**[Cite as *State v. Scott,* 2010-Ohio-5869.]**

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

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| State of Ohio, | : | |
| Plaintiff-Appellee, | : | |
| | | No. 10AP-174 |
| v. | : | (C.P.C. No. 09CR04-2437) |
| Carnell R. Scott, | : | (REGULAR CALENDAR) |
| Defendant-Appellant. | : | |

D E C I S I O N

Rendered on December 2, 2010

*Ron O'Brien*, Prosecuting Attorney, and *Sarah W. Creedon*, for appellee.

*Steven A. Larson*, for appellant.

APPEAL from the Franklin County Court of Common Pleas

KLATT, J.

**{¶1}** Defendant-appellant, Carnell R. Scott, appeals from a judgment of conviction and sentence entered by the Franklin County Court of Common Pleas. For the following reasons, we affirm that judgment.

**{¶2}** On April 24, 2009, a Franklin County Grand Jury indicted appellant with one count of aggravated murder in violation of R.C. 2903.01, one count of murder in violation of R.C. 2903.02, and one count of having a weapon while under disability in violation of R.C. 2923.13. Both murder counts also contained a firearm specification pursuant to

R.C. 2941.145. The charges arose from the shooting death of Terry Small. Appellant entered a not guilty plea to the charges and proceeded to a jury trial.

**{¶3}** At trial, the state's case was largely based on the testimony of Patricia Cooper. Cooper, an admitted drug-addicted prostitute, used to buy drugs from appellant. She also would have sex with appellant in return for drugs. On the morning of Small's death, appellant came to her house and told her to go to a drug house at 407 Berkeley Road in Columbus, Ohio. Appellant and Cooper went to the house and Cooper purchased some crack cocaine from a person who lived in the house.

**{¶4}** Cooper testified that while inside the house, appellant got into a verbal altercation with Small. Appellant accused Small of stealing items from his truck. Both men threw punches at one another and then Small ran out the back door. Cooper saw appellant walk to the back door and fire three shots out the back door. Cooper could not see Small. Following the shooting, Cooper exited the house through the front door. According to Cooper, appellant was the only person she saw with a gun the morning of the shooting. Police found Small lying facedown on a driveway approach that led up to the back of the house at 407 Berkeley Road. Small died from a single gunshot wound to the chest.

**{¶5}** Appellant submitted evidence implicating another man as the person who shot Small. Robert Broomfield testified that Antoine Littlefield assaulted him shortly after Small's death. During the assault, Littlefield allegedly told Broomfield "[d]on't make me kill you like I killed Terry Small." (Tr. 493.) Appellant also presented testimony from a woman who lived close to the house at 407 Berkeley Road. She testified that she heard

a gunshot and saw a number of young men, in their 20's, in the backyard of that house. Appellant is 35 years old. She then saw one of those men fall at the end of the driveway.

**{¶6}** The jury found appellant not guilty of aggravated murder but guilty of murder and the attendant firearm specification as well as having a weapon while under disability. The trial court sentenced appellant accordingly.

**{¶7}** Appellant appeals and assigns the following errors:

> [1.] THE TRIAL COURT ERRED IN OVERRULING THE DEFENDANT'S RULE 29 MOTION AS THERE WAS NOT SUFFICIENT EVIDENCE TO CONVICT THE DEFENDANT.
>
> [2.] THE TRIAL COURT VIOLATED CARNELL SCOTT'S RIGHTS TO DUE PROCESS AND A FAIR TRIAL WHEN IT ENTERED A JUDGMENT OF CONVICTION FOR MURDER, WHICH WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND THE FIFTH AND * * * FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND SECTION 16, ARTICLE I OF THE OHIO CONSTITUTION.
>
> [3.] CARNELL SCOTT'S RIGHT TO A FAIR TRIAL WAS VIOLATED BECAUSE TRIAL COUNSEL WAS INEFFECTIVE FOR NOT REQUESTING A JURY CHARGE OF VOLUNTARY MANSLAUGHTER IN VIOLATION OF HIS SIXTH AMENDMENT RIGHT UNDER THE U.S. CONSTITUTION.

**{¶8}** Appellant contends in his first and second assignments of error that his murder conviction is not supported by sufficient evidence[1] and is against the manifest weight of the evidence. We disagree.

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[1] Although appellant couches his first assignment of error as a challenge to the trial court's denial of his Crim.R. 29 motion, the standard of review for that decision is the same as our review of the sufficiency of the evidence. *State v. Graham*, 10th Dist. No. 09AP-896, 2010-Ohio-2907, fn.1.

**{¶9}** The legal concepts of sufficiency of the evidence and weight of the evidence are both quantitatively and qualitatively different. *State v. Thompkins* (1997), 78 Ohio St.3d 380, paragraph two of the syllabus. Therefore, we will separately discuss appellant's sufficiency of the evidence and weight of the evidence arguments.

**{¶10}** The Supreme Court of Ohio delineated the role of an appellate court presented with a sufficiency of the evidence argument in *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus:

> An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. 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.

