

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff-Appellee,

vs.

Toby D. Wilcox # 505-534

Defendant-Appellant,

07-0455

On Appeal from the
FRANKLIN County Court
of Appeals, TENTH
Appellate District

Court of Appeals
Case No. 05-APA-972

MOTION TO FILE DELAYED APPEAL

Toby D. Wilcox respectfully moves the Court pursuant to Ohio Supreme Court Rule II, Section 2(A)(4)(a) for leave to file a delayed appeal and a notice of appeals. This case involves a felony and more than 45 days has passed since the Court of Appeals decision was filed in this case. A memorandum in support is attached.

Toby D. Wilcox
SIGNATURE

Toby D. Wilcox # 505-534
NAME AND NUMBER

S.O.C.F.
INSTITUTION

1724 STATE ROUTE 728, P.O. BOX 45699
ADDRESS

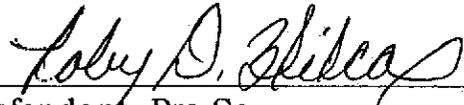
LUCASVILLE, OHIO. 45699
CITY, STATE & ZIP

DEFENDANT-APPELLANT, PRO SE

FILED
MAR 14 2007
MARCIA J MENGEL, CLERK
SUPREME COURT OF OHIO

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Motion was sent by regular U.S. mail to the Prosecutor's Office at: 373 S. HIGH ST. 14th FLOOR.
on this 9th day of FEBRUARY 2007 PROSECUTING ATTORNEYS,
GREGORY PETERSON, DOUG STEAD.



Defendant, Pro Se
Southern Ohio Correct. Facility
1728 St. Rt. 728
Lucasville, Ohio 45699

MEMORANDUM IN SUPPORT

On December 21, 2008 the Court of Appeals filed its decision in my case. I have attached a copy of the Court of Appeals opinion to this motion. I was unable to file a notice of appeal, memorandum in support of jurisdiction within 45 days of the Court of Appeal decision in my case.

I was unable to file an appeal to this Court within 45 days of the Court of Appeal decision for the following reasons.

- 1) I HAVE LIMITED ACCESS TO THE LAW LIBRARY.
- 2) I HAVE LIMITED KNOWLEDGE OF THE LAW.
- 3) I SENT IN AN INCOMPLETE MEMORANDUM IN SUPPORT OF JURISDICTION AND THE CLERK SENT IT BACK WITH INSTRUCTION ON HOW TO FILE A COMPLETE AND CORRECT MOTION BUT I DID NOT RECIEVE IT UNTIL THE 6th OF FEBUARY THE DAY AFTER MY 45 DAY DEAD LINE. I WAS ALSO INFORMED TO FILE THIS MOTION FOR DELAYED APPEAL IF I WAS UNABLE TO SEND BACK A COMPLETE AND CORRECT MOTION WITHIN MY 45 DAY DEAD LINE.
4. I HAVE TO ORDER ALL LEGAL PAPER WORK FROM THE LAW LIBRARY AT A NICKEL A COPY AND WAIT BETWEEN 1 AND 5 DAYS TO RECIEVE MY COPIES.
5. THE ONLY DAYS THAT I CAN PLACE AN ORDER OR PICK UP MY LEGAL PAPER WORK IS MONDAY AND FRIDAY.

Subscribed and sworn to before me this 21st day of December 2008



SHERI L. BRYANT
Notary Public, State of Ohio
My Comm. Expires 3/1/11

Sheryl L. Bryant
before me this 21st day of December 2008

If this Court would grant me a delayed appeal I would raise the following issues in my memorandum in support of jurisdiction.

- I.) It was error for the court not to give a jury instruction on a lesser included offence of murder as requested by appellants counsel.
- II.) The guilty findings by the jury were against the manifest weight of the evidence.
- III.) It was error for the court to deny the motion to suppress statements made by the appellant in violation of his constitutional rights.
- IV.) It was error for the lower court to permit the D.N.A. evidence and testimony as the D.N.A. was obtained in violation of appellants constitutional rights and was unreliable.

CONCLUSION

This Court should grant leave me leave to file a delayed appealed appeal and a notice of appeal.

