

ORIGINAL

IN THE SUPREME COURT OF OHIO
2009

STATE OF OHIO,

Case No. 2009-1490

Plaintiff-Appellee,

On Appeal from the
Franklin County Court
of Appeals, Tenth
Appellate District

-vs-

TIMOTHY HOWARD,

Court of Appeals

Defendant-Appellant.

Case No. 08AP-177

MEMORANDUM OF PLAINTIFF-APPELLEE OPPOSING JURISDICTION

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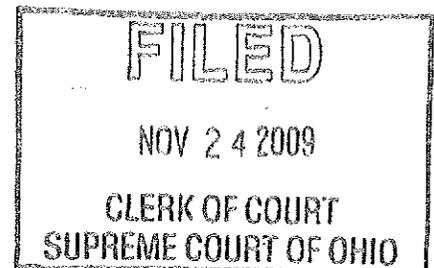


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EXPLANATION OF WHY THIS COURT SHOULD DECLINE JURISDICTION

Defendant Timothy Howard was convicted of aggravated murder and tampering with evidence in the killing of his wife Delilah “Dee” Howard. Defendant claimed that Dee hanged herself by a bathrobe belt in the basement of their home. But defendant’s suicide theory could not stand up to the physical evidence, particularly the following:

- **The nail:** Defendant told first responders that Dee was hanging from a single nail. The nail, however, was covered in dust and other debris. Later testing showed that the nail could not support Dee’s 135 pound body. Just in case defendant identified the wrong nail, two other nearby nails were tested. But Dee could not have hanged herself from either of these nails.
- **The bathrobe belt:** Defendant said that he got Dee down by cutting the bathrobe belt and that he did not untie any knots in the belt. But if this was so, one would expect at least one knot to still be in the belt when authorities arrived at the scene. There were no knots in the belt.
- **The furrow:** The furrow around Dee’s neck was horizontal and nearly encircled her neck, which is consistent with a ligature strangulation. In a typical hanging, the furrow casts upward in the shape of an inverted “V.”

In addition to this physical evidence, defendant admitted to having an affair with another woman shortly before Dee’s death, thus giving him a motive to kill Dee.

The Tenth District affirmed defendant’s convictions, and defendant now seeks discretionary review. Defendant’s four propositions of law, however, are unworthy of this Court’s review. Defendant raises routine, fact-specific claims alleging (1) that the prosecutors engaged in misconduct, (2) that the trial court abused its discretion in excluding certain evidence, (3) that his convictions are supported by insufficient evidence, and (4) that his convictions are against the manifest weight of the evidence. None of defendant’s propositions of law seeks to overrule, extend, or modify existing law. Rather, defendant merely complains that the Tenth District misapplied well-settled

law to the narrow facts of this case. Accordingly, any ruling from this Court would have minimal impact on future cases.

Because this case presents no questions of such constitutional substance or of such great public interest as would warrant further review by this Court, and because the Tenth District correctly affirmed defendant's convictions, the State respectfully submits that jurisdiction should be declined.

STATEMENT OF THE CASE AND FACTS

Defendant was indicted for aggravated murder and tampering with evidence, and the case proceeded to a jury trial. For a description of the evidence adduced at trial, the State incorporates the discussion set forth in the Tenth District's opinion at ¶¶2-27. The jury found defendant guilty of both charges, and the trial court sentenced defendant accordingly. Defendant appealed to the Tenth District, and that Court affirmed. Thereafter, this Court allowed defendant to pursue a delayed appeal. *State v. Howard*, 123 Ohio St.3d 1405, 2009-Ohio-5031.

ARGUMENT

Response to First Proposition of Law: Prosecutors have no duty to present exculpatory evidence to the jury, and a testifying defendant is subject to cross-examination like any other witness.

Defendant's first proposition of law alleges prosecutorial misconduct. Relying on a summary of defendant's interview with Detective Debra Barnett, defendant first maintains that the prosecutors should have presented evidence that defendant told Barnett that Dee was hanging from "one or more nails." According to defendant, the prosecutors

also “misconstrued” the evidence by arguing that defendant told first responders that Dee was hanging from a single nail. Defendant further contends that the prosecutors improperly challenged the credibility of his trial testimony that Dee was hanging by two nails.

To start, although the prosecutors’ “single nail” theory was apparent from the very beginning of the trial, the defense raised no prosecutorial-misconduct objection until the trial was almost complete. In order to preserve an issue for appeal, there must be a timely objection. “Untimely objections are reviewed ‘using a plain-error analysis pursuant to Crim.R. 52(B).’” *State v. Adams*, 103 Ohio St.3d 508, 2004-Ohio-5845, ¶100, citing *State v. Johnson* (1989), 46 Ohio St.3d 96, 102; see, also, *State v. Walters*, 10th Dist. No. 06AP-693, 2007-Ohio-5554, ¶80. By waiting until the trial was nearly over to raise any prosecutorial-misconduct objection, the defense forfeited all but plain error.

