

**IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY**

STATE OF OHIO

Plaintiff-Appellee

v.

NIGEL DIAZ

Defendant-Appellant

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Appellate Case No. 22604

Trial Court Case No. 06-CR-4315

(Criminal Appeal from
Common Pleas Court)

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O P I N I O N

Rendered on the 5th day of June, 2009.

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BROGAN, J.

{¶ 1} Nigel Diaz appeals from his conviction in the Montgomery County Common Pleas Court of purposeful murder in violation of R.C. 2903.02(A), one count of felony murder in violation of R.C. 2903.02(B), felonious assault with a deadly weapon in violation of R.C. 2903.11(A)(2), one count of tampering with evidence in violation of R.C.

2921.12(A)(1), and five firearm specifications.

{¶ 2} On November 10, 2005, Dayton police discovered the body of Kevan Weatherby face down on the floor of a back bedroom at a home located at 56 West Norman Avenue. Weatherby had been shot four times in the head at close range. Police discovered that Weatherby was married to Shante Weatherby and had two young sons. Police determined that Kevan left his family and moved into the West Norman house in April 2005. In August or September 2005, the defendant moved into the house with Weatherby. Shortly thereafter, Shante noticed that Kevan became arrogant and secretive. Although Shante never knew Kevan to carry a gun, she saw one in September 2005 in his bedroom. (Tr. 210.)

{¶ 3} In October 2005, Shante began to suspect that her husband was involved in selling illegal drugs after she smelled marijuana on money Kevan had given her. Later in October, Kevan expressed fear of his roommate so she suggested he move in with her mother. (Tr. 197.) The last day she saw Kevan alive was Sunday, November 6, 2005. Shante testified she and Kevan were planning on leaving Dayton with their children on Monday, November 7, 2005, because he found a job in Alabama. (Tr. 198.)

{¶ 4} Waymon Smith, a childhood friend of Kevan's, informed police that Kevan and the defendant were selling marijuana together. Smith testified at trial that the defendant wired money to people in New York for marijuana, and he and Kevan drove to New York and returned with a garbage bag full of wet marijuana. (Tr. 228.) Smith testified at trial that the defendant moved into Kevan's house about a month before Kevan's death.

{¶ 5} The State's star witness was Diaz's girlfriend, Tenika Hayes. Hayes

testified she met Diaz in the summer of 2005 when he was living with Weatherby. She corroborated Smith's testimony that Diaz and Weatherby were dealing marijuana which they got from New York. She testified that in September 2005 Diaz became upset with Weatherby because he sold some marijuana and Diaz did not get paid for it. She testified that Weatherby rented cars for Diaz's use to help pay him back. She said Diaz told her that Weatherby was trying to leave and "to stiff him" and he was going to have to kill him. (Tr. 281.)

{¶ 6} Hayes testified that on November 6, 2005, Diaz arranged to have Weatherby meet him and Hayes at a restaurant called Grandma's Kitchen. Hayes said Diaz told her that he planned to kill Weatherby. She testified Weatherby came to the restaurant and then left with Diaz. She testified Diaz returned later and told her that he had killed Weatherby. She testified Diaz told her he made Kevan beg for his life and then made him lie down on the floor of his bedroom and then he shot him in the head. (Tr. 285.)

{¶ 7} Hayes testified Diaz showed her the .357 Magnum revolver he used to kill Weatherby, and told her to take it to her people to see if she could get some money or drugs for it. (Tr. 287.) She testified she took the gun to her friend Johnny Trigg, Sr. and got sixty dollars and an ounce of weed for it. (Tr. 290.) She testified she gave the money and drugs to Diaz. When they learned that the police discovered Weatherby's body, she and Diaz left Dayton and went to Atlanta. She testified she and Diaz stayed in Atlanta for a week and then returned to Dayton to pick up her social security check before driving to New York City. She testified she and Diaz stayed in New York City through Christmas and then went to Atlanta where she was arrested in March 2006. At

the time of her arrest she was driving the gray Grand Prix Weatherby had rented in Dayton months earlier and which had been reported stolen.

{¶ 8} Hayes admitted she came forward with her information about Weatherby's death only after she was convicted of two counts of aggravated robbery and two counts of felonious assault in an unrelated matter and was seeking a deal from the State on sentencing. (Tr. 301.) Hayes testified that neither the State nor the court agreed to any sentencing concessions in trade for her cooperation with the State of Ohio. (Tr. 269.) Prior to her testimony, Hayes was sentenced to eleven years in prison. She received concurrent sentences for older charges of theft and forgery. Hayes admitted she could have received a maximum sentence of forty years on all the charges of which she was convicted. (Tr. 298.)

