

[Cite as *State v. Gibson*, 2009-Ohio-3883.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91793

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DANA GIBSON

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED IN PART, REVERSED IN PART, AND
REMANDED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-504831

BEFORE: Jones, J., Dyke, P.J., and Celebrezze, J.

RELEASED: August 6, 2009

**JOURNALIZED:
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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

LARRY A. JONES, J.:

{¶ 1} Defendant-appellant, Dana Gibson (“Gibson”), appeals the judgment of the lower court. Having reviewed the arguments of the parties and the pertinent law, we hereby affirm in part and reverse in part.

{¶ 2} Gibson was arrested on November 27, 2007. On November 30, 2007, he was bound over to the Cuyahoga County Common Pleas Court from the Cleveland Municipal Court. On December 19, 2007, Gibson was indicted on seven charges: two counts of murder (aggravated murder under R.C. 2903.01 and murder under 2903.02(B)), two counts of felonious assault (R.C. 2903.11(A)(1) and (A)(2)), one count of tampering with evidence, one count of arson, and one count of offenses against a human corpse. The arson count was found to be a misdemeanor of the first degree by the court under Criminal Rule 29.

{¶ 3} Following pretrials, jury selection began on June 2, 2008. The trial commenced the next day on June 3, 2008. On June 6, 2008, the jury returned a verdict of guilty on six counts: murder under section 2903.02(A); murder under 2903.02(B); both felonious assault counts; tampering with evidence, and arson. The count of offenses against a human corpse was dismissed prior to trial. The defendant was found not guilty of aggravated murder, under R.C. 2903.01, but found guilty of the lesser included offense of murder under Count 1, the R.C. 2903.02(A) section as referenced above.

{¶ 4} On June 17, 2008, the lower court sentenced Gibson to 15-years-to-life on Counts 1 and 2, to run concurrent. Gibson was also sentenced to five years on

Counts 3 and 4, to run concurrent with each other, but consecutive to Counts 1 and 2.

He also received five years on Count 5, to run consecutive to the five-year term of incarceration on Counts 3 and 4, which are consecutive to the fifteen-years-to-life sentence on Counts 1 and 2. Finally, Gibson received six months on Count 6, the misdemeanor arson charge, for a total sentence of 25-years-to-life.

{¶ 5} According to the facts, Gibson lived in Cleveland, Ohio with his half-brother Raymond Gibson, in the upstairs apartment of a house on East 81st Street. Their aunt, Marie Griffin, lived in the downstairs apartment of the same home. Their mother, Ezell Gibson, used to live with them, but is now in a nursing home suffering from the effects of Alzheimer's disease.

{¶ 6} It was noted by the defense that Gibson is not the biological son of Ezell Gibson, but was adopted as a baby. It should also be noted that there is a significant age and size difference between the two half-brothers. Gibson was 46 years old, while Raymond was 66 years old at the time of his death. Gibson was also much larger and heavier than Raymond. Gibson was six foot two inches tall and weighed approximately 210 pounds, while at the time of his death, Raymond was five feet nine inches tall and only weighed 135 pounds. Raymond also had arthritic knees and had difficulty walking up and down the stairs.

{¶ 7} On November 26, 2007, Marie Griffin left the house to attend choir practice. She returned home at 9 p.m., and although she noticed her nephew

Raymond's car was gone, she did not sense that anything was wrong.¹ When Marie woke up the next morning, she noticed that Raymond's car was still gone and she began to worry about him. She went downstairs into the basement and noticed bloody rags in the garbage near her laundry and also noticed blood drops on the stairs and on the door that led outside.

{¶ 8} Marie had a dentist appointment that morning, but on the way to the appointment, she stopped at her friend Geraldine's house noting to Geraldine that she felt something was amiss at home. Marie later went to the nursing home, where Raymond usually was during the day visiting his mother.

{¶ 9} When Marie returned home, she discovered that the driveway had been "washed down completely."² Moreover, the items that she previously saw in the home: a garbage bag containing bloody towels, blood on the door, a curtain rod and curtains that had been hanging in the stairway leading up to Raymond's and Gibson's apartment were all gone. It was at this point that Marie called the police.

