[Cite as *State v. Langford*, 2010-Ohio-3619.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 09AP-1140 (C.P.C. No. 08CR-10-7526)
Mark Langford,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on August 5, 2010

Ron O'Brien, Prosecuting Attorney, and *Steven L. Taylor*, for appellee.

Kirk A. McVay, for appellant.

APPEAL from the Franklin County Court of Common Pleas

TYACK, P.J.

{¶1} Mark Langford is appealing from his conviction on a charge of murder. He assigns five errors for our consideration:

> [I] THE TRIAL COURT ERRED WHEN IT OVERRULED DEFENDANT-APPELLANT'S MOTION TO DISMISS THE INDICTMENT DUE TO PRE-INDICTMENT DELAY IN VIOLATION OF DEFENDANT-APPELLANT'S RIGHTS TO DUE PROCESS OF LAW AND A FAIR TRIAL GUARANTEED BY AMENDMENTS V, VI, AND XIV OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 10 AND 16 OF THE OHIO CONSTITUTION.

> [II] THE TRIAL COURT ERRED WHEN IT FAILED TO INSTRUCT THE JURY THAT A PERSON MUST ACT "WITH THE KIND OF CULPABILITY REQUIRED FOR THE COMMISSION OF AN OFFENSE" TO BE CONVICTED ON A COMPLICITY THEORY OF GUILT, THEREBY DEPRIVING DEFENDANT-APPELLANT HIS RIGHTS TO DUE PROCESS OF LAW AND A FAIR TRIAL AS GUARANTEED BY AMENDMENT V AND XIV OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION.
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> [III] THE TRIAL COURT ERRED WHEN IT OVERRULED DEFENDANT-APPELLANT'S OBJECTIONS TO THE ADMISSION OF EVIDENCE RELATING TO DEFENDANT-APPELLANT'S AFFILIATION WITH A STREET GANG INVOLVED IN DRUG TRAFFICKING AND HIS INCARCERATION IN FEDERAL PRISON FOR OTHER CRIMES, IN VIOLATION OF DEFENDANT-APPELLANT'S RIGHTS TO DUE PROCESS OF LAW AND A FAIR TRIAL GUARANTEED BY AMENDMENTS V AND XIV OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION.
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> [IV] THE TRIAL COURT ERRED WHEN IT ENTERED JUDGMENT AGAINST THE DEFENDANT AS TO COUNTS ONE AND TWO OF THE INDICTMENT WHEN THEY ARE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE, IN VIOLATION OF DEFENDANT-APPELLANT'S RIGHTS TO DUE PROCESS OF LAW AND A FAIR TRIAL GUARANTEED BY AMENDMENTS V AND XIV OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION.
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> [V] THE TRIAL COURT ERRED WHEN IT CREDITED DEFENDANT-APPELLANT 123 DAYS OF CREDIT AGAINST HIS SENTENCE RATHER THAN THE 676 DAYS REQUESTED BY DEFENDANT-APPELLANT, IN VIOLATION OF HIS RIGHT TO EQUAL PROTECTION OF THE LAW UNDER THE CONSTITUTIONS OF THE UNITED STATES AND THE STATE OF OHIO.

{¶2} Marlon Jones was shot and killed on July 18, 1995. Mark Langford, under the alias James Allen, was indicted on August 4, 1995 and accused of aggravated murder

as a result of the shooting. That original indictment was dismissed about three months later when a key witness, Nichole Smith, did not honor her subpoena and appear to testify at trial. Apparently unbeknownst to authorities, Langford was still a minor when the shooting occurred.

{¶3} Columbus police detectives continued their investigation and interviewed Langford in September 1997 and June 1998. Finally, Langford was interviewed over ten years later while he was incarcerated on federal charges.

{¶4} Police filed new charges against Langford with respect to the shooting of Marlon Jones in the Juvenile Division of the Franklin County Court of Common Pleas and the case was bound over to the General Division of the Franklin County Court of Common Pleas in October 2008. This led to a two count indictment charging Langford with aggravated murder, in violation of R.C. 2903.01, and murder, in violation of R.C. 2903.02. Each count carried a three-year firearm specification.

{¶5} Because of the extended delay between the shooting and the indictment, a lapse of over 13 years, counsel for Langford filed a motion seeking dismissal of the charges. The refusal of the trial court to dismiss the charges is contested in the first assignment of error.

{¶6} The trial judge assigned to the case conducted a pre-trial evidentiary hearing on the motion to dismiss. Larry Reese, the lead detective assigned to the case by the Columbus Division of Police, testified. Langford also testified at the hearing.

{¶7} Detective Reese is a member of what is commonly called the cold case unit of the Columbus Division of Police. He did not receive responsibility for the case until February 2006—over ten years after the shooting. Of the two detectives previously

assigned to the homicide, one had retired and one had transferred from the homicide squad to another squad.

