

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff-Appellee,

v.

THERESA ANN VOSS,

Defendant-Appellant

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CASE NO. 08-1851

ON APPEAL FROM THE WARREN
COUNTY COURT OF APPEALS,
TWELFTH APPELLATE DISTRICT

COURT OF APPEALS CASE NO.
CA-2006-11-132

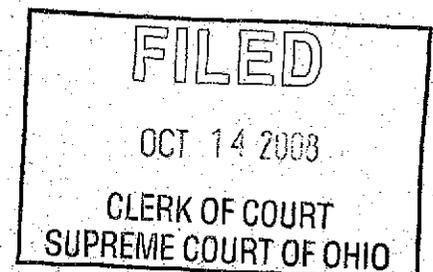
MEMORANDUM OF THE STATE OF OHIO IN OPPOSITION TO
APPELLANT'S MEMORANDUM IN SUPPORT OF JURISDICTION

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

This is not a case of public or great general interest. Appellant, Theresa Voss is not a public figure, nor is this case in the public eye. This is a fact driven appeal, which does not pose a substantial constitutional question that would affect the public. Appellant's first three propositions of law address jail phone calls. This law is well established in this area and does not pose a substantial constitutional question. Proposition of law number four addresses sufficiency and manifest weight arguments which are completely fact driven. Appellant's fifth and final proposition of law is one of ineffective assistance of counsel which focuses on purely speculative evidence. This proposition of law also does not provide a substantial constitutional question. Appellant has provided no reason to grant jurisdiction in this specific case.

ARGUMENT

APPELLEE'S RESPONSE TO APPELLANTS PROPOSITION OF LAW #1

A pretrial detainee's limited expectation of privacy allows telephone conversations recorded in a jail or a correctional facility to be admissible at trial.

Under both Ohio and Federal law the interception of wire, oral, or electronic communication is prohibited. *See* O.R.C. §2933.52; 18 U.S.C. §2511. The Ohio Revised Code defines oral communication as, "an oral communication uttered by a person exhibiting an expectation that the communication is not subject to interception under circumstances justifying that expectation". O.R.C. §2933.51(B). The United States Supreme Court has held that both pretrial detainees and convicted prisoners do not possess "the full range of freedoms of an unincarcerated individual." *Bell v. Wolfish*.

(1979), 441 U.S. 520, 546, 99 S.Ct. 1861. Furthermore, “[a] right of privacy in traditional Fourth Amendment terms is fundamentally incompatible with the close and continual surveillance of inmates and their cells required to ensure institutional security and internal order.” *Hudson v. Palmer* (1984), 468 U.S. 517, 527-28, 104 S.Ct. 3194. The admission of electronically recorded conversations between an appellant and his brother, made in a jail visiting area, was not a violation of the appellant’s Fourth Amendment rights. *Lanza v. New York* (1962), 370 U.S. 139, 141, 83 S.Ct. 1218. The recorded conversation was properly submitted because a pretrial detainee has a diminished expectation of privacy. “A prison shares none of the attributes of privacy of a home, an automobile, an office, or a hotel room.” *Id.* at 143.

Similarly, the Ohio Supreme Court affirmed the conviction of a defendant who argued that electronically intercepted conversations between rioting inmates were unconstitutionally recorded contrary to R.C. 2933.51 and should have been suppressed at trial. *State v. Robb* (2000), 88 Ohio St.3d 59, 65. In upholding the conviction, the Court held that the conversations, which were recorded in many areas of the prison, were admissible because “inmates generally...have no right to expect any privacy in their cells.” *Id.* at 67. The *Robb* court used the U.S. Supreme Court’s reasoning from *Hudson* to show that the removal of prisoners’ privacy rights is justified by the underlying consideration for internal security in a prison. *Robb*, 88 Ohio St.3d at 67. In affirming the defendant’s conviction, the Court also held that the Omnibus Crime Control and Safe Streets Act of 1968 only protected oral communications that could “justifiably be considered private.” *Id.* The oral communications were not protected by the 1968 act because the prisoners had a limited expectation of privacy, and therefore their

conversations could not justifiably be considered private. The Twelfth District Court of Appeals explained the reasoning behind these decisions.

