[Cite as *State v. Doren*, 2011-Ohio-5903.]

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

State of Ohio — Court of Appeals No. WD-10-044

Appellee — Trial Court No. 2004-CR-0477

v.

Ralph Doren — **DECISION AND JUDGMENT**

Appellant — Decided: November 10, 2011

* * * * *

Paul A. Dobson, Wood County Prosecuting Attorney, and
Aaron T. Lindsey, Assistant Prosecuting Attorney, for appellee.

Andrew R. Schuman, for appellant.

* * * * *

OSOWIK, P.J.

{¶ 1} This is an appeal from a judgment of the Wood County Court of Common Pleas that found appellant guilty of one count of aggravated murder in violation of R.C. 2903.01(B) following a bench trial. Pursuant to R.C. 2929.03(A), as it existed when the

murder was committed in 1991, appellant received a life sentence with parole eligibility after 20 years. For the reasons that follow, the judgment of the trial court is affirmed.

{¶ 2} On June 7, 1991, 20-year-old Deana Meeks was murdered in her home in Northwood, Ohio, during a burglary. Meeks' throat was slashed with a knife while she sat in the kitchen of the home she shared with her mother, Joyce Baird, and stepfather, Boyd "Smitty" Smith. On that day, Smith arrived home from work at about 5:30 p.m. and went directly into the garage to work on cars, as was his routine. When Smith entered the house at approximately 6:30 p.m., he saw Meeks' body on the floor under the kitchen table. The house had been ransacked. The initial murder investigation spanned several years and led police to appellant at one point but no charges were brought. At that time, Smith had encouraged police to look into possible involvement by appellant, who had asked Smith for money a few months before the murder. According to Smith, he had refused to loan appellant any money, even after appellant made it clear he knew Smith had hundreds of dollars in quarters stored in a slot machine in the home. After the murder, police discovered that the hopper in the slot machine containing the quarters had been emptied.

{¶ 3} From 1991 until appellant's indictment in October 2004, four investigators handled the case. The initial investigation took place from 1991 to 1993. In 1993, the Northwood Police organized a special task force, which included then-Sergeant Douglas Breno, to continue the investigation. The task force was closed down later that year, however, at Northwood Chief Lark's direction. When Sgt. Breno subsequently became

chief of the Northwood Police Department, he assigned Detective William Jackson to the case. In June 1995, Darryl Henderson, an agent with the Ohio Bureau of Criminal Identification and Investigation ("BCI"), also began working on the case. That investigation led to the indictment of three of appellant's acquaintances -- Bill Burns and brothers Craig and Todd Magrum. The state eventually dismissed the indictments against the Magrum brothers in part because prosecutors believed that police had coerced Craig Magrum's confession. The indictment against Burns was dismissed for insufficient evidence.

{¶ 4} Appellant was not considered a suspect until April 1997, after he contacted authorities and asserted that he had information about the case which he would reveal in exchange for modification of a prison sentence he was then serving in Michigan. Investigators working on the case interviewed appellant, who inferred that a friend of his had been involved in the murder. Appellant refused to provide the friend's name but gave the investigators the precise location of a wooded spot in Michigan, just across the border from Sylvania, Ohio, where police could find items belonging to Meeks which he claimed his friend had thrown away shortly after the murder. At the spot appellant indicated, investigators found items which Meeks' mother later identified as having been stolen the day Meeks was killed. Investigators interviewed appellant several more times -- the last time in August 1998 -- but he still refused to divulge the name of the person who committed the homicide. Investigators eventually confronted appellant about having committed the burglary and murder himself. However, for reasons not clear from the

record, the investigation was again closed in 1998 and remained closed until 2003, when it was assigned to Northwood Detective Trent Schroeder. The details of Detective Schroeder's investigation will be set forth as they relate to appellant's assignments of error below.

{¶ 5} On October 20, 2004, appellant was indicted on one count of aggravated murder for the death of Deana Meeks. Following trial to a jury, appellant was convicted and sentenced to a mandatory term of life imprisonment with eligibility for parole after 20 years. On appeal, however, this court found that the trial court erred by not granting appellant's request for a mistrial after the prosecution played an unredacted tape recording of a telephone conversation in which appellant discussed a polygraph test, contrary to the trial court's earlier instruction to redact the comments about the polygraph and in violation of an order in limine. This court reversed the conviction and the matter was remanded for a new trial. See *State v. Doren*, 6th Dist. No. WD-06-064, 2009-Ohio-167.

Appellant waived trial to a jury and the matter was set for a bench trial commencing June 7, 2010. Prior to trial, the defense filed a motion to suppress the photo array identification of appellant made by witness Margaret Burket on June 9, 2003. Burket initially had been identified as a potential witness because she lived across the street from Meeks at the time of the murder. Burket told police who questioned her after the murder that she had been working in her front yard on the afternoon of June 7, 1991, when she saw a "scarey" man she did not recognize walk past her house twice. Burket gave a detailed description of the man.

{¶ 6} In support of his motion to suppress, appellant argued that the array was suggestive because none of the other photos in the array depicted men as old as appellant. Appellant also asserted that Burket's identification was "completely unreliable" because she had only two very brief opportunities to see the man as he walked by her house on the day of the murder, she paid only "casual attention" to him, she had not seen him before that day or since, and more than 12 years had passed from the time she saw the man to the time she viewed the photo array.