{¶8} Detective Reese reopened the investigation at the direction of his supervising sergeant after an associate United States Attorney contacted the Columbus Division of Police and indicated that two federal prisoners claimed to have information with respect to the Marlon Jones homicide. The federal prisoners claimed that they had talked to Langford and/or overheard him discussing the case with others. The federal prisoners claimed that Langford had confessed to involvement in the homicide. These claims led to the investigation with respect to the homicide being reopened.

{¶9} Detective Reese began looking for Nichole Smith and ultimately located her. Detective Reese also went to South Carolina to interview the two federal prisoners who claimed to have information about Mark Langford.

{¶10} In reviewing the police files, Detective Reese noted that the projectile which killed Marlon Jones had been ordered destroyed by a detective formerly assigned to the case. Detective Reese also acknowledged that a fingerprint of Langford on a cartridge box related to the case had also been destroyed after the first indictment was dismissed. Detective Reese also acknowledged that a potential witness, known as "Big Mike," had died in the intervening years. Further, Detective Reese acknowledged that the memory of other witnesses can fade after a significant lapse of time.

{¶11} Langford also testified at the hearing on the motion to dismiss. He stated that he had been in federal custody for over eight years as a result of drug charges. He testified that when the case was originally indicted, he had a number of witnesses who would testify he was not involved. He listed "D Rock," whose first name was Deshaun, as

such a witness and testified that "D Rock" had died during the intervening time. An exhibit showing that a Deshaun Williams had died in February 2001 was presented and ultimately admitted into evidence.

{¶12} Langford claimed that "D Rock" had talked to the people involved in the homicide and had been told Langford was not involved.

{¶13} Langford also testified a cousin named Don Gentry, known as "Big Mike," had lived in the neighborhood where the shooting occurred. Gentry had allegedly talked to people associated with Marlon Jones and could testify at trial. Gentry died in January 2000.

{¶14} Langford testified that a second person known as "Big Mike" had supplied one of the guns involved in the shooting of Marlon Jones and had been available to testify back in 1995. This "Big Mike" would claim he provided a .357 Magnum to a Curtis Stokes, who was one of the shooters. Allegedly, this "Big Mike" was Paul Michael Ross, Jr., who was shot and killed in December 1998.

{¶15} Langford believed that his first attorney had the names of still other witnesses.

{¶16} After the presentation of the evidence at the hearing, the attorneys argued the merits of the motion to dismiss and the trial court took the matter under advisement. At an in-court proceeding ten days later, the trial judge overruled the motion based heavily upon its interpretation of *United States v. Lovasco* (1977), 431 U.S. 783, 97 S.Ct. 2044, and upon a factual finding that Langford had not demonstrated any actual prejudice as a result of the delay.

{¶17} The case law, with respect to the right to a speedy trial as guaranteed by the Sixth Amendment to the United States Constitution, has been relatively stable over recent years. In *Barker v. Wingo* (1972), 407 U.S. 514, 92 S.Ct. 2182, the Supreme Court of the United States identified four factors to be considered: 1) the length of the delay; 2) who caused the delay; 3) whether an accused defendant asserted his or her rights to a speedy trial; and 4) whether the defendant suffered prejudice as a result of the delay.

{¶18} No one contests the fact that a delay of over 13 years between the commission of the crime and an indictment is an extended delay, especially where, as here, police detectives were always aware of allegations that the defendant was one of the people involved in the homicide.

{¶19} Likewise, no one asserts that Langford was responsible for the delay which occurred between the homicide and the second indictment. Until the two federal prisoners came forward with claims that Langford had confessed to involvement in the crime, police could reasonably believe that they lacked the proof necessary to convince a jury of Langford's guilt. Thus, police saw no benefit to seeking an indictment only to risk dismissing the case before trial a second time. Obviously, the delay was not caused by Langford, but by the State of Ohio and its agents.

{¶20} Langford never waived his rights to a prompt prosecution. He could not assert a right to a speedy prosecution with no charges pending against him.

{¶21} The key issue under *Barker*, is the question of whether or not Langford was prejudiced by the delay. The trial court found no prejudice, based upon a finding that Langford's testimony about potential witnesses was not credible.

{¶22} Counsel for Langford in the trial court demonstrated that three witnesses Langford claims would be supportive of his claims of innocence had died. One, Don Gentry, had no personal knowledge of the homicide, but claimed to have talked to friends of the deceased, Marlon Jones, about what occurred. Such a discussion would be classic hearsay and would be barred from presentation in evidence, assuming the friends of Marlon Jones were not saying that they shot their friend. See also Evid.R. 602. The loss of Gentry's testimony cannot be seen as prejudicial to Langford under the circumstances.

