[Cite as *State v. Roth*, 2018-Ohio-153.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. John W. Wise, P.J.
Plaintiff-Appellee	:	Hon. Craig R. Baldwin, J.
	:	Hon. Earle E. Wise, Jr., J.
-vs-	:	
	:	
KENNETH ARTHUR ROTH	:	Case No. 2017CA00037
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Court of Common Pleas, Case No. 2016CR0731
JUDGMENT:	Affirmed
DATE OF JUDGMENT:	January 9, 2018

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
JOHN D. FERRERO Prosecuting Attorney By: RONALD MARK CALDWELL Assistant Prosecuting Attorney 110 Central Plaza South Suite 510 Canton, OH 44702-1413	FREDRICK PITINII 101 Central Plaza South Suite 1000 Canton, OH 44702

Wise, Earle, J.

{¶ 1} Defendant-Appellant, Kenneth Arthur Roth, appeals the February 15, 2017 judgment of conviction of the Court of Common Pleas of Stark County, Ohio. Plaintiff-Appellee is the state of Ohio.

FACTS AND PROCEDURAL HISTORY

{¶ 2} On December 11, 2009, the victim, age 61, was found murdered in her home. The cause of death was ligature strangulation. She was discovered face down on the floor with her underwear tied around her neck. A laptop, two firearms, and a small fireproof safe were found missing from the home. DNA testing on several items did not reveal any suspects. With the advancements of DNA testing, the DNA samples were again tested in 2013 using Y-STR analysis. The results could not exclude appellant or his male paternal relatives. Appellant had worked as a handyman for the victim.

{¶ 3} On April 20, 2016, the Stark County Grand Jury indicted appellant on one count of aggravated murder in violation of R.C. 2903.01. A jury trial commenced on February 6, 2017. The jury found appellant guilty as charged. By judgment entry filed February 15, 2017, the trial court sentenced appellant to life in prison without parole.

{¶ 4} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶ 5} "DEFENDANT'S CONVICTION WAS NOT SUPPORTED BY SUFFICIENT EVIDENCE AND THE COURT ERRED AS A MATTER OF LAW IN

DENYING THE DEFENSE'S RULE 29 MOTION AND SUBMITTING THE MATTER TO THE JURY."

II

{¶ 6} "APPELLANT'S CONVICTION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

I, II

{¶ 7} In his two assignments of error, appellant claims the trial court erred in denying his Crim.R. 29 motion for acquittal, and his conviction was not supported by the sufficiency and manifest weight of the evidence. We disagree.

{¶ 8} Crim.R. 29 governs motion for acquittal. Subsection (A) states the following:

> The court on motion of a defendant or on its own motion, after the evidence on either side is closed, shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment, information, or complaint, if the evidence is insufficient to sustain a conviction of such offense or offenses. The court may not reserve ruling on a motion for judgment of acquittal made at the close of the state's case.

{¶ 9} The standard to be employed by a trial court in determining a Crim.R. 29 motion is set out in *State v. Bridgeman,* 55 Ohio St.2d 261, 381 N.E.2d 184 (1978), syllabus: "Pursuant to Crim.R. 29(A), a court shall not order an entry of judgment of acquittal if the evidence is such that reasonable minds can reach different conclusions

as to whether each material element of a crime has been proved beyond a reasonable doubt."

{¶ 10} On review for sufficiency, a reviewing court is to examine the evidence at trial to determine whether such evidence, if believed, would support a conviction. *State v. Jenks,* 61 Ohio St.3d 259, 574 N.E.2d 492 (1991). "The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *Jenks* at paragraph two of the syllabus, following *Jackson v. Virginia,* 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

{¶ 11} "While the test for sufficiency requires a determination of whether the prosecution has met its burden of production at trial, a manifest weight challenge questions whether the prosecution has met its burden of persuasion." *State v. Bowden,* 8th Dist. Cuyahoga No. 92266, 2009-Ohio-3595, ¶ 13. On review for manifest weight, a reviewing court is to examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine "whether in resolving conflicts in the evidence, the jury 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. Martin,* 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983). See also, *State v. Thompkins*, 78 Ohio St.3d 380, 678 N.E.2d 541 (1997). The granting of a new trial "should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *Martin* at 175.

{¶ 12} Appellant was convicted of aggravated murder in violation of R.C. 2903.01(A) which states: "No person shall purposely, and with prior calculation and design, cause the death of another or the unlawful termination of another's pregnancy."