Toby D. Wilcox
SIGNATURE

Toby D. Wilcox #505-534
NAME AND NUMBER

Southern, Ohio, Correctional Facility
INSTITUTION

1724 State Route 728, P.O. Box 45699
ADDRESS

LUCASVILLE, OHIO, 45699
CITY, STATE & ZIP

DEFENDANT-APPELLANT, PRO SE

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion for Delayed Appeal was forwarded by regular U.S. Mail to 373 S. High St. 14th floor Prosecuting

Attorney GREGORY PETERSON DOUG STEAD

this 9th day of FEBRUARY, 2007

Toby D. Wilcox
SIGNATURE

Toby D. Wilcox #505-534
NAME AND NUMBER

DEFENDANT-APPELLANT, PRO SE

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

FILED
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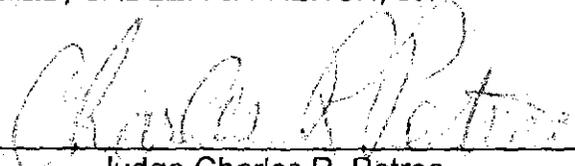
State of Ohio, :
 :
Plaintiff-Appellee, : No. 05AP-972
 : (C.P.C. No. 04CR-03-1872)
v. :
 : (REGULAR CALENDAR)
Toby D. Wilcox, :
 :
Defendant-Appellant. :

JUDGMENT ENTRY

For the reasons stated in the opinion of this court rendered herein on December 21, 2006, defendant's four assignments of error are overruled, and it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is affirmed. Costs are assessed against defendant.

PETREE, SADLER & FRENCH, JJ.

BY


Judge Charles R. Petree

ON COMPUTER

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

FILED
COURT OF APPEALS
FRANKLIN COUNTY
2006 DEC 21 PM 12:22
CLERK OF COURTS

State of Ohio, :
 :
 Plaintiff-Appellee, : No. 05AP-972
 : (C.P.C. No. 04CR-03-1872)
 v. :
 : (REGULAR CALENDAR)
 Toby D. Wilcox, :
 :
 Defendant-Appellant. :

O P I N I O N

Rendered on December 21, 2006

Ron O'Brien, Prosecuting Attorney, and Jennifer L. Maloon,
for appellee.

Bellinger & Donahue, and Kerry M. Donahue, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

PETREE, J.

{¶1} Defendant-appellant, Toby D. Wilcox, appeals from a judgment of the Franklin County Court of Common Pleas convicting him of six counts of aggravated murder, one count of attempted aggravated murder, two counts of kidnapping, one count of aggravated burglary, and one count of aggravated robbery. For the reasons that follow, we affirm the judgment of the trial court.

{¶2} On March 22, 2004, defendant was indicted on six counts of aggravated murder with death penalty and firearm specifications, one count of attempted aggravated murder, two counts of kidnapping with firearm specifications, one count of aggravated

possible evidence. At trial, Detective Snyder described photographs of the scene and the evidence collected. When Detective Snyder arrived at the scene, Mr. Westbrook was facedown on the floor. One of the items the police collected from the scene was a blue New York Yankees baseball cap that was found near a pool of blood.

{¶6} Robert C. Belding, a former deputy coroner in Franklin County, performed autopsies on Mr. Westbrook and Alamar. Dr. Belding determined that Mr. Westbrook had been shot twice. According to Dr. Belding's testimony, one projectile struck Mr. Westbrook's jaw, upper chest, and neck. That bullet, which shattered Mr. Westbrook's jaw, would have inflicted enough pain to cause him to drop to the floor. Dr. Belding's testimony indicated that the wounds inflicted by that projectile were serious but not lethal. The other projectile struck Mr. Westbrook "a little back at the top of [his] head," traveled downward through his brain, and lodged at the base of his skull near the hyoid bone. (Tr. 196.) The perforation of his skull and brain was the cause of his death. Dr. Belding testified that Alamar was struck by a projectile that entered and exited his skull. The cause of Alamar's death was the perforation of his skull and brain by a gunshot. Alamar was 33 days old when he died.

{¶7} Ms. Wright testified regarding the circumstances surrounding the deaths of Mr. Westbrook and Alamar. Ms. Wright was engaged to marry Mr. Westbrook, and the two, along with her infant child, Alamar, were living together at the 1456 North 5th Street apartment. Mr. Westbrook supported the household by selling marijuana, and he had three guns in the apartment. Sometime after 9 a.m., on May 29, 2003, Frank Daniels, known as "Touche," arrived at the apartment of Ms. Wright and Mr. Westbrook. Mr. Daniels and Mr. Westbrook had a conversation, and they eventually went outside the

point, Ms. Wright lost consciousness. Her testimony indicated that Tatum's gun was pointed directly in her face immediately before she passed out. When she regained consciousness, she got up off the floor, and she saw the exit wound in her son's head. She ran outside to get her phone to call 911, and she ran back inside and locked the door until the police arrived. After the police arrived, Mr. Wall returned and told her that she had been shot. She had been shot in her left hand and her chest, where the bullet lodged.

