[Cite as *State v. Smith*, 2009-Ohio-4539.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
HIGHLAND COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	Case No. 08CA15
vs.	:	
WILLIAM H. SMITH,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellant.	:	

APPEARANCES:

COUNSEL FOR APPELLANT: Timothy Young, Ohio Public Defender, and Melissa M. Prendergast, Assistant Ohio Public Defender, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215[1]

COUNSEL FOR APPELLEE: James B. Grandey, Highland County Prosecuting Attorney and Keith C. Brewster, III, Highland County Assistant Prosecuting Attorney, 112 Governor Foraker Place, Hillsboro, Ohio 45133

CRIMINAL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED: 8-25-09

ABELE, J.

{¶ 1} This is an appeal from a Highland County Common Pleas Court judgment of conviction and sentence. A jury found William H. Smith, defendant below and appellant herein, guilty of murder in violation of R.C. 2903.02(A), tampering with

[1] Different counsel represented appellant during the trial court proceedings.

evidence in violation of R.C. 2921.12(A)(1), felonious assault in violation of R.C. 2903.11(A)(2), and kidnapping in violation of R.C. 2905.01(A)(3). Appellant assigns the following errors for review:

> FIRST ASSIGNMENT OF ERROR:
>
> "TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL, IN VIOLATION OF THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND SECTION 10, ARTICLE I OF THE OHIO CONSTITUTION."
>
> SECOND ASSIGNMENT OF ERROR:
>
> "THE TRIAL COURT COMMITTED PLAIN ERROR IN FAILING TO SEVER THE MURDER, ABUSE OF A CORPSE, AND TAMPERING WITH EVIDENCE COUNTS REGARDING LYNN LUCAS FROM THE FELONIOUS ASSAULT AND KIDNAPPING COUNTS REGARDING PEGGY TAYLOR. AS A RESULT OF THE IMPROPER JOINDER OF THESE COUNTS FOR WILLIAM SMITH'S TRIAL, HE WAS DEPRIVED OF A FAIR TRIAL AND DUE PROCESS AS GUARANTEED BY THE UNITED STATES AND OHIO CONSTITUTIONS."
>
> THIRD ASSIGNMENT OF ERROR:
>
> "THE TRIAL COURT ERRED AND DEPRIVED WILLIAM SMITH OF DUE PROCESS AND A FAIR TRIAL WHEN IT ENTERED HIS JUDGMENTS OF CONVICTION IN THE ABSENCE OF SUFFICIENT EVIDENCE TO ESTABLISH GUILT."
>
> FOURTH ASSIGNMENT OF ERROR:
>
> "THE TRIAL COURT VIOLATED MR. SMITH'S RIGHTS TO DUE PROCESS AND A FAIR TRIAL WHEN IT ENTERED JUDGMENTS OF CONVICTION FOR FELONIOUS ASSAULT, AND KIDNAPPING, WHICH WERE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."
>
> FIFTH ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED AND DEPRIVED WILLIAM SMITH OF DUE PROCESS OF LAW AND A FAIR TRIAL AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SECTION 16, ARTICLE I OF THE OHIO CONSTITUTION WHEN IT ALLOWED IMPROPER EXPERT TESTIMONY."

SIXTH ASSIGNMENT OF ERROR:

"THE TRIAL COURT VIOLATED MR. SMITH'S SUBSTANTIVE DUE PROCESS RIGHTS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 16 OF THE OHIO CONSTITUTION WHEN IT REQUIRED ALL OF THE TERMS IMPOSED TO BE SERVED CONSECUTIVELY."

{¶ 2} Appellant is a widower, previously married to Gracie Smith. Ms. Smith died of cancer in 2005. By all accounts, appellant's behavior became increasingly bizarre after his wife's death. Appellant subsequently became romantically involved with Peggy Taylor, the wife of one of his stepsons. When she attempted to end their relationship, he held her at his house, against her will, and fired a gun next to her ear. Not surprisingly, this behavior did not endear appellant to Taylor, who eventually got free and ended their relationship.

{¶ 3} Appellant later asked one of his former stepsons, Leroy Preston Taylor, to locate a new woman for him. Mr. Taylor introduced him to Lynn Lucas, from whom appellant had sold marijuana to and from whom he had received "intercourse" and a "blow job," but was not involved in a "relationship" with her. Apparently, appellant and Lucas were a "couple" for several months.

{¶ 4} John Duncan, Ms. Lucas's father, typically heard from his daughter every day. Over the weekend preceding February 5, 2007, however, he did not hear from

her. Mr. Duncan called his son, John, and asked him to look in on his sister. John Duncan found his sister at her home, in the bathroom, dead from what was made to appear to be a self-inflicted gunshot wound to her neck. Appellant later confessed to his stepson that he shot Lynn Lucas and caused her to drop to the floor like "a bag of tatoes [sic]."

