[Cite as *State v. Pettway*, 2009-Ohio-4544.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91716

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

TIMOTHY PETTWAY

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-498474

BEFORE: Boyle, J., Rocco, P.J., and McMonagle, J.

RELEASED: September 3, 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).

MARY J. BOYLE, J.:

{¶ 1} Defendant-appellant, Timothy Pettway, appeals his murder conviction. Finding no merit to the appeal, we affirm.

Procedural History and Facts

{¶ 2} In July 2007, Timothy Pettway was indicted on seven counts: Counts 1 and 2, aggravated murder, in violation of R.C. 2903.01(A) and (B); Counts 3 and 4, aggravated robbery, in violation of R.C. 2911.01(A)(1) and (A)(3); Counts 5 and 6, aggravated burglary, in violation of R.C. 2911.11(A)(1) and (A)(2); and Count 7, kidnapping, in violation of R.C. 2905.01(A)(1). Each count had one- and three- year firearm specifications, and the aggravated murder counts also had felony- murder specifications.

{¶ 3} Prior to trial, Counts 4 through 7 were nolled. The following evidence was presented to a jury.

{¶ 4} Elizabeth Wilson testified that she became friends with the victim, Christopher Mitchell, in 2006 while they were both students at Tri-C. Wilson introduced her friend, Jillian Emenhiser, to Mitchell. They would all hang out together at Mitchell's apartment.

{¶ 5} Wilson began dating Pettway in January 2007. She also introduced him to Mitchell sometime around February that same year. On the afternoon of June 17, 2007, she received a text message from Pettway saying that he was going to move into Mitchell's spare bedroom. Later that evening, after Wilson and Emenhiser got off work, they went to Mitchell's

apartment. Pettway was there, cleaning the spare bedroom. Mitchell was not home when they got there, but he arrived around 3:00 or 4:00 a.m. with his girlfriend, Rebecca Beyer. When Mitchell arrived, he was angry with Wilson and Emenhiser for smoking in his apartment. He told them that they had to go outside to smoke. They did, and Mitchell followed them outside and kissed both of them on the mouth. Wilson said that she was not offended, but she thought it was strange. Emenhiser told Mitchell to stop. They went back in the apartment and went to bed. Wilson said she told Pettway about the kiss when they went to bed.

{¶ 6} Emenhiser slept on the couch. When she woke up, she said Mitchell was playing music very loudly, and he was taking the locks off of the door in the spare bedroom, which Pettway had put on. Emenhiser asked him why, and he said he was mad that they had smoked in his apartment and said that he did not think he could get along with Pettway.

{¶ 7} Wilson testified that she woke up when she heard Mitchell taking the locks off of the door. She said Mitchell was using a screwdriver to remove the locks. Pettway got up, packed some of his belongings in suitcases, and left with Wilson and Emenhiser. They took a cab to a bookstore in Bay Village. Pettway took his suitcases into the bookstore. Wilson went in to change her clothes, but Emenhiser remained in the cab.

Lisa Flaatrud, the owner of the bookstore, confirmed Wilson's and Emenhiser's testimony regarding this portion of the events.

{¶ 8} Pettway, Wilson, and Emenhiser left the bookstore in the cab and went to Pettway's aunt's house on West 104th Street. While they were there, Pettway asked Wilson and Emenhiser to go back to Mitchell's with him to get the rest of his belongings. Neither woman wanted to go, so Pettway called a friend of his, whom he called "Smoke." Wilson identified Smoke as codefendant Joseph McGowan.

{¶ 9} McGowan testified that he pled guilty in this case to aggravated murder and aggravated robbery and was serving a sentence of 25 years to life in prison in exchange for giving truthful and honest testimony. He said that on June 18, 2007, Pettway called him and asked him to help him move his things out of Mitchell's apartment. McGowan met Pettway at Mitchell's apartment. Mitchell and his girlfriend were there. Pettway told McGowan to take some bags from the kitchen and living room downstairs and place them in the cab when it arrived.

{¶ 10} McGowan said when he got back to Mitchell's apartment and after making two trips downstairs, Pettway closed the door to the kitchen and "tossed [him] a [baseball] bat." Next, Pettway "shut the blinds," and McGowan "heard a gun cock and [Mitchell] stood up and took the phone off his ear." Pettway said to Mitchell's girlfriend, "this ain't got nothing to do

with you girl." Then, [Mitchell] and Pettway began to wrestle. While wrestling, McGowan said that Pettway shot Mitchell. After Pettway shot Mitchell, McGowan heard him say, "why [are] you messing with my girl?"

