

ORIGINAL

IN THE
SUPREME COURT OF OHIO

STATE OF OHIO

Plaintiff-Appellant

vs.

JOSEPH HARRIS

Defendant-Appellee

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:
:

NO. 2013-

13-0414

On Appeal from the Hamilton County
Court of Appeals, First Appellate
District

Court of Appeals
Case Number C-110472

MEMORANDUM IN SUPPORT OF JURISDICTION

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EXPLANATION OF WHY THIS IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

R.C. 2945.371(J) permits the state to introduce statements made by a defendant during an examination for competency or insanity when the statements do not include admissions that tend to implicate the defendant in the crime. But the First District Court of Appeals incorrectly interpreted this statute and ruled that a psychologist's testimony that Joseph Harris feigned mental illness during his examination was inadmissible during the state's case-in-chief, despite the fact that the psychologist did not testify about any factual issues of guilt. This misinterpretation of the statute resulted in the reversal of Harris' Murder conviction and a clear miscarriage of justice. The record shows that the psychologist did not testify to any statements made by Harris or about any of the facts of the case. The First District's analysis of R.C. 2945.371(J) cannot be found in the opinions of other courts and highlights a problem in how Ohio appellate courts are interpreting this statute. The disparity in the results that emanate from these interpretations begs for clarification by this Court.

The statute was amended in 1997 to add a sentence that stated specifically that "the prosecutor or defense counsel may call as a witness any person who evaluated the defendant or prepared a report pursuant to a referral under this section." R.C. 2945.371(J). This contemplates that there are situations in which a court-appointed psychologist may testify to issues other than factual issues of guilt. It follows that a psychologist can testify to his or her observations and impressions of a defendant who is examined for competency or insanity purposes without revealing any specific statements made by the defendant or about any facts of the case. The First District Court of Appeals ignored this distinction. Nothing in R.C. 2945.371(J) prohibits the use of proof of malingering in the state's case-in-chief. And application of the statute is not

dependent on whether the defendant later withdraws a plea of insanity; likewise, it does not turn on whether the admissible statement reflects negatively on the defendant's credibility.

The Ninth District Court of Appeals has stated that the statute does not prohibit testimony that reflects upon a defendant's credibility when that testimony is devoid of factual issues of guilt. *State v. Mathes*, 9th Dist. No. C.A. 20225, 2001 WL 651527 (June 13, 2001). In *State v. Mathes*, the court approved the introduction of a defendant's statement to a psychologist when the subject of the statement was " * * * other than the defendant's admissions that tend to implicate him in the crime." *Id.* at 4.

Here, the prosecution presented a psychologist's opinion that, during her interview of Harris, he feigned mental illness. The psychiatrist testified neither to any factual issues in the case nor to any admission by Harris that tended to implicate him. She testified solely to her observations and impressions.

Even if a psychologist's statement is improperly admitted, this Court has held that it is harmless error when the state presents overwhelming evidence of the defendant's guilt. *State v. Cooley*, 46 Ohio St.3d 20, 544 N.E.2d 895 (1989). In that case, the defendant underwent a court-ordered psychiatric examination for use at sentencing after being convicted of aggravated murder, kidnapping, rape, and aggravated robbery. He faced the death penalty. During the interview, Cooley admitted to the examiner that he hit his victims with a nightstick. When the trial judge considered this "factual issue of guilt" at sentencing, Cooley claimed that this violated R.C. 2945.39(D), the predecessor to R.C. 2945.371(J). This Court found it to be harmless error, however, because three other witnesses testified that Cooley told them he beat his victims.

In Harris' case, the defendant told at least two other witnesses that he was going to avoid prosecution by feigning mental illness. Despite the fact that Dr. Dreyer did not testify about any

factual issues of guilt, and therefore did not violate R.C. 2945.371(J), the First District Court of Appeals reversed Harris' Murder conviction. The court did not follow the analysis conducted in the *Cooley* case, but instead engaged in a patent misinterpretation of the statute. Harris' case presents the opportunity for this Court to clarify the application of the statute and prevent future miscarriages of justice, whether by the First District Court of Appeals or by any other appellate court that attempts to interpret R.C. 2945.371(J). This Court must entertain jurisdiction and accept this case for discretionary review in order to provide Ohio courts the guidance needed.

STATEMENT OF THE CASE AND FACTS

Harris was charged in a four-count indictment on October 29, 2010: Count 1: Aggravated Murder; Count 2: Murder; Count 3: Aggravated Robbery; Count 4: Having Weapon While Under Disability. On December 30, 2010, he filed a Suggestion of Incompetency and a Plea of Not Guilty by Reason of Insanity (NGRI). Harris was found competent to stand trial and the case was tried to a jury beginning on June 20, 2011. An entry stating the NGRI plea was withdrawn was entered eight days later. The jury found Harris guilty as charged, and a pre-sentence investigation was conducted. The trial court sentenced Harris on July 29, 2011 to concurrent terms as follows: Aggravated Murder: life without the possibility of parole; Murder: merged with the conviction in Count 1; Aggravated Robbery: eight years; Having Weapon Under Disability: five years. He also received the consecutive, mandatory three-year term on a gun specification.

On appeal, however, the First District Court of Appeals reversed his conviction due to the testimony of a court psychologist during the court's case-in-chief. The state now appeals.

Facts: Eighteen-year-old Shane Gulleman was taking steps to improve his life in September 2010. He had completed a six-month sentence in an Indiana prison and enrolled in college. According to his mother, Jamie Gulleman, "[h]e was trying to get his life turned around and do good and just make a life for himself." Shane moved away from home and began his first semester of college. But an addiction to heroin followed him there. On September 26, 2010, Shane drove to Winton Terrace in Cincinnati to buy drugs to support his habit. Joseph Harris was the seller. Unbeknownst to Shane, Harris planned on robbing him of whatever money he brought to consummate the deal. During the transaction, Harris shot Shane 8 or 9 times on his right side, with one bullet directly to the head. When police responded to a 911 call, they found Shane's body slumped over on the driver's side of the car. Shell casings from a .45 caliber gun were scattered throughout the area. The coroner testified that all of the gunshots travelled from the

right side of Shane's body to the left, which was consistent with someone in the front passenger seat shooting him. Although morphine and marijuana were found in Shane's bloodstream, gunshot wounds caused his death.

