

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

CASE NO. 10-1325

Plaintiff-Appellee,

**ON APPEAL FROM THE
MONTGOMERY COUNTY COURT
OF APPEALS, SECOND
APPELLATE DISTRICT**

vs.

THOMAS EVERETTE, JR.

**COURT OF APPEALS
CASE NO. 23598**

Defendant-Appellant.

APPELLEE'S MERIT BRIEF

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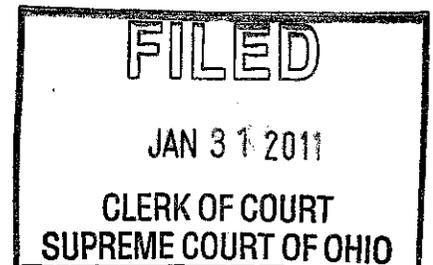


TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii, iii
STATEMENT OF THE CASE AND FACTS	1-2
ARGUMENT	2-10
<u>Proposition of Law:</u>	
When trial court proceedings are recorded by means of videotape, the 180-day time requirement for filing a petition for post-conviction relief under R.C. 2953.21(A)(2) begins to run when, in accordance with App.R. 9(A), the videotape recording of proceedings is filed with the court of appeals.	2-10
CONCLUSION	10-11
CERTIFICATE OF SERVICE	12
APPENDIX	<u>APPX. PAGE</u>
APPENDIX A, <i>State v. Everette</i> , 2 nd Dist. No. CA 22838, 2009-Ohio-5738	1-6
APPENDIX B, Entry, Supreme Court of Ohio, 2010-0064, (March 3, 2010)	7
APPENDIX C, <i>State v. Fogle</i> , 5 th Dist. No. 09 CA 114, 2010-Ohio-2805	8-11
APPENDIX D, <i>State v. Downs</i> , 9 th Dist. No. 03CA0053-M, 2003-Ohio-6009	12-13
APPENDIX E, <i>Daniels v. Santic</i> , 11 th Dist. No. 2004-G-2570, 2005-Ohio-1101	14-15

TABLE OF AUTHORITIES

<u>CASES:</u>	<u>PAGE</u>
<i>Daniels v. Santic</i> , 11 th Dist. No. 2004-G-2570, 2005-Ohio-1101	8
<i>Erwin v. Bryan</i> , 125 Ohio St.3d 519, 929 N.E.2d 1019, 2010-Ohio-2202	6
<i>Murray v. Giarratano</i> (1989) 492 U.S. 1, 109 S.Ct. 2765, 106 L.Ed.2d 1	9
<i>State ex rel. Love v. Cuyahoga Cty. Prosecutor's Office</i> (1999), 87 Ohio St.3d 158, 718 N.E.2d 426	9
<i>State ex rel. Murr v. Thierry</i> (1987), 34 Ohio St.3d 45, 517 N.E.2d 226	9
<i>State v. Downs</i> , 9 th Dist. No. 03CA0053-M, 2003-Ohio-6009	8
<i>State v. Everette</i> , 2 nd Dist. No. CA 22838, 2009-Ohio-5738	1
<i>State v. Everette</i> , 2 nd Dist. No. CA 23585, 2010-Ohio-2832	2, 6
<i>State v. Fields</i> (1999), 136 Ohio App.3d 393, 736 N.E.2d 933	9
<i>State v. Fogle</i> , 5 th Dist. No. 09 CA 114, 2010-Ohio-2805	8
<i>State v. Moore</i> (1994), 99 Ohio App.3d 748, 651 N.E.2d 1319	3
<i>State v. Steffen</i> (1994), 70 Ohio St.3d 399, 639 N.E.2d 67	3, 9
<i>Toledo v. Reasonover</i> (1965), 5 Ohio St.2d 22, 213 N.E.2d 179	6, 7, 8
 <u>OTHER:</u>	
App.R. 9	7, 8, 9, 10
App.R. 9(A)	2, 3, 4, 5, 6, 7, 10, 11
App.R. 9(B)	5
App.R. 11(B)	1
OH Const. Art. IV, § 5(B)	6
R.C. 2953.21	3, 7, 10

R.C. 2953.21(A)	10
R.C. 2953.21(A)(2)	2, 3, 4, 6, 7, 10
R.C. 2953.21(J)	3
R.C. 2953.23(A)	2

STATEMENT OF THE CASE AND FACTS

In June 2008, Defendant-Appellant Thomas Everette was convicted in the Montgomery County Common Pleas Court of Aggravated Murder, Aggravated Robbery, Grand Theft and Having Weapons While Under Disability. He was sentenced to an aggregate term of life in prison with the possibility of parole after 28 years.

Everette appealed his conviction to the Second District Court of Appeals on July 16, 2008. That same day, Everette's counsel requested that a transcript of the trial court proceedings be prepared. On August 26, 2008, six videotapes – which included videotapes of the jury trial, the hearing on a motion to suppress, and the sentencing hearing – were filed with the court of appeals. Two days later, a summary of docket and journal entries was also filed.

On August 28, 2008, the Clerk of Courts issued its App.R. 11(B) notification, thus indicating that the appellate record was complete. The App.R. 11(B) notification stated that the “Transcript of Proceedings” had been filed on August 26, 2008. On October 15, 2008, written transcripts of the trial and suppression hearing were also filed.

Everette's conviction was affirmed on October 30, 2009. *State v. Everette*, 2nd Dist. No. CA 22838, 2009-Ohio-5738. This Court denied Everette's motion for a delayed appeal. (March 3, 2010 *Entry*, Case No. 2010-0064)

On April 8, 2009, while his direct appeal was pending, Everette filed with the trial court a petition for post-conviction relief. The State moved to dismiss the petition as untimely, because it was filed more than 180 days after the videotape transcript of proceedings was filed in the court of appeals on August 28, 2008. Everette countered, arguing that his 180-day time limitation began to run on October 15, 2008, i.e., the day the *written* transcripts were filed. On July 29, 2009, the trial court dismissed Everette's petition, finding that it was untimely under

R.C. 2953.21(A)(2), and that Everette had not established that his late filing satisfied any of the exceptional circumstances listed in R.C. 2953.23(A).

Everette appealed the trial court's decision to the Second District Court of Appeals. The court of appeals affirmed the trial court's judgment. *State v. Everette*, 2nd Dist. No. CA 23585, 2010-Ohio-2832. In its opinion, the court of appeals held that, in accordance with App.R. 9(A), when the trial court's proceedings are recorded by means of a videotape (as they were in this case), the 180-day time requirement for filing a petition for post-conviction relief begins to run on the date that the videotape transcript in the direct appeal is filed with the court of appeals. *Id.* at ¶ 26. Accordingly, the court held, Everette's petition was untimely filed. *Id.* at ¶ 34.

On October 13, 2010, this Court accepted Everette's appeal in order to answer the following question: When the trial court proceedings are recorded by means of videotape, when does the 180-day time requirement for filing a petition for post-conviction relief under R.C. 2953.21(A)(2) begin to run – when the videotape is filed with the court of appeals in the direct appeal, or when a written transcript is filed?

ARGUMENT

Proposition of Law:

When trial court proceedings are recorded by means of videotape, the 180-day time requirement for filing a petition for post-conviction relief under R.C. 2953.21(A)(2) begins to run when, in accordance with App.R. 9(A), the videotape recording of proceedings is filed with the court of appeals.

“A post-conviction proceeding is not an appeal of a criminal conviction, but, rather, a collateral civil attack on the judgment.” *State v. Steffen* (1994), 70 Ohio St.3d 399, 410, 639 N.E.2d 67; R.C. 2953.21(J). For that reason, a petition for post-conviction relief is not a constitutional right, and the only rights afforded a defendant in post-conviction proceedings are those that are granted by the legislature. *Steffen* at 410; *State v. Moore* (1994), 99 Ohio App.3d 748, 751, 651 N.E.2d 1319. In Ohio, the only rights granted a defendant in post-conviction proceedings are those specifically enumerated by the legislature in R.C. 2953.21 through 2953.23.

Of particular relevance here are the provisions of R.C. 2953.21 that mandate specific timing requirements for filing petitions for post-conviction relief. Specifically, R.C. 2953.21(A)(2) provides that if a defendant has filed a direct appeal of his or her conviction, a petition for post-conviction relief must be filed no later than 180 days after the “trial transcript” is filed in the court of appeals in the direct appeal. Thus, the entire resolution of the issues now before this Court comes down to an interpretation of the meaning of “trial transcript.”