“[M]aintaining institutional security and preserving internal order and discipline are essential goals that may require limitation or retraction of the retained constitutional rights of both convicted prisoners and pretrial detainees. [C]entral to all other corrections goals is the institutional conversations of internal security within the corrections facilities themselves. Prison officials must be free to take appropriate action to ensure the safety of inmates and corrections personnel and to prevent escape or unauthorized entry”. *State v. Voss*, 2008-Ohio-3889; citing *Wolfish* at 546-547.

The Appellant argues that recordings of telephone conversations she made while in pretrial confinement were improperly admitted as evidence, because the recordings were made in violation of her privacy and due process rights. Def. Br. at 3. The recorded telephone conversations, titled State’s Exhibit 50, were recorded while the Appellant was in jail awaiting trial for aggravated murder. (T.p. 681). The recordings were of telephone conversations between the Appellant and her husband. (T.p. 683). Unlike the defendant in *Robb*, whose conversations were recorded without his knowledge – though still held admissible – the Appellant was given notice that her conversations might be recorded. The telephones used by the prisoners had a notice posted that indicated the calls would be monitored. (T.p. 682). Additionally, the calls also contained a recording that the call would be monitored and recorded. *See*, State’s Exhibit 50. So, not only did the Appellant have a lowered expectation of privacy as a pretrial detainee, but she was also given notice that her calls would be monitored.

The Appellant’s recorded telephone conversations were properly admitted as evidence.

APPELLEE'S RESPONSE TO APPELLANT'S PROPOSITION OF LAW #2 AND #3

Conversations between a defendant and spouse, recorded while the defendant is held as a pretrial detainee in a jail or corrections facility, are not protected by spousal privilege and can be submitted as evidence at trial.

The Ohio Supreme Court has held that "the circumstances where a spouse is prohibited from testifying for or against his or her spouse should be narrowly defined". *State v. Mowery* (1982), 1 Ohio St.3d 192, 195. The rule specifically governing spousal privilege, R.C. 2945.44, provides in part:

Husband or wife shall not testify concerning a communication made by one to the other, or act done by either in the presence of the other, during coverture, unless the communication was made or act done in the known presence or hearing of a third person competent to be a witness . . .

The purpose behind the spousal privilege is to promote marital peace. *State v. Antill* (1964), 176 Ohio St. 61, 64. Several factors, including the nature of the message or the circumstances under which it was delivered, may destroy a claim that confidentiality was intended. *State v. Bryant* (6th Dist. 1988), 56 Ohio App.3d 20, 22. Furthermore, "the state's interest in monitoring and recording telephone calls made and received by pretrial detainees outweighs the public policy behind the spousal communication privilege". *Voss*, 2008-Ohio-3889; citing *Wolfish* at 546-547.

The Ohio Revised Code section 2945.44 states that the communication or act must be made during coverture. Coverture has been defined as a man and a woman "who are married under the law, whether by license or common law, and cohabitating as such." *Bentleyville v. Pisani* (8th Dist. 1995), 100 Ohio App.3d 515, 517. Ohio courts have held that only statements made during coverture are privileged, and therefore spousal privilege under R.C. 2945.42 does not apply when the spouses are separated and not living as

husband and wife when the communication is made. *Bentleyville*, 100 Ohio App.3d at 518. The Third District Court of Appeals held that spousal privilege did not apply to taped conversations where the husband and wife were separated and living apart. *State v. Shaffer* (3rd Dist. 1996), 114 Ohio App.3d 97, 101. Similarly, in *Bentleyville*, the court admitted taped telephone conversations where the couple was separated, living apart, and had divorce proceedings pending. *Bentleyville*, 100 Ohio App.3d at 518.

The Appellant's statements made over the prison telephone to her husband, Eric Voss, should not be considered confidential communications. Considering both the circumstances in which the communications were made and the purpose behind the spousal privilege rule, the Appellant's telephone calls were properly admitted as evidence. The Appellant made the calls on a prison telephone that gave notice that the conversations would be recorded. (T.p. 682). Also, similar to the parties in both *Shaffer* and *Bentleyville*, the Appellant and her husband were separated and no longer living together at the time the conversations were recorded. (T.p. 681). The Appellant's conversations with Mr. Voss were not made while in coverture, and therefore the conversations should not be privileged. Finally, the purpose behind the spousal privilege rule – to promote marital peace – would not be served by suppressing the telephone conversations. Mr. Voss did not testify against the Appellant: the Appellant's words were used against her.

