[Cite as *State v. Harris,* 2010-Ohio-498.]

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

STATE OF OHIO	:	
	:	Appellate Case No.
Plaintiff-Appellee	:	
	:	Trial Court Case No. 2006-CR-3683
v.	:	
	:	(Criminal Appeal from
ANTHONY A. HARRIS	:	Common Pleas Court)
	:	
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the 12th day of February, 2010.

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BROGAN, J.

{¶ 1} Anthony Harris has appealed his conviction for murder and felonious assault. In addition to contending that the jury's verdicts were contrary to the weight of the evidence, and contending that he was denied effective assistance of counsel, Harris contends that certain testimony should not have been admitted into evidence

because it was irrelevant and highly prejudicial: (1) testimony that in a house Harris had been in, police found a gun unrelated to either Harris or the charged offenses, and (2) testimony that he was profiled on an episode of the television show "America's Most Wanted" (AMW).

{¶ 2} We reject Harris's weight-of-the-evidence and ineffective assistance of counsel contentions. But we do think that the trial court should not have admitted the contested testimony. We agree that it was irrelevant and can be highly prejudicial. In this case, however, in light of other, independent evidence, we think the admission of the testimony was harmless. We will affirm the conviction.

I

{¶ 3} Ta-quan Johnson and Jesse Brown III ran a motorcycle club called Good Fellows, which held a meeting one Thursday night in late August 2006 at their clubhouse in Dayton, Ohio. At this meeting, as they typically did, Johnson and Brown set up a bar and served beer. Around 3 a.m. a group of men walked into the clubhouse, among them was Michael Sherman, a close friend of Brown's girlfriend, DiVina Jones. Sherman and Jones were so close that they called each other "cousin." Sherman walked over to the bar where Brown was sitting and sat down next to him. Brown told Johnson (tending bar that night) to give Sherman a beer, and Brown and Sherman began talking. After a few minutes of talking, seeing an open pool table, the two rose and walked over to shoot a game.

{¶ 4} By 3:30 a.m. or so most people, including Sherman, had left the clubhouse, so Johnson and Brown began cleaning up. Johnson went outside to

put a few cases of beer in his car, and he noticed Sherman's car in the parking lot, a white, two-door Monte Carlo. Sherman was sitting in the driver's seat and someone Johnson could not see was in the passenger seat. Johnson continued to his own car, put the cases inside, and turned to walk back to the clubhouse. When he looked up, Johnson saw Brown standing outside. Johnson then watched the passenger door of Sherman's car open and heard the passenger say, "I want to know something the next time you give my cousin two dollars for some gas." (Tr. 80). As Brown began walking toward Sherman's car, Johnson saw Harris (he could see the passenger now) pull out a gun and point it at Brown, telling him to get his hands out of his pockets. When Brown reached the driver's-side of the car Johnson heard him say to Sherman, "tell your goof to watch what he called and made up." (Tr. 82).

{¶ 5} Then Johnson watched as Harris started shooting at Brown. Brown collapsed and Johnson, still standing next to his car, took a step toward him. But Johnson changed his mind when he saw that Harris had changed targets. As Johnson turned to run, one of Harris's bullets found its mark and he fell to the ground. After falling, Johnson heard a few more shots and then Harris say, "right cous, right," before the car pulled out of the parking lot. (Tr. 83). In all, Harris divided fourteen bullets between them. Twelve hit their marks and left Johnson paralyzed and Brown dead.

{¶ 6} Justin McCombs was sitting in his car across the parking lot, head down fumbling with his keys as tried to find the right one to start the car. He heard a gunshot and looked up to see the shooter on the passenger side of the white Monte

Carlo, walking towards the rear. After Johnson fell, McCombs watched as the shooter fired a few more shots at Brown, who was still on the ground. When the car took off, McCombs ran to the men and called the police. He did not get a good look at the shooter's face but described him as wearing a dark t-shirt and dark shorts.