{¶ 13} The jury heard from thirteen witnesses. First was Willard VanVoorhis, the victim's brother. He explained his sister's home was in a wooded area, set back almost a hundred yards from the roadway, with the closest neighbor being a quarter of a mile away. Vol. I T. at 178. The home was located in a rural area and was isolated. *Id*. at 179. The victim and her second husband were separated in 2003. *Id.* Between 2003 and 2009, Mr. VanVoorhis was unaware of any men in his sister's life. *Id.* On the evening of December 11, 2009, Mr. VanVoorhis met the police and paramedics at his sister's home to perform a well check as the victim had not been answering her phone for almost two days. *Id*. at 181-182. After the police gained entry into the home, Mr. VanVoorhis secured his sister's dog, a large Akita. *Id*. at 182. The dog and several piles of dog feces were found in the lower level family room or "basement." *Id*. at 183-184. After the police finished their investigation, Mr. VanVoorhis, together with the victim's son, searched the house and noticed a laptop, two firearms, and a small safe were missing. *Id*. at 190. Hand towels were missing from the bathroom. *Id*. at 191.

{¶ 14} The next witness was the victim's son, Matthew Hackathorn, a police officer for the city of Akron. *Id*. at 195. He testified in late 2009, his mother was deep cleaning her home to remove any cat allergens so his daughter, the victim's granddaughter, could spend the night there. *Id*. at 200-201. His mother had a bad back from two car accidents so it was hard for her to lift things. *Id*. at 201. He also testified to the aforementioned missing items from the home. *Id*. at 206-207; State's Exhibits

20R and 20P. He added her large outdoor trash can was nowhere to be found. *Id.* at 206.

{¶ 15} Tia Judd, the victim's coworker, testified next. She stated on December 9, 2009, the victim worked from 7:00 a.m. to 3:31 p.m. *Id*. at 217. She was not scheduled to work on the 10th, and she had taken the 11th off as a vacation day. *Id*. at 217-218.

{¶ 16} Another coworker, Jennifer Blind, testified the victim was a private person, and she was unaware of another man in her life other than the estranged husband. *Id*. at 222.

{¶ 17} Elizabeth (Liz) Heid-Cowan was the victim's childhood and lifelong friend. *Id*. at 226-227. She identified appellant in court who she had met through the victim. *Id*. at 228-229. The victim had met him through her brother's ex-wife. *Id*. at 229. Appellant cleaned out basements and did odd jobs for the women. *Id.* at 229-230. He became a friend to the victim and Ms. Heid-Cowan. *Id*. at 230. Both the victim and Ms. Heid-Cowan attended a cookout at appellant's home. *Id.* Ms. Heid-Cowan confirmed that the victim was attempting to eliminate allergens from her home and was "moving stuff around, cleaning." *Id*. at 232. She stated she thought appellant was helping her move furniture and stuff in the home. *Id.*

{¶ 18} Stark County Sheriff's Deputy Ryan Hostetler interviewed appellant on December 22, 2009. *Id*. at 240. Appellant voluntarily went to the Stark County Sheriff's Office where the interview was recorded on video. *Id*. at 241; State's Exhibit 14. The recording was played to the jury. *Id*. at 242. In his interview, appellant stated he went deer hunting between November 30, and December 6, 2009, and he arrived home on December 8, 2009. *Id*. at 242-243. Appellant stated he last saw the victim in November

2009 because he gave her a bill for work he had done for her. *Id*. at 244. One of the items on the bill was for the purchase of a breaker on November 20, 2009. *Id*. at 245. Appellant was not arrested at the time. *Id*. at 245. A review of the interview indicates appellant did odd jobs for the victim every two to three months, and he attended her calling hours. Appellant and the victim socialized on one occasion. He was told about the victim's death by Liz. He also testified the victim's "crazy dog" did not like him, and he always made her lock up the dog when he was coming over to do work.

{¶ 19} Kylie Graham, a forensic scientist with the Ohio Bureau of Criminal Investigation, testified back in 2009, she worked for the Canton-Stark County Crime Laboratory, and examined several items of evidence for DNA analysis. Vol. II T. at 19-20. She looked for blood, semen, and saliva evidence. *Id.* at 20. As part of her analysis, she received known samples from six individuals, including appellant. *Id.* Ms. Graham examined a bottle of lotion, the victim's sexual assault kit, and hairs, fingernail clippings, jewelry, and clothing obtained from the victim's body. *Id*. at 22-51; State's Exhibits 1-5, 11-13, 18, 21. No DNA foreign to the victim was detected except for unknown male DNA under the victim's fingernails and DNA from the victim's barrette. *Id*. at 22, 25, 27, 29-51, 53-54. The DNA on the barrette was identified as belonging to an individual that had been autopsied prior to the victim, as the barrette may have fallen on the floor at the coroner's office. *Id*. at 36, 55, 59.