{¶ 5} The Highland County Grand Jury returned an indictment and charged appellant with murder, manslaughter, abuse of a corpse, tampering with evidence felonious assault and kidnapping.[2] Appellant pled not guilty to all charges and the matter came on for jury trial in June 2008. At the conclusion of the State's case, the trial court granted a Crim.R. 29 motion to dismiss the charge of abuse of a corpse, but allowed the other counts to go to the jury. The jury subsequently returned guilty verdicts.

{¶ 6} The trial court sentenced appellant to serve twenty-eight years to life in prison, meted out as follows: fifteen years to life for murder, plus an additional three years on a firearm specification; three years for tampering with evidence, to be served consecutively to the sentence for murder; four years for felonious assault plus an additional three years on a firearm specification; and two years for kidnapping to be served concurrent to felonious assault but consecutive to the other terms. This appeal followed.

I

{¶ 7} We proceed, out of order, to address appellant's third assignment of error

[2] The latter two charges involved the 2006 incident with Peggy Taylor, while the first four offenses dealt with the death of Lynn Lucas.

wherein he argues that the evidence is insufficient to support his kidnapping conviction. We disagree.

{¶ 8} In a sufficiency of evidence review, appellate courts look to the adequacy of evidence and whether that evidence, if believed, supports a finding of guilt beyond a reasonable doubt. State v. Thompkins (1997), 78 Ohio St.3d 380, 386, 678 N.E.2d 541; State v. Jenks (1991), 61 Ohio St.3d 259, 273, 574 N.E.2d 492. In other words, after a review of all the evidence and each inference reasonably drawn therefrom in the light most favorable to the prosecution, any rational trier of fact must be able to have found all the essential elements of the offense beyond a reasonable doubt. State v. Hancock, 108 Ohio St.3d 57, 840 N.E.2d 1032, 2006-Ohio-160, at ¶34; State v. Jones (2000), 90 Ohio St.3d 403, 417, 739 N.E.2d 300.

{¶ 9} R.C. 2905.01(A)(3) proscribes restraining another person's liberty for purposes of terrorizing that person. Peggy Taylor testified about the February 2006 events when she attempted to break-off her relationship with appellant. According to her testimony, appellant first threatened to kill himself and, later, warned Taylor that they would both be found "dead on the living room floor." At one point, according to Taylor, appellant kept daring her to "go ahead and go, go ahead and go," but when she tried to leave he told her "you ain't going nowhere." The statement that she was "going nowhere" is sufficient to prove restraint of her liberty, and his threats to kill her, along with shooting the gun next to her ear, is sufficient to prove that he inflicted terror. We thus find the evidence adduced at trial sufficient for the jury to convict appellant of kidnapping.

{¶ 10} Accordingly, appellant's third assignment of error is without merit and is

hereby overruled.

II

{¶ 11} We next proceed to appellant's fourth assignment of error wherein he argues that his convictions for felonious assault and kidnapping are against the manifest weight of the evidence. Again, we disagree.

{¶ 12} In reviewing a claim that a verdict is against the manifest weight of the evidence, an appellate court may not reverse the conviction unless it is obvious that 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. See State v. Earle (1997), 120 Ohio App.3d 457, 473, 698 N.E.2d 440; State v. Garrow (1995), 103 Ohio App.3d 368, 370-371, 659 N.E.2d 814. After our review of the trial transcript and all the evidence adduced at trial, we are not persuaded this was the case below.

{¶ 13} The gist of appellant's argument is that the only evidence to convict him of these two offenses is Peggy Taylor's uncorroborated testimony. It is well settled law, however, that corroboration of a victim's testimony is not needed to support a guilty verdict. In re J.A., Montgomery App. No. 23059, 2009-Ohio-2321, at ¶14; State v. Hanni, Cuyahoga App. No. 91014, 2009-Ohio-139, at ¶22; State v. Jones, Mahoning App. No. 06MA109, 2008-Ohio-1541, at ¶45. All that was required was the jury find Taylor credible and the issue of credibility was solely within the jury's purview as the trier of fact. See State v. Vance, Athens App. No. 03CA27, 2004-Ohio-5370, at ¶10; State v. Baker (Sep. 4, 2001), Washington App. No. 00CA9. Obviously, the jury found Taylor's testimony credible and we will not second-guess that finding.

{¶ 14} Accordingly, for these reasons we find no merit in appellant's fourth

assignment of error and it is hereby overruled.

