

ORIGINAL

NO. 10-1288

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO
NO. 91691

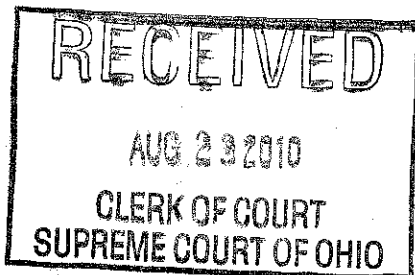
STATE OF OHIO

Plaintiff-Appellee

-vs-

TERRANCE HOUGH

Defendant-Appellant



APPELLEE'S MEMORANDUM IN RESPONSE

Defendant-Appellant Pro Se

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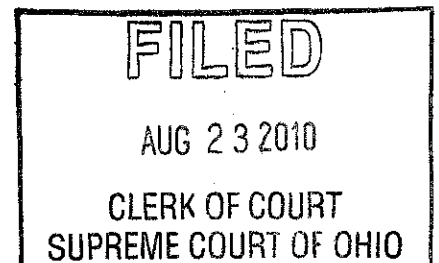


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**WHY THIS FELONY CASE IS NOT A CASE OF GREAT PUBLIC OR
GENERAL INTEREST AND DOES NOT INVOLVE A SUBSTANTIAL
CONSTITUTIONAL QUESTION**

Terrance Hough does not present this Court with either a substantial constitutional question or a matter of great public or general interest. The Eighth District Court of Appeals (hereinafter "Eighth District") correctly applied controlling precedent and affirmed Hough's convictions. *State v. Hough*, Cuyahoga App. No. 91691, 2010-Ohio-2770.

In the early morning hours of July 5, 2007, Terrance Hough (Hough) deliberately killed Jacob Feichtner, Katherine Rosby, and Bruce Anderson and attempted to kill Donald Walsh and Katherine Nicholas. Hough was convicted of multiple counts of aggravated murder and attempted murder after a ten-day jury trial. The contested issue at trial revolved around Hough's state of mind. The jury found, and overwhelming evidence supports, that Hough acted with prior calculation and design.

In his memorandum requesting jurisdiction, Hough raises the same arguments that the Eighth District denied. Hough's arguments all involve well-established precedent and do not present this Court with anything more than a request for further review of properly decided issues. The State of Ohio respectfully submits that Hough's arguments do not warrant the jurisdiction of this Court. The Eighth District properly applied controlling precedent and upheld Hough's convictions. No aspect of this case presents this Honorable Court with either a substantial constitutional question or a matter of general or great public interest. As such, the State of Ohio respectfully requests this Court decline to accept jurisdiction in this case.

STATEMENT OF THE CASE

This appeal stems from the murder and attempted murder of five individuals by Defendant Terrance Hough. A Cuyahoga County Grand Jury returned a multi-count capital indictment against Hough. The indictment charged Hough with three counts of Aggravated Murder, pursuant to R.C. 2903.01(A), for purposely, and with prior calculation and design, causing the deaths of Jacob Feichtner, Katherine Rosby, and Bruce Anderson. Each Aggravated Murder count contained mass murder and firearm specifications. Hough was additionally charged with two counts of Attempted Murder, pursuant to R.C. 2903.02(A)/R.C. 2923.02, for attempting to cause the deaths of Donald Walsh and Katherine Nicholas.

Hough pled not guilty and exercised his right to a jury trial. On May 15, 2008, the jury found Hough guilty as charged. The matter proceeded to the mitigation phase. The jury recommended that Hough be sentenced to life without the possibility of parole. The trial court accepted the recommendation and sentenced Hough to three consecutive sentences of life without parole for each count of Aggravated Murder. He was sentenced to ten years for each count of Attempted Murder, to be served consecutively to each other and consecutively to the Aggravated Murder sentences. The trial court additionally imposed a merged three year sentence for the firearm specifications which were run prior and consecutive to the underlying felonies.