{¶ 9} Johnny Trigg, Sr. testified that Tenika Hayes pawned a black .357 Magnum revolver to him for fifty or sixty dollars and some marijuana. He testified the gun was later stolen from his house.

{¶ 10} Detective Doyle Burke testified he went to the Norman Avenue address on November 10, 2005 when it was reported that Weatherby had not been seen for several days. He and other detectives forced entry into the residence and discovered Weatherby's body lying in a pool of blood in the front upstairs bedroom. Doyle testified Weatherby had been shot in the head several times and the blood splatter pattern was indicative of the victim being shot while laying on the floor. (Tr. 140.) Burke testified that police did not recover any shell casings from the bedroom consistent with the murder weapon being a revolver. (Tr. 143.)

{¶ 11} Timothy Duerr, a firearms examiner with the Miami Valley Regional Crime Laboratory, testified he examined bullet fragments removed from Weatherby's head at the autopsy and determined the bullets could have been fired from a .357 magnum revolver.

{¶ 12} Dr. Brian Casto, a Montgomery County deputy coroner, testified he performed the autopsy upon Kevan Weatherby. He testified Weatherby died as a result of four gun shot wounds to the head and neck. (Tr. 114.) He used nineteen autopsy photographs to illustrate his testimony.

{¶ 13} Diaz testified in his own defense and denied killing Weatherby. He testified he left Dayton for Atlanta, Georgia on Friday, November 4, 2005. He testified he traveled to Atlanta with his cousin, Randy Newman. He testified Weatherby was a good friend and he occasionally stayed at his house overnight. He denied using or selling drugs at any time. (Tr. 380.) Diaz denied telling Detective Olinger that he did not learn of Weatherby's death until sometime in 2006.

{¶ 14} Randy Newman testified he drove up from Tampa, Florida, the Thursday after Halloween and drove his cousin, the defendant, to Atlanta the next day (November 4, 2005) around noon.

{¶ 15} Eleanor A. Walker, a good friend of the defendant, testified Diaz moved into her son's house in August 2005. She testified that she saw the defendant on November 4, 2005, around noon, when Diaz's cousin apparently was picking Diaz up to take him to Atlanta, Georgia. She testified she remembered the date because it was the day after she cashed her monthly social security check.

{¶ 16} In his first assignment, Diaz contends his convictions were against the

manifest weight of the evidence. He argues the only evidence came from a convicted felon, Tenika Hayes, who was trying to get a deal for her testimony. He notes Tenika Hayes was the person found driving the deceased's rental vehicle, and she sold the alleged murder weapon to Johnny Trigg, Sr. He notes Hayes was convicted of several serious crimes of violence the day after the deceased was last seen alive. He also notes that he presented the testimony of Randall Brown who testified he drove him to Atlanta two days before the deceased was last seen alive.

{¶ 17} The State argues that Diaz's convictions were not against the manifest weight of the evidence because Diaz's alibi witnesses were not credible. The State notes that Randall Newman's testimony was simply incredible. The State notes that the jury was not required to believe that Newman drove all the way from Tampa, Florida on Thursday, November 3, 2005, after working all day, and then immediately returned to Atlanta the next day with Diaz after driving all night. The State also argues that Eleanora Walker's testimony that she remembered the date Diaz left town because it was the day after she received her social security check was not credible since she had been receiving these checks for fifteen years and it was unlikely that monthly event stood out in her memory.

{¶ 18} The criminal manifest-weight-of-the-evidence standard was explained in *State v. Thompkins* (1997), 78 Ohio St.3d 380, 678 N.E.2d 541. *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202. In *Thompkins*, the court distinguished between sufficiency of the evidence and manifest weight of the evidence, finding that these concepts differ both qualitatively and quantitatively. Weight of the evidence addresses the evidence's effect of inducing belief. *Id.* "In other words, a reviewing court asks

whose evidence is more persuasive—the state’s or the defendant’s?” *Id.*

{¶ 19} To determine whether a verdict is against the manifest weight of the evidence, “The court, 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.” *State v. Elmore*, 111 Ohio St.3d 515, 2006-Ohio-6207, citations omitted. “The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction.” *Id.* When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the manifest weight of the evidence, the appellate court sits as a “thirteenth juror” and disagrees with the fact-finder’s resolution of the conflicting testimony. *Wilson*, *supra*, citations omitted.

