

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio

Court of Appeals No. L-08-1380

Appellee

Trial Court No. CR0200603339

v.

Robert Wilson

DECISION AND JUDGMENT

Appellant

Decided: May 21, 2010

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Evy M. Jarrett, Assistant Prosecuting Attorney, for appellee.

Spiros P. Cocoves, for appellant.

* * * * *

OSOWIK, P.J.

{¶ 1} This is an appeal from a judgment of the Lucas County Court of Common Pleas. On October 20, 2006, appellant was indicted on one count of murder, in violation of R.C. 2903.02(A), in connection with the killing of a confidential informant who had

been utilized by the Toledo Police Department in an investigation of appellant's ongoing criminal activity.

{¶ 2} On February 1, 2007, appellant moved to dismiss the indictment on grounds that it was based on privileged testimony. The motion was denied on December 10, 2007.

{¶ 3} On September 5, 2008, appellant was found guilty of murder by a jury. The trial court denied appellant's motion for acquittal, motion for a new trial, and renewed motion to dismiss. On October 10, 2008, appellant was sentenced to a term of imprisonment of 15 years to life. For the reasons set forth below, this court affirms the judgment of the trial court.

{¶ 4} On appeal, appellant sets forth the following seven assignments of error:

{¶ 5} "The trial court erred to the prejudice of Mr. Wilson by permitting the state, through its witnesses, to bolster the credibility of Janet Wilson in violation of his due process rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and the applicable portions of the Ohio Constitution.

{¶ 6} "The trial court erred to the prejudice of Mr. Wilson by denying his request to examine the grand jury testimony of Mrs. Wilson and others to determine if that testimony is privileged in violation of his due process rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and the applicable portions of the Ohio Constitution.

{¶ 7} "The trial court erred to the prejudice of Mr. Wilson when it ordered him to pay unspecified costs, including court appointed fees, without first determining the ability to pay those costs.

{¶ 8} "The trial court erred to the prejudice of Mr. Wilson by denying the motion for acquittal presented by the defense at the conclusion of the trial in violation of his due process rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and the applicable portions of the Ohio Constitution.

{¶ 9} "A criminal defendant's due process rights are violated where key evidence is not properly preserved by the State and is unavailable to the defense for testing and analysis, all in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and the applicable portions of the Ohio Constitution.

{¶ 10} "Trial counsel rendered ineffective assistance of counsel to Mr. Wilson in violation of his right to a fair and reliable trial and his due process rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and the applicable portions of the Ohio Constitution.

{¶ 11} "Cumulative errors deprive a criminal defendant and criminal appellant of a fair trial in violation of his rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Ohio Constitution."

{¶ 12} The following undisputed facts are relevant to the issues raised on appeal. In 1993, Brenda Navarre served as a confidential informant for the Toledo Police Department's Vice Narcotics Unit. Navarre was cooperating with Detective William

Seymour. Seymour was investigating appellant for suspected drug trafficking. Over the course of several months, Navarre made three "direct buys" of crack cocaine from appellant. A "direct buy" is a drug purchase made during the course of an investigation under law enforcement supervision and using law enforcement funds. Subsequent to the multiple undercover crack purchases between Navarre and appellant, appellant was indicted for his drug trafficking activity.

{¶ 13} In late November 1993, Seymour received an urgent phone call from Navarre. She was described as "very frantic" and was "crying and hysterical." On December 1, 1993, Navarre's body was discovered on a city sidewalk. She was unresponsive and bleeding from a severe head injury. A bloody, 110-pound boulder was found nearby. Navarre was rushed to a hospital for emergency treatment. Navarre died from her injuries several days later.

{¶ 14} Examination by the medical examiner revealed that Navarre's death was caused by numerous injuries to her body, including multiple, severe fractures about the face and skull. The medical examiner found that these injuries were consistent with multiple blunt force traumas and being struck in the head with a boulder. After going unsolved for a period of time, the case was eventually categorized as a "cold case."