Hough appealed and argued that his aggravated murder convictions were not supported by sufficient evidence, that the trial court erred by admitting certain other acts and victim-impact evidence, and that he was denied effective assistance of counsel. The Eighth District affirmed Hough's convictions. *State v. Hough*, Cuyahoga App. No. 91691, 2010-Ohio-2770.

STATEMENT OF THE FACTS

On July 5, 2007 the quiet cul-de-sac street Sky Lane in the Old Brooklyn neighborhood was devastated by a mass murder perpetrated by a resident firefighter.

Jacob and John Feichtner, along with their father Roland, lived at 4375 Sky Lane in Cleveland, Ohio. Jacob and John both attended college outside of the city but were home for the July 4th holiday. Terrance and Regina Hough lived to the right of the Feichtners. Christina Castellano lived on the left side and the Badners and Rosarios lived across the street. The Feichtners lived in a friendly residential neighborhood. In March of 2002, Terrance and Regina Hough moved in next door. Terrance Hough was a firefighter with the Cleveland Fire Department and was required, at the time, to reside in the City of Cleveland. The Houghs and Feichtners had a strained relationship. Roland Feichtner, realizing Terrance Hough's temperament, instructed his children to be mindful of the neighbors. None of the other neighbors complained about the Feichtners.

On July 4th, 2007 Jacob and his girlfriend Valerie Skora planned an afternoon of celebration. The two went to Valerie's Aunt's holiday party in Broadview Heights until approximately 8:00p.m. After the party, Jacob and Valerie made plans to meet up with their friends at a hill where people frequently gathered to watch the City of Cleveland fireworks display. The couple stopped back at Jacob's home before heading up to the hill. During that time, Jacob asked Christina Castellano for permission to set off a firework in his back yard. With Christina's permission, Jacob set off one firework and the couple left to meet up with their friends.

Jacob and Valerie met up with Donnie Walsh, Katherine Nicholas, Katherine Rosby, Bruce Anderson, Mary Ellen Skora, and Jennifer White. Donnie Walsh was engaged to Katherine Nicholas and Katherine Rosby and Bruce Anderson were dating.

After the show, the group proceeded to Jacob's house. Some of the girls set up a blanket on the front lawn and Jacob and Valerie walked across the street to visit with their other neighbors, the Badners. The Badners, among others, were setting off fireworks for the holiday. John Feichtner, along with his friends Kevin Dubiel and Theresa Nita, returned to the Feichtner's and went inside to play video games.

Jacob and Valerie then returned home where Jacob and Donnie Walsh began to set off fireworks in the street. The Badners watched the display. The fireworks were not noisy. Valerie then went inside the home to make a sandwich. Around 11:30p.m., Jacob grabbed a plastic bag to pick up the trash. Jacob wanted to make sure that nothing went into Terrance Hough's yard. At that time, there were five individuals in the Feichtner's front yard. Katherine Nicholas was standing in the yard, Katherine Rosby and Bruce Anderson were sitting near the end of the driveway, Donnie Walsh was cleaning up fireworks in the tree lawn, and Jacob was picking up near the driveway.

Approximately thirty minutes later, Terrance Hough walked out of his front door armed with a .40 caliber semiautomatic pistol concealed at his side. Hough walked up to Jacob Feichtner and yelled "you fucking kids won't be doing this shit no more." Jacob, realizing Hough had a gun, said "what are you going to do, shoot me? Put down the gun and go back inside." At that time, Hough raised his weapon and shot Jacob in the chest. Jacob fell on his back. Hough moved to stand over him and shot him two times through the heart. Dr. Felo, a pathologist at the Cuyahoga County Coroner's Office, testified that Jacob Feichtner's heart was shredded as a result of the gunshots.

Katherine Rosby was sitting with her back turned to the incident. Katherine mistook the noise for fireworks and asked if Jacob was setting them off behind her back. Hough then took several steps away from Jacob and approached Katherine from behind.

He stood over her and shot her twice in the back. Bruce Anderson, Katherine's boyfriend, was seated right next to Katherine when Hough approached. Bruce tried to escape from Hough by rolling away. Hough, however, approached Bruce and shot him twice in the back.