{¶9} The day after the shootings, Ms. Wright identified Tatum in a photo array as the person who had originally approached her. As to the other assailant, Ms. Wright testified that the person who had approached Mr. Westbrook had brown skin and unbraided hair, was shorter than Tatum but slightly taller than she, and was wearing a "wife beater" and denim shorts. (Tr. 238.) Additionally, she testified that he was wearing a blue New York baseball cap, which he had "pulled * * * down on top of his head." Id.

{¶10} On June 3, 2003, Ms. Wright identified defendant's picture in a photo array as the person who had been with Mr. Westbrook when he was shot. She was not completely sure of the identification at that time because the person in the picture had braided hair and the person at the scene had unbraided hair under a baseball cap. She testified that she told the detective that she was 90 to 100 percent sure of her identification, and that she needed to see him in person to look at his eyes. At trial, Ms. Wright identified defendant as the person who had been with Mr. Westbrook when he was shot. She testified that she was 100 percent sure of that identification.

{¶11} Frank Daniel, a friend of Mr. Westbrook, testified at trial. He admitted that, in 1994, he had been convicted of drug trafficking. Mr. Daniel first saw Mr. Westbrook

returned. At some point in time, a man crossed the street and approached Mr. Westbrook. That person talked with Mr. Westbrook. She was unsure what they were talking about, but it was clear to her that the man wanted something. Mr. Westbrook said something to Ms. Wright, and she began to go toward the apartment. Another person came from another direction, pulled out a gun, and fired it at Ms. McCrae. Ms. McCrae ran. After she ran down the street, she turned and saw the assailant who had approached Mr. Westbrook holding a gun to his head. According to Ms. McCrae's testimony, that assailant was wearing a blue hat. She went to the porch of a house where a woman named "Ingrid" lived. She heard more shots. After the police arrived, she saw Ms. Wright, with blood on her, run out of the apartment screaming, "my baby, my baby." (Tr. 384.) Ms. McCrae testified that she had previously smoked marijuana, but she did not smoke it on the morning of the shootings. When Ms. McCrae was shown a photo array containing defendant's photo, she identified defendant as looking the closest to the assailant that had approached Mr. Westbrook. According to Ms. McCrae's testimony, her identification was uncertain because the person in the photo was not smiling. She earlier had testified that the person who had approached Mr. Westbrook "kept smiling like he was in a good mood or something." (Tr. 385.)

{¶13} Mark Hardy, a criminalist with the Columbus Division of Police, testified that he examined four spent shell casings recovered from the scene, as well as two spent bullets recovered from Mr. Westbrook's body and one spent bullet recovered from Ms. Wright's body. Mr. Hardy determined that two of the casings had been fired by one gun and that a second weapon had fired the other two casings. Thus, two weapons were involved in firing the recovered casings. As to the spent bullets, Mr. Hardy could not

{¶16} Defendant's expert in DNA analysis, Keith Inman, also examined the baseball cap. Mr. Inman testified that he found the DNA from at least three individuals on the inner linings of the hat. He identified Mr. Westbrook as the major donor, but he agreed with Ms. Lambourne's conclusion that defendant's DNA was on the hat.

{¶17} At the conclusion of the state's case, the state dismissed four of the five death penalty specifications as to counts four, five, and six in the indictment and requested that the "prior calculation and design" language relating to the death penalty specifications attached to counts one, two, and three of the indictment be eliminated. Aside from those changes, the jury found defendant guilty as charged in the indictment.

{¶18} A mitigation hearing was held, and the jury recommended that defendant be sentenced to life imprisonment without parole for counts one and four. On August 31, 2005, the trial court entered judgment sentencing defendant to life sentences without parole as to counts one and four, with an additional three consecutive years of prison for the gun specification in count one; ten years in prison as to count seven; ten years in prison as to count nine; ten years in prison as to count ten; and ten years in prison as to count eleven. The court ordered that counts one, four, seven, nine, ten, and eleven shall run consecutive with each other. Additionally, the trial court merged counts two, three, and eight with count one, and merged counts five and six with count four.

{¶19} Defendant appeals and assigns the following four assignments of error for our review:

I. IT WAS ERROR FOR THE COURT NOT TO GIVE A JURY INSTRUCTION ON THE LESSER INCLUDED OFFENSE OF MURDER AS REQUESTED BY COUNSEL FOR DEFENSE.

being committed and (iii) some element of the greater offense is not required to prove the commission of the lesser offense." *State v. Wilkins* (1980), 64 Ohio St.2d 382, 384. An instruction on a lesser-included offense is required "only where the evidence presented at trial would reasonably support both an acquittal on the crime charged and a conviction upon the lesser included offense." *State v. Thomas* (1988), 40 Ohio St.3d 213. "Thus, if due to some ambiguity in the state's version of the events involved in a case the jury could have a reasonable doubt regarding the presence of an element required to prove the greater but not the lesser offense, an instruction on the lesser included offense is ordinarily warranted." *State v. Solomon* (1981), 66 Ohio St.2d 214, 221.