A. Videotape Transcript vs. Written Transcript

Although the phrase “trial transcript” is not specifically defined in R.C. 2953.21, its meaning is hardly ambiguous. Common sense tells us that a “transcript” (be it a trial transcript, a hearing transcript, or otherwise), is a recording of a court’s proceedings. And while the phrase

“trial transcript” is not specifically defined, the phrase “transcript of proceedings” (and a trial is certainly a “proceeding”) is defined.

Specifically, App.R. 9(A) provides:

The original papers and exhibits thereto filed in the trial court, *the transcript of proceedings, if any*, including exhibits, and a certified copy of the docket and journal entries prepared by the clerk of the trial court shall constitute the record on appeal in all cases. *A videotape recording of the proceedings constitutes the transcript of proceedings other than hereinafter provided, and, for purposes of filing, need not be transcribed into written form.* Proceedings recorded by means other than videotape must be transcribed into written form. When the written form is certified by the reporter in accordance with App.R. 9(B), such written form shall then constitute the transcript of proceedings. When the transcript of proceedings is in the videotape medium, counsel shall type or print those portions of such transcript necessary for the court to determine the questions presented, certify their accuracy, and append such copy of the portions of the transcripts to their briefs.

In all capital cases the trial proceedings shall include a written transcript of the record made during the trial by stenographic means.

(Emphasis added.)

Here, Everette’s trial took place in a video courtroom, without a stenographer or court reporter. Consequently, when the record on appeal was being composed in Everette’s direct appeal, six videotapes (which included videotapes of the jury trial with verdict, as well as videotapes of hearings on a motion to suppress and sentencing) were submitted to the Clerk of Courts on August 26, 2008 as constituting the “transcript of proceedings.” This was done in accordance with App.R. 9(A). Thus, it’s evident that the “trial transcript” was included within the “transcript of proceedings” that was filed in the court of appeals on August 26, 2008. Accordingly, in order for Everette’s petition for post-conviction relief to be filed timely under R.C. 2953.21(A)(2), it was required to be filed by February 23, 2009 (i.e. 180 days after the video transcript was filed with the court of appeals in Everette’s direct appeal). But because it was not filed until April 8, 2009, it was clearly late.

Everette, however, reads App.R. 9(A) differently, and asks this Court to also read App.R. 9(A) as stating that, if a *written transcript* is filed with the court of appeals (whether it is required to be filed or not), then the written transcript shall constitute the transcript of proceedings on direct appeal, and not the videotape. But in making this argument, Everette commits the same mistake that he (falsely) accuses the court of appeals of making – he fails to read the whole rule and to consider each sentence of the rule in a proper context with the others.

Everette’s mistake in his reading and interpretation of App.R. 9(A) was best explained by the court of appeals in its decision below:

In its amicus curiae brief, the Ohio Public Defender asserts that App.R. 9(A) establishes that a written transcript, certified by the court reporter, is the transcript of proceedings and, thus, when the written transcript is filed, that filing triggers the 180-day time limitation. Specifically, the Ohio Public Defender relies on the sentence that reads: “When the written form is certified by the reporter in accordance with App.R. 9(B), such written form shall then constitute the transcript of proceedings.”

However, the second sentence of App.R. 9(A) explicitly states that a videotape recording of the trial proceedings constitutes the transcript of proceedings and that it need not be transcribed into written form in order to be filed. App.R. 9(A) further states that, when the proceedings are videotaped, counsel must reduce the portions of the videotaped transcript necessary for appellate review into written form, certify the accuracy of the written transcript, and append the written transcripts to the brief.

In contrast, proceedings recorded by means other than videotape must be reduced to written form. The sentence following the requirement for non-videotaped proceedings (i.e., the sentence upon which the Ohio Public Defender primarily relies) then states that the written form is the transcript of proceedings. Reading App.R. 9(A) as a whole, the provision that the written form is the transcript of proceedings applies solely when a non-videotaped proceeding (e.g., audio only, shorthand, stenotype) is reduced to written form, not to all circumstances when a written transcript is produced.

Although the burden to produce the necessary written transcripts of videotaped proceedings falls on counsel, most written transcripts are produced, upon counsel’s request, by a court reporter or other professional transcriptionist and not by counsel himself or herself. The mere fact that a court reporter or transcriptionist, at counsel’s request, has produced a written transcript of a

videotaped proceeding and has certified its accuracy, as required by App.R. 9(A), does not render that written transcript the official transcript of proceedings.

State v. Everett, Mont. App. No. CA 23585, 2010-Ohio-2832, ¶ 21-24.

In short, when trial proceedings are recorded by means of a videotape, as Everett's trial was, the filing of the videotape transcript with the court of appeals, in accordance with App.R. 9(A), is the "triggering event" that begins the 180-day "clock" for the filing of a petition for post-conviction relief to start running. Accordingly, the time period for filing Everett's petition began to run on August 26, 2008, and expired 180 days later on February 23, 2009. The petition filed on April 8, 2009, therefore, was untimely and the court of appeals' decision to affirm the trial court's dismissal of the petition was correct.

B. Statutes vs. Rules

Everett's next argument addresses what to do if a rule of practice or procedure that is enacted by this Court, is in conflict with a statute enacted by the General Assembly. Everett correctly states that, where a rule of practice created by this Court conflicts with a statute that addresses matters of substantive law, the statute controls over the rule. *Erwin v. Bryan*, 125 Ohio St.3d 519, 929 N.E.2d 1019, 2010-Ohio-2202, ¶ 28-29; OH Const. Art. IV, § 5(B). He then contends that the 180-day deadline for filing a post-conviction petition is analogous to a "statute of limitations" for filing a civil action, and that the setting of a statute of limitation involves a matter of substantive law. (See Everett's *Merit Brief* at p. 6) With that as a background, Everett concludes, "App.R. 9 may not be construed to alter the triggering event for the 180-day deadline for filing a petition for post-conviction relief as stated in R.C. 2953.21(A)(2)." (Id.)

While he is technically correct in his conclusion, there are two problems with Everett's argument. First, Everett failed to make it in the court of appeals below and, therefore, has waived his right to make it here. See c.f. *Toledo v. Reasonover* (1965), 5 Ohio St.2d 22, 213

N.E.2d 179, paragraph two of the syllabus (“This court will not ordinarily consider a claim of error which was not raised and was not considered or decided by [the court of appeals].”).

Second, since App.R. 9 and R.C. 2953.21 are not in conflict, his argument is irrelevant. There is nothing within the language of App.R. 9 that can in anyway be construed as abridging, enlarging, modifying or otherwise altering the 180-day filing deadline set out in R.C. 2953.21. The statute says a defendant must file his or her petition no later than 180 days after the date on which the trial transcript is filed in the court of appeals. The rule, on the other hand, serves simply to help clarify when the 180 days begins to run, by explaining what is considered to be the transcript in cases where the trial proceedings are recorded by videotape. Clearly, the statute and the rule do not conflict, and any argument advanced by Everette to the contrary cannot be sustained.

C. The Plain Meaning of R.C. 2953.21(A)(2)

Everette’s next argument suggests that, since the term “transcript” is not defined in R.C. 2953.21, the statutory language should be given its “plain meaning,” and should be construed “according to [it’s] common usage.” He then provides the definition of “transcript” found within Black’s Law Dictionary and Webster’s Dictionary, and encourages this Court to conclude that the “plain meaning” of the term “transcript” requires that the “transcript” must be written.

But there is no need to resort to a dictionary to find the meaning of “transcript” because this Court, in adopting App.R. 9(A), has already defined what transcript means: If the trial court proceedings were videotaped, then the videotape is the transcript. And if the proceedings were recorded by means other than a videotape, then the recording must be transcribed into written form and, in such cases, the written form shall constitute the transcript. Accordingly, the plain meaning of “transcript” is clear, and no further definition is needed.

D. Public Policy

Everette next makes a public policy argument for why the filing of a written transcript, and not a videotape transcript, should be deemed the “triggering event” for beginning the calculation of the 180-day filing requirement for post-conviction-relief petitions. However, Everette did not present this argument in the court of appeals below and, therefore, should be barred from raising it here on appeal. See c.f. *Toledo v. Reasonover* (1965), 5 Ohio St.2d 22, 213 N.E.2d 179, paragraph two of the syllabus (“This court will not ordinarily consider a claim of error which was not raised and was not considered or decided by [the court of appeals].”).

Nevertheless, in making his argument, Everette first contends that the Second District’s use of the filing of the videotape transcript as the start of the 180-day calculation is “inconsistent with the practice of other Ohio courts.” However, in order for one court’s practices to be “inconsistent” with the practices of another, there must be something to compare it to. And since the Second District is the only court to have thus far addressed this specific issue, there are no other “inconsistent” court practices that can be used for comparison.

