

TABLE OF CONTENTS

NNE LEWIS WAS CONVICTED OF MURDER WITH FIREARM SPECIFICATIONS(F-1) 1

STATEMENT OF THE CASE AND FACTS 1

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW 2

 Proposition of Law #1: 2

 THE APPELLATE COURT IMPROPERLY SUSTAINED THE GUILTY VERDICT AND CONVICTION FOUND BY THE JURY AGAINST APPELLANT WAS BASED UPON INSUFFICIENT EVIDENCE.

 Proposition of Law #2 8

 THE APPELLATE COURT IMPROPERLY SUSTAINED THE GUILTY VERDICT AND CONVICTION WHICH WERE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

 Proposition of Law #3 12

 THE APPELLATE COURT IMPROPERLY RULED THAT DEFENSE COUNSEL DID NOT COMMIT INEFFECTIVE ASSISTANCE OF COUNSEL.

 Proposition of Law #4 13

 THE APPELLATE COURT IMPROPERLY RULED THAT THE TRIAL COURT’S ADMISSION OF HEARSAY TESTIMONY WAS HARMLESS ERROR.

CONCLUSION 15

CERTIFICATE OF SERVICE 16

JOURNAL ENTRY OF THE CUYAHOGA COUNTY COURT OF APPEALS
(FILED DECEMBER 5, 2011, VOLUME 742, PAGE 877)

NNE LEWIS WAS CONVICTED OF MURDER WITH FIREARM SPECIFICATIONS

This case presents four Propositions of Law in this felony murder case.

STATEMENT OF THE CASE AND FACTS

The trial was conducted beginning on September 15, 2010 and ended on September 22, 2010.

On September 23, 2010, the jury found Appellant Nne Lewis guilty of murder pursuant to O.R.C. 2903.02(A) with one and three year firearm specifications.

On October 26, 2010, Appellant was sentenced to eighteen years at the Lorain Correctional Institution with the three year gun specification to be served prior to and consecutive to the fifteen years.

On November 3, 2010, Appellant filed an appeal with the Cuyahoga County Eighth District Court of Appeals. The Eighth District Appellate Court affirmed the judgment of the trial court on December 1, 2011.

Appellant Nne Lewis and victim/cousin Erik Lewis were residing at 1853 Allandale in East Cleveland, Ohio in January 2010 at the home of their paternal uncle and aunt, Isaac and Cynthia Anderson. (Zoe Anderson also resided there). On January 5, 2010, Isaac, Cynthia, and Nne were at the home. Erik was at work. At approximately 2:30 - 3:00 A.M., Zoe arrived at the Allandale residence. At almost the same instance, Isaac and Cynthia were awoken by gun shots.

Zoe found the body just inside the home. The East Cleveland police were called and took photographs. The Lewis family were initially unsure whether the victim was Appellant or his cousin. Erik Lewis was identified as the victim who expired at the hospital. Nne Lewis' whereabouts were unknown.

Approximately ten hours later, Appellant's father received a call from his son who asks his father to pick him up at which point Appellant is immediately arrested.

Appellant Nne Lewis is taken to the East Cleveland police department where he is booked and interviewed by a detective after he signed a Miranda waiver. Appellant states, "he was scared, and he was running," and, that he had spent the night in an abandoned house.

The detective requested assistance to perform a gun residue test, a trajectory analysis and ballistics comparison.

The Cuyahoga County Coroner's Office rendered its verdict on May 26, 2010 and the death of Erik Lewis was ruled a homicide.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

PROPOSITION OF LAW #1 THE APPELLATE COURT IMPROPERLY SUSTAINED THE GUILTY VERDICT AND CONVICTION FOUND BY THE JURY AGAINST APPELLANT WAS BASED UPON INSUFFICIENT EVIDENCE.

Appellant Nne Lewis challenged the sufficiency of the evidence supporting his conviction for murder with a one and three year firearm specification. The appellate court sustained the conviction.

A challenge to the sufficiency of the evidence supporting a conviction requires a court to determine whether the State has met its burden of production at trial. State v. Thompkins, (1997), 78 Ohio St.3d 380, 390, 1997-Ohio-52, 678 N.E.2d 541. On review for sufficiency, courts are to assess not whether the State's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction. Id. State v. Jenks (1981) 61 Ohio St. 3d 259, 574 N.E. 2d 492.

Appellant believes that in the lower Appellate Court, there was error as no reasonable person would believe he was guilty beyond a reasonable doubt. There were no witnesses to the

shooting of the victim and there are several issues which involve circumstantial evidence, which do not rise to the level of proof "beyond a reasonable doubt." Appellant asserts that the Appellate Court decision inappropriately affirmed with the jury's guilty verdict in the absence of evidence which is in fact convincing as to the elements of the crime of murder.

1. GUN RESIDUE

A BCI employee testified that she conducted gunshot residue testing on Appellant's hands, pants and sweatshirt. That witness testified that she found from Appellant Lewis' sweatshirt "two particles on the left cuff and left pocket area."

There were no particles indicative of gunshot primer on Appellant Nne Lewis' pants or hand. That witness also testified to the fact that Nne Lewis is right-handed, and that she has done many tests where there were a lot more gunshot primer residue, and that residue can stick to clothing by walking through a room.

There is significant doubt as to what this evidence means. Minimally, this means that Nne Lewis was near a fired gun. There is no explanation as to why absolutely no one else in the home had GSR tests done.

Another BCI witness testified that only one bullet was sent to him by the Cuyahoga County Coroner's Office. He states that he received a total of six bullets and one fragment. It is not clear how many of the five bullets submitted by the police to BCI were gathered from bullets which exited the deceased body. However, it is fair to assume that there were close to eleven shots fired at the scene of the crime, as the victim was shot eight times.

The fact that there were minor particles of gunshot primer residue on Nne Lewis' clothing, particularly when so many shots are fired, is not proof beyond a reasonable doubt that he discharged a firearm.

