[Cite as *State v. Pace*, 2015-Ohio-2884.]

COURT OF APPEALS
MORGAN COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

THOMAS MATTHEW PACE

Defendant-Appellant

JUDGES:
Hon. Sheila G. Farmer, P. J.
Hon. John W. Wise, J.
Hon. Craig R. Baldwin, J.

Case No. 14 AP 0007

O P I N I O N

CHARACTER OF PROCEEDING:	Criminal Appeal from the Court of Common Pleas, Case No. 13 CR 0044
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	July 17, 2015

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
MARK J. HOWDYSHELL PROSECUTING ATTORNEY 19 East Main Street MccCnnelsville, Ohio 43756	PETER N. CULTICE CULTICE LAW FIRM 58 North Fifth Street Zanesville, Ohio 43701

Wise, J.

{¶1}. Appellant Thomas Matthew Pace, aka Matt Pace, appeals his conviction, in the Court of Common Pleas, Morgan County, for the murder of Dustin Drone. Appellee is the State of Ohio. The relevant facts leading to this appeal are as follows.

{¶2}. During the afternoon and evening of November 2, 2013, a birthday party for appellant's daughter took place at Appellant Pace's residence. One of the attendees at the party was Katherine Mae Jones, the wife of appellant's former friend, Daniel Jones. Daniel had previously accused appellant of having an affair with Katherine. Starting at about 8:00 PM, Daniel called Katherine several times requesting that she come home. Katherine eventually left, along with her minor daughter, D.J., and her daughter's friend, M.F.

{¶3}. When Katherine arrived at her home on State Route 37 in Malta Township, about one mile from the Pace residence, she saw her husband Daniel and his friend Dustin Drone, the eventual murder victim in this case, standing outside.

{¶4}. Appellant, who had been drinking at the party, then showed up at the residence of Daniel and Katherine Jones. By this time, it was dark. After appellant parked his truck at the end of the driveway, Dustin proceeded to that area of the property. Although the primary reason for appellant's visit was to confront Daniel, appellant and Dustin got involved in an altercation which became physical. During the tussle, Dustin was stabbed with a knife. 911 was contacted.

{¶5}. When Morgan County sheriff deputies arrived a few minutes later, Dustin was lying near a pine tree by the road. He was unresponsive and had no pulse. Daniel, who was with him, reported to the deputies that Dustin had gone down the driveway to

confront appellant and had ended up getting "cut" by appellant. One of the deputies began chest compressions on Dustin, and paramedics soon arrived, but Dustin died at the scene.

{¶6}. Further investigation of the stabbing ensued, and on November 15, 2013, appellant was indicted for murder (R.C. 2903.02(A)), with a repeat violent offender specification (R.C. 2941.149).

{¶7}. A jury trial was conducted on July 15, 16, and 17, 2014, following which appellant was found guilty as charged. A sentencing hearing was held on August 18, 2014, following which appellant was sentenced to life in prison, with parole eligibility after fifteen years.

{¶8}. On September 4, 2014, appellant filed a notice of appeal. He herein raises the following five Assignments of Error:

{¶9}. "I. THE TRIAL COURT ERRED IN ALLOWING USE OF AND REFERENCE TO HEARSAY STATEMENTS WRITTEN IN A HOSPITAL REPORT IN VIOLATION OF R.C. 2317.02(B), DOCTOR-PATIENT PRIVILEDGE [SIC], AND RULE 404(B) OF THE OHIO RULES OF EVIDENCE.

{¶10}. "II. THE TRIAL COURT ERRED BY NOT CONDUCTING A MORE DETAILED INQUIRY AS TO WHY DEFENDANT-APPELLANT APPARENTLY WANTED NEW COUNSEL PRIOR TO THE START OF TRIAL.

{¶11}. "III. APPELLANT WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHEN TRIAL COUNSEL ARGUED A POSITION TO THE JURY COMPLETELY CONTRARY TO THE POSITION AND TESTIMONY OF APPELLANT.

{¶12}. "IV. APPELLANT'S STATE AND FEDERAL RIGHTS TO DUE PROCESS WERE VIOLATED BECAUSE HIS CONVICTION WAS NOT SUPPORTED BY SUFFICIENT EVIDENCE.