{¶ 11} McGowan further testified that after Pettway shot Mitchell, Pettway told him to go in the kitchen and "hit that nigger." McGowan said he hit Mitchell twice in the leg with the bat. He said he listened to Pettway because Pettway had a gun and he "fear[ed] for his life." Then, McGowan said Pettway took the baseball bat from him and hit Mitchell in the head with it three or four times. Mitchell was lying on the floor on his stomach, "moaning and groaning" as Pettway hit him. The bat was made of wood and had duct tape around it.

{¶ 12} McGowan also testified that Pettway took some property from the living room, including an "XBOX, laptop, [and] other things," but that Pettway claimed the items belonged to him.

{¶ 13} McGowan put the bags in the cab when it arrived. As he was moving the bags, he noticed Pettway had the baseball bat in his hand and a bag on his shoulders. McGowan heard Pettway tell the cab driver to go to West 104th Street and Western Avenue. When they got there, McGowan helped unload the items from the cab. Several other people from in the house also helped. McGowan said he traded shoes with Pettway in the

basement and left after the bags were unloaded because the incident and Pettway made him feel "unsafe."

{¶ 14} Wilson testified that when Pettway returned to Loida Arroya's house, Pettway's aunt, he was sweating and seemed rattled. Emenhiser said she heard Pettway tell Wilson that he had to shoot Mitchell. Emenhiser said she also overheard Pettway telling McGowan as they unloaded the cab that they had to "take their clothes off." Emenhiser testified that Pettway went to Arroya's basement and changed his clothes. Wilson, however, denied that Pettway changed his clothes. Wilson further testified that Pettway did not tell her anything that had happened while they were still at Arroya's house.

{¶ 15} After McGowan left Arroya's, Wilson, Emenhiser, and Pettway went to Pettway's friend's house down the street. They were watching television when they saw Mitchell's apartment building on the news and heard that a male had been shot and killed. Wilson said she recognized that it was Mitchell's apartment building. Wilson and Emenhiser went to the bathroom together to talk about what might have happened. Wilson said she was upset and thought it might have been Mitchell who was killed. Wilson said they were in the bathroom for about an hour because she just learned her friend was dead and she was trying to deal with it. Both women were crying. Pettway came into the bathroom and told Wilson not to be mad.

{¶ 16} Emenhiser said that Pettway told her that he was arguing with Mitchell and when he went to kick Mitchell, Mitchell grabbed his leg, and Pettway fell back and accidentally shot Mitchell.

{¶ 17} The day after the murder, June 19, Wilson said she and Pettway were in the car when she asked Pettway what happened at Mitchell's apartment. Pettway told her he "had to shoot him." She said Pettway told her that while he was arguing with Mitchell, he tried to kick Mitchell away from him, but Mitchell grabbed his foot. Pettway then told Wilson that he fell backwards and when he hit the ground, his gun went off and the bullet hit Mitchell. Wilson testified that Pettway told her McGowan began hitting Mitchell with the baseball bat; Pettway said he told him to stop twice, but McGowan continued to hit Mitchell.

{¶ 18} Wilson asked Pettway to take her home and he did. She did not call the police. The police came to her house a couple of days later and asked her questions about Mitchell's murder. After she told the police what she knew, she told Pettway that the police had contacted her. At that point, Wilson said that Pettway "elaborated on what he had told [her] before that." Pettway told her that "[Mitchell] like came at him with the screwdriver" up "by his neck," and that they both tried to grab the gun and were struggling over it when it went off. Wilson said the first time she heard about a screwdriver was the second time they discussed what happened.

{¶ 19} Wilson further said that she and Pettway discussed what happened a third time, about a week later, at his uncle's house. This time, Wilson said Pettway told her that he was arguing with Mitchell in the bedroom and the gun was on the bed. Pettway said Mitchell swung at him with a screwdriver, "[t]hey struggled for the gun and[,] somehow he shot [Mitchell]." When she went home, she told the police where Pettway was and they picked him up there. Wilson admitted that she lied to police that Pettway told her, "someone had gotten rid of the gun for him." She said she only told the police so that she could go home.

{¶ 20} Emenhiser said she also spoke to Pettway again about Mitchell's death at her home, a few days later. This time, Pettway told her "him and [Mitchell] were arguing and that [Mitchell] went to grab a screwdriver and came after him with a screwdriver and that he shot him." Emenhiser said she also talked with Pettway a third time about what happened. Emenhiser said she spoke to the police before she went to talk to Pettway for the third time, and that Wilson knew she spoke to the police. This time, Pettway repeated what he said to her the second time (at her house), but he added that McGowan hit Mitchell with a baseball bat several times. Pettway told her that he kept telling McGowan to stop. This was Pettway's first time mentioning to Emenhiser that a bat was involved. Emenhiser said Pettway

wanted to know what she told the police and he asked her not to testify against him.

