ORIGINAL

IN THE SUPREME COURT OF OHIO
2012

STATE OF OHIO,

Plaintiff-Appellee,

-vs-

REGIS DICKERSON,

Defendant-Appellant.

Case No. 2012-1462

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

Court of Appeals Case No. 11AP-789

MEMORANDUM OF PLAINTIFF-APPELLEE OPPOSING JURISDICTION

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EXPLANATION OF WHY THIS COURT SHOULD DECLINE JURISDICTION

The instant case does not present questions of such constitutional substance nor of such great public interest as would warrant further review by this Court. Appellant simply takes issue with the Tenth District Court's sound decision and attempts to reargue his skewed view of the facts. It is respectfully submitted that jurisdiction should be declined.

STATEMENT OF THE CASE AND FACTS

Appellee State of Ohio adopts the Statement of the Case and Facts set forth by the Tenth District Court in its Decision rendered July 19, 2012. *State v. Dickerson*, 10th Dist. No. 11AP-789, 2012- Ohio-3268, at ¶¶ 1-10.

ARGUMENT

RESPONSE TO PROPOSITION OF LAW NO. ONE:

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO PERMIT A DETECTIVE TO TESTIFY TO A PRIOR IDENTIFICATION BY AN UNAVAILABLE WITNESS.

Identification testimony is not admissible pursuant to Evid.R. 801(D)(1)(c) unless the person who made the out-of-court identification testifies at trial and is subject to cross-examination. Weissenberger, Ohio Evidence Courtroom Manual (2005), at p. 344; Evid.R. 801(D)(1)(c). *State v. White*, 2nd Dist. No. 20324, 2005-Ohio-212, ¶ 42.

Evid.R. 801(D)(1)(c), which concerns prior identifications by a witness, provides:

> {¶ 29} "A statement is not hearsay if * * * [t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is * * * (c) one of identification of a person soon after perceiving him, if the circumstances demonstrate the reliability of the prior identification."
>
> {¶ 30} As the rule makes clear, "[i]dentification testimony is not admissible per Evid.R. 801(D)(1)(c) unless the person who made the out-of-court identification testifies at trial and is subject to cross-examination." *State v. White,* Montgomery App. No. 20324, 2005-Ohio-212, 2005 WL 120059, ¶ 42.

State v. Nevins, 171 Ohio App.3d 97, 104, 869 N.E.2d 719, 724-25, 2007-Ohio-1511.

Appellant's claim that the testimony was admissible under Evid.R. 803(8) lacks merit. Evid.R. 803(8) states:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> **(8) Public records and reports.** Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (a) the activities of the office or agency, or (b) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, unless offered by defendant, unless the sources of information or other circumstances indicate lack of trustworthiness.

Here, Titus Turner was unavailable and appellant could not circumvent the rules by having Detective Wachalek testify as to Turner's uncertain identification in the photo array. The parties all agreed Turner was unavailable. Even if the photo array qualified as a public record, it contained inadmissible hearsay.

Appellant's reliance on *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973) is misplaced. In *Chambers*, the witness was available and made statements against interest. Chambers was denied an opportunity to cross-examine a witness who had made prior confessions to the crime. *Id.* at 299-302. The court refused to allow Chambers to call the witness as an adverse witness. Thereafter, Chambers tried to introduce the witness's prior statements via other witnesses. The availability of the witness was central to the court's decision. *Id.* at 301.

The trial court did not err in refusing to allow appellant to call a detective to testify to an identification made by an unavailable witness. Two witnesses who had known appellant for many years testified that he shot Hart. Even with appellant's proposed testimony, there was no reasonable probability of a different outcome.

Appellant, for the first time, asserts that the State withheld evidence or engaged in wrongdoing. Appellant did not argue this in the Tenth District and any such argument is not properly before this Court. Notably, in his appeal to the Tenth District, appellant recognized that "neither side was able to locate Turner for trial." The Tenth District properly found that the statements appellant sought to introduce were inadmissible hearsay. This proposition of law does not merit review.

RESPONSE TO PROPOSITION OF LAW NO. TWO:

THE JURY ACTED REASONABLY IN FINDING APPELLANT GUILTY.

A.

In determining whether a verdict is against the manifest weight of the evidence, this Court acts as a "thirteenth juror." This role allows the Court to weigh the evidence in order to determine whether the trier of fact "clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997), quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1983). However, the power to reverse on "manifest weight" grounds should only be used in exceptional circumstances, *i.e.*, when "the evidence weighs heavily against the conviction." *Thompkins*, 78 Ohio St.3d at 387, quoting *Martin*, 20 Ohio App.3d at 175.