{¶ 7} On June 2, 2010, the trial court issued a decision denying the motion to suppress. The court rejected appellant's arguments that the photo array was unduly or unnecessarily suggestive and found that, based on the totality of the circumstances, Burket's identification of appellant as the person who walked past her house on the day of the murder was "reasonably reliable."

{¶ 8} The matter came to trial on June 7, 2010. After hearing testimony from more than 20 witnesses and reviewing 123 exhibits, the trial court found appellant guilty of aggravated murder and sentenced him to a mandatory term of life imprisonment with eligibility for parole after 20 years. The trial court ordered the sentence to be served concurrently with any other jail sentence the defendant was then serving.

{¶ 9} Appellant sets forth four assignments of error:

{¶ 10} "1. The trial court abused its discretion in admitting testimony protected by spousal privilege.

{¶ 11} "2. The trial court erred in admitting evidence of Margaret Burket's photo array identification.

{¶ 12} "3. The conviction was not supported by sufficient evidence.

{¶ 13} "4. The conviction was against the manifest weight of the evidence."

{¶ 14} In support of his first assignment of error, appellant asserts that he was prejudiced by the testimony of his former wife, Marjorie Dick. Appellant argues that Dick's testimony was protected by spousal privilege since the two were married at the time of the offense. Appellant and Dick were divorced, however, at the time of trial.

{¶ 15} We note preliminarily that because there was no objection to Dick's testimony at trial, our review of this issue is discretionary and limited to plain error only. *State v. Jones* (2001), 91 Ohio St.3d 335, 352. Pursuant to Crim.R. 52(B), "* * * plain errors or defects affecting substantial rights may be noticed although they are not brought to the attention of the trial court." However, this court has held that "* * * notice of plain error must be taken with the utmost caution, under exceptional circumstances, and only in order to prevent a manifest miscarriage of justice. In order to prevail on a claim governed by the plain error standard, appellant must demonstrate that the outcome of his trial would clearly have been different but for the errors he alleges." *State v. Jones*, 6th Dist. No. L-05-1101, 2006-Ohio-2351, ¶ 72. (Citations omitted.)

{¶ 16} The general rule of spousal privilege is set forth in R.C. 2945.42 and provides that a "[h]usband or wife shall not testify concerning a communication made by one to the other, or act done by either in the presence of the other, during coverture,

unless the communication was made or act done in the known presence or hearing of a third person competent to be a witness." It is the duty of the party seeking to introduce the spouse's testimony to establish that the testimony is excepted from the scope of the privilege by reason of the communication or acts having been made in the presence of a third party. *State v. Howard* (1990), 62 Ohio App.3d 190. It is not required, however, that the third party whose presence rendered the conversation outside the scope of the privilege be brought into court. *State v. Adamson* (1995), 72 Ohio St.3d 431.

{¶ 17} At trial, Dick testified as to a statement appellant made shortly after the murder. The record is unclear as to the precise date of the statement. According to Dick, at about 3:00 p.m. on a Friday or Saturday after the murder, she met appellant at a local tavern because appellant wanted to talk to her. When Dick arrived at the tavern, she sat beside appellant at the bar and had a beer. While they were sitting at the bar, a news bulletin came on the television reporting that there had been a murder in Bowling Green. Before the reporter identified the victim, Dick heard appellant say, "Deana Meeks." Appellant then stared straight ahead and did not look at the television or at Dick. He did not discuss the murder.

{¶ 18} Appellant's statement was made in a public place in the middle of the afternoon while he and Dick sat at the bar; at a minimum, a bartender would have been nearby after serving them their drinks. The "communication" in question consisted of only two words – "Deana Meeks" – made while appellant stared straight ahead, according to Dick's testimony, without looking around first to see if he could speak without being

overheard. Based on Dick's testimony at trial, we are unable to find that when appellant uttered Meeks' name he intended the statement to be confidential. Therefore, we find that the spousal privilege did not apply.

{¶ 19} Further, even if this court were to find that the statement was protected by spousal privilege, we would be unable to find that the trial court committed plain error by allowing Marjorie Dick's testimony. Appellant has not demonstrated that the outcome of his trial would clearly have been different but for the testimony. This court has thoroughly reviewed the record of proceedings in the trial court, including the entirety of the testimony at trial, which is set forth in detail below. Upon consideration thereof, we are unable to find that appellant would not have been convicted absent Marjorie Dick's testimony.

{¶ 20} Based on the foregoing, appellant's first assignment of error is not well-taken.

{¶ 21} In support of his second assignment of error, appellant asserts that the trial court erred by denying his motion to suppress a witness's identification of him in a photo array. Appellant argues that the photo array was "flawed" and that the identification was unreliable.