{¶ 21} Jasmine Rowe testified that she lived in the same apartment complex as Mitchell in June 2007. They were close friends; she had known him for about eight months and visited his apartment daily. On June 18, 2007, she heard something that "sounded like a door slam and then [she] heard footsteps in the stairway." She went outside to smoke and saw two men taking boxes from Mitchell's apartment and putting them in a cab. Rowe identified Pettway as one of the men taking the boxes into the cab. She did not see the men get into the cab, but she saw the cab leave. As Rowe walked toward Mitchell's apartment, she saw Beyer, Mitchell's girlfriend. Beyer looked upset, and Rowe let her use her cell phone. After Rowe saw that Beyer called 911, she went into Mitchell's apartment and saw him lying on the floor with blood coming from his head; he was not moving, and he did not appear to be breathing. Rowe waited outside of the apartment until the authorities arrived.

{¶ 22} Augustine Cooper, a cab driver, testified that at 3:45 p.m. on June 18, 2007, he responded to a call for a pickup on West 44th Street and Bridge Avenue (Mitchell's apartment). Two men loaded the van with milk crates, bags, and a suitcase. The passengers were not hurrying as they loaded the cab. Cooper said as the men got into the cab, he saw an object wrapped in

duct tape, which he believed to be a wooden hockey stick. Both Pettway and the other passenger handled this object.

{¶ 23} Loida Arroya testified that on June 18, 2007, Pettway and another person came to her house and unloaded items from a cab. Wilson and Emenhiser were already at her house and they helped unload the cab. After that, she noticed Pettway and the other passenger changed their clothes. She also said Pettway was not acting normal when she saw him, he was in a hurry, and he tried to leave as quickly as possible. They all left soon after that. The police arrived at Arroya's home a couple of hours later, searched the home, and took several of Pettway's items, including clothing, some shoes, and a laptop.

{¶ 24} Officer Donny Bettis testified that he and his partner were the first to arrive at Mitchell's apartment. Officer Bettis said there was a female at the crime scene who was "fearful, scared, nervous, [and] shaken up." Officer Bettis obtained the name of a suspect, a physical description, and Arroya's address. Officer Bettis and other officers went to Arroya's home on West 104th Street. The suspect was not there, but the officers spoke to Arroya.

{¶ 25} Officer Preston Manney testified that when he and his partner arrived at the scene, there were "several other zone cars * * * arriving." Officer Manney stated that they arrived approximately five minutes after

Mitchell had been shot; he appeared to be dead when they got there. Other than Mitchell, Beyer was the only other person in the apartment. He said that Beyer "was rather shook up, but not hysterical. She pretty much was calm enough to answer our questions without going into hysterics." Officer Manney could tell that she was upset because she "had been crying, there were tears, stress in her voice, she was very excitable." When asked, "what caused her to be so upset," Officer Manney replied, "[t]he male being shot and then stomped on."

{¶ 26} Officer Manney testified, "[w]hen we asked [Beyer] how long it had been, she stated that it just happened, that he was moving a few minutes before we arrived." He further testified, "[s]he told us that a male that had moved in yesterday and was told to move out had returned with a friend. When they came into the apartment, the male that had moved in, suspect number one, produced a revolver, a gun actually she said."

{¶ 27} Officer Manney further stated that, "[w]e learned of a vehicle through a second witness who was downstairs." He also testified that he learned (but did not say from who) that the suspect was a black male, about 5 feet ten or eleven inches tall, and that he had left the "premises" approximately five to ten minutes before they got there in a "Zone cab."

{¶ 28} Detective Kathleen Carlin testified that when she arrived at the scene, she learned a cab was used to transport the suspects. She contacted

the cab company and asked them to bring the cab back to the scene of the crime. When the cab arrived, she interviewed Cooper, learned where he took the passengers, and had the cab towed so it could be examined.

{¶ 29} When the SIU (Scientific Investigation Unit) arrived, Detective Carlin had them take pictures of the apartment. She stated the apartment was "fairly neat and organized," there appeared to be items missing from the entertainment center, and there was a screwdriver next to Mitchell. She spoke to Rowe and Beyer at the scene and had them give statements. Rowe and Beyer gave descriptions of two suspects. The next day, Detective Carlin went to Arroya's house, spoke with her, searched the basement, and found a laptop computer, two pairs of boots, and a T-shirt.

{¶ 30} Doctor Andrea McCollom, deputy coroner for the Cuyahoga County Coroner's Office, testified that Mitchell died as a result of "[b]lunt impacts to the head with skull and brain injuries" and from a gunshot wound to the upper abdomen. She further testified that either "condition" could have killed him.

