

[Cite as *State v. Smith*, 2009-Ohio-6932.]

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO, : APPEAL NOS. C-080712
 : C-090505
 Plaintiff-Appellee, : TRIAL NOS. B-0707191(B)

 vs. :
 : *DECISION.*
 RICKY SMITH, :
 :
 Defendant-Appellant. :

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed in Part, Sentences Vacated in Part, and Cause
Remanded in C-080712; Affirmed in C-090505

Date of Judgment Entry on Appeal: December 31, 2009

Joseph T. Deters, Hamilton County Prosecuting Attorney, and *Philip R. Cummings*,
Assistant Prosecuting Attorney, for Plaintiff-Appellee,

Roger Kirk, for Defendant-Appellant.

Please note: This case has been removed from the accelerated calendar.

J. HOWARD SUNDERMANN, Judge.

{¶1} Defendant-appellant Ricky Smith and his brother, Roger Smith, were indicted for murder and felony murder in connection with the stabbing death of Rodney Gorley. Following the denial of Ricky's motion to suppress identification testimony, Ricky and Roger were tried together before a jury.

I. State's Evidence

{¶2} At the trial, the state presented testimony from three eyewitnesses: Markuita Dale, Rasheka Smith, and Kristal Williams. The women testified that in the evening hours of August 23, 2007, Gorley had walked to Kristal's home to use her phone. Kristal was sitting on her front porch talking and drinking alcohol with Rasheka and Marquita. After Gorley had made his phone call, as he sat on the front porch talking to the three women, Roger Smith walked by. Roger exchanged some words with Gorley and left. Roger gave Gorley a nasty look, but Gorley just laughed at him.

{¶3} A short time later, Ricky Smith approached Gorley as he was stepping off the porch. Ricky attacked Gorley from his blind side and started hitting him on the head with a hammer. Roger then joined in the attack and repeatedly "punched" or stabbed Gorley in the chest. Gorley, a big man, was able to body-slam the brothers a few times before he ultimately fell bleeding to the ground. The three women, who had witnessed the attack, called the police. Ricky and Roger then fled from the area.

{¶4} When the police arrived, they found Gorley lying unconscious, face-down in Kristal's front yard next to a chain-link fence. His clothes were covered in

blood. He had extensive wounds to his head and was struggling to breathe. Gorley was transported to University Hospital for treatment, but he died three days later.

{¶5} Shortly thereafter, the police began to search the surrounding area. They found a serrated knife blade lying in a pool of blood in the grass on the west side of Kristal's home, as well as a foot print and a skullcap or do-rag. They also recovered a bloody knife handle near the driver's-side door of a red pickup that had been parked in the back of Roger's residence. The police also interviewed Kristal, Markuita, and Rasheka. They each told police that Ricky had attacked Gorley with a hammer, while Roger had punched Gorley in the chest. The following day, the women were shown two separate photo arrays. They each individually identified Roger and Ricky as the perpetrators.

{¶6} The police arrested Roger at his home that afternoon. He was transported to the police station for questioning. During Roger's interview, the police observed some cuts and abrasions on his face, his left hand, and his body. They also saw blood splashes on his jeans and collected the jeans for testing. They sought and obtained Roger's permission to search his home. During the search, they recovered from his bedroom a pair of gym shoes that had spots of blood on them. Two days later, the police apprehended Ricky in an abandoned apartment building where he had been hiding.

{¶7} Dr. Gretal Stephens, a forensic pathologist for the Hamilton County Coroner's Office, conducted an autopsy on Gorley. Stephens testified that Gorley had suffered a number of semicircular lacerations on his head caused by the round end of a hammer. According to Stephens, Gorley had been struck in the head no fewer than seven times. These head injuries had not caused his death, but they would have rendered him dazed or unconscious. She further testified that, had Gorley lived, the

wounds to his head would have formed permanent scars and would have caused him pain for a number of weeks. Stephens testified that Gorley had also suffered a stab wound to his heart. He died from anoxic encephalopathy due to complications from that stab wound.

{¶8} Michael Trimpe, a trace-evidence examiner at the Hamilton County crime lab, examined the knife blade and handle that police had recovered. He testified that the blade and handle physically fit together and that the knife had been in a bent position when the handle had broken from the blade.

{¶9} Tracy Sundermeir, a serologist for the Hamilton County Coroner's Office, performed DNA testing on Roger's jeans and tennis shoes, the knife blade, and the knife handle. She testified that there was a mixture of Gorley's and Roger's blood on Roger's jeans and Roger's left tennis shoe, and that Gorley's blood was on both the knife blade and handle, as well as on Roger's right tennis shoe.

