[Cite as *State v. Jarrett*, 2015-Ohio-1287.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101245

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

GUY JARRETT

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-13-574656-A

BEFORE: Blackmon, J., Kilbane, P.J., and S. Gallagher, J.

RELEASED AND JOURNALIZED: April 2, 2015

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PATRICIA ANN BLACKMON, J.:

{¶1} Appellant Guy Jarrett appeals his conviction and assigns the following errors for our review:

> I. The trial court committed plain error by allowing the prosecution to elicit inadmissible hearsay in the form of words spoken during a 9-1-1 call played in the presence of the jury, the caller stating, "I'm pretty sure everybody kept saying that Guy did the shooting. Everybody kept saying that Guy was shooting."
>
> II. Appellant was denied the effective assistance of counsel in violation of the Sixth Amendment of the United States Constitution.
>
> III. The appellant's convictions are against the manifest weight of the evidence.

{¶2} Having reviewed the record and pertinent law, we affirm Jarrett's convictions. The apposite facts follow.

{¶3} On March 9, 2013, Byron Redd was fatally shot while sitting in his truck with his girlfriend and her close friend. On May 31, 2013, the Cuyahoga County Grand Jury returned a multi-count indictment against Jarrett for charges including one count of aggravated murder, two counts of murder, four counts of felonious assault, four counts of aggravated robbery, and one count of discharge of a firearm on or near prohibited premises. Each count had a one-and three-year firearm specification attached.

{¶4} At his arraignment on June 14, 2013, the trial court found Jarrett indigent, assigned counsel for his defense, and Jarrett pleaded not guilty to the charges. Subsequently, numerous pretrial conferences were conducted. On January 30, 2014, a jury trial commenced.

Jury Trial

{¶5} At trial, the state presented the testimony of 12 witnesses. Through these testimonies, the evidence established that Redd died as a result of being struck by seven bullets, while sitting in his parked truck and then attempting to drive away to evade an armed robbery. At the time of the attack, Redd's girlfriend, Lueverdia Hutchins, and their mutual friend, Brionia Pratt, were also sitting in the truck. The events unfolded in the vicinity of East 149th Street and St. Clair Avenue, across from a house where a birthday party was ongoing.

{¶6} Of the 12 state witnesses, three including Hutchins were present or in very close proximity at the time of the attack. Hutchins testified that at the time Redd was killed, they had been dating for about two months. On the evening of March 9, 2013, Hutchins and Redd had gone to a movie, then to a liquor store, bought tequila, and then sat in Redd's driveway where they drank the beverage. After consuming the tequila, the two went to visit a friend who returned with them to Redd's house to pick up dirt bikes that were stored in Redd's garage.

{¶7} Hutchins testified that later that night, she and Redd went to pick up their friend, Pratt, from her home in Euclid, Ohio. The three friends drove around drinking a bottle of tequila that Pratt had brought. Hutchins testified that at some point, they found out about a birthday party and proceeded to the location.

{¶8} When they pulled onto East 149th Street, the vehicle's occupants observed a domestic argument in the middle of the street and onlookers milling around. Hutchins

testified that both she and Pratt exited the vehicle, but Redd remained in his truck that was parked adjacent to an empty lot across from the house where the party was being held.

{¶9} Hutchins testified that she decided against going inside the house of the birthday party and returned to the truck. Pratt, who had just relieved herself behind Redd's truck and another vehicle, also re-entered the truck. Hutchins testified that after she and Pratt re-entered the truck, the host stopped by the truck to thank them for coming by to celebrate her birthday.

{¶10} Hutchins said that as the host began walking away from the truck, the driver's door flew open, a man in a black hooded sweatshirt pointed a gun inside the truck and said "you all know what it is, give it up." Hutchins testified that Redd immediately told her and Pratt to duck as he attempted to put his truck in drive, but the gear stick jammed. The assailant fired into the truck as the gear stick became unstuck and continued to shoot as Redd attempted to drive away.

{¶11} Hutchins testified that as Redd was driving away, he kept saying "he shot me, he shot me," slumped over, and kept requesting that she take him home. Hutchins took control of the steering wheel. Hutchins testified that while she attempted to the steer the truck, Redd, whose foot was on the gas pedal, eventually passed out and the truck crashed into Redd's house.

{¶12} Hutchins testified about the assailant's identity in pertinent part, as follows:

> Q. I want to take us back to the moment that you see the person at the door. Okay?

A. Yes.

Q. You are seated where in the car?

A. Passenger's side.

Q. How is it that you are able to get a look at the person in the doorway?

A. Because when he snatched the door open and say you all know what it is, I look at him.

Q. How long did you get a look at him for?

A. At least probably 30 seconds. Probably a little longer.

Tr. 456-457.