{¶22} In this case, a review of the indictment reveals that the first six counts in the indictment were for alleged violations of R.C. 2903.01(B), felony aggravated murder. R.C. 2903.01(B) provides as follows: "No person shall purposely cause the death of another or the unlawful termination of another's pregnancy while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit, kidnapping, rape, aggravated arson, arson, aggravated robbery, robbery, aggravated burglary, burglary, terrorism, or escape." The indictment did not allege that defendant acted with prior calculation and design, except in the death penalty specifications. However, as to those particular specifications, they were either dismissed, or the language regarding prior calculation and design, in the remaining specifications, was eliminated as an issue to be determined by the jury. Therefore, whether defendant acted with prior calculation and design was ultimately not at issue at trial.

{¶23} At trial, defendant's counsel asked for murder instructions as to each victim, arguing an absence of purpose. His counsel requested an instruction on murder under

his head, traveled through his brain, and lodged at the base of his skull. We find that the evidence of this case would compel any reasonable trier of fact to find intent to kill.

{¶26} Regarding the death of Alamar, defendant contends that there was no evidence that Tatum purposely killed him, and, therefore, purpose cannot be imputed to defendant. The state argues that the evidence supported the element of purpose to kill Alamar under the doctrine of transferred intent. As stated by this court, "The doctrine of transferred intent provides that where an individual is attempting to harm one person and as a result accidentally harms another, the intent to harm the first person is transferred to the second person and the individual attempting harm is held criminally liable as if he both intended to harm and did harm the same person." *State v. Crawford*, Franklin App. No. 03AP-986, 2004-Ohio-4652, at ¶14.

{¶27} Ms. Wright testified that, immediately before she lost consciousness, Tatum was pointing his gun directly at her. At the time, she was holding her baby, Alamar, in her hands. Ms. Wright was struck in her left hand, which was holding Alamar's head, and her chest. Alamar was killed when the bullet struck him in the head. We find no evidence in this case that reasonably suggests that Tatum lacked the purpose to kill.

{¶28} Considering the evidence in this case, we conclude that it was not an abuse of discretion for the trial court not to instruct the jury on the offense of murder. Therefore, defendant's first assignment of error is overruled.

{¶29} Defendant's second assignment of error alleges that the guilty verdicts were against the manifest weight of the evidence. He also contests the sufficiency of the evidence as to his aggravated murder convictions by arguing that the state failed to prove that he purposely caused the deaths of Mr. Westbrook and Alamar.

speculates that the murder weapon could have been defective. As resolved above in our analysis of defendant's first assignment of error, the evidence before the jury demonstrated that defendant acted with purpose in connection with the death of Mr. Westbrook. Moreover, defendant's assertions to the contrary, the state was not required to produce the murder weapon in order to demonstrate the existence of a purpose to kill.

{¶33} Defendant also argues that Alamar's death was unintentional. Again, for the reasons set forth above regarding defendant's first assignment of error, that argument is not persuasive. Additionally, in reference to Alamar's death, defendant contends that there was no evidence of a conspiracy. However, it was not necessary for the state to prove defendant's involvement in a conspiracy in this case. The evidence demonstrated that defendant aided or abetted another, i.e. Tatum, in shooting Ms. Wright and Alamar. Pursuant to R.C. 2923.03(A), "[n]o person, acting with the kind of culpability required for the commission of an offense, shall * * * [a]id or abet another in committing the offense." "Whoever violates [R.C. 2923.03] is guilty of complicity in the commission of the offense, and shall be prosecuted and punished as if he were a principal offender." R.C. 2923.03(F).

{¶34} Defendant argues that the convictions were against the manifest weight of the evidence because the identifications of defendant were "tainted." (Defendant's merit brief, at 18.) Defendant argues that Ms. Wright lacked credibility for various reasons. He attempts to discount her identification by arguing that she was motivated to make sure that someone was convicted for Mr. Westbrook's and Alamar's murder, seemingly implying that she was lying to ensure defendant's conviction. He notes that she was unsure of her identification when shown the photo array, but was sure when she saw him

the credibility of a witness by a trier of fact is given great deference by this court. *State v. Covington*, Franklin App. No. 02AP-245, 2002-Ohio-7037, at ¶28. The jury is in the best position to view the witnesses and observe their demeanor, gestures and voice inflections, and use those observations in weighing the credibility of the testimony. *State v. Wright*, Franklin App. No. 03AP-470, 2004-Ohio-677, at ¶11.

