**[Cite as *State v. Zadar*, 2011-Ohio-1060.]**

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION
**No. 94698**

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## STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

## SEAN T. ZADAR

DEFENDANT-APPELLANT

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**JUDGMENT:**
**AFFIRMED**

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Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-521966

**BEFORE:** Stewart, P.J., Celebrezze, J., and S. Gallagher, J.

**RELEASED AND JOURNALIZED:** March 10, 2011

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MELODY J. STEWART, P.J.:

**{¶ 1}** On March 13, 2009, defendant-appellant, Sean T. Zadar, was indicted on one count of murder in violation of R.C. 2903.02(A) in connection with the strangulation death of his mother, Carolyn Zadar, at her home in Parma Heights, Ohio. The case proceeded to trial in October 2009 and concluded with a mistrial due to a hung jury. A second trial, commenced in January 2010, resulted in the jury returning a guilty verdict. Appellant was sentenced to 15 years to life in prison. Appellant timely appeals raising four errors for review. After a consideration of the record and pertinent law, we affirm.

**{¶ 2}** The victim lived in Parma Heights with her two adult sons, Tom and Sean Zadar. Her husband lived in Florida. On July 29, 2008, Tom called Parma Heights police and reported finding his mother deceased in the home. Police and firefighters responded and found the victim's decomposing body lying on the floor of her bedroom between the bed and the dresser, covered in blankets and pillows. The rest of the room was neat and orderly and the bed was made. There was no sign of forced entry into the house and valuables including cash, computers, televisions, VCRs, and jewelry were visible and undisturbed. Vehicles belonging to Tom and Sean were parked in front of the house. The victim's car, a white Toyota SUV, was missing.

**{¶ 3}** Tom told the police that he had last seen his mother at about 2:00 p.m. on Thursday, July 24, 2008, when they argued over what to do about Sean's bizarre and aggressive behavior. Tom was afraid that Sean was hiding a gun in the house and he wanted his mother to kick Sean out, but she was concerned about Sean being homeless and wanted to get him help. After they spoke, Tom left his mother at home with Sean and went to the Omni Fitness Center gym, something he did almost every afternoon. When he came home, his mother's car was gone and he did not hear his brother in his room. He assumed Sean had taken their mother to the hospital for treatment of her asthma, as he had done in the past. He glanced in his mother's bedroom and everything seemed in order so, over the following days, he continued with his normal routine. On Tuesday, July 29, 2008, his mother's lifelong friend, Joyce Garland, came to the house and expressed concern over her inability to contact his mother. She told Tom that she

had checked Parma Hospital and his mother was not there. After she left, Tom checked the house and found his mother's body on the bedroom floor hidden under blankets and pillows. He called the police and waited outside for their arrival.

**{¶ 4}** The police spoke to one of the supervisors at Omni Fitness Center who confirmed Tom's regular attendance at the gym. She testified that Tom came to the facility everyday between 2:45 and 3:15 p.m., except Sunday. She recalled seeing Tom there July 24 through July 29, 2008 at his regular time. She testified that the gym had a video camera showing the front entrance and that she provided the police with a videotape showing Tom arriving during his usual time on Saturday, July 26, 2008.

**{¶ 5}** Joyce Garland testified that in 2007 she recommended Carolyn see Dan Zamora, a therapist at the office where she worked, because Carolyn told her she was afraid of her son Sean. Carolyn made a number of appointments to see Zamora in 2007 and 2008. On July 24, 2008, Carolyn called the office and tried to schedule an appointment for that day. Zamora's schedule was booked but Garland was able to get Carolyn an appointment for Saturday, July 26, 2008. Garland became concerned on Monday when she discovered Carolyn did not keep the appointment and she tried to call Carolyn but got no answer. On Tuesday, Garland called Parma Hospital to see if Carolyn was there. She then went to Carolyn's house where she noticed that Carolyn's car was not there but her two sons' cars were. She spoke to Tom who told her that Sean took Carolyn to the hospital. She told Tom that she checked the hospital and Carolyn

had not been there. Garland called her husband and they went to the police department. While they were there, Tom called to report finding his mother's body.

