

[Cite as *State v. Anderson*, 2010-Ohio-66.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92568

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ORIE ANDERSON

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-504304

BEFORE: Cooney, P.J., Blackmon, J., and Jones, J.

RELEASED: January 14, 2010

**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. 2.2(A)(1).

COLLEEN CONWAY COONEY, P.J.:

{¶ 1} Defendant-appellant, Orié Anderson (“Anderson”), appeals his convictions for murder and having a weapon under disability. Finding no merit to the appeal, we affirm.

{¶ 2} In December 2007, Anderson was charged with the aggravated murder of Tony Thomas (“Thomas”) and having a weapon under disability. Both charges carried one- and three-year firearm specifications. A jury found him guilty of the lesser included offense of murder and having a weapon under disability and both firearm specifications on each count. The trial court merged the firearm specifications and sentenced Anderson to 15 years to life with a possibility of parole on the murder conviction and imposed a three-year prison term on the firearm specification, to be served prior to and consecutive to the murder sentence.

{¶ 3} Anderson now appeals, raising four assignments of error for our review.

Sufficiency and Manifest Weight of the Evidence

{¶ 4} In the first assignment of error, Anderson claims that the evidence is insufficient to sustain his convictions. He argues that there is no direct testimony linking him to Thomas’s murder and that some of the witnesses who testified against him were biased. In the second assignment

of error, he claims that his convictions are against the manifest weight of the evidence. We address these two assignments of error together because, although the standards of review differ, they involve the same evidence.

{¶ 5} In *State v. Diar*, 120 Ohio St.3d 460, 2008-Ohio-6266, 900 N.E.2d 565, ¶113, the Ohio Supreme Court explained the standard for sufficiency:

{¶ 6} “Raising the question of whether the evidence is legally sufficient to support the jury verdict as a matter of law invokes a due process concern. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386, 678 N.E.2d 541. In reviewing such a challenge, ‘[t]he relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.’ *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus, following *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560.”

{¶ 7} The Ohio Supreme Court restated the criminal manifest weight standard and explained how it differs from the sufficiency standard in *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, ¶25:

{¶ 8} “The criminal manifest-weight-of-the-evidence standard was explained in * * * *Thompkins* * * *, [in which] the court distinguished between sufficiency of the evidence and manifest weight of the evidence,

finding that these concepts differ both qualitatively and quantitatively. *Id.* at 386, 678 N.E.2d 541. The court held that sufficiency of the evidence is a test of adequacy as to whether the evidence is legally sufficient to support a verdict as a matter of law, but weight of the evidence addresses the evidence's effect of inducing belief. *Id.* at 386-387, 678 N.E.2d 541. In other words, a reviewing court asks whose evidence is more persuasive -- the state's or the defendant's? We went on to hold that although there may be sufficient evidence to support a judgment, it could nevertheless be against the manifest weight of the evidence. *Id.* at 387, 678 N.E.2d 541. '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 factfinder's resolution of the conflicting testimony.' *Id.* at 387, 678 N.E.2d 541, citing *Tibbs v. Florida* (1982), 457 U.S. 31, 42, 102 S.Ct. 2211, 72 L.Ed.2d 652."

{¶ 9} Anderson was convicted of murder under R.C. 2903.02(A), which provides in pertinent part that, "No person shall purposely cause the death of another[.]" He was convicted of having a weapon under disability under R.C. 2923.13(A)(2), which states, in pertinent part:

"[N]o person shall knowingly acquire, have, carry, or use any firearm or dangerous ordnance, if * * * [t]he person is under indictment for or has been convicted of any felony offense of violence or has been adjudicated

a delinquent child for the commission of an offense that, if committed by an adult, would have been a felony offense of violence.”

Evidence at Trial

{¶ 10} The jury heard the following evidence at trial. On the afternoon of November 5, 2007, Anderson had been gambling with four to six others outside Sunlight Food Mart, a convenience store located in Cleveland. Alonzo Tate (“Tate”) testified that Anderson drove away in a silver or gray Chevrolet HHR vehicle with Illinois license plates.¹ Anderson later returned to the area near the store. After Tate purchased marijuana from an individual on the street, he observed Thomas standing outside the store. Tate then walked across the street and approached an acquaintance to share the marijuana he had just purchased. Suddenly, Tate heard two shots fired in quick succession and saw Thomas fall to the ground as Anderson drove away in the Chevrolet HHR. Tate testified that Thomas and Anderson were the only ones in the area when Thomas was shot. Tate approached Thomas and observed he had been shot in the head.

{¶ 11} That same afternoon, Nael El Khatib (“El Khatib”), had been working at the store. He testified that Anderson came into the store, and Thomas followed him, walking very quickly as if he were angry, and accused

¹An “HHR” vehicle is a compact wagon named for its “Heritage High Roof.”

