

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

State of Ohio

Court of Appeals No. L-11-1207

Appellee

Trial Court No. CR0200903450

v.

Devan Owens

DECISION AND JUDGMENT

Appellant

Decided: February 1, 2013

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
David F. Cooper, Assistant Prosecuting Attorney, for appellee.

Spiros P. Cocoves, for appellant.

* * * * *

YARBROUGH, J.

I. Introduction

{¶ 1} This is an appeal from the judgment of the Lucas County Court of Common Pleas following a jury trial, in which appellant, Devan Owens, was found guilty and sentenced to life in prison on charges of aggravated murder and aggravated burglary. For the following reasons, we affirm.

A. Facts and Procedural Background

{¶ 2} The events giving rise to Owens' conviction occurred on the morning of December 16, 2009. Early that morning, Owens traveled to his brother's, Justin Owens, house along with Corey Catchings, who provided transportation for Owens. Owens stopped by Justin's house in order to pick up a gun he had left there a few days earlier.

{¶ 3} After stopping by Justin's house, Catchings drove Owens around an apartment complex, called the Greenview Apartments, until Owens told him to stop, at which point Owens exited the vehicle. While waiting for Owens to return to the vehicle, Catchings witnessed Owens kick in the front door of a townhouse located at 1210 Rockcress Drive, Toledo, Ohio.

{¶ 4} Upon entrance into the townhouse, Owens was surprised to find 24-year-old Romeo Alexander inside. Alexander confronted Owens, and a fight ensued. Realizing he was losing the fight, Owens pulled out his 9mm handgun and fired it into Alexander's side. The shot did not stop Alexander, so Owens fired another round into Alexander's head, which proved to be a fatal blow.

{¶ 5} After witnessing Owens kick the door in, Catchings panicked and fled the scene. While driving away, he witnessed the fight between Owens and Alexander through his rearview mirror. Additionally, Catchings testified that he heard gunshots as he fled the scene.

{¶ 6} One of Alexander's neighbors, Patricia Hooker, heard the gunshots as she was preparing a meal inside her home at 1144 Rockcress Drive in Toledo, Ohio.

Immediately after hearing the gunshots, Hooker went outside to investigate what had happened, and noticed an inanimate object lying on the street. Not knowing whether it was a body or something else, she ordered her brother, Thomas Milligan, to examine the object. Upon approaching the object, Milligan confirmed that it was Alexander's lifeless body.

{¶ 7} As Milligan was examining the body, Hooker noticed a heavysset, African-American male with a beard walking toward the body from the direction of the Greenview Apartments. The man, later confirmed to be Owens, was wearing a dark hooded sweatshirt, dark sweat pants, and dark shoes. When Owens approached the body, he bent over to pick something up, and then ran off between two neighboring houses.

{¶ 8} A short time later, Owens sent Justin a text message stating "I f***ed up." When he returned to Justin's house, he appeared winded and bloodied. Owens told Justin that, as he was attempting to burglarize the townhouse, someone was there and began to beat him up. Thereafter, Owens admitted to Justin that he shot the individual twice.

{¶ 9} In addition to Justin's testimony concerning Owens' admissions, Anthony Edwards testified that he was at Justin's apartment when Owens returned from the Greenview Apartments. Like Justin, Edwards stated that Owens admitted to shooting Alexander "in the side of the head."

{¶ 10} After speaking to Justin and Edwards, Owens ran into Damichael Benton and asked him for a ride to Owens' home on Airport Highway. Benton agreed. On his way home, Owens asked Benton to stop by the Greenview Apartments. While there,

Owens was spotted by Teosha Alexander and Shontelle Bryant, who were being interviewed by the police at the time. After they alerted the police, the police chased Owens back to Benton's automobile. Upon arriving at the automobile, the police ordered Owens, along with Benton and a third passenger, out of the vehicle.

{¶ 11} Once they secured the three individuals, the police asked Hooker and Milligan to identify whether the man that approached the body matched any of the three men apprehended. Both Hooker and Milligan identified Owens as the assailant. Hooker and Milligan were able to identify Owens despite the fact that he was wearing different clothes by this time.

{¶ 12} After securing a search warrant, detective Chad Culpert searched Benton's automobile and located a 9mm firearm under the front passenger seat, where Owens was sitting. DNA analysis showed that Owens' DNA was found on the firearm. Further, firearms expert David Cogan testified that one of the rounds recovered at the scene of the shooting was fired from the handgun recovered by Culpert. The remaining round was too damaged for an accurate analysis.