{¶ 10} During trial, Marie testified that Gibson and Raymond were seen fighting one another on a bed, with Gibson on top of Raymond. This occurred approximately two months before Raymond's death. Marie testified that Gibson had stating the

¹Earlier the next morning, a burned-out vehicle was found on Ashbury Avenue in Cleveland, Ohio. This is not far from the East 81st Street residence. The call came in at 1:39 a.m. on November 27th, which was approximately 20 minutes prior to the time Dana Gibson was knocking on the door, telling his aunt that he had lost his keys. Tr. 212.

²Tr. 216.

following: “[A]untie, he was going to kill me. He got a gun.”³ The police did recover a gun from the premises and took it with them.

{¶ 11} In discussing the incident at issue in this appeal, Gibson told Cleveland Police Detective Henry Veverka that he and his half-brother had gotten into a fight over the use of a car that belonged to Raymond. According to Detective Veverka’s testimony, the two of them continued to argue and Raymond grabbed a butcher knife from the kitchen drawer. Then, according to Detective Veverka, Gibson grabbed a nearby crowbar and hit Raymond with it. The fight continued into the hall and down the stairs with Gibson continually hitting Raymond.

{¶ 12} Detective Veverka further testified that Gibson told him that he got rid of the body first, then the car, by setting them on fire.⁴ The crowbar, clothing, and some towels apparently used to clean up the scene were discovered in the attic of the home on East 81st Street. Gibson was then arrested and booked for aggravated murder, murder, two counts of felonious assault, tampering with evidence, arson, and offenses against a human corpse. Gibson now appeals.

{¶ 13} Gibson assigns five assignments of error on appeal:

{¶ 14} “[1.] “The evidence presented at trial was insufficient to prove the charges at bar beyond a reasonable doubt;

{¶ 15} “[2.] “The defendant’s conviction is against the manifest weight of the evidence;

³Tr. 260.

{¶ 16} “[3.] “The trial court erred in denying appellant’s acquittal pursuant to Ohio Criminal Rule 29, where evidence is not sufficient to support a conviction;

{¶ 17} “[4.] “The trial court erred in not allowing testimony from a party regarding an admission by a party opponent, which would qualify as a hearsay exemption under Ohio Evidence Rule 801(D)(2);

{¶ 18} “[5.] “Appellant was not afforded effective assistance of counsel.”

Insufficient Evidence and Manifest Weight

{¶ 19} Due to the substantial interrelation between Gibson’s first, second, and third assignments of error, we shall address them together.

{¶ 20} The legal concepts of sufficiency of the evidence and weight of the evidence are both quantitatively and qualitatively different. With respect to sufficiency of the evidence, sufficiency is a term of art meaning that legal standard that is applied to determine whether the case may go to the jury or whether the evidence is legally sufficient to support the jury verdict as a matter of law. In essence, sufficiency is a test of adequacy. Whether the evidence is legally sufficient to sustain a verdict is a question of law. In addition, a conviction based on legally insufficient evidence constitutes a denial of due process. *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52, 678 N.E.2d 541.

{¶ 21} Although a court of appeals may determine that a judgment of a trial court is sustained by sufficient evidence, that court may, nevertheless, conclude that the

⁴Tr. 391.

judgment is against the weight of the evidence. Weight of the evidence concerns the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other. It indicates clearly to the jurors that the party having the burden of proof will be entitled to their verdict, if, on weighing the evidence in their minds, their verdict shall find the greater amount of credible evidence sustains the issue that is to be established before them. Weight is not a question of mathematics, but depends on its effect in inducing belief. When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a “thirteenth juror” and disagrees with the fact finder’s resolution of the conflicting testimony. *Id.*

{¶ 22} As to a claim that a judgment is against the manifest weight of the evidence, 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. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction. *State v. Martin* (1983), 20 Ohio App.3d 172, 485 N.E.2d 717. The weight to be given the evidence and the credibility of the witnesses are primarily for the trier of fact to determine. *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212.

