

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	*	S.C. No. 2009-0522
Plaintiff-Appellee,	*	On Appeal from the
-vs-	*	Lucas County Court
DAMIENE A. BOLES,	*	of Appeals, Sixth Appellate
Defendant-Appellant.	*	District
	*	Court of Appeals
	*	Case No. L-07-1255
	*	

APPELLEE'S MEMORANDUM IN RESPONSE

JULIA R. BATES, PROSECUTING ATTORNEY
LUCAS COUNTY, OHIO

By: Brenda J. Majdalani, #0041509 (Counsel of Record)
Assistant Prosecuting Attorney
Lucas County Courthouse
Toledo, Ohio 43604
Phone: (419) 213-2001
Fax: (419) 213-2011

COUNSEL FOR APPELLEE, STATE OF OHIO

Jeffrey M. Gamso, #0043869
(Counsel of Record)
P.O. Box 306
Toledo, Ohio 43697-0306
Phone No: (419) 340-4600
Fax No: (419) 243-4046

Jeffrey J. Helmick, #0040197
HELMICK & HOOLAHAN
119 Adams Street, 2nd Floor
Toledo, Ohio 43604-5508
Phone No: (419) 243-4800
Fax No: (419) 243-4046

COUNSEL FOR APPELLANT, DAMIENE A. BOLES

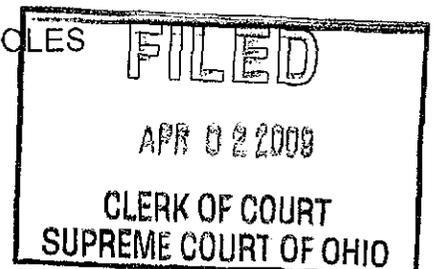


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EXPLANATION OF WHY THIS CASE IS NEITHER A CASE OF PUBLIC OR GREAT GENERAL INTEREST, NOT INVOLVES ANY SUBSTANTIAL CONSTITUTIONAL QUESTION, AND WHY LEAVE TO APPEAL SHOULD NOT BE GRANTED.

Appellant contends that he was wrongfully convicted in the trial court below of the murder of Cori Key. Appellant's Memorandum asks this Court to do nothing more than second-guess the well-reasoned decision of the appellate court below. Based on all the above, review should be denied as not involving any substantial constitutional question. This is not a case of great public or general interest. Therefore jurisdiction should be denied for all these reasons as well as all the reasons set forth in the memorandum below.

ARGUMENT AGAINST JURISDICTION

FIRST PROPOSITION OF LAW: THE TRIAL COURT DID NOT ERR WHEN IT ADMITTED ALLEGED HEARSAY STATEMENTS.

Appellant's first assignment of error asserts that the trial court erred when it admitted two hearsay statements from three State witnesses. Appellant's assigned error is without merit for all of the following reasons.

A. The trial court did not err in admitting hearsay statements from Mr. Smith because the statements were subject to a well recognized hearsay exception.

Appellant asserts that the trial court erred when it admitted Mr. Smith's statement that Ms. Keys had informed him that her boyfriend (Appellant) had told her he would kill her. Appellant asserts that the trial court's decision to allow admission of the statement as "state of mind" was erroneous because it did not reflect the declarant's (the victim's) excited state of mind. However, Appellant overlooks the fact that even if the trial court recited the wrong reason, it nevertheless was correct in admitting the statement.

The victim's statement was clearly admissible under the present sense impression exception under Evid.R. 803(1). Present sense impressions are declarations that are made by the observer at the time that the event is being perceived. Staff Notes, Evid. R. 803. The circumstantial guaranty of trustworthiness is derived from the fact that the statement is contemporaneous to the event and that there is little risk of faulty recollection. *Id.* Additionally, the statement is made to another person who is capable of verifying the statement at the time it is made. There is no requirement that the statement be made under the influence of an emotion or trauma and it is limited to observations about the event that is taking place. *Id.* One of the

principal elements of the circumstantial guaranty of trustworthiness of this exception is that the statement was made at a time and under circumstances in which the person to whom the statement was made would be in a position to verify the statement. *Id.*

In this case, based on the testimony of Mr. Smith, it is clear that the Appellant's statement (that he, Boles, would kill the victim) was made contemporaneously with the victim's statement, describing Appellant's statement, to Mr. Smith. The testimony indicates that Ms. Key's statement related to a startling event that was unfolding over the telephone with her boyfriend as she was talking to Mr. Smith. Ms. Key was describing to Mr. Smith, her impression of her telephone conversation with Appellant and asking him to advise her father in the event that something happened to her. Mr. Smith was able to verify that Ms. Key made the statement. The statement was therefore properly admitted as a present sense impression of the declarant. *State v. Sziva*, Ninth Dist. App. No. C.A. 23384, 2007-Ohio-5120 at ¶¶18-21.