At that time, Hough turned to go back to his house. Katherine Nicholas, who was still outside, began screaming. Hough then turned around and aimed the gun directly at Nicholas using both hands. Donnie Walsh, who was watching the massacre from the tree lawn, ran in front of his fiancée to protect her. Donnie was struck in the elbow as he pushed Katherine out of the way. Hough fired again and shot Katherine in her left pinky finger.

Hough said "yeah, yeah" after every shot that he fired. Donnie Walsh explained that Hough's comments sounded as if each shot was bringing him joy. Hough fired a total of nine shots at the victims and then turned around, shrugged his shoulders, and went back to his house.

Detective Joe Bovenzi lived several houses down from the crime scene. He testified that around midnight he heard approximately 8 or 9 shots. Detective Bovenzi and his family were friends with both the Feichtners and the Houghs. Detective Bovenzi ordered his family inside, grabbed his weapon, and ran down to the Feichtner's residence. As he approached the scene, Detective Bovenzi learned that Hough was the shooter. He then entered the Hough residence through the front door and found Hough sitting at the kitchen table. Detective Bovenzi secured Hough and the murder weapon and then called for backup. Officer Matt Stepic arrived to assist Detective Bovenzi. Upon his arrival, Hough spontaneously asserted that he had snapped. Officer Stepic noted that Hough appeared very calm and spoke clearly. Hough was asked about weapons and his

wife, Regina, directed officers to a gun cabinet in the basement. Officers recovered a total of seven handguns and four rifles/long firearms from the Hough residence.

Hough used a 40 caliber Beretta semiautomatic handgun during the shooting. This type of weapon requires that the user pull the trigger each and every time a bullet is released. Further testimony revealed that Hough always has the safety on that firearm, which would also have to be turned off in order to function. The weapon was loaded with hollow point bullets. Hollow point bullets are specifically designed to expand so that they cause more tissue damage to the target. Hollow point bullets have more "killing power."

Terrance Hough's wife, Regina, testified on his behalf. Mrs. Hough testified that her husband was a gun collector and hunter who kept guns stored at different places in the house. She testified that she did not think her husband could hurt anyone. Hough stored one handgun in the top shelf of a cabinet in the kitchen and another one in the bedroom. Mrs. Hough testified that after she put her children to bed she went to the basement to watch television. Terrance Hough went into the couple's bedroom. Mrs. Hough testified that around midnight, she heard Terrance Hough leave the bedroom, go into the kitchen, and then go outside. Mrs. Hough stated that her husband then came to the basement and apologized to her. Terrance Hough told his wife "I took care of it; I took care of the neighbors. I shot them."

LAW AND ARGUMENT

PROPOSITION OF LAW I: A DEFENDANT ACTS WITH PRIOR CALCULATION AND DESIGN WHEN HE HAS A STRAINED RELATIONSHIP WITH THE VICTIM, METICULOUSLY SELECTS HIS MURDER WEAPON, WAITS TO KILL MULTIPLE VICTIMS UNTIL POTENTIAL WITNESSES RETURN HOME, AND EXPRESSES JOY WITH EVERY SHOT FIRED.

Hough argued at trial and on direct appeal that he did not act with prior calculation and design when he killed three victims and attempted to kill two more. The Eighth District properly applied controlling precedent and found that Hough's convictions were supported by sufficient evidence. When reviewing for sufficiency of evidence, an appellate court's function is to examine the evidence admitted at trial and determine whether, "in the light most favorable to the prosecution, any rational trier of fact would have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Jenks* (1991), 61 Ohio St.3d 259 at 278 citing *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560.