The Appellate decision makes improper conclusions about the minor amount of gun shot residue on Appellant. The Appellate decision states:

“He did have some particles indicative of GSR on some parts of his clothes that were tested despite that he had been absent for approximately ten hours.” at page 12.

This conclusion is not logical. “Some particles” is actually a total of three (3) particles on Appellant’s left cuff and pocket area. No particles were found on Appellant’s right side or on his hands. Why should finding three particles equate with the conclusive finding because “ten hours” had gone by? If Appellant had changed his clothes, why is there any GSR? Appellee called several witnesses who saw Appellant leave the home. How credible are highly intoxicated men with criminal records who think they remember what Appellant was wearing? The same men who were assisted in their probation violation problems.

Again, Appellant believes that the GSR evidence is insufficient to support the conviction.

2. NEGATIVE DNA TESTS

A witness from the Cuyahoga County Coroner’s office testified that he was asked to perform a DNA analysis from the six (6) spent gun casings.

He testified that there was “an insufficient quantity of human DNA detected” on the casings. The appellate decision fails to mention this fact and only references at page nine that “insufficient DNA” was obtained from the bullets.

These are negative tests which do not implicate Appellant Nne Lewis in any way.

3. WHERE WAS THE GUN FIRED?

The State of Ohio asserts that all of the gun shots had to be fired from inside the home.

The State called a third BCI employee who conducted a shooting reconstruction. He testified that one bullet was probably shot from within the home, but two others could have been fired from either inside or outside the home.

This testimony suggests that B.H. No. 1 was fired from the first floor hallway, and down the stairs, but he fails to explain how the six casings are found around the victim.

It also fails to explain how the immediate recollections of both the aunt and uncle are contrary to this witness' experiments. The uncle testified that the first shots "sounded like they came from outside" and the last shots sounded like they came from within.

The aunt testified that "I kept seeing the shots outside the window. I could see lights, and they were flashing." Although this testimony is mentioned in the Appellate decision, it gives no apparent consideration to the aunt and uncle's recollections.

Again, this evidence is insufficient to convict Appellant as the shooter.

4. APPELLANT'S 10 HOUR ABSENCE

Appellant Nne Lewis went to an abandoned home for approximately ten hours.

The detective interviewed Appellant, and related that he stated the following about what he did after his cousin was shot:

- He said he came out into the driveway of the residence and ran down Allandale.
- He said that he ran down and was being shot at from the street. And then later he told me that he ran down and was being shot from the rear of residence.
- He indicated that he ran down Allandale towards Euclid, and that he was approached by a male that got out - - he referred to it as a red vehicle. The male said, What's up? At that point he thought that male had a gun, so he continued running.
- He stated he was scared, and he was running.
- He stated that he spent the night in an abandon residence on East 143rd which was the abandon residence that he eventually made the telephone call from.

The detective admitted that Appellant voluntarily waived his Miranda rights and also cooperated with the gunshot residue and DNA tests.

A second detective testified that he heard Appellant Lewis speaking to TaShawna Murray's cell phone (which was on speaker) and heard him ask her to pick him up "and take him

out of the city.”

All of these statements allegedly spoken by Appellant are consistent with each other. He stated he is scared. He is afraid that someone was trying to shoot him or rob him. He already knew that someone has shot at his cousin.

Whether or not some third party might have robbed Erik Lewis was never investigated by the East Cleveland Police Department. Yet, according to testimony, the victim only had fifty-six cents on him when he was killed. No investigation was done to determine where the victim was drinking or with whom before he returned home. According to the Toxicology Laboratory Report, the victim’s blood alcohol level was 0.116. This is a level which is very high, meaning the victim was very intoxicated. There is no explanation as to why victim returned home at 2:30 a.m instead of at his normal 12:00 a.m. time. The aunt testified that the victim had seventy dollars on him earlier that day. The Appellate decision at page 13, however, incorrectly states that Ms. Lewis “held” the deceased’s money that day. If victim was robbed, this would be consistent with what Appellant told the police. It would also explain why there was only fifty-six cents in the victim’s pocket. The victim’s mother Theresa Lewis raises her concern about the poor police investigation (noting that she heard it “was a robbery gone bad”:

MS. LEWIS: I asked, Was my son at work that day? Nobody could tell me. I asked, who was he with after work? Nobody could tell me. I said, who was the last two people who saw My son alive? Nobody could tell me.

There is not any evidence or testimony which contradicts Appellant’s claim that he was afraid for his own safety.

5. APPELLANT’S ALLEGED ACCESS TO GUNS IS REMOTE

The State of Ohio, through innuendo, tried to show Appellant had access to guns.

Appellant's father is asked about whether or not his son had taken his firearms, and he states, "absolutely not." Mr. Lewis also testified that his son did not know the combination to the handgun safe.

The State of Ohio also calls the aunt, Ms. Lewis, who testified that "her brother found out that he had two guns that he was trying to take out of the house." (Emphasis added).

Ms. Lewis admitted that she never saw any fire arm or permitted one in her house.

The girlfriend, Ms. Murray, testified about seeing Nne three time with guns in the past.

The weapon or weapons used to shoot Erik Lewis were never found. There is no direct evidence that Nne Lewis had a gun on January 5-6, 2010. There is no evidence that he ever stole his father's guns. Ms. Murray testified that she has seen Nne around or with a gun three times since elementary school with no dates provided. The date that may have occurred is unclear.

Despite the remoteness of the testimony regarding guns and Appellant, the Appellate decision at page 13 states:

"testimony placed defendant in possession of guns on at least three occasions and indicated that he may have attempted to recently remove guns from this father's home." (Page 13)

Again, the Appellant's prior three possessions of guns is remote, and insufficient to prove that he had possession of a gun and used it to kill his cousin.