Earlier that evening, Khristina Willis saw Joseph Harris in Winton Terrace confronting a man with a gun. She later told police that she thought that Harris was robbing someone. Shortly afterwards, she heard gunshots coming from a nearby parking lot on Craft Street where Shane's body was ultimately found. She then saw Harris and another man run from the parking lot and jump over a fence.

Sherron Peoples was seated in a car in the same parking lot when he saw a car with a young, white man pull into the lot. He recognized Harris and co-defendant Bennie, who walked through the lot and over to the car. Harris got in the passenger side of the car while Bennie stood outside. Within moments, Peoples heard gunshots.¹ Harris and Bennie quickly ran past him with their guns drawn. Cell telephone records confirmed that Peoples was in Winton Terrace at the time of the murder.

Gary Brown was an inmate at the Hamilton County Justice Center at the time when Harris was incarcerated on the current charges. Brown went to the psychiatric ward to try to get some sleeping pills and saw Harris there. Brown mentioned that he'd seen Harris on the news and asked what "was going on." Harris said that he was going to sell drugs to a customer of a heroin dealer, "Little B," and that while waiting for Little B, Harris saw that the customer had a roll of bills. Harris said the customer acted like he didn't want to give up the money, so he shot him. He also said he felt a woman "ratted his name out." He said that when he got out of the situation, he would "handle her, blam her," i.e., shoot her.

¹ Bennie was acquitted on all counts.

Tobias Johnson was also in the Justice Center at the same time as Harris. Both men were housed in the "B" pod, known as the murder pod. Harris approached him and asked if Johnson could help him on his case. Harris said he was going to pin the case on a man named Joker. He also told Johnson he was going to go to the psychiatric ward and act like he was crazy. Harris told Johnson that a friend of his, "B," was a heroin dealer, but that at one point, he was out of heroin. Harris had Oxycontin, commonly used as a heroin substitute. Harris told Johnson that he would offer Oxycontin to buyers. When they showed up with cash to purchase the drug, however, he would rob them instead. One such buyer, "Shane," showed up at "the bottom of the hill" in Winton Terrace. Harris first told Johnson that when he got in the car, the buyer began crying and said he wanted to rob Harris. Harris said he opened the car door to leave and shot Shane "a couple of times with a .45." He said he saw a toy gun in the car. In another version, Harris did not mention the gun. Harris told Johnson that he paid Bennie \$20 to drive him down the hill so that he could rob the buyer. At this point, Harris asked Johnson to testify against Bennie and to name a third person, Derrell Anderson, in order to win Harris' acquittal. Later, when he apparently realized Johnson was going to testify for the state, he asked Johnson not to go to court and testify. "He told me, don't get him life. And can I help him out and don't come to the courtroom, would I help him out."

A third inmate, Derrell Anderson, also encountered Harris. He said that Harris told him he knew a man was going to try to buy drugs on Craft Street, and that Harris planned on robbing him. Harris told Anderson that he had a .45 and that he shot the victim four or five times. Anderson said on one occasion, he was at the mental health unit at the same time as Harris and Bennie. He overheard them talking about "who got caught with the murder weapon." Apparently someone else was caught with the gun in an unrelated incident. On another occasion, while

waiting in the bull pen before a court appearance, he heard Harris and Bennie arguing about whether Harris was giving out information about his co-defendant. Harris denied this, and told Bennie to “stick to the same story,” “don’t change the story.”

A fourth inmate, Antonio Gray, testified that while incarcerated at the Justice Center, Harris approached and also asked him to help on his case. He told Gray that he was going to plead insanity, but that it “did not work.” Harris also said he was going to say that he was not at the location of the murder. Harris told Gray he had intended to rob Shane, but that things did not go as planned. He said Shane would not give up his money, so he shot him. Knowing that he was the last person to text Shane before the shooting, Harris said he changed out the SIM card in his cell phone several times. “Yes, he was worried about that.”

Detective Tim Gormly investigated the murder. To the public, he released only the fact that Shane Gulleman was shot to death in Winton Terrace. He did not release the fact that a .45 was used or that drugs played any part in the death. The initial investigation was very difficult, Gormly stated, because witnesses rarely come forward in the neighborhood where the crime occurred. But Sherron Peoples called Crimestoppers and spoke to Gormly, who then obtained cell phone records for Gulleman and Harris. These showed that Gulleman was texting with Harris just prior to his death. Texts show that Gulleman was to arrive in 30 minutes, and that Harris agreed to sell him seven Oxycontin pills for \$210.

From the Cincinnati Bell records, police obtained the IMEI number for Harris’ phone.² This is a unique identifying number from which one can identify calls from a phone, regardless of what SIM card is used. The IMEI can also identify all SIM cards associated with a given phone. Records showed that Harris used four different SIM cards around the time of the murder: on September 17th, he began using a card that bore a 937 area code; on September 26th, he used a

² “IMEI” is an International Mobile Equipment Identification number.

card belonging to Myiya Crawford, his girlfriend; on September 27th, he switched to a second card used by Myiya; on September 30th, he switched to a card registered to his mother, Jackie Harris. Records showed that at 1:14 a.m. on September 26th, within 20 or 25 minutes after the murder, Harris texted to an unidentified caller "Don't say shit."

Harris testified at trial and stated that he met with Shane Gulleman to sell him Oxycontin pills. He said that during the transaction, Gulleman hesitated and stated that he had left something in the back of the car. Knowing that buyers often bring fake guns and try to rob the seller, Harris was suspicious. "So I am looking back. The whole time his body is turned towards the back seat and he was doing something under the seat * * * he just kept hesitating and trying to take my attention off of him giving me the money * * * So I look back and I see what he was grabbing, and I just - - I got out. I ran, start shooting." Harris said he did not know how many times he fired his gun. He denied feigning insanity or incompetency and stated that the witnesses who testified to the contrary lied. He admitted that much of what they said was true, but stated that "they added on some stuff."