{¶23} The testimony of "D Rock" that he had talked to persons involved in the homicide and that these persons confessed to their involvement while denying Langford's involvement could be admissible under Evid.R. 804(B)(3) which reads:

> **Hearsay exceptions.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> * * *
>
> (3) **Statement against interest.** A statement that was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless the declarant believed it to be true. A statement tending to expose the declarant to criminal liability, whether offered to exculpate or inculpate the accused, is not admissible unless corroborating circumstances clearly indicate the truthworthiness of the statement.

However, finding the corroboration required by Evid.R. 804(B)(3) might be seen as impossible. Langford had told police on some occasions that he was in Detroit, Michigan when the homicide occurred. However, he also claimed at least once to have been

present at the time of the shooting. Unless corroboration of the alleged confession of a third-party could have been presented, the allegation of a confession could not be presented in evidence.

{¶24} The same problem confronts attempts to present testimony from the other "Big Mike." That "Big Mike" allegedly would have claimed to have provided a weapon used in the homicide to a third-party, Curtis Stokes. However, "Big Mike" could not say the third-party did not, in turn, give the gun to Langford or someone else associated with the shooting.

{¶25} During the delay between the dismissal of the first indictment and the investigation being reactivated, a homicide detective with the Columbus Division of Police ordered the destruction of the projectile recovered from the body of Marlon Jones. The projectile was the cause of death. The projectile was from a bullet fired from a Ruger .357 or other large gauge handgun.

{¶26} The testimony at trial indicated that Langford was shooting a handgun when Marlon Jones was killed. Nichole Smith testified that these men were shooting. One was shooting an assault rifle and two were shooting handguns. Nicole could not say which handgun Langford was shooting.

{¶27} Federal prisoner Jason Arnold testified that Langford told him about the three men shooting at Marlon Jones and confessed to being one of the three. Langford claimed that he was shooting a .22 caliber handgun and not the .357 caliber handgun which fired the fatal shot.

{¶28} Since no testimony establishes that Langford fired the fatal shot, the loss of the projectile was not prejudicial to Langford.

{¶29} Also lost between the first indictment and the second indictment was a cartridge box with a fingerprint on it which purportedly was Langford's. However, the latent lifts for the fingerprint were retained and were available for review by defense counsel to either confirm or contest the testimony that Langford's fingerprint was on the cartridge box. The loss of the box itself was not prejudicial under the circumstances.

{¶30} As a result of the above, we cannot overturn the trial judge's finding that Langford had suffered no prejudice as a result of the pre-indictment delay. Therefore, we cannot say the trial court erred in overruling the motion to dismiss the indictment.

{¶31} The first assignment of error is overruled.

{¶32} The second assignment of error asserts that the trial court gave an inaccurate charge on the topic of complicity. Complicity is addressed in R.C. 2923.03(A), which reads:

> No person, acting with the kind of culpability required for the commission of an offense, shall do any of the following:
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> (1) Solicit or procure another to commit the offense;
>
> (2) Aid or abet another in committing the offense;
>
> (3) Conspire with another to commit the offense in violation of section 2923.01 of the Revised Code;
>
> (4) Cause an innocent or irresponsible person to commit the offense.

{¶33} The State of Ohio presented two theories at trial. One was that Langford was the actual shooter and therefore a principal offender in the homicide. The other theory was that Langford was an accomplice.

{¶34} Establishing complicity requires that the State prove that the alleged accomplice acted with the kind of culpability required for the commission of the offense. When the offense is murder, the accomplice must have acted with a purpose to kill, since murder was defined in R.C. 2903.02(A) in 1995, in pertinent part: "No person shall purposely cause the death of another[.]"

{¶35} Trial counsel did not object to the charge given to the jury on complicity after the charge was given. The charge did include a complete definition of "purposely," which is defined in R.C. 2901.22(A) as follows:

> A person acts purposely when it is his specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature.

{¶36} In the context of this case, the "certain result" which the jury had to consider and apparently did consider in this deliberation was the death of Marlon Jones. The jury, by its verdict, found that Langford had a specific intention to cause the death of Marlon Jones, either by his own intention or by the transpired intent of the shooter who was actually using the Ruger .357. The jury could not have been misled by the charge given, nor could it have found Langford guilty based upon an error in the jury charge. No reversible error is present with respect to the jury charge or complicity.

{¶37} The second assignment of error is overruled.

{¶38} The third assignment of error attacks the failure of the trial court to keep out of the hearing of the jury the facts that: 1) Langford and Marlon Jones were in rival gangs selling drugs in Columbus, Ohio; and 2) Langford had recently been incarcerated at a federal prison.