In addition, part of the problem with finding other court practices for comparison is that it appears that very few courts outside of the Montgomery County Common Pleas Court have video courtrooms. But there are some. Videotaped recordings of court proceedings have taken place in the 5th, 9th and 11th appellate districts. See, *State v. Fogle*, 5th Dist. No. 09 CA 114, 2010-Ohio-2805; *State v. Downs*, 9th Dist. No. 03CA0053-M, 2003-Ohio-6009; *Daniels v. Santic*, 11th Dist. No. 2004-G-2570, 2005-Ohio-1101. And in these cases, the courts of appeals have held that, in accordance with App.R. 9(A), the videotape constitutes the transcript of the proceedings. *Fogle* at ¶ 24; *Downs* at ¶ 5; *Santic* at ¶ 9-12.

Everette advances another public policy argument in suggesting that tying the 180-day filing requirement to the date that the videotape transcript is filed places pro se, incarcerated defendants at a disadvantage. He argues that, since such defendants do not have access to the equipment necessary to view the videotapes, they will not have access to the trial record while preparing post-conviction petitions.

But while having a written transcript instead of a video transcript would likely be more convenient for incarcerated defendants, such is not a sufficient public policy reason for rejecting the Second District's well-reasoned opinion, nor is it a sufficient reason for completely ignoring App.R. 9's clearly-established provision that, in video courtrooms, the videotape recording of proceedings constitutes the transcript of proceedings. Everette's argument also ignores the fact that there is no constitutional right to file for post-conviction relief, *State v. Steffen*, supra, 70 Ohio St.3d at 410, citing *Murray v. Giarratano* (1989) 492 U.S. 1, 109 S.Ct. 2765, 106 L.Ed.2d 1, so the fact that he and other incarcerated defendants might be inconvenienced by not having a written transcript before filing for post-conviction relief does not implicate public policy concerns.

Likewise, defendants who wish to file for post-conviction relief are not entitled to discovery. *State ex rel. Love v. Cuyahoga Cty. Prosecutor's Office* (1999), 87 Ohio St.3d 158, 718 N.E.2d 426. Consequently, Everette was not entitled to have access to a written transcript while preparing his petition. See *State ex rel. Murr v. Thierry* (1987), 34 Ohio St.3d 45, 517 N.E.2d 226 (finding that petition for post-conviction relief must be pending before access to transcript can be sought). See also *State v. Fields* (1999), 136 Ohio App.3d 393, 398, 736 N.E.2d 933 (finding that "[t]ranscripts are not always a necessity in post-conviction relief cases

because post-conviction relief claims brought pursuant to R.C. 2953.21(A) must raise matters outside the record.”).

Everette’s public policy arguments, therefore, must fail.

E. Recently Proposed Changes to App.R. 9

Finally, Everette points out that changes to App.R. 9 have recently been proposed. These changes, if adopted, would require that all videotaped proceedings be transcribed into writing, and that the written transcript would then be deemed the “official transcript” on appeal. Yet, the proposed changes to App.R. 9 are just that – proposals. And even if eventually adopted, a new App.R. 9 would not change the fact that, in 2008 when Everette filed his direct appeal, and in 2009 when he filed his petition for post-conviction relief, App.R. 9 clearly provided that, in video courtrooms, the videotape recording of proceedings – and not a written transcript - constituted the transcript of proceedings.

CONCLUSION

There is nothing confusing, unclear or ambiguous about when a petition for post-conviction relief must be filed. R.C. 2953.21(A)(2) requires that the petition be filed within 180 days after the date on which the trial transcript is filed in the court of appeals in the defendant’s direct appeal. App.R. 9(A), in turn, provides that, when the trial is recorded by videotape, the videotape recording of proceedings constitutes the transcript of proceedings. Reading these provisions together, when a defendant is tried and convicted in a video courtroom, his petition for post-conviction relief, to be timely, must be filed within 180 days after the date that the videotape transcript is filed with the court of appeals in the defendant’s direct appeal.

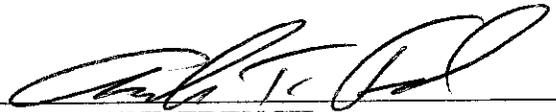
Here, The Second District Court of Appeals, by affirming the trial court’s decision to dismiss Everette’s post-conviction petition as untimely, interpreted and applied R.C. 2953.21 and

App.R. 9(A) correctly in finding that Everett's petition was required to be filed within 180 days of the date on which the videotape transcript was filed in Everett's direct appeal, regardless of when (or if) a written transcript was filed. Therefore, because no error was committed by the court of appeals below, the State of Ohio respectfully requests that its proposed Proposition of Law be adopted, and that the dismissal of Everett's untimely petition for post-conviction relief be affirmed.

Respectfully submitted,

MATHIAS H. HECK, JR.
PROSECUTING ATTORNEY

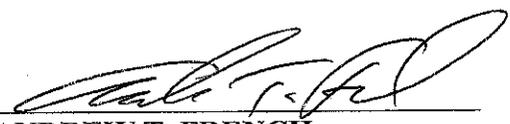
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Merit Brief was sent by first class on this 31st day of January, 2011, to Opposing Counsel: Jeremy J. Masters, Assistant State Public Defender, 250 East Broad Street, Suite 1400, Columbus, OH 43215.

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2009 WL 3527657

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Second District, Montgomery County.

STATE of Ohio, Plaintiff-Appellee

v.

Thomas E. EVERETTE, Jr., Defendant-Appellant.

No. 22838. Decided Oct. 30, 2009.

Criminal appeal from Common Pleas Court.

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Opinion

FROELICH, J.

*1 ¶ 1 Thomas E. Everett, Jr., was convicted after a jury trial in the Montgomery County Court of Common Pleas of two counts of aggravated murder, aggravated robbery, and grand theft of a motor vehicle, all with firearm specifications. Everett was also convicted by the court of having a weapon while under disability. The two aggravated murder counts were merged, as were the firearm specifications, and Everett was sentenced to an aggregate term of life imprisonment with the possibility of parole after 28 years.

¶ 2 Everett appeals from his convictions, claiming that his fundamental rights were violated when certain proceedings occurred in his absence, that the court erred in admitting certain autopsy photographs, that the court erred in giving the jury an instruction pursuant to State v. Howard (1989), 42 Ohio St.3d 18, 537 N.E.2d 188, and that the indictment failed to include a mental state for the firearm specifications. For the following reasons, the trial court's judgment will be affirmed.

I

¶ 3 According to the State's evidence, on July 29, 2007, Everett shot Phillip Cope in the back of his head with a .9 mm handgun. At the time, Cope was in the bathroom of his apartment with Ashley Ross, who was staying in his apartment, bathing his dogs. Cope died from that single gunshot wound, and he was found in his bathroom by police at approximately 1:45 p.m. on the following day based on information received from Jason Snell, who was also staying with Cope.

¶ 4 Immediately after the shooting, Everett asked Ross to "wipe some things down and grab the cup he was drinking out of" and to go with him. Everett told Ross to drive his Oldsmobile while he (Everett) drove Cope's green Camaro. Everett left the Camaro at a home near Nottingham Trailer Park, and the two drove together in Everett's vehicle to the trailer park. Everett told Ross that he had killed Cope because "Phil had robbed the wrong person" and that he had gotten money for shooting Cope. Everett later traded the .9 mm handgun to Daryl Stollings for drugs. Everett told Stollings "not to hold onto the gun for a lengthy period of time, not to be caught with the gun because the gun was hot, it had a body on it." Everett said the "body" was "a couple hours old."

¶ 5 Everett asserted that he had an alibi for the time of the shooting. At trial, he presented evidence that he was at the Dayton Tall Timbers Resort KOA campground in Brookville from 8:38 p.m. on July 28, 2007, until 12:37 p.m. on July 29, 2007. Witnesses on Everett's behalf testified that, upon returning from camping, he took a shower, and went to bed. Everett next left the house after dinner to go to his brother's home. Everett asserted that other individuals could have shot Cope, including Ross, Stollings, and Snell, who had stolen Cope's television and pawned it on July 30, 2007.

¶ 6 On August 13, 2007, Everett was indicted for aggravated murder (prior calculation and design) with a firearm specification, aggravated murder (while committing or fleeing immediately after committing an aggravated robbery) with a firearm specification, aggravated robbery with a firearm specification, grand theft of a motor vehicle with a firearm specification, and having a weapon while under disability. In February 2008, a jury trial was held on the charges. On February 28, 2008, the trial court declared a mistrial due to the jury's inability to reach a unanimous verdict.