6. APPELLANT'S JEALOUSY IS ALSO REMOTE

Appellee stresses the idea that Appellant Lewis was jealous of his cousin.

Although Appellee asserts that proof of motive is not necessary, the jealousy issue is a primary component of its case. Appellant's girlfriend TaShawna Murray admitted that he had accused her of sleeping with the deceased. Ms. Murray also admitted that she told the Appellant that she had slept with "everybody."

She also testifies that on January 5, 2010, during many telephone calls with Appellant,

that Erik Lewis' name never came up, and that Appellant never expressed any jealousy towards his cousin that night. Ms. Murray also admitted that she was with a Robert Shields on January 5, 2010, and that Appellant was clearly jealous. Mr. Shield's believed that Ms. Murray was trying to make Appellant jealous.

Ms. Murray does state that Erik Lewis' name only came up because the Appellant "couldn't wait until Erik got there so he could tell him what I did." (with Robert Shields).

The Appellate Court does not discuss the jealousy issue in its decision on the 'insufficiency' issue. However, it is discussed in the opinion's factual summary. In failing to discount the jealousy assertion, the Appellate decision seems to lend credibility to it.

Again, the jealousy motive is speculative and unpersuasive and not at issue on the night of the shooting. .

This is another remote, unconnected theme which does not prove that Appellant purposefully killed his cousin.

All of the above subsections demonstrate insufficient evidence. Minimal gun residue raises several questions. There was no DNA evidence. The Appellant's fleeing the scene clearly occurred. Even the story told through the police supports that he was afraid for his life. The access to guns and jealousy issue do not have probative value. Likewise, the relationship with the girlfriend and the trajectory theories present insufficient evidence that Appellant committed the crime of murder. The State of Ohio has presented a series of issues which suggest that Appellant was involved in circumstances unrelated to shooting. Most of the issues are red herrings. The State of Ohio's case was insufficient, and yet the Appellate Court sustained the conviction for murder. Appellant therefore prays for a reversal of his conviction and remand.

PROPOSITION OF LAW #2: THE APPELLATE COURT IMPROPERLY SUSTAINED THE GUILTY VERDICT AND CONVICTION WHICH WERE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

Under the manifest weight of the evidence standard of review, the appellate court sits as a “thirteenth juror” and may disagree with the fact finder’s resolution of the conflicting evidence. State v. Thompkins (1997), 78 Ohio St.3d 380, 387. The appellate court “must review the trial record, and determine if, “the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reserved and a new trial ordered.” Id., quoting State v. Martin (1983), 20 Ohio App.3d 172, 175.

Appellant incorporates the various evidentiary issues discussed in Proposition of Law #1.

In viewing the evidence, there are three primary areas which involved Appellant:

1. APPELLANT’S PRESENCE AT MURDER SCENE

Nne Lewis was at home on January 5, 2010. His aunt and uncle so testify. He admitted to a detective that he was in the home when the shooting occurred. This evidence of mere presence is hardly adequate to equate directly that Appellant is the shooter.

The State of Ohio’s evidence is inconsistent as to whether or not the shooter was inside the home when all bullets were shot. One BCI witness stated that two bullets could have been fired from “either inside or outside the home. Ms. Lewis testified that she saw “flashing” outside her window. Her husband thought the first shots “sounded like they came from outside.”

Another State’s witness from the Cuy. Cty. Coroner, testified that some of the victim’s wounds went in the front, and some in his back. There is also testimony that the door which the victim entered was opened more than 90 degrees.

Thus, there is considerable evidence which raises significant doubts about whether or not Appellant’s presence at his home equates with him being the shooter. The State’s expert testifies that two of the random bullets could have been shot outside of the home.

Appellant’s presence at the crime scene is not enough to justify the conviction.

2. APPELLANT'S FLIGHT

Nne Lewis left the home after the shooting for approximately ten hours.

The Appellant's exit from his home where the shooting occurred has been discussed above. Appellant admitted that he had spent the night in an abandoned home. He indicated that he had been shot at and was afraid for his safety. He also cooperated with the detective and made a voluntary statement. The fact that Appellant fled, and admitted it, is not an admission of guilt.

The Appellate decision states that the jury received a "flight" instruction at page 14, but fails to offer any discussion as to why this supports the conviction against the manifest weight of the evidence.

3. MINIMAL GUN POWER RESIDUE

Nne Lewis had minor gun powder residue on his left cuff and left pocket area.

The State's witness indicated that there was no gunshot primer residue on Appellant's hands or pants. She admitted in her testimony that two particles found on Appellant's left cuff and pocket area are small amounts, and conceded that those particles could have gotten on Appellant's clothing from "walking through gunshot residue powder."

This punches a large hole in the State's theory that gunshot residue powder falls to the ground quickly due to gravity, and does not stay in the air.

The verdict was against the manifest weight as to the gun power residue issue.

4. MISCELLANEOUS CUMULATION OF IRRELEVANT AND REMOTE EVIDENCE.

As argued above, Appellee offered significant evidence which is remote to this case. Appellant's prior possession of firearms on three occasions is one such area. A second is the fights between Appellant Lewis and his girlfriend TaShawna Murray. A third area of remote evidence is Appellant's alleged jealousy of the decedent.

In addition, the State of Ohio presented its DNA expert, with no findings. The State called another male friend of Ms. Murray, who Appellant was allegedly jealous of on the night of the shooting.

Appellee also introduced 31 different photographs of the victim's naked and bullet-ridden body and 55 photographs of the his bullet-holed and bloody clothing.

Not one of these areas of evidence is enough to convict Appellant. It is not even clear if all of the State's evidence had much probative value in determining whether or not Appellant Lewis purposely killed his cousin. The State of Ohio called 35 witnesses and introduced in total 190 exhibits.