{¶ 20} Sara Horst, a forensic scientist with the Bureau of Criminal Identification and Investigation, examined the same items in late 2013, early 2014, and collected samples for further DNA analysis. *Id*. at 92-103.

{¶ 21} Jennifer Colecchia, a DNA analyst with the Ohio Bureau of Criminal Investigation, examined the samples and found them to contain DNA consistent with the victim. *Id*. at 114-129. Some of the samples contained a mixture of DNA belonging to the victim and a male. *Id*. at 128. Ms. Colecchia explained on those mixed samples, a male specific DNA test was performed called Y-STR DNA testing. *Id*. at 130-131.

{¶ 22} Hallie Dreyer, a forensic scientist in the DNA Unit with the Ohio Bureau of Criminal Investigation, explained Y-STR DNA testing focuses on the Y chromosome which is unique to males. *Id*. at 137. The "Y chromosome is passed down as a whole from father to son," so the Y chromosome profile is not unique to a single individual, but can be unique to a paternal lineage. *Id*. at 138. The statistical information from Y-STR DNA testing is always lower than traditional DNA testing. *Id*. at 139. Ms. Dreyer examined the mixed samples using Y-STR DNA testing and found a partial profile consistent with appellant on the victim's underwear. *Id*. at 144-145. Ms. Dreyer concluded neither appellant "nor any of his paternal male relatives can be eliminated as the source of the partial Y-chromosome DNA profile from the swabbing from the underwear. According to the US Y-STR Database the estimated frequency of this profile is 1 in every 71 male individuals," with five out of sixteen locations present. *Id*. at 145, 151, 163. The highest number in Y-STR DNA testing using the technology "that we have currently online at our laboratory" is 1 in every 621. *Id*. at 146. A new swab from an unstained area of the underwear was examined using Y-STR DNA testing and again, neither appellant nor any of his paternal male relatives could be excluded as the source. *Id*. at 149-151. The estimated frequency of this profile was 1 in every 101 males, with seven out of sixteen locations present. *Id*. at 151, 163. While Ms. Dreyer

could not exclude appellant as a contributor on the underwear, she could not say the DNA detected was "his and only his." *Id*. at 159-160. Ms. Dreyer admitted to finding DNA in the victim's underwear that did not come from the victim or appellant, but in her personal, professional opinion, "this is potentially a female profile that we might be detecting, but yes, there is unknown minor DNA detected." *Id*. at 143-144, 160-161.

{¶ 23} P.S. Murthy, M.D., the Stark County Coroner, performed an autopsy on the victim on December 13, 2009. *Id*. at 179; State's Exhibits 9, 19A-T. Dr. Murthy testified to the details of his external autopsy observations. *Id*. at 180. The victim was "dressed" in her "hospital scrub suit" with a green sweater. *Id.* Her underwear was cut and tied around her neck. *Id.* He observed massive contusions on the victim's neck and contusions on her right thigh and buttock, as well as other injuries. *Id*. at 181, 185-186. Dr. Murthy opined some of the injuries were done postmortem. *Id*. at 182. He also opined the victim had been dead for a period of forty-eight hours. *Id*. at 183. The victim's body was discovered on December 11, 2009. Internally, Dr. Murthy stated the victim suffered massive hemorrhage in her neck consistent with a ligature, that being the underwear found around her neck. *Id*. at 180, 184, 185-186. Contributing to the victim's strangulation was a right bra cup that had been stuffed into her mouth. *Id*. at 184-185. Dr. Murthy determined the victim's cause of death to be ligature strangulation, with the ligature being the victim's underwear tied in a knot "very, very" tightly around her neck. *Id*. at 187. He concluded the manner of death was homicide. *Id*.