{¶13}. "V. APPELLANT'S CONVICTION WAS CONTRARY TO THE MANIFEST WEIGHT OF THE EVIDENCE."

I.

{¶14}. In his First Assignment of Error, appellant contends the trial court erred in allowing the use of certain hearsay statements via a hospital report. We disagree.

{¶15}. The admission or exclusion of relevant evidence rests in the sound discretion of the trial court. *State v. Sage* (1987), 31 Ohio St.3d 173, 180, 510 N.E.2d 343. As a general rule, all relevant evidence is admissible. Evid.R. 402; cf. Evid.R. 802. Our task is to look at the totality of the circumstances in the case sub judice, and determine whether the trial court acted unreasonably, arbitrarily or unconscionably in allowing or excluding the disputed evidence. *State v. Oman* (Feb. 14, 2000), Stark App.No. 1999CA00027.

{¶16}. The information in question stems from written records made during appellant's treatment at Harding Hospital following his attempted suicide in February 2014, about three months after he was indicted for the murder of Dustin Drone. The record in question stated that appellant, inter alia, was "voicing frustration" and had stated that he was having homicidal thoughts toward an unnamed family member. The record also noted that appellant was thinking about breaking a TV monitor in the hospital and using the glass to "cut somebody." Because of these threats, appellant was discharged from treatment.

{¶17}. At trial, the State proceeded to use the hospital record, without entering it as evidence, during its cross-examination of appellant, who took the stand in his own defense. Appellant's trial counsel, attempting to prevent use of the record, made a motion in limine during the State's cross-examination of appellant, outside the presence of the jury. Tr. At 528. The motion was denied, and the record was then proffered as Court's Exhibit No. 1 (*see* Tr. at 532), but it was never admitted as evidence, and no actual mention of the record was made in the presence of the jury. On further cross-examination, appellant was asked about the suicide attempt of February 2014 and if he remembered why he was discharged from the hospital. He responded that he did not remember. He was then asked if it was because he was "threatening to cut somebody up." Tr. at 550. Appellant responded with: "No sir, not that I know of." Tr. at 550. The State did not pursue the line of inquiry and moved on to other questioning. The only other reference was in the State's closing argument, when the prosecutor stated, in reference to appellant's claimed lack of memory about certain events: "He can't remember why he was discharged from the hospital." Tr. at 568.

{¶18}. Appellant maintains that the allowance of information from the hospital record was a violation of the hearsay rule, doctor-patient privilege, R.C. 2317.02(B), and the "prior bad acts" rule of Evid.R. 404(B). However, we find the hospital record was not obtained in violation of R.C. 2317.02(B), as it was released via a prior court order. Furthermore, because the record was used for credibility purposes on cross-examination and never entered as a jury exhibit, we find no abuse of discretion in regard to Evid.R. 404(B). To the extent that any other claimed evidentiary violation

occurred, we would find the limited references to appellant's medical treatment before the jury to be harmless beyond a reasonable doubt.

{¶19}. Accordingly, upon review, we are unpersuaded that the trial court abused its discretion in regard to the use of appellant's post-indictment hospital records.

{¶20}. Appellant's First Assignment of Error is overruled.

II.

{¶21}. In his Second Assignment of Error, appellant contends the trial court erred by inadequately inquiring of him concerning his alleged desire for new counsel prior to trial. We disagree.

{¶22}. In *State v. Deal* (1969), 17 Ohio St.2d 17, 244 N.E.2d 742, the Ohio Supreme Court held as follows:

{¶23}. "Where, during the course of his trial for a serious crime, an indigent accused questions the effectiveness and adequacy of assigned counsel, by stating that such counsel failed to file seasonably a notice of alibi or to subpoena witnesses in support thereof even though requested to do so by accused, it is the duty of the trial judge to inquire into the complaint and make such inquiry a part of the record. The trial judge may then require the trial to proceed with assigned counsel participating if the complaint is not substantiated or is unreasonable."

{¶24}. *Id*., at the syllabus.