The conglomeration of remote, innuendo-filled evidence introduced by the State of Ohio has nothing to do with what should be considered as relevant evidence to support the conviction against Appellant. The Appellate decision fails to address head on the remoteness of much of the evidence, but sustaining the verdict of page 15 based upon consideration of the "record."

The three areas which have any non-remote bearing on the involvement of Nne Lewis as the shooter as discussed above. He was present and had minimal gun residue on his clothes. He fled the scene of the crime for ten hours.

There is no direct evidence that he possessed a firearm on January 5-6, 2010. His DNA is not on any bullet casings. There is no evidence that he had any type of jealousy towards the deceased that night. Clearly, if jealousy was at issue, the man with Ms. Murray on that night could have been the object of his anger, but not his cousin. Whether or not shots were fired inside and outside the house seems up for question, as two eye witnesses testify that they heard the sounds and lights of the shooting gun from outside.

Appellant Lewis contends that the red herrings and remote issues presented to the jury caused the jury to lose its way. It was a miscarriage of justice to convict Nne Lewis of

purposefully causing the death of his cousin. The manifest weight of the evidence must involve substantive evidence and not just large amounts of evidence. The State of Ohio's case seems to suggest that more evidence equates with manifest evidence. The Appellate Court utilizing the "totality" approach ignores that the "totality" of large amounts of remote, irrelevant evidence.

For these reasons, Appellant Nne Lewis request a reversal and remand.

PROPOSITION OF LAW #3: THE APPELLATE COURT IMPROPERLY RULED THAT DEFENSE COUNSEL DID NOT COMMIT INEFFECTIVE ASSISTANCE OF COUNSEL.

A claim of ineffective assistance of counsel requires a defendant to show that (1) the performance of defense counsel was seriously flawed and (2) the result of the appellant's trial would have been different had defense counsel provided proper representation. Strickland v. Washington (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674.

First, it must be determined if there was a substantial violation of any of "defense counsel's essential duties to his client." State v. Bradley (1998), 42 Ohio St. 3d 136, 538 N.E. 2d 373. On this prong of the Strickland test, one must ask whether or not the failure of the defense counsel discussed below was such a duty violations.

The second prong of Strickland is whether or not Appellant Lewis was prejudiced by counsel's ineffectiveness.

Defense counsel's elicitation of testimony from a witness who believed God told her that the Appellant committed this crime meets both criteria of ineffective assistance of counsel.

The paternal aunt Cynthia Lewis is called as a State's witness. In cross-examination by defense counsel, she was asked if she believes that her nephew killed his cousin. She responds, "yes," and then states the following about Appellant Nne Lewis:

"Okay then. The Lord told me, he came to my spirit, he did it."

This elicitation of testimony that the Lord told her that her nephew “did it” is extremely prejudicial. Here is an aunt who says she loves the Appellant, and yet she tells the jury that she thinks he is capable of committing the murder of her other nephew. It was a decision not just flawed, but in a case with so much circumstantial evidence, this is a significant evidence against the Appellant’s interests. There is no conceivable reason why defense counsel would elicit this.

At page 17, the Appellate decision concluded that this was “trial strategy.” The Appellate Court’s view is that this testimony was elicited to show that Appellant’s aunt did not base her view on any evidence. It is unclear what the lower court meant when it also states that “other family members clearly implied her (Cynthia Lewis’) belief that defendant was guilty of the murder.” There is quite a bit of discussion on the testimony of Appellant’s father about Cynthia Lewis. It is clear that the brother believes that his sister likes to create controversy.

However, it is unclear where in the transcript Ms. Lewis thinks that her nephew Nne is the murderer until defense counsel elicits that testimony. There is no apparent or subtle rationale which justifies that the defense attorney should have highlighted how or why Appellant’s loving aunt believes her nephew is a murderer.

Appellant suffered a substantial prejudice when the jury heard his aunt state that she believes that he committed the murder. To compound this prejudice, defense counsel, at least in arguendo, elicits hearsay as the person or entity who Ms. Lewis’ quotes (God) is unavailable. Based upon this extreme testimony, Appellant prays for reversal and remand on this issue.

PROPOSITION OF LAW #4: THE APPELLATE COURT IMPROPERLY RULED THAT THE TRIAL COURT’S ADMISSION OF HEARSAY TESTIMONY WAS HARMLESS ERROR.

The State of Ohio’s witness Cynthia Lewis was involved in the following testimony:

PROSECUTOR: Did your brother [James Lewis] ever make a comment to you that you felt was concerning to you?

MS. LEWIS: Yes.

PROSECUTOR: What was that comment?

DEFENSE COUNSEL: Objection

THE COURT: Overruled

MS. LEWIS: The comment was, Don't be surprised if Nne has something to do with this.

Mr. James Lewis had previously been called as a State witness. Nothing in those fifty pages of testimony involves the comment being made to Cynthia Lewis. This is pure hearsay as defined by Ohio R. Ev. 801. It falls into no exceptions to hearsay under the Ohio Rules of Evidence.

This testimony is also highly prejudicial to the Appellant. This is the second time that Cynthia Lewis states that Appellant's family thinks he was the murderer.

It requires Appellant to call James Lewis as a witness and ask him about this alleged statement, which Mr. Lewis adamantly denied

The Appellate Court concludes that this is harmless because the father James Lewis was permitted to retestify and deny that he ever made such a statement. The Appellate Court rules that this was "hearsay" but concludes that since cross-examination was permitted, that it was harmless error.

Even if this hearsay was "unequivocally refuted" as concluded at page 19 of the Appellate decision, its admission had a significant and devastating impact. The Appellate Court agrees that this conviction was "almost entirely based on circumstantial evidence." P. 11.

In a case with circumstantial evidence, coupled with the remote and irrelevant evidence, this type of testimony, and Mrs. Lewis' other testimony that the "Lord," created an unfair situation for Appellant. Harmless error should also be based on the totality of the evidence. Without any direct evidence, the jury is allowed to hear that two people closest to defendant

might believe that he is the murderer. Such improper hearsay in such a close case could have tipped the scale in favor of this conviction.