{¶ 22} Initially, we note that "[a]ppellate review of a motion to suppress presents a mixed question of law and fact." *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶ 8. In ruling on a motion to suppress, "the trial court assumes the role of trier of fact and is therefore in the best position to resolve factual questions and evaluate the

credibility of witnesses." Id., citing *State v. Mills* (1992), 62 Ohio St.3d 357, 366. On appeal, we "must accept the trial court's findings of fact if they are supported by competent, credible evidence." Id., and *State v. Guysinger* (1993), 86 Ohio App.3d 592, 594. Accepting these facts as true, we must then "independently determine as a matter of law, without deference to the trial court's conclusion, whether they meet the applicable legal standard." *State v. Luckett*, 4th Dist. Nos. 09CA3108 and 09CA3109, 2010-Ohio-1444, ¶ 8, citing *State v. Klein* (1991), 73 Ohio App.3d 486, 488.

{¶ 23} A witness's pretrial photo identification of a defendant will be suppressed only if the photo array was unnecessarily suggestive of the suspect's guilt and the identification was unreliable. *State v. Waddy* (1992), 63 Ohio St.3d 424, 438. The defendant has the burden to show that the identification procedure was unduly suggestive. *State v. Harris*, 2d Dist. No. 19796, 2004-Ohio-3570, ¶ 19. If the pretrial confrontation procedure was not unduly suggestive, any remaining questions as to reliability go to the weight of the identification, not its admissibility, and no further inquiry into the reliability of the identification is required. *State v. Wills* (1997), 120 Ohio App.3d 320, 325.

{¶ 24} If, however, the defendant meets his or her burden to show that the identification was unduly suggestive, the court must then consider whether the identification, viewed under the totality of the circumstances, is reliable despite its suggestive character. *Harris*, supra; *Manson v. Brathwaite* (1977), 432 U.S. 98, 114. To assess the reliability of the identification, the court must consider: (1) the witness's

opportunity to view the defendant at the time of the incident, (2) the witness's degree of attention, (3) the accuracy of the witness's prior description, (4) the witness's certainty when identifying the suspect at the time of the confrontation, and (5) the length of time elapsed between the crime and the identification. *Neil v. Biggers* (1972), 409 U.S. 188.

{¶ 25} In the instant case, our first step is to determine whether appellant has established that the identification procedure was unreasonably suggestive. As to this question, we must consider several factors, including: whether appellant had facial hair or other facial features that were distinctive from the others in the array; whether appellant appeared to be of a substantially different age than the others in the array; whether the style, length or color of appellant's hair differed significantly from the others; whether the defendant was attired differently, and whether the style of appellant's photograph was sufficiently unique. *State v. Murphy* (2001), 91 Ohio St.3d 516; *State v. Whit*e, 6th Dist. No. L-06-1363, 2008-Ohio-2990, ¶ 71-81. A defendant's photo need not be surrounded by photos of individuals nearly identical to him in appearance. *State v. Davis* (1996), 76 Ohio St.3d 107, 112.

{¶ 26} At the suppression hearing, the trial court heard the testimony of Northwood Police Captain Trent Schroeder, Detective James Ford with the Arlington, Texas, Police Department, and Margaret Burket. Captain Schroeder testified that when he was assigned to reopen the Meeks case in 2003, he came across a potential witness by the name of Margaret Robbins. Robbins' name was included in a report prepared by an investigating officer in 1991 after the officer canvassed the neighborhood immediately

following the murder. In the initial report, Robbins had described a man she had seen walking past her house twice on the day of the murder. According to the 1991 report, Robbins had indicated that the man she saw was 30 to 35 years old, five feet, nine or ten inches tall, with a long mustache and his hair in a ponytail. He carried a dark blue backpack.

{¶ 27} By 2003, Robbins had moved to Arlington, Texas, and was using her married name of Margaret Burket. Schroeder contacted Burket and explained that he was investigating Meeks' murder. In response, Burket wrote Schroeder a letter in which she detailed her recollections from June 7, 1991. In her letter, Burket stated that she recalled the man to have been in his early 40's, about five feet, ten inches tall and "not thin but not heavy," with shoulder length brown hair. The man carried a dark blue or black backpack over one shoulder. Schroeder agreed at the hearing that there are discrepancies in Burket's two descriptions.

{¶ 28} At Schroeder's request, Burket agreed to view a photo array to see if she would be able to identify the man she saw walking along the street on June 7, 1991. Schroeder testified that he had located a photo of appellant from "close to 1991" and assembled that with five booking photos of other men from the same approximate time frame with any identifying information blacked out. Schroeder made an effort to find "filler photos" depicting men with physical characteristics somewhat consistent with appellant's appearance at that time. Schroeder then contacted Detective Ford in

Arlington, Texas, who agreed to assist. Schroeder sent Ford the photo array he had assembled and Ford met with Burket on June 9, 2003.

{¶ 29} Detective James Ford testified via teleconference from Texas. Ford recalled reading Burket the instructions from the photo array report form and then showing her the photo array and asking her to fill out the form after she viewed all of the photos. Ford did not tell Burket whether the suspect's photo was included in the array. Burket looked at the photos for about 30 seconds; she then pointed to photo number four and appeared to be "visibly upset or nervous." Photo number four was appellant. She then told Ford she couldn't be absolutely sure but thought that was the man she saw walk past her house. Burket checked a box on the form by the statement, "I cannot positively make identification at this time." Below that on the form was the question, "Do any of the persons shown in the photographs resemble the person that you observed?" Burket checked a box stating, "Yes, the person shown in photo number 4 resembles the person I observed." Ford, who had shown witnesses hundreds of photo line-ups in his career as a detective, did not notice anything unusual or suggestive about the photo line-up he was asked to show Burket.