{¶ 13} Ultimately, Owens was indicted by the Lucas County Grand Jury on December 30, 2009, on charges of aggravated murder, aggravated robbery, and aggravated burglary, along with attendant firearms specifications. The matter proceeded to trial on July 11, 2011. On the first day of trial, the state entered a nolle prosequi as to the aggravated robbery charge. After a five-day jury trial, Owens was found guilty of aggravated murder, in violation of R.C. 2903.01(B) and (F), aggravated burglary in

violation of R.C. 2911.11(A)(2), and the firearms specifications as to each. Owens was sentenced to life imprisonment for aggravated murder, ten years for aggravated burglary, and three years on each firearms specification. The terms were ordered to be served consecutively, but the firearms specifications were ordered to be served concurrently with one another. Owens timely appeals his conviction.

B. Assignments of Error

{¶ 14} Owens raises the following assignments of error:

I. The trial court erred in permitting state's witness Corey Catchings to testify, over the objection of the defendant, that defendant was a 'known burglar,' in violation of the defendant's right to due process and right to a fair and reliable trial as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Ohio Constitution.

II. The trial court erred in permitting state's witness Justin Owens to testify, over the objection of the defendant, that the defendant was involved in criminal activity, including robbery and 'home invasion,' in violation of the defendant's right to due process and right to a fair and reliable trial as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Ohio Constitution.

III. The trial court erred in permitting the testimony of a witness for the state, Shontelle Bryant, not disclosed in discovery to the defendant as required by the rules of procedure, in violation of the defendant's right to due process and right to a fair and reliable trial as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Ohio Constitution.

IV. In the alternative to assignment of error III, the trial court erred to the prejudice of defendant in refusing to grant the defendant's request for a continuance as a remedy for the state's failure to provide defendant with the name of witness Shontelle Bryant as required by R. 16, in violation of the defendant's right to due process and right to a fair and reliable trial as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Ohio Constitution.

V. The trial court erred in allowing, over objection of the defendant, prior consistent statements of state's witness Anthony Edwards, in violation of the defendant's right to due process and right to a fair and reliable trial as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Ohio Constitution.

VI. The defendant was denied a fair trial in violation of the constitutions of the State of Ohio and the United States, by reason of the cumulative effect of the erroneous rulings by the trial court set forth in assignments of error one through five, in violation of the defendant's right to due process and right to a fair and reliable trial as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Ohio Constitution.

II. Analysis

A. Bad Acts Testimony

{¶ 15} In his first and second assignments of error, Owens argues that the trial court erred when it allowed Catchings' and Justin's bad acts testimony. In its appellate brief, the state admits that the trial court erred when it admitted this testimony over Owens' objection. However, the state argues that the trial court's error was harmless, as it did not affect the outcome of the case.

{¶ 16} The first alleged error committed by the trial court concerns Catchings' testimony. When asked whether Owens was a known burglar, Catchings stated, over Owens' objection, that he "heard rumours before – but I really didn't believe them." The second alleged error occurred as Justin was asked by the state whether he knew of Owens' prior criminal activity, to which he responded that he knew Owens was involved in robberies and home invasions.

{¶ 17} The admission of prior bad acts is governed by Evid.R. 404(B), which states:

(B) Other crimes, wrongs or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

{¶ 18} Other acts evidence is admissible if “(1) there is substantial proof that the alleged other acts were committed by the defendant, and (2) the evidence tends to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” *State v. Lowe*, 69 Ohio St.3d 527, 530, 634 N.E.2d 616 (1994). That there is substantial proof that Owens engaged in the alleged acts is not disputed. However, as conceded by the state, there is no indication that the evidence was offered for the purpose of proving any of the enumerated items. Thus, we agree with Owens and the state that the trial court erred by admitting this evidence over Owens’ objection.

{¶ 19} Although we conclude that the trial court erroneously allowed the bad acts testimony, our analysis does not stop there. We must determine whether the error committed by the trial court was harmless. Under Crim.R. 52(A), we must disregard any error that does not affect a party’s substantial rights. The Ohio Supreme Court has previously stated the following with respect to harmless error analysis in the context of a criminal trial:

Where evidence has been improperly admitted in derogation of a criminal defendant's constitutional rights, the admission is harmless "beyond a reasonable doubt" if the remaining evidence alone comprises "overwhelming" proof of defendant's guilt. *State v. Williams*, 6 Ohio St.3d 281, 290, 452 N.E.2d 1323 (1983), quoting *Harrington v. California*, 395 U.S. 250, 254, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969).

{¶ 20} Here, we conclude that the admission of the bad acts evidence did not affect Owens' substantial rights, because the remaining evidence contains overwhelming evidence of his guilt. The state's admissible evidence included testimony from individuals who observed Owens fleeing the scene of the crime only seconds after shots were fired. In addition, Catchings testified that he actually witnessed Owens commit the crime. Further, Justin and Edwards testified that Owens admitted to shooting Alexander in the head. Finally, the DNA and firearm analysis confirms Owens' use of the firearm found near the scene of the crime.