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1: A psychologist's trial testimony regarding a defendant's feigned mental illness during a competency and sanity evaluation is admissible under R.C. 2945.371(J) when it does not include factual evidence of guilt. It is admissible during the state's case-in-chief to show the accused's intent to mislead and defraud authorities to escape prosecution.

Dr. Carla Dreyer, the psychologist who interviewed Harris during a competency and sanity evaluation, testified during the state's case-in-chief. She did not ever reveal *any* statement made by Harris, and made *no* reference to any of the facts of the case. She testified solely about the fact that Harris feigned mental illness during the examination. This testimony corroborated the testimony of two inmates who were incarcerated at the same time as Harris prior to his trial. The court held that the state was prohibited from using Dr. Dreyer's testimony to bolster other witnesses' testimony in any fashion, solely because the psychologist's opinion resulted from her discussions with Harris.

R.C. 2945.371(J) provides in part: "No statement that a defendant makes in an evaluation * * * relating to * * * the defendant's mental condition at the time of the offense charged shall be used against the defendant on the issue of guilt in any criminal action or proceeding, but, in a criminal action or proceeding, the prosecutor or defense counsel may call as a witness any person who evaluated the defendant or prepared a report pursuant to a referral under this section." The latter sentence was not included in a prior version of the statute, R.C. 2945.39(D).

In *State v. Cooley*, this Court interpreted a prior version of the statute and held that a defendant's statement during such an examination may not be used to prove that he committed the crime for which he was facing trial. *State v. Cooley*, 46 Ohio St.3d 20, 544 N.E.2d 895 (1989). The Ninth District Court of Appeals applied *Cooley* and held that the current statute, R.C.

2945.371(J), which maintained similar language, “distinguishes between factual evidence of guilt and issues of the defendant’s psychological state.” *State v. Mathes*, 9th Dist. No. C.A. 20225, 2001 WL 651527 (June 13, 2001). The newer version of the statute added the language permitting either party to call the person who evaluated the defendant as a witness. The *Mathes* court stated that “[t]he additional language * * * offers further support that the statute does not prohibit the introduction of statements made by the defendant during a court-ordered mental health examination other than the defendant’s admissions that tend to implicate him in the crime.” *Id.* at 4.

In *State v. Armstrong*, a defendant argued that a psychologist’s opinion that he was malingering was admitted at trial to prove the issue of guilt. Armstrong had raised an affirmative defense of insanity. The appellate court disagreed, however, and stated that the testimony was admissible to show that the defendant was faking his own insanity. Statements that showed the defendant was manipulative were relevant to prove that he knew right from wrong, and were not related to the issue of guilt. *State v. Armstrong*, 152 Ohio App.3d 579, 2003-Ohio-2154, 789 N.E.2d 657. In the present case, Harris withdrew his plea of insanity before trial. But *Armstrong* illustrates the point that evidence of malingering can be distinguished from the issue of guilt.

Joseph Harris’ attempt to feign mental illness during his evaluation cannot be characterized as an admission; he said nothing to implicate himself in the murder of Shane Gulleman, and none of his statements were testified to by the court psychologist. The First District Court of Appeals’ interpretation of R.C. 2945.371(J) found the opposite and made no distinction between factual evidence of guilt and issues of the defendant’s psychological state. It treated the psychologist’s observation that Harris was feigning mental illness as factual evidence of guilt rather than an explanation of his psychological state.

At trial, inmate/informant Tobias Johnson testified that Harris told him that he was going to go to the psychiatric ward and act like he was crazy. Another inmate, Antonio Gray, testified that Harris told him he tried to plead insanity, but that it did not work. And a third inmate testified that he saw Harris in the mental health unit, adding credence to the testimony of Johnson and Gray.

Despite the lack of any reference to the facts of the case, the First District Court of Appeals ruled that Dr. Dreyer's testimony was used against the accused on the issue of guilt because it "emphasized Harris' questionable credibility." *See* ¶ 24, 25. The court found that because Dr. Dreyer's opinion was offered to bolster the state's argument that Harris feigned mental illness to avoid the charges against him, it lent credibility to the testimony of the inmate witnesses. The court erroneously equated the issue of credibility with the issue of factual guilt.

The appellate court found that the testimony, "if it only went to whether Harris had shot Gulleman," was harmless. The court conceded that at the time of the state's case-in-chief, Harris' defense was that he did not commit the crime. Despite this, the court found that in essence, because Harris testified, the analysis changed. *See* ¶ 27. The court examined Harris' testimony where, for the first time, he admitted meeting the victim and killing him. But because he denied that he intended to rob Gulleman, the appellate court found that "his defense shifted" and Dr. Dreyer's testimony now constituted reversible error because "it emphasized Harris' questionable credibility." *Id. at* ¶ 27. The court never addressed the fact that the state could not have anticipated the change in his defense. The court then stated that the psychologist's testimony could have "reasonably affected how the jury viewed Harris' explanation of the shooting and his contention that he had not intended to rob Gulleman." *Id. at* ¶ 27. With this analysis, the court equated Dr. Dreyer's testimony about *the nature* of Harris' answers with the use of *actual*

statements that he made during his examination. The court necessarily found that when Dr. Dreyer commented on his insincerity, she testified to the ultimate issue of guilt. That analysis relies on a tortured interpretation of R.C. 2945.371(J) that is not justified on the record.

While R.C. 2945.371(J) prohibits the use of such a statement on the issue of guilt, it states affirmatively that anyone who evaluated the defendant may be called as a witness. The admissibility issue relates solely to the particular type of statement made by a defendant. In comparing an amended version of the statute, the Ninth District found that “the statute does not prohibit the introduction of statements made by the defendant during a court-ordered mental health examination other than the defendant’s admissions that tend to implicate him in the crime.” *State v. Mathes, supra*.