{¶ 23} The record in the case at bar verifies that significant evidence was presented at the trial court. More specifically, the State produced the murder weapon, a long, heavy, solid metal pole. This pole was used to repeatedly hit Raymond Gibson in the head. The State also produced evidence demonstrating that Raymond Gibson died from four wounds to the head caused by the murder weapon. One of the wounds was located behind his ear, causing a stress laceration to the ear and fracturing the skull beneath it. The other three wounds were neatly organized parallel one to another and located on the left side, toward the rear of Raymond Gibson's head. The blows were delivered with such force that Raymond's skull was fractured and his brain was lacerated.

{¶ 24} In addition to the murder weapon and the medical trauma evidence, significant testimony was also presented. Marie Griffin testified that during the September 2007 altercation, Gibson was on top of Raymond choking him to the point where Raymond could barely speak.⁵ Marie also testified that the relationship between Raymond and Gibson was such that every time Gibson entered a room Raymond would leave.⁶ In addition to Marie's testimony, Detective Tim Brown testified that when he arrived on the scene he observed suspected blood in the basement sink and floor drain, on the basement stairs, outside the house, and in the hallway leading up to the second floor apartment shared by Raymond and Gibson.

⁵Tr. 207.

⁶Tr. 224.

{¶ 25} In addition to the medical evidence and the testimony given, the State presented sufficient evidence that demonstrated that Gibson intended to take the life of Raymond. The nature of the weapon used and the type of injuries received demonstrated Gibson's intent to take the life of Raymond when he hit him repeatedly with the metal pole.

{¶ 26} Gibson argues that he was acting in self-defense. However, we find his argument to be unpersuasive. In order for Gibson to establish self-defense, he must prove the following elements: (1) that the defendant was not at fault in creating the situation giving rise to the affray; (2) that the defendant had 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) that the defendant did not violate any duty to retreat or avoid the danger. *State v. Robbins* (1979), 58 Ohio St.2d 74, 388 N.E.2d 755, paragraph two of the syllabus. *State v. Barnes* (2002), 94 Ohio St.3d 21, 24.

{¶ 27} Here, the only potential evidence to support Gibson's self-defense argument was his claim that Raymond had a kitchen knife that Raymond pulled out of a kitchen drawer to use against Gibson. However, Gibson had no injuries and there was no evidence of a struggle in the kitchen other than three drops of blood. The jury was free to assess Gibson's motivation to lie and consider that prior to making this self-serving statement, he lied about knowing where Raymond was. Moreover, there was evidence that the force used against Raymond was significantly disproportionate to the threat Gibson alleged. This disparity is easily identifiable when one considers

the difference between Gibson and Raymond in terms of age, size, and physical health.

{¶ 28} We find that there was sufficient evidence for a jury to conclude that Gibson committed murder, felonious assault, tampered with evidence, and committed arson. In addition, there is substantial evidence upon which the court could reasonably conclude that appellant committed the offenses charged. Moreover, there is nothing in the record to suggest that the jury lost its way and created such a miscarriage of justice as to require a reversal of Gibson's convictions.

{¶ 29} Gibson argues in his third assignment of error that the lower court erred in denying his motion for acquittal. Crim.R. 29(A) states that a trial court "shall order the entry of a judgment of acquittal * * * if the evidence is insufficient to sustain a conviction of such offense or offenses." When reviewing sufficiency of the evidence, an appellate court must determine "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, 273, 574 N.E.2d 492. The Ohio Supreme Court has determined that, in essence, sufficiency is a test of adequacy. *State v. Robinson* (1955), 162 Ohio St. 486, 124 N.E.2d 148. See, also, *State v. Sutton*, Cuyahoga App. No. 90172, 2008-Ohio-3677.

{¶ 30} Gibson claims that he acted in self-defense, and his convictions for murder and felonious assault should be reversed. However, as previously stated above, the evidence in the case at bar does not support his claim of self-defense. The

murder weapon, injuries to the victim, and evidence presented in this case do not support a finding of self-defense. He also argues that his arson conviction should be reversed. However, Gibson's argument ignores the evidence, including his admissions to Detective Veverka, that show he attempted to clean the crime scene, concealed evidence in the attic, dumped Raymond's body behind an abandoned house, and burned Raymond's car. We find that the trial court did not err in denying Gibson's motion for acquittal.