{¶ 20} There is no evidence in this record that the jury lost its way. The State did rely on the testimony of a convicted felon to convict the defendant. Her testimony was consistent with the forensic evidence presented by the coroner and the investigating detectives. That evidence corroborated Hayes’ testimony that Diaz told her he made the victim lie down in the bedroom before Diaz shot him. Her testimony that Diaz shot Weatherby because he was planning on leaving and “stiffing him” for the money he owed him was also corroborated by the victim’s spouse. Shante Weatherby testified her husband told her on November 5, 2005 he was fearful of “Half,” a nickname for Diaz. She testified he stayed at her aunt’s house the last night she saw him alive.

{¶ 21} Despite the defendant’s protestations that he did not use or sell drugs,

Waymon Smith testified that the deceased and Diaz went to New York to get marijuana. There was no evidence introduced to suggest why Smith would implicate Diaz in drug trafficking with Weatherby.

{¶ 22} There is also circumstantial evidence that the person who killed Weatherby had a key to lock the residence where Weatherby resided. The police had to enter Weatherby's house forcibly because the doors were locked. There was evidence that the defendant had lived at the residence and had the means of securing it upon leaving. The jury had the opportunity to evaluate Ms. Hayes' testimony and that of the defendant. They chose to believe Ms. Hayes' testimony, and her testimony alone was sufficient to convict Diaz. The evidence was not against the manifest weight of the evidence. The first assignment of error is Overruled.

{¶ 23} In his second assignment, Diaz argues that his convictions were based on insufficient evidence. 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 crimes charged beyond a reasonable doubt. *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.C. 2781, 61 L.Ed. 2d 560. Having found that the convictions were not against the manifest weight of the evidence, it necessarily follows the convictions were not based on insufficient evidence. The second assignment of error is also Overruled.

{¶ 24} In his third assignment, Diaz contends the trial court abused its discretion when it failed to grant his motion for a continuance.

{¶ 25} Prior to the commencement of trial, and outside of the jury's presence, the trial court addressed a defense motion for a continuance filed on December 13, 2007.

The trial judge indicated he had read the motion and the attached letter from Diaz; he then gave counsel the opportunity to be heard. Defense counsel explained Diaz's request for a continuance as stemming from a belief that he "has not had ample time to prepare his case for trial. That he has, obviously, a great deal at stake here and that he would like to, once again, respectfully, request a continuance in order that he might continue his, we might continue, looking for witnesses." (Tr. 23.)

{¶ 26} The prosecutor opposed the motion saying, "There's been ample time to find any witnesses, whatever witnesses would support the defendant's contention of alibi in this matter. The case has been indicted for, I believe, it's over a year. And the defendant's been back since May and he's been aware of the charges and timeframe that's referenced. And, quite frankly, we're hard pressed to figure out why it would take so long to find anybody who could that alibi [sic]."

{¶ 27} The trial judge noted that the court had previously granted two continuances in the case, including a continuance of a trial date. Considering the fact that the indictment was returned about one year before trial and the fact that nothing "particularly new" was presented in the motion, the judge indicated his intention to overrule the motion. (Tr. 23.)

{¶ 28} Diaz then asked to speak to the court, which the judge allowed. Diaz complained that defense counsel waited until November 27, 2007 to file the notice of alibi and that counsel failed to contact witnesses. (Tr. 24.) The trial judge responded that the defense would not be precluded from presenting alibi testimony simply because counsel did not file the notice of alibi as soon as he learned that Diaz wanted to present such a defense. *Id.* Further, the court told Diaz that defense counsel had advised the

court that he had “taken due diligence to contact these people and they’re either going to be here or they’re not under the circumstances presented.” Id. So, again, the judge said he would overrule the motion for continuance.

{¶ 29} Not satisfied, Diaz then complained that the defense had not received full discovery. (Tr. 24-25.) When given a chance to respond, the prosecutor clarified that all discovery had been given to the defense with itemized lists and that multiple discovery receipts had been signed for and filed. (Tr. 25.) “It’s been ongoing as we receive it. We provided it to the defense. We’ve not received any reciprocal discovery to this point. If there is discovery that’s been received by the defense, we’ve not received any. But as far as our burden, we’ve met our burden continuously.” (Tr. 25.)

