

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio

Court of Appeals Nos. L-10-1256
L-10-1361

Appellee

Trial Court No. CR0200902735

v.

Aaron Jones

DECISION AND JUDGMENT

Appellant

Decided: March 29, 2013

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Jeffrey D. Lingo, Assistant Prosecuting Attorney, for appellee.

Deborah Kovac Rump, for appellant.

* * * * *

OSOWIK, J.

{¶ 1} This is a consolidated appeal from judgments of the trial court which found appellant guilty of one count of murder and one count of aggravated robbery and denied appellant's motion for new trial. For the reasons that follow, the judgments of the trial court are affirmed.

{¶ 2} On September 9, 2009, appellant was indicted on one count of murder in violation of R.C. 2903.02(B) and one count of aggravated robbery in violation of R.C. 2911.01(A)(3) in connection with the murder of Jeffrey Patterson on June 11, 2009. Following a jury trial, appellant was found guilty of both counts. He was sentenced to 15 years to life for the murder conviction and 9 years for the aggravated robbery conviction, to be served concurrently. Appellant filed a timely appeal, followed by a motion for new trial. A hearing was held on the motion and, on November 17, 2010, it was denied. Appellant filed a notice of appeal from the denial and this court subsequently consolidated the two appeals.

{¶ 3} Appellant sets forth the following assignments of error:

Assignment of Error I:

The trial court erred when it certified a witness as an expert in forensic anthropology. Not only did the witness lack the necessary credentials, the testimony she offered did not materially assist the jury and was more prejudicial than probative.

Assignment of Error II:

The state failed to prove the convictions for murder and aggravated robbery with sufficient evidence.

Assignment of Error III:

Jones' convictions are against the manifest weight of the evidence.

Assignment of Error IV:

The trial court abused its discretion by not granting his motion for a new trial.

Assignment of Error V:

Jones' trial counsel was ineffective for failing to use the trial court's authority to require Rite Aid to timely respond to the subpoena and produce the required records and witnesses to support Jones' defense.

{¶ 4} In support of his first assignment of error, appellant asserts that the witness in question, Julie Saul, was not qualified to be certified as a forensic anthropologist. At trial, the deputy coroner testified as to her opinion that the murder weapon was a pronged tool such as a pry bar, tire iron or hammer. After the state offered into evidence a hammer recovered from the roof of a Rite Aid near the murder scene, Saul testified that the weapon used to kill Patterson left a "signature" indicative of a hammer.

{¶ 5} "Evid.R. 702(B) specifies that a witness may testify as an expert if she is qualified by, '* * * specialized knowledge, skill, expertise, training, or education regarding the subject matter of the testimony.'" *State v. Ayala*, 6th Dist. Nos. L-97-1365, L-97-1356, 1999 WL 739652 (Mar. 19, 1999). Further, Evid.R. 703 states that "[T]he facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by the expert or admitted in evidence at the hearing."

"The determination of expert witness qualifications to testify rests within the sound discretion of the court and will not be reversed absent an abuse of that discretion."

Id., citing *State v. Awkal*, 76 Ohio St.3d 324, 331, 667 N.E.2d 960 (1996); *State v. Bidinost*, 71 Ohio St.3d 449, 453, 644 N.E.2d 318 (1994). An abuse of discretion connotes more than a mere error in judgment; it implies that the trial court's ruling is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 6} Before the court certified Julie Saul as an expert witness in the area of forensic anthropology, Saul testified at length as to her professional background. In summary, Saul is director of the forensic anthropology laboratory for the Lucas County Coroner's Office, where she has worked since the mid-1980s. Saul also is a consultant in forensic anthropology at the Wayne County (Michigan) medical examiner's office and the Summit County (Ohio) medical examiner's office, and consults for the FBI evidence response team in Cleveland, Ohio.

{¶ 7} Based upon the foregoing, we find that the trial court's ruling certifying Saul as an expert in the area of forensic anthropology was not unreasonable, arbitrary or unconscionable and therefore did not constitute an abuse of discretion. Appellant's first assignment of error is not well-taken.

{¶ 8} Appellant's second and third assignments of error will be addressed together as both can be resolved by examining the evidence presented at trial.

{¶ 9} In support of his second assignment of error, appellant asserts that the state failed to prove the elements of aggravated robbery and murder. As to aggravated robbery, appellant argues that there was no evidence anything was stolen from Patterson

or that a theft was attempted because his wallet and recent purchases from the convenience store were undisturbed. As to murder, appellant argues that the state failed to prove that appellant caused Patterson's death while committing or attempting to commit an offense of violence because there was no proof that he committed aggravated robbery.

{¶ 10} In support of his third assignment of error, appellant questions the state's "timeline" relating to the time of the murder and his alleged whereabouts, as well as the lack of any physical damage to his hands after such a violent act.