{¶ 30} Finally, Burket testified as to her memory of the man she saw walking past her house on June 7, 1991. She recalled that the man was of medium build, five-nine or five-ten, and had "very scruffy-looking" facial hair. He was wearing jeans cut off at the knee and brown boots. He looked like a construction worker or a vagrant and was dirty. She recalled that he was carrying a dark backpack. Burket testified that she saw the man

walk by her house twice. The first time she just glanced at him; the second time she saw him "pretty good." She thought he looked "a little scary" so she went in her house and watched until he passed by. Burket also confirmed the statement she gave to the officer on June 7, 1991, in which she described the man. Burket then testified as to the description she gave Schroeder in a letter written on May 11, 2003, after he contacted her regarding the photo array.

{¶ 31} Finally, Burket testified as to the photo array Detective Ford showed her. Burket stated that Ford did not tell her that the person suspected of committing the crime was in the photo array and she did not ask. Burket looked at the first three photos, none of which looked like anyone she had ever seen. She stated that when she got to photo number 4, "I didn't need to look any further…[b]ecause that was the face of the man that I saw in the neighborhood the day she was killed." She testified that, "When I got to number 4, I felt it all over me that that was the man I saw." She recalled telling Ford after she pointed out photo number four that she was "99.9 percent sure" it was the man she saw from outside the house that day. Burket testified that she did not indicate on the photo array form that she positively identified any of the photos because "there was still that one percent of doubt, but I don't think you can be a hundred percent sure of anything." She further stated that, by indicating on the photo array form that she was unable to positively make an identification at that time, she was "being cautious," adding, "We are talking about a man's life."

{¶ 32} On its face, the array shown to Burket consisted of black-and-white booking photos of six Caucasian men. All six are wearing street clothes that are not distinct in any way. Any significant difference between the men as far as height or weight is not possible to discern from the torso shots. It does not appear that any of the men are extremely thin or noticeably heavy. Some of the men have facial hair, some do not. All appear to have dark hair; none of them have extremely long or short hair. As to the ages of the men, there do not appear to be any glaring differences among the six. There are no particularly youthful looking individuals in the array, nor are there any who appear to be significantly older than appellant or any of the others.

{¶ 33} We note that the officer who showed the photo array to Burket testified at the suppression hearing. As summarized above, the record reflects that the officer did not tell Burket that the suspect's photo was included in the array and handled the procedure as he had done hundreds of other times during his career as a detective. He simply read the instructions to Burket and waited for her to look at the photos and respond to the questions on the photo array report form.

{¶ 34} In summary, we find that the six photos shown to Burket were sufficiently similar as to not highlight or call attention to appellant's photo. We are unable to find that the photo array was unduly suggestive. Having made that determination, we are not required to analyze the reliability of the photo array. Nevertheless, we have considered that issue and find that appellant has not shown that Burket's identification of him after viewing the photo array was unreliable. Again, the detective who handled the photo

array identification in Texas testified at the suppression hearing as to precisely how he handled the procedure. Although 12 years had passed between the day of the murder and the day Burket identified appellant's photo in the array, numerous factors weigh in favor of admissibility. As set forth above, Burket testified that she was "99.9 percent" sure that photo number four depicted the man she saw that day. When Burket saw the individual walking past her house she took particular note of his appearance because he did not look like he "belonged" in the neighborhood and in fact looked "scarey." She went inside her house and watched him through a window until he was out of view. This court agrees with the trial court that, under the totality of the circumstances, Burket's identification was reliable.

{¶ 35} Based on the foregoing, appellant's second assignment of error is not well-taken.

{¶ 36} As his third and fourth assignments of error, appellant asserts that his conviction was not supported by sufficient evidence and was against the manifest weight of the evidence. Appellant argues both of these issues together. We note that two of appellant's arguments in support of these assignments of error have been addressed and found to have no merit: first, that his ex-wife's testimony was protected by spousal privilege and should have been excluded, and second, that Burket's photo array identification should have been suppressed.

{¶ 37} A manifest weight challenge questions whether the state has met its burden of persuasion. *State v. Thompkins* (1997), 78 Ohio St.3d 380. In making this

determination, the court of appeals sits as a "thirteenth juror" and, after "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." *Thompkins,* supra, at 386, citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175. Here, the factfinder was the trial judge who heard testimony, observed body language, evaluated voice inflections, observed hand gestures, perceived the interplay between witness and examiner, and watched each witness's behavior in the courtroom. During appellate review, we are to accord due deference to the credibility determinations made by the factfinder. See *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. Only if we conclude that the trier of fact clearly lost its way in resolving conflicts in evidence and created a manifest miscarriage of justice will we reverse the conviction and order a new trial.

{¶ 38} In contrast, "sufficiency" of the evidence is a question of law as to whether the evidence is legally adequate to support a jury verdict as to all elements of the crime. *Thompkins,* supra, at 386. When reviewing the sufficiency of the evidence to support a criminal conviction, an appellate court must examine "the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. 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 crime proven beyond a reasonable doubt."