In the present case, Dr. Dreyer testified to a very narrow issue: whether in her dealings with Harris to evaluate competency and insanity, she felt he was malingering or attempting to feign symptoms of a mental illness. There is a distinction between a defendant’s statements during an interview and a psychologist’s conclusion of malingering based upon those statements. Because *his statements* were not admitted against him on the issue of guilt, neither the Fifth Amendment nor R.C. 2945.371(J) was violated.

Under Evid. R. 404(B), evidence of other crimes, wrongs or acts is admissible to show proof of motive or absence of mistake. Feigning mental illness was relevant to show Harris’ intent to mislead and defraud authorities after the commission of his crimes. It also corroborated the testimony of Tobias Johnson and Antonio Gray, inmates previously unknown to Harris who would have had no way of knowing, independently, that Harris planned on feigning insanity.

And finally, the evidence of Harris’ guilt was overwhelming. Even if it is argued that the testimony should have been presented in the state’s case-in-rebuttal, rather than the case-in-chief,

it was harmless in light of the overwhelming evidence. *See State v. Bozsik*, 9th Dist. No. 3091-M, 2001-Ohio-7011, citing to *State v. Williams*, 6 Ohio St.3d 281, 452 N.E.2d 1323 (1983).

The state presented evidence that a witness, Sherron Peoples, saw Harris get in Gulleman's car while the co-defendant stood as a look-out. Immediately thereafter, Peoples heard multiple gunshots and saw Harris exit the car and run away. Cell telephone records showed through text messages that Shane Gulleman told Harris the time he would arrive at the designated parking lot. Texts also detailed the terms of the proposed sale of the Oxycontin pills. The location of the cell towers that transmitted the texts and calls was within the immediate location of the parking lot where Gulleman's body was found.

Forensic evidence proved that Shane Gulleman was in the driver's seat, facing the steering wheel, when he sustained fatal gunshot wounds to his right side. The evidence showed he was not turning towards the back seat of the car, as it would have been impossible for the entrance wounds of the bullets to be located all along his right side as they were.

This alone provided evidence that Harris killed Gulleman. Police also explained to the jury that robberies during drug deals are a common occurrence. The evidence of the plan for Harris to meet Gulleman, a young man from a small town in Indiana, in a parking lot far from Gulleman's home and in a high-crime Cincinnati neighborhood known for drug activity, very late at night and unaccompanied, combined with the presence of a look-out while the transaction was to have taken place, formed strong circumstantial evidence that Harris was either committing or attempting to commit a robbery when he shot his victim.

Additionally, three jailhouse inmates testified that Harris confessed to them that he planned on robbing Shane Gulleman and killed him in the process. Gary Brown testified that Harris said he shot the victim when he acted like he didn't want to give up his "roll of bills" for

the pills being sold. Tobias Johnson testified that Harris told him that he often robbed potential buyers. Harris said he met with one such buyer, Shane Gulleman, and shot him with a .45. Similarly, Derrell Anderson testified that Harris told him he planned on robbing a man who was going to meet him to buy drugs on Craft Street and shot the victim four or five times. And Harris told Antonio Gray that he had intended to rob Shane Gulleman, but that when the victim did not cooperate, he shot him.

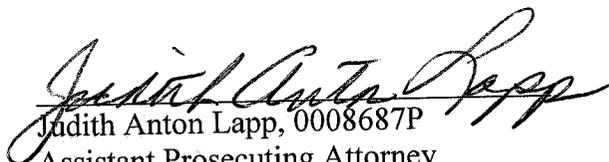
All of this testimony overwhelmingly proved Harris' guilt, independent of the testimony of Dr. Dreyer. In light of the strength of this evidence, it is clear that Dr. Dreyer's testimony regarding Harris' attempt to feign mental illness was not nearly as significant. The First District Court of Appeals found, however, that because Dr. Dreyer's testimony "emphasized Harris' questionable credibility," it could have affected how the jury viewed Harris' testimony and his version of events. But four additional witnesses were presented whose testimony attacked Harris' credibility. Dr. Dreyer's testimony, which was devoid of facts of the case, was not so striking that it could have reasonably affected the jury's assessment of Harris' credibility. The record also contains Harris' repeated admissions that that he shot Shane Gulleman in cold blood while attempting to rob him. The jury had overwhelming evidence of guilt before it and the First District Court of Appeals erred in reversing Harris' conviction.

CONCLUSION

The First District Court of Appeals misinterpreted R.C. 2945.371(J) and caused a grave miscarriage of justice by reversing a Murder conviction based upon this. The court took this action in the face of overwhelming evidence of Harris' guilt. Because of the varying decisions that apply R.C. 2945.371(J), this Court should clarify its application and end the First District Court of Appeals' restriction of its proper use.

Respectfully,

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PROOF OF SERVICE

I hereby certify that I have sent a copy of the foregoing Memorandum in Response, by United States mail, addressed to Wendy R. Callaway, 2089 Sherman Avenue, Suite 20, Cincinnati, Ohio 45212, Cincinnati, Ohio 45202, counsel of record and Timothy Young, Ohio Public Defender, 250 E. Broad Street, Suite 1400, Columbus, Ohio 43215-2998, this 17th day of March, 2013.


Judith Anton Lapp, 0008687P
Assistant Prosecuting Attorney

APPENDIX

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,

Plaintiff-Appellee,

vs.

JOSEPH HARRIS,

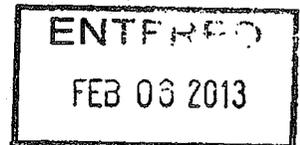
Defendant-Appellant.

APPEAL NO. C-110472
TRIAL NO. B-1006801-A

JUDGMENT ENTRY.



D100864128



This cause was heard upon the appeal, the record, the briefs, and arguments.

The judgment of the trial court is affirmed in part, reversed in part, and cause remanded for the reasons set forth in the Opinion filed this date.