The recorded telephone conversations were properly admitted and did not violate spousal privilege or the policy behind the privilege.

APPELLEE'S RESPONSE TO APPELLANT'S PROPOSITION OF LAW #4

The evidence was sufficient and not against the manifest weight of the evidence to convict the Appellant of aggravated murder.

A. Sufficiency of the Evidence

A challenge to the sufficiency of the evidence is a question of law. *State v. Thompkins*, 78 Ohio St.3d 380, 387. When examining the evidence presented at trial, the appellate court must determine if such evidence was legally sufficient to sustain the conviction against the appellant. *Id.* at 386. Giving all evidence equal weight, regardless of its nature, the appellate court determines if the evidence warrants the jury's finding of guilty. *State v. Jenks* (1991), 61 Ohio St.3d 259, 283.

The standard for reviewing the evidence on record requires the appellate court to make all inferences most favorably to the prosecution. *Jenks*, 61 Ohio St.3d at 283. The Ohio Supreme Court determined that if the fact finder "is convinced the accused is guilty beyond a reasonable doubt, we can require no more." *Id.* Reasonable doubt does not exclude every possibility, but a remote hypothesis of innocence does not satisfy an appellant's burden of demonstrating insufficient evidence when the jury had a rational basis for the conclusion it reached. *See, State v. Lott* (1990), 51 Ohio St.3d 160.

Pursuant to the O.R.C. §2903.01(A), the State was required to prove that the Appellant, with prior calculation and design, purposely caused the death of another. In considering prior calculation and design, the Ohio Supreme Court has held that:

"Where evidence adduced at trial reveals the presence of sufficient time and opportunity for the planning of an act of homicide to constitute prior calculation, and the circumstances surrounding the homicide show a scheme designed to implement the calculated decision to kill, a finding by the trier of fact of prior calculation and design is justified." *State v. Cotton* (1978), 56 Ohio St.2d 8, paragraph three of the syllabus.

More recently, the Ohio Supreme Court concluded in *State v. Taylor* (1997), 78 Ohio St.3d 15, that “it is not possible to formulate a bright-line test that emphatically distinguishes between the presence or absence of ‘prior calculation and design.’ Instead, each case turns on the particular facts and evidence presented at trial.” *Taylor*, 78 Ohio St.3d at 20. The Ohio Supreme Court has also upheld aggravated murder convictions where the evidence showed that the defendant had merely an instant to design the victim’s death when the defendant returned to his apartment to retrieve a weapon. *State v. Robbins* (1979), 58 Ohio St.2d 74, 78.

Similarly, the court of appeals has relied on three contextual factors in determining the existence of prior calculation and design. *State v. Jenkins* (8th Dist. 1976), 48 Ohio App.2d 99. The Seventh District applied the *Jenkins* test in *State v. Trouten* (7th Dist. 2005), 2005-Ohio-6592, 2005 Ohio App. Lexis 5932. The court found that evidence relations between the defendant and the victim were strained and evidence the defendant obtained a gun before the shooting was sufficient to prove prior calculation and design. *Id.* at 111.

The State clearly demonstrated that the Appellant purposely caused Troy Temar’s death with prior calculation and design. First, the Appellant had sufficient time and opportunity to plan the killing, as she obtained a gun a month before the murder. (T.p. 449). Second, circumstances surrounding the killing show that the Appellant had a scheme that she designed and implemented:

- The Appellant had a gun with her the night of the killing. (T.p. 450).
- The victim, shot twice, was found off an abandoned farmhouse driveway. (T.p. 205).
- The Appellant knew the location of the farmhouse prior to the killing. (T.p. 475).
- The Appellant brought rubber gloves and shoes to the crime scene (T.p. 447).

- The victim's body was burned with gasoline. (T.p. 452).

Finally, similar to *Trouten*, the facts in the present case met the *Jenkins* test: the Appellant had a strained relationship with the victim and obtained a weapon prior to the killing.