An appellate court acting in its role as "thirteenth juror" also must keep in mind the trier of fact's superior, first-hand position in judging the demeanor and credibility of witnesses. "On the trial of a case, either civil or criminal, the weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts." *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus. A court of appeals cannot reverse a jury verdict on manifest-weight grounds unless all three appellate judges concur. *Thompkins*, 78 Ohio St.3d at 389 & paragraph four of the syllabus.

This Court does not act as a "thirteenth juror" in determining the sufficiency of the evidence. The issue of sufficiency of the evidence presents a purely legal question for the Court regarding the adequacy of the evidence. *Thompkins*, 78 Ohio St.3d at 386. The Ohio Supreme Court has provided the following test for judging the sufficiency of the evidence:

> 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 , 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus.

"This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). When there is conflicting evidence, "it [is] the function of the jury to weigh the evidence and assess the credibility of the witnesses in arriving at its verdict." *Jenks*, 61 Ohio St.3d at 279. "It is not the function of an appellate court to substitute its judgment for that of the factfinder." *Id.* "[I]t is the minds of the jurors rather than a reviewing court which must be convinced." *State v. Thomas*, 70 Ohio St.2d 79, 80, 434 N.E.2d 1356 (1982).

A court reviewing the sufficiency of the evidence must consider the totality of all of the evidence, construing all of the evidence in the light most favorable to the prosecution. *Jackson*, 443 U.S. at 319; *Jenks*, 61 Ohio St.3d at 272 (jury weighs "all of the evidence"). "[I]ndividual pieces of evidence, insufficient in themselves to prove a point, may in cumulation prove it. The sum of an evidentiary presentation may well be greater than its constituent parts." *Bourjaily v. United States*, 483 U.S. 171, 179-80, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987). "[A] piece of evidence, unreliable in isolation, may become quite probative when corroborated by other evidence." *Bourjaily*, 483 U.S. at 180.

B.

Appellant argues that the verdict is not supported by the evidence because Edwards was a drug user and Perry lied to police during her first interview. Perry testified that appellant was like a brother to her and that she loved him and initially was trying to protect him. Perry was

closer to appellant than Hart. Perry was clear that she did not want appellant in trouble with the police but, once she learned Hart died, she came forward with the truth at the urging of her mother. Appellant claims that his witnesses are worthy of belief but fails to acknowledge that both Richardson and Kelso were inside and did not witness the shooting that happened outside.

Perry testified that appellant was trying to calm her down during her fight with Myers. Hart then tried to calm the situation down and check on Perry, which apparently offended appellant who said, "Nigger, what do you mean? This ain't got nothing to do with you." Perry then tried to calm appellant and explain who Hart was as she stood in the middle of the men. Appellant just put out his arm, pointed at Hart, and shot him at close range in the chest. Hart had no weapon. Perry saw the gun go off and was absolutely positive appellant shot Hart. Perry spoke to appellant after the shooting to be sure the police did not pull him over. Appellant told her not to go to the hospital to check on Hart because he wasn't family. Perry felt guilty for causing the affray but appellant told her: "You ain't have nothing to do with that and I didn't have nothing to do with that. Just leave it at that."

Perry entered into her plea bargain before the shooting happened. The recommendation for probation pursuant to a defendant's agreement was signed in November 2011, three months after the incident. No reduction in charges was given due to her testimony, rather a recommended sentence was arranged. Perry talked to police long before the defendant's agreement was entered into.

Edwards, appellant's cousin, also saw the shooting and was certain appellant was responsible. Edwards did not know Hart. Edwards testified that she did not want to testify against appellant. Despite the fact that Edwards was drinking and smoking marijuana, Edwards' testimony was consistent with Perry's recall of the events and with the physical evidence. The

coroner found that Hart was killed by a single gunshot wound to the abdomen. Perry and Edwards both testified that appellant shot Hart once in the chest/abdomen area.

Edwards and Perry had no motive to lie to implicate their close friend. The jury was in the best position to determine the credibility of these witnesses and acted reasonably in believing their testimony. Appellant's convictions are supported by sufficient evidence and are not against the manifest weight of the evidence. This proposition of law does not merit review.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the within appeal does not present questions of such constitutional substance nor of such great public interest as would warrant further review by this Court. It is respectfully submitted that jurisdiction should be declined.

Respectfully submitted,

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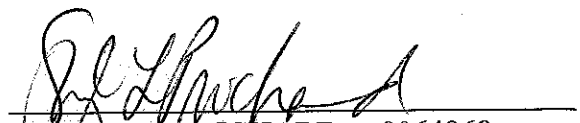
CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent by regular U.S. Mail, this day, Aug 31, 2012, to Regis Dickerson, #612-417, Lebanon Correctional Inst., P.O. Box 56, London, Ohio 45036.



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