State v. Jenks (1991), 61 Ohio St.3d 259, paragraph two of the syllabus. A conviction that is based on legally insufficient evidence constitutes a denial of due process, and will bar a retrial. *Thompkins*, supra, at 386-387.

{¶ 39} We will first set forth the elements of the offense charged in this case. Appellant was convicted of one count of aggravated murder in violation of R.C. 2903.01(B), which states: "(B) No person shall purposely cause the death of another * * * while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit, * * * aggravated burglary [or] burglary * * *."

{¶ 40} The trial court considered the testimony of 21 witnesses – 20 state's witnesses and one defense witness. Additionally, the trial court reviewed over 100 exhibits.

Physical Evidence

{¶ 41} Before trial, the parties stipulated that Meeks was last seen alive at 1:45 p.m. on June 7, 1991, by a teller at Mid Am Bank after Meeks left work. Boyd "Smitty" Smith, who was living with Meeks and her mother, found Meeks' body in the kitchen of their home in Northwood, Ohio, at around 7:15 p.m. When Smith entered the house through the kitchen door, he immediately saw Meeks' body lying in a pool of blood underneath the kitchen table.

{¶ 42} Several photographs of Meeks' body, taken by the first officers responding to the scene, were admitted into evidence. The pictures show Meeks lying face-down under the kitchen table in a pool of blood. Detective Bratton, the first chief investigator

assigned to lead the case, did not testify. Testifying officers who responded to the scene – then-Sergeant Douglas Breno, Patrolman Robert Barrett, and John Helm, an investigator with the Wood County Prosecutor's Office – described the condition of the house when they initially secured the scene as having been "ransacked" and in "disarray." The front door was locked and the back door showed no signs of forced entry.

{¶ 43} Dr. Jose Guerra, a radiologist who worked for the Wood County Coroner, responded to the scene that night and estimated the time of death between 2 p.m. and 7 p.m. Since Guerra had never performed an autopsy, he ordered the body transported to the Lucas County Coroner's Office. Dr. James Patrick, M.D., Lucas County Coroner, performed the autopsy. He determined that Meeks was killed by a single, incised wound to her throat, which severed the right jugular vein and larynx. He found no evidence of defensive wounds.

{¶ 44} David Barnes, a special agent with the Ohio Bureau of Criminal Investigation ("BCI"), examined the scene the following day. He testified that the "directionality" of the blood spatters showed that Meeks had been sitting in a chair when her throat was cut from behind. Usable fingerprints from the residence which were later compared with appellant's prints yielded no matches.

{¶ 45} With respect to the condition of the house, Barnes testified that the ransacking was more extensive than normally found in burglaries. It did not appear to him that a struggle had occurred. A coin-operated gambling machine had been opened

and the "hopper" that was used to hold coins was empty. Other valuables in the house, such as a television, a VCR, several guns and a safe, were not taken.

{¶ 46} When appellant was later identified as a possible suspect, DNA samples were collected and compared to DNA obtained from the following evidence: a cigarette butt from the kitchen table, a towel found on the kitchen floor next to Meeks' body, a bedspread, a black nylon bag, hair, and swabs from Meeks' body. The only conclusion drawn from the DNA analysis was that the profile from the cigarette butt was from an unknown female, not the victim. Two unsuccessful attempts were made to isolate Y chromosomes from Meeks' fingernails; the samples did not yield sufficient quantities of Y chromosome DNA for comparison purposes.

Testimonial Evidence

{¶ 47} Douglas Breno testified that he was a patrol sergeant for the city of Northwood Police Department on June 7, 1991. Breno was the first officer to respond to the scene of the murder. After Breno saw Meeks' body in the kitchen he searched the first floor and secured the house. Breno further testified that after he became Northwood's Chief of Police he reopened the case.

{¶ 48} The next officer on the scene was Robert Barrett, a patrolman with the Northwood Police Department. The house appeared to have been "tossed" as if a tornado had passed through. Barrett canvassed the neighborhood for witnesses and spoke to Margaret Robbins. According to Barrett's notes, Robbins said she had seen a man who appeared "kind of dirty" walking along the street that afternoon; about 15 or 20 minutes

later, the man walked past her house again. She described the man as "a white male, maybe 30 to 35, 5'10", 230 pounds, long mustache, red bandana, ponytail, cutoff jeans to about his knees, work boots, trucker wallet, and carrying a military style duffel bag, maybe dark blue in color."

{¶ 49} Boyd Smith, who was living with Meeks and her mother, testified that he discovered Meeks' body on the kitchen floor when he entered the house after work at approximately 7:00 p.m. on June 7, 1991. Smith identified photographs of a slot machine in his living room and estimated that at the time of the murder there had been about $500 worth of quarters in it. After the murder, he discovered that the machine had been opened and the coins taken. Joyce Baird, Meeks' mother, identified numerous pieces of jewelry, foreign coins and other small items that were stolen on the day of the murder and recovered in 1996. Baird testified that at the time of the murder she was familiar with appellant because he occasionally went to their house to work on cars with Boyd.