{¶ 31} The jury found Pettway guilty of murder, as a lesser included offense of aggravated murder in Count 1, with the one- and three-year firearm specifications. The jury found Pettway not guilty of aggravated murder and aggravated robbery as charged in Counts 2 and 3. The trial court sentenced him to 15 years to life in prison for murder and three years

for the firearm specifications, for an aggregate term of 18 years to life in prison. The trial court also informed him there would be five years of postrelease control upon his release from prison.

Assignments of Error

{¶ 32} Defendant-appellant, Timothy Pettway, appeals his convictions of murder and the firearm specifications. He raises five assignments of error for our review:

{¶ 33} "[1.] The trial court erred in allowing the testimony of Jillian Emenhiser where her name was not disclosed to appellant in the state's discovery response."

{¶ 34} "[2.] The trial court erred in denying appellant's Criminal Rule 29 motion for acquittal when there was insufficient evidence to prove the elements of murder."

{¶ 35} "[3.] The appellant's conviction for murder was against the manifest weight of the evidence."

{¶ 36} "[4.] The trial court erred in admitting the hearsay statement of Rebecca Beyer into evidence."

{¶ 37} "[5.] Appellant's conviction for murder must be reversed where there was more than one cause of death and he was not the principal offender."

Crim.R. 16

{¶ 38} In his first assignment of error, Pettway maintains that the trial court erred in permitting Emenhiser's testimony because the state failed to identify her as one of the witnesses it intended to call at Pettway's trial in accordance with Crim.R. 16, nor did the state give him a copy of her statement.

{¶ 39} When Pettway objected to Emenhiser testifying at trial, his counsel informed the trial court, "we know who she is, but we don't know the sum and substance of this testimony." The state responded that during pretrial phases, it "read each and every report" to Pettway containing "a synopsis of each and every statement as it relates to each witness." The state argued that it must have been a "typo" that Emenhiser was not on the list, as she was a material witness. The state further told the trial court that it had informed defense counsel about the witness and read them "the entire brief synopsis as it relates to this witness statement."

{¶ 40} Pettway's attorneys denied ever seeing a statement from Emenhiser or Wilson, but said they did get a copy of Beyer's statement. One of Pettway's attorneys then stated, "[n]ow, we know in essence she's going to say that he admitted that, that he shot the victim." The court responded, "[h]ow do you know that?" The defense attorney replied, "[b]ecause they verbally told us that." The court later asked, "[d]id you learn of Jillian Emenhiser through the state's disclosing it?" Both attorneys replied that

they had. The court stated, "[s]o you knew, you heard the name?" Again, they said yes. The court then asked, "[d]o you recall, as the prosecutor has indicated, the conversation in which it was purportedly related to you the sum and substance of what her statement was?" One of the attorneys responded, "[t]he only thing we've ever been told about her is that our client allegedly made an admission to her that he shot the victim. Exactly under what circumstances, we don't know, but we know that the state has told us that she will testify that our client admitted to her that he shot Mr. Mitchell." The court then allowed Emenhiser to testify.

{¶ 41} Crim.R. 16(B)(1)(e) states that "[u]pon motion of the defendant, the court shall order the prosecuting attorney to furnish to the defendant a written list of names and addresses of all witnesses whom the prosecuting attorney intends to call at trial, together with any record of prior felony convictions of any such witness, which record is within the knowledge of the prosecuting attorney."

{¶ 42} However, "[i]f at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court *may* order such party to permit discovery or inspection, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may

make such other order as it deems just under the circumstances." (Emphasis added.) Crim.R. 16(E)(3).

{¶ 43} Pettway argues Crim.R. 16 "is designed to ensure fairness at trial" and "to avoid surprise and prevent concealment of evidence favorable to one party." Pettway concedes, however, that "he was aware of the witnesses [sic] name through informal pretrial discussions." In addition, Pettway did not deny the state's claim that he received a synopsis of Emenhiser's statements during pretrial discussions.

{¶ 44} When a prosecutor violates Crim.R. 16 by failing to provide the name of a witness, a trial court does not abuse its discretion in allowing the witness to testify where the record fails to disclose (1) a willful violation of the rule, (2) that foreknowledge would have benefitted the accused in the preparation of his or her defense, or (3) that the accused was unfairly prejudiced. *State v. Scudder* (1994), 71 Ohio St.3d 263, 269, citing *State v. Heinish* (1990), 50 Ohio St.3d 231, syllabus.

{¶ 45} In this case, we conclude the trial court did not abuse its discretion in allowing Emenhiser's testimony. First, there is no evidence the state willfully violated Crim.R. 16, if it did at all. A review of the record reveals Pettway was made aware of Emenhiser's name and given a synopsis of her statement before trial by the state. Second, Pettway had foreknowledge of Emenhiser testifying and knew the substance of what

Emenhiser was going to testify to. Third, Pettway has failed to show he was unfairly prejudiced by the admission of the testimony. He had an opportunity to review the synopsis of the statement during pretrial discussions, he did not request a continuance to better prepare for her testimony, and he cross-examined her at length, which allowed the jury to come to their own conclusions about her truthfulness.