{¶ 31} Accordingly, Gibson's first, second, and third assignments of error are overruled.

{¶ 32} However, our analysis does not end here because we find plain error regarding Gibson's convictions. Pursuant to Crim.R. 52(B), "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

{¶ 33} Gibson is currently serving two concurrent terms of incarceration for killing one victim: one term of incarceration for murder pursuant to R.C. 2903.02(A), and the other for murder pursuant to R.C. 2903.02(B).

{¶ 34} Furthermore, Gibson is serving two concurrent terms of incarceration for felonious assault against one victim: one term of incarceration for felonious assault pursuant to R.C. 2903.11(A)(1) and the other for felonious assault pursuant to R.C. 2903.11(A)(2).

{¶ 35} According to R.C. 2941.25:

“(A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.

“(B) Where the defendant’s conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them.”

{¶ 36} According to the Supreme Court of Ohio:

{¶ 37} “In the first step, the elements of the two crimes are compared. If the elements of the offenses correspond to such a degree that the commission of one crime will result in the commission of the other, the crimes are allied offenses of similar import and the court must proceed to the second step. In the second step, the defendant’s conduct is reviewed to determine whether the defendant can be convicted of both offenses. If the court finds either that the crimes were committed separately or that there was a separate animus for each crime, the defendant may be convicted of both offenses.” *State v. Cabrales* (2008), 118 Ohio St.3d 54, 2008-Ohio-1625, 886 N.E.2d 181.

{¶ 38} As it pertains to Gibson’s murder convictions: “The Ohio Supreme Court has held that the conviction and sentence on two counts of murder for a single killing violated R.C. 2941.25 and the Double Jeopardy Clauses of the Ohio and United States Constitutions.” *State v. Hudson*, 9th Dist. No. 24009, 2008-Ohio-4075; see

State v. Huertas (1990), 51 Ohio St.3d 22, 553 N.E.2d 1058. “[Where] a defendant who kills only one victim is convicted of two aggravated murder counts, the trial court may sentence on only one count.” *State v. Waddy* (1992), 63 Ohio St.3d 424, 588 N.E.2d 819.

{¶ 39} In the instant case, felonious assault pursuant to R.C. 2903.11(A)(1) and R.C. 2903.11(A)(2) are allied offenses of similar import. *State v. Smith*, 1st Dist. No. C-070216, 2008-Ohio-2469; see, also, *State of Ohio v. Goldsmith*, Cuyahoga

{¶ 40} App. No. 90617, 2008-Ohio-5990. This is so because Gibson struck Raymond with multiple blunt force strikes in rapid succession and did not have a separate animus for each strike.

{¶ 41} Thus, “although the aggregate sentence should remain the same, by law, the convictions should be merged.” *State v. Crowley* (2002), 151 Ohio App.3d 249, 2002-Ohio-7366, 783 N.E.2d 970.

{¶ 42} Accordingly, we find plain error. Gibson’s convictions should be merged.

Hearsay

{¶ 43} Gibson argues in his fourth assignment of error that the lower court erred in not allowing testimony from a party regarding an admission by a party opponent, which would qualify as a hearsay exemption under Ohio Evidence Rule 801(D)(2).

{¶ 44} A trial court has broad discretion in determining the admissibility of evidence. *State v. Maurer* (1984), 15 Ohio St.3d 239, 265, citing *State v. Hymore* (1967), 9 Ohio St.2d 122, 128. Accordingly, an appellate court should not interfere with a trial court’s evidentiary rulings absent an abuse of discretion. *Id.* “An abuse of

discretion ‘connotes more than an error of law or of judgment; implies that the court’s attitude is unreasonable, arbitrary or unconscionable.’” *State v. Jackson*, 107 Ohio St.3d 53, 2005-Ohio-5981, at ¶181, quoting *State v. Adams* (1980), 62 Ohio St.2d 151, 157.