Further, the court holds that there were reasonable grounds for this appeal, allows no penalty and orders that costs are taxed under App. R. 24.

The Court further orders that 1) a copy of this Judgment with a copy of the Opinion attached constitutes the mandate, and 2) the mandate be sent to the trial court for execution under App. R. 27.

To the clerk:

Enter upon the journal of the court on February 6, 2013 per order of the court.

By: _____

A handwritten signature in black ink, appearing to be "K. L. ...".

Presiding Judge

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

FILED
COURT OF APPEALS

FEB 06 2013

TRACY WINKLER
CLERK OF COURTS
HAMILTON COUNTY

STATE OF OHIO,
Plaintiff-Appellee,
vs.
JOSEPH HARRIS,
Defendant-Appellant.

APPEAL NO. C-110472
TRIAL NO. B-1006801-A

OPINION.

PRESENTED TO THE CLERK
OF COURTS FOR FILING

FEB 06 2013

COURT OF APPEALS
CLERK OF COURTS
HAMILTON COUNTY, OH

2013 FEB -6 A 10:24

FILED

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed in Part, Reversed in Part, and Cause Remanded

Date of Judgment Entry on Appeal: February 6, 2013

Joseph T. Deters, Hamilton County Prosecuting Attorney, and *Judith Anton Lapp*, Assistant Prosecuting Attorney, for Plaintiff-Appellee,

The Law Office of Wendy R. Calaway, Co., LPA, and *Wendy R. Calaway*, for Defendant-Appellant.



D100864331

Please note: this case has been removed from the accelerated calendar.

Per Curiam.

{¶1} Joseph Harris appeals his convictions for aggravated murder with a firearm specification, aggravated robbery, and having a weapon while under a disability. Because we conclude that the trial court erred when it allowed the testimony of a court psychologist during the state's case in chief, we reverse the judgment of the trial court, and remand the cause for a new trial.

{¶2} Harris, and his codefendant, Ryan Bennie, were indicted for aggravated murder with firearm specifications, murder with firearm specifications, aggravated robbery with firearm specifications, and having weapons while under disability for a shooting that resulted in the death of Shane Gulleman in the Winton Terrace neighborhood of Cincinnati on September 26, 2010.

Pretrial Issues

{¶3} During discovery, the state filed a certification in support of its motion for nondisclosure of the state's private witnesses. See Crim.R. 16(D). Pursuant to Rule 7(K) of the Hamilton County Rules of Practice of the Court of Common Pleas, a hearing was held before the presiding criminal judge of the court of common pleas on May 4, 2011.¹ Upon the motion of the assistant prosecutor and over the objections of the codefendants' attorneys, the presiding judge excluded the defense attorneys from his chambers while the assistant prosecutor presented his evidence in support of nondisclosure. At the conclusion of the hearing, the presiding judge found that the assistant prosecutor had not abused his discretion when he did not disclose the witnesses to the defendants.

¹ Rule 7(K) requires that the presiding criminal judge hold the nondisclosure hearing.

{¶4} On May 18, 2011, the assistant prosecutor moved to take a deposition of Sherron Peoples to perpetuate his testimony. The state asserted that Peoples, who was one of the witnesses whose name had not been disclosed to defense attorneys, was a threat not to appear at trial. Following a hearing, the presiding judge granted the state's motion. On May 19, 2011, the state and defense attorneys conducted a deposition of Peoples with both defendants present.

Jury Trial

{¶5} Harris and Bennie were tried before a jury. Gulleman was 18 years old when he drove from Indiana to Winton Terrace for the purpose of buying Oxycontin from Harris. Gulleman parked his car in a lot. He was then shot seven to eight times. He died at the scene. Gulleman's mother, Jamie Gulleman, testified that her son had had a drug problem, and that she had identified him from a photograph shown to her by police officers.

{¶6} Khristina Willis testified that she had lived in Winton Terrace in February 2010. Willis stated that on the night of September 25, 2010, she had been walking to a store in the neighborhood and had seen Harris pull out a gun and ask a group of people "where the money and weed at." According to Willis, she knew Harris through his mother. Willis stated that she believed that Harris and another black male had been committing a robbery. After seeing Harris pull out a gun, Willis had run down the street to her neighbor's house. As Willis was running to her neighbor's house, she had seen Harris and the other man going toward a street known as "Long Craft." Willis estimated that she had been at her neighbor's house for approximately ten minutes when she heard shots ring out from the direction where Harris had been headed. Willis then had seen Harris and another man jumping a fence near a parking lot.

{¶7} Police officer Benjamin Miller testified that in the early morning hours of September 26, 2010, he had gone to a parking lot behind a building at 112 Craft Street in Cincinnati in response to a report of shots having been fired. Miller testified that 112 Craft Street was on the portion of street commonly referred to in the neighborhood as "Long Craft." According to Miller, when he and his partner responded to the parking lot, they had found a gunshot victim slumped over in the driver seat of a white, four-door sedan. Miller testified that the victim was unresponsive, and that he and his partner had called for paramedics at that time. Miller remained at the scene to ensure that no one disturbed the crime scene.

{¶8} Dr. William Ralston, chief deputy coroner for Hamilton County, testified about the autopsy that he performed on Gulleman. Ralston stated that Gulleman had been shot eight or nine times and that all of the bullets had traveled from right to left. Ralston stated that the results of the autopsy were consistent with the bullets having been fired from the passenger side of the car.

{¶9} The state next called Sherron Peoples to testify. Peoples stated that he knew both Harris and Bennie, and that he had known Harris all his life. On the night of the shooting, Peoples was in a car in the same parking lot where Gulleman was shot. Peoples testified that he had seen Gulleman pull into the parking lot in a white car. After Gulleman had parked his car, Peoples had seen Harris and Bennie walk into the parking lot and go toward Gulleman's car. During his trial testimony, Peoples stated that he did not know who had gotten into the car. But he conceded at trial that he may have told police that he had seen Harris get in the car, and that he had heard gunshots. After hearing the gunshots, Peoples had seen Harris and Bennie leaving the parking lot. Peoples stated that he may have told police officers

that he had seen a gun in Harris's hand, and that he had known Harris to carry a .45-caliber gun.