{¶ 46} Contrary to Pettway's contentions, we find that the trial court did not abuse its discretion in allowing Emenhiser's testimony.

{¶ 47} Accordingly, Pettway's first assignment of error is overruled.

Crim.R. 29

{¶ 48} In his second assignment of error, Pettway argues that the trial court erred when it did not grant his Crim.R. 29 motion for acquittal.

{¶ 49} Under Crim.R. 29(A), a trial court "shall not order an entry 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 proven beyond a reasonable doubt." *State v. Bridgeman* (1978), 55 Ohio St.2d 261, syllabus. The test an appellate court must apply in reviewing a challenge based on a denial of a motion of acquittal is the same as a challenge based on the sufficiency of the evidence to support a conviction. *State v. Bell* (May 26, 1994), 8th Dist. No. 65356.

{¶ 50} An appellate court's function in reviewing the sufficiency of the evidence to support a criminal conviction is to 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. *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus. "In essence, sufficiency is a test of adequacy. Whether the evidence is legally sufficient to sustain a verdict is a question of law." *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386. 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. *Jenks* at 273.

{¶ 51} Pettway was convicted of murder, under R.C. 2903.02(A), which provides, in pertinent part, that "[n]o person shall purposely cause the death of another."

{¶ 52} Pettway maintains that the state did not present sufficient evidence to prove beyond a reasonable doubt that he purposely caused Mitchell's death. Specifically, Pettway argues that McGowan's testimony was not credible because McGowan testified to avoid a possible death penalty sentence, he contradicted prior statements that he gave to the police, and he had severe psychiatric disorders that profoundly interfered with his intellect

and perception. Pettway further contends the evidence was not sufficient evidence because the murder weapons were not found.

{¶ 53} After reviewing the evidence in a light most favorable to the prosecution, we conclude that any rational trier of fact could have found that the essential elements of murder were proven beyond a reasonable doubt.

{¶ 54} We note at the outset that Pettway's claims regarding McGowan's credibility are not proper under a review for evidentiary sufficiency. *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, ¶79.

{¶ 55} The evidence presented, if believed, established that Mitchell kissed Pettway's girlfriend; that Mitchell kicked Pettway out of his apartment after they had lived together for less than 24 hours; that Pettway left Mitchell's apartment and returned with a gun and a baseball bat; that Pettway shot Mitchell in the abdomen, ordered McGowan to hit Mitchell with the bat, and then hit Mitchell in the head with the bat himself; and that Pettway was outside of Mitchell's apartment immediately after Mitchell had been shot and beaten. Moreover, Wilson and Emenhiser testified that Pettway admitted to killing Mitchell. This evidence is sufficient for a trier of fact to conclude beyond a reasonable doubt that Pettway purposely caused Mitchell's death, even without the actual weapon ever being presented.

{¶ 56} Accordingly, Pettway's second assignment of error is overruled.

Manifest Weight of the Evidence

{¶ 57} In his third assignment of error, Pettway argues that his conviction was against the manifest weight of the evidence.

{¶ 58} "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 judgment is against the weight of the evidence. * * * Weight of the evidence concerns 'the inclination of the *greater amount of credible evidence*, offered in trial, to support one side of the issue rather than the other. * * * Weight is not a question of mathematics, but depends on its *effect in inducing belief*.' (Emphasis added.) * * *

{¶ 59} "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. * * * The court, reviewing the 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." (Internal citations omitted.) *Thompkins* at 387.

{¶ 60} Pettway submits that "this jury clearly lost its way in rendering the verdict that it did," relying on the same arguments he made regarding sufficiency of the evidence. We find Pettway's arguments to be without merit.

{¶ 61} Emenhiser, Wilson, and McGowan all testified that Pettway either shot Mitchell or admitted to shooting Mitchell. And McGowan further testified that Pettway hit Mitchell in the head multiple times with the bat.

{¶ 62} The jury weighed McGowan's credibility and it, as the fact finder, was free to believe all, none, or some of what he said during trial, regardless of his status as a codefendant or any inconsistencies between his statement to the police and what he testified to at trial. The jury was well aware of the fact that McGowan hoped to receive favorable treatment in exchange for his testimony, and that he pled guilty to aggravated murder and aggravated robbery. Based on this evidence, along with the evidence stated above with respect to sufficiency, we find that the jury did not clearly lose its way or create a manifest miscarriage of justice such that Pettway's conviction was against the manifest weight of the evidence.

{¶ 63} Accordingly, Pettway's third assignment of error is overruled.