{¶25}. The holding of *Deal* has implicitly been extended to cases of retained counsel as well. *See State v. Keith*, 79 Ohio St.3d 514, 524 (1997). However, vague or general objections do not trigger the judicial duty to investigate further. *See State v. Johnson* (2006), 112 Ohio St.3d 210, ¶ 68.

{¶26}. As the State aptly responds in its brief, appellant never clearly indicated to the trial court that he wanted new counsel, and he made no specific allegations of dissatisfaction, just “maybe some difficulty with my attorney.” Tr. at 129. The pretrial discussion emphasized by appellant concerned certain pro se motions which appellant wanted to present to the court. *See* Tr. at 128-130. Appellant's chief contention was that he had not had time to discuss certain matters with his trial attorney. *See* Tr. at 130. Defense counsel thereupon informed the court that he would review the pro se motions with his client during the lunch break and that evening. Tr. at 131. No further remarks were made by appellant concerning his counsel; in fact, on a later day of the trial, appellant, when presented with an opportunity to hear his police interview tape, stated to his attorney: "If that's what you want to do, **** that's what we're going to do." Tr. at 554.

{¶27}. Appellant in support relies *inter alia* on a case from this Court, *State v. Murphy*, 5th Dist. Richland No. 99CA48, 2000 WL 222000. However, in that case, appellant "advised the trial court his appointed counsel was unsatisfactory" and asked the trial court to discharge the attorney. We reversed, concluding that although the trial court had recognized the request, it had not conducted the inquiry required in *Deal.* In contrast, the case sub judice does not entail this type of specific allegation; therefore, we find *Murphy* distinguishable and hold in this matter there was no duty upon the trial court to further investigate the issue from the bench.

{¶28}. Accordingly, appellant's Second Assignment of Error is overruled.

III.

{¶29}. In his Third Assignment of Error, appellant contends he was deprived of the effective assistance of counsel at trial in violation of the United States Constitution. We disagree.

{¶30}. Our standard of review for ineffective assistance claims is set forth in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. Ohio adopted this standard in the case of *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373. These cases require a two-pronged analysis in reviewing a claim for ineffective assistance of counsel. First, we must determine whether counsel's assistance was ineffective; i.e., whether counsel's performance fell below an objective standard of reasonable representation and was violative of any of his or her essential duties to the client. If we find ineffective assistance of counsel, we must then determine whether or not the defense was actually prejudiced by counsel's ineffectiveness such that the reliability of the outcome of the trial is suspect. This requires a showing that there is a reasonable probability that but for counsel's unprofessional error, the outcome of the trial would have been different. *Id.* Furthermore, we must presume a properly licensed attorney executes his or her duties in an ethical and competent manner. *See State v. Smith,* 17 Ohio St.3d 98, 100, 477 N.E.2d 1128 (1985).

{¶31}. The gist of appellant's "ineffective assistance" argument is that his trial counsel attempted to advance inconsistent defense theories; i.e., that trial counsel "presented a defense completely contrary to the known position and testimony of *** his client." Appellant's Brief at 11. Specifically, appellant urges that trial counsel's reliance on the defense of self-defense contradicted appellant's own trial testimony that he did

not stab Dustin. This Court has recognized that self-defense is a "confession and avoidance" affirmative defense in which the defendant admits the elements of the crime but seeks to prove some additional element which absolves the defendant of guilt. *See Uhrichsville v. Losey,* Tuscarawas App.No. 2005 AP 03 0028, 2005–Ohio–6564, ¶ 9. To establish the legal defense of self-defense in Ohio, the following elements must be shown: (1) The defendant was not at fault in creating the situation giving rise to the affray; (2) the defendant has a bona fide belief that he was in imminent danger of death or great bodily harm and that his only means of escape from such danger was in the use of such force; and (3) the defendant must not have violated any duty to retreat or avoid the danger. *State v. Jones,* Stark App.Nos. 2007–CA–00041, 2007–CA–00077, 2008–Ohio–1068, ¶ 32, citing *State v. Robbins* (1979), 58 Ohio St.2d 74, 388 N.E.2d 755, paragraph two of the syllabus. If the defendant fails to prove any one of these elements by a preponderance of the evidence, then the defendant has failed to demonstrate that he acted in self-defense. *State v. Cassano* (1996), Ohio St.3d 94, 107.