{¶ 21} In light of the overwhelming evidence presented by the state to establish Owens' guilt, we conclude that the trial court's erroneous admission of the bad acts testimony was harmless. Accordingly, Owens' first and second assignments of error are not well-taken.

B. Bryant's Testimony

{¶ 22} In his third assignment of error, Owens argues that the trial court erred when it allowed Bryant to testify despite the state's failure to list her as a witness. Owens

alternatively argues in his fourth assignment of error that the trial court erred when it denied his request for a continuance as a remedy for the state's violation of Crim.R. 16.

{¶ 23} On July 8, 2011, a pretrial hearing was held in which Owens took issue with the state's substitution of Bryant for her mother, whom the state had learned was having issues with drugs and would likely have issues of credibility. Since the trial was only days away, and having had no opportunity to interview Bryant, Owens argued that the state should not be allowed to substitute the witnesses. Alternatively, Owens requested a continuance in order to interview Bryant.

{¶ 24} Although Owens' counsel indicated that the state had not informed him of the substitution until a day or so before the hearing, the state pointed out the fact that Bryant's name appeared in a police report from Detective William Seymour, which was provided to Owens during discovery. Further, the state argued that the content of Bryant's testimony would be identical to that of her mother's testimony.

{¶ 25} The trial court denied Owens' request for a continuance and allowed Bryant to testify. In reaching its decision, the court stated: "In the report that was provided to the Defense on December the 21st, 2009, although [Bryant] was not indicated in that report specifically as a witness, her name was available and the * * * Defense could have interviewed her."

{¶ 26} "The admission or exclusion of relevant evidence rests within the sound discretion of the trial court." *State v. Sage*, 31 Ohio St.3d 173, 180, 510 N.E.2d 343 (1987). A trial court abuses its discretion when its attitude is unreasonable, arbitrary, or

unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). “A review under the abuse-of-discretion standard is a deferential review. It is not sufficient for an appellate court to determine that a trial court abused its discretion simply because the appellate court might not have reached the same conclusion or is, itself, less persuaded by the trial court’s reasoning process than by the countervailing arguments.” *State v. Morris*, 132 Ohio St.3d 337, 2012-Ohio-2407, 972 N.E.2d 528, ¶ 14.

{¶ 27} Under Crim.R. 16(I), “Each party shall provide to opposing counsel a written witness list, including names and addresses of any witness it intends to call in its case-in-chief, or reasonably anticipates calling in rebuttal or surrebuttal.” There is no question that Bryant was not on the written witness list provided to Owens. As a result, the prosecution violated Crim.R. 16(I). However, a violation of Crim.R. 16(I) does not automatically require the exclusion of the witness. *State v. Stonerock*, 4th Dist. No. 11CA15, 2012-Ohio-2290, ¶ 15. Rather, a court is instructed to remedy the discovery violation by imposing “the least severe sanction that is consistent with the purpose of the rules of discovery.” *City of Lakewood v. Papadelis*, 32 Ohio St.3d 1, 511 N.E.2d 1138 (1987), paragraph two of the syllabus.

{¶ 28} Specifically, “[p]rosecutorial violations of Crim.R. 16 are reversible only when there is a showing that (1) the prosecution’s failure to disclose was a willful violation of the rule, (2) foreknowledge of the information would have benefited the

accused in the preparation of his defense, and (3) the accused suffered some prejudicial effect.” *State v. Joseph*, 73 Ohio St.3d 450, 458, 653 N.E.2d 285 (1995).

{¶ 29} Here, Owens concedes that the state’s violation of Crim.R. 16 was not willful. Further, our review of the record reveals that the admission of Bryant’s testimony did not prejudice Owens in any way. The content of Bryant’s testimony was essentially identical to Teosha Alexander’s testimony. Owens argues that Bryant’s testimony was crucial because it placed Owens at the scene immediately after the murder. However, Teosha Alexander’s testimony also established that Owens was at the scene of the murder. Thus, Owens was not prejudiced by the admission of Bryant’s testimony. Accordingly, his third assignment of error is not well-taken.

{¶ 30} Owens alternatively argues that the trial court erred when it denied his request for a continuance as a remedy to the state’s violation of Crim.R. 16(I).

{¶ 31} The trial court has inherent discretionary power to deny or grant a motion for a continuance as part of the authority of the court to hear and determine causes of action. *State ex rel. Buck v. McCabe*, 140 Ohio St. 535, 45 N.E.2d 763 (1942), paragraph one of the syllabus. Thus, a trial court’s decision to deny a request for a continuance of trial is reviewed on appeal under an abuse of discretion standard. *State v. Unger*, 67 Ohio St.2d 65, 423 N.E.2d 1078 (1981), syllabus; *State v. Luce*, 6th Dist. No. L-90-091, 1991 WL 154061, *2 (Aug. 9, 1991).