Confrontation Clause

{¶ 64} In his fourth assignment of error, Pettway argues that the trial court erred when it permitted Officer Manney to testify to hearsay statements

made by Rebecca Beyer, claiming that it deprived him of a fair trial because it violated his right under the Sixth Amendment to confront adverse witnesses.

{¶ 65} Officer Manney testified that he and his partner arrived within five minutes after Mitchell had been shot and that he appeared to be dead when they got there. Beyer "was rather shook up, but not hysterical," and was "calm enough" to answer "questions without going into hysterics." When the prosecutor asked Officer Manney, "what caused her to be so upset," Officer Manney replied, "[t]he male being shot and then stomped on." Officer Manney further testified, "[w]hen we asked [Beyer] how long it had been, she stated that it just happened, that he was moving a few minutes before we arrived." He also explained that "[s]he told us that a male that had moved in yesterday and was told to move out had returned with a friend. When they came into the apartment, the male that had moved in, suspect number one, produced a revolver, a gun actually she said."

{¶ 66} The trial court admitted Officer Manney's testimony regarding Beyer's statements because it found them to fall within the excited-utterance exception to the hearsay rule. However, "even where an out-of-court statement falls within a firmly rooted hearsay exception, such as an excited utterance, a court must still consider whether the statement nonetheless should have been excluded under the Confrontation Clause as construed in [*Crawford v. Washington* (2004), 541 U.S. 36]." *Cleveland v. Colon*, 8th Dist.

No. 87824, 2007-Ohio-269, ¶16, citing *United States v. Hadley* (C.A.6, 2005), 431 F.3d 484, 495.

{¶ 67} The Sixth Amendment to the United States Constitution guarantees an accused the right to confront witnesses against him. *Crawford* at 54. But not all hearsay implicates the Sixth Amendment's core concerns. *State v. Allen*, 8th Dist. No. 82556, 2004-Ohio-3111, ¶29. "It is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause." *Davis v. Washington* and *Hammon v. Indiana* (2006), 547 U.S. 813.

{¶ 68} In *Crawford*, the United States Supreme Court held that testimonial statements made by a witness may only be admitted when the declarant is unavailable and the defendant has previously been afforded the opportunity for cross-examination. Id. at 59. This is true, regardless of whether such statements are deemed reliable by a court. Id. at 61-62. It is undisputed that Beyer was unavailable to testify at trial and Pettway was not afforded a prior opportunity to cross-examine her. Thus, the threshold issue for our determination is whether the challenged statements were testimonial.

{¶ 69} Courts apply different tests to determine whether statements are testimonial, based on the identity of the questioner and the purpose of the questioning. See *State v. Siler*, 116 Ohio St.3d 39, 2007-Ohio-5637, ¶28. If

the questioner is a law enforcement officer or an agent of law enforcement, the court applies the primary-purpose test to determine whether the statements are testimonial. *Siler* at ¶ 28. But if the questioner is not a law enforcement officer or agent of law enforcement, the court applies the "objective witness test." See *State v. Stahl*, 111 Ohio St.3d 186, 2006-Ohio-5482. Since there is no question that the examiner in this case was a police officer, we will only expand upon the meaning of the primary-purpose test.

{¶ 70} The primary-purpose test was first articulated by the United States Supreme Court two years after *Crawford*, in the companion cases of *Davis* and *Hammon*. The court explained:

{¶ 71} "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later prosecution." Id. at 822.

{¶ 72} In *Davis* and *Hammon*, the court specifically addressed the question, "which police interrogations produce testimony." Id. at 822. It noted that the statements made in *Crawford* were clearly testimonial because

the police interrogation "took place at the police station and was directed solely at establishing a past crime." Id. at 814. In *Davis* and *Hammon*, however, the court explained that it was not as clear as to whether the statements were testimonial. Id.

{¶ 73} "*Davis* involved statements that a domestic-violence victim made to a 911 operator identifying her assailant and describing his whereabouts immediately after the assault, while *Hammon* involved statements made to police officers responding to a domestic-violence complaint after the police had secured the scene." *Siler* at ¶23. Applying the primary-purpose test, "the court determined that 'the circumstances of [the 911] interrogation [in *Davis*] objectively indicate its primary purpose was to enable police assistance to meet an ongoing emergency.' [*Davis*] at 828. Accordingly, those statements were nontestimonial. Id. In *Hammon*, however, the court stated, '[o]bjectively viewed, the primary, if not indeed the sole, purpose of the interrogation was to investigate a possible crime.' Id. at 830. Therefore, the court held that those statements were testimonial. Id." *Siler* at ¶25. The court did note, however, that some initial inquiries at a crime scene that begin as an interrogation to determine the need for emergency can evolve into testimonial statements once officers have determined there is not an ongoing emergency. *Davis* and *Hammon* at 828-829.