{¶ 11} "Sufficiency" of the evidence is a question of law as to whether the evidence is legally adequate to support a jury verdict as to all elements of the crime. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). When reviewing the sufficiency of the evidence to support a criminal conviction, an appellate court must 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, 574 N.E.2d 492 (1991), paragraph two of the syllabus.

{¶ 12} In contrast, a manifest weight challenge questions whether the state has met its burden of persuasion. *Thompkins, supra*, at 387. In making this determination, the court of appeals sits as a "thirteenth juror" and, after "reviewing the entire record, weighs

the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether 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.” *Id.* at 386, citing *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983).

{¶ 13} This court has thoroughly considered the entire record of proceedings in the trial court, the testimony and the law as set forth above. As to appellant’s second assignment of error, we find that the state presented sufficient evidence from which, when viewed in a light most favorable to the state, a rational trier of fact could have found appellant guilty beyond a reasonable doubt of aggravated robbery and murder. *See Jenks, supra.*

{¶ 14} As to appellant’s argument under his third assignment of error, as this court has consistently affirmed, the trier of fact is vested with the discretion to weigh and evaluate the credibility of conflicting evidence in reaching its determination. It is not within the proper scope of the appellate court’s responsibility to judge witness credibility. *State v. Hill*, 6th Dist. No. OT-04-035, 2005-Ohio-5028, ¶ 42. Further, based on the testimony in this case and the law, this court cannot say that the jury clearly lost its way or created a manifest miscarriage of justice by finding appellant guilty of the charges against him. *Thompkins, supra.* Accordingly, the jury’s verdict was not against the manifest weight of the evidence.

{¶ 15} Based on the foregoing, appellant's second and third assignments of error are not well-taken.

{¶ 16} In support of his fourth assignment of error, appellant asserts that the trial court erred by denying his motion for a new trial based on newly discovered evidence.

{¶ 17} Granting a motion for a new trial is an extraordinary measure which should be allowed only when the evidence presented weighs heavily against conviction. *State v. Otten*, 33 Ohio App.3d 339, 340, 515 N.E.2d 1009 (9th Dist.1986). Absent an abuse of discretion, a decision to grant or deny a motion for a new trial on the basis of newly discovered evidence will not be disturbed. *State v. Hawkins*, 66 Ohio St.3d 339, 350, 612 N.E.2d 1227 (1993).

{¶ 18} A new trial based upon newly discovered evidence will not be granted unless the new evidence discloses a strong probability that it will change the result if a new trial is granted, has been discovered since trial and could not in the exercise of due diligence have been discovered before the trial, is material to the issues, is not merely cumulative to former evidence, and does not merely impeach or contradict the former evidence. *Hawkins, supra*, at 350, citing *State v. Petro*, 148 Ohio St. 505, 76 N.E.2d 370 (1947).

{¶ 19} Appellant now argues that newly discovered evidence and testimony concerning a hammer that was retrieved from the roof of the Rite Aid would have impeached the credibility of two of the state's trial witnesses and could have been used as persuasive evidence that the hammer was not the murder weapon. Appellant raises the

issue of some maintenance workers who he claims were on the Rite Aid roof before and after the murder and who may have been able to testify as to what they did or did not observe. However, appellant did not provide the trial court with affidavits of the potential witnesses as required by Crim.R. 33. Additionally, new evidence that merely impeaches former evidence cannot be used as the basis for a new trial. *See Hawkins, supra*. Accordingly, we find that the trial court did not abuse its discretion in denying appellant's motion for a new trial and appellant's fourth assignment of error is not well-taken.

{¶ 20} In his fifth assignment of error, appellant asserts that he was denied effective assistance of trial counsel. Appellant argues that although trial counsel issued a subpoena to Rite Aid when she learned that there had been workers on the roof around the time of the murder, she did nothing to assure compliance with the subpoena when the trial commenced without a response from Rite Aid. Appellant now asserts that trial counsel should have requested a continuance until Rite Aid complied with the subpoena.

{¶ 21} *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), sets forth the standard for judging ineffective assistance claims: "When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 687-688. Furthermore, "the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the

proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* at 694.

{¶ 22} Applying the first prong, we find that appellant has not shown that counsel’s representation fell below an objective standard of reasonableness. In fact, the record reflects that appellant told counsel before trial that he was unwilling to continue the trial date. Therefore, because appellant fails to satisfy the first prong as set forth above, no further review is warranted. Accordingly, appellant’s fifth assignment of error is not well-taken.

{¶ 23} On consideration whereof, the judgments of the Lucas County Court of Common Pleas are affirmed. Costs of this appeal are assessed to appellant pursuant to App.R. 24.

Judgments affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Arlene Singer, P.J.

JUDGE

Thomas J. Osowik, J.

JUDGE

Stephen A. Yarbrough, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: <http://www.sconet.state.oh.us/rod/newpdf/?source=6>.