{¶ 7} Immediately after pulling out of the parking lot, Sherman drove north through the city to the house where his sister's boyfriend was staying at 2626 Falmouth. When they arrived, Harris went inside. Police, having located Sherman's car parked in the driveway, soon arrived. They knocked on the front door, and the man who answered consented to a search of the house. During the search, police found a gun, which later testing of the bullet casings found at the scene of the shooting showed was not the gun that fired the bullets at Brown and Johnson. Their search also uncovered a black t-shirt and a pair of blue jean shorts and, underneath them, Harris's wallet. But police did not find Harris.

{¶ 8} Police did not find Harris for almost two years. They got their break when, in response to a letter from Brown's mother, and with information provided by Dayton police, the television show *America's Most Wanted* profiled Harris in one of its January 2008 episodes. Tips came in that lead police to Atlanta, Georgia. There, in February 2008, at the county jail, Dayton police picked up Harris, who had been booked under the name Jonathon Coles. During the drive back to Dayton, Harris, having agreed to talk, admitted to the officers that he had been using the name Jonathon Coles since he fled Dayton in 2006.

{¶ 9} The following month, the grand jury returned a six-count indictment against Harris: murder (as a proximate result of felonious assault with a deadly

weapon), R.C. 2903.02(B); murder (as a proximate result of felonious assault causing serious physical harm), R.C. 2903.02(B); two counts of felonious assault with a deadly weapon, R.C. 2903.11(A)(2); two counts of felonious assault causing serious physical harm, R.C. 2903.11(A)(1). A firearm specification accompanied each count. In September 2008, a jury found Harris guilty on each count and found each firearm specification true. The trial court sentenced Harris to serve thirty-seven years to life in prison. Harris timely appealed his conviction, and he now assigns four errors for our review.

II

First Assignment of Error

"WHETHER THE VERDICTS ARE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶ 10} We will review the first assignment of error by following this standard: "When a conviction is challenged on appeal as being against the manifest weight of the evidence, we must review the entire record, weigh the evidence and all reasonable inferences, consider witness credibility, and determine 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.'" *State v. Reed*, 155 Ohio App.3d 435, 2003-Ohio-6536, at ¶51, quoting *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387. After reviewing the record, weighing the evidence and all reasonable inferences, and considering the credibility of the witnesses, we cannot say that the verdicts are contrary to the weight

of the evidence–eyewitness testimony identified Harris as the shooter; clothing linked to Harris was found soon after the shooting that matched the description police had of what the shooter was wearing; and Harris fled, evading police for almost two years.

{¶ 11} Sherman and Johnson were eyewitnesses to the shooting who each told the jury unequivocally that Harris was the shooter. "Any doubt in your mind," the prosecutor asked Johnson, "that this [Harris] is the man who shot you and your friend, Jesse?" "No," Johnson replied. (Tr. 88). "There is not doubt in your mind that it was the defendant?" asked the prosecutor, "Will you ever forget that?" "No," the jury heard Johnson reply. (Tr. 99). The jury also heard that Johnson fingered Harris soon after the shooting, quickly and definitively picking out Harris's picture from a photo array: "When you were asked by detectives to identify the shooter," said the prosecutor, "you looked at that photo spread you told us about. You told us that you picked out the defendant's photograph?" "Yes," said Johnson. "You did not take any time?" "No." (Tr. 98). Sherman, too, quickly picked out Harris's photograph from an array. When the prosecutor asked Detective Doyle Burke how long it took Sherman to pick out Harris's photograph, he replied, "It was immediate. He [Sherman] stated in the beginning of the interview he knew the individual but only by nickname. So this was not a stranger he was picking out." (Tr. 55). Sherman also told the jury that he saw a gun in Harris's hand and watched Harris shoot Johnson.

{¶ 12} The jury further heard that police found at the residence Harris entered soon after the shooting a shirt and pair of shorts that matched the description of what

the shooter had been wearing. Sherman testified that immediately after the shooting he drove Harris to 2626 Falmouth. When they arrived, Sherman said, Harris went inside. There, police found the clothing and, as one officer put it, "[u]nderneath that clothing was a man's wallet. In the wallet was the identification of Anthony Harris." (Tr. 53).