"Prior calculation and design" is not defined in the Ohio Revised Code, but is considered to be "more than just an instantaneous decision to kill." *State v. Jones*, 91 Ohio St.3d 335, 2001-Ohio-57. There is no bright-line test for determining the existence of prior calculation and design as "each case turns on the particular facts and evidence presented at trial." *Jones*, supra at 345 citing *State v. Taylor* (1997), 78 Ohio St.3d 15, 19, 676 N.E.2d 82, 88. Several factors, "including: (1) whether the accused and the victim knew each other, (2) whether there was thought or preparation in choosing the murder weapon or the murder site, (3) and whether the act was 'drawn out' or 'an almost instantaneous eruption of events should be considered under the totality of the circumstances of the homicide to determine whether there was prior calculation and design." *State v. Jenkins* (1976), 48 Ohio App.2d 99, 102. Prior calculation and design "can be found even when the plan to kill was quickly conceived and executed." *State v. Coley*, 93 Ohio St.3d 253, 263, 2001-Ohio-1340.

The evidence presented in this case shows that Terrance Hough had a strained relationship with the Feichtners and their friends. This ongoing problem formed the

basis of Hough's plan. On the day of the murder, Hough waited nearly half an hour after the victims were done using fireworks, and after all of the neighbors had gone to bed, before he went outside and began shooting. He left his home carrying a firearm loaded with bullets designed to have more killing power. He yelled "you fucking kids won't be doing this shit anymore." When Jacob Feichtner confronted Hough about the firearm, Hough aimed at him and shot him through the heart. He aimed directly at each victim and proclaimed "yeah, yeah" with joy after every shot he fired. While Hough's defense is based on the premise that he just "snapped," testimony revealed that right after the shooting Hough informed his wife that he "...took care of it, I took care of the neighbors. I shot them."

Prior calculation and design can be shown by "evidence that the murder was executed in such a manner that circumstantially proved the defendant had a preconceived plan to kill." *State v. Trewartha*, 165 Ohio App.3d 91, 844 N.E.2d 1218, 2005-Ohio-5697, ¶ 19. See *State v. Palmer* (1997), 80 Ohio St.3d 543, 687 N.E.2d 685, (defendant engaged in argument with victims after traffic accident and got out of the vehicle with a loaded pistol that was cocked and ready to fire which "gives rise to the inference that appellant intended to use that weapon. That inference is also independently supported by the fact that appellant shot Sponhaltz twice in the head execution-style"); *State v. Goodwin* (1999), 84 Ohio St.3d 331, 703 N.E.2d 1251 (during a robbery, the defendant placed gun to the head of cooperative victim and pulled the trigger then continued to rob the store); *State v. Madris* (1999), 134 Ohio App.3d 6, 18, 729 N.E.2d 1272, 1281 (finding prior calculation and design where defendant aimed his gun at unresisting victim and took additional steps to cock the hammer, close one eye, and pull the trigger).

The evidence adduced at trial does not indicate a spur of the moment, instantaneous decision. Rather, it shows a plan to kill each of the victims. Hough approached three helpless victims, one of whom actually attempted to get away from him. As he approached with a loaded firearm, Hough yelled that the kids “would not be doing this shit anymore.” This statement clearly shows that Hough had formulated the intent to kill the victims before the shooting took place. Each victim was shot multiple times at close range and in a manner designed to kill.

Hough argues that he did not have a plan to kill but merely snapped due to the victim’s use of fireworks. However, the evidence at trial shows that the fireworks were not noisy and that Hough waited at least thirty minutes before he came outside. Hough argues that he chose his specific murder weapon because it was the only one in his possession that he was legally permitted to walk outside with. Hough argues that this is evidence against prior calculation and design. However, such careful thought supports the State’s position that Hough acted with a plan. Hough also argues that his wife and John Feichtner did not hear Hough yell prior to the shooting. However, both Mrs. Hough and John Feichtner were inside at the time.

Any rational trier of fact would believe that Hough killed Jacob Feichtner, Katherine Rosby, and Bruce Anderson with prior calculation and design. Because this argument was thoroughly and properly considered, the State requests this Honorable Court refuse to grant jurisdiction in this case.

PROPOSITION OF LAW II: THE STATE MAY INTRODUCE RELEVANT EVIDENCE AND EVIDENCE TO REBUT A CHARACTER TRAIT OFFERED BY THE ACCUSED.