The Appellant dated the victim for three years; they were living together as well. (T.p. 406). Their relationship was strained to the point that the victim asked the Appellant to move-out. (T.p. 421). The victim started dating another woman. (T.p. 407). The victim would only meet the Appellant in public, and he started recording telephone conversations with the Appellant, both of which indicate that their relationship was strained. (T.p. 431-32). Testimony at trial indicated that the Appellant's brother gave her a .40 caliber Glock. (T.p. 449). The two bullets that killed the victim were .40 caliber and were almost certainly fired from a Glock (T.p. 252, 256). The Appellant's brother testified that the Appellant told him she shot the victim. (T.p. 448).

The evidence presented to the jury sufficiently proved the Appellant purposely caused the victim's death with prior calculation and design.

B. Manifest Weight of the Evidence

In considering whether a conviction was against the manifest weight of the evidence, an appellate court must weigh the evidence, consider the credibility of the witnesses, and determine whether in resolving conflicts the jury clearly lost its way and created such a manifest injustice that the conviction must be reversed. *State v. Thompkins*, 78 Ohio St.3d 380, 387. This discretionary power should only be exercised in the exceptional case where the evidence weighs heavily against conviction. *Id.* Special deference is given to the conclusion reached by the jury. *State v. Jackson* (May 24, 1999), Clinton App. No.

CA98-11-022, 1999 Ohio App. Lexis 2345. An appellate court will not reverse a judgment as being against the manifest weight of the evidence unless it unanimously disagrees with the jury's resolution of conflicting testimony. *Thompkins*, 78 Ohio St.3d at 389. In the trial of a criminal case, a determination of the weight of the evidence and credibility of witnesses is primarily for the trier of facts. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. Finally, a reviewing court must not substitute its judgment for that of the trial court where there exists some competent and credible evidence supporting the judgment. *Myers v. Garson* (1993), 66 Ohio St.3d 610, 616.

Based on the evidence and reasonable inferences drawn from the evidence, the jury did not lose its way when it found that the Appellant acted with prior calculation and design in purposely causing the death of Troy Temar. The jury chose to believe witnesses who testified that the victim and the Appellant had a strained relationship. (T.p. 421). The jury chose to believe the Appellant's brother who testified that he gave the Appellant a gun prior to the shooting (T.p. 449). Additionally, the jury chose to believe testimony that the Appellant knew about the abandoned farmhouse prior to the killing. (T.p. 475). The evidence, viewed in its entirety, showed that these preparations took place between the time the victim asked the Appellant to move-out and the time the victim's body was discovered in the trunk of a car. (T.p. 421, 337).

The jury properly convicted the Appellant in light of overwhelming evidence that indicated the Appellant purposely killed the victim with prior calculation and design.

APPELLEE'S RESPONSE TO APPELLANT'S PROPOSITION OF LAW #5

Appellant received effective assistance of counsel.

In order to establish that counsel was ineffective, the Appellant must show that counsel's performance was deficient, and that the deficiency prejudiced the defense. *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052. The Appellant carries the burden of showing that counsel's representation fell below the objective standard of reasonableness. *State v. Bradley* (1989), 42 Ohio St.3d 136, 142. To establish prejudice, the Appellant must prove that, but for counsel's errors, she would not have been convicted. *Bradley*, 42 Ohio St.3d at 136.

A properly licensed attorney is presumed competent. *Vaughn v. Maxwell* (1965), 2 Ohio St.2d 299, 301. Questions regarding the effectiveness of counsel must be considered with a "strong presumption that counsel's conduct falls within the wide range of professional assistance." *Strickland*, 466 U.S. at 689. Hindsight may not be used to distort the assessment of what was reasonable in light of trial counsel's perspective at the time. *State v. Cook* (1992), 65 Ohio St.3d 516, 524-25. Judicial scrutiny must be highly deferential, presuming that the challenged action is sound trial strategy or tactical decisions. *State v. Bird* (1998), 81 Ohio St.3d 582, 585; *State v. Ferguson*, 108 Ohio St.3d 451, 463. Tactical or strategic trial decisions, even if ultimately unsuccessful, do not generally constitute ineffective assistance of counsel. *State v. Carter* (1995), 72 Ohio St.3d 545, 558.