* * *

Q. I want to take us back to when you were in the car with Brionia and Byron, okay? When Guy came up to the door, how far away were you seated from where he was standing?

A. Two feet at the most.

Q. Was anyone or anything in between, in your way of seeing him from where you were seated?

A. No.

Q. Did he have anything covering his face at that time?

A. No.

Q. So Byron's truck, when the car door opens does anything happen inside the car?

A. No.

Q. Okay. Was there any lighting at the time?

A. No.

Q. How long did you, were you able to gaze upon Guy when this is happening?

A. 30 seconds to a minute.

Q. And the person that was at the door of the car with the gun, do you see that person in court today?

A. Yes.

Tr. 477-478.

* * *

THE COURT: A few more questions for you, ma'am. With respect to where the truck was sitting, was the street light able to let you see the shooter?

THE WITNESS: Yes.

Tr. 529.

{¶13} Williams, who was celebrating her birthday on the night of the shooting, testified that she went to speak with Redd while he was sitting in his truck that was parked opposite her house. Williams testified that after thanking Redd for stopping by, she began walking back to her house when she saw the driver's door quickly open, and then heard gunshots ring out. Williams ran to her front porch as the shooting continued, and as Redd tried to drive away down the street.

{¶14} Williams testified in pertinent part about the assailant's identity as follows:

Q. And could you see the person who had the gun?

A. Yes.

Q. All right. What were they wearing?

A. A black sweatshirt.

Q. Okay. And could you tell who that person was who was shooting?

A. Not at first.

Q. Was there anyone around the shooter at that time in the street?

A. No.

Q. Okay. What happens at this point? What do you see now?

A. Everybody just scattering; everybody scattering going everywhere. Guy turned around.

Q. Now, you say Guy turned around?

A. Yeah, like he wasn't in the street no more. He was facing like how I'm facing, like his back was to me.

Q. Okay. Keep your voice up.

A. His back was to me. And then when he was done shooting, like he turned around and he started walking like he was going to walk through the yard, but a car reversed down the street and picked him up.

Q. Now, when he turned around, did you see him?

A. Yes.

Q. Did you recognize who that person was?

A. Yes.

Q. And who was that person?

A. Guy.

Q. This is the Guy that you knew?

A. Yes.

Tr. 738-739.

* * *

Q. So after the shooting, what was Guy doing?

A. He was like walking up towards the yard.

Q. And did you see him walking?

A. That's when I seen his face.

Q. All right. And how many — how long have you known Guy for?

A. Years.

Q. And how many times would you say — how many times had you seen him in person before the shooting?

A. Every day. A lot of times.

Q. All right. And so had you seen him walk before?

A. Yes.

Q. Okay. Were you familiar with how he walked?

A. Yes.

Q. And was he wearing anything on his — now, when you see Guy, is there anything in between you and Guy?

A. No.

Q. Okay. And how is it that you were able to see Guy's face?

A. He turned around. He wasn't shooting anymore.

Q. Well, here, tell me about the lighting. What was the lighting like out there?

A. It was streetlights on.

Q. And where was the closest streetlight to Guy?

A. Like, I think there was one right behind the house, in front of the house, but to the left of the house.

Q. Whose house?

A. The blue house.

Q. Your house?

A. Yes.

Tr. 740-741.

{¶15} During Williams's testimony, the state played a recording of a 911 call that Williams had made within an hour of the shooting. In the recording, Williams identifies Jarrett as the shooter and repeatedly indicated that she was scared for her life. Williams testified that although she had consumed a significant amount of alcohol and had smoked marijuana, it did not impair her ability to recognize Jarrett as the shooter.

{¶16} Pratt testified that she was best friends with Redd for ten years prior to his death. Pratt said that she was seated in the back of Redd's truck when Jarrett snatched open the driver's side door and pointed a gun at the occupants. Pratt said she was looking directly at Jarrett and was able to see his face because of the street lights.

{¶17} After the shooting, Pratt went on her Instagram page to block an individual named Ron from posting on her page. In the process, Pratt saw pictures from the birthday party on Ron's Instagram page. Pratt said that Jarrett was in one of the pictures.

Pratt screen shot the picture and later showed it to Hutchins, Redd's brother, as well as to the police detectives and pointed out that Jarrett was the shooter.