In his second proposition of law, Hough requests this Honorable Court disregard fundamental rules of evidence and find that the trial court improperly admitted certain

evidence. The admission or exclusion of evidence lies within the sound discretion of the trial court and will not be disturbed absent an abuse of that discretion. *State v. Diar*, 120 Ohio St.3d 460, 900 N.E.2d 565, 2008-Ohio-6266 at ¶66.

Hough argues that the trial court erred by admitting other acts testimony. Specifically, he claims that Detective Sampson's testimony regarding the location and number of firearms in Hough's home is inadmissible. As the Eighth District found, Hough incorrectly characterizes this evidence as "other acts" evidence. Detective Sampson's testimony merely relayed the evidence that was collected from Hough's home. This evidence is not an "other act" nor was it used as character evidence. This evidence was relevant to show Hough's choice of weapon. Hough's deliberate choice of weapon was one of the factors that supports prior calculation and design.

Hough additionally argues that the trial court erred when it allowed his wife to testify about prior interactions with her husband. The Eighth District correctly held that the trial court did not err in admitting this testimony. During direct examination, Mrs. Hough "opened the door" for the State to question her about her husband's behavior. Evid. R. 404(A); see also *State v. Jalowiec*, 91 Ohio St.3d 220, 232, 744 N.E.2d 163, 2001-Ohio-26.

Because Hough's second proposition of law was correctly decided below, the State requests this Honorable Court refuse to grant jurisdiction in this case.

PROPOSITION OF LAW III: THE ADMISSION OF AN INSIGNIFICANT AMOUNT OF VICTIM-IMPACT EVIDENCE IS HARMLESS ERROR WHEN THERE IS OVERWHELMING EVIDENCE OF A DEFENDANT'S GUILT.

"The State is not wholly precluded from eliciting testimony from victims that touches on the impact the crime had on them: 'circumstances of the victims are relevant

to the crime as a whole. The victims cannot be separated from the crime.” *State v. Williams*, 99 Ohio St.3d 439, 793 N.E.2d 446, 2003-Ohio-4164, ¶143. “Evidence which depicts both the circumstances surrounding the commission of the murder and also the impact of the murder on the victim’s family may be admissible during both the guilt and the sentencing phases.” *State v. Fautenberry*, 72 Ohio St.3d 435, 1995-Ohio-209.

“The erroneous admission of victim-impact evidence does not necessarily constitute reversible error. There must be some indication that the trier of fact was ‘influenced by or considered’ the victim-impact evidence. To show prejudice, there must be some reasonable probability that the outcome would have been different.” *State v. Harris*, Cuyahoga App. No. 78519, 2002-Ohio-1406.

Hough argued below that the trial court erroneously admitted portions of the testimony of Roland Feichtner, the father of one of the victims. During his testimony, Mr. Feichtner stated that he was seeking counseling and compared his military experience to the events of the night in question. The Eighth District found that a small part of Mr. Feichtner’s testimony could be characterized as victim-impact evidence. However, Mr. Feichtner’s testimony did not rise to the level of improper victim-impact evidence discussed in *Fautenberry, supra*.

In light of the overwhelming evidence of guilt in this case, the Eighth District properly found that this limited admission was not prejudicial. Because this issue was properly resolved below, the State requests this Honorable Court refuse to grant jurisdiction in this case.

***PROPOSITION OF LAW IV: TRIAL COUNSEL IS NOT
INEFFECTIVE FOR FAILING TO MAKE GROUNDLESS
MOTIONS AND OBJECTIONS.***

The Eighth District correctly found that Hough was not denied the effective assistance of counsel. “On the issue of counsel’s ineffectiveness, the petitioner has the burden of proof, since in Ohio a properly licensed attorney is presumably competent.” *State v. Calhoun* (1999), 86 Ohio St.3d 279. The United States Supreme Court has established a process to evaluate whether or not an appellant’s attorney failed to competently represent the defendant. *Strickland v. Washington* (1984), 466 U.S. 668, 687. This Court summarized the two-prong test as follows: “first, appellant must show that counsel’s performance was deficient, and second, that the deficient performance prejudiced appellant so as to deprive him of a fair trial.” *State v. Fraizer*, 115 Ohio St.3d 139, 2007-Ohio-5048.