{¶32}. Although a number of Ohio appellate cases analyze the issue of a trial counsel's performance in *failing* to raise the defense of self-defense when warranted, our research indicates little has been discussed on the opposite side of the coin: a trial counsel's decision to invoke the defense where it might be questionable to do so. *But see State v. Newsome*, 11th Dist. Ashtabula App.No. 2003-A-0076, 2005-Ohio-3775. One appellate court has nonetheless bluntly concluded: "It would be nonsensical to permit a criminal defendant to completely deny that he committed the act underlying the charge, yet also claim that his commission of the act was justified and that he should therefore be excused from criminal responsibility. Such a holding would allow a criminal

defendant to have his cake and eat it too." *State v. Powell*, 4th Dist. Ross No. 96CA2257, 1997 WL 602864.

{¶33}. The trial transcript actually reveals that appellant wavered in his testimony regarding the presence of the knife. He first indicated that he did not "remember" having a knife, and that he did not "know" if Daniel or Dustin had one. *See* Tr. at 515-516. While he later became more emphatic that he didn't have or use a knife during the altercation in question (*see* Tr. at 546), we find it would have been reasonable for defense counsel to prepare for the contingency that the jurors, during deliberation, might focus on the possibility that appellant simply didn't remember the details of the fight, including the presence of a knife, due to his earlier drinking and the fog of a violent struggle. Notably, defense counsel iterated as follows during closing arguments:

{¶34}. "What else can you possibly do than hire a lawyer, take his advice, take it in front of a jury of your peers, take the witness stand and tell them what happened? What else can you possibly do? You can't turn the clock back. If he didn't have a knife, if he didn't cut or stab Dustin Drone, then that's all he can say to you.

{¶35}. "If he cannot remember it, which I don't know, you still have to consider self defense. You don't have to consider it, but the elements of it are there. If he actually did it, what choice did he have? Are we going to convict a man for doing what he could to get out from being choked or shot? Somebody's shooting a gun; somebody's beating the hell out of you; somebody's got their arm around your throat."

{¶36}. Tr. at 579-580.

{¶37}. Even if we would find trial counsel's defense approach did not constitute reasonable representation on this point, however, in light of the entire trial record we

find no demonstration that the outcome of the trial would have been different if trial counsel had argued against the utilization of the defense of self-defense. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland, supra*.

{¶38}. We therefore hold appellant was not deprived of his constitutional right to the effective assistance of counsel. Appellant's Third Assignment of Error is overruled.

IV.

{¶39}. In his Fourth Assignment of Error, appellant contends his conviction was not supported by sufficient evidence. We disagree.

{¶40}. In addressing a claim of insufficiency of the evidence, “[t]he relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.” *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus.

{¶41}. Appellant herein was convicted of murder, under R.C. 2903.02(A), which states as follows: "(A) No person shall purposely cause the death of another or the unlawful termination of another's pregnancy."

{¶42}. According to Katherine Jones, when she left the party to return home, appellant came to her car and said he was "going to go kick [Daniel's] butt." Tr. at 304. Katherine recalled on the other hand that when she got to her house, Dustin was pounding his fist in his hand, threatening to "beat up" appellant. Tr. at 294, 304. As Katherine proceeded to enter her house, she saw her husband Daniel, who had also been drinking that day, come outside and fire a shotgun in the air. Tr. at 295. She

sensed that trouble was coming. Tr. at 305. She called Becky, appellant's wife, suggesting she stop appellant from coming to the Jones' residence, but she was told he was already on his way. Tr. at 306.