{¶ 13} Finally, the jury heard that soon after the shooting Harris fled Dayton and assumed a new identity. The shootings took place in August 2006, but Harris was not arrested until February 2008 because, according to the testimony of Officer Michael Galbraith, they simply could not find him. When police finally caught up with Harris in Atlanta, Georgia, they discovered that Harris had been living under an assumed name.

{¶ 14} Harris, though, argues that there were critical problems with the prosecution's evidence. He claims that evidence linking him to the crime was missing, that the prosecutor did not physically connect him to the crimes, that the prosecutor did not produce the gun used in the crime, that the prosecutor did not prove that he owned or possessed a gun, that the clothes found at 2626 Falmouth matched only a generic description of a black shirt and jean shorts, and that the prosecutor never proved that the clothes belonged to him. Some of the evidence that Harris asserts was missing was unnecessary (e.g., the gun used in the shooting and proof that Harris owned a gun). Other evidence may be found in the testimony of the two eyewitnesses (e.g., that Harris possessed a gun that night and was physically present at the shooting). The remaining alleged evidentiary problems do not cause us to believe the jury made a mistake. Lastly, Harris points out that on

none of the clothing was found any gun-powder residue or blood. We fail to see the significance of this when, so far as we can tell from the record, neither test was ever performed. Also, given the distance that we infer was between the shooter and his victims, that blood would not be found on the clothing would hardly be surprising.

{¶ 15} Harris also raises issues of Sherman's credibility and weight that should be accorded his testimony. He points to conflicting accounts of certain events that occurred on the night of the shooting, and points out Sherman's admission that he (Sherman) was under the influence of alcohol, Xanax (a muscle relaxant), and marijuana that night. Some of Sherman's testimony does conflict with that of other witnesses; however, the conflicts are on largely insignificant points of fact, like, for example, how many men walked into the clubhouse with Sherman on the night of the shooting. But nothing about the conflicts or the jury's apparent resolution of them suggests to us that the jury lost its way. Also, the issue of how much weight should be given to Sherman's testimony we leave to the jury to determine, and, seeing no reason to question its determination, we defer to its decision. Finally, we observe that having heard the eyewitness testimony of Johnson plus the testimony of the other witnesses, the jury could have found Harris guilty even if it were inclined to give Sherman's testimony scant credit and weight.

{¶ 16} Harris lastly raises an admittedly puzzling issue regarding what the shooter said, in light of the apparent relationships among some of the people involved. DiVina Jones, Jesse Brown's girlfriend at the time, and Michael Sherman are not related according to any chart of consanguinity but nevertheless have known each other so long that they had taken to calling each other "cousin." Johnson

testified that both before and after the shooting the shooter referred to his "cousin." Harris points out that there is no evidence that Jones and he were friends let alone close enough for him to refer to her as his cousin. The state does not attempt to solve this puzzle.

{¶ 17} This evidence, of course, suggests that the shooter was actually Sherman. But we must disregard this suggestion immediately in light of Johnson's unequivocal "No" to the prosecutor's question, "[D]id [Sherman] shoot you?" (Tr. 98-99). Also, that Sherman would gun down his "cousin's" boyfriend is difficult to believe, particularly in the absence of evidence showing any animosity between Brown and Sherman. Indeed, the evidence shows the exact opposite: Johnson testified that when Sherman came into the clubhouse Brown told him (Johnson) to give Sherman a beer, and Sherman and Brown sat at the bar laughing and joking, having what by all accounts was an amicable conversation. Puzzling as this bit of testimony is, given all the evidence before the jury we cannot say that the jury created a manifest miscarriage of justice that we must correct.

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

Second Assignment of Error

"WHETHER THE TRIAL COURT ABUSED ITS DISCRETION BY ADMITTING INTO EVIDENCE A RIFLE WITH NO CONNECTION TO THE APPELLANT OR THE CRIMES."