{¶ 30} Defense counsel added that, as far as he knew, he had received all discovery, but that, if anything came up during the course of the trial that had not been received, it would be dealt with at that time. (Tr. 25.) The trial judge then adjourned the in-chambers hearing, and the trial began. (Tr. 25.)

{¶ 31} A few days into the trial, the prosecutor provided additional discovery material to the defense. The following occurred out of the hearing of the jury:

{¶ 32} “Mr. Dagenhart: Thank you sir, I was just presented on the break with some additional discovery by the state, specifically it was a narrative entered by Detective Smith today uh and outlines two interviews, one on last Friday, uh two on last Friday December 14th. One is Waymon Smith and one interview with Mr. Johnny Trigg, Sr., giving us new information uh, significant new information which is also extremely prejudicial in regards to what this witness, Waymon Smith, is going to say. Rather than read it into the record I’ve marked the one page of discovery as defense Exhibit B and I

thought I would just tender it to the court for the record.

{¶ 33} “The Court: Actually why don’t we have it marked as a Motion Exhibit of yours.

{¶ 34} “Mr. Dagenhart: That would be fine.

{¶ 35} “The Court: Mr. Deschler.

{¶ 36} “Mr. Deschler for the State: Your honor, I believe what the defense is referencing is statements obtained in interviews on December 14th of last week, it would have been Friday, we just received them ourselves uh and these are addendums to statements of previous interviews obtained from these witnesses. So these witnesses have definitely been known to the defense for some time now and this is just follow-up information provided even though it was last Friday the 14th. It was put in a supp [supplementary report] and provided to us and we provided it to the defense today as soon as we got it being Monday.

{¶ 37} “The Court: It’s the court’s understanding that these statements by prospective witnesses were made pursuant to an interview made last Friday, is that correct?

{¶ 38} “Mr. Deschler for the State: Yes, that’s correct your honor with us Waymon Smith.

{¶ 39} “The Court: So the content of those statements was not known to the government until then?

{¶ 40} “Mr. Deschler for the State: That’s correct your honor we didn’t...we ourselves didn’t have a chance to interview him in reference to this statement until Friday, uh Friday night actually.

{¶ 41} “The Court: And that was timely supplied to Mr. Dagenhart, as of today?”

{¶ 42} “Mr. Deschler for the State: Yes sir.

{¶ 43} “Mr. Dagenhart: We got it today at the lunch break, yes sir.

{¶ 44} “The Court: Oh, very well, the court finds that the discovery rules that are applicable the court’s management plan have been complied with here and I will permit the state to inquire on those matters contained in the statement on the motion exhibit. The other matter before the court has to do with an alternate juror recognizing the last witness to testify and will inquire of that juror...actually I’m going to do this in just a moment I’m going to do this in camera so if the others who are here in the court room the public will be excluded from that.”

{¶ 45} Whether to grant or deny a continuance is a matter entrusted to the broad, sound discretion of the trial judge. *State v. Unger* (1981), 67 Ohio St.2d 65, syllabus. “An appellate court must not reverse the denial of a continuance unless there has been an abuse of discretion.” *Unger*, at 67, citations omitted. It is well-settled that the definition of an abuse of discretion is action that connotes more than an error of law or of judgment. Rather, it contemplates an attitude by the court that is unreasonable, arbitrary, or unconscionable. *State v. Reiner* (2000), 89 Ohio St.3d 342, 356.

{¶ 46} At the time the trial court denied Diaz’s third pre-trial request for a continuance, there was no evidence that the State had not presented all the discovery material in its possession. Although Diaz requested additional time to look for additional witnesses, there was no evidence that Diaz did not present all the witnesses he intended to present in his behalf. When the State later supplemented its discovery with a one-page report of its interview of State’s witnesses, Waymon Smith and Johnny Tripp, the

defendant did not demonstrate how he was prejudiced by the mid-trial discovery provided.

{¶ 47} The State argues that it fully complied with both Crim.R. 16 and Mont.Local R. 3.03 by providing the statements of Smith and Tripp when it did. We agree. We also do not know what was contained in the one-page supplemental discovery because Defense Ex.B is not part of the appellate record. In any event, Diaz did not request a continuance after the supplemental discovery was provided. See *State v. Bowshier*, Clark App. No. 06-CA-41, 2007-Ohio-5364. The trial court did not abuse its discretion in denying Diaz's third continuance motion. The third assignment of error is Overruled.