{¶43}. As previously noted, the altercation between appellant and Dustin occurred at the end of the driveway of the Jones' residence. Daniel Jones testified he saw appellant turn his truck around at the end of the driveway and stop. Tr. at 257. Daniel recalled that Dustin told him to put away the shotgun because he was going to go talk to appellant. Dustin then walked out to "confront" appellant, while Daniel put the shotgun back in the garage and remained on the porch. Tr. at 258. Daniel saw appellant run in front of the headlights of his truck and yell to him: "You're next, motherfucker." Tr. at 259. After appellant got in and drove away, Daniel went out to the area of the fight. When he rolled Dustin over, he saw he had been stabbed. *Id.*

{¶44}. The daughter of Katherine and Daniel, D.J., and her friend M.F. were also inside the residence with Katherine. All three testified they heard arguing from the end of the driveway. Tr. at 296, 330, 358. Katherine testified that Daniel came in the house and told D.J. that "your slut mother caused this problem." Tr. at 307.

{¶45}. According to the testimony of Dr. Charles Jeffrey Lee, deputy coroner in nearby Licking County, Ohio, Dustin suffered a total of four stab wounds. One of the stab wounds indicated the knife blade went in approximately five and one-half inches, hitting the victim's diaphragm, stomach, lower left lung, and heart. Tr. at 435. Dr. Lee opined that the cause of death was an internal hemorrhage due to a stab wound to the heart. Tr. at 436. He classified the death as a homicide and further opined that a wound of this nature would take just ten minutes to "bleed out." Tr. at 439, 440.

{¶46}. We find nothing was presented at trial creating an inference that Daniel, or anyone else other than appellant, had cause or opportunity to be involved in a fight with Dustin on the driveway on the night in question. Sergeant James Fisher of the Morgan County Sheriff's Department, who handled much of the investigation, agreed that "[t]he fight was between Mr. Drone and Mr. Pace." Tr. at 408. Upon review of the record and transcript in a light most favorable to the prosecution, we find that a reasonable finder of fact could have found the elements of murder under R.C. 2903.02(A), beyond a reasonable doubt.

{¶47}. Accordingly, appellant's Fourth Assignment of Error is overruled.

V.

{¶48}. In his Fifth Assignment of Error, appellant contends his conviction was against the manifest weight of the evidence. We disagree.

{¶49}. Our standard of review on a manifest weight challenge to a criminal conviction is stated as follows: “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. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717. *See also, State v. Thompkins* (1997), 78 Ohio St.3d 380, 678 N.E.2d 541. The granting of a new trial “should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction.” *Martin* at 175, 485 N.E.2d 717. We have frequently recognized that the jurors in a criminal trial “as the firsthand triers of fact, [are] patently in the best position to gauge the truth.” *See, e.g., State v. Frazier,* 5th

Dist. Stark No. 2010CA00042, 2011–Ohio–434, ¶ 23. Furthermore, “[w]hile the jury may take note of the inconsistencies and resolve or discount them accordingly * * * such inconsistencies do not render [a] defendant's conviction against the manifest weight ***.” *State v. Craig* (Mar. 23, 2000), Franklin App. No. 99AP–739, citing *State v. Nivens* (May 28, 1996), Franklin App. No. 95APA09–1236, 1996 WL 284714.

{¶50}. Appellant urges that the State presented no forensic evidence of the stabbing in this case, other than the coroner's report and testimony. As indicated previously, appellant took the stand in his defense, but only admitted to biting Dustin during the fight. The knife used in the stabbing was never recovered by law enforcement officers, even though Sergeant Fisher testified that deputies searching the Jones' garage "collected some knives that would fit the description that the coroner give [sic] us of the weapon that was used." Tr. at 389. Furthermore, the incident occurred after dark, and the primary witness for the State, Daniel Jones, had previously accused appellant of having an affair with his wife.

{¶51}. The weight to be given to the evidence and the credibility of the witnesses are issues for the trier of fact. *See*, *e.g*., *State v. Jamison* (1990), 49 Ohio St.3d 182, 552 N.E.2d 180. Upon review of the record, we find the jury could have properly decided that appellant was the perpetrator of the fatal stabbing of Dustin, and we hold that the jurors, in resolving any conflicts in the evidence, did not create a manifest miscarriage of justice requiring a new trial. Appellant's Fifth Assignment of Error is overruled.

{¶52}. For the reasons stated in the foregoing opinion, the judgment of the Court of Common Pleas, Morgan County, Ohio, is hereby affirmed.

By: Wise, J.

Farmer, P. J., and

Baldwin, J., concur.

JWW/d 0618