{¶18} The jury found Jarrett guilty of all counts. For purposes of sentencing, February 14, 2014, the trial court merged the two murder charges, Counts 2 and 3, and two felonious assault charges, Counts 4 and 5, into Count 1, the aggravated murder charge. The trial court also merged Counts 6 and 7, two of the three aggravated robbery charges. The trial court then sentenced Jarrett to life in prison with parole eligibility after 30 years on merged Count 1 and three years on merged Count 6 to be served concurrently to Count 6.

{¶19} In addition, the trial court sentenced Jarrett to six years each for Count 8, 9, 10, and 11, the remaining two aggravated robbery and felonious assault charges. These sentences were ordered served concurrent to each other, but consecutive to Count 1. Further, the trial court sentenced Jarrett to three years for Count 12, discharge of firearm on or near prohibited premises, to be served concurrent to all other counts. Finally, the trial court sentenced Jarrett to a total of nine years on the firearm specification to be served prior to and consecutive to the aforementioned sentences.

Hearsay Evidence

{¶20} In the first assigned error, Jarrett argues the trial court committed plain error by allowing the state to elicit inadmissible hearsay evidence in the form of the playing of the recorded 911 call Williams made to the police.

{¶21} We review the admission of evidence under an abuse of discretion standard. *State v. Driggins*, 8th Dist. Cuyahoga No. 98073, 2012-Ohio-5287, citing *State v. Maurer*, 15 Ohio St.3d 239, 473 N.E.2d 768 (1984). "Abuse of discretion" connotes more than error of law or judgment; it implies that the court's attitude was unreasonable, arbitrary, or unconscionable." *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶22} In the instant case, as previously stated, during Williams's testimony, the state played the recording of the 911 call Williams made to the police shortly after Redd was shot. In the recording, Williams can be heard stating that "I'm pretty sure everybody kept saying that Guy did the shooting. Everybody kept saying that Guy was shooting." Tr. 761. Jarrett now contends that this was inadmissible hearsay and the trial court committed plain error in its admission.

{¶23} Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Evid.R. 801(C). Pursuant to Evid.R. 802, hearsay is inadmissible unless it falls within an exception provided by the rules of evidence. *State v. Wright*, 8th Dist. Cuyahoga No. 100803, 2014-Ohio-5424.

{¶24} In order to find plain error, it must be determined that, but for the error, the outcome of the proceeding clearly would have been different. *State v. Hostacky*, 8th Dist. Cuyahoga No. 100003, 2014-Ohio-2975, citing *State v. Long*, 53 Ohio St.2d 91, 96-97, 372 N.E.2d 804 (1978).

{¶25} At the outset we note that the complained of statement was not admitted to prove the truth of the matter asserted. Prior to the recording being played in the presence of the jury, Williams testified at length about the unfolding events. Williams testified that she observed Jarrett shooting into Redd's truck and that she was not mistaken because she had known Jarrett since he was in fourth grade.

{¶26} Williams testified that Jarrett stood in the middle of the street shooting at Redd's truck as it was driving away, then Jarrett turned around and she could see his face. Thus, by the time the tape was played, Williams had already witnessed Jarrett shooting Redd. Consequently, the outcome of the trial would not have been different, because Williams had already testified that Jarrett was the shooter.

{¶27} Moreover, Williams explained why she made the above statement to police dispatch and why she was reluctant to come forward about the events. Williams testified in pertinent part as follows:

> Because I was nervous. I didn't want to be no snitch in the first place. I didn't want to have to call, but my name just kept coming up. So I had no choice. But I just wasn't going to be talking over the phone like that, no. But I knew what I seen though, and I know when the shooting was over he turned around, I wasn't that intoxicated, and I seen his face.

Tr. 822.

{¶28} We conclude, in light of Williams's exhaustive testimony on direct examination identifying Jarrett as the shooter and the vigorous cross-examination of that testimony by defense counsel, as well as the testimonies of Hutchins and Pratt, who both identified Jarrett as the shooter, the admission of the tape recording was cumulative. As

such, the outcome of the trial would not have been different. Accordingly, we overrule the first assigned error.

Ineffective Assistance of Counsel

{¶29} In the second assigned error, Jarrett argues defense counsel was ineffective for failing to object to the tape recording of Williams's 911 call to police dispatch.

{¶30} To succeed on a claim of ineffective assistance, a defendant must establish that counsel's performance was deficient and that the defendant was prejudiced by the deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989). Counsel will only be considered deficient if his or her conduct fell below an objective standard of reasonableness. *Strickland* at 688.