*2 ¶ 7 In June 2008, a second jury trial was conducted on the aggravated murder, aggravated robbery, and grand theft

charges; the charge of having a weapon while under disability was tried to the bench. During deliberations, the jury sent several questions to the judge and also asked if they could re-hear Ross's testimony. After approximately six hours of deliberations, excluding breaks and meals, the jury informed the court that it was deadlocked. Over defense counsel's objection, the court gave the jury Ohio's version of the so-called "dynamite charge," in accordance with *Howard* and 2 Ohio Jury Instructions (2008), Section 429.09(2), and gave the jury the option of continuing deliberations at that time or returning in the morning. The jury decided to return the following day, to the dismay of one of the jurors who orally expressed her frustration as the group was walking to the garage.

{¶ 8} The following day, the court informed counsel of the one juror's comments, which prompted Everette's counsel to move for a mistrial. That motion was denied. After further deliberations, the jury convicted Everette of the four charges before it and the accompanying firearm specifications. The same day, the court found Everette guilty of having a weapon while under disability. Everette was sentenced accordingly.

{¶ 9} Everette appeals from his convictions, raising four assignments of error.

II

{¶ 10} Everette's first assignment of error states:

{¶ 11} "THE TRIAL COURT ERRED BY CONDUCTING PROCEEDINGS OUTSIDE THE PRESENCE OF APPELLANT, VIOLATING HIS RIGHTS UNDER ARTICLE I § 10 OF THE CONSTITUTION OF THE STATE OF OHIO."

{¶ 12} In his first assignment of error, Everette claims that his constitutional rights were violated when he was not present for two critical proceedings during jury deliberations.

{¶ 13} A criminal defendant has a fundamental right to present at all "critical stages" of his criminal trial. Section 10, Article I, Ohio Constitution; Crim.R. 43(A); *State v. Hale*, 119 Ohio St.3d 118, 892 N.E.2d 864, 2008-Ohio-3426, at ¶ 100. "An accused's absence, however, does not necessarily result in prejudicial or constitutional error." *State v. Davis*, 116 Ohio St.3d 404, 880 N.E.2d 31, 2008-Ohio-2, at ¶ 90. "[T]he presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only." *Id.*, quoting *Snyder v.*

Massachusetts (1934), 291 U.S. 97, 107-108, 54 S.Ct. 330, 78 L.Ed. 674, overruled on other grounds, *Duncan v. Louisiana* (1968), 391 U.S. 145, 154, 88 S.Ct. 1444, 20 L.Ed.2d 491.

{¶ 14} Everette asserts that his fundamental rights were violated when he was absent from two discussions between the court and counsel after the jury retired to deliberate. On the first occasion, the court noted that Everette "is not present since he remains at the County Jail. But, for this particular proceeding since we're not in the presence of the jury, I feel comfortable proceeding without him." Everette's counsel informed the court that, "for what it's worth I'll waive his presence. My intention is after we break here on-on this brief session, I'm going to go over to the jail and bring him up to speed on everything that we've done." The court and counsel then discussed a series of questions sent by the jury regarding various witnesses' testimony and whether the jurors could rehear Ashley Ross's testimony. After consulting with counsel, the court sent written responses to the jury.

*3 {¶ 15} We find no violation of Everette's fundamental rights when the court spoke with counsel and responded to jury questions during deliberations. Everette's counsel waived his presence at the conference concerning the jury's questions. *Hale* at ¶ 103. Moreover, the Supreme Court of Ohio has stated that a trial court's written response to a jury question is not a critical stage of the criminal proceeding, *State v. Campbell*, 90 Ohio St.3d 320, 346, 738 N.E.2d 1178, 2000-Ohio-183, and a defendant's constitutional rights are not violated when he is absent during the conference regarding the court's response to the jury questions. E.g., *Id.* (defendant "had no right to be present at the legal discussion of how the [jury] question should be answered"); *State v. Martin*, Montgomery App. No. 22744, 2009-Ohio-5303; *State v. Williams*, Miami App. No.2004 CA 6, 2004-Ohio-6218, at ¶ 10. See, also, *State v. Frazier*, 115 Ohio St.3d 139, 873 N.E.2d 1263, 2007-Ohio-5048, at ¶ 147 (absence from conference on jury instructions did not prevent a fair trial); *State v. Conway*, 108 Ohio St.3d 214, 842 N.E.2d 996, 2006-Ohio-791, at ¶ 52 (same).

{¶ 16} Second, Everette complains that he was absent when his counsel made a motion for a mistrial. On the second day of deliberations, the trial court informed counsel, without Everette present, that, upon the jurors' being escorted to the parking lot by the bailiff at the end of the previous day's deliberations, one juror became "rather loud" and "said a few obscenities essentially to the effect * * * that she was quite upset that she was being forced to come back today to continue deliberations, that continued deliberations were

going to be of no use, and that the Court simply should not be forcing her and her fellow jurors to come back.” The court informed counsel that the juror had returned to the courtroom with the bailiff, and the judge had told her that he expected her to return the next day to continue deliberations. The juror left without incident and returned the following day. Everette’s counsel moved for a mistrial on the ground that the jury was hung. The court overruled the motion.

{¶ 17} Everette’s absence when his counsel moved for a mistrial was not prejudicial. The jury was not present, and no evidence or testimony was presented in Everette’s absence. See *Frazier* at ¶ 145, 873 N.E.2d 1263. Further, Everette’s interests were protected by his counsel’s motion, which was a legal matter within counsel’s professional competence, and Everette’s presence at this hearing would not have contributed to his defense. See *State v. McKnight*, 107 Ohio St.3d 101, 837 N.E.2d 315, 2005-Ohio-6046, at ¶ 215 (stating that defendant’s absence from conferences was not prejudicial where counsel was present and participated, and the conferences “mostly involved legal issues within the professional competence of counsel, not issues that appellant must personally decide”).

{¶ 18} The first assignment of error is overruled.

III

*4 {¶ 19} Everette’s second assignment of error states:

{¶ 20} “THE TRIAL COURT ERRED BY ADMITTING EVIDENCE WHERE ITS PROBATIVE VALUE WAS SUBSTANTIALLY OUTWEIGHED BY THE DANGER OF UNFAIR PREJUDICE.”

{¶ 21} In his second assignment of error, Everette contends that the trial court abused its discretion in admitting, over his objection, State’s Exhibits 6 through 9, which consisted of graphic autopsy photographs. Everette argues that the unfair prejudice caused by the gruesome nature of the photographs substantially outweighed the photographs’ probative value.

{¶ 22} In general, relevant evidence is admissible unless its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury. Evid.R. 402; Evid.R. 403(A). The decision whether to admit evidence is left to the sound discretion of the trial court, and a reviewing court will not reverse that decision absent an abuse of discretion. *State v. Sage* (1987), 31 Ohio St.3d 173, 510 N.E.2d 343, paragraph two of the syllabus. An

abuse of discretion means more than a mere error of law or an error in judgment. It implies an arbitrary, unreasonable, unconscionable attitude on the part of the trial court. *State v. Adams* (1980), 62 Ohio St.2d 151, 404 N.E.2d 144.

{¶ 23} At trial, the State stated its intention to present ten photographs of Cope during the testimony of Dr. Bryan Casto, forensic pathologist and deputy coroner with the Montgomery County Coroner’s Office.¹ Exhibit 6 was a photograph of Cope’s left eye with the eyelid retracted, which showed the path that the bullet traveled through Cope’s eye. Exhibit 7 depicted the significant skull fracture caused by the bullet. Exhibit 8 showed the base of the skull with the top of the skull and the brain removed. Exhibit 9 was a photograph of the bottom of the brain after it had been removed from the skull.

1 Exhibits 1 and 2 displayed Cope’s body as he was received from his apartment, one photograph from the left side and one from the right. Everette objected to the introduction of both photographs, arguing that one view was sufficient. The court admitted both over Everette’s objection, stating that the two photographs did not have “that type of prejudicial, shocking impact upon the jury.” Everette has not appealed from this ruling. Exhibit 3 was the identification photograph for Cope. Exhibit 4 showed the entrance wound to the back of Cope’s head, taken after his hair had been shaved. Exhibit 5 was a close-up of Cope’s eye and showed the exit wound. Exhibit 10 showed two metal fragments of the bullet, which were recovered from Cope’s head. Everette did not object to Exhibits 3, 4, 5, and 10.