Anderson of saying something about his mother. Anderson looked Thomas up and down and asked if he had a “piece.” Thomas exited the store without answering. Seconds later, Anderson left the store. El Khatib heard two shots in quick succession. He looked outside and saw Thomas on the ground, bleeding from the back of his head. He watched Anderson drive away in what appeared to be a PT Cruiser. When questioned by police, El Khatib denied having seen anything because he feared retaliation.

{¶ 12} Several neighborhood residents also heard the gunshots. Brenda Patterson (“Patterson”) lived across the street from the store. She and another neighbor heard several gunshots in rapid succession. Upon looking out the window, they observed people gathered around the store and a body lying on the ground. Patterson went downstairs and saw that Thomas had been shot in the back of the head. Marvin Jarman testified that he had been visiting across the street from the store. He heard an argument and gunshots fired in rapid succession, so he called 911.

{¶ 13} Shortly after the shooting, Cleveland police arrived on the scene and called for medical transport for Thomas. Tate informed police that Anderson had shot Thomas and driven away in a silver Chevrolet HHR with Illinois license plates. Further investigation revealed that Thomas had

sustained bullet wounds to the back of his head and arm, and had been shot from at least four feet away.

{¶ 14} Police received an anonymous tip leading them to the home of Anderson's girlfriend, Shana Blanchard ("Shana"). Officers found the silver Chevrolet HHR parked behind the house, hidden from view on the street. Andria Blanchard, Shana's mother, testified that she had rented the silver Chevrolet HHR for Anderson. A few days before the shooting, Anderson promised to return the vehicle on November 5. He failed to do so, later explaining that he had been afraid. Later, police investigators examined the silver Chevrolet HHR and collected fingerprints and personal belongings. Anderson stipulated that the fingerprints from the rearview mirror were his.

{¶ 15} The day after the shooting, Tate provided a written statement to police indicating that Anderson had shot Thomas. He also identified Anderson from a photo array. During trial, Tate admitted that he went to Anderson's attorney, Harvey Bruner ("Bruner"), and signed a statement declaring that he had not observed the shooting or any homicide.

{¶ 16} After the shooting, law enforcement officials searched for Anderson. On January 2, 2008, Milwaukee police officer Scott Siller ("Siller") and FBI agent Patrick Boland ("Boland") went to Anderson's sister's house in Milwaukee, where Anderson surrendered to police. Anderson told

Siller that a man had approached him, and because Anderson believed the man was going to kill him, Anderson shot him.

{¶ 17} Boland also interviewed Anderson at length, and the jury heard a recording of that interview. During the interview, Anderson informed Boland that he had parked a Chevrolet HHR behind Shana's house and then fled the city. When Boland asked Anderson if he had seen Thomas die, Anderson broke eye contact, paused for a long time, and refused to answer the question. Anderson then began discussing self-defense laws in Ohio and asked Boland what he would have done if another person had approached him in a threatening manner with a gun.

{¶ 18} After Boland's interview, law enforcement officers transported Anderson to Cleveland, where Detectives Raymond Diaz ("Det. Diaz") and Ignatius Sowa interviewed him. Anderson told them that he had been the happiest person in the world on November 4; on November 5, in a split second, his life had changed; and on November 6, he was a fugitive from justice with 40,000 police searching for him. He also asked them why the police took so long to get to the crime scene on the day of the crime and what kind of evidence the police had. Anderson asked them if he could retrieve his property from the silver Chevrolet HHR.

{¶ 19} After his arrest, Anderson was held in the Cuyahoga County Jail and shared a pod with Dante Mitchell (“Mitchell”). Mitchell testified that on several occasions, Anderson had admitted shooting Thomas.

{¶ 20} In the instant case, the evidence was sufficient to convict Anderson of murder and having a weapon under disability. We also find that the convictions were not against the manifest weight of the evidence. The State presented evidence and the jury properly found that Anderson purposely killed Thomas, and that Anderson had carried a weapon while under disability. On appeal, Anderson argues that there is little direct evidence that he killed Thomas. But circumstantial and direct evidence have the same probative value. *Jenks*, 61 Ohio St.3d at 259, paragraph one of the syllabus.

{¶ 21} In the instant case, El Khatib testified that just before the murder, Anderson and Thomas had a heated argument in the store. During the argument, Anderson asked Thomas if he had “a piece,” which is a common term for a weapon, and then the two proceeded outside. Several witnesses in the neighborhood testified to hearing two shots around 4:00 p.m. on November 5. Tate testified that immediately after the shots were fired, the only individuals in the immediate vicinity were Anderson and Thomas, and Thomas had been shot.