Defendant fails to show any error, let alone plain error. The prosecutors were not required to present evidence that defendant told Barnett that Dee was hanging from “one or more nails.” Prosecutors have no duty to present to the jury every piece of exculpatory evidence. Having received the summary during discovery, it was up to the defense to present evidence of defendant’s prior statement (in compliance with the Rules of Evidence, of course). Rejecting a similar argument, the Seventh Circuit has observed: “Our legal system remains an adversary one, and prosecutors are not required to make a defendant’s case for him.” *United States v. Holt* (C.A. 7, 2007), 486 F.3d 997, 1003.

To the extent defendant claims that the prosecutors supported their “single nail” theory with “false” evidence, that argument too is without merit. To prevail on such a

claim, a defendant must show: (1) the evidence was actually false; (2) the evidence was material; and (3) the prosecution knew the evidence was false. *State v. Iacona* (2001), 93 Ohio St.3d 83, 97 (citing Sixth Circuit cases).

The prosecutors' "single nail" theory was based on three witnesses: medic Jacques Whittenberger, Sheriff's Deputy Samuel Byrd, and Sheriff's Detective Don Murray—all of whom testified that defendant stated that Dee was hanging from a single nail. Murray observed defendant's interview with Barnett and testified that defendant told Barnett that Dee was hanging from "a nail." As for Whittenberger and Byrd, they testified to statements defendant made before Barnett even arrived at the scene. Thus, what defendant said to Barnett during the interview has no bearing on the veracity of Whittenberger's or Byrd's testimonies.

As a result, the most defendant can say is that the summary conflicts with Murray's "a nail" testimony and defendant's own testimony that he never told first responders that Dee was hanging from a single nail. But evidence is not false merely because it conflicts with other evidence. *Koch v. Puckett* (C.A. 5, 1990), 907 F.2d 524, 531 (defendant's testimony denying that he made inculpatory statements does not prove perjury but rather "merely establishes a credibility question for the jury"); *United States v. Griley* (C.A. 4, 1987), 814 F.2d 967, 971 ("Mere inconsistencies in testimony by government witnesses do not establish the government's knowing use of false testimony."); *United States v. Sherlock* (C.A. 1, 1989), 865 F.2d 1069, 1082 ("presenting witnesses with contradictory stories" does not necessarily amount to presenting perjured testimony). Rather, conflicts in evidence "are a matter to be explored on cross-

examination * * *, and the credibility of each account is for the jury to determine.”

United States v. Casas (C.A. 1, 2005), 425 F.3d 23, 45.

Equally unpersuasive is defendant’s complaint that the prosecutor during cross-examination challenged the credibility of defendant’s trial testimony that Dee was hanging from two nails. A criminal defendant who elects to testify is subject to the same rigors of cross-examination as any other witness. As this Court stated more than 80 years ago: “[W]hen a defendant offers himself as a witness, and testifies on his own behalf, he thereby subjects himself to the same rules, and may be called upon to submit to the same tests as to his credibility as may legally be applied to other witnesses.” *Sabo v. State* (1928), 119 Ohio St. 231, 242, citing *Hanoff v. State* (1881), 37 Ohio St. 178; see, also, *Brown v. United States* (1958), 356 U.S. 148, 154-55.

Moreover, “a cross-examiner may ask a question if the examiner has a good-faith belief that a factual predicate for the question exists.” *State v. Gillard* (1988), 40 Ohio St.3d 226, paragraph two of the syllabus. Here, the defense never challenged the prosecutor’s good faith while cross-examining defendant, meaning that good faith is presumed. *Gillard*, 40 Ohio St.3d at 231. In any event, although “hard proof” is not required, the prosecutor had hard proof that defendant gave conflicting accounts on how he allegedly found Dee hanging. Defendant told first responders that that Dee was hanging from a single nail. Defendant’s written statement made no reference to which nail or how many nails Dee was hanging from. When asked during a later interview which nail Dee was hanging from, defendant answered, “I have no idea, I didn’t look up at anything at all to see how it was configured or anything like that.” Defendant’s conflicting statements, combined with the remaining evidence in the case, gave the

prosecutor ample reason to suggest that defendant's testimony that he found Dee hanging by two nails—or that Dee was hanging at all—was fiction.

Defendant's argument that the prosecutors improperly challenged his credibility during closing arguments is likewise without merit. To begin, defendant raised no objection during closing arguments, thereby forfeiting all but plain error. Crim.R. 52(B). Defendant fails to show any error, let alone plain error. "Prosecutors are entitled to latitude as to what the evidence has shown and what inferences can be drawn therefrom." *State v. Richey* (1992), 64 Ohio St.3d 353, 362. Given the evidence adduced at trial, the prosecutors fairly argued that defendant's conflicting accounts on how he allegedly found Dee hanging—from one nail, to no reference at all, to "no idea," to two nails—reflected an on-going (yet unsuccessful) attempt to portray Dee's death as a suicide.

For the foregoing reasons, defendant's first proposition of law warrants no further review.

Response to Second Proposition of Law: Evidentiary rulings are subject to an abuse-of-discretion standard of review and may not be reversed unless material prejudice results.