{¶ 24} Everette objected to Exhibits 6 through 9, arguing that the photographs were inflammatory and did not add to the case or to proving the cause of death. The State replied that the photographs were relevant to whether Everette had purposefully caused Cope’s death, for which the State had the burden of proof. Everette’s counsel responded that he was willing to stipulate to Dr. Casto’s expertise in the field of forensic pathology and to his qualifications to testify at trial regarding the cause of death. Everette was also willing to stipulate to Dr. Casto’s opinion that Cope’s death was caused by a gunshot wound to the back of the head. The court determined that it needed to voir dire Dr. Casto to “see from his perspective as an expert how the four photographs advance the issue of purpose.”

{¶ 25} During the voir dire examination of Dr. Casto outside the presence of the jury, Dr. Casto explained that the purpose of Exhibit 6 was to show the path of the bullet, and the photograph helped “connect the dots between what structures

are being injured as the bullet passes from the back of the head through the left upper eyelid.” As to Exhibit 7, Dr. Casto stated: “This photograph is of value because it demonstrates [that Cope was] clearly alive when he sustains the gunshot wound. In other words, he is not dead from drowning in the tub and then subsequently shot, or dead from an overdose and subsequently shot.” Dr. Casto explained that Exhibit 8 helped confirm that the entrance wound was, in fact, to the back of the head as in an execution-style shooting rather than the bullet entering through the eye and exiting out the back of the head. Exhibit 9 demonstrated the large amount of destruction to the right side of the brain caused by the gunshot wound and the bruising of the brain on the left side.

*5 {¶ 26} After the voir dire examination of Dr. Casto, the State indicated that it would accept Everett's stipulation as to Dr. Casto's expertise, but would not accept the second part of the stipulation regarding Dr. Casto's opinion of the cause of death.

{¶ 27} The trial court admitted Exhibit 6, stating that it is “not so graphic that it has any application to Evidence Rule 403.” The court found Exhibit 7 to be relevant, because it demonstrated that Cope was alive when then gunshot wound was inflicted. The court admitted that exhibit despite the fact that it was “quite graphic.” As to Exhibit 8, the court stated: “Exhibit 8 will help confirm that this was a back of the head shot, an execution style killing, which it does obviously go to the issue of whether or not this was a purposeful killing. Therefore, even though once again it is quite graphic, I will allow it.” In contrast, the court excluded Exhibit 9 under Evid.R. 403, stating that it only showed that death was not immediate, which was not relevant because “we know that that caused the death and it's a very graphic photo.”

{¶ 28} We find no fault with the trial court's ruling. As we stated in *State v. Wade*, Montgomery App. No. 21530, 2007-Ohio-1060, “[a]utopsy photos are inherently prejudicial when they depict gruesome, graphic wounds, but when offered to prove elements of the offense that the State has the burden of proving, they are usually not *unfairly* prejudicial. That is the case here.” *Id.* at ¶ 35; see, also, *State v. Whitfield*, Montgomery App. No. 22432, 2009-Ohio-293, at ¶ 120-127.

{¶ 29} The State had the burden to prove that Everett had purposefully killed Cope. As found by the trial court, Exhibit 8 helped to explain that the bullet wound entered the back of the skull, as in an execution-style shooting, and not through the left eye. Exhibit 7 established that Cope was alive when he was shot, and Exhibit 6 helped explain the cause of death. The

State presented a limited number of autopsy photos, they were not cumulative, and each of the disputed photographs was probative of the manner of Cope's death. See *State v. Davis*, 116 Ohio St.3d 404, 880 N.E.2d 31, 2008-Ohio-2, at ¶ 113. Although the photographs are graphic, their probative value was not substantially outweighed by unfair prejudice. The trial court did not err in admitting the autopsy photographs, Exhibits 6-8.

{¶ 30} The second assignment of error is overruled.

IV

{¶ 31} Everett's third assignment of error states:

{¶ 32} “THE TRIAL COURT ERRED IN ITS SUPPLEMENTAL INSTRUCTIONS TO THE JURY, VIOLATING APPELLANT'S RIGHTS TO DUE PROCESS OF LAW UNDER THE FEDERAL AND STATE CONSTITUTIONS.”

{¶ 33} In his third assignment of error, Everett claims that the trial court erred in providing a *Howard* instruction, over the objection of defense counsel, after the jury informed the court that it could not reach a unanimous verdict. He argues: “The jury had clearly and unreservedly communicated that it was deadlocked and going further would require the surrender of honest convictions. The Trial Court did not appear to take into account that this was the second communication from the jury indicating difficulty in reaching unanimity. The fact that the case had previously hung a jury appeared to press the Trial Court to give the instruction after only six hours of deliberations, which in turn pressed the jurors to bring in a verdict.” Alternatively, Everett asserts that the trial court's failure to give an instruction under 2 Ohio Jury Instructions (2008), Section 429.09(3) rendered the *Howard* instruction unduly coercive.

*6 {¶ 34} At approximately 10:30 p.m., after approximately six hours of deliberations, the jury sent the judge a note, which stated: “We, the jury, have come to the conclusion that we cannot make a unanimous decision without the surrender of honest convictions in order to be congenial or to reach a verdict solely because of the opinion of other jurors.” Over defense counsel's objection, the court responded to the note by instructing the jury in accordance with *Howard* and 2 Ohio Jury Instructions (2008), Section 429.09(2), as follows:

{¶ 35} “The principle mode provided by our Constitution and our laws for deciding questions of fact in a criminal case is by jury verdict.

{¶ 36} “In a large proportion of cases, absolute certainty cannot be obtained or expected.

{¶ 37} “Although the verdict must reflect the verdict of each individual juror and must not be mere acquiescence in the conclusion of your fellow jurors, each question submitted to you should be examined with proper regard and deference to the opinions of others.

{¶ 38} “You should consider it desirable that the case be decided.

{¶ 39} “You are selected in the same manner and from the same source as any future jury would be. There is no reason to believe the case will ever be submitted to a jury more capable, impartial or intelligent than this one.

{¶ 40} “Likewise, there is no reason to believe that more or clearer evidence will be produced by either side.

{¶ 41} “It is your duty to decide the case if you can do so with a clean conscious [sic].

{¶ 42} “You should listen to one another's arguments with a disposition to be persuaded.

{¶ 43} “Do not hesitate to re-examine your views and change your position if you are convinced it is erroneous.

{¶ 44} “If there is disagreement, all jurors should re-examine their positions given that a unanimous verdict has not been reached.

{¶ 45} “Jurors for acquittal should consider whether their doubt is reasonable considering that it is not shared by others equally honest who have heard the same evidence with the same desire to arrive at the truth and under the same oath.

{¶ 46} “Likewise, jurors for conviction should ask themselves whether they might reasonably doubt the correctness of a judgment not concurred in by all other jurors.”

{¶ 47} Section 429.09(3), which was not given to the jury, states:

{¶ 48} “It is conceivable that after a reasonable length of time honest differences of opinion on the evidence may prevent an agreement upon a verdict. When that condition exists you

may consider whether further deliberations will serve a useful purpose. If you decide that you cannot agree and that further deliberations will not serve a useful purpose you may ask to be returned to the courtroom and report that fact to the court. If there is a possibility of reaching a verdict you should continue your deliberations.”

*7 {¶ 49} “Jury instructions are within the trial court's discretion. Accordingly, a trial court's decision whether to give a *Howard* instruction is within its discretion, and this court will not reverse that decision absent an abuse of discretion.” (Citations omitted). *State v. Lightner*, Hardin App. No. 6-09-02, 2009-Ohio-4443, at ¶ 11.

{¶ 50} Upon review of the record, the trial court did not abuse its discretion when it instructed the jury in accordance with *Howard* upon receipt of the jury's note. The trial court's supplemental instruction tracked the language approved by the Supreme Court of Ohio in *Howard*. Although a previous trial had ended in a mistrial due to that jury's inability to reach a unanimous verdict, this jury had not previously indicated that it could not reach a verdict, and it had been deliberating for six hours, having received the case earlier in the day on the fourth day of trial. Further, the fact that the jury indicated that it could not reach a verdict without surrendering honest convictions did not require the court to accept this untested belief or to give an instruction under Section 429.09(3). As we stated in *State v. Smith*, Montgomery App. No. 19370, 2003-Ohio-903:

{¶ 51} “We do recognize, of course, that in most cases of this nature, a note from a jury simply reports the existence of a deadlock. In the present case, the forelady went further, expressing an opinion that additional deliberation would not change the situation. In our view, however, such an assertion is implicit in virtually every instance when jurors report an inability to reach a unanimous verdict. Indeed, if jurors thought that continued deliberation might break a deadlock, they presumably would continue deliberating rather than stopping to report a deadlock. As a result, we find nothing particularly significant about the language employed by the forelady in this case. Her untested belief that further deliberation would prove futile did not prohibit the trial court from exercising its discretion to read the *Howard* charge.” (Footnote omitted) *Id.* at ¶ 7, 537 N.E.2d 188.