Permitting the aunt's to testify to this hearsay over the objection of is an abuse of discretion. Appellant requests reversal and remand on this issue.

CONCLUSION

In Proposition #1, Appellant asserts that there was insufficient evidence to support the murder conviction. The totality of the evidence was insufficient to prove that Appellant Lewis purposely murdered his cousin.

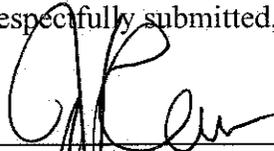
Proposition #2 asserts that the jury's verdict of guilty was against the manifest weight of the evidence. How could have the right-handed Appellant shot a gun multiple times and have no gun power residue on his right hand or right side of his clothing? There is also doubt raised about the shooter's location. Appellant's cooperation with the police supports the validity of his fears and flight.

Proposition #3 asserts that ineffective assistance of legal counsel occurred. The defense attorney asked the aunt to testify about what God told her about his client's involvement in the murder. In a case with circumstantial evidence at the crux of Appellee's case, what this testimony did was create a stunning prejudice to Appellant. This is not trial strategy.

Lastly, in Proposition #4, the trial court lets in hearsay when the aunt is permitted to testify to what her brother (and Appellant's father) said about the Appellant's involvement in the murder. Again, the jury now hears that the aunt, the father and God believe that Appellant is a murderer.

For these reasons, Appellant Nne Lewis prays for a reversal and remand for a new trial.

Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of the foregoing **Memorandum in Support of Jurisdiction of Appellant Nne Lewis** was sent via ordinary U.S. mail, postage prepaid to, Brent Kirvel, Cuyahoga County Assistant Prosecutor, Justice Center Building, 8th Floor, 1200 Ontario St., Cleveland, OH 44113 on this 5th day of January, 2012.



John H. Lawson

[Cite as *State v. Lewis*, 2011-Ohio-6155.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 95964

STATE OF OHIO

PLAINTIFF-APPELLEE

VS.

NNE LEWIS

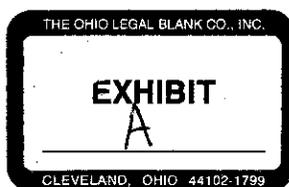
DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-533055

BEFORE: Sweeney, J., Stewart, P.J., and Rocco, J.

RELEASED AND JOURNALIZED: December 1, 2011



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JAMES J. SWEENEY, J.:

{¶ 1} Defendant-appellant Nne Lewis (“defendant”) appeals his conviction for murder with firearm specifications. For the reasons that follow, we affirm.

{¶ 2} On January 6, 2010, defendant’s cousin Erik Lewis was pronounced dead from multiple gunshot wounds. His death was ruled a homicide.

{¶ 3} Prior to Erik’s death, both he and defendant were residing with their aunt and uncle, Cynthia Lewis Anderson and Isaac James Anderson at their Allandale Avenue home in East Cleveland. Many witnesses described the relationship between defendant

and Erik as being very close, like brothers. It was said that they never fought and were raised together by defendant's father and Erik's mother, who were siblings that lived across the street from one another. Nne's father put him out of the house for "trust issues" relating to Nne's use of his father's credit card to purchase an engagement ring. Nne's father intended for his son to return to his home and repent and was not happy that his sister Cynthia had "housed" him. Cynthia testified to her understanding that Nne had also attempted to remove his father's guns from the house. Nne's father denied that and said Nne did not know the combination to the safe where his 9 mm guns were kept.

{¶ 4} Nne's father described him as a docile person who did not have the stomach for violence. Several witnesses testified that Nne and his girlfriend TaShawna had a tumultuous relationship where they physically attacked one another. At one point, TaShawna's brother Michael physically assaulted defendant in retaliation for abusing his sister. This was witnessed by TaShawna, her mother, and several other people and was confirmed by Michael. When the couple expressed their intent to remain together, Michael distanced himself from the situation. Michael was at the hospital with his daughter at the time of Erik's murder and he passed a "stress test" administered by the police. Video surveillance from the hospital reportedly confirmed his alibi.

{¶ 5} TaShawna said that defendant repeatedly accused her of being unfaithful with "everyone," including his cousin Erik. Although she testified she had remained faithful to defendant, she for some reason let, and at times intentionally lead, defendant to

believe the opposite was true. Regardless, there was no mention of Erik in this regard during defendant's conversations with TaShawna on January 6, 2010. On that day, she was leaving defendant with the impression that she had been with another man. Both that man and TaShawna's friend said she told them she was breaking up with Nne that night. TaShawna said she did not break up with Nne but continued to converse with him by phone into the early morning hours.

{¶ 6} TaShawna said she had observed defendant with a gun on three occasions. Her mother also testified that defendant brought a gun into her home once. Cynthia said she would never allow a weapon in her home and was not aware of one being there, however, she did not go through her nephew's belongings.

{¶ 7} Cynthia and Isaac both said Nne was the only other person home when they went to bed on January 5-6, 2010. Isaac, who went upstairs around 1:00 a.m., indicated that Erik was usually home from work earlier but had not yet returned by that time this particular day. Cynthia corroborated this fact.

{¶ 8} The autopsy report indicated that Erik had consumed alcohol shortly before his death; approximately six drinks. Erik's girlfriend had spoken with him but did not know where he went after work. No one was able to identify where Erik had been before returning to the Allandale home. An officer on patrol saw him walking towards Allandale just moments before his death but did not observe the murder.

{¶ 9} Erik's mother and defendant's father testified that Erik was a great person.

By all accounts he was a hard worker, spent some time in military training, supported his daughter and had no known enemies. He and defendant were active in the community, avid basketball players and musicians. Erik's mother expressed her dissatisfaction with the investigation and her belief that defendant had nothing to do with her son's death.