**{¶ 6}** Zamora testified that he was treating Carolyn for symptoms of depression and anxiety arising from her stressful home situation, primarily due to her fear over her son Sean's volatile behavior and his outbursts. After his first meeting with Carolyn, Zamora said he was concerned enough to advise her to get rid of any guns or rifles in the house. He stated that Carolyn saw him a total of 12 times over 2007 and 2008, during crisis situations, and she sometimes brought her husband or son Tom with her. He said she had never missed a scheduled appointment until July 26, 2008.

**{¶ 7}** Barbara Weber testified that she worked at the nursing home where Carolyn's mother stayed. She saw Carolyn during her twice weekly visits and the two often spoke. She said on one occasion Carolyn told her she was afraid her son Sean was going to kill her. The last time she saw Carolyn was on July 23, 2008 and Carolyn acted strangely that day.

**{¶ 8}** Carolyn's neighbor, Barbara Marien, testified that on Saturday, July 26, 2008, she saw one of the Zadar brothers go speeding down the street in the late afternoon driving Carolyn's car. She could not be certain whether it was Tom or Sean driving, but she said it was unusual to see either of the brothers driving their mother's car.

**{¶ 9}** Sergeant Carter of the Sampson County, North Carolina, sheriff's office testified that at 1:29 a.m. on August 1, 2008, he found appellant sleeping in a white Toyota SUV at a rest stop. Carter said he initially woke appellant up because there was

no overnight parking permitted at that rest stop. After asking repeatedly why appellant was sleeping there, appellant told Carter that he was going to Florida to "see his daddy." When Carter returned to his car, he was advised that the car was taken from a homicide in Parma Heights, Ohio and the suspect might be driving it. Carter returned to the car and ordered appellant out and patted him down for weapons. When Carter tried to place appellant in handcuffs, appellant tensed and tried to turn around. Carter said he had to shove appellant against the car and threaten him with a taser in order to get the handcuffs on. Appellant told Carter that the car belonged to a friend, that he had permission to use it, and that's all Carter needed to know. Upon being asked repeatedly if there were any weapons in the car, appellant disclosed that there was a gun in the car. A .45 caliber semiautomatic handgun was found in the rear compartment of the car along with camping equipment, survival gear, and other personal possessions stored in plastic bins. Carter arrested appellant and took him to the Sampson County jail.

**{¶ 10}** Jerome Zadar, the victim's husband and appellant's father, testified that Carolyn had told him that Sean's behavior was getting progressively worse and that she was getting more and more fearful of him. After he got a call from Tom telling him that his wife was dead, he came to Cleveland and met with detectives. He learned that his wife's car was gone and his son Sean was missing. He reported the car stolen. When he looked into appellant's room, he discovered that most of appellant's personal belongings were gone. After appellant was arrested in North Carolina, Jerome visited him in jail. Appellant denied that he was on his way to Florida to visit Jerome and had no response to

the news that his mother was dead. Appellant refused to discuss the subject, and when his father asked him when he last saw his mother, appellant responded, "I'll have to think about that." When his father asked him why he had his mother's car, appellant replied only that it was a "legal issue."

**{¶ 11}** An autopsy showed that Carolyn had deep bruising of the scalp which was caused by being struck by, or the head striking, a blunt, flat object. There were also injuries to the neck consistent with being caused by a flat, straight edged object. The cause of death was asphyxia by cervical compression. The coroner testified that one of the belts found in appellant's gear could cause injuries consistent with those found on the victim. The coroner's DNA expert testified that the victim's DNA was found on that belt. However, according to the coroner's office policy, he could not interpret the results and had to report them as "inconclusive" due to the presence of DNA from one of the Parma Heights detectives who went to North Carolina and collected the evidence.

**{¶ 12}** In his first two assignments of error, appellant argues that there was insufficient evidence to support his conviction for murder and, that the conviction was against the manifest weight of the evidence. He contends that the state's evidence was not credible. He maintains that the jury was confused by testimony that was not relevant and unfairly prejudicial. He challenges the detectives' conclusion that a stranger was not involved and questions their failure to check for fingerprints in the victim's bedroom to see if someone else committed the crime.