{¶ 52} The trial court was entitled to encourage the jury to make continued efforts to reach a verdict, if they could conscientiously do so. *Howard*, 42 Ohio St.3d at 25, 537 N.E.2d 188. The court did not coerce the jury to reach a

verdict or mislead the jury, by failing to give the instruction under Section 429.09(3), into believing that a deadlocked jury was not an option.

{¶ 53} The third assignment of error is overruled.

V

{¶ 54} Everett's fourth assignment of error states:

{¶ 55} "THE TRIAL COURT COMMITTED STRUCTURAL ERROR IN CONVICTING APPELLANT OF THE FIREARM SPECIFICATION, IN VIOLATION OF HIS RIGHT TO DUE PROCESS UNDER THE UNITED STATES CONSTITUTION AND THE CONSTITUTION OF THE STATE OF OHIO."

{¶ 56} In his fourth assignment of error, Everett claims that the firearm specifications in the indictment fail to include recklessness as the culpable mental state and that the failure to include the mental state amounts to structural error. We recently addressed and rejected this argument in *State v. Vann*, Montgomery App. No. 22818, 2009-Ohio-5308, reasoning:

*§ {¶ 57} " * * * [A] firearm specification is not an element of the predicate offense, and it does not raise the felony level of the offense. Neither is a firearm specification a separate criminal offense that requires proof of a culpable mental state separate from commission of the predicate offense. *State v. Cook*, Summit App. No. 24058, 2008-Ohio-4841; *State v. Gilbert*, Cuyahoga App. No. 90615, 2009-Ohio-463. Rather, a firearm specification is merely a penalty enhancement that attaches to some predicate offense.

{¶ 58} "R.C. 2941.145 provides that an offender may be sentenced to an additional three year term of imprisonment

where the indictment specifies that 'the offender had a firearm on or about the offender's person or under the offender's control *while committing the offense*, and either displayed the firearm, brandished the firearm, indicated that the offender possessed the firearm, or used the firearm to facilitate the offense.' As the Court of Appeals in *Cook* noted, 'by its own terms, the statute requires that an underlying offense occur for the firearm specification to be applicable.' *Id.* at ¶ 9. It cannot stand alone, and is not itself a separate offense. *Id.* Therefore, a firearm specification does not require its own mens rea. *Id.* at ¶ 8.

{¶ 59} "Simply put, the holdings in *Lozier* [*State v. Lozier*, 101 Ohio St.3d 161, 2004-Ohio-732] and *Colon* [*State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624] do not apply to firearm specifications because they are neither elements of the predicate offense to which they are attached nor separate criminal offenses. Therefore, convictions for firearm specifications do not require proof of a culpable mental state. *Cook; Gilbert.*" *Vann* at ¶ 12-14.

{¶ 60} Based on our opinion in *Vann*, Everett's fourth assignment of error is overruled.

VI

{¶ 61} The judgment of the trial court will be affirmed.

FAIN and WOLFF, JJ., concur.

(Hon. WILLIAM H. WOLFF, JR., retired from the Second District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

Parallel Citations

2009 -Ohio- 5738



The Supreme Court of Ohio

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GILBERT A. BRUSH
CLERK OF COURTS
MONTGOMERY CO OHIO

CLERK OF COURT
SUPREME COURT OF OHIO

State of Ohio

Case No. 2010-0064

v.

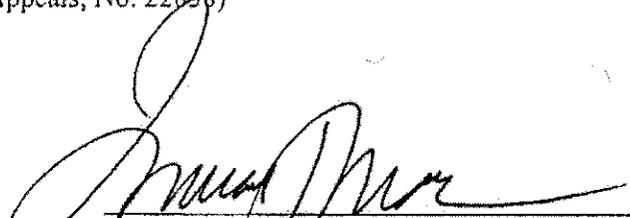
ENTRY

Thomas E. Everette, Jr.

Upon consideration of appellant's motion for a delayed appeal,

It is ordered by the Court that the motion is denied. Accordingly, this cause is dismissed.

(Montgomery County Court of Appeals; No. 22838)


THOMAS J. MOYER
Chief Justice

2010 WL 2474374

CHECK OHIO SUPREME COURT RULES FOR
REPORTING OF OPINIONS AND WEIGHT OF LEGAL
AUTHORITY.Court of Appeals of Ohio,
Fifth District, Licking County.

STATE of Ohio, Plaintiff-Appellee

v.

Bret FOGLE, Defendant-Appellant.

No. 09 CA 114. Decided June 17, 2010.

Criminal Appeal from the Municipal Court, Case No. 08 CRB
1501.**Attorneys and Law Firms**Douglas Sassen, Law Director, Tricia M. Moore, Assistant
Law Director, Newark, OH, for plaintiff-appellee.

Andrew Sanderson, Newark, OH, for defendant-appellant.

Opinion

WISE, J.

*I ¶ 1} Appellant Bret Fogle appeals his conviction and sentence entered on August 17, 2009, in the Licking County Municipal Court on one count of Domestic Violence following a trial by jury.

¶ 2} Appellee is State of Ohio.

STATEMENT OF THE FACTS AND CASE

¶ 3} On June 10, 2008, Appellant Bret Fogle and his wife Lisa Darby were involved in an altercation following an evening consuming alcohol with other family members at the home of Fogle's cousin. (T. at 32-33). At some point during the evening, Darby left to walk a dog and tripped over the dog and fell. *Id.* After the fall, she returned to the cousin's house briefly and then proceeded to go home. (T. at 29). When Appellant returned home later, Darby informed him that she was leaving him and that she had found someone else. (T. at 34-35). Darby then asked Appellant to roll some cigarettes for her. *Id.* According to Darby, Appellant began screaming at her. (T. at 35). Darby pointed a finger at Appellant and told

him to stop talking to her that way. *Id.* Appellant responded by biting her finger. (T. at 36).

¶ 4} On June 13, 2008, Darby went to the police and filed a complaint. (T. at 44). She also sought medical attention for her injuries on that day. *Id.* According to Darby, she suffered a puncture wound to her fingers due to the bite she received from Appellant, along with injuries to her ribs, knee, breast and buttocks. (T. at 42).

¶ 5} Based on the above, Appellant was charged with one count of domestic violence, a first degree misdemeanor.

¶ 6} On June 27, 2008, Appellant appeared before the trial court and entered a plea of Not Guilty to one count of Domestic Violence as contained in the complaint filed against him.

¶ 7} On October 13, 2008, a jury trial was held on the charge. At the conclusion of the trial, the jury returned a verdict of guilty.

¶ 8} The trial court sentenced Appellant, imposing a \$250.00 fine and 180 days in jail, with credit for time served.

¶ 9} Appellant now appeals, assigning the following errors for review:

ASSIGNMENTS OF ERROR

¶ 10} "I. THE RECORD BELOW FAILS TO DEMONSTRATE THAT THE JURY WAS PROPERLY IMPANELED AND PRESENT IN THE COURT ROOM PRIOR TO THE ANNOUNCEMENT OF THE PURPORTED VERDICT.

¶ 11} "II. THE DEFENDANT-APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL.

¶ 12} "III. THE CONVICTION OF THE DEFENDANT-APPELLANT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE PRESENTED BELOW."

I.

¶ 13} In his first assignment of error, Appellant assigns as error the failure of the jury verdict to be returned to the judge in open court, arguing that, as a result, his conviction is improper. We disagree.

{¶ 14} Crim.R. 31(A) requires that a verdict “ * * * be unanimous. It shall be in writing, signed by all jurors concurring therein, and returned by the jury to the judge in open court.”

*2 {¶ 15} This Court has reviewed both the written transcript and the video recording of the trial in this matter and finds that while the written transcript does not reflect the returning of the jury verdict in open court, the video recording does confirm that such did occur, in open court, on the record and in the presence of the jury and Appellant. (See video recording at 3:24:23).

{¶ 16} App.R. 9 provides:

{¶ 17} “(A) **Composition of the record on appeal**

{¶ 18} “ * * * A videotape recording of the proceedings constitutes the transcript of proceedings other than hereinafter provided, and, for purposes of filing, need not be transcribed into written form. Proceedings recorded by means other than videotape must be transcribed into written form. When the written form is certified by the reporter in accordance with App.R. 9(B), such written form shall then constitute the transcript of proceedings. When the transcript of proceedings is in the videotape medium, counsel shall type or print those portions of such transcript necessary for the court to determine the questions presented, certify their accuracy, and append such copy of the portions of the transcripts to their briefs.

