR, JJ., concur.