{¶39} Sometimes serious criminal cases cannot be tried without unfavorable facts about a criminal defendant being revealed to the jury. Two of the key witnesses were men who had been serving time with Langford in federal prison and who claimed that Langford had told them about his involvement in the Marlon Jones homicide. There was no practical way to present the testimony of the federal inmates without explaining how they happened to spend extended periods of time with Langford and how he happened to trust them.

{¶40} Likewise, the homicide apparently occurred because Langford and Marlon Jones were in competing gangs. The competition led to Langford being beaten up and Langford and/or friends of Langford responding by shooting at the young men Langford and his friends viewed as being responsible for the beating. Marlon Jones died in the gunfire.

{¶41} The trial judge was within her discretion to allow the gang involvement and the federal incarceration to be revealed to the jury.

{¶42} The third assignment of error is overruled.

{¶43} The fourth assignment of error asserts that the conviction(s) for murder were against the manifest weight of the evidence. Sufficiency of the evidence is the legal standard applied to determine whether the case should have gone to the jury. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52. In other words, sufficiency tests the adequacy of the evidence and asks whether the evidence introduced at trial is legally sufficient as a matter of law to support a verdict. Id. "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." *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus, following *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781. The verdict will not be disturbed unless the appellate court finds that reasonable minds could not reach the conclusion reached by the trier of fact. *Jenks* at 273. If the court determines that the evidence is insufficient as a matter of law, a judgment of acquittal must be entered for the defendant. See *Thompkins* at 387.

{¶44} Even though supported by sufficient evidence, a conviction may still be reversed as being against the manifest weight of the evidence. *Thompkins*, at 387. In so doing, the court of appeals, sits as a " 'thirteenth juror' " and, after " 'reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines 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.' " Id. (quoting *State v. Martin* [1983], 20 Ohio App.3d 172, 175); see, also, *Columbus v. Henry* (1995), 105 Ohio App.3d 545, 547-48. Reversing a conviction as being against the manifest weight of the evidence should be reserved for only the most " 'exceptional case in which the evidence weighs heavily against the conviction.' " *Thompkins* at 387.

{¶45} As this court has previously stated, "[w]hile the jury may take note of the inconsistencies and resolve or discount them accordingly, see [*State v.*] *DeHass* [(1967), 10 Ohio St.2d 230], such inconsistencies do not render defendant's conviction against the manifest weight or sufficiency of the evidence." *State v. Nivens* (May 28, 1996), 10th Dist. No. 95APA09-1236. It was within the province of the jury to make the credibility decisions in this case. See *State v. Lakes* (1964), 120 Ohio App. 213, 217 ("It is the

province of the jury to determine where the truth probably lies from conflicting statements, not only of different witnesses but by the same witness.")

{¶46} See *State v. Harris* (1991), 73 Ohio App.3d 57, 63 (even though there was reason to doubt the credibility of the prosecution's chief witness, he was not so unbelievable as to render verdict against the manifest weight).

{¶47} The testimony of Nichole Smith at trial was that she accompanied Langford and two other men to the site of the homicide. All three young men had firearms. Nichole Smith claimed that she was nearby while the young men did the shooting and ran away with them immediately after the shooting. She claimed all three young men bragged about the shooting and claimed "we got them." (Tr. 72-73.)

{¶48} Jason Arnold and Isaac Jackson were the federal inmates who testified that Langford confessed to his involvement in the shooting death of Marlon Jones.

{¶49} Given the testimony of Nichole Smith, Jason Arnold and Isaac Jackson, the conviction(s) for murder were not against the manifest weight of the evidence.

{¶50} The fourth assignment of error is overruled.

{¶51} The fifth assignment of error argues that the trial court gave Langford too little jail-time credit for the time he was in custody. The trial court awarded 123 days of credit, not the 676 days counsel requested on Langford's behalf.

{¶52} The record before us demonstrates that Langford was jailed on the homicide charges for 123 days in 1995. The State of Ohio has acknowledged that credit for those 123 days is appropriate.

{¶53} Langford was again in custody for an additional 553 days between his May 2008 indictment and his November 2009 sentencing date. He was also in federal custody

at that time. The relatively recent case of *State v. Fugate*, 117 Ohio St.3d 261, 2008-Ohio-856, supports Langford's argument. Where a person receives concurrent sentences, jail-time credit is awarded against all of the sentences, not just one.

{¶54} The fifth assignment of error is sustained.

{¶55} In review, the first, second, third, and fourth assignments of error are overruled. The fifth assignment of error is sustained. The sentence of the Franklin County Court of Common Pleas is vacated and the case is remanded with instructions to grant jail-time credit for both the 123 days served in 1995 and the time served since the May 2008 indictment.

Judgment vacated and remanded with instructions.

FRENCH and CONNOR, JJ., concur.

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