

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C.A. No. 27405

Appellee

v.

GRACSHAWN G. THOMAS

Appellant

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CR 13 10 2888A

DECISION AND JOURNAL ENTRY

Dated: June 17, 2015

HENSAL, Presiding Judge.

{¶1} Gracshawn Thomas appeals his convictions for aggravated murder, murder, having weapons under disability, tampering with evidence, and accompanying firearm specifications. For the following reasons, this Court affirms.

I.

{¶2} On the morning of September 18, 2013, Alphonzo Golden was waiting at a traffic light in Akron when a tan Buick Rendezvous pulled up along the driver's side of his station wagon. The driver of the Rendezvous, who, according to witnesses, was an African-American male wearing a black hat and red hooded sweatshirt, lowered the front passenger window of his vehicle, extended a gun toward Mr. Golden, and fired multiple shots, striking Mr. Golden twice and killing him. The driver of the Rendezvous then pulled around the other traffic at the intersection and sped away.

{¶3} A short time later, Mr. Thomas pulled into Joy Strickland's backyard in a tan Buick Rendezvous and immediately began cleaning out the vehicle's interior. He was wearing a "maroon" hooded sweatshirt. One of Mr. Thomas's cousins arrived shortly thereafter, and he began helping Mr. Thomas clean out the vehicle. Meanwhile, Mr. Golden's girlfriend learned about the shooting and went down to the scene. When police asked her about possible suspects, she gave them Mr. Thomas's name along with the name of the cousin and a friend of theirs. An analysis of Mr. Thomas's cell phone data indicated that his phone had been in the same part of the city as the shooting at the time it occurred.

{¶4} A week after the shooting, the police issued charges for Mr. Thomas. Early the next morning, the Rendezvous that he was driving on the morning of the shooting was found by the police. It had been painted black and set on fire. Mr. Thomas turned himself into the authorities later that day.

{¶5} The Grand Jury indicted Mr. Thomas for aggravated murder with a firearm specification, murder with two firearm specifications, having weapons while under disability, and tampering with evidence. At trial, Mr. Thomas testified that he had never met Mr. Golden and had no animosity toward him. He said that, on the morning of the shooting, he was driving a tan Rendezvous that belonged to a relative of his known as "Poon." According to Mr. Thomas, he was out purchasing marijuana that he intended to sell to others. When he stopped at a store, however, he realized that some of the marijuana bundles that he had made up had fallen out of his pocket. That is why he was searching through the Rendezvous and cleaning it out in Ms. Strickland's backyard. He said that he drove the Rendezvous to Ms. Strickland's backyard because that is where he was supposed to return it to Poon.

{¶6} A jury found Mr. Thomas guilty of the offenses, and the trial court sentenced him to a total of 35 years to life imprisonment. Mr. Thomas has appealed, assigning three errors.

II.

ASSIGNMENT OF ERROR I

THE TRIAL COURT ERRED AS A MATTER OF LAW WHEN IT ALLOWED THE INTRODUCTION OF INADMISSIBLE HEARSAY OF THE ALLEGED VICTIM IN VIOLATION OF MR. THOMAS' RIGHT TO CONFRONT WITNESSES UNDER THE SIXTH AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS 1, 10 & 16 OF THE OHIO CONSTITUTION.

{¶7} Mr. Thomas argues that the trial court incorrectly allowed Mr. Golden's girlfriend to testify that Mr. Golden asked her for information about Mr. Thomas and his cousin before his death. He also argues that it incorrectly allowed her to testify that she had provided Mr. Golden with the cousin's phone number and to testify that Mr. Golden seemed afraid of meeting the cousin. According to Mr. Thomas, the girlfriend's testimony violated the confrontation clause and the rules on hearsay.

{¶8} Regarding Mr. Thomas's confrontation clause argument, we note that he did not make such an argument in the trial court. He, therefore, has forfeited it for appeal. *State v. Maple*, 9th Dist. Summit No. 25331, 2011-Ohio-1516, ¶ 21. Although he has not forfeited plain error, he has not argued plain error in his brief so we will not address the issue. *State v. Ricks*, 9th Dist. Medina No. 09CA0094-M, 2010-Ohio-4659, ¶ 13.