Hough initially argued that trial counsel was ineffective for failing to request a limiting instruction for evidence of his gun possession. As previously discussed, this evidence was not “other acts” evidence and was relevant and admissible. As such, counsel did not err.

Hough next argues that counsel was ineffective for failing to object to several different statements. “The failure to make objections alone is not enough to sustain a claim of ineffective assistance of counsel.” *State v. Conway*, 108 Ohio St.3d 214, 842 N.E.2d 996, 2006-Ohio-791, ¶168.

First, Hough’s counsel was not ineffective for failing to object to the State’s cross-examination of his wife. On direct examination, Mrs. Hough opened the door to evidence concerning her husband’s temperament. The State’s cross-examination questioning was admissible pursuant to Evid. R. 404(A). Hough’s counsel is not ineffective for failure to object to the State’s proper cross-examination.

Second, Hough argues that counsel was ineffective for failing to object to the testimony of Dr. Seitz. Dr. Seitz testified to Donald Walsh's injuries. This testimony was admissible to prove Hough's attempted murder conviction against Mr. Walsh.

Third, Hough argues that trial counsel was ineffective for failing to object to the testimony of Roland Feichtner. Trial counsel's actions could reasonably be construed as a trial tactic in this case and Hough does not present evidence to overcome the presumption that it is. Further, there is no indication that Hough suffered prejudice as a result of counsel's failure. "To show such prejudice, a defendant must prove that, but for his lawyer's errors, a reasonable probability exists that the result of the proceedings would have been different." *State v. Hutton*, 100 Ohio St.3d 176, 183, 2003-Ohio-5607. Due to the overwhelming amount of evidence, the exclusion of this testimony would not have changed the outcome of this case.

Hough also argues that counsel was ineffective for failing to object to the State's closing argument. The prosecution is entitled to wide latitude in closing arguments. *State v. Treesh* (2001), 90 Ohio St.3d 460, 466, 739 N.E.2d 749. Counsel's decision to not object to closing arguments should be properly viewed as a trial tactic. *State v. Myers*, 97 Ohio St.3d 335, 2002-Ohio-6658, 780 N.E.2d 186, ¶ 154. Hough's argument fails because counsel made a sound tactical decision.

Hough finally argues that counsel was ineffective when counsel failed to request that the trial court waive his costs during sentencing. Hough's counsel filed a motion to waive costs on June 12, 2008, several days after sentencing. The trial court subsequently granted Hough's motion. While counsel failed to file a timely motion, the trial court granted the motion, and the State failed to appeal. As such, Hough's argument fails.

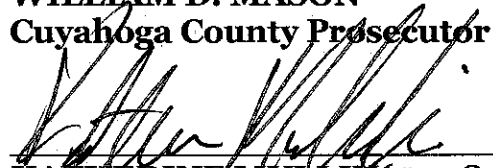
The Eighth District properly found that Hough was not denied the effective assistance of counsel. As such, the State respectfully requests this Honorable Court refuse to grant jurisdiction in this case.

CONCLUSION

The State of Ohio respectfully requests that this Honorable Court decline to accept jurisdiction in this case, and dismiss Hough's appeal. Supreme Court review is not warranted as no aspect of Hough's case presents this Honorable Court with either a substantial constitutional question or a matter of general or great public interest.

Respectfully submitted,

WILLIAM D. MASON
Cuyahoga County Prosecutor



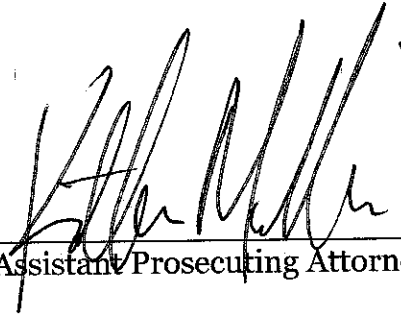
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CERTIFICATE OF SERVICE

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this 20TH day of August, 2010, to:

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