{¶ 50} Darryl Henderson, an agent with the BCI, testified as to his involvement with this case in 1995. Henderson worked for about two years with John Helm, an investigator with the Wood County Prosecutor's Office, who had been working the case since 1991. Henderson's primary focus while working on the case involved investigating possible involvement by William Burns, Todd Magrum and Craig Magrum, all of whom were "associates" of Boyd Smith. Eventually, Todd and Craig Magrum were indicted in this case; however, the indictments ultimately were dismissed. In 1997, the investigation shifted away from Burns and the Magrums due to a lack of substantial leads and physical

evidence and began to focus on appellant, who at that time was incarcerated in Michigan. Investigators learned that an anonymous individual had called authorities in Ohio stating that someone he knew in the Michigan State Penitentiary System had information relating to the Meeks homicide. Henderson and Helm followed up and learned that the caller had been referring to appellant. As a result, the two investigators participated in four interviews with appellant during the summer of 1997.

{¶ 51} During the first interview, appellant told the investigators that he and Boyd Smith knew each other from working together in various auto body shops. Appellant stated that Deana Meeks was "like a daughter" to him and said he knew who killed her. Appellant wanted Henderson to arrange his immediate release from prison and said that once he was released he would provide the name and whereabouts of the individual. The officers told appellant that it would be very difficult for Ohio officials to arrange his release from a Michigan prison. They also told appellant they needed something to verify his claim to have that information. As a result, appellant told the investigators he knew of a place in Michigan just across the Ohio border where some of the items taken from the Boyd Smith residence had been discarded. Appellant stated that he had been driving with the as-yet unnamed individual when the individual claimed to have committed the Meeks homicide. According to appellant, shortly before the items were discarded, the two men had stopped at a carryout. While his companion was in the store, appellant looked in a brown paper bag that was in the front passenger compartment. In

the bag were a proof set of foreign coins, a purse or handbag, a woman's wallet, some jewelry, and various papers.

{¶ 52} Appellant told the investigators that he and his friend traveled to a remote wooded location and pulled off the road. Appellant stated that he stayed in the van and watched while his friend walked 20 or 25 yards into the woods and discarded the evidence. Appellant claimed that he did not know the relevance of the items until a few days later when he learned of the murder. Appellant's companion never identified the items as being from the Smith home, yet appellant was certain the items were from the murder scene. Appellant told the investigators that the value of the items became apparent to him a few days later when, as he sat in a bar with his companion listening to news reports about the homicide, his companion told him that he had killed Meeks.

{¶ 53} Appellant provided the investigators with a detailed description of the wooded area. When asked, appellant did not give a reason for not coming forward with this information earlier. Appellant refused to provide any additional information at that time. After the interview, Henderson and Helm gave the information to local officials and the area appellant described was searched. Numerous items identified later by Meeks' mother were found scattered in the woods. Based on that evidence, officials determined that appellant did in fact know something about the homicide. Accordingly, Henderson and Helm returned to interview appellant. Appellant "was not happy" when he was told that he would not be released from prison and refused to provide the investigators with the identity of the individual who appellant claimed was the murderer.

Appellant denied being an accomplice to the murder. In subsequent attempts to identify the individual appellant claimed committed the murder, the investigators contacted numerous of appellant's associates from that approximate time period.

{¶ 54} Henderson testified that he and Helm interviewed appellant three more times in an attempt to convince appellant to provide them with the name of the person he claimed committed the murder, appealing to appellant's "sense of justice." Appellant refused to cooperate unless he was released from prison first. Eventually, Michigan prison officials contacted Henderson and reported that another inmate had come forward with information about appellant's involvement in the case. As a result, Henderson interviewed inmate Mark Miller in late 1997 or early 1998, as well as inmates Michael Coddington and David Dempsey. While officials were not able to obtain any information from the other inmates linking any of them to the Meeks homicide investigation, three individuals did provide Henderson with information appellant had divulged to them about the murder. The information appellant provided the three inmates appeared to be inconsistent in some respects, which Henderson surmised could have been intentional on appellant's part in order to protect himself. When they interviewed Coddington, the inmate stated that appellant had indicated that he "killed a girl in the shower." Inmate Miller indicated that appellant had told him that his ex-wife would cover for him. Dempsey told the investigators appellant had said the body was dumped by a lake. Additionally, Dempsey told investigators appellant had said he was a friend of the victim's father, that Smith had a home at a lake, that the victim's name was "Deanne,

Dana or Deana," that he broke into Smith's home because Smith was not home and kept money in his house, that appellant said he made it look like a robbery by leaving the house a mess, that there was no sexual assault, that he stabbed the victim and it did not take long for the victim to die. Henderson agreed that all of the information provided by Dempsey was consistent with reports from the coroner and previous investigators.