{¶ 24} The final witness for the state was Stark County Sheriff's Major C.J. Stantz. Major Stantz responded to the scene in 2009 and discovered the victim face down on a bedroom floor. Vol. III T. at 8-9, 14. The victim had a "ligature around her

neck, and there was an item stuffed inside her mouth." *Id*. at 15. There were no signs of forced entry into the home. *Id.* All the doors and windows were intact and secured. *Id*. at 15-16, 17, 19. A bed frame was leaning up against a door in the hallway. *Id*. at 27-28; State's Exhibit 20BB. Major Stantz testified the victim had worked on December 9, 2009, leaving work at 3:31 p.m. *Id*. at 30; State's Exhibit 7. She then stopped at a Marc's store, as a cancelled check established she was there at 5:20 p.m. *Id*. at 33; State's Exhibit 8. After a couple months, the case went cold. *Id*. at 34. Any leads that continued to come in were worked. *Id.* In 2013, the Bureau of Criminal Investigation was asked to reexamine the evidence. *Id.* As a result of the continuing investigation, appellant was viewed as a viable suspect. *Id.* Thereafter, on January 13, 2015, Major Stantz interviewed appellant.[1] *Id*. at 35, 43-44. The interview was recorded on video and the recording was played for the jury. *Id*. at 35-38; State's Exhibit 15. At first, appellant could not, for a few seconds, remember the victim. Then he remembered he had done odd jobs for her and had left her a bill before he went hunting. Appellant again acknowledged he had been hunting between November 30, and December 8, 2009, and then went hunting again a short while later. During this interview, appellant explained it was between those two hunting trips that he dropped the bill off to her house, not in November 2009 before the first hunting trip as he stated during the first interview. He stated several times he dropped the bill off before he went on the second hunting trip. After being informed someone may have seen him at the victim's house on December 9, 2009, appellant agreed he could have been there around that date

[1] Major Stantz indicated in his testimony that he could not remember the date of the interview. He did agree with the prosecutor's suggestion that it took place "around the year of 2013.' However, a discovery receipt signed by defense counsel and filed on June 7, 2016, states the interview of appellant took place on 1/13/2015. Also listed is a supplemental report which is included in the record. The supplement prepared by Major Stantz reflects that the interview took place on Tuesday, January 13, 2015.

dropping off the bill. Appellant reiterated that the victim's dog did not like him. He stated he learned of the victim's death when her son Matt called him and told him the police wanted to speak with him. In a search of appellant's home conducted on December 4, 2014[2], Major Stantz discovered a receipt for gasoline purchased in Cadiz on December 7, 2009 at 8:22 a.m., and a receipt from a grocery store in East Canton dated December 9, 2009 at 1:42 p.m. *Id*. at 38-40; State's Exhibits 10A and 10B. On May 6, 2016, Major Stantz again interviewed appellant. *Id*. at 40. There is no recording of this interview as the recording equipment was not working. *Id*. at 41. During this interview, appellant was advised of his rights, and was informed of the charge against him for causing the death of the victim. *Id*. at 41-42. Appellant did not answer any questions and asked for an attorney. *Id*. at 42.

{¶ 25} Appellant called one witness, Julie Heinig, Ph.D., a forensic director and DNA technical leader with DNA Diagnostics Center. Dr. Heinig reviewed appellant's case file "[t]o see that testing was performed, what was tested, what the results are, the interpretation of the results, the conclusions, and to make sure that the results support the conclusions." *Id*. at 71. She agreed with the methodology used by the crime lab and the analysts' conclusions and interpretations of the swabbed areas of the underwear. *Id*. at 72-77, 82, 87. She opined the 1 in 71 and the 1 in 101 were very low statistics. *Id*. at 79. In comparing the evidence samples to all the submitted known samples, Dr. Heinig noted that the sample given by William Christner was consistent with the Y-STR DNA obtained from the underwear, in other words, he has "the same

[2] In response to a question by the prosecutor, Major Stantz agreed that the search was conducted on December 4, 2013, However, documents filed in the trial court, including a discovery receipt, a law enforcement supplemental report, the search warrant and search inventory log, reflect that the search warrant for appellant's residence was obtained and executed on December 4, 2014.

DNA profile at the five and seven loci that were compared." *Id*. at 83. Dr. Heinig explained (*Id*. at 85):

> The statistic when it is generated reflects ev - - - the evidence sample. So, in other words, a DNA profile was obtained from the evidence sample and the question is how often would we see this DNA profile in the population and the answer is every 1 in 71 male individuals would have this profile. And so you can compare anyone to that profile, and so, for instance, comparing Kenneth Roth he could be included and comparing William Christner he could be included. So the statistic is always just about the evidence sample, how often will we see this DNA profile from this evidence sample.