The Appellant argues that she did not receive effective assistance of counsel because her trial counsel did not call Susan Wright to testify. Def. Supp. Br. at 1. The Appellant bases her argument on what she presumes Susan Wright would have testified to, as well

as on her presumption that the jury would have believed Susan Wright's testimony, thus changing the outcome of the trial. Def. Supp. Br. at 1. However, the test for ineffective assistance of counsel does not turn on presumption, but instead depends on finding that trial counsel's performance fell below an objective standard of reasonableness. *Bradley*, 42 Ohio St.3d at 142. The Appellant is asking this Court to use hindsight to speculate that the trial counsel's strategic decision not to call a certain witness was poorly made, which under *Bird*, *Ferguson*, and *Carter*, supra, this Court cannot do. The Appellant's trial counsel chose to call five witnesses to testify on behalf of the Appellant. (T.p. 2). Counsel could have called twenty witness, or none. Being strategic or tactical decisions, neither would have made his performance deficient. Furthermore,

“Wright's putative testimony is outside the record on appeal, see App. R. 9(A), and thus not properly before us. Moreover, the fact that Wright's supposed testimony would have suggested that Hoerlein also had a motive to kill Temar does not create a reasonable probability in this case that but for her trial counsel's failure to present such testimony the outcome of the trail would have been different”. *Voss*, 2008-Ohio-3889.

The Appellant also argues that her trial counsel was deficient for failing to submit evidence that the codefendant, Eric Hoerlein, did not receive a call from the Appellant asking him to come to the crime scene. Def. Supp. Br. at 2. The Appellant's argument has two problems. First, the Appellant has not established that she would not have been convicted if evidence that she did not call the codefendant had been submitted. *Bradley*, supra. Second, the trial counsel's choice not to pursue the phone call was a strategic or tactical decision, and such decisions do not generally constitute ineffective assistance of counsel. *Carter*, supra.

While Eric Hoerlein testified that the Appellant called him and asked him to come pick her up because the vehicle that she and the victim were driving had “broken down,”

Mr. Hoerlein did not indicate whether the Appellant called him from her cell phone or a public telephone. (T.p. 444-45, 474). Records indicating that the Appellant did not call the codefendant from her cell phone do not preclude a call via another telephone. Even if evidence existed that refuted the codefendant's claim that the Appellant called him for help, the Appellant has not established that had her counsel produced such evidence, she would not have been convicted. The amount of evidence in support of the Appellant's conviction was significant. The Appellant admitted to being with the victim the night of the killing. (T.p. 418). The Appellant obtained a gun a month prior to the killing (T.p. 448). The gun, a Glock, was the same caliber and model used in the killing. (T.p. 252, 448). The Appellant admitted to the codefendant that she shot the victim. (T.p. 448). Evidence that the Appellant did not call the codefendant from her cell phone would not have changed the outcome of the trial.

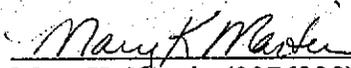
Second, a reviewing court cannot use the benefit of hindsight to distort the assessment of the trial counsel's performance. *Cook, supra*. The Appellant's trial counsel made a strategic or tactical decision not to pursue the telephone call during vigorous cross-examination; this Court must presume that the trial counsel's decision was sound. The jury could have just as easily believed that the Appellant called the codefendant from another phone than believed that the codefendant was lying. Whether or not counsel chose correctly, the decision not to pursue the phone call further was a strategic or tactical decision, and such a decision does not generally constitute ineffective assistance of counsel. *Carter, supra*.

Appellant was not denied effective assistance of counsel.

CONCLUSION

This case is not one of great public or general interest; nor does it offer a substantial constitutional question. For the foregoing reasons, the State respectfully requests that is Court not accept jurisdiction.

Respectfully Submitted,

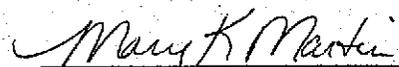


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PROOF OF SERVICE

I hereby certify that a copy of this was sent by ordinary U.S. mail to Wm. Robert Kaufman, Attorney for Theresa Voss, 144 East Mulberry Street, P.O. Box 280, Lebanon, OH 45036 on this 9th day of October, 2008.

Respectfully Submitted,



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