{¶ 10} Cynthia awoke to gunfire and observed flashes of light outside. At trial she said it sounded like the shooter was coming up the stairs as the shots sounded closer. She may have told police that it sounded like the shooter was coming in the house. She called 9-1-1 and heard her daughter Zoe pick up the phone requesting an ambulance. Cynthia ventured down the stairs and realized that the victim was Erik; not Nne as Isaac had initially thought. She did not see Nne and was concerned for his safety. Cynthia called Nne's girlfriend TaShawna looking for Nne. Nne's father went to the hospital and later returned to Cynthia's house. Cynthia testified that Nne's father said, "Don't be surprised if Nne has something to do with this." Nne's father adamantly denied making such a statement and insisted his son had not murdered his cousin. Nne's father said he based his opinion on Nne's statement to police and the evidence but had not ever discussed the matter with his son directly.

{¶ 11} Cynthia and Isaac testified that Nne was last seen on the telephone and they assumed he had been talking to TaShawna. According to TaShawna, she had been speaking with Nne and had intentionally lead him to believe that she was having sex with another man that night. This apparently upset Nne, who told TaShawna he could not

wait until Erik got home so he could tell him what she had done. However, TaShawna spoke with Nne subsequently when she returned to her house and things had calmed down. Nne got off the phone with her and said he would call her back. She did not hear from him again until later that morning and after Erik had died. TaShawna indicated that when the subject of Erik's death arose, defendant asked her "was he your first?" — which she took to mean her first lover.

{¶ 12} Isaac also heard the gunfire and thought perhaps some shots were fired from the outside. He went downstairs to investigate and saw a body laying in front of the doorway. The door was opened but the screendoor was shut. He initially thought it was Nne. Isaac's daughter Zoe arrived home from work and saw the body in the doorway.

{¶ 13} Several officers and EMS responded to the scene within minutes. Officers recovered six fired cartridge casings and three spent bullets from the scene; they were all from the same 9 mm gun. One bullet was found in a neighboring home and another was found days later in the basement of the Allandale residence.

{¶ 14} One man testified that he saw defendant walking quickly down Allandale immediately after the shots were fired. He described the gunfire as being distant, not "personal," otherwise he would have left the area. He could not recall specifics because he was intoxicated, having been drinking for hours in a car with his friends. Another man had been loitering outside a nearby Convenient store and had also seen defendant that night. Both men identified defendant's picture from a photo array. Both individuals

had criminal records and testified that the state had intervened in their cases to aid in their ability to remain on probation despite violations.¹ They recalled that defendant was wearing dark clothing.

{¶ 15} Later that morning, defendant appeared at the home of a woman who lived on East 143rd Street asking to use the phone. He had spent the night in an abandoned home. The woman believed defendant was calling his girlfriend to pick him up. When she overheard defendant repeatedly asking if his girlfriend's people had anything to do with it, she suspected something was wrong. The woman inquired further of what had happened and defendant said someone had shot his cousin and was shooting at him. Defendant then called his father to pick him up. The woman recalled that defendant was wearing only a white sweatshirt, which she felt was inappropriate for the extremely cold weather. She had offered him a coat.

{¶ 16} Defendant's father picked him up from that location but almost immediately thereafter the police arrested defendant. Defendant looked scared and defendant's father said his actions made sense to him as defendant was in fear for his own life.

{¶ 17} Defendant waived his Miranda rights and voluntarily spoke to police. He also agreed to submit his DNA for testing. Defendant said he heard the door open and then shots were fired. He heard the victim asking why did you do that? Defendant's hearing was affected from the gunshots and he ran out of the house over "the body."

¹ Probation was only continued for one of the men and the other was sent to prison.

Defendant told police he encountered his Aunt Cynthia at the steps. Defendant at one point in his statement told police that he was shot from the front of the house and at another time said shots were fired at him from behind the house. The detective testified that he did not feel defendant was being forthcoming and therefore decided not to obtain a written statement from him.

{¶ 18} Many neighbors testified and said they did not hear any gunfire. One resident, who had been awake, heard the shots but only saw a dark figure running down the street. Another man had observed a car parked and running in front of Cynthia's residence, which he found unusual, however, this was at least an hour prior to the shooting. The men who were drinking in the car outside did not see anyone besides defendant.

{¶ 19} The East Cleveland Police utilized the services of BCI to prepare a shooting reconstruction. Agent Mark Kollar conducted an investigation and concluded that the bullet trajectory determinations indicated that the shots were fired from inside of the residence, with at least one bullet being fired from the first floor landing on the stairwell. A second bullet hole could have been fired from either inside or outside of the residence depending upon the angle of the front door at the time of impact. Kollar concluded that the fact that the first responders found the door angle being open beyond 90 degrees with the victim laying inside, made it more likely the shot was fired from inside. Although a bullet was found in a neighboring residence, Kollar opined that it had exited through the

storm door and ricocheted off the front driveway into the neighboring home. He noted that this would account for the bullet's insufficient energy to penetrate the wall it ultimately struck as well as the deformity of the bullet.

{¶ 20} The Cuyahoga County Coroner testified regarding the gunshot wounds to the victim. He was unable to state with certainty how many times the victim was shot because the wounds could overlap. The Coroner estimated there were eight or possibly nine shots fired. There were some shots that went from the back to the front and others that entered from the front and exited from the back. He explained that the position of the body at time of impact was not known and would affect this determination. There was conflicting evidence as to whether a bullet hole in the victim's back was an entrance or exit wound.

{¶ 21} Gunshot primer residue was collected from the victim's hands but not tested. Likewise, the fingernail scrapings were collected but not tested. The experts explained this testing was not done because the reports indicated that there was no close contact between the victim and the shooter.