{¶ 19} The prosecutor admitted that the gun police found in the house at 2626 Falmouth was not involved in the shooting in this case and had no connection to

Harris. But when counsel objected to the testimony regarding the gun, the trial court overruled the objection, assuring counsel that the evidence was relevant, "It is relevant. Trust me on that." (Tr. 183). It is beyond our ability to comprehend why the court thought this. And we think that the court plainly abused its discretion by allowing the testimony. See *Rigby v. Lake Cty.* (1991), 58 Ohio St.3d 269, 271 (The admission of evidence is reviewed under the abuse-of-discretion standard.).

{¶ 20} In addition to the possibility of prejudice, the unrelated-gun evidence was not admissible because it was not relevant. Evid.R. 402 ("Evidence which is not relevant is not admissible."). Relevant testimonial-evidence tends to prove (or disprove) a material element of an offense. *State v. Gardner* (1979), 59 Ohio St.2d 14, 20; see, also, Evid.R. 401 ("Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."). We do not see how this evidence tended to prove that Harris was guilty. That police found a gun in the house did not tend to prove any material element of the charged offenses, nor did the evidence make it more likely that Harris committed the offenses. The state contends that the evidence helped the jury know what items at the residence police discovered and collected, but this is nothing the jury needed to know.

{¶ 21} Still, we will not reverse Harris's conviction on this basis because we think the error was harmless. Criminal Rule 52(A) instructs us to disregard "[a]ny error, defect, irregularity, or variance which does not affect substantial rights." See, also, Evid.R. 103(A) ("Error may not be predicated upon a ruling which admits or

excludes evidence unless a substantial right of the party is affected * * *."). This rule is premised on the idea that the U.S. Constitution guarantees an accused the right to a trial free only from prejudicial error, which is not necessarily a trial free from all error. See *U.S. v. Hasting* (1983), 461 U.S. 499, 508-509, 103 S.Ct. 1974, 76 L.Ed.2d 96. We do not think that the admission of this evidence materially contributed to Harris's conviction because we find it highly unlikely that the jury would have acquitted Harris in its absence. The prosecutor presented other evidence, independent of the irrelevant gun-evidence, on which the jury could have based its verdicts.

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

Third Assignment of Error

"WHETHER THE TRIAL COURT ABUSED ITS DISCRETION BY ADMITTING TESTIMONY REGARDING APPELLANT BEING PROFILED ON 'AMERICA'S MOST WANTED' INTO EVIDENCE."

{¶ 23} When Harris objected to the AMW testimony, the trial court overruled the objection explaining, "There is a chain gap here, they [the prosecution] have the right to explain why there is a two year gap and this is quite a bit." (Tr. 159). Brown's father then proceeded to testify about how a letter Brown's mother sent to AMW resulted in Harris being profiled on the show. Later, Officer Galbraith testified that when AMW producers contacted him he gave them information about the case and Harris. The court abused its discretion by allowing these references to AMW.

{¶ 24} The trial court should have excluded this testimony under Evid.R.

403(A) because its probative value was substantially outweighed by the danger of unfair prejudice. Evid.R. 403(A) ("Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury."). That Harris appeared on AMW had little to do with whether he committed the crimes for which he was being tried. And such evidence "is incredibly and unfairly prejudicial–essentially telling the jurors to believe that [the defendant] is guilty of the charged offenses because he appeared on [a] well-known television program[] featuring individuals that police consider responsible for committing crimes." *U.S. v. Baker* (C.A.11, 2005), 432 F.3d 1189, 1219; see, also, *Ford v. Curtis* (C.A.6, 2002), 277 F.3d 806, 811 (saying that reference to AMW is "of nominal relevance and prejudicial"); *Wilding v. State* (Fla., 1996), 674 So.2d 114, 119 (saying that "[t]he fact that [the defendant] was the subject of this widely viewed television program clearly was irrelevant and highly prejudicial").