{¶10} John Mulholland, a crime-scene investigator for the Hamilton County Sheriff's Office, also tested the knife blade and handle for latent fingerprints. He testified that he had been unable to get enough ridge details from the blade or the handle to lift a fingerprint from either item. He explained that he had examined the knife and blade after the serologist had tested them for DNA evidence, and that testing would have obliterated any ridge detail on the two items.

II. Jury's Verdict and Sentence

{¶11} After hearing all the evidence, the jury found Ricky and Roger guilty of murder and felony murder.¹ On July 31, 2008, Ricky filed a timely motion for a

¹ While Roger was tried and convicted with Ricky, he has filed a separate appeal that has not been consolidated with this appeal. Ricky's appellate counsel, however, has advanced many of the same assignments of error raised by Roger's appellate counsel. Thus, with some variations, our response to the assignments of error in each appeal will be duplicative. See *State v. Smith* (July 1, 2009), 1st Dist. No. C-080685.

new trial that was premised on grounds other than newly discovered evidence. Ricky filed an amended motion for a new trial on August 4, 2008. On August 8, 2008, the trial court, without ruling on Ricky's motions for a new trial, sentenced him to concurrent terms of 15 years to life. That same day, Ricky's appellate counsel filed the appeal numbered C-080712.

III. Limited Remand to Trial Court For a Ruling on Motions for New Trial

{¶12} After reviewing the record upon appeal, Ricky's appellate counsel realized that the trial court had never ruled upon Ricky's timely filed motions for a new trial, and that the time for Smith's appeal had been tolled under App.R. 4(B)(3) until the trial court entered an order denying the motions.² As a result, appellate counsel sought and was granted a limited remand to the trial court so that the court could rule upon the outstanding motions for a new trial.

{¶13} During the limited remand, Ricky's trial counsel filed two additional motions for a new trial on May 4, 2009, and May 11, 2009. The May 4 motion restated the same arguments made in the July 31, 2008, and August 4, 2008, motions. The May 11 motion, however, was premised on newly discovered evidence relating to the misconduct of a juror. Following a hearing on June 18, 2009, the trial court overruled all the motions for a new trial. Ricky then filed his own pro se appeal, numbered C-090505, from the trial court's entry overruling the motions for a new trial. We have sua sponte consolidated Ricky's appeal with counsel's appeal for the purposes of briefing, oral argument, and disposition.

² See, e.g., *State v. Turner*, 8th Dist. No. 88489, 2007-Ohio-3264, ¶18.

IV. Arguments on Appeal

{¶14} Ricky raises eight assignments of error for our review. He argues that (1) the trial court should have suppressed identification testimony from three eyewitnesses because of unduly suggestive photo arrays; (2) the trial court erred when it permitted the state to impeach him with convictions that were more than ten years old; (3) he was denied a fair trial because of prosecutorial misconduct in opening statements and closing arguments; (4) the trial court erred by failing to instruct the jury on involuntary and voluntary manslaughter and by providing an aiding-and-abetting instruction; (5) his convictions were supported by insufficient evidence and were against the manifest weight of the evidence; (7) the trial court erred in overruling his motions for new trial; and (8) the trial court erred in convicting and sentencing him for two counts of murder stemming from the death of a single victim. Finding merit only in his eighth assignment of error, we vacate the sentences imposed for the two counts of murder and remand this case to the trial court for the imposition of only one sentence for those two counts. The trial court's judgment is otherwise affirmed.

V. Motion to Suppress

{¶15} In his first assignment of error, Ricky argues that the trial court should have suppressed the identification testimony of Kristal Williams, Markuita Dale, and Rasheka Smith because their identifications had resulted from unduly suggestive photo arrays.

{¶16} In determining the admissibility of a pretrial identification of a suspect by a witness, this court engages in a two-step analysis.³ First, we must determine

³ See *State v. Keeling*, 1st. Dist. No. C-010610, 2002-Ohio-3299, ¶14.

whether the identification procedure was impermissibly suggestive.⁴ Second, if the procedure was impermissibly suggestive, we must determine if there was a substantial likelihood of irreparable misidentification.⁵ The defendant bears the burden of proving that the identification procedures were impermissibly suggestive and that the resulting identification was unreliable.⁶ If the defendant fails to satisfy the first burden, then we need not address whether there was a substantial likelihood of irreparable misidentification.⁷

{¶17} At the suppression hearing, all three women testified that they had spoken with the police on the night that Gorley had been fatally injured, and that they had identified Ricky and Roger as the two men who had been fighting with Gorley. The women told the police that they knew both men from the neighborhood. The following day, the police stopped by Kristal's home with two separate photo arrays. The women each selected Ricky and Roger's photographs from the arrays.