**{¶11}** Whether the evidence is legally sufficient is a question of law, not fact. *Thompkins* at 386. Indeed, in determining the sufficiency of the evidence, an appellate court must give "full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson v. Virginia* (1979), 443 U.S. 307, 319, 99 S.Ct. 2781, 2789. Consequently, the weight of the evidence and the credibility of the witnesses are issues primarily determined by the trier of fact. *State v. Yarbrough,* 95 Ohio St.3d 227, 2002-Ohio-2126, ¶79; *State v. Thomas* (1982), 70 Ohio St.2d 79, 80. A verdict will not be disturbed unless, after viewing the evidence in the light most favorable to the prosecution, it is apparent that reasonable minds could not reach the conclusion reached by the trier of fact. *State v. Treesh* (2001), 90 Ohio St.3d 460, 484; *Jenks* at 273.

**{¶12}** In order to convict appellant of murder, the state had to prove beyond a reasonable doubt that appellant purposefully caused the death of another. R.C. 2903.02(A). Appellant argues that his conviction is not supported by sufficient evidence because no witness actually saw him shoot Small. We disagree.

**{¶13}** Although no witness actually saw a bullet hit Small, it is well-established that circumstantial evidence possesses the same probative value as direct evidence. *State v. Sowell,* 10th Dist. No. 06AP-443, 2008-Ohio-3285, ¶92 (citing *State v. Treesh*, 90 Ohio St.3d 460, 2001-Ohio-4). In fact, the Supreme Court of Ohio has held that "[a] conviction can be sustained based on circumstantial evidence alone." *State v. Franklin* (1991), 62 Ohio St.3d 118, 124 (citing *State v. Nicely* (1988), 39 Ohio St.3d 147, 154-55). In the present case, Cooper testified that appellant and Small got into a fight because appellant accused Small of stealing items from his truck. After each man threw punches at one another, Small ran out the back door of the house. Appellant went to the back door and fired three shots. Small was later found on a driveway approach that led to the back of the house, dead from a gunshot wound to the chest.

**{¶14}** Viewing the totality of the evidence in a light most favorable to the state, the evidence is sufficient for reasonable minds to conclude that appellant shot Small, causing his death. Accordingly, appellant's murder conviction is supported by sufficient evidence. Therefore, we overrule appellant's first assignment of error.

**{¶15}** Appellant's manifest weight of the evidence claim requires a different review. The weight of the evidence concerns the inclination of the greater amount of credible evidence offered to support one side of the issue rather than the other. *State v. Brindley,* 10th Dist. No. 01AP-926, 2002-Ohio-2425, ¶16. When presented with a

challenge to the manifest weight of the evidence, an appellate court, 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 [trier of fact] clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.' " *Thompkins* at 387 (quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175). An appellate court should reserve reversal of a conviction as being against the manifest weight of the evidence for only the most " 'exceptional case in which the evidence weighs heavily against the conviction.' " Id.

**{¶16}** A defendant is not entitled to a reversal on manifest weight grounds merely because inconsistent evidence was presented at trial. *State v. Raver,* 10th Dist. No. 02AP-604, 2003-Ohio-958, ¶21. Neither is a conviction against the manifest weight of the evidence because the trier of fact believed the state's version of events over the appellant's version. *State v. Gale,* 10th Dist. No. 05AP-708, 2006-Ohio-1523, ¶19; *State v. Williams,* 10th Dist. No. 08AP-719, 2009-Ohio-3237, ¶17. The trier of fact is free to believe or disbelieve all or any of the testimony. *State v. Jackson* (Mar. 19, 2002), 10th Dist. No. 01AP-973; *State v. Sheppard* (Oct. 12, 2001), 1st Dist. No. C-000553. The trier of fact is in the best position to take into account inconsistencies, along with the witnesses' manner and demeanor, and determine whether the witnesses' testimony is credible. *State v. Williams,* 10th Dist. No. 02AP-35, 2002-Ohio-4503, ¶58; *State v. Clarke* (Sept. 25, 2001), 10th Dist. No. 01AP-194. Consequently, an appellate court must ordinarily give great deference to the fact finder's determination of the witnesses' credibility. *State v. Covington,* 10th Dist. No. 02AP-245, 2002-Ohio-7037, ¶28; *State v. Hairston,* 10th Dist. No. 01AP-1393, 2002-Ohio-4491, ¶74.