**{¶ 13}** "The legal concepts of sufficiency of the evidence and weight of the evidence are both quantitatively and qualitatively different." *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52, 678 N.E.2d 541, paragraph two of the syllabus. Sufficiency is a test of adequacy. Whether the evidence is legally sufficient to sustain a verdict is a question of law. Id. at 386. 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." (Emphasis deleted.) Id. at 387. Weight is not a question of mathematics, but depends on its effect in inducing belief. Id.

**{¶ 14}** When reviewing the sufficiency of the evidence to support a criminal conviction, an appellate court examines the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus.

**{¶ 15}** The manifest weight of the evidence standard of review requires us to review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. *State v. Otten* (1986), 33 Ohio App.3d 339, 515 N.E.2d 1009, paragraph one of the syllabus. "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." *Thompkins*, 78 Ohio St.3d at 387, citing *Tibbs v. Florida* (1982), 457 U.S. 31, 42, 102 S.Ct. 2211, 72 L.Ed.2d 652.

**{¶ 16}** Nevertheless, we are mindful that the weight to be given the evidence and the credibility of the witnesses are matters primarily for the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, paragraph one of the syllabus. The trier of fact has the authority to "believe or disbelieve any witness or accept part of what a witness says and reject the rest." *State v. Antill* (1964), 176 Ohio St. 61, 67, 197 N.E.2d 548. An appellate court may not merely substitute its view for that of the jury. *In re Wheeler*, 8th Dist. No. 90766, 2008-Ohio-3656, ¶25. Therefore, reversal on manifest weight grounds is reserved for "the exceptional case where the evidence weighs heavily against the conviction." Id., citing *Thompkins*, 78 Ohio St.3d at 387.

**{¶ 17}** To sustain appellant's conviction for murder in violation of R.C. 2903.02(A), the state had to prove that appellant purposely caused the death of his mother. "A person acts purposely when it is his specific intention to cause a certain result[.]" R.C. 2901.22. Appellant argues that there was no eyewitness to the crime, no confession, and no physical evidence linking him to the crime, therefore, the evidence is insufficient to support his conviction and it must be reversed. We disagree.

**{¶ 18}** Proof of guilt may be made by circumstantial evidence, real evidence, and direct evidence, or any combination of the three, and all three have equal probative value.

*State v. Nicely* (1988), 39 Ohio St.3d 147, 529 N.E.2d 1236; *Jenks*, supra. Moreover, "circumstantial evidence may be more certain, satisfying, and persuasive than direct evidence." *State v. Jackson*, 57 Ohio St.3d 29, 38, 565 N.E.2d 549. Intent can be proved from underlying facts and circumstances. Id., citing *State v. Johnson* (1978), 56 Ohio St.2d 35, 38, 381 N.E.2d 637. "Even murder convictions can rest solely on circumstantial evidence." Id., citing *Nicely*.

**{¶ 19}** The evidence showed that Carolyn was afraid, and at times terrified of appellant due to his volatile behavior. He had outbursts of rage and had threatened Carolyn. She was afraid he was going to kill her.

**{¶ 20}** On Thursday, July 24, 2008, the last day the victim was seen alive, the victim was at home alone with appellant. That day, before leaving for the gym, Tom implored her to do something about appellant's behavior, to put him out of the house. Phone records show the victim called her therapist's office at 12:36 p.m. That call was returned at around 1:30 p.m. confirming an appointment on Saturday. The victim did not make the Saturday appointment. July 24, 2008 was the last day the victim used the phone, logged on to the computer, or was seen walking her dog.

**{¶ 21}** There was evidence that appellant fled the crime scene. The coroner's report lists the date of death as July 26, 2008. A neighbor testified that on Saturday, July 26, 2008, between 3:00 p.m. and 4:00 p.m., she saw one of the Zadar brothers speeding away from the house in Carolyn's car. There was evidence that showed Tom was at the

gym at that time. Appellant was found days later in North Carolina, driving his mother's car packed with survival gear and most of his personal belongings.

**{¶ 22}** Evidence showed the victim had been strangled with a flat, straight edged object. One of the belts found in appellant's possession when he was arrested fit that description and was found to have traces of the victim's DNA on it.