{¶ 74} The United States Supreme Court compared the facts of *Davis* and *Hammon* to the facts of *Crawford* to determine whether the primary purpose of police interrogation was to enable police assistance to meet an ongoing emergency or rather, to establish or prove past events. It considered four factors: (1) whether the speaker was speaking about current events as they were actually occurring, requiring police assistance, or was he or she describing past events; (2) whether a "reasonable listener" could conclude that the speaker was facing an ongoing emergency that required help; (3) whether the officer's questions were tailored to resolve an emergency, rather than simply learn what happened in the past; and (4) whether the interrogation was formal; the greater the formality, the more likely it was testimonial. *Davis* at 827.

{¶ 75} In light of these factors, this court determined that an ongoing emergency existed in *Cleveland v. Colon*, 8th Dist. No. 87824, 2007-Ohio-269, appeal not accepted for review by 114 Ohio St.3d 1426, 2007-Ohio-2904. A husband and wife called the police when he saw a man beating their neighbor. This court held that the victim's statements identifying Colon as her attacker were nontestimonial because "[u]nlike the circumstances in *Hammon*, the incident had just concluded when the officer arrived, the defendant had just fled the scene and had not been secured by the police, and the victim was hurt, bleeding and crying. The circumstances objectively

indicate that the primary purpose of the interrogation was to enable the police to assist the victim in an ongoing emergency." Id. at ¶20. This court then held that the hearsay statements were properly admitted as an excited utterance. Id. at ¶26.[1]

{¶ 76} This court reached a similar result in *State v. Brown*, 8th Dist. No. 87651, 2006-Ohio-6267, affirmed on other grounds by 119 Ohio St.3d 447, 2008-Ohio-4569. In this case, when police officers arrived, they observed the victim bleeding and holding his side. He told the police that his girlfriend had stabbed him and pointed to a vehicle up the street where he said she was located. This court found the primary purpose of the interrogation was to assist the victim in an ongoing emergency, not to establish or prove events potentially relevant to criminal prosecution. Id. at ¶21. Accordingly, the statements were found to be nontestimonial and properly admitted under the excited-utterance exception to the hearsay rule. Id. See, also, *State v.*

[1]Although the Ohio Supreme Court did not accept Colon's appeal for review, he was recently granted a conditional writ of habeas corpus by the Northern District of Ohio in *Colon v. Taskey* (June 4, 2009), N.D.Ohio No. 1:08-CV-199. The Northern District of Ohio court found that this court "correctly identified the Supreme Court case law on point," but that this court was "objectively unreasonable in applying the clearly established federal law on point to the facts of this case." Id. The court stated: "This case presents a factual scenario that more closely resembles the situation in *Hammon*, rather than the situation in *Davis*. Although the victim in this case was crying and upset, Colon had already left the vicinity and thus there was no ongoing emergency. Officer Korber's questioning of the victim (and the victim's responses to this questioning) sought testimonial evidence and was a traditional police interrogation, rather than an initial inquiry designed to address an ongoing emergency and to secure the safety of the victim and of others." Id.

McKenzie, 8th Dist. No. 87610, 2006-Ohio-5725, appeal not accepted for review by 113 Ohio St.3d 1443, 2007-Ohio-1266; *State v. Rinehart*, 4th Dist. No. 07CA2983, 2008-Ohio-5770; *State v. Riley*, 6th Dist. WD-03-076, 2007-Ohio-879, at ¶21 ("when police, upon their arrival at a crime scene, are notified that suspects have just fled and are given a description to aid in their apprehension, the emergency is 'ongoing,' especially when, as here, the statements were made minutes after officers responded to the 911 call"); *State v. Reardon*, 168 Ohio App.3d 386, 2006-Ohio-3984, at ¶15 ("questions designed to promote safety in an ongoing emergency are nontestimonial as a matter of public policy because officers need to know the character of the individuals they are pursuing"); *State v. Bailey*, 1st Dist. Nos. C-060089 and C-060091, 2007-Ohio-2014, at ¶ 50 (statements were nontestimonial where "[t]he record demonstrates that [the declarant who had flagged down officers] made these statements to get aid from the police and to help the police in an emergency situation-locating a man in the dark of night who was armed and who had already fired a weapon").