**{¶17}** In his manifest weight argument, appellant highlights the credibility problems of the state's main witness, Cooper. She admitted to doing drugs the morning of the shooting. She has a lengthy criminal record and she admitted that she initially lied to police about Small's death. There were also contradictions between her testimony and testimony of other witnesses regarding the circumstances surrounding Small's death. However, the jury was aware of all of these concerns and could evaluate her credibility in light of them. *State v. Thompson*, 10th Dist. No. 08AP-22, 2008-Ohio-4551, ¶21; *State v. Reed*, 10th Dist. No. 09AP-84, 2009-Ohio-6900, ¶26. The trier of fact is in the best position to determine the credibility of a witness. Here, notwithstanding Cooper's credibility issues, the jury obviously chose to believe her testimony and her version of events. This was within the province of the jury as the trier of fact, and we will not substitute our judgment for that of the trier of fact. *State v. Jackson*, 10th Dist. No. 06AP-1267, 2008-Ohio-1277, ¶15; *Thompson*. Nor do we believe that the evidence weighs heavily against a conviction, such that the jury clearly lost its way and created a manifest miscarriage of justice.

**{¶18}** Appellant's murder conviction is not against the manifest weight of the evidence. Accordingly, we overrule appellant's second assignment of error.

**{¶19}** Appellant contends in his third assignment of error that he received ineffective assistance of trial counsel. To prevail on a claim of ineffective assistance of counsel, appellant must satisfy the two-prong test enunciated in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052; accord *State v. Bradley* (1989), 42 Ohio St.3d 136. Initially, appellant must show that counsel's performance was deficient. To meet that requirement, appellant must show counsel's error was so serious that counsel was not

functioning as the "counsel" guaranteed by the Sixth Amendment. Appellant may prove counsel's conduct was deficient by identifying acts or omissions that were not the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. *Strickland*, 466 U.S. at 690, 104 S.Ct. at 2066. Appellant's failure to satisfy one prong of the *Strickland* test negates a court's need to consider the other. Id., 466 U.S. at 697, 104 S.Ct. at 2069.

**{¶20}** In analyzing the first prong under *Strickland,* there is a strong presumption that defense counsel's conduct falls within a wide range of reasonable professional assistance. Id., 466 U.S. at 689, 104 S.Ct. at 2066. Appellant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. Id. (citing *Michel v. Louisiana* (1955), 350 U.S. 91, 101, 76 S.Ct. 158, 164). Tactical or strategic trial decisions, even if ultimately unsuccessful, do not generally constitute ineffective assistance. *State v. Carter* (1995), 72 Ohio St.3d 545, 558.

**{¶21}** If appellant successfully proves that counsel's assistance was deficient, the second prong under *Strickland* requires appellant to prove prejudice in order to prevail. Id., 466 U.S. at 692, 104 S.Ct. 2067. To meet that prong, appellant must show counsel's errors were so serious as to deprive her of a fair trial, "a trial whose result is reliable." Id., 466 U.S. at 687, 104 S.Ct. at 2064. Appellant would meet this standard with a showing "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id., 466 U.S. at 694, 104 S.Ct. at 2068.

**{¶22}** Appellant contends his trial counsel was ineffective for failing to request a jury instruction on voluntary manslaughter, a lesser included offense of murder. We disagree.

**{¶23}** Trial counsel's decision not to request a jury instruction on voluntary manslaughter might have been part of his trial strategy and, therefore, cannot be considered ineffective assistance of counsel. *State v. Lee,* 10th Dist. No. 04AP-234, 2004-Ohio-6834, ¶22 (citing *State v. Griffie* (1996), 74 Ohio St.3d 332, 333); *State v. Copley,* 10th Dist. No. 04AP-511, 2005-Ohio-896, ¶44; *State v. Davis,* 5th Dist. No. 2003 CA 429, 2004-Ohio-7056, ¶55 ("Thus, appellant has failed to overcome the presumption that trial counsel employed sound trial strategy in not requesting a jury instruction on the crime of voluntary or involuntary manslaughter.").

**{¶24}** Although appellant now questions his counsel's decision not to request an instruction on voluntary manslaughter, he has not overcome the presumption that such a decision may have been part of his counsel's sound trial strategy. Counsel argued at trial that appellant did not shoot Small. Counsel presented two witnesses in an attempt to place the blame for Small's death on other people. Broomfield testified that another man, Littlefield, made statements suggesting that Littlefield killed Small. Additionally, a neighbor testified that she saw a number of young men outside the house when Small was shot. Appellant is 35 years old. Counsel also highlighted the inconsistencies in Cooper's testimony, thereby challenging her credibility.

**{¶25}** In light of the evidence presented at trial, appellant's trial counsel reasonably could have been pursuing a valid "all or nothing" strategy. A request for a voluntary manslaughter jury instruction would have been inconsistent with that strategy.

See *State v. Golden*, 10th Dist. No. 01AP-367, 2001-Ohio-8769 ("Here, where seeking a lesser-included instruction would have been inconsistent with the defense theory, the failure of counsel to request such an instruction did not constitute ineffective assistance of counsel."). Appellant has not demonstrated that his trial counsel was ineffective by failing to request a jury instruction on voluntary manslaughter. We overrule appellant's third assignment of error.

**{¶26}** In conclusion, we overrule appellant's three assignments of error and affirm the judgment of the Franklin County Court of Common Pleas.

*Judgment affirmed.*

TYACK, P.J., and BROWN, J., concur.