{¶10} Police officer David Landesberg identified photographs that he had taken at the scene of the shooting. According to Landesberg, police officers had recovered \$210 that had been found under Gulleman's left leg. Landesberg also testified that a pellet gun had been found under the passenger seat of Gulleman's car. When asked about the gun by Harris's counsel, Landesberg stated that it looked like a real firearm, and that it had been completely concealed under the passenger seat.

{¶11} Police sergeant Jeff Hunt testified that he had been dispatched to arrest Harris for suspicion of Gulleman's murder. Hunt stated that Harris's cellular telephone had been recovered from one of his pockets and that a bag of bullets had been recovered from the apartment where Harris had been found. According to Hunt, the bullets in the bag appeared to be .45-caliber bullets.

{¶12} Over the objection of defense counsel, Dr. Carla Dreyer, a psychologist, testified that Harris had been referred to the court clinic by the trial court for an evaluation of his competency to stand trial and for a determination of whether he had been legally insane at the time of the shooting. Dreyer testified that Harris was competent to stand trial and that he did not meet the criteria for a not-guilty-by-reason-of-insanity plea. Dreyer testified that in her opinion, Harris "was malingering both cognitive and psychiatric difficulties." Dreyer explained that malingering meant "feigning or exaggerating, so basically making up or exaggerating already existing symptoms to seem worse than they are."

{¶13} Gary Brown testified that he had been in the Hamilton County Justice Center while Harris and Bennie were held there. According to Brown, Harris had told him that "[Gulleman] had that roll on him and he act like he didn't want to give

it up." Brown stated that, to him, that meant, "like if someone is robbing you, you hesitating to, you know, give up what they ask for." Brown testified that Harris had stated that a woman had "rolled over on him," and that Harris had said he would "blam" her. The assistant prosecutor then asked, "Did [Harris] make any statement about what he had done to the guy that wouldn't give him the roll?" And Brown replied, "He said he blammed him, but he didn't go off into detail about where he shot him at or what he shot him with, or --- he didn't go on off into that. But blam, blam basically means shoot, shoot someone."

{¶14} Tobias Johnson and Harris were housed in the same pod in the justice center. Johnson testified that Harris had discussed his case with him and had told Johnson that he planned to act like he was crazy to try to avoid the charges against him. According to Johnson, Harris had told him two versions of what had happened the night that Gulleman was shot. In the first story, Harris stated that another person, who went by the nickname "B," was going to sell Gulleman some heroin. B had run out of heroin, so Harris had lied and said he had Oxycontin and arranged to meet Gulleman. According to Johnson, Harris had gone to the parking lot to rob Gulleman. Johnson stated that Harris had told him that when he had pointed a gun at Gulleman, Gulleman had begun to cry and had said that he had planned on robbing Harris. Harris had then gotten out of the car and shot Gulleman as Harris was exiting from the car. In the second version of the story that Harris allegedly told Johnson, Harris had gone to the parking lot to rob Gulleman. There was no mention of Gulleman having stated that he had also planned to rob Harris.

{¶15} Antonio Gray had also met Harris in the justice center. According to Gray, Harris had told him that he was going to plead insanity first, and if that did not work, he was going to say that he had not been there when the shooting happened.

Gray also testified that Harris had told him about the shooting: "And it was supposed to be, you know I guess a robbery because he was supposed to have 85 Oxycontin pills, Mr. Harris did, and he was going to rob, you know Mr. Gulleman. But it did not go as planned because Mr. Gulleman didn't want to give up the money." According to Gray, Harris told him that because Gulleman had not given him the money, Harris had shot him.

{¶16} Derrell Anderson testified that he had met Harris in the justice center. According to Anderson, Harris had told him "that a murder happened in the first right court on Craft Street, that he was robbing the guy. It was the guy that came down there to meet somebody else for some drugs. And he went and instead of giving him the drugs he robbed the guy."

{¶17} Harris took the stand in his own defense. Harris testified that on September 25, he had gone to the parking lot to sell Gulleman some Oxycontin. According to Harris, Gulleman had started to hesitate before paying for the pills. Harris testified that

[Gulleman] said something, he left something in the back. So I am like—I am already watching it, because I know how a lick will do as you pull off or they'll either come and rob a person late night or do anything, so I am already like watching him, what he's doing. So I am looking back. The whole time his body is turned towards the back seat and he was doing something under the seat, so I looked back. I'm like, what you doing, man? He just kept hesitating and trying to take my attention off of him giving me the money, because I had the pills already to sell him. So I look back and I see what he was grabbing, and I just—I got out. I ran, I started shooting.

Harris claimed that he had seen what he believed to be a real gun in Gulleman's backseat.

{¶18} At the conclusion of the trial, the jury found Harris guilty as charged.² Following a sentencing hearing, the trial court merged the murder count with the aggravated murder count and sentenced Harris to life without the possibility of parole for aggravated murder, with a consecutive three-year term for the firearm specification, eight years for aggravated robbery, and five years for having a weapon while under a disability. The sentences were made consecutive to each other for an aggregate sentence of life plus 16 years.

Harris's Appeal

{¶19} In his first assignment of error, Harris asserts that the trial court erred by allowing the state to introduce evidence of his court-ordered competency evaluation. Harris contends that the admission of the evidence, including statements that he made to Dreyer, violated his Fifth Amendment protection against self-incrimination, his Sixth Amendment right to counsel, and his Fourteenth Amendment right to a fair trial and due process. We consider each of these contentions in turn.