{¶18} Yet defense counsel only questioned Rasheka about the manner in which the police had shown her the photo array. Rasheka testified that the women had separately viewed the arrays, and that at no time during their viewing of the arrays had the police suggested which photograph to choose. At the conclusion of the hearing, the trial court overruled Ricky's motion to suppress because he had failed to prove that the identification procedures were unduly suggestive.

{¶19} Based on our review of the record, we agree with the trial court. Ricky failed to demonstrate that the manner in which the police presented the photo arrays to the three women was unduly suggestive. As a result, we need not inquire into the

⁴ See *id.*

⁵ See *id.* at ¶15.

⁶ See *State v. Harris*, 1st Dist. No. C-040483, 2005-Ohio-6995, ¶34.

⁷ See *State v. Green* (1996), 117 Ohio App.3d 644, 653, 691 N.E.2d 316.

reliability of the women's identifications. Consequently, we overrule his first assignment of error.

VI. Evidence of Prior Convictions

{¶20} In his second assignment of error, Ricky argues that the trial court erred when it permitted the state to impeach him with convictions that were more than ten years old, because it discouraged him from testifying and hindered his defense.

{¶21} In April 2008, the state filed a notice of its intention to use evidence of Ricky's prior convictions that fell outside the ten-year time limit in Evid.R. 609(B). The proffered evidence included prior convictions for aggravated robbery, drug trafficking, and drug possession. A few days before trial, the trial court heard argument on the notice and indicated it was inclined to allow the state to use the evidence because its probative value likely outweighed its prejudicial effect. The court stated, however, that it had not reviewed Ricky's prior convictions and asked the state to provide certified copies of those convictions. The court then stated that its preliminary ruling "might have to be fine-tuned" if the issue arose at trial.

{¶22} After the trial had begun, Ricky's counsel moved to exclude the prior-conviction evidence, arguing that its admission would prevent Ricky from testifying. In response, the court stated that it would "review what records it deem[ed] appropriate to put in [evidence] at a later time." At the conclusion of the state's case, Ricky's counsel told the court that Ricky had decided not to testify.

{¶23} The record does not indicate why Ricky chose not to testify. His decision might have been made "simply out of fear that he w[ould] look bad by clever counsel."⁸ Or he might have feared that, even without the use of the stale convictions, the jury

⁸ *Portuondo v. Agard* (2000), 529 U.S. 61, 67, 120 S.Ct. 1119.

might have been swayed by his prior “non-stale” conviction for possession of marijuana. But whatever Ricky’s reasons might have been, the trial court never had the opportunity to consider each of his out-of-time convictions to determine whether, in the interests of justice, the probative value of each substantially outweighed its prejudicial effect. As a result, we need not determine if the trial court abused its discretion in making a preliminary ruling on the issue. We, therefore, overrule the second assignment of error.

VII. Assistant Prosecuting Attorney’s Remarks

{¶24} In his third assignment of error, Ricky argues that he was denied due process and the right to a fair trial by remarks made by the assistant prosecuting attorney during opening statement and closing argument.

{¶25} “Whether a prosecutor’s remarks at trial require a reversal of a conviction requires an analysis as to (1) whether the remarks were improper and (2) if so, whether the remarks prejudicially affected the accused’s substantial rights. The touchstone of the analysis ‘is the fairness of the trial, not the culpability of the prosecutor.’ ”⁹

{¶26} Ricky first argues that the prosecutor acted improperly in opening argument when he told the jurors that they were sitting in the room with “murderers,” and when he later referred to the Bible. Ricky also argues that, during his closing argument, the assistant prosecutor made remarks that improperly denigrated defense counsel, misstated the evidence, and cited evidence that was not in the record. Finally, he argues that the assistant prosecutor improperly stated that the “only evidence heard in this case is the evidence from the State of Ohio and not one bit of it is incredible or unbelievable.”

⁹ *State v. Jackson*, 107 Ohio St.3d 53, 2005-Ohio-5981, 836 N.E.2d 1173, ¶108 (internal citations omitted).