**{¶ 23}** The evidence also showed that appellant provided false information to the authorities in North Carolina, telling them the car belonged to a friend and that he had permission to use it. He also told them he was going to see his father in Florida, something he denied when his father came to see him. He showed no emotion when informed that his mother was dead and asked no questions about the circumstances of her death. When his father asked him when he last saw his mother or why he was using her car, appellant said he had to think about when he last saw her and that his use of her car was "a legal issue."

**{¶ 24}** There is no conflicting testimony to be resolved in the case, and the state's evidence was not irrelevant or confusing. The detectives explained that they did not want to contaminate the scene with fingerprint powder while waiting for someone from the Coroner's Trace Evidence Department to come and collect evidence. They also explained that there were no signs of forced entry and that there were valuables openly in view throughout the house, including hundreds of dollars in cash in the victim's bedroom.

**{¶ 25}** The evidence presented at trial, although circumstantial, when viewed in a light most favorable to the state, is sufficient for a reasonable trier of fact to find that

appellant purposely caused the strangulation death of his mother and then fled. Additionally, the state presented credible evidence showing appellant's involvement in this offense and, therefore, the evidence does not weigh heavily against conviction. Accordingly, the first and second assignments of error are overruled.

**{¶ 26}** In his third assignment of error, appellant argues that the trial court erred in permitting the state to introduce "other acts" evidence in violation of R.C. 2945.59 and Evid.R. 404(B). Specifically, appellant argues that the trial court erred in allowing the state to present evidence that a handgun was recovered from the car when he was arrested and that the court improperly admitted Zamora's and Tom's testimony relating to appellant's behavior. He contends that such testimony is an attack on his character and not relevant to the issue of guilt.

**{¶ 27}** The admission or exclusion of evidence lies within the sound discretion of the trial court. *State v. Sage* (1987), 31 Ohio St.3d 173, 510 N.E.2d 243. In order to find an abuse of that discretion, we must determine whether the trial court's decision was unreasonable, arbitrary, or unconscionable. *State v. Adams* (1980), 62 Ohio St.2d 151, 404 N.E.2d 44. R.C. 2945.59 states: "In any criminal case in which the defendant's motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing an act is material, any acts of the defendant which tend to show his motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing the act in question may be proved, whether

they are contemporaneous with or prior or subsequent thereto, notwithstanding that such proof may show or tend to show the commission of another crime by the defendant."

**{¶ 28}** Evid.R. 404(B) provides: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

**{¶ 29}** Sergeant Carter testified that a gun was among the possessions appellant had in the car when he was arrested. This evidence was offered in connection with the description of appellant's arrest, not to show his bad character and propensity to commit crimes. Additionally, Tom testified that the last conversation he had with the victim related to appellant's increasingly aggressive behavior and Tom's fear that appellant was keeping a gun in the house. Therefore, we agree with the trial court's finding that evidence of the gun was relevant to the case and was more probative than prejudicial.

**{¶ 30}** We are not persuaded by appellant's contention that he preserved the issue relative to Tom's and Zamora's testimony by filing a motion in limine and by objection. A review of the record discloses that the motion in limine did not challenge Tom's testimony and appellant failed to object to the testimony during trial. During his argument in support of the motion in limine prior to trial, appellant specifically withdrew his objection to Zamora testifying about statements the victim made during treatment about appellant's aggressive behavior.

**{¶ 31}** However, even if appellant had preserved his objection to Tom's testimony, we find no error in the trial court allowing the testimony. Tom testified that he and his brother did not get along and had not spoken for years. He testified that appellant had issues with noise and would become upset whenever Tom made any noise in the house. Tom testified that he had to use earphones when watching television or playing his keyboards. Even with using the headphones, appellant complained that the tapping on the keys bothered him. Tom said one time he used the air compressor in the garage to clean his computer and later found the air hoses to the compressor had been cut. Appellant also had issues over sharing access to the internet. Tom testified that one time, after he had disconnected the internet service, he found appellant's computer monitor and other possessions smashed and put out on the tree lawn as garbage. Tom testified that appellant's outbursts were getting worse so he confronted his mother on July 24, 2008 and implored her to do something about appellant's behavior.