{¶ 19} “ * * *

{¶ 20} “(E) **Correction or modification of the record**

{¶ 21} “If any difference arises as to whether the record truly discloses what occurred in the trial court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party is omitted from the record by error or accident or is misstated therein, the parties by stipulation, or the trial court, either before or after the record is transmitted to the court of appeals, or the court of appeals, on proper suggestion or of its own initiative, may direct that the omission or misstatement be corrected, and if necessary that a supplemental record be certified and transmitted. All other questions as to the form and content of the record shall be presented to the court of appeals.”

{¶ 22} Pursuant to App.R. 9(A) as set forth above, it was the responsibility of counsel for Appellant to “type or print

those portions of such transcript necessary for the court to determine the questions presented.” It appears from the record that counsel for Appellant did, in good faith, order the complete record to be transcribed; however, the court reporter or transcriptionist in this case failed to include that portion of the record where the jury reconvened after deliberations and returned their verdict to the judge in open court.

{¶ 23} As set forth above, App.R. 9(E) provides a means to correct and/or supplement any errors or omissions in the record. This correction may be initiated by the “parties by stipulation, or the trial court, either before or after the record is transmitted to the court of appeals, or the court of appeals, on proper suggestion or of its own initiative.”

*3 {¶ 24} While this Court has the authority, based on the foregoing, to have the court reporter correct the record and have the supplemental record certified and transmitted, we find that such is not necessary in this case because App.R. 9(A) provides that the videotape recording, or in this case a CD ROM, constitutes the transcript of the proceedings. However, we think the better practice in cases such as these would be for the State to ask to have the transcript be corrected and supplemented to accurately reflect the proceedings.

{¶ 25} Based on the foregoing, we find Appellant's first assignment of error not well-taken and overrule same.

II.

{¶ 26} In his second assignment of error, Appellant argues that he was denied the effective assistance of counsel. We disagree.

{¶ 27} Our standard of review is set forth in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. Ohio adopted this standard in the case of *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373. These cases require a two-pronged analysis in reviewing a claim for ineffective assistance of counsel. First, we must determine whether counsel's assistance was ineffective; i.e., whether counsel's performance fell below an objective standard of reasonable representation and whether counsel violated any of his or her essential duties to the client.

{¶ 28} If we find ineffective assistance of counsel, we must then determine whether or not the defense was actually prejudiced by counsel's ineffectiveness such that the reliability of the outcome of the trial is suspect. This requires a showing that there is a reasonable probability

that but for counsel's unprofessional error, the outcome of the trial would have been different. *Id.* at 141-142, 538 N.E.2d 373. Trial counsel is entitled to a strong presumption that all decisions fall within the wide range of reasonable professional assistance. *State v. Sallie*, 81 Ohio St.3d 673, 675, 693 N.E.2d 267, 1998-Ohio-343. Tactical or strategic trial decisions, even if ultimately unsuccessful, will not substantiate a claim of ineffective assistance of counsel. *In re M.E.V.*, 10th Dist. No. 08AP-1097, 2009-Ohio-2408, ¶ 34.

{¶ 29} Appellant specifically cites trial counsel's failure to object to the failure of the trial court to read and accept the jury's verdict in open court.

{¶ 30} Upon review and based on our disposition of Appellant's first assignment of error, we cannot say that Appellant's counsel's performance fell below the standard.

{¶ 31} Appellant's second assignment of error is overruled.

III.

{¶ 32} In his third and final assignment of error, Appellant argues that his conviction was against the manifest weight of the evidence. We disagree.

{¶ 33} On review for manifest weight, a reviewing court is to examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine "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. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717. See also, *State v. Thompkins*, 78 Ohio St.3d 380, 678 N.E.2d 541, 1997-Ohio-52. In making this determination, the Supreme Court of Ohio has outlined eight factors for consideration, which include "whether the evidence was uncontradicted, whether a witness was impeached, what was not proved, that the reviewing court is not required to accept the incredible as true, the certainty of the evidence, the reliability of the evidence, whether a witness' testimony is self-serving, and whether the evidence is vague, uncertain, conflicting, or fragmentary." *State v. Apanovitch* (1987), 33 Ohio St.3d 19, 23-24, 514 N.E.2d 394, citing *State v. Mattison* (1985), 23 Ohio App.3d 10, 490 N.E.2d 926, syllabus. Ultimately, however, "[t]he discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *Martin*, 20 Ohio App.3d at 175, 485 N.E.2d 717.

*4 {¶ 34} "When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a "thirteenth juror" and disagrees with the factfinder's resolution of the conflicting testimony." *Tibbs v. Florida* (1982), 457 U.S. 31, 42, 102 S.Ct. 2211, 72 L.Ed.2d 652."

{¶ 35} In the case sub judice, Appellant was convicted of domestic violence in violation of R.C. § 2919.25(A) which states, "[n]o person shall knowingly cause or attempt to cause physical harm to a family or household member."

{¶ 36} At trial, the State presented the testimony of the victim as well as her medical records and photographs of her injuries. She testified that the injuries she sustained were caused by Appellant.

{¶ 37} Appellant claims that the testimony of Appellant's relatives support his position that the victim sustained her injuries in the fall which occurred when walking the dog. Appellant further argues that the fact that he, and not the victim, filed for divorce and the fact that the victim did not report the incident or seek medical treatment until days later render her testimony incredible.

{¶ 38} Upon review, while we find that the testimony of Timothy Fogle and David Fogle support the fact that the victim, upon her return after walking the dog, told everyone that she had fallen and that she complained of being sore, we find that neither Timothy Fogle nor David Fogle were present during the altercation which ensued between Appellant and the victim later in the evening and neither can say when or where she sustained her injuries. The victim's fall earlier in the evening does not negate the possibility that she sustained injuries later at the hand of Appellant.

{¶ 39} In this case, as in many domestic violence cases, the altercation between the Appellant and the victim occurred when no one else was present. At trial, both the victim and Appellant testified to conflicting versions of events. The jury was free to accept or reject any and all of the evidence offered by the parties and assess the witness's credibility. "While the jury may take note of the inconsistencies and resolve or discount them accordingly * * * such inconsistencies do not render defendant's conviction against the manifest weight or sufficiency of the evidence". *State v. Craig* (Mar. 23, 2000), Franklin App. No. 99AP-739, citing *State v. Nivens* (May 28, 1996), Franklin App. No. 95APA09-1236. Indeed, the jurors need not believe all of a witness' testimony, but may accept only portions of it as true. *State v. Raver*, Franklin App.

No. 02AP-604, 2003-Ohio-958, at ¶ 21, citing *State v. Antill* (1964), 176 Ohio St. 61, 67, 197 N.E.2d 548.; *State v. Burke*, Franklin App. No. 02AP1238, 2003-Ohio-2889, citing *State v. Caldwell* (1992), 79 Ohio App.3d 667, 607 N.E.2d 1096.

{¶ 40} The jury in this matter chose to believe the victim.

*5 {¶ 41} While appellate review includes the responsibility to consider the credibility of witnesses and weight given to the evidence, these issues are primarily matters for the trier of fact to decide. *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212. Therefore, based on the evidence presented, we cannot say that the jury clearly lost its way and created a manifest miscarriage of justice when it convicted Appellant.

{¶ 42} Based on the foregoing, we find the jury did not lose its way, and find no manifest miscarriage of justice.

{¶ 43} Appellant's third assignment of error is overruled.

{¶ 44} For the reasons stated in the foregoing opinion, the judgment of the Municipal Court of Licking County, Ohio, is affirmed.

WISE, J. EDWARDS, P.J., and DELANEY, J., concur.

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2010 -Ohio- 2805

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2003 WL 22657825

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Ninth District, Medina County.

STATE of Ohio, Appellee,

v.

Donn DOWNS, Appellant.

No. 03CA0053-M. Decided Nov. 12, 2003.

Defendant was convicted in a jury trial in the Wadsworth Municipal Court, Medina County, No. 02TRD07350-C, of driving under suspension (DUS). Defendant appealed. The Court of Appeals, Carr, J., held that regularity of trial court's proceedings would be presumed.

Affirmed.

Appeal from Judgment Entered in the Wadsworth Municipal Court County of Medina, Ohio, Case No. 02TRD07350- C.

Attorneys and Law Firms

Donn Downs, Akron, OH, for appellant.

Page C. Schrock, Prosecuting Attorney, Wadsworth, OH, for Appellee.

Opinion

CARR, Judge.