{¶9} Regarding Mr. Thomas's hearsay argument, Evidence Rule 801(C) defines hearsay 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." According to the Ohio Supreme Court, "[a]n 'assertion' for hearsay purposes 'simply means to say that something is so, e.g., that an event happened or that a condition existed.'" *State v. Carter*, 72 Ohio St.3d 545, 549

(1995), quoting 2 McCormick on Evidence, Section 246, 98 (4th Ed.1992). The question that Mr. Golden asked his girlfriend about Mr. Thomas's cousin was not an assertion and, therefore, not hearsay. *Id.* We also conclude that the girlfriend's testimony that Mr. Golden was concerned about meeting Mr. Thomas's cousin was admissible under Rule 803(3) because it involved Mr. Golden's "then existing state of mind." *State v. Apanovitch*, 33 Ohio St.3d 19, 21 (1987). Mr. Thomas's first assignment of error is overruled.

SECOND ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED AS A MATTER OF LAW BECAUSE THE STATE FAILED TO ESTABLISH ON THE RECORD SUFFICIENT EVIDENCE TO SUPPORT THE CHARGES LEVIED AGAINST MR. CLAYTON (SIC) IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE 14TH AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE 1, SECTIONS 1, 10 & 16 OF THE OHIO CONSTITUTION.

{¶10} Mr. Thomas next argues that his convictions were not supported by sufficient evidence. Whether a conviction is supported by sufficient evidence is a question of law, which this Court reviews de novo. *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997). In making this determination, we must view the evidence in the light most favorable to the prosecution:

An appellate court's function when 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. 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, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus.

{¶11} Mr. Thomas argues that the only evidence that he was involved in Mr. Golden's murder was circumstantial. He argues that, although he was driving a similar vehicle on the morning of the shooting, his sweatshirt was maroon, not red, and he did not have on a black hat. He notes that, given the large coverage area of cell phone towers, the fact that his cell phone

communicated with a tower that was in the same area of the city as the shooting around the time of the shooting does not mean he was the shooter. He also notes that no one obtained the license plate number of the Rendezvous that was involved in the shooting. According to Mr. Thomas, there was also no evidence that he had the prior calculation and design to kill Mr. Golden or that he was involved in the destruction of Poon's Rendezvous. He further argues that there was no evidence that he ever had possession of a gun.

{¶12} “Circumstantial evidence and direct evidence inherently possess the same probative value.” *Jenks* at 272. Accordingly, the fact that there was no direct evidence that Mr. Thomas was responsible for Mr. Golden's death is not determinative. Regarding prior calculation and design, the Ohio Supreme Court has held that there is no bright-line test and that whether it existed depends on the facts and evidence presented in each case. *State v. Taylor*, 78 Ohio St.3d 15, 20 (1997). Some of the issues that are relevant to the determination are whether the defendant and victim had a strained relationship, whether the defendant brought a gun to a place where he knew the victim would be present, and whether he continued firing at the victim after the victim was already wounded. *Id.* at 22.

{¶13} Viewed in a light most favorable to the State, the evidence at trial indicated that Mr. Golden had some prior history with Mr. Thomas that made Mr. Golden concerned about his safety. At the time of the shooting, Mr. Thomas was driving the same make, model, and color vehicle as Mr. Golden's killer, was in the same part of the city, and was wearing a similarly-colored sweatshirt. Immediately after the shooting, Mr. Thomas's cell phone made several calls to his cousin's cell phone. Shortly thereafter, Mr. Thomas pulled behind a house and began to clean out the interior of the vehicle. According to a detective, the type of gun that was used to kill Mr. Golden would have ejected shell casings into the shooter's vehicle. As Mr. Thomas

cleaned the car, the cousin who had been called from Mr. Thomas's cell phone arrived to help him. Finally, the night after charges were issued for Mr. Thomas, the Rendezvous he was driving on the morning of the shooting was set on fire after being painted a different color.

{¶14} Upon review of the record, we conclude there was sufficient evidence for the jury to convict Mr. Thomas. According to Mr. Golden's girlfriend, about nine months before this shooting, one of Mr. Thomas's cousins was killed. After the death, Mr. Golden became concerned about his safety, so he began driving his truck everywhere because its height allowed him to maintain a good view of his surroundings. The morning of the shooting, however, Mr. Golden's truck refused to start, so he had to take the station wagon instead. The fact that Mr. Golden was shot that morning suggests that the shooter had been waiting for an opportunity to kill Mr. Golden. We, therefore, conclude that the evidence supported a finding that Mr. Thomas shot and killed Mr. Golden with prior calculation and design. We also conclude that the fact that Mr. Thomas immediately drove the Rendezvous to a secure location after the shooting and began cleaning it out with the assistance of his cousin, as well as the fact that it was set on fire after the police began searching for Mr. Thomas in connection with the murder, is sufficient circumstantial evidence to support his conviction for tampering with evidence. R.C. 2921.12(A)(1), *State v. Glunt*, 9th Dist. Medina No. 13CA0050-M, 2014-Ohio-3533, ¶ 7 (explaining elements of tampering with evidence). Mr. Thomas's second assignment of error is overruled.