**{¶ 32}** Background information is admissible to give the jury the setting of the case. *Smith v. Smith*, 8th Dist. No. 86690, 2006-Ohio-3156, fn. 3, citing *State v. Hurt* (Mar. 29, 1996), Franklin App. No. 95APA06-786. The references to appellant's volatile behavior in this case were background information, explaining the family dynamics and the circumstances leading up to the victim's murder. This evidence was necessary to give the jury the setting of the case and was permissible as an attempt to demonstrate motive as allowed by Evid.R. 404(B).

**{¶ 33}** Accordingly, the third assignment of error is overruled.

**{¶ 34}** In his fourth assignment of error, appellant claims that the trial court denied him a fair trial by admitting prejudicial hearsay evidence. Appellant contends that the testimony of the victim's friend, Barbara Ann Weber, and the victim's therapist, Dan Zamora, relating what the victim told them constituted a violation of his Confrontation Clause rights. In the alternative, he contends that this testimony constituted inadmissible hearsay.

**{¶ 35}** Weber testified that the victim told her she was afraid of her son and thought that her son was going to kill her. Zamora testified that the victim was fearful of appellant, "especially during one of his rages or outbursts when he became nearly uncontrollable like when he destroyed his bedroom one time." Zamora testified that after hearing Carolyn's account of appellant's behavior, he was concerned enough to advise her to get rid of any guns or rifles in the house.

**{¶ 36}** The Sixth Amendment's Confrontation Clause only applies to testimonial statements and does not apply to non-testimonial statements. *State v. Siler*, 116 Ohio St.3d 39, 2007-Ohio-5637, 876 N.E.2d 534, ¶21. If a statement is testimonial, then the Confrontation Clause requires a showing of both the declarant's unavailability and the defendant's opportunity to have previously cross-examined the declarant. Id. If the statement is non-testimonial, it is merely subject to the regular admissibility requirements of the hearsay rules. Id.

**{¶ 37}** In order to determine whether a statement to a non-law enforcement person is testimonial, the "objective witness" test applies. *State v. Stahl*, 111 Ohio St.3d 186,

2006-Ohio-5482, 855 N.E.2d 834, ¶36, citing *Crawford v. Washington* (2004), 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177. This test requires the court to determine whether an objective witness would have reasonably believed that her statement would be available for use at a later trial. Id. The focus is on the expectation of the declarant at the time of making the statement. Id., paragraph two of the syllabus.

**{¶ 38}** Here the statements made by the victim to her friend and to her therapist are not testimonial, as an objective witness under the same circumstances would not have reasonably believed her statements would be used later for trial. Thus, there is no Confrontation Clause issue regarding admission of the statements the victim made to Weber and Zamora.

**{¶ 39}** Because we find that the statements are not testimonial, they are admissible if they fit within a hearsay exception. In this case, the victim's statements fall under Evid.R. 803(3), which allows introduction of a "statement of the declarant's then existing state of mind, emotion, sensation, or physical condition." Testimony that a victim was fearful falls under this hearsay exception and is properly admitted. *State v. Tibbetts*, 92 Ohio St.3d 146, 158, 2001-Ohio-132, 749 N.E.2d 226, citing *State v. Apanovitch* (1987), 33 Ohio St.3d 19, 22, 514 N.E.2d 394. See, also, *State v. Braden*, 98 Ohio St.3d 354, 2003-Ohio-1325, 785 N.E.2d 439, ¶100; *State v. Miller*, 96 Ohio St.3d 384, 2002-Ohio-4931, 775 N.E.2d 498. The state-of-mind exception, however, does not permit witnesses to testify to the declarant's statements as to why he or she held a particular state of mind. *Tibbetts* at 159. In this case, the trial court was careful to limit

the testimony admitted to statements the victim made relative to her state of mind and not why she held that particular state of mind.

**{¶ 40}** Additionally, the statements made to Zamora fall under Evid.R. 803(4), which provides a hearsay exception for "[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." Appellant conceded this issue prior to trial and withdrew his objection to Zamora's testimony.

**{¶ 41}** Accordingly, appellant's fourth assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover of appellant its 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 Cuyahoga County Court of Common Pleas 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.

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MELODY J. STEWART, PRESIDING JUDGE

FRANK D. CELEBREZZE, JR., J., and
SEAN C. GALLAGHER, J., CONCUR