{¶39} In this case, multiple witnesses testified regarding defendant's presence at the scene of the shootings. Their identifications varied in certainty, and their testimonies regarding what defendant was wearing and/or carrying were not entirely consistent. However, those inconsistencies were for the jury to resolve and discount, as it found appropriate. We conclude that, despite those inconsistencies, it was reasonable for the jury to find that defendant was the assailant who approached, and ultimately shot and killed, Mr. Westbrook.

{¶40} When the evidence in this case is viewed in a light most favorable to the prosecution, we find that defendant's convictions were supported by sufficient evidence. We further find that his convictions were not against the manifest weight of the evidence. This is not an "exceptional case in which the evidence weighs heavily against" defendant's convictions. Therefore, we overrule defendant's second assignment of error.

{¶41} Defendant argues in his third assignment of error that the trial court erred by denying his motion to suppress statements. Specifically, defendant seems to argue that the trial court should have suppressed the statements he made to the police in Nevada, on March 12, 2004.

{¶42} At a hearing on a motion to suppress, the trial court functions as the trier of fact. Thus, the trial court is in the best position to weigh the evidence by resolving factual

his defense." The Sixth Amendment right to counsel does not attach until a prosecution is commenced, that is, after the initiation of adversary criminal proceedings by a formal charge, a preliminary hearing, an indictment, an information or an arraignment. *Kirby v. Illinois* (1972), 406 U.S. 682, 689, 92 S.Ct. 1877. "Once an accused is charged, he may not be interrogated, either directly or indirectly, about the subject matter of those charges unless counsel is present." *State v. Conway*, 108 Ohio St.3d 214, 2006-Ohio-791, at ¶70.

{¶45} Defendant seems to argue that his Sixth Amendment right to counsel attached when he appeared in a Nevada courtroom for extradition to Ohio. However, the Sixth Amendment right to counsel does not attach at extradition proceedings. See, e.g., *Chewning v. Rogerson* (C.A.8 1994), 29 F.3d 418, 421 ("It is well settled that extradition proceedings are not considered criminal proceedings that carry the sixth amendment guarantee of assistance of counsel.") Additionally, at the time defendant was interviewed by Detective Dorn in Nevada, formal charges had not been filed in Ohio. Therefore, defendant's Sixth Amendment right to counsel had not attached at that point in time. Furthermore, despite testimony indicating that defendant was advised of his constitutional rights prior to the questioning in Nevada, there is no indication that he invoked his Fifth Amendment right to counsel by unambiguously requesting counsel. Consequently, we conclude that the trial court did not err in denying his motion to suppress statements.

{¶46} Accordingly, we overrule defendant's third assignment of error.

{¶47} In his fourth assignment of error, defendant argues that the trial court erred by permitting the DNA evidence to be admitted at trial. The Fourth Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment, and Section 14, Article I, of the Ohio Constitution, prohibit the government from

police deceived him as to how his DNA would be used. Defendant argues that consent was given as to an unrelated assault case, but not for use in this aggravated murder case. In essence, defendant argues that he was deceived because he was not informed that the police wanted a saliva sample in order to investigate the deaths of Mr. Westbrook and Alamar. Defendant's deception argument is unpersuasive, as Detective Dorn's testimony at the suppression hearing indicated that he interviewed defendant regarding the homicides before he asked for the saliva sample. Thus, defendant reasonably understood that the police were investigating the homicides at the time he voluntarily gave the police the saliva sample.

{¶50} Under his fourth assignment of error, defendant also argues that the DNA evidence was scientifically unreliable. Defendant asserts that there was evidence that the tested sample was contaminated. In support of his argument, defendant cites the suppression hearing testimony of Ms. Lambourne that "there might have been some contamination from the blood simply because I realized that some of the types in the minor donor on that hatband appears to be one of the victims." (Tr. 14.) When that testimony is read in context, it becomes clear that she was speculating that there could have been blood cells in her sample taken from the hatband of the bloodstained hat. In that sense, her sample was "contaminated" with blood. However, there was no evidence that cells of defendant or a victim had been transferred to the hat after it was recovered from the scene of the shootings, or that the possible presence of blood cells in the sample precluded reliable scientific analysis of the hat. In addition, Ms. Lambourne expressly rejected the possibility that there had been laboratory contamination.