III

{¶ 15} The fifth assignment of error involves the trial court's ruling to allow, over objection, comments from Eva Hall, an Ohio Bureau of Criminal Investigation crime scene investigator. The State had finished showing Agent Hall a series of photographs that depicted the victim's body and the juxtaposition of her hand over the gun that she allegedly used to take her own life. Agent Hall explained that, typically, suicide victims have a much tighter grip on the gun that they used to end their lives and this was not apparent here. Appellant argues that allowing Hall to testify on this point, when no foundation was laid to qualify her to be an expert on evidence evaluation, constitutes reversible error.

{¶ 16} First, we must set forth precisely what Agent Hall stated. Hall did not offer an opinion as to whether the victim's death was a suicide or a homicide. Rather, Hall stated that she had "never seen this occur in a suicide before." "[N]ine times out of ten," Agent Hall related, the muscles of a suicide victim contract and cause them to grip a gun very tightly.

{¶ 17} Second, Agent Hall was not evaluating the evidence at the crime scene so much as describing how that particular scene differed from previous suicide investigations that she had conducted. Hall was clear from the outset that she had "processed an undetermined amount of homicides and suicides and violent crimes, and obviously ha[s] had extensive training in this type of crime." We believe that Hall is qualified under Evid.R. 702 to compare and contrast the appearance of this scene with other suicide scenes with which she had been involved.

{¶ 18} Finally, even if we assume arguendo that the trial court erred by allowing this comment, that error was harmless and did not affect a substantial right. Crim.R. 52(A); Evid.R. 103(A). The uncontroverted testimony was that the victim was right-handed. When she was discovered, her left hand was on the gun. Agent Hall testified that suicide victims did not typically use their non-dominant hands. Furthermore, Dr. Lehman from the Montgomery County Coroner's Office testified that he performed an autopsy and the victim died of a gunshot wound to the neck. He stated that he had never before seen a suicide committed in that manner. Finally, BCI agent Martin Lewis testified that the decedent had no gun shot residue on her left-hand.[3]

{¶ 19} In short, considerable evidence was adduced at trial to show that it was very unlikely that the decedent shot herself in her neck with her left hand. At most, Agent Hall's comments on the placement of the victim's left-hand relative to the gun is cumulative of other evidence adduced at trial that tended to suggest that she did not use that hand to kill herself. Therefore, we find no prejudice from the comments to which appellant objects.

{¶ 20} Accordingly, for all these reasons, we find no merit to appellant's fifth assignment of error and it is hereby overruled.

IV

[3] Gun shot residue was found on the victim's right hand and there was no clear explanation how that might have occurred. No residue tests were performed on appellant as too much time had passed since the victim's death and apparently gun shot residue is easily washed off the hands.

{¶ 21} Appellant's sixth assignment of error challenges the trial court's decision to require appellant to serve his sentences consecutively. The precise bases for that objection, however, is somewhat unclear from the argument portion of his brief. Appellant appears to acknowledge that the trial court acted within its discretion to impose consecutive sentences, but takes issue with the Ohio Supreme Court allowing such discretion after its ruling in State v. Foster, 109 Ohio St.3d 1,845 N.E.2d 470, 2006-Ohio-856 (which struck down portions of Ohio's felony sentencing laws). Appellant claims the "Foster remedy improperly deprives [him] of the substantive procedural safeguards the General Assembly enacted in Senate Bill 2," thus violating the United States Supreme Court holding in Hicks v. Oklahoma (1980), 447 U.S. 343, 100 S.Ct. 2227, 65 L.Ed.2d 175.

{¶ 22} This Court has previously considered whether the holding in Foster violates the Hicks case and has concluded that it does not. See State v. Starett, Athens App. No. 07CA30, 2009-Ohio-744, at ¶¶29-33; State v. Montgomery, Adams App. No. 07CA858, 2008-Ohio-4753 at ¶¶23-25. Other Ohio appellate districts have come to the same conclusion. See State v. Edwards, Mahoning App. No. 07MA235, 2009-Ohio-1205, at ¶¶37-43; State v. Ruiz, Cuyahoga App. No. 90595, 2008-Ohio-6281, at ¶¶11-17. We read this assignment of error as raising the same arguments that were considered and rejected in those cases and we adhere to our prior rulings in Starett and Montgomery.

{¶ 23} Accordingly, based upon the foregoing reasons we overrule appellant's sixth assignment of error.

V

{¶ 24} We now turn to appellant's first and second assignments of error that will be jointly considered in view of the fact that they raise related issues. The underlying premise for both assignments of error is that the charges against appellant should have been severed and tried in two separate proceedings – the homicide charges in one trial and the kidnapping and felonious assault charges in another. Appellant asserts that because trial counsel did not seek a Crim.R. 14 severance, he received ineffective assistance of counsel. Moreover, appellant argues it is plain error for the trial court not to have severed the charges sua sponte.