{¶ 15} In June 2005, Sergeant Lou Vasquez of the Toledo Police Department was investigating a robbery. The victim was the grandson of Janet Wilson who, coincidentally, had been married to appellant since 1992. After the robbery investigation's conclusion, Wilson contacted and spoke to Sergeant Vasquez on numerous occasions pertaining to her

knowledge of Brenda Navarre's death. She continued to have numerous conversations regarding Navarre over the next year. Wilson finally agreed to make a formal statement detailing what she knew about the death in August 2006.

{¶ 16} After Wilson's statement, Detective Bart Beavers of the Toledo Police Department's Cold Case Unit reopened the Navarre case. He spoke to Wilson on at least seven or eight instances regarding Navarre's death. After further investigation, Detective Beavers discovered that the case was originally recorded as a felonious assault and had not been updated to a homicide after Navarre died from her injuries. Due to this miscategorization, the physical evidence relating to the case, including the bloody boulder, was destroyed after the statute of limitations on felonious assaults had run.

{¶ 17} Despite being married to appellant, Janet Wilson elected to testify against him at trial. Appellant's counsel asserted spousal privilege. Subsequent to a hearing, the trial court ruled that Wilson was competent to testify. Her testimony was properly limited to acts and communications by appellant in the presence of third parties.

{¶ 18} Wilson testified that she had been married to appellant since 1992. She stated that on the night of Navarre's death, she drove to appellant's sister's home. As Wilson and appellant were leaving the home, appellant's sister came downstairs to say goodbye. Appellant was carrying a brown paper bag and a plastic garbage bag. Wilson stated that late that night, she and appellant ended up at the apartment of her son, Alfonzo Davis, who was present at the time. They were no longer in possession of the bags. Appellant proceeded to take a bath, and he and Wilson left the next morning.

{¶ 19} Alfonzo Davis testified that appellant and his mother spent the night at his apartment, which was unusual as they had never done so prior to that instance. Davis stated that some time later appellant made illustrative comments regarding his opinion of confidential informants. A confidential informant is colloquially referred to as a "snitch bitch." Davis testified that appellant told him that "[s]nitch bitches die." Appellant also told him, that "he had to kill the snitch bitch" and that he "[d]ropped a brick on her head."

{¶ 20} At trial, Sergeant Vasquez was asked about his conversations with Wilson. He indicated that they had spoken on several occasions regarding Navarre's death. When asked about the consistency of Wilson's statements over the years, Sergeant Vasquez responded that her "story was always the same."

{¶ 21} Detective Beavers also testified at trial. He indicated that he had spoken with Wilson at least seven or eight times regarding the Navarre case. Detective Beavers verified that every statement made to him by Wilson was consistent during the investigation, and that those statements were consistent with her trial testimony.

{¶ 22} The implicit premise in appellant's first three assignments of error is that the court abused its discretion when making its rulings. As such, these claims will be addressed under the same standard of review. The abuse of discretion standard requires consideration of whether a "trial court's decision was unreasonable, arbitrary, or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶ 23} The crux of appellant's first contention is that testimony offered by the state, through Sergeant Vasquez and Detective Beavers, constituted inadmissible hearsay.

Essentially, appellant claims that this testimony bolstered the veracity of that of Janet Wilson. We disagree. Evid.R. 801(C) defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered into evidence to prove the truth of the matter asserted."

{¶ 24} It is well settled that testimony as to the consistency of a witness's prior statements, not offered to prove the veracity of those statements, is not inadmissible hearsay under Ohio law. In *Meriwether*, the appellate court held that "[t]estimony that a witness's previous statement during an investigation was consistent with his trial testimony does not narrate the witness's previous statement and does not, therefore, violate the hearsay rule." *State v. Meriwether* (Mar. 15, 1996), 2d Dist. No. 15079.