{¶ 77} Relying on these cases, we find that Beyer's statements were nontestimonial because the interrogation took place to resolve an ongoing emergency. Officers arrived within minutes of Mitchell being shot, and Mitchell was lying on the floor bleeding from his head and stomach. Although Pettway had fled the scene, he had not yet been apprehended. And

Officer Manney did not know that Pettway had fled the scene when he was questioning Beyer (although it is unclear when Officer Manney learned that Pettway had fled the scene, he testified that other officers learned that Pettway had fled the scene from another witness downstairs). Thus, Officer Manney had no way of knowing when he initially questioned Beyer whether the shooter had fled, or whether he was still in the vicinity and still posed a danger. Further, Beyer's statements assisted officers in locating a man who was most likely still armed and possibly a danger to the public and the police.

{¶ 78} Finding the statement nontestimonial does not end our analysis. We must consider whether the statements were inadmissible hearsay or fell within the excited-utterance exception to the hearsay rule. See Evid.R. 803(2). There is not much question in this case that Beyer was clearly "under the stress or excitement" of a startling event – her boyfriend being shot and beaten in front of her – that occurred minutes before the officers arrived.

{¶ 79} Thus, because the statements were nontestimonial and fell within the excited-utterance exception to the hearsay rule, they were properly admitted by the trial court.

{¶ 80} Accordingly, Pettway's fourth assignment of error is overruled.

Multiple Causes of Death and Principal Offender

{¶ 81} In his fifth assignment of error, Pettway argues that his conviction for murder must be reversed because there was more than one cause of death and he was not the principal offender. Specifically, Pettway maintains that the state's evidence proved that McGowan was the principal offender since it was McGowan who hit Mitchell with the baseball bat, and the coroner opined that Mitchell died from head trauma. We disagree.

{¶ 82} When asked what her opinion was based on a reasonable degree of medical certainty as to the cause of Mitchell's death, the deputy coroner responded: "Cause of death: Blunt impacts to the head with skull and brain injuries. Other condition: Gunshot wound of abdomen with visceral and skeletal injuries." She further explained that "[a]nything that causes at least 1 percent of somebody's death * * * is another condition. For this particular case, the blunt impacts to the head * * * could have caused his death alone. And the other condition, the gunshot wound * * * also could have caused his death alone."

{¶ 83} R.C. 2929.04 sets forth criteria for imposing a death sentence. R.C. 2929.04(A)(7) provides in pertinent part: "Imposition of the death penalty for aggravated murder is precluded unless * * * [t]he offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary, and

either the offender was the principal offender in the commission of the aggravated murder or, if not the principal offender, committed the aggravated murder with prior calculation and design."

{¶ 84} R.C. 2923.03 sets forth when an offender may be convicted of complicity: "(A) No person, acting with the kind of culpability required for the commission of an offense, shall do any of the following: (1) Solicit or procure another to commit the offense; (2) Aid or abet another in committing the offense; (3) Conspire with another to commit the offense in violation of section 2923.01 of the Revised Code; (4) Cause an innocent or irresponsible person to commit the offense." Section (B) further provides: "It is no defense to a charge under this section that no person with whom the accused was in complicity has been convicted as a principal offender." And R.C. 2923(F) states that "[w]hoever violates this section is guilty of complicity in the commission of an offense, and shall be prosecuted and punished as if he were a principal offender. A charge of complicity may be stated in terms of this section, or in terms of the principal offense."

{¶ 85} First, it is well established that under R.C. 2923.03(F), Pettway could be convicted of murder, or aggravated murder for that matter, even if he was not the principal offender. See *State v. Taylor* (1993), 66 Ohio St.3d 295, 307 (defendant "can be convicted of aggravated murder in violation of R.C. 2903.01(B) without being the actual killer"). To receive the death

penalty, however, one must be the "actual killer." Id., citing *State v. Penix* (1987), 32 Ohio St.3d 369, 371 ("principal offender" for purposes of R.C. 2929.04(A)(7) equates to being the actual killer).

{¶ 86} Second, it is equally well established that to convict one of murder ("[n]o person shall purposely cause the death of another"), the state does not have to prove that the manner in which the person killed the victim was the sole cause of the victim's death. See *State v. Keene*, 81 Ohio St.3d 646, 655, 1998-Ohio-342, citing *State v. Joseph* (1995), 73 Ohio St.3d 450, 469 (appellant contended that the state did not prove him to be the principal offender in the murder because the coroner did not testify that his bullet caused the victim's death; court held the state did not have to prove appellant's bullet was the sole cause of death and that "[t]here can be more than one actual killer - and thus more than one principal offender - in an aggravated murder").

{¶ 87} Nonetheless, in the instant case, we find the evidence was sufficient to prove beyond a reasonable doubt that Pettway not only shot Mitchell, but also hit him in the head with the bat. Either would have been sufficient to support a conviction of murder.

{¶ 88} Accordingly, Pettway's fifth assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

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

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

MARY J. BOYLE, JUDGE

KENNETH A. ROCCO, P.J., and
CHRISTINE T. McMONAGLE, J., CONCUR