ASSIGNMENT OF ERROR III

MR. THOMAS' CONVICTIONS ARE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE POSSESSION (SIC) IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE 14TH AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS 1, 10 & 16 OF THE OHIO CONSTITUTION.

{¶15} Mr. Thomas also argues that his convictions are against the manifest weight of the evidence. “While the test for sufficiency requires a determination of whether the state has met its burden of production at trial, a manifest weight challenge questions whether the state has met its burden of persuasion.” *Glunt* at ¶ 18, quoting *State v. Carr*, 9th Dist. Summit No. 26661, 2014-Ohio-806, ¶ 28. To determine whether a conviction is against the manifest weight of the evidence, this Court

must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether, in resolving conflicts in 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, 33 Ohio App.3d 339, 340 (9th Dist.1986). Weight of the evidence pertains to the greater amount of credible evidence produced in a trial to support one side over the other side. *Thompkins*, 78 Ohio St.3d at 387. The appellate court should only exercise its power to reverse a judgment as against the manifest weight of the evidence in exceptional cases. *Otten* at 340.

{¶16} Mr. Thomas argues that he presented extensive evidence demonstrating that he was not involved in the shooting. He argues that his shirt was maroon, not red or orange, which is what a witness to the shooting testified the shooter was wearing. He also argues that, given the large range of cell phone towers, his cell phone data does not necessarily place him at the location of the shooting. According to Mr. Thomas, his testimony was consistent with the testimony of the other witnesses and the cell phone data. He also notes that there was no gun recovered and that there was also no evidence establishing that he was involved in setting Poon’s Rendezvous on fire. He, therefore, argues that the State failed to prove beyond a reasonable doubt that he was guilty of the offenses.

{¶17} Mr. Thomas's convictions were based on circumstantial evidence that could be construed multiple ways. Upon review of all of the evidence together, however, we cannot say that the jury lost its way when it found him guilty. The evidence indicates that he was in the same part of Akron as the shooter, driving an identical vehicle, and wearing a shirt that was a similar hue of the color of the shirt that witnesses reported the shooter wearing. Although Mr. Golden's exact history with Mr. Thomas and his cousin is unknown, Mr. Thomas admitted that his cousin's death occurred at Mr. Golden's birthday party. Mr. Golden, apparently, was so concerned about Mr. Thomas, his cousin, and their friend following the party that he altered his driving habits, and they were the first names that Mr. Golden's girlfriend gave to the police. Immediately after the shooting, Mr. Thomas and his cousin thoroughly cleaned the Rendezvous he had been driving. While Mr. Thomas claimed he was searching for little bundles of marijuana, he failed to explain how those bundles could have dispersed to so many areas of the vehicle after falling out of his pocket while he was in the driver's seat. The fact that Mr. Thomas called his cousin five times in the minutes following the shooting suggests that he was urgently trying to reach him, an urgency that does not seem justified by the loss of a couple of tiny bundles of marijuana. Finally, the timing of the Rendezvous fire, after officers went to Mr. Thomas's residence looking for him, but before he turned himself into the authorities, also supports the conclusion that it was Mr. Thomas who killed Mr. Golden. It was for the jury to resolve any inconsistencies in the testimony and to determine what weight to give each witness's testimony. *State v. Davis*, 9th Dist. Summit No. 26995, 2014-Ohio-5260, ¶ 8. This Court will not overturn the jury's verdict simply because it did not choose to believe Mr. Thomas's testimony. *Id.* Mr. Thomas's third assignment of error is overruled.

III.

{¶18} The trial court did not incorrectly admit hearsay evidence, Mr. Thomas's convictions are supported by sufficient evidence, and his convictions are not against the manifest weight of the evidence. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

JENNIFER HENSAL
FOR THE COURT

WHITMORE, J.
SCHAFFER, J.
CONCUR.

APPEARANCES:

PAUL GRANT, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and RICHARD S. KASAY, Assistant Prosecuting Attorney, for Appellee.