Defendant's second proposition of law alleges that the trial court improperly excluded various pieces of evidence regarding Dee's statement of mind to support the defense's suicide theory. "[T]he admission of evidence lies within the broad discretion of the trial court, and a reviewing court should not disturb evidentiary decisions in the absence of an abuse of discretion that has created material prejudice." *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, ¶62, citing *State v. Issa* (2001), 93 Ohio St.3d 49, 64; see, also, Evid.R. 103(A) ("Error may not be predicated upon a ruling which admits

or excludes evidence unless a substantial right of the party is affected”). “The term ‘abuse of discretion’ * * * implies that the court’s attitude is unreasonable, arbitrary or unconscionable.” *State v. Adams* (1980), 62 Ohio St.2d 151, 157.

The trial court had legitimate evidentiary reasons to sustain the State’s objections. In any event, defendant fails to show any material prejudice. The jury heard plenty of evidence regarding Dee’s state of mind. Importantly, the State admitted four undated suicide notes Dee had written. These notes show that Dee had at some point contemplated suicide and thus were a significant component to the defense’s suicide theory.

In addition to the suicide notes, defendant’s daughter Angela testified that Dee appeared “sad” and “drained and stressed out and upset” the week before she died. Defendant’s other daughter Amanda likewise said that Dee “was not happy with herself” and both Amanda and Angela testified that Dee was overly concerned with her appearance. Although Amanda stated she could not “really remember,” she described Dee as “kind of upset” when she heard Brenda Watson’s (the woman with whom defendant was having an affair) “hook up together” message on defendant’s cell phone. Defendant admitted that he and Dee were “having a hard time” in their marriage and that their relationship had “deteriorated.”

Moreover, defendant, Angela, and Amanda all testified that Dee took medications for various physical ailments. Amanda elaborated on Dee’s drug use, saying that Dee “would take more than what she was prescribed” and felt that Dee was “abusing the medication.” Amanda related an incident in which Dee had “passed out” on the porch

while babysitting Amanda's son, leaving him in his car seat outside in the cold. Amanda also stated that Dee would return home "out of it" after obtaining pills from a friend.

All in all, the jury was fully aware of Dee's mental state and had all the evidence it needed to make an informed decision as to whether Dee committed suicide or whether defendant murdered her. The trial court's evidentiary rulings therefore affected no substantial rights.

For the foregoing reasons, defendant's second proposition of law warrants no further review.

Response to Third and Fourth Propositions of Law: In judging the sufficiency of the evidence, the appellate court examines 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. Under a manifest weight review, a court of appeals determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice.

Defendant's third and fourth propositions of law allege that his convictions are supported by insufficient evidence and are against the manifest weight of the evidence. In judging the sufficiency of the evidence, the appellate court "examine[s] 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* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus, following *Jackson v. Virginia* (1979), 443 U.S. 307.

Under a manifest weight review, a 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.” *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175. Reversing a conviction as being against the manifest weight of the evidence should be reserved for only the most “exceptional case in which the evidence weighs heavily against the conviction.” *Thompkins*, 78 Ohio St.3d at 387.

Circumstantial evidence alone can sustain a conviction, and evidence is not insufficient merely because there are no eyewitnesses. *State v. McKnight*, 107 Ohio St.3d 101, 2005-Ohio-6046, ¶75, citing *State v. Heinisch* (1990), 50 Ohio St.3d 231, 238. Indeed, circumstantial evidence can be just as persuasive, and in some cases more persuasive, than eyewitness testimony. *Jenks*, 61 Ohio St.3d at 272.

Given the physical evidence, the jury reasonably rejected defendant’s suicide theory and concluded that defendant killed Dce. Plus, the implausibility of defendant’s statements regarding how he allegedly found Dce hanging—as well as the inconsistencies in his statements—not only negates defendant’s suicide theory, but it also proves that defendant lied to authorities. And the jury was free to infer consciousness of guilt from defendant’s lies. *State v. Williams*, 99 Ohio St.3d 493, 2003-Ohio-4396, ¶54, citing *State v. Johnson* (1989), 46 Ohio St.3d 96, 100. Under the highly deferential sufficiency and manifest-weight standards of review, the jury reasonably found defendant guilty of aggravated murder and tampering with evidence.

For the foregoing reasons, defendant's third and fourth propositions of law warrant no further review.

CONCLUSION

For the foregoing reasons, the State respectfully submits that the within appeal presents no questions of such constitutional substance or of such great public interest as would warrant further review by this Court. It is respectfully submitted that jurisdiction should be declined.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent by regular U.S. Mail, this day, November 24, 2009, to Timothy Howard, #569-390, Ross Correctional Institution, P.O. Box 7010, Chillicothe, OH 45601.



SETH L. GILBERT 0072929
Assistant Prosecuting Attorney

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent by regular U.S. Mail, this day, November 24, 2009, to Timothy Howard, #569-390, Ross Correctional Institution, P.O. Box 7010, Chillicothe, OH 45601.



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