{¶ 25} The state contends that the evidence explained the course of the investigation leading to Harris's arrest and prosecution and helped the jury understand why there was a time gap between the commission of the crimes and the trial. The state relies on the opinion in *State v. Korecky* (June 13, 1995), Franklin App. Nos. 94APA10-1505, 94APA10-1506, for support, but *Korecky* is distinguishable. Unlike Harris, the defendant in *Korecky* had been charged with fleeing. Even then, the court said that steps taken to locate him were only minimally relevant.

{¶ 26} The problem here is not so much the bare facts of the investigation

themselves but the reference to Harris's appearance on AMW. The reference to AMW "simply served to unnecessarily emphasize the seriousness of the crimes for which defendant was a fugitive." *State v. Tucker*, Franklin App. No. 00AP-670, 2002-Ohio-3274, at ¶43. The fact that Harris was not arrested for almost two years and where he was found could have been presented to the jury through the testimony of a police officer without referring to AMW.

{¶ 27} Still, we think that this error, too, was harmless, for the same reason that we, in the second assignment of error, thought the admission of the irrelevant gun-evidence was harmless. Given the other, independent evidence presented by the prosecution, particularly the eyewitness testimony, we find it highly unlikely that the jury would have acquitted Harris but for hearing that he was profiled on AMW.

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

Fourth Assignment of Error

"WHETHER APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL."

{¶ 29} To prevail on his claim of ineffective assistance of counsel, Harris must show that defense counsel's performance was so poor as to be legally deficient, and then Harris must show he was prejudiced by the deficiency. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. Harris contends that counsel allowed the court to empanel a biased juror, and that counsel displayed a general pattern of ineffectiveness. We disagree.

{¶ 30} Harris first contends that counsel failed to exercise a peremptory

challenge on the juror identified on page sixteen of the trial transcript as "Ms. Johnson." There, the juror admitted that she was uncertain whether she could be impartial because her daughter worked as an assistant to Ms. Caudill, an employee in the prosecutor's office. But later in the transcript, defense counsel says, "*Ms. Judson*, I think you mentioned that you knew Ms. Caudill?" (Tr. 62) (Emphasis added). After listening to the audio recording of this portion of the trial, we discovered that Harris has been mislead by an error in transcription. On page sixteen, the prosecutor actually said "Ms. Judson," not "Ms. Johnson" like the transcript reads. The transcript shows that the prosecutor exercised his third peremptory-challenge to dismiss Ms. Judson. (Tr. 67). Thus, the potentially-biased juror Harris points to here did not serve on the jury that found him guilty.

{¶ 31} We also disagree that defense counsel's conduct wove a pattern of woeful ineffectiveness. Harris seems to think that the shortcomings of counsel's performance are self evident, because he never actually explains them. He points to the fact that counsel proffered only one witness and one exhibit but does not say why this was deficient conduct. Harris also points to counsel's failure to cross examine Michael Sherman on each inconsistency in his testimony, and he points out that counsel objected only three times during the trial. Again, he does not say why effective counsel would have done otherwise. Also, while it may be true, as Harris asserts, that counsel could have asked the crime lab to perform a wearer-identification test on the clothing police found at 2626 Falmouth, and counsel could have had all the evidence tested by another expert, Harris again fails to say, let alone convince us, why effective counsel would have acted differently. Finally,

counsel was upbraided by the court for failing to request a copy of the 911 call, as local practice apparently dictated he must. Defense counsel was from Georgia, and while he perhaps should have familiarized himself more throughly with local practice, this was the only such incident and we do not think it constituted deficient performance.

{¶ 32} We cannot say that the conduct identified by Harris, considered separately or together, rose to the level of legally deficient performance under the *Strickland* test. And even if it did, Harris (perhaps thinking it, too, is self evident) fails to explain how he was prejudiced.

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

III

{¶ 34} Having overruled all four assignments of error, Harris's conviction is Affirmed.

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GRADY and FROELICH, JJ., concur.

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