Based on the above, and assuming for sake of argument only, that the trial court erred in finding Ms. Key's statement to Mr. Smith to be an excited utterance, a trial court's decision should be upheld, where the court made the correct decision, even if it was for the wrong reason. *State v. Peagler*, 76 Ohio St.3d 496, 501, 1996-Ohio-73, 668 N.E.2d 489; *State v. Blankenship* (1988), 38 Ohio St. 3d 116, 119, 526 N.E.2d 816. Because the statement was admissible as a present sense impression, the trial court's ruling, admitting Ms. Key's statement, decision should be upheld.

B. The trial court did not err in admitting hearsay statements from Ms. Hodrick.

Appellant also complains that the trial court erred when it admitted the double hearsay statement of Satyra Hodrick that Ms. Key told her a neighbor said that Appellant broke into her house.

1. Sevequa Glenn's statement to the victim, Ms. Key, was an excited utterance.

Under Evid.R. 803(2), the "excited utterance" exception, there must be 1) a startling occurrence sufficient to still the reflective faculties of the declarant, 2) a statement made nearly contemporaneously with the startling event¹, 3) relating to that event, and 4) concerning things the declarant had an opportunity to personally observe. *State v. Wallace* (1980), 37 Ohio St. 3d 87, 89, 524 N.E.2d 466 ; *State v. Taylor* (1993), 66 Ohio St.3d 295, 300-301, 612 N.E.2d 316; *State v. McMorris* (Mar. 21, 1997), Sixth Dist. App. No. S-96-018, p.5.

In this case, Ms. Glenn's observation that Appellant was "messaging with a window" of the victim's home, for approximately 30 minutes, Trial Tr. 490:20-492:10, when Ms. Glenn knew the victim was not at home, Trial Tr. 501: 4-7, was an unusual event that she not only remembered, but an event that bothered her enough to later tell the victim that Appellant had been seen at the house². The inference that this

¹There is no per se amount of time after which a statement can no longer be considered an excited utterance. The central requirement is that the statement be made while the declarant is still under stress of the event. The statement may not be the result of reflective thought. *State v. Hoehn*, Ninth Dist. App. No. 03CA0076-M, 2004-Ohio-1419 at ¶14, citing *Taylor*, 66 Ohio St.3d at ¶14. A victim's statement made to police can be an excited utterance even though made four hours after the event. *Id.* at ¶¶17-18.

² While Ms. Glenn testified that she did not tell Ms. Key that Appellant was observed "messaging with the window," she apparently did tell Ms. Key that fact, since Ms. Hodrick testified that Ms. Key called her and was upset because a neighbor told her Appellant had broken into her home. Trial Tr. 421:15-

statement occurred hours after the event does not prevent it from being treated as an excited utterance. *Taylor*, 66 Ohio St.3d at ¶14. Additionally, there is nothing in the record to indicate that the statement was the result of reflective thought. And there can be no argument that Ms. Hodrick's statement to Ms. Key was a statement that was directly related to Ms. Glenn's personal observation of Appellant's conduct. As a result, the statement was properly admissible as an excited utterance.

2. Ms. Key's statement to Ms. Hodrick was admissible under either the state of mind exception and/or as an excited utterance.

The second part of the double hearsay analysis concerns Ms. Key's statement to Ms. Hodrick. This statement was properly admissible as a "state of mind" exception.

a. State of Mind:

Evid.R. 803(3) creates a hearsay-rule exception for "[a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed." In this case, the victim's statement to Ms. Hodrick indicated that she was upset that Appellant had broken into her home. The statement also indicates that the victim believed that Appellant was responsible for breaking into her home, and it also indicates that she believed what Ms. Glenn had told her about seeing the Appellant "messaging with a window." As such, the statement established the victim's state of mind, namely that she was upset and it further supports the inference that Appellant was the person who

planned her murder. In other words, he was the person who was responsible for the non--working condition of her telephones- a critical first step in the plan to commit a murder. Therefore, Ms. Key's statement was properly admissible under the state of mind exception to the hearsay rule.

Therefore, based on all the above, Ms. Key's statement to Ms. Hodrick was an exception to the hearsay rule. It was an excited utterance and because both the statement of Ms. Glenn and the statement of Ms. Key meet well recognized hearsay exceptions, the trial court did not err in admitting the "double hearsay." Appellant's First Proposition is therefore without merit and must be denied.