{¶ 25} The state's witnesses never narrated Wilson's previous statements. Instead, they commented on whether those statements were consistent with what she had related to them during the investigation. We find no indication that the trial court's decision to admit the testimony was unreasonable, arbitrary, or unconscionable. Appellant's first assignment of error is found not well-taken.

{¶ 26} In his second assignment of error, appellant claims that the trial court erred by not disclosing sealed grand jury testimony. Crim.R. 6(E) permits a court to disclose matters occurring before a grand jury upon a showing that grounds may exist for a motion to dismiss the indictment. The Ohio Supreme Court has interpreted the rule to mean that release of the grand jury testimony is within the discretion of the trial court. The court has further held that an accused is not entitled to inspect grand jury proceedings absent a

showing of a "particularized need" that outweighs the need for secrecy. See *State v. Greer* (1981), 66 Ohio St.2d 139.

{¶ 27} It is well-settled that an accused is not entitled to grand jury transcripts absent a showing that justice requires the extreme measure of disclosure. *State v. Coley* (2001), 93 Ohio St.3d 253. In this same vein, a particularized need sufficient to warrant disclosure is shown when "circumstances reveal a probability that the failure to provide the grand jury testimony will deny the defendant a fair trial." *State v. Davis* (1988), 38 Ohio St.3d 361, 365, quoting *State v. Sellards* (1985), 17 Ohio St.3d 169, 173.

{¶ 28} Appellant asserts that a particularized need was present because spousal testimony could have served as the basis of dismissal as the indictment arguably was based upon privileged testimony. Based upon the record, we disagree. In order to defeat a grand jury indictment based on the grand jury's exposure to inappropriate information such as privileged communication, the appellant must show that the grand jury lacked other non-privileged testimony that could have formed the basis for the indictment. *United States v. Bracy* (C.A.9, 1977), 566 F.2d 649; *United States v. Basurto* (C.A.9, 1974), 497 F.2d 781.

{¶ 29} The appellant has not demonstrated that the grand jury lacked another basis for the decision to indict. The trial court specifically noted that it had reviewed the grand jury testimony twice and found that the appellant had failed to demonstrate a particularized need to unseal the testimony. Likewise, we have reviewed the grand jury testimony provided in the record and conclude that the grand jury was presented other ample non-privileged testimony that could have formed the basis of the indictment. The record shows

no basis for a Crim.R. 6(E) dismissal but for the trial court's denial of disclosure. The disputed trial court action did not prejudice appellant.

{¶ 30} We find appellant has not shown a particularized need that would outweigh the compelling need for secrecy. As such, appellant has not shown that the trial court's decision not to allow access was unreasonable, arbitrary, or unconscionable. Appellant's second assignment of error is found not well-taken.

{¶ 31} In his third assignment of error, appellant argues that the trial court erred by ordering him to pay court costs without first determining his ability to pay. These include mandatory costs associated with the "Citizens Award Program" pursuant to R.C. 9.92(C), the costs of supervision pursuant to R.C. 2951.021(A), the costs of prosecution pursuant to R.C. 2947.23(A)(1), the costs of confinement pursuant to R.C. 2929.18(A)(5), and the costs of defense counsel pursuant to R.C. 2941.51.

{¶ 32} Under Ohio law, a trial court may assess court costs after considering "the offender's present and future ability to pay the amount of the sanction or fine." R.C. 2929.19(B)(6). Additionally, the Ohio Supreme Court has held that "a motion of an indigent criminal defendant for waiver of payment of costs must be made at the time of sentencing." *State v. Threatt*, 108 Ohio St.3d 277, 2006-Ohio-905, ¶ 23.

{¶ 33} The record indicates that the trial court was provided with two presentence investigation reports. In its judgment entry, the trial court unambiguously held that appellant was "found to have, or reasonably may be expected to have, the means to pay all or part of the applicable costs of supervision, confinement, assigned counsel, and

prosecution as authorized by law." Further, appellant failed to move to waive payment of these costs at the time of sentencing. Accordingly, we find no indication that the trial court's decision was unreasonable, arbitrary, or unconscionable. Appellant's third assignment of error is found not well-taken.