{¶20} Harris points to the United States Supreme Court's decision in *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981), to support his claims that the admission of Dreyer's testimony violated his Fifth and Sixth Amendment rights. In *Estelle*, the trial court ordered the defendant in a capital murder case to undergo a psychiatric evaluation, even though defense counsel had not raised the defendant's competency or sanity. *Id.* at 456-457. The psychiatrist concluded that the defendant was competent to stand trial. *Id.* at 457. Then, in the penalty phase,

² Bennie was acquitted of all charges.

the state called the psychiatrist to testify about the defendant's lack of remorse and future dangerousness. *Id.* at 458. In the course of his testimony, the psychiatrist related statements that the defendant had made about the crime itself. *Id.* at 464. The Supreme Court concluded that the examination that formed the basis of the psychiatrist's testimony violated the defendant's Fifth Amendment right against self-incrimination because the defendant had been compelled to speak to the psychiatrist and had not been informed of his *Miranda* rights. *Id.* at 469. Similarly, the court held that the psychiatrist's examination violated the defendant's right to counsel because the defendant was "denied the assistance of his attorneys in making the significant decision of whether to submit to the examination and to what end the psychiatrist's findings could be employed." *Id.* at 471.

{¶21} *Estelle* is inapposite. Unlike the defendant in *Estelle*, Harris voluntarily submitted to the psychiatrist's examination when his counsel submitted a suggestion of incompetence and a written not-guilty-by-reason-of-insanity plea. "[T]he appellant, by entering his plea of not guilty by reason of insanity, initiated the interview process set forth in R.C. 2945.39, and * * * under the rationale of *Steffen, supra*, he cannot complain about the use of the results obtained from it." *State v. Price*, 1st Dist. Nos. C-860402 and C-860409, 1987 Ohio App. LEXIS 9310 (Oct. 28, 1987), citing *State v. Steffen*, 31 Ohio St.3d 111, 121-22, 509 N.E.2d 383 (1987). We thus conclude that Harris's Fifth and Sixth Amendment rights were not violated.

{¶22} Harris also argues that Dreyer's testimony violated his right to a fair trial and his due-process rights. He contends that the trial court allowed the testimony in violation of Evid.R. 404.

{¶23} The state argued at trial, and argues now on appeal, that Dreyer's testimony about Harris's malingering, in conjunction with the testimony that Harris

intended to feign mental illness, was admissible as evidence of consciousness of guilt. In *State v. Eaton*, the Ohio Supreme Court stated "flight, escape from custody, resistance to arrest, concealment, assumption of a false name, and related conduct, are admissible as evidence of consciousness of guilt, and thus of guilt itself." 19 Ohio St.2d 145, 160, 249 N.E.2d 897 (1969), *vacated on other grounds* 408 U.S. 935, 92 S.Ct. 2857, 33 L.Ed.2d 750 (1972), quoting 2 Wigmore, *Evidence* 111, Section 276 (3 Ed.). But under R.C. 2945.371(J), "[n]o statement that a defendant makes in an evaluation or hearing under divisions (A) to (H) of this section relating to the defendant's competence to stand trial or to the defendant's mental condition at the time of the offense charged shall be used against the defendant on the issue of guilt in any criminal action or proceeding * * *." Thus, we conclude that Dreyer's testimony about Harris's malingering was not admissible as evidence of his consciousness of guilt.

{¶24} Courts have recognized that testimony about a defendant's statements during a competency examination could be admitted for reasons other than evidence of guilt. "A defendant's statements made in the course of a court-ordered psychological examination may be used to refute his assertion of mental incapacity, but may not be used to show that he committed the acts constituting the offense." *State v. Cooney*, 46 Ohio St.3d 20, 544 N.E.2d 895 (1989), paragraph two of the syllabus. See Evid.R. 404(A)(1). But in this case, Dreyer's testimony was offered in the state's case in chief, not in rebuttal.

{¶25} We therefore conclude that the trial court erred when it allowed Dreyer to testify. The state argues that, even if we did conclude that the testimony was improper, any error would be harmless, as Harris took the stand in his own

defense and admitted that he had shot Gulleman. We turn our consideration, then, to whether the admission of the testimony was harmless.

{¶26} “Before constitutional error can be considered harmless, we must be able to ‘declare a belief that it was harmless beyond a reasonable doubt.’ * * * Where there is no reasonable possibility that unlawful testimony contributed to a conviction, the error is harmless and therefore will not be grounds for reversal.” (Citations omitted.) *State v. Brown*, 65 Ohio St.3d 483, 485, 605 N.E.2d 46 (1992). See Crim.R. 52(A). Here, we cannot conclude that the court’s error was harmless beyond a reasonable doubt. Dreyer’s testimony was initially offered to bolster the state’s claim that Harris had intended to feign mental illness to avoid the charges against him. The testimony about Harris’s alleged malingering lended credibility to the testimony of Brown, Johnson, Anderson, and Gray about Harris’s statements in the justice center. Until he testified, Harris’s defense appeared to be centered around the argument that he had not been involved. But once he took the stand, his defense shifted to whether the shooting had been done in the course of committing a robbery. If there were no attempted robbery, Harris could not be guilty of aggravated murder.

{¶27} We agree that, given Harris’s testimony, Dreyer’s testimony may have been harmless if it went only to whether Harris had shot Gulleman. But because the testimony was about Harris feigning symptoms, it emphasized Harris’s questionable credibility. Such questions about his credibility could have reasonably affected how the jury viewed Harris’s explanation of the shooting and his contention that he had not intended to rob Gulleman. We conclude that the error was not harmless, and we sustain the first assignment of error. We therefore reverse Harris’s convictions for aggravated murder and aggravated robbery.

{¶28} In his second assignment of error, Harris asserts that the trial court erred when it failed to grant his motion to compel discovery. During discovery, the assistant prosecutor filed a certificate of nondisclosure of witnesses pursuant to Crim.R. 16(D). In accordance with Rule 7(K) of the Hamilton County Rules of Practice of the Court of Common Pleas, the matter was referred to the presiding judge for a review of the prosecuting attorney's certification. See Crim.R. 16(F).