{¶ 48} In his fourth assignment, Diaz argues that the trial court erred in overruling his motion to suppress statements he gave to police after he was arrested. The record reveals that Dayton Police Detectives Donna Pack and Philip Olinger traveled to Decatur, Georgia to transport Diaz to Dayton for trial on the pending murder and other related charges. Donna Pack testified she and Olinger met Diaz on the morning of May 4, 2007 at the DeKalb County Jail. Diaz was dressed in civilian clothes and he was placed in the rear of a transport van in handcuffs. At 9:37 a.m., Detective Pack presented a *Miranda* rights and waiver form to Diaz explaining that they wished to interview him in regard to the crime of murder. Pack said she explained the form to Diaz who indicated he understood his rights and he signed the waiver indicating a willingness to talk to Pack and Olinger.

{¶ 49} Pack said she and Olinger engaged in casual conversation with Diaz at various times throughout the nine-hour trip home from Georgia. She said at times Diaz initiated the conversation. She said when they pulled into a McDonald's about two hours

after they left Decatur, Diaz made his first statement relating to the case. Pack did not relate what incriminating statement or statements Diaz allegedly made to her and Olinger. She stated she did not recall that Diaz ever asked for an attorney. Diaz did not testify at the suppression hearing. At the conclusion of the hearing, the trial court found that any statements Diaz made during the trip to Dayton to the officers were admissible. The court found that all of the warnings required by *Miranda* were properly given by police and waived by Diaz. The court found no evidence Diaz ever requested counsel.

{¶ 50} Diaz argues that he should have been re-advised of his *Miranda* rights during the nine-hour trip to Dayton. Further, he states he was represented by counsel. The State argues that the evidence supports the trial court's finding that Diaz's statements were voluntarily made after a knowing and voluntary waiver of his *Miranda* rights. The State argues there was no need to re-advise Diaz of his rights since it was a continuous conversation while traveling to Dayton. Lastly, the State argues that Diaz did not raise the issue that he should not have been questioned since he had received appointed counsel before he was extradited back to Ohio. Also, the State argues that it did not question Diaz about the murder case, but that it was Diaz who questioned them about the investigation.

{¶ 51} The record is not clear what incriminating statement Diaz made and when on the trip to Dayton he made it. Perhaps it was Detective Olinger's testimony at trial that Diaz denied living in Dayton and only learned in 2006 that Weatherby had been murdered. (Tr. 346.) Olinger testified that Diaz told him a person named Mike told him Weatherby had died but Diaz did not ask how he met his death.

{¶ 52} We agree with the State that the evidence supports the trial court's finding

that the defendant's statements were freely and voluntarily given after he waived his *Miranda* rights. There is no evidence he requested counsel during the trip to Dayton. The totality of circumstances demonstrates that Diaz was aware of his *Miranda* rights during the nine-hour trip to Dayton. He need not have been re-advised. See *State v. Parrish*, Mont. App. No. 21091, 2006-Ohio-2677. Defendant waived any objections to the admission of his statements on the basis of a Sixth Amendment claim. That issue was not raised in his written motion or at the hearing itself and the trial court was not required to address it. The Appellant's fourth assignment of error is Overruled.

{¶ 53} In his fifth assignment of error, Diaz argues the trial court erred in various evidentiary rulings which prevented him from receiving a fair trial. Specifically, he argues the trial court erred in permitting evidence that Diaz and Weatherby traveled to New York City to buy a quantity of marijuana and that Weatherby owed Diaz for missing drugs which was the motive for the killing. Diaz argues this evidence should not have been admitted because it was inadmissible evidence of prior bad acts prohibited by Evid.R. 404(B) and Evid.R. 403(B).

{¶ 54} The trial court overruled Diaz's liminal motion to prevent the State from presenting evidence that he and Weatherby agreed to sell marijuana together. (Tr. 183.) The trial court held the evidence admissible to explain Diaz's motive for killing Weatherby. The trial judge stated he would give the jury an instruction concerning the limited purpose the evidence could be considered by them. The State argues that the trial court did not abuse its discretion by permitting this testimony by Waymon Smith and Tenika Hayes to be admitted.