{¶ 32} We agree with the trial court that Owens had ample time to prepare for Bryant’s testimony. Having been notified several days prior to the beginning of the trial,

Owens could have interviewed Bryant if he so wished to do so. Further, the state had already put Owens on notice with regard to the content of Bryant's testimony, as it was identical to the testimony of Teosha Alexander and the intended testimony of Bryant's mother. Therefore, we conclude that the trial court's decision to deny the continuance was not unreasonable, arbitrary, or unconscionable. Accordingly, Owens' fourth assignment of error is not well-taken.

C. Edwards' Testimony

{¶ 33} In his fifth assignment of error, Owens argues that the trial court erred when it overruled his objection to prior consistent statements made during the state's re-direct examination of Edwards. The state argues that Owens waived any error by failing to timely object.

{¶ 34} In response to Owens' assertion that Edwards was impaired by his use of marijuana on the day of the murder, the state attempted to recite Edwards' prior statements made to the police concerning Owens' involvement in the crime. Owens objected, a bench discussion was held, and the objection was overruled.

{¶ 35} Notably, there is no indication in the record that Owens based his objection on hearsay grounds. Rather, his stated basis for the objection was that the prosecution was making improper use of leading questions.

{¶ 36} “[I]t is a cardinal rule of appellate procedure that a party cannot assert new legal theories for the first time on appeal.” *State v. Richcreek*, 196 Ohio App.3d 505, 2011-Ohio-4686, 964 N.E.2d 442, ¶ 33 (6th Dist.), citing *In re Banks*, 4th Dist. No.

07CA3192, 2008-Ohio-2339, ¶ 7-10. This rule applies to new arguments for the admission of evidence not made during trial. *See State v. York*, 115 Ohio App.3d 245, 249, 685 N.E.2d 261 (4th Dist.1996) (failure to raise and argue the excited-utterance exception at trial waives the issue on appeal). “Litigants must not be permitted to hold their arguments in reserve for appeal, thus evading the trial court process.” *Mark v. Mellott Mfg. Co., Inc.*, 106 Ohio App.3d 571, 589, 666 N.E.2d 631 (4th Dist.1995).

{¶ 37} Owens raises the hearsay question for the first time on appeal.

Consequently, absent plain error, any error is deemed waived. Crim.R. 52(B) provides: “Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.” For an error to affect a substantial right, it must affect the outcome of the trial. *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68, 759 N.E.2d 1240.

{¶ 38} Under Evid.R. 801(D)(1), a prior consistent statement by a declarant is not hearsay, and is therefore admissible, if it is “offered to rebut an express or implied charge against declarant of recent fabrication or improper influence or motive.”

{¶ 39} Although we recognize that the state’s use of prior consistent statements in this case was not designed to rebut a charge of recent fabrication or improper influence or motive, we conclude that the erroneous admission of the evidence did not affect the outcome of the trial. Indeed, as we stated above, the state’s remaining evidence overwhelmingly established Owens’ guilt. Additionally, the information Edwards provided to the police had already been properly admitted into evidence during the state’s

direct examination of Edwards. Thus, the trial court did not commit plain error when it failed to exclude Edwards' testimony. Accordingly, Owens' fifth assignment of error is not well-taken.

D. Cumulative Error

{¶ 40} In his final assignment of error, Owens argues that he was denied a fair trial as a result of the cumulative effect of the erroneous rulings by the trial court set forth in his first five assignments of error.

{¶ 41} The cumulative effect doctrine was stated by the Ohio Supreme Court as follows:

Although violations of the Rules of Evidence during trial, singularly, may not rise to the level of prejudicial error, a conviction will be reversed where the cumulative effect of the errors deprives a defendant of the constitutional right to a fair trial. *State v. DeMarco*, 31 Ohio St.3d 191, 509 N.E.2d 1256 (1987), paragraph two of the syllabus; *State v. Bell*, 8th Dist. No. 92308, 2009-Ohio-6302, ¶ 39.

{¶ 42} In this case, the trial court committed error when it admitted Catchings' and Justin's bad acts testimony. However, our analysis of those errors under Owens' first two assignments of error establishes that the errors were harmless. Our review of the record reveals no other instances of error. Accordingly, Owens' sixth assignment of error is not well-taken.

III. Conclusion

{¶ 43} The judgment of the Lucas County Court of Common Pleas is hereby affirmed. Owens is ordered to pay the costs of this appeal pursuant to App.R. 24.

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.

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, P.J.

JUDGE

Stephen A. Yarbrough, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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