{¶27} The record reveals that Ricky did not object at trial to any of the assistant prosecutor's remarks, except the last one. The trial court sustained the one objection and instructed the jury not to consider Ricky's failure to testify for any reason. Given the trial court's corrective action, Ricky cannot demonstrate that he was materially prejudiced by the last remark.¹⁰

{¶28} Furthermore, based upon our review of the record, we are not convinced that the assistant prosecutor's remaining remarks, when considered individually or collectively, rose to the level of plain error. As a result, we overrule the third assignment of error.

VIII. Jury Instructions

{¶29} In his fourth assignment of error, Ricky argues that the trial court erred when it instructed the jury on aiding and abetting and when it refused to instruct the jury on involuntary and voluntary manslaughter.

{¶30} But the record reveals that only Roger's counsel had asked the trial court to instruct the jury on involuntary and voluntary manslaughter, and that he alone objected when the trial court failed to give those instructions. Ricky's counsel objected only to the trial court's instruction on aiding and abetting. Because Ricky's counsel never sought an instruction on involuntary or voluntary manslaughter, he has waived, absent plain error, any objections he had to the trial court's refusal to give the instructions.¹¹

{¶31} In this case, the trial court's decision not to instruct the jury on involuntary manslaughter did not constitute plain error. The evidence showed that

¹⁰ See *State v. Ferguson* (1983), 5 Ohio St.3d 160, 163, 450 N.E.2d 265.

¹¹ See Crim.R. 30(A); see, also, *State v. Coley*, 93 Ohio St.3d 253, 266, 2001-Ohio-1340, 754 N.E.2d 1129.

Ricky had attacked an unarmed Gorley without any provocation and had beaten him about the head with a hammer, while his brother Roger had stabbed Gorley in the heart with a knife. No jury could have reasonably found that Ricky had recklessly inflicted these injuries.¹² Because Gorley's injuries had resulted from purposeful conduct, the evidence did not reasonably support an acquittal for felony murder and a conviction for the lesser-included offense of involuntary manslaughter.¹³ Thus, we cannot hold that, but for the lack of an instruction on involuntary manslaughter, the result of the trial would have been otherwise.

{¶32} Likewise, the trial court's failure to instruct the jury on voluntary manslaughter was not plain error. The state presented uncontroverted evidence that Ricky and his brother had ambushed an unarmed Gorley, attacking him with a hammer and a knife. Thus, the evidence did not demonstrate that Ricky had acted while under a sudden passion or fit of rage, and it therefore did not support an acquittal on the charge of felony murder and a conviction for voluntary manslaughter.¹⁴

{¶33} Nor can we conclude that the trial court committed error when it instructed the jury on aiding and abetting. Contrary to Ricky's assertions, a defendant can be convicted of complicity even though he is charged in the indictment only as a principal offender.¹⁵ Furthermore, the state presented ample evidence that Ricky had acted in concert with Roger during their attack upon Gorley. As a result, the trial court's jury instruction on complicity was proper. We, therefore, overrule Ricky's fourth assignment of error.

¹² See R.C. 2903.04; see, also *State v. Finley*, 1st Dist. No. C-061052, 2008-Ohio-4904, ¶27.

¹³ See *State v. Shane* (1992), 63 Ohio St.3d 630, 632, 590 N.E.2d 272; see, also, *State v. Nesbitt*, 1st Dist. No. C-0800010, 2009-Ohio-972, ¶19-27.

¹⁴ See R.C. 2903.03; *Nesbitt*, supra.

¹⁵ See *State v. Tumbleson* (1995), 105 Ohio App.3d 693, 664 N.E.2d 1318; see, also, *State v. Ensmann* (1991), 77 Ohio App.3d 701, 603 N.E.2d 303.

IX. Sufficiency and Weight of the Evidence

{¶34} In his fifth assignment of error, Ricky argues that his murder convictions were based upon insufficient evidence and were against the manifest weight of the evidence.

{¶35} Ricky was found guilty of murder under R.C. 2903.02(A), which provides that “[n]o person shall purposely cause the death of another.” Ricky was also found guilty of felony murder under R.C. 2903.02(B), which provides that “[n]o person shall cause the death of another as a proximate result of the offender’s committing or attempting to commit an offense of violence that is a felony of the first or second degree.” In this case, Ricky was found guilty of causing Gorley’s death while committing felonious assault under R.C. 2903.11(A)(1). The felonious-assault statute provides that “[n]o person shall knowingly cause serious physical harm to another.”