{¶29} During the hearing before the presiding judge, the assistant prosecutor requested that he be permitted to present information in support of his certification of nondisclosure outside the presence of the defense attorneys. The defense attorneys objected, arguing that an ex parte hearing would impinge upon the effectiveness of their assistance to their clients. Over defense objections, the presiding judge conducted the hearing outside the presence of defense counsel. Before the defense attorneys left the presiding judge's chambers, Harris's attorney asked the assistant prosecutor if there had been direct threats to the witnesses whose names were not being disclosed. The prosecutor replied, "[I]n general, the witnesses who the state anticipating [sic] calling in this case have all expressed—made a request on their own to law enforcement, either to me or to the police, that their names and identities not be disclosed prior to trial because of a concern for their safety. With respect to any direct threats, that is information that I want to give the court outside the presence of counsel."

{¶30} After defense counsel left the chambers, the assistant prosecutor presented information about threats to and concerns for the safety of four state witnesses. Four police officers, who also attended the hearing, attested to the information relayed by the assistant prosecutor. Part of the information relayed to the court included an allegation that after the assistant prosecutor had disclosed to

Harris's prior counsel that one of the witnesses, Sherron People, was a confidential informant, the witness had been approached on the street and threatened. According to the assistant prosecutor, that incident was the instigation for requesting an ex parte hearing with the presiding judge. The presiding judge concluded that the assistant prosecutor had not abused his discretion in refusing to disclose the name of the four witnesses.

{¶31} Harris now contends that the assistant prosecutor's certificate of non-disclosure failed to provide any reasonable, articulable facts in support of non-disclosure as required by Crim.R. 16(D). But we conclude that the certification satisfied the rule's requirements.

{¶32} More troubling is the hearing that took place before the presiding judge. Crim.R. 16(F) provides that "[u]pon motion of the defendant, the trial court shall review the prosecuting attorney's decision of nondisclosure * * * for abuse of discretion during an *in camera* hearing conducted seven days prior to trial, with counsel participating." Clearly, the presiding judge's decision to allow the prosecutor to present information during an ex parte hearing violated the rule's requirement that a hearing be conducted with counsel participating.

{¶33} Having concluded that the presiding judge erred in holding an ex parte hearing, we must consider whether Harris was prejudiced by the error. We conclude that he has not demonstrated prejudice. It is clear that the prosecutor did disclose the names of the four witnesses to defense counsel. Despite Harris's assertions, there is no indication how earlier disclosure of the names of the witnesses would have aided his defense. The hearing before the presiding judge occurred on May 4, 2011, which was seven days before the scheduled trial date. On May 19, 2011, the prosecutor and the defense attorneys again appeared before the presiding judge

on the prosecutor's request to perpetuate the testimony of Peoples. The presiding judge granted the prosecutor's request, and Peoples was deposed with all attorneys and Harris and Bennie attending. The trial did not begin until June 15, so it is unclear how, given the length of time between the disclosure of Peoples's name and the start of trial, Harris's counsel was prevented from adequately preparing for trial. And while the other three witnesses were presumably not disclosed until the start of the trial, Harris has provided no demonstration of how his counsel was prevented from preparing for trial.

{¶34} Nor has Harris demonstrated how he was prejudiced by the non-disclosure of the witnesses. Harris did not ask for a continuance when the names were disclosed. Further, he did not object to the testimony of any of the witnesses when they were called to testify. Thus, while we are troubled by the violation of Crim.R. 16(F), we overrule Harris's assignment of error because he has not demonstrated prejudice.

{¶35} Harris's third assignment of error is that he was deprived of a fair trial and due process of law by the misconduct of the prosecutor. His fourth assignment of error is that he was deprived of the effective assistance of counsel. And his sixth assignment of error is that he was deprived of a fair trial due to cumulative error. Given our disposition of the first assignment of error, these assignments of error are moot, and we decline to address them.

{¶36} The fifth assignment of error is that his convictions were based on insufficient evidence and were against the manifest weight of the evidence. Harris also asserts that the trial court erred when it denied his Crim.R. 29 motion for an acquittal.

{¶37} The standard of review for a sufficiency claim and for the denial of a Crim.R. 29 motion for an acquittal is the same. When an appellant challenges the sufficiency of the evidence, we must determine whether the state presented adequate evidence on each element of the offense. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). On the other hand, when reviewing whether a judgment is against the manifest weight of the evidence, we must determine whether the jury clearly lost its way and created a manifest miscarriage of justice. *Id.* at 387. Because we are reversing Harris's convictions for aggravated murder and aggravated robbery, we need not consider whether those convictions were against the manifest weight of the evidence.

{¶38} Harris was convicted of aggravated murder in violation of R.C. 2903.01(B), which provides that "[n]o person shall purposely cause the death of another * * * while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit, * * * aggravated robbery, [or] robbery." He was also convicted of aggravated robbery in violation of R.C. 2911.01(A)(1).

{¶39} Harris admitted that he had shot Gulleman. But during trial he denied that he had tried to rob Gulleman. He now contends that the state did not present sufficient evidence of a robbery or attempted robbery. We disagree. State witnesses testified that Harris had told them that he had intended to rob Gulleman. The jury was in the best position to determine the credibility of those witnesses. Further, that Gulleman was found with \$210 under his body and that his wallet was still in the car after the shooting does not negate the circumstantial evidence that Harris had attempted to rob Gulleman before shooting him. We conclude that the state presented sufficient evidence of aggravated murder, aggravated robbery, and

having weapons while under disability. And the jury did not lose its way when it found Harris guilty of having weapons while under a disability. The fifth assignment of error is overruled.

{¶40} Therefore, we reverse Harris's convictions for aggravated murder and aggravated robbery along with the firearm specifications. His conviction for having weapons while under disability is affirmed. We remand the cause for a new trial on the aggravated murder with the firearm specifications and the aggravated robbery with the firearm specifications.

Judgment affirmed in part and reversed in part, and cause remanded.

SUNDERMANN, P.J., HENDON and FISCHER, J.J., concur.

J. HOWARD SUNDERMANN, retired, from the First Appellate District, sitting by assignment.

Please note:

The court has recorded its own entry this date.