{¶ 22} The trace evidence supervisor of the Coroner's office testified that there were eleven bullet holes in the victim's jacket, which could be both entrance and exit holes. He testified that testing revealed that several shots were fired from a distance of four to five feet or more, while others indicated shots being fired between one and three feet, still others were inconclusive for distance. The trace evidence supervisor said if

someone fires a gun they will have gunshot primer residue (“GSR”) on their hands. However, GSR is easily removed from the skin. While GSR can also be removed from clothing, it is more difficult due to it getting embedded in the weave of the fabric.

{¶ 23} Defendant was tested for GSR, however, the police did not test any other occupants of the Allandale home for GSR who were also present at the scene of the murder; which included Cynthia, Isaac, and Zoe.

{¶ 24} Samples of defendant’s clothing were submitted for testing, including the cuff and pocket portions of his sweatshirt. Two particles that are highly indicative of GSR were found on defendant’s left cuff and pocket area. Records indicate that defendant is right handed. No GSR particles were found on the samples taken from his pants. There was insufficient DNA obtained from the bullets to run any testing on it.

{¶ 25} Tests conducted on the spent casings indicated they were all from the same type of bullet. Several witnesses testified that 9 mm guns expel casings but revolvers do not.

{¶ 26} Cynthia testified that it was her personal opinion that defendant had committed the crime. Under cross-examination she admitted that this was not based on any evidence but was told to her by the Lord during prayer. Conversely, the victim’s mother, also defendant’s aunt, echoed defendant’s father’s opinion that defendant had not committed the murder and explained that this opinion was derived from the evidence and their understanding of his relationship with his cousin. She, however, also had not spoken

with defendant directly about the incident.

{¶ 27} The murder weapon was never recovered and defendant's father testified that he had possession of both of his 9 mm guns at the time in question.

{¶ 28} The jury found defendant guilty and the trial court imposed an eighteen year to life prison sentence. Defendant appeals.

{¶ 29} "Assignment of Error I: The guilty verdict and conviction found by the jury against Appellant was based upon insufficient evidence."

{¶ 30} "An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine 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, 574 N.E.2d 492, paragraph two of the syllabus.

{¶ 31} As the record reflects, the case against defendant is almost entirely based on circumstantial evidence. Nonetheless, "[p]roof of guilt may be made by circumstantial evidence as well as by real evidence and direct or testimonial evidence, or any combination of these three classes of evidence. All three classes have equal probative value, and circumstantial evidence has no less value than the others." (Citations and quotations omitted.) *State v. Nicely* (1988), 39 Ohio St.3d 147, 151, 529 N.E.2d 1236.

{¶ 32} Defendant argues that the evidence was insufficient to prove that he purposely caused his cousin's death and focuses on the following areas: gunshot primer residue, negative DNA tests, the shooting reconstruction, defendant's flight and period of absence, his access to guns, his suggested jealousy, and his relationship with TaShawna.

{¶ 33} In terms of a sufficiency analysis, the focus remains on whether the state has presented any evidence, that if believed, would support a conviction of murder pursuant to R.C. 2903.02(A) that defendant "purposely cause[d] the death of [Erik Lewis]."

{¶ 34} Distilling the evidence to the basics, the record presents evidence that defendant was home with Cynthia and Isaac when Erik entered the home. Shots were fired. Cynthia and Isaac came downstairs and found Erik lying in the doorway with multiple gunshot wounds. Zoe arrived almost immediately after the shooting and also observed Erik's body.

{¶ 35} Nne, who was home when Isaac went to bed at 1:00 a.m. and placed himself there when shots were being fired, was no longer there when Cynthia and Isaac discovered the body. Eyewitnesses saw him walking down the street right after shots were fired. Although defendant made a statement that he ran away in fear for his life, while being shot at, he was seen walking quickly down the street after shots had already been fired. Defendant was inconsistent in his statement to police as to the location of the shooter. He heard his cousin come inside and said the gunshots affected his hearing.

Yet, he was able to leave the home going over Erik's body and said he was shot at from outside. This is contrary to Cynthia and Isaac's testimony that indicated the shooter sounded further inside the house with each successive shot.

{¶ 36} The shooting reconstruction concluded that the shots were likely fired from inside the home and most of the neighbors did not hear the gunfire at all. The eyewitnesses described defendant as wearing dark clothes when he was seen leaving the scene yet he had on a white sweatshirt when he was arrested ten hours later. He did have some particles indicative of GSR on some parts of his clothes that were tested despite that he had been absent for approximately ten hours. The defense was able to suggest the possibility of more than one shooter based on the number of gunshot wounds found in the victim's body and the fact that some weapons do not expel bullets. However, the evidence collected from the scene was all consistent with having been fired from the same weapon. The defense also elicited testimony of a possible robbery. But, Cynthia testified she held the victim's money, which would account for the fact that he was found with only change in his pocket. Also, nothing had been taken from the Allandale residence. No weapon was recovered but testimony placed defendant in possession of guns on at least three occasions and indicated he may have attempted to recently remove guns from his father's home. There was sufficient evidence to sustain a murder conviction and this assignment of error is overruled.

{¶ 37} “Assignment of Error II: the guilty verdict and conviction were against the manifest weight of the evidence.”

{¶ 38} To warrant reversal of a verdict under a manifest weight of the evidence claim, this court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses, and determine whether, in resolving conflicts in evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the judgment must be reversed and a new trial ordered. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52, 678 N.E.2d 541.

{¶ 39} Having thoroughly reviewed the record, we cannot conclude that the jury clearly lost its way in convicting defendant.

{¶ 40} Defendant admits he was in the home when the shooting occurred. He takes exception with the conclusions of the shooting reconstructionist that all shots were likely fired from inside of the residence and points to Cynthia’s testimony that she saw “flashing” outside her window. While this may cast some doubt as to the location of the shooter, it does not render the jury’s verdict against the manifest weight of the evidence or lead to the conclusion that the jury clearly lost its way.