SECOND PROPOSITION OF LAW:
THE CONVICTION IS AMPLY SUPPORTED BY THE SUFFICIENCY
OF THE EVIDENCE.

In his Second Assignment of Error, Appellant asserts that his conviction is not supported by the sufficiency of the evidence. He asserts that Mr. Smith's testimony is not clear as to what evening he saw Appellant at the scene of the crime. However, this is not a case in which the fact finder clearly lost its way and created a miscarriage of justice. This is not an exceptional case in which the evidence weighs heavily against the conviction. In fact, the weight of the evidence weighs in favor of the conviction.

This Court has held that a reviewing court must accord due deference to the credibility determinations made by the fact finder. *State v. DeHass* (1967), 10 Ohio St.2d 230. Additionally, the jury is entitled to believe all, part or none of a particular witness' testimony. *State v. Scott* (Jul. 30, 1997), First Dist. App. No. C-960190 at p. 2

(the fact finder is entitled to accept or reject a witness's testimony in whole or in part). In this case, Appellant's whole sufficiency argument centers around the implicit assertion that the jury erred when it believed the State's witnesses and when it believed Appellant's own statements.

In this case, the conviction is amply supported by the evidence. First, Mr. Smith testified to precisely what evening it was that he saw the Appellant leaving the scene of the crime. He testified that it was the "next day" that he learned the victim was dead. The witness gave other testimony that clearly shows that this event occurred the night before the victim was discovered. Trial Tr. 518:8-17. The witness stated that his conversation with the victim and his later observation of the Appellant leaving the victim's garage area all occurred on the same night and that was the night before she was found. See also Trial Tr. 519:2-23. The matter was further clarified when defense counsel discussed the issue on cross-examination. Trial Tr. 533:4-23. Since Appellant does not dispute that the victim's body was found in the early evening hours of Saturday, July 31st, all of the testimony cited indicates that Mr. Smith's observations of Appellant could only have occurred in the late evening/early morning hours of July 30-31st. The State would also note that Mr. Smith's testimony indicates that Appellant threatened him with harm if Mr. Smith told anyone about what he saw. Appellant would have no reason to make such a threat unless he was the perpetrator who was seen leaving the scene of the crime and he knew that he had been observed. Trial Tr. 527:9-23. Based on all of the above, Appellant's conviction is more than amply supported by the evidence. Appellant's Proposition must therefore be denied.

THIRD PROPOSITION OF LAW:
THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN LIMITING
THE SCOPE OF CROSS-EXAMINATION.

In his Third Proposition, Appellant asserts that the trial court erred when it improperly limited the scope of his cross-examination of Jeannine Lamb, concerning Mr. Smith's alleged drug habit. However, if the trial court would have allowed the defense to cross-examine Ms. Lamb about an alleged drug habit that Mr. Smith himself denied, the trial court would have been improperly sanctioning the improper character assassination of a witness strictly prohibited by Evid.R. 608(B).

It is well established that the scope of cross-examination and the admissibility of evidence during cross-examination are matters within the sound discretion of the trial court. *O'Brien v. Angley* (1980), 63 Ohio St. 2d 159, 163, 407 N.E.2d 490. Evidentiary rulings will not be reversed unless there has been a clear and prejudicial abuse of discretion. *Id.* The alleged impeaching information that the defense wanted to show was that Mr. Smith's sense of time and general perception of events may have been altered by an alleged drug habit. Contrary to Appellant's implications, this information would not have shown bias. Rather, it was an attempt to show the bad character of Mr. Smith. However, the trial court properly limited the scope of cross-examination since specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's character for truthfulness, other than conviction of crime as provided in Evid. R. 609, may not be proven by extrinsic evidence. Evid.R.608(B). Defense counsel's attempt to cross-examine Jeannine Lamb about Mr. Smith's alleged drug habit was an improper attempt to engage in the extrinsic type of character

assassination that is strictly prohibited by Evid.R.608(B). The defense had already had asked Mr. Smith about whether or not he had ingested any drugs the night he made his observations of Appellant, which he firmly denied. Trial Tr. 533:18-19. Unsatisfied with Mr. Smith's answer, defense counsel then decided to attack Mr. Smith's character through cross-examination of Jeannine Lamb. Trial Tr. 726:9-728:19. As the trial court correctly noted, however, defense counsel had already asked Mr. Smith about whether or not he took drugs.

For all the foregoing reasons, the trial court acted well within its discretion in limited Appellant's improper attempt to cross-examine Jeannine Lamb. Appellant's Third Proposition is without merit and must be denied.