{¶ 26} Ms. Dreyer did not agree with this finding, stating the following (Vol. II T. at 155-156):

> What we are looking at on these profiles is the data that is above our threshold for reporting. Those are the only locations that we can use to make an inclusion. However, there is often and specifically in this case there is additional data that is either just below our reporting threshold or it's not what we call concordant.
>
> Concordance is something where we perform this test more than once and we're looking for the profile to be reproducible. We can only use

those locations that are reproducible for inclusions, but we can use all of the information obtained for exclusion and exclusionary purposes.

On this sample specifically the locations that we used for a statistic were consistent with William Christner, but using the additional data that was present there were inconsistencies, so at best I would say inconclusive regarding William Christner as an - - a contributor.

{¶ 27} In making his Crim.R. 29 motion to the trial court, defense counsel argued "there's just two bits of evidence that have been presented here," the DNA evidence and whether appellant was at the victim's house the day of the murder, "and neither one of those or even if they're taken together would demonstrate by proof beyond a reasonable doubt" that appellant killed the victim. Vol. III T. at 56. As outlined above, sufficient evidence was presented (Y-STR DNA evidence and appellant's own admissions) to show that reasonable minds could reach different conclusions as to whether appellant was in the victim's home at the time of the murder to overcome a Crim.R. 29 challenge.

{¶ 28} We do not find the trial court erred in denying appellant's Crim.R. 29 motion.

{¶ 29} We note the weight to be given to the evidence and the credibility of the witnesses are issues for the trier of fact. *State v. Jamison,* 49 Ohio St.3d 182, 552 N.E.2d 180 (1990). The trier of fact "has the best opportunity to view the demeanor, attitude, and credibility of each witness, something that does not translate well on the written page." *Davis v. Flickinger,* 77 Ohio St.3d 415, 418, 674 N.E.2d 1159 (1997).

{¶ 30} Also, circumstantial evidence is that which can be "inferred from reasonably and justifiably connected facts." *State v. Fairbanks,* 32 Ohio St.2d 34, 289 N.E.2d 352 (1972), paragraph five of the syllabus. "[C]ircumstantial evidence may be more certain, satisfying and persuasive than direct evidence." *State v. Richey,* 64 Ohio St.3d 353, 595 N.E.2d 915 (1992). It is to be given the same weight and deference as direct evidence. *Jenks,* 61 Ohio St.3d 259, 574 N.E.2d 492.

{¶ 31} The evidence establishes there was no forced entry into the victim's home. It is reasonable to infer the victim knew the perpetrator and permitted the entrance into her home. Appellant performed odd jobs for the victim and socialized with her on at least one occasion. During his first interview in 2009, appellant stated he last saw the victim in November 2009. He was notified of the victim's death by her friend Liz, and attended the victim's calling hours. During his second interview in 2015, appellant at first did not immediately remember the victim, an individual he had worked for and socialized with; an individual who was murdered for which he was questioned about his whereabouts shortly thereafter. His story changed about last seeing the victim in November 2009, stating he dropped the bill off in December, in between his two hunting trips. He acknowledged he could have been at the victim's home on December 9, 2009. The victim's body was discovered on December 11, 2009, and Dr. Murthy opined she had been dead for a period of forty-eight hours. Appellant stated he was informed of the victim's death by her son Matt, not Liz as he said during his first interview. It is reasonable to infer appellant was not truthful during his interviews based on these inconsistencies. Y-STR DNA testing conducted on swabs obtained from the underwear used to strangle the victim could not exclude appellant as a contributor. The victim's

dog was found confined in the lower level of the home. It is reasonable to infer it was because appellant was in the home.

{¶ 32} It is also reasonable to infer appellant's memory had faded over the five years between interviews and he was simply mistaken in his statements to the officers in his second interview. However, the jury heard the testimony at trial, observed the demeanor of the witnesses, including appellant's during the taped interviews, judged their credibility and considered the exhibits. The jury heard the arguments of both the prosecutor and defense counsel as to what inferences they should draw or not draw from the evidence. They were instructed by the judge and deliberated until they reached a guilty verdict.

{¶ 33} Based upon the testimony and the exhibits presented, we find sufficient evidence, if believed, to support the conviction for aggravated murder. While the evidence is not overwhelming, we do not find this to be the exceptional case where the evidence weighs heavily against the conviction. Further, we find that in weighing any conflicts in evidence and making reasonable inferences from that evidence the jury did not lose its way and did not create a manifest miscarriage of justice.

{¶ 34} Assignments of Error I and II are denied.

{¶ 35} The judgment of the Court of Common Pleas of Stark County, Ohio is hereby affirmed.

By Wise, Earle, J.

Wise, John, P.J. and

Baldwin, J. concur.

EEW/db