{¶ 22} On the day of the shooting, Anderson was seen driving a silver Chevrolet HHR, which witnesses observed parked outside the store. Investigators found Anderson's personal belongings and fingerprints in the vehicle, which Anderson admitted he had abandoned behind his girlfriend's house. After the murder, Anderson fled Cleveland. He confessed to both Siller and Mitchell that he had shot Thomas. He also revealed in interviews with Siller and Boland that he had researched the law of self-defense. He admitted that his life had changed for the worse on November 5, the day of the murder. These facts demonstrate that Anderson murdered Thomas.

{¶ 23} Anderson also challenges the credibility of the State's witnesses. He argues that on the day of the murder, Tate was abusing drugs, that Tate had seven prior criminal convictions, and that Tate admitted to attorney Bruner that he had not actually seen the murder. But Tate testified that he had not smoked marijuana that day until after the shooting. Moreover, the jury knew of Tate's prior convictions and assessed his credibility accordingly. Also, Tate explained that he had signed a statement indicating that he had not witnessed the murder because he had been confused by the wording of the statement. Though he did not see Anderson shoot Thomas, he heard the shots fired and observed Anderson immediately after the shooting.

{¶ 24} Next, Anderson challenges El Khatib's credibility. He argues that El Khatib had a prior conviction, agreed to testify only one week before the trial, and testified in exchange for the prosecutor's sending a "cooperation letter" to the Department of Justice. But the jury knew of his 1996 conviction for attempted involuntary manslaughter. Additionally, El Khatib testified that he had been informed that the "cooperation letter" would not help much in his pending federal case. Anderson also argues that immediately after the murder, El Khatib told police that he had not seen or heard anything. But El Khatib claimed that he feared retaliation.

{¶ 25} Even if these two witnesses were not credible, the State presented substantial evidence to show that Anderson murdered Thomas. The State also demonstrated that Anderson possessed a weapon while under disability. Anderson argues that no witness could place a gun in his hand, but he admitted to Siller, Boland, and Mitchell that he had shot Thomas. And Anderson stipulated to his prior convictions, which established that he was "under disability" when he shot Thomas.

{¶ 26} On appeal, Anderson argues that he shot Thomas in self-defense, but he failed to raise this argument below or present evidence establishing self-defense. Therefore, he has not preserved this issue for our review, and we decline to consider it.

{¶ 27} Based on the evidence before us, Anderson’s convictions are supported by sufficient evidence and are not against the manifest weight of the evidence. We, therefore, overrule the first two assignments of error.

Improper Admission of Certain Evidence

{¶ 28} In the third assignment of error, Anderson argues that we should reverse his conviction because the trial court improperly admitted certain evidence, depriving him of a fair trial. Specifically, he argues that the trial court erroneously allowed Boland and Det. Diaz to testify to Anderson’s truthfulness during the recorded interview with Boland.

{¶ 29} We review a trial court’s decision to admit lay witness opinion testimony under an abuse of discretion standard. *Urbana ex rel. Newlin v. Downing* (1989), 43 Ohio St.3d 109, 113, 539 N.E.2d 140. “The term ‘abuse of discretion’ connotes more than an error of law or judgment; it implies that the court’s attitude is unreasonable, arbitrary or unconscionable.” *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

{¶ 30} Evid.R. 701 governs opinion testimony by lay witnesses and provides:

“If the witness is not testifying as an expert, the witness’ testimony in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness’ testimony or the determination of a fact in issue.”

{¶ 31} A witness may not offer his or her opinion regarding another witness's credibility. *State v. Boston* (1989), 46 Ohio St.3d 108, 545 N.E.2d 1220 (“In our system of justice it is the fact finder, not the so-called expert or lay witnesses, who bears the burden of assessing the credibility and veracity of witnesses”), quoting *State v. Eastham* (1988), 39 Ohio St.3d 307, 530 N.E.2d 409 (Brown, J., concurring).

{¶ 32} The trial court sustained objections to the portions of Boland's testimony that Anderson challenges on appeal and, at one point, admonished the jury not to consider the excluded evidence. And we presume that juries follow the trial court's instructions. *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, 840 N.E.2d 1032, ¶86, citing *State v. Fears* (1999), 86 Ohio St.3d 329, 334, 715 N.E.2d 136. Therefore, we examine only the portions of Det. Diaz's testimony that Anderson challenges for which the trial court did not sustain objections. That testimony included the following:

Prosecutor: “[referring to the audio recording of Boland's interview of Anderson] Then he starts to give facts, he starts to give details about what he was on parole for, the facts of his case. Now, the facts that he gives yes, I'm on parole, I had a case, I was 17 and a half, just being young and dumb. A dude I didn't like, I climbed into his window, you know what I'm saying, probably just to scare him. Spray paint on his wall, being stupid. Just being a teen. Do you know if those facts comport to the actual case?”