{¶ 34} In his fourth assignment of error, appellant contends the court erred in denying his motion for an acquittal. "Pursuant to Crim.R. 29(A), a court shall not order an entry of judgment of acquittal if the evidence is such that reasonable minds can reach different conclusions as to whether each material element of a crime has been proved beyond a reasonable doubt." *State v. Bridgeman* (1978), 55 Ohio St.2d 261, syllabus.

{¶ 35} We conduct our appellate review of the Crim.R. 29 ruling pursuant to a sufficiency of the evidence standard. *State v. Newson*, 6th Dist. No. H-02-036, 2003-Ohio-4729. The underlying query we must resolve is whether a rational trier-of-fact could have found the disputed element of a crime established beyond a reasonable doubt. *State v. Wilson*, 8th Dist. No. 84593, 2005-Ohio-511.

{¶ 36} In the case sub judice, appellant furnishes no evidentiary support of his unilateral assertion that the trial court erred by denying his motion for acquittal. He merely alleges an error, yet provides no basis for it. Accordingly, we find appellant's fourth assignment of error not well-taken.

{¶ 37} Appellant's fifth and sixth assignments of error are grounded in the argument that the inadvertent destruction of physical evidence by the state suggests a due process violation. As such, these errors will be reviewed collectively.

{¶ 38} Appellant's fifth assignment of error suggests that his due process rights were violated by the state's failure to retain physical evidence associated with the case. In his sixth assignment of error, appellant argues that trial counsel rendered ineffective assistance of counsel by failing to move for dismissal of the charges based on the failure to preserve evidence.

{¶ 39} This court has held that a "state's failure to preserve materially exculpatory evidence violates a defendant's due process rights under the Fourteenth Amendment to the United States Constitution." *State v. Babos*, 6th Dist. Nos. L-05-1394, L-05-1424, L-06-1209, 2007-Ohio-2393, ¶ 20, citing *Arizona v. Youngblood* (1988), 488 U.S. 51, 57-58. A violation of due process from a loss of evidence occurs if either materially exculpatory evidence is destroyed or withheld, or the state acts in bad faith in its failure to preserve potentially useful evidence. *Id.* at ¶ 20-21. Evidence is materially exculpatory if "there is a 'reasonable probability' that, had the evidence been disclosed to the defense, the result of the proceeding had been different." *State v. Johnston* (1988), 39 Ohio St.3d 48, 61.

{¶ 40} After review of the record, we find no indication that the physical evidence was materially exculpatory. It is reasonably probable that no evidence, aside from victim's blood, would be found on the boulder. We further find no evidence that the state acted in bad faith when it destroyed the physical evidence. Detective Beavers testified that the evidence was destroyed due to its labeling in accordance with the initial classification of the offense as a felonious assault, rather than a homicide. These findings render

appellant's sixth assignment of error moot. Accordingly, we find appellant's fifth and sixth assignments of error not well- taken.

{¶ 41} Appellant's final assignment of error purports that he was denied a fair trial as a result of cumulative errors. Appellant cites *State v. DeMarco*, in which the Ohio Supreme Court held that a "conviction will be reversed where the cumulative effect of the errors deprives a defendant of the constitutional right to a fair trial."

{¶ 42} We have thoroughly examined the record and considered appellant's arguments regarding various claimed errors by the trial court and trial counsel. We have found them to be without merit. As such, the doctrine of cumulative error does not apply. Appellant's final assignment of error is found not well-taken.

{¶ 43} On consideration whereof, the judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

JUDGE

Mark L. Pietrykowski, J.

JUDGE

Thomas J. Osowik, P.J.
CONCUR.

JUDGE

<p>This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.</p>