*1 ¶ 1 Appellant, Donn Downs, appeals the decision of the Wadsworth Municipal Court, which found him guilty of driving under suspension. This Court affirms.

I.

¶ 2 Appellant was cited for one count of driving under suspension, in violation of R.C. 4507.02(D); and two counts of non-compliance or driving under a financial responsibility act suspension, in violation of R.C. 4507.02(B)(1). The case proceeded to jury trial. The jury found appellant guilty of driving under suspension, and the trial court sentenced appellant accordingly.

¶ 3 Appellant timely appealed, setting forth six assignments of error.

II.

¶ 4 An appellate court's review is restricted to the record provided by the appellant to the court. App.R. 9. See, also, App.R. 12(A)(1)(b). In accordance with App.R. 9(B), the appellant assumes the duty to ensure that the record, or the portion necessary for review on appeal, is filed with the appellate court. *Rose Chevrolet, Inc. v. Adams* (1988), 36 Ohio St.3d 17, 19, 520 N.E.2d 564. See, also, App.R. 10(A); Loc.R. 5(A). This duty falls upon the appellant because the appellant has the burden on appeal to establish error in the trial court. *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199, 400 N.E.2d 384; App.R. 9(B).

¶ 5 In the case sub judice, the record on appeal consists of the docket and journal entries from the trial court, as well as a certified videotape of the trial proceedings. This Court finds that the videotape is insufficient to satisfy the appellant's burden of establishing error. App.R. 9(A) provides, in pertinent part:

"A videotape recording of the proceedings constitutes the transcript of proceedings other than hereinafter provided, and for purposes of filing, need not be transcribed into written form. * * * When the transcript of proceedings is in the videotape medium, counsel shall type or print those portions of such transcript necessary for the court to determine the questions presented, certify their accuracy, and append such copy of the portions of the transcripts to their briefs." See, also, Loc.R. 5(A)(1)(b).

¶ 6 Appellant provided a certified videotape of the trial proceedings. However, appellant failed to provide this Court with any typed portion of the videotape transcript.

¶ 7 A presumption of validity accompanies the ruling of the trial court. Without those portions of the record necessary for the resolution of an appellant's assignment of error, "the reviewing court has nothing to pass upon and * * * has no choice but to presume the validity of the lower court's proceedings and affirm." *Knapp*, 61 Ohio St.2d at 199, 400 N.E.2d 384. Appellant failed to attach typed portions of the videotape transcript necessary for the review of his assignments of error; therefore, this Court must presume the regularity of the trial court's proceedings and affirm its judgment. See, e.g., *State v. Williams*, 9th Dist. No. 3247-

M, 2002-Ohio-1638; *State v. Schwarz*, 9th Dist. No. 3176-M, 2001-Ohio-1731; *State v. Buzzelli*, 9th Dist. No. 3145-M, 2001-Ohio-1634. Accordingly, appellant's six assignments of error are overruled.

Judgment affirmed.

SLABY, P.J., and BAIRD, J., Concur.

III.

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2003 -Ohio- 6009

*2 {¶ 8} Having overruled appellant's six assignments of error, the judgment of the Wadsworth Municipal Court is affirmed.

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2005 WL 583798

CHECK OHIO SUPREME COURT RULES FOR
REPORTING OF OPINIONS AND WEIGHT OF LEGAL
AUTHORITY.

Court of Appeals of Ohio,
Eleventh District, Geauga County.

Clifford DANIELS, Plaintiff-Appellant,

v.

Christopher SANTIC, Defendant-Appellee.

No. 2004-G-2570. March 11, 2005.

Synopsis

Background: Contractor, who abandoned project to build garage foundation, filed breach-of-contract action against property owner. Property owner counterclaimed, alleging breach of contract and unworkmanlike construction. Following a bench trial, the Chardon Municipal Court, No. 2003 CVF 171, entered judgment in favor of property owner. Contractor appealed.

Holdings: The Court of Appeals, Geauga County, Rice, J., held that:

1 contractor's failure to transcribe portions of videotape of trial that were necessary to determine questions presented on appeal, to certify accuracy of those portions, and to append copy of portions of transcript to brief precluded review of assignments of error that required review of videotape, and 2 contractor's failure to properly reference portions of record supporting assignments of error precluded contractor from demonstrating his claimed errors.

Affirmed.

Civil Appeal from the Chardon Municipal Court, Case No.2003 CVF 171. Affirmed.

Attorneys and Law Firms

Clement Kollin and Katherine A. Scheid, Cleveland, OH, for Plaintiff-Appellant.

Ronald A. Skingle, Cleveland, OH, for Defendant-Appellee.

Opinion

OPINION

RICE, J.

*1 ¶ 1 Appellant, Clifford Daniels ("Daniels"), appeals from the judgment of the Chardon Municipal Court awarding appellee, Christopher Santic ("Santic"), \$10,033.16 in damages on Santic's counterclaim for breach of contract and unworkmanlike performance. We affirm.

¶ 2 Daniels agreed to build a garage foundation on Santic's property for \$6,450. Daniels began the work but abandoned the project. The foundation as constructed by Daniels was defective and cracked. The Geauga County Building Inspector "red tagged" the foundation because of the defects in workmanship.

¶ 3 Santic hired other contractors to repair the defects in Daniels' work and complete the project. Santic paid \$16,483.16 to have the repairs made and the project completed.

¶ 4 Daniels filed a breach of contract action against Santic. Santic counterclaimed alleging breach of contract and unworkmanlike construction. The matter proceeded to a bench trial. The trial court awarded judgment in favor of Santic on Daniels' breach of contract claim and on Santic's claims for breach of contract and unworkmanlike construction. Daniels filed a timely appeal raising four assignments of error:

¶ 5 "[1.] The trial court erred to the prejudice of plaintiff-appellant by finding, in the absence of expert testimony, that plaintiff-appellant failed to perform in a workmanlike manner and that such failure was the cause of damage to defendant-appellee.

¶ 6 "[2.] The trial court erred to the prejudice of plaintiff-appellant by allowing the introduction of photographs into evidence when the witness was not the photographer and had no personal knowledge of when the pictures were taken [or] the condition which was depicted.

¶ 7 "[3.] The trial court erred to the prejudice of plaintiff-appellant by accepting the defendant's self-serving, non-expert testimony as to the cause and cost of the damage and the money necessary for repair and completion.

{¶ 8} “[4.] The trial court erred to the prejudice of plaintiff-appellant by miscalculating the award of damages including items never originally included in the contract.”

1 {¶ 9} Each assignment of error raised by Daniels requires review of the transcript. In this case, the trial was recorded by videotape. Because appellant has failed to comply with the requirements of App.R. 9 and 16(D) we affirm the trial court's judgment.

{¶ 10} App.R. 9(A) provides in relevant part:

{¶ 11} “A videotape recording of the proceedings constitutes the transcript of proceedings other than hereinafter provided, and, for purposes of filing, need not be transcribed into written form. Proceedings recorded by means other than videotape must be transcribed into written form. * * * When the transcript of proceedings is in the videotape medium, counsel shall type or print those portions of such transcript necessary for the court to determine the questions presented, certify their accuracy, and append such copy of the portions of the transcripts to their briefs.”

*2 {¶ 12} Daniels did not transcribe the portions of the video necessary to determine the questions presented, certify their accuracy, or append a copy of the portions of the transcript to his brief. We cannot consider those assignments of error that would require a review of the videotape. *Deer Lake Mobile Park v. Wendel*, 11th Dist. No.2002-G-2438, 2003-Ohio-6981, ¶ 15. See, also, *Visnich v. Visnich* (Dec. 17,

1999), 11th Dist. No. 98-T-0144, 1999 Ohio App. LEXIS 6140, at 4, (stating, “As we have held on numerous occasions this court will not, nor should appellant expect it to, search through the videotapes in order to find passages that support the assignments of error raised.”) (Internal quotations and citations omitted.)

2 {¶ 13} App.R. 16(D) provides:

{¶ 14} “References in the briefs to parts of the record shall be to the pages of the parts of the record involved; * * *. If reference is made to evidence, the admissibility of which is in controversy, reference shall be made to the pages of the transcript at which the evidence was identified, offered, and received or rejected.”

{¶ 15} Appellant's brief fails to properly reference the portions of the record supporting his assignments of error and thus, he cannot demonstrate his claimed errors.

{¶ 16} For the foregoing reasons, appellant's assignments of error are without merit and the judgment of the Chardon Municipal Court is affirmed.

DONALD R. FORD, P.J., ROBERT A. NADER, J., Ret.,
Eleventh Appellate District, sitting by assignment, concur.

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