{¶ 25} We acknowledge that we do have concerns about the fact that those charges were not severed and were tried simultaneously. The crimes perpetrated against Peggy Taylor occurred approximately one year before Lynn Lucas' murder and there is no indication in the record that these events were part of a common scheme or plan. We also believe that appellant may have a legitimate concern that the evidence of his violence toward Taylor in 2006 could have influenced the jury to believe that he exhibited similar violent behavior a year later. Nevertheless, in light of the standard of review we must apply here, and considering the amount of evidence adduced at trial that implicated appellant, we do not believe any such error in this regard would constitute reversible error.

{¶ 26} To establish constitutionally ineffective assistance of counsel, a defendant must show that (1) his counsel's performance was deficient, and (2) such deficient performance prejudiced the defense and deprived him of a fair trial. See Strickland v. Washington (1984), 466 U.S. 668, 687, 80 L.Ed .2d 674, 104 S.Ct. 2052; also see State v. Issa (2001), 93 Ohio St.3d 49, 67, 752 N.E.2d 904.

{¶ 27} Both prongs of the Strickland test need not be analyzed, however, if the claim can be resolved under just one. See State v. Madrigal (2000), 87 Ohio St.3d 378, 389, 721 N.E.2d 52. To establish the latter element (i.e. the existence of prejudice), a defendant must establish that a reasonable probability exists that, but for counsel's alleged error, the result of the trial would have been different. State v. White (1998), 82 Ohio St.3d 16, 23, 693 N.E.2d 772; State v. Bradley (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, at paragraph three of the syllabus.

{¶ 28} With respect to appellant's claim that the trial court's failure to sua sponte sever the charges for trial constitutes plain error, we note that notice of plain error under Crim.R. 52(B) is to be taken with utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice. See State v. Long (1978), 53 Ohio St.2d 91, 372 N.E.2d 804, at paragraph three of the syllabus. More important, to find plain error we must be able to say that, but for the error, the outcome of the trial would have been otherwise. Id. at paragraph two of the syllabus; State v. Braden, 98 Ohio St.3d 354, 785 N.E.2d 439, 2003-Ohio-1325, at ¶50; State v. Sanders (2001), 92 Ohio St.3d 245, 263, 750 N.E.2d 90.

{¶ 29} In short, in order to reverse appellant's conviction in this matter under either of his two arguments, we would be required to conclude that the jury would not have found appellant guilty if the charges had been severed and tried separately. Unfortunately for appellant, we simply cannot draw that conclusion. Peggy Taylor gave sufficient testimony to support appellant's conviction for felonious assault and kidnapping. Insofar as her testimony may have influenced the jury on the murder charge, we also point to the testimony of appellant's step-son, Leroy Taylor, who

related how appellant confided in him that he shot Lynn Lucas who dropped to the floor like "a bag of tatoes [sic]." This damaging evidence identified appellant as the perpetrator, but it was not the only evidence. The State also adduced testimony from several witnesses to the effect that some sort of struggle occurred at the Lucas home the day the decedent was murdered. Items were overturned, spent shell casings littered the floor and bullet holes appeared in various places. BCI agents Mark Losko and Travis Worse testified that the bullets recovered from other locations in the home tested positive for appellant's DNA.

{¶ 30} In light of all of the evidence, we cannot conclude that the jury would have acquitted appellant if the charges had been severed and tried separately. Thus, while we agree the better practice would have been to try these matters in two separate proceedings, we are not persuaded that the failure to pursue that option was constitutionally ineffective assistance, nor do we believe the trial court's actions constitute plain error.

{¶ 31} Accordingly for these reasons, we hereby overrule appellant's first and second assignments of error.[4]

{¶ 32} Therefore, having considered all of the errors appellant assigned and argued, and after finding merit in none, we hereby affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

[4] Appellant also claims that trial counsel was deficient for not pursuing those issues that he has raised in his third, fourth and sixth assignments of error. In light of the fact that we have already found no merit in those assignments of error, we do not again address them.

It is ordered that the judgment be affirmed and that appellee recover of appellant the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Highland County Common Pleas Court to carry this judgment into execution.

If a stay of execution of sentence and release upon bail has been previously granted, it is continued for a period of sixty days upon the bail previously posted. The purpose of said stay is to allow appellant to file with the Ohio Supreme Court an application for a stay during the pendency of the proceedings in that court. The stay as herein continued will terminate at the expiration of the sixty day period.

The stay will also terminate if appellant fails to file a notice of appeal with the Ohio Supreme Court in the forty-five day period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Ohio Supreme Court. Additionally, if the Ohio Supreme Court dismisses the appeal prior to the expiration of said sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Harsha, J. & McFarland, J.: Concur in Judgment & Opinion

For the Court

BY: _____
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.