{¶36} After viewing the evidence in a light most favorable to the prosecution, we hold that a rational trier of fact could have reasonably concluded that state had proved the essential elements of murder and felony murder beyond a reasonable doubt. Three eyewitnesses testified that Ricky had attacked an unarmed Gorley without any provocation and had repeatedly hit him on the head with a hammer, while his brother had stabbed him in the heart with a knife. Moreover, after reviewing the record, we cannot conclude that the jury lost its way and created such a manifest miscarriage of justice that we must reverse Ricky’s convictions and order a new trial.¹⁶ As a result, we overrule his fifth assignment of error.

¹⁶ See *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541.

X. Postrelease Control

{¶37} In his sixth assignment of error, Ricky argues that the trial court erred in imposing a sentence for murder that included postrelease control. We disagree.

{¶38} It is well established that a court speaks only through its journal entries, not by oral pronouncements.¹⁷ Although the sentencing transcript shows that the trial court improperly advised Ricky that he would be subject to postrelease control, the trial court correctly stated the law in its journal entry. The journal entry specifically stated that Ricky was not subject to postrelease control: “THE DEFENDANT IS NOT SUBJECT TO THE POST RELEASE CONTROL PROVISIONS OF OHIO LAW AS THIS IS A LIFE SENTENCE. PAROLE ELIGIBILITY FOR THIS OFFENDER IS GOVERNED BY OHIO REVISED CODE 2967.13(A)(1) AND THE DEFENDANT IS SO ADVISED.” Because the trial court did not impose any period of postrelease control upon Ricky, we find his sixth assignment of error meritless.¹⁸

XI. Motions for New Trial

{¶39} In his seventh assignment of error, Ricky argues that trial court erred in denying his motions for a new trial.

{¶40} Ricky filed four motions for a new trial. The first two motions were filed on July 31, 2008, and August 4, 2008. Following this court’s limited remand, trial counsel filed two additional motions for a new trial on May 4, 2009, and May 11, 2009. Following a hearing, the trial court overruled all four motions.

{¶41} Based upon our review of the record, we conclude that the trial court properly overruled the motions. The first three motions, which were virtually identical,

¹⁷ See *Kaine v. Marion Prison Warden* (2000), 88 Ohio St.3d 454, 455, 2000-Ohio-381, 727 N.E.2d 907; *Schenley v. Kauth* (1953), 160 Ohio St. 109 113 N.E.2d 625.

¹⁸ See *State v. Fleming*, 6th Dist. No. OT-07-024, 2008-Ohio-3844, fn.1.

argued that the state had presented insufficient evidence to sustain Ricky's convictions, and that the trial court had erred in instructing the jury on aiding and abetting. Because we have already concluded that the trial court's instruction on aiding and abetting was proper and that the evidence was more than sufficient to support the jury's verdicts, the trial court did not abuse its discretion in denying these motions for a new trial.

{¶42} With respect to the final motion, which was premised on juror misconduct, Ricky argued that a juror, one hour prior to the verdict, had told a woman, "Looking good. Looking real good, but don't tell anyone." In its entry overruling this motion, the trial court stated that the affidavit was suspect and did not sufficiently demonstrate juror misconduct to warrant a new trial. We further note that the motion was not timely filed.¹⁹ As a result, the trial court properly overruled it. We, therefore, overrule the seventh assignment of error.

XII. Sentence

{¶43} In his eighth assignment of error, Ricky argues that the trial court erred by entering separate convictions and sentences for the two murder counts when they stemmed from a single killing. In our disposition of the appeal by Ricky's brother and co-defendant, Roger Smith,²⁰ we found plain error in his convictions for the two counts of murder. Because Ricky's convictions for the murder counts was likewise improper and a violation of his double-jeopardy rights,²¹ we sustain his eighth assignment of error, vacate the sentences imposed by the trial court, and remand this cause for the

¹⁹ See Crim.R. 33(B).

²⁰ See *State v. Smith* (July 1, 2009), 1st Dist. No. C-080685.

²¹ See *State v. Huertas* (1990), 51 Ohio St.3d 22, 28, 553 N.E.2d 1058 (holding that when a defendant who kills only one victim is found guilty of two aggravated-murder counts, the trial court may sentence on only one count); see, also, *State v. Johnson*, 1st Dist. Nos. C-080156 and C-080158, 2009-Ohio-2568, ¶84.

imposition of a single conviction for the two murder counts. We affirm the trial court's judgment in all other respects.

Judgment accordingly.

HILDEBRANDT, P.J., and CUNNINGHAM, J., concur.

Please Note:

The court has recorded its own entry this date.