Mr. Bruner: “Objection.”

The Court: “Overruled. Do you know?”

Diaz: "I do know for a fact they are not the truth because I have read the police report."

Prosecutor: "So he is not telling the truth there, is he?"

Diaz: "No, he is not."

* *

Prosecutor: "The facts as Orié Anderson relate [sic] them on that tape are not correct, isn't that correct?"

Diaz: "That is correct."

Prosecutor: "Orié states he's been to prison for four years, is that true or not?"

Mr. Bruner: "Objection."

The Court: "Overruled."

Diaz: "That is true."

Prosecutor: "And Orié states it took police 20 minutes to get to Tony Thomas's body on that date. Is that true or false?"

Diaz: "That is what he told us. False."

Prosecutor: "So you would agree with me that there are things that are true, and things that are false."

Diaz: "Correct."

* *

Prosecutor: "Same kind of theme that he had with the FBI on the tape, there was somebody out there that didn't have anything to do with this. I want to make sure everybody knows he had nothing to do with this?"

Diaz: "Correct."

Prosecutor: "That's the fourth time you asked him a direct question?"

Diaz: "Yes."

Prosecutor: "Did he answer you this time?"

Diaz: "[reading from the police report regarding Diaz's interview of Anderson] 'Anderson then states that he is not going to talk with us about this without his attorney. And Anderson states that he would like us to tell Tony's sister he's sorry for her loss. And Anderson states he has court in the morning. He would speak with his attorney.' At this time we ended our conversation."²

{¶ 33} In the relevant exchanges, Det. Diaz opined that Anderson had not been truthful in the interview. Anderson argues that the State was permitted to discredit his testimony. We note, however, that Anderson did not testify, so this argument has no merit.

{¶ 34} However, we questions whether the testimony properly falls within Evid.R. 701, because the testimony did not help the jury to determine a fact in issue. Some of the testimony was cumulative and some was irrelevant to proving aggravated murder and having a weapon under disability, the crimes with which Anderson had been charged. For instance, Anderson stipulated to the prior conviction that placed him "under disability" for purposes of possessing a weapon, so the testimony about his prior case was cumulative. Additionally, the length of time police took to arrive at the scene of the crime did not tend to prove any of the elements of the crimes in

²Tr. 794 - 808.

question, so it was irrelevant. Anderson did not object to the last portion of the cited testimony, so we decline to address it on appeal.

{¶ 35} Arguably, the trial court should have excluded at least some of the challenged testimony. But we do not find that the trial court abused its discretion in admitting the evidence or that the result of the trial would have been different if the evidence had been excluded. Therefore, we overrule the third assignment of error.

Ineffective Assistance of Counsel

{¶ 36} In the fourth and final assignment of error, Anderson argues that his trial counsel was ineffective because counsel (1) failed to request severance of the weapons-under-disability charge, and (2) failed to prevent the jury from hearing evidence of his prior criminal history. We cannot conclude that trial counsel's failure to make such objections changed the outcome of the trial.

{¶ 37} The Ohio Supreme Court recently reiterated the standard for an ineffective assistance of counsel claim in *State v. Trimble*, 122 Ohio St.3d 297, 2009-Ohio-2961, 911 N.E.2d 242, holding:

“Reversal of a conviction for ineffective assistance of counsel requires that the defendant show that counsel's performance was deficient and that the deficient performance prejudiced the defendant so as to deprive him of a fair trial. *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674. Accord *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, paragraph two of the syllabus.”

{¶ 38} We must presume that a licensed attorney is competent and that the challenged action is the product of sound trial strategy and falls within the wide range of professional assistance. *Strickland* at 689. Courts must generally refrain from second-guessing trial counsel's strategy, even where that strategy is questionable, and appellate counsel claims that a different strategy would have been more effective. *State v. Jalowiec*, 91 Ohio St.3d 220, 237, 2001-Ohio-26, 744 N.E.2d 163. This court has held, "[t]he decision to try the disability charge to the jury, in and of itself, cannot be construed as anything more than a tactical one." *State v. McDonald* (April 27, 2000), Cuyahoga App. No. 75472, discretionary appeal not allowed, 90 Ohio St.3d 1407, 734 N.E.2d 836.

{¶ 39} In the instant case, Anderson offers nothing but conjecture to show that the outcome of the trial would have been different if his counsel had prevented the jury from hearing about his prior conviction and criminal history. Therefore, Anderson has failed to demonstrate ineffective assistance of counsel.

{¶ 40} The fourth assignment of error is overruled.

Judgment is 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.

COLLEEN CONWAY COONEY, PRESIDING JUDGE

PATRICIA ANN BLACKMON, J., and
LARRY A. JONES, J., CONCUR