FOURTH PROPOSITION OF LAW:
THE TRIAL PROSECUTOR DID NOT ENGAGE IN MISCONDUCT.

Appellant's Fourth Proposition asserts that the prosecutor committed misconduct by allegedly making inappropriate remarks in his closing remarks. However, appellant's assigned error is without merit because no misconduct occurred.

The test for prosecutorial misconduct is whether the prosecutor's conduct at trial was improper and whether it prejudicially affected the substantial rights of the defendant. *State v. Lott* (1990), 51 Ohio St.3d 160, 165, 555 N.E.2d 293. The prosecutor's conduct during trial cannot be grounds for error unless the conduct deprived the defendant of a fair trial. *State v. Apanovitch* (1987), 33 Ohio St.3d 19, 24, 514 N.E.2d 394. As a result, reversal for prosecutorial misconduct is not warranted

unless it is clear that the outcome of the trial would have been different but for the misconduct. *State v. Smith* (1984), 14 Ohio St.3d 13, 15, 470 N.E.2d 883.

Reviewing the prosecutor's statements in context of the entire trial, it is clear that the prosecutor's comments were in response to the defense theory of the case. Even if this Court were to conclude that the statements were somehow improper, they do not rise to a level of plain error. Appellant's Fourth Proposition is without merit and must be denied.

FIFTH PROPOSITION OF LAW:
APPELLANT WAS NOT DENIED THE EFFECTIVE ASSISTANCE
OF COUNSEL NOR HAS HE PROVEN SUCH A CLAIM.

In this proposition, Appellant asserts that he was denied the effective assistance of trial counsel based on various acts of omission and commission. However, Appellant's assertion is without merit since defense counsel's actions were part of a viable trial strategy.

Applying the *Strickland*³ standard to the facts of this case establishes that counsel rendered constitutionally effective assistance. The first instance of which Appellant complains is counsel's failure to object to the deputy coroner's testimony on direct examination. Appellant asserts that because her opinion relating to time of death was allegedly not rendered to "any degree of scientific certainty" the testimony should have been challenged. A review of the testimony reveals while a "time of death" cannot be established in any murder case, the coroner's testimony regarding the range of

³ *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2012, 80 L. Ed. 2d 674.

death (i.e. the post mortem interval) was rendered to a sufficient degree of scientific certainty- that certainty having been established at the outset of the testimony⁴. That being the case, the deputy coroner's testimony was not objectionable. Defense counsel, therefore did not render ineffective assistance by failing to object to same.

Appellant also asserts that defense counsel rendered ineffective assistance by failing to argue the State's telephone records as exonerating evidence. However, the defense did present this evidence to the jury through counsel's cross-examination of Sgt. Forrester. Trial Tr. 806: 22-807:1.

Appellant further asserts, that counsel rendered ineffective assistance by failing to move to strike Ms. Hodrick's testimony that the victim told her that a neighbor reported that Appellant had broken into her home. However, as stated in its First Proposition of Law, the statement was admissible under recognized hearsay exceptions. Therefore, counsel did not render ineffective assistance by failing to object to this testimony.

Finally Appellant asserts that defense counsel rendered ineffective assistance by failing to object to the alleged instances of prosecutorial misconduct. However for all the reasons stated in the State's Fifth Proposition of Law, no misconduct occurred, and even if some of the statements made were objectionable, the statements were harmless error and not prejudicial. Based on all of the above, Appellant's Fifth Proposition is not well taken and must be denied.

⁴ Contrary to Appellant's assertion it is clear that the expert opinion was not a "hunch" but rather an expert opinion actually rendered to the required degree of reasonable scientific certainty. The facts underlying this opinion were also established immediately prior to the questioning about "time of death." Trial Tr. 738:3-23.

CONCLUSION

Based upon the foregoing facts and case law presented, the State of Ohio respectfully requests this Court to find Appellant's Propositions of Law not well taken, overrule same, and to affirm the judgment and conviction of the lower court.

Respectfully submitted,

JULIA R. BATES, PROSECUTING ATTORNEY
LUCAS COUNTY, OHIO

By: 
Brenda J. Majdalani, #0041509
Assistant Prosecuting Attorney

CERTIFICATION

This is to certify that a copy of the foregoing was sent via ordinary U.S. Mail this 3rd day of March, 2009, to Jeffrey M. Gamso, P.O. Box 306, Toledo, Ohio 43697-0306 and Jeffrey J. Helmick, HELMICK & HOOLAHAN, 1119 Adams Street, 2nd Floor, Toledo, Ohio 43604-5508, Counsel for Defendant-Appellant.


Brenda J. Majdalani, #0041509
Assistant Prosecuting Attorney