{¶ 55} David Dempsey testified that he and appellant were in the same correctional facility between 1995 and 1997 and often talked during free time. Eventually, after a detective had come to the prison several times to interview appellant, appellant told Dempsey he was being questioned as part of a robbery investigation. During later conversations, however, Dempsey learned that the detective had questioned appellant regarding a murder. Through the course of about a dozen conversations with Dempsey, appellant said he was not concerned about the investigation because he had an alibi. Appellant said that on the date in question he had been with his wife at a local bar; he had become intoxicated and his wife eventually left. Appellant told Dempsey he then left the bar and went to Smith's house to get some money because Smith kept a large amount of cash in his house. When he got to Smith's house, he knocked on the door and entered when no one answered. Appellant said he ransacked the house so that it would not appear that he knew where the money was kept. He told Dempsey that at some point Smith's daughter came home and he had to kill her because she knew who he was. Appellant stated that he stabbed the young woman, who he believed was 16 or 17 years

old, with a kitchen knife. Appellant also told Dempsey that he immediately washed the blood off his hands and later burned his clothes and destroyed the knife.

{¶ 56} Mark Miller testified he met appellant in 1997 while both men were serving time in a Michigan prison. Miller was serving a sentence of 25 to 75 years for first degree criminal sexual conduct. During one of their conversations, appellant told Miller, who was known as a "jailhouse lawyer," that he was being investigated in connection with a murder in Ohio. According to Miller, appellant wanted to know whether it would look suspicious if he refused to talk to investigators about the murder. Miller testified in detail as to what appellant told him about the murder and stated that he had written down much of what appellant said after each of their conversations, thinking that the information might be useful later. Appellant eventually told Miller that he was not worried about the investigation because he had an alibi since he had been with his ex-wife at the time of the murder. During the course of their conversations, appellant told Miller that he had killed the teenage daughter of a friend of his by stabbing her with a knife while burglarizing their home. Appellant stated that he had gone to the home of his friend Boyd Smith intending to steal money he knew his friend kept there. Appellant said Smith's daughter startled him and he had to kill her because she knew who he was. He also told Miller that he washed his hands in a lake and later burned his clothes and the knife. Appellant blamed his actions on "the drugs" and said he was "all fucked up" and would not have hurt Meeks if she had not screamed.

{¶ 57} Margaret Burket testified as to seeing appellant walk past her house on the day of the murder and as to her identification of appellant from the photo array shown to her in Texas. Burket's testimony at trial was consistent with the testimony she gave at the hearing on the motion to suppress. At trial, Burket again stated that she saw man who looked "scarey" and "out of place" walk past her house while she was in her front yard the afternoon of the murder. She thought it looked strange to see a grown man walking along the sidewalk "with a backpack hanging off his shoulder." Burket went inside and continued to watch the man because "he didn't look like he was up to any good or belonged there." When the man was directly in front of her house, Burket "took a good look just to make sure," thinking that if something had happened in the neighborhood "it might be noteworthy to see what this guy looked like." Burket estimated that she watched the man for "a minute or two."

{¶ 58} William Eitniear testified that at the time of the murder he had known appellant for 15 or 20 years. In 1991, the two men regularly spent time together smoking crack. In May or June 1991, appellant asked Eitniear several times if he wanted to break into Smith's house. Each time appellant brought it up, Eitniear said no because Smith was a good friend of one of Eitniear's uncles.

{¶ 59} Zachary Bateson, a deputy at the Wood County Justice Center, testified that on the previous day he had escorted appellant back to the justice center after court adjourned. While Bateson was processing appellant back into the facility, appellant said that several witnesses being held at the justice center who had testified against him were

"snitches." Appellant told Bateson he knew where they were located in the facility and said that if he had a minute with each of them "he'd snap their fucking necks."

{¶ 60} Northwood Police Captain Trent Schroeder testified that he was assigned to re-open the Meeks cold case in 2003. As part of his investigation, Schroeder re-interviewed individuals who knew appellant. Schroeder detailed several interviews with Gary Mickens, who had known appellant in 1991, when they smoked crack together almost every day. At one point, Mickens recalled driving with appellant to a location around the time of the murder and stopping in an alley with a privacy fence nearby. Schroeder eventually drove Mickens to an alley about one block from the house where Meeks was murdered. Mickens thought it looked familiar but could not say with certainty that he had been there before. Mickens then told Schroeder that appellant had gotten out of his van; when appellant returned, he had blood on his shirt sleeve. When Mickens asked appellant about the blood, appellant said that someone came home and he had to hit her.

{¶ 61} Schroeder further testified that by the time he reopened the investigation in 2003, appellant was no longer talking to law enforcement; appellant had stopped offering information in 1997 or 1998. Schroeder testified that when he was reviewing the evidence gathered he decided to contact Margaret Burket and ask her to look at a photo array. His testimony was essentially the same as that given at the hearing on the motion to suppress the photo identification.

{¶ 62} The state rested and the defense offered the testimony of Paul Salvino, who was incarcerated in the same facility as appellant for several years beginning in 1996. Salvino and appellant spent many hours together during free time and talked often. Salvino asserted that appellant was not friends with David Dempsey, Mark Miller or Michael Coddington, all of whom were inmates housed near Salvino and appellant at various times. Salvino recalled telling investigator Helm that he believed Coddington and Dempsey were snitches who got other inmates in trouble. Salvino further testified that if appellant had told him something that could get appellant in trouble he would not tell anybody.

{¶ 63} Investigator Helm testified that during his investigation of this matter, Paul Salvino's name never came up when he questioned individuals about who appellant's associates were in prison. Helm testified that when he interviewed Miller, Coddington and Dempsey at various times, all three provided information that was specific to the Meeks crime scene.