{¶ 45} Gibson argues that “there were stories told about Dana’s and Raymond’s relationship, and these stories were related to the detectives on this case, most notably Detective Veverka, who could testify only as to what he saw at the scene and what the witness (including the defendant) told him.”⁷ Appellant argues that he never made these statements and he did not have the intent necessary to be found guilty. However, it was actually defense counsel who attempted to solicit appellant’s statement to Detective Veverka, not the State. Moreover, the statement was self-serving and, by defense counsel’s own argument, being offered to benefit Gibson. Therefore, the lower court did not abuse its discretion when it correctly sustained the State’s objection and disallowed the testimony.

{¶ 46} Accordingly, Gibson’s fourth assignment of error is overruled.

Ineffective Assistance of Counsel

{¶ 47} For his final assignment of error, Gibson complains that his defense counsel was ineffective. Gibson argues that his trial attorneys acted ineffectively by advising him to waive his speedy trial rights, calling only one witness, and not allowing him to testify on his own behalf. We find no merit in Gibson’s claims.

⁷Appellant’s brief p.13.

{¶ 48} A claim of ineffective assistance of counsel requires a defendant to show that (1) the performance of defense counsel was seriously flawed and deficient and (2) the result of the appellant's trial or legal proceeding would have been different had defense counsel provided proper representation. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. This requires two distinct lines of inquiry. First, we determine "whether there has been a substantial violation of any of defense counsel's essential duties to his client[.]" *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, paragraph two of the syllabus. When making this inquiry, we presume that licensed counsel has performed in an ethical and competent manner. *Vaughn v. Maxwell* (1965), 2 Ohio St.2d 299, 209 N.E.2d 164.

{¶ 49} Second, we determine whether "the defense was prejudiced by counsel's ineffectiveness." *Bradley*, 42 Ohio St.3d at paragraph two of the syllabus. Prejudice requires a showing to a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at paragraph three of the syllabus.

{¶ 50} Our review of claims of ineffective assistance of counsel is undertaken with the understanding that we are not in a position to second-guess trial counsel. In *Strickland*, the United States Supreme Court stated, "[j]udicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second guess counsel's assistance after a conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Strickland*,

466 U.S. at 689. Debatable trial tactics will not form a basis for proving ineffective assistance of counsel. *State v. Hoffner*, 102 Ohio St.3d 358, 2004-Ohio-3430, 811 N.E.2d 48, ¶45.

{¶ 51} In the case at bar, Gibson fails to provide any evidence as to the value of the “issues” he wanted his counsel to mention at his trial. Gibson simply makes plain unsupported assertions as to the value of issues he wanted to mention. Gibson fails to point to any evidence in the record that would identify his attorney’s decisions as anything other than trial strategy. It is common practice for speedy trial rights to be waived. It is also common strategy for attorneys to counsel their clients not to testify on their own behalf, as it frequently opens the door to other issues in cross-examination that defense counsel may not find beneficial to the client.

{¶ 52} The record shows that Gibson’s attorney’s actions were well within the parameters of effective assistance of counsel. We conclude that Gibson’s attorney made valid and proper strategic decisions in regard to their client’s welfare. These decisions fell well within the ambit of debatable trial tactics and do not establish that counsel violated an essential duty to Gibson. See *State v. Panza*, Cuyahoga App. No. 84177, 2005-Ohio-94, ¶24; *State v. Irwin*, Hocking App. No. 03CA13, 2004-Ohio-1129, ¶33.

{¶ 53} Gibson’s fifth assignment of error is overruled.

{¶ 54} As previously stated, it was plain error for Gibson to be convicted of two counts of murder and two counts of felonious assault. The convictions should have been merged. Accordingly, this matter is remanded to the trial court to merge

defendant's two convictions for murder into one murder conviction and to merge defendant's two convictions for felonious assault into one felonious assault conviction, thereby imposing one single conviction for each of the two allied offenses. In all other respects, the matter is affirmed

Judgment affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

It is ordered that appellant and appellee split the costs herein taxed.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated.

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

LARRY A. JONES, JUDGE

ANN DYKE, P.J., and
FRANK D. CELEBREZZE, JR., J., CONCUR