{¶ 55} Evid.R. 404(B) provides:

{¶ 56} “(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 that he acted 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.” [Emphasis added.]

{¶ 57} The State offered the testimony of Waymon Smith and Tenika Hayes that the defendant and the deceased were engaged in selling marijuana to prove consequential facts, to-wit, Diaz’s motive to kill Weatherby, not to prove that Diaz was a person of bad character and he was acting in conformity with that character in killing Weatherby. See *State v. Fields* (2001), 93 Ohio St.3d 6; *State v. Keene* (1998), 81 Ohio St.3d 646.

{¶ 58} Evid.R. 403(A) provides that although relevant, evidence is inadmissible if its probative value is substantially outweighed by the danger of undue prejudice, of confusion of the issues, or if misleading the jury. The trial court has broad discretion in determining whether probative evidence is substantially outweighed by its prejudicial effects. See *State v. Jones* (2001), 91 Ohio St.3d 355. Abuse of discretion connotes unreasonable and arbitrary conduct on behalf of the trial court. *State v. Hancock*, 108 Ohio St.3d 57, 2006-160. The trial court did not act unreasonably or arbitrarily in concluding the probative value of Diaz and the deceased’s drug activity to prove the motive for the killing outweighed the prejudicial effect of that testimony.

{¶ 59} Diaz argues the trial court abused its discretion in admitting nineteen autopsy photographs. He contends the photographs were inflammatory. The State argues the photographs were admitted to assist the coroner in the presentation of his

testimony. The State argues that only two photographs were arguably gruesome, but that does not prevent their admission. *State v. Apanovith* (1987), 33 Ohio St.3d 19. The Ohio Supreme Court has generally found no abuse of discretion in the admission of autopsy photographs which assist the coroner's presentation. See *State v. Heinisch* (1990), 50 Ohio St.3d 231. We have examined the photographs and find no abuse of discretion present in the trial court's ruling.

{¶ 60} Diaz contends the trial court erred in conducting an in-chambers conference with counsel without him being present. (Tr. 436-438.) After the trial court recessed at the conclusion of the second last day of trial, the court conducted an in-chambers conference with counsel. Defense counsel moved to dismiss the felonious assault charge, alleging serious physical harm as redundant to the murder charge. The trial court granted the defense motion and ordered that the felonious assault charge under R.C. 2903.11(A) be dismissed. Diaz's counsel waived the right of Diaz to be present for the conference. We fail to see how Diaz was prejudiced by his failure to be present at a conference at which his counsel obtained the dismissal of one of the charges in the indictment. There is no evidence Diaz was denied a fair trial or hearing due to his absence. See *State v. Davis*, 116 Ohio St.3d 404, 417; 2008-Ohio-2. The fifth assignment of error is Overruled.

{¶ 61} In his sixth assignment, Diaz argues his trial counsel was constitutionally ineffective for failing to do various things. Initially, he claims his counsel was ineffective for failing to subpoena certain alibi witnesses which he does not name. The record reveals that two alibi witnesses testified on behalf of Diaz, to-wit: Randy Newman and Eleanora Walker. At the conclusion of the defendant's case, there was no indication in

the record that any alibi witnesses had not been subpoenaed by defense counsel.

{¶ 62} Secondly, he contends his trial counsel was ineffective for failing to request a continuance or move to exclude new discovery introduced by the State in the midst of the trial. The new discovery was a one-page narrative police report of Detective Smith's pre-trial interview of Waymon Smith and Johnny Trigg, Sr. The significance of this report is not portrayed in this record because Defense Ex. B is not part of the appellate record. Waymon Smith was cross-examined concerning the pre-trial interview with Detective Smith. (Tr. 234.) Waymon Smith denied telling Detective Smith that he had loaned the deceased a significant amount of money. (Tr. 235.) He admitted he loaned seven thousand dollars to his business partner, Mitchell West. He testified he believed the detective misunderstood him. There is no evidence that the late discovery prejudiced the defendant.

{¶ 63} Lastly, Diaz asserts that his trial counsel was ineffective for not filing an earlier continuance motion and for not filing a liminal motion regarding the autopsy photographs. Neither of these contentions have any merit in light of our earlier resolution of the continuance issue and the photographs issue. The Appellant's sixth assignment is Overruled. The judgment of the trial court is Affirmed.

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DONOVAN, P.J., and WOLFF, J., concur.

(Hon. William H. Wolff, Jr., retired from the Second District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

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