{¶ 64} The record before the trial court, by agreement of the parties, included several transcripts from appellant's 1996 trial for the murder of Deana Meeks. The court, as the trier of fact, reviewed the prior testimony of several individuals, summarized in relevant part below: Michael Coddington, Steven Bacon, James Botzko, Gary Mickens, assistant coroner Jose Guerra and investigator John Helm.

Testimony admitted from appellant's 1996 trial:

{¶ 65} John Helm testified at length as to his knowledge of the 1993 investigation, which led to two confessions by Craig Magrum, an associate of Boyd Smith. Helm believed the confessions were coerced and an indictment against Magrum was dismissed. Helm was also involved with BCI Agent Henderson's investigation. Helm focused his investigation on William Burns and the Magrum brothers until April 1997, when appellant contacted them about the property taken from Smith's house. Helm accompanied Henderson to the Jackson, Michigan, prison to interview appellant. Helm testified appellant insisted he would not give the name of the friend he claimed had possessed the stolen property because he was afraid of being known as a "snitch" by other inmates; appellant wanted to secure a shorter prison sentence before divulging his friend's name. Appellant did not want to provide any other information, based on advice he was receiving from another inmate.

{¶ 66} Michael Coddington testified at the first trial that, while he and appellant were incarcerated together at various Michigan prisons, appellant told him he was under investigation for the Meeks murder. Coddington testified that appellant told him that he killed Meeks because she saw him stealing something from her father and said she was going to tell. According to Coddington, appellant said he cut Meeks' throat and that three other men were with him.

{¶ 67} James Botzko testified that he knew appellant from their mutual, daily patronage of the Home Café, a bar in Sylvania, Ohio. Botzko related that, a few months

before he heard about Meeks' murder, he was at the Home Café when appellant and Mickens arrived. Botzko said he saw that appellant had blood on his left sleeve. Botzko asked appellant about it and appellant said he had gotten into a fight at another bar. Botzko thought this happened around 6:00 p.m. but did not recall what day of the week it was. On cross-examination, Botzko said he had heard about the Meeks murder a few days after seeing appellant and Mickens at the Home Café, which was contrary to his first statement that he heard about the murder months after seeing appellant with blood on his sleeve.

{¶ 68} Appellant's acquaintance Gary Mickens testified at the first trial that he smoked crack with appellant almost every day and "sometimes all night." Mickens testified that after Meeks was murdered, appellant was the one who informed him that Meeks had been killed and that someone had slit her throat. BCI agents interviewed Mickens in 1997, but Mickens could not tell them anything and testified that he did not remember anything. Mickens admitted that investigators specifically questioned him about appellant, a black bag, and items taken from Smith's house during the robbery; nothing prompted any memories, however. Then, in April 2003, when Northwood Police Chief Herman and Northwood Detective Schroeder re-interviewed Mickens, he was able to remember certain events. Mickens recalled appellant picking him up one afternoon in the summer of 1990 or 1991. Appellant pulled into an alley and parked, telling Mickens he was going to "check out a house." When appellant returned, he had blood on his left shirt sleeve; he did not recall how much blood, only that "there was enough that I would

not go into the bar with him." When Mickens noticed the blood, appellant said "Oh, somebody came home, and I had to hit her." In exchange for his cooperation with the investigation prior to the first trial, Mickens received immunity from prosecution for the burglary and Meeks' murder; however, the immunity agreement would be void if prosecutors discovered that Mickens was directly involved in Meeks' murder.

{¶ 69} Steven Bacon, who lived across the street from Smith's house, testified at the first trial that he was home all day on June 7, 1991, and had not noticed any suspicious strangers in the neighborhood. Dr. Guerra's testimony at the first trial was essentially the same as that given at the second trial.

{¶ 70} As this was a bench trial in a criminal case, it is presumed the court considered only relevant, material, and competent evidence in arriving at its judgment unless the contrary affirmatively appears. *State v. Poelking*, 8th Dist. No. 78697, 2002-Ohio-1655; *State v. Post* (1987), 32 Ohio St.3d 380, 384; *State v. White* (1968), 15 Ohio St.2d 146, 151. Nothing in the record suggests the trial judge considered any irrelevant, immaterial, or incompetent evidence. Appellant has attempted to support his appeal with arguments as to the credibility of witnesses with criminal backgrounds, a lack of direct physical evidence linking him to the crime scene, and what appellant describes as "cursory" investigations by detectives and others associated with the case. After our thorough review of the entire record of proceedings in this case, we find that the evidence presented by the state weighs heavily in favor of appellant's conviction. We cannot say that the trier of fact clearly lost its way and created such a manifest miscarriage of justice

that appellant's conviction must be reversed and a new trial ordered. We therefore find that appellant's conviction was supported by sufficient evidence proving all elements of the charged offense as well as by the manifest weight of the evidence. Accordingly, appellant's third and fourth assignments of error are found not well-taken.

{¶ 71} On consideration whereof, the judgment of the Wood County Court of Common Pleas is affirmed. Costs of this appeal are assessed to appellant 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

Arlene Singer, J. _____
JUDGE

Thomas J. Osowik, P.J. _____
CONCUR.
JUDGE