{¶31} In *Strickland*, the United States Supreme Court also stated that a court's scrutiny of an attorney's work must be deferential. The court further stated that it is too tempting for an appellant to second-guess his attorney after conviction and appeal and that it would be all too easy for a court to conclude that a specific act or omission was deficient, especially when examining the matter in hindsight. Accordingly, this court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance, and the defendant must overcome the presumption that the challenged action might be considered sound trial strategy. *Id.* at 689. Further, to establish resulting prejudice, a defendant must show that the outcome of the proceedings would have been different but for counsel's deficient performance. *Id*. at 694.

{¶32} In the instant case, in resolving the first assigned error, we concluded that the admission of the tape recorded 911 call did not amount to inadmissible hearsay. We also concluded that the outcome of the trial would not have been different.

{¶33} Further, our review of the record reveals that the tenor of defense counsel's trial strategy was to attack the validity of the witnesses's identification of Jarrett as the shooter. Throughout the trial, defense counsel strongly emphasized that Hutchins, Williams, and Pratt were so inebriated by alcohol, ecstacy, and marijuana, rendering their senses so impaired, that they could not have possibly provided a valid identification.

{¶34} Specifically, as it pertains to Williams, it is quite possible that defense counsel's trial strategy in not objecting to the playing of the tape, was to enable them to argue that Williams could not have possibly seen Jarrett, but was actually told by others that Jarrett was the shooter. Jarrett has the burden of proof and must overcome the strong presumption that trial counsel's decision to pursue this theory might be considered sound trial strategy. *State v. Becker*, 8th Dist. Cuyahoga No. 100524, 2014-Ohio-4565, citing *State v. Smith*, 17 Ohio St.3d 98, 100, 477 N.E.2d 1128 (1985). Jarrett is now asking this court to second guess trial counsel's trial strategy, and we decline to do so. *State v. Grasso*, 8th Dist. Cuyahoga No. 98813, 2013-Ohio-1894, ¶ 62, citing *State v. Gooden*, 8th Dist. Cuyahoga No. 88174, 2007-Ohio-2371, ¶ 38. Accordingly, we overrule the second assigned error.

Manifest Weight of the Evidence

{¶35} In the third assigned error, Jarrett argues his convictions were against the manifest weight of the evidence.

{¶36} In *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, the Ohio Supreme Court addressed the standard of review for a criminal manifest weight challenge, as follows:

> The criminal manifest-weight-of-the-evidence standard was explained in *State v. Thompkins* (1997), 78 Ohio St.3d 380, 1997-Ohio-52, 678 N.E.2d 541. In *Thompkins*, 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.

Id. at ¶ 25.

{¶37} An appellate court may not merely substitute its view for that of the jury, but must find that "in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *Thompkins* at 387. Accordingly, reversal on manifest weight grounds is reserved for "the exceptional case that the evidence weighs heavily against the conviction." *Id.*

{¶38} In the instant case, the jury heard exhaustive testimony from three eyewitnesses, two of whom were in the truck when Redd was killed. The third was in close proximity when the attack began and watched as it unfolded. All three eyewitnesses identified Jarrett when presented with a photo array and all three expressed complete certainty that Jarrett was the shooter. All three witnesses volunteered that they were consuming alcohol, smoking marijuana, or both at the time of the attack, but still insisted that Jarrett was the shooter.

{¶39} Here, because the factfinder has the opportunity to see and hear the witnesses, the cautious exercise of the discretionary power of a court of appeals to find that a judgment is against the manifest weight of the evidence requires that substantial deference be extended to the factfinder's determinations of credibility. *State v. Ellis*, 8th Dist. Cuyahoga No. 99830, 2014-Ohio-116, citing *State v. Robinson*, 8th Dist. Cuyahoga No. 99290, 2013-Ohio-4375, citing *State v. Lawson*, 2d Dist. Montgomery No. 16288, 1997 Ohio App. LEXIS 3709 (Aug. 22, 1997). Thus, the decision whether, and to what extent, to credit the testimony of particular witnesses is within the peculiar competence of the factfinder, who has seen and heard the witness.

{¶40} Thus, despite Jarrett's assertion that the testimonies of Hutchins, Williams, and Pratt were not credible, the jury, who had the opportunity to see and hear the witnesses, had the distinct advantage to competently credit or discount the testimony of a particular witness. Further, as discussed earlier, Williams did not want to testify in the matter, for fear of being labeled a snitch. Thus, based on the foregoing, we cannot say that

the jury clearly lost its way and created such a manifest miscarriage of justice that the convictions are against the manifest weight of the evidence. Accordingly, we overrule the third assigned error.

{¶41} 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 be sent to said 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.

PATRICIA ANN BLACKMON, JUDGE

MARY EILEEN KILBANE, P.J., and
SEAN C. GALLAGHER, J., CONCUR