{¶ 41} We agree that the jury could have reached a contrary verdict based on the evidence, depending upon the weight they applied to it. Nonetheless, there is evidence in the record that does support his conviction; among it the detective’s testimony that defendant’s version of events was inconsistent and was also contradicted by other

evidence in the record. Defendant did have some GSR on him. While it was a small amount, the testimony indicated additional GSR evidence could have been lost or removed during the period of defendant's absence. Further, the jurors received a flight instruction; that permitted the jury to consider defendant's flight as evidence of his consciousness of guilt. Defendant believes the evidence of his possession of guns, physical altercations with TaShawna, and his jealousy of his cousin were "remote" and should weigh against his conviction. Defendant highlights the lack of direct evidence linking him to the crime. As set forth above, the law does not require the state to present direct evidence in order to sustain a conviction and provides that circumstantial evidence is to be accorded the same weight. Considering the record as a whole, defendant's conviction was not against the manifest weight of the evidence and this assignment of error is overruled.

{¶ 42} "Assignment of Error III: Appellant's trial counsel committed ineffective assistance of counsel."

{¶ 43} To substantiate a claim of ineffective assistance of counsel, a defendant must demonstrate that (1) the performance of defense counsel was seriously flawed and deficient, and (2) the result of defendant's trial or legal proceeding would have been different had defense counsel provided proper representation. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Brooks* (1986), 25 Ohio St.3d 144, 495 N.E.2d 407. In *State v. Bradley*, the Ohio Supreme Court truncated this

standard, holding that reviewing courts need not examine counsel's performance if the defendant fails to prove the second prong of prejudicial effect. *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373. "The object of an ineffectiveness claim is not to grade counsel's performance." *Id.* at 143, 538 N.E.2d 373.

{¶ 44} Defendant asserts his counsel was ineffective for failing to request a jury instruction with regard to the lesser included offense of voluntary manslaughter. The Supreme Court of Ohio, in *State v. Griffie* (1996), 74 Ohio St.3d 332, 658 N.E.2d 764, held that the decision to request a jury instruction with regard to a lesser-included offense is a matter of trial strategy and does not constitute ineffective assistance of trial counsel. See, also, *State v. Clayton* (1980), 62 Ohio St.2d 45, 402 N.E.2d 1189, certiorari denied (1980), 449 U.S. 879, 101 S.Ct. 227, 66 L.Ed.2d 102. It must also be noted that a defendant is not entitled to an instruction on a lesser-included offense if participation in the charged wrongdoing is denied. *State v. Reider* (Aug. 3, 2000), Cuyahoga App. No. 76649.

{¶ 45} During the course of trial and even on appeal, defendant's trial strategy involved a complete denial of any criminal activity, that resulted in the death of the victim. Defendant's trial strategy prevented any request for a jury instruction with regard to the offense of voluntary manslaughter. *State v. Reider*, *supra*. Accordingly, trial counsel was not ineffective in this regard.

{¶ 46} Secondly, defendant asserts that his attorney was ineffective because he elicited testimony from his aunt that she based her opinion of his guilt on the fact that the “Lord told” her that defendant did it. This did not amount to ineffective assistance of counsel. Cynthia’s direct testimony and that of other family members clearly implied her belief that defendant was guilty of the murder. The defense simply elicited testimony that she had not based this opinion on any evidence. The defense further supplied testimony from the victim’s own mother, also defendant’s aunt, that she did not believe defendant had committed the murder. This was supported by defendant’s father’s opinion that he did not commit the crime. Counsel’s scope of cross-examination was within the realm of trial strategy and did not constitute ineffective assistance of counsel.

{¶ 47} This assignment of error is overruled.

{¶ 48} “Assignment of Error IV: The trial court erred in permitting hearsay testimony to be admitted.”

{¶ 49} During direct examination of Cynthia Lewis the following exchange took place over defendant’s objection:

{¶ 50} “Q: Did your brother ever make a comment to you that you felt was concerning to you?”

{¶ 51} “A. Yes.

{¶ 52} “Q. What was that comment?”

{¶ 53} “[Defense counsel]: Objection

{¶ 54} “THE COURT: Overruled.

{¶ 55} “A. The comment was, ‘Don’t be surprised if Nne has something to do with this.’”

{¶ 56} Defendant submits that this testimony amounted to hearsay and its admission resulted in prejudicial error requiring reversal. The state responds that any error in its admission was harmless in that the defense called defendant’s father to the stand who denied making the statement.

{¶ 57} Hearsay is any statement, other than one made by a declarant at trial, which is offered in evidence to prove the truth of the matter asserted. Evid.R. 801(C). Generally, a statement is not hearsay if it is admitted to prove that the declarant made it, rather than to prove its contents. *State v. Williams* (1988), 38 Ohio St.3d 346, 348, 528 N.E.2d 910, 914. It is unclear whether the state offered the testimony to prove that defendant’s father simply made the statement or whether they were offering it to prove its truth, that his father believed defendant may have been involved in his cousin’s murder. Because the State has not maintained it had offered the testimony for some reason other than to prove the truth of the matter asserted therein nor has the State addressed the hearsay aspect of the testimony at all, we will presume the testimony qualified as hearsay and should not have been admitted. Nonetheless, defendant was able to confront the declarant, his father, about the alleged statement during his case-in-chief. Defendant’s father adamantly denied making such a statement. The Ohio Supreme Court directs, “the Constitution entitles a

criminal defendant to a fair trial, not a perfect one * * * [and] ha[s] repeatedly reaffirmed the principle that an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt." *Williams*, supra at 349, other citations omitted. Any error in admitting this isolated testimony by defendant's aunt, which was unequivocally refuted by defendant's father's testimony, was harmless beyond a reasonable doubt when considering the whole record. This assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Common Pleas Court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

JAMES J. SWEENEY, JUDGE

MELODY J. STEWART, P.J., and
KENNETH A. ROCCO, J., CONCUR