ORIGINAL

IN THE SUPREME COURT OF OHIO
2013

STATE OF OHIO,	Case No. 2013-1285
Plaintiff-Appellee,	On Appeal from the Franklin County Court of Appeals, Tenth Appellate District
-vs-	
LEVANDER DAVIS,	
Defendant-Appellant.	Court of Appeals Case No. 12AP-156

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. The defendant was convicted of murder, attempted murder and felonious assault, all with firearm specifications, and of having a weapon while under disability. The defendant asks this Court to review the weight and sufficiency of the evidence presented. But this Court does not weigh the evidence. *See, e.g., State v. Murphy*, 176 Ohio St. 385, 199 N.E. 884 (1964). And the State presented overwhelming evidence establishing the defendant's guilt of all of the offenses, through the testimony of multiple eyewitnesses to the shooting, along with physical and scientific evidence. The defendant presents no compelling reason for this Court to expend its scarce judicial resources to review his case, and the issue he presents involves fact-laden inquiries and well-settled legal principles. These fact-intensive inquiries and case-specific issues would be unlikely to provide law of statewide interest that would be helpful to the bench and bar. It is respectfully submitted that jurisdiction should be declined.

STATEMENT OF THE CASE AND FACTS

The State relies on and incorporates the statement of the facts and procedural history contained in the court of appeals' opinion, at ¶¶2-11. As pertinent here, the defendant fired between 30 and 50 rounds of ammunition from two different guns inside a bar in Columbus on March 8, 2012, while approximately 40 patrons were present in the bar. *State v. Davis*, 10th Dist. No. 12AP-156, 2013-Ohio-2770, ¶¶3-9. One person was shot eight times, and he testified against the defendant. One person died. Three eyewitnesses testified and identified the defendant, one of whom had been friends with the defendant.

The court of appeals affirmed the defendant's conviction. Id. He now asks this Court to accept jurisdiction over his case. That request should be denied.

RESPONSE TO PROPOSITIONS OF LAW NOS. ONE AND TWO:

SUFFICIENT EVIDENCE SUPPORTED DEFENDANT'S CONVICTIONS.

The issue of sufficiency of the evidence presents a purely legal question for a reviewing court regarding the adequacy of the evidence. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). This 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.

Here, the State presented sufficient evidence to establish all of the elements of all of the offenses. The defendant claimed that the State failed to prove that he possessed a .40-caliber handgun in the bar that night, which he used to cause the victim's death and Mr. Fagain's serious injuries, because there was no reliable, physical evidence establishing that the defendant possessed a .40-caliber weapon in the bar that night, and because when he was arrested, the defendant possessed the chrome 9-millimeter handgun which he had fired in the bar that night. These claims lacked merit and were properly rejected.

First, a lack of physical evidence does not warrant interfering with the jury's decision. *See State v. Hunter*, 10th Dist. No. 10AP-599, 2011-Ohio-1337, ¶¶23-25. Forensic evidence is not required to support a conviction. *State v. Johnson*, 112 Ohio St.3d 210, 2006-Ohio-6404, ¶53, 858 N.E.2d 1144 (rape victim's testimony enough even with no physical evidence); *State v. Kaufman*, 187 Ohio App.3d 50, 2010-Ohio-1536, ¶71, 931 N.E.2d 143 (7th Dist.) ("there is no

requirement that testimonial evidence of sexual abuse must be corroborated by physical or other evidence"); *State v. Lundy*, 8th Dist. No. 90229, 2008-Ohio-3359, ¶12 ("absence of corroborating physical evidence does not negate the testimony of a witness to a crime"); *State v. Jones*, 10th Dist. No. 07AP-977, 2008-Ohio-3765, ¶16 (lack of physical evidence does not preclude conviction).

Nonetheless, in this case, there was reliable, physical and scientific evidence establishing that the defendant possessed a .40-caliber handgun in the bar that night, as his DNA was recovered from a .40-caliber magazine found outside the bar immediately after the shooting. And there were thirty-three .40-caliber shell casings found inside the bar in the same general area as the casings fired from the defendant's gun. The defendant's claim that this evidence was not sufficient to establish his possession of a .40-caliber handgun in the bar on the night of the shooting was correctly rejected.

In addition to this reliable, physical and scientific evidence establishing the defendant's guilt, the State also presented two eyewitnesses who saw the defendant shoot the decedent, one of whom was friends with the defendant, and a third eyewitness who saw the defendant with a gun that night. Additionally, Mr. Fagain testified that the defendant was the person who shot him, and he had been shot twice in the stomach. There was overwhelming evidence establishing that the defendant was the person who shot and killed Mr. Ferguson, then shot Mr. Fagain eight times and sprayed the barroom and its patrons with gunfire. *See State v. Palmer*, 80 Ohio St.3d 543, 687 N.E.2d 685 (1997) (sufficient evidence supported aggravated murder conviction after argument with victim, notwithstanding defendant's destruction of murder weapon); *see also State v. Mickles*, 6th Dist. No. L-05-1206, 2006-Ohio-3803, ¶51 (sufficient evidence supported murder conviction, notwithstanding failure to recover murder weapon).

The defendant also claimed that there were multiple shooters in the bar that night. The State's evidence established that there were multiple guns fired that night, including a gun that was found hidden in the basement of the bar. However, the three eyewitnesses who testified all saw only one person with a gun in the bar before the shooting and that was the defendant. And contrary to appellant's claims, neither Mr. Houston nor Mr. Fagain had any trouble identifying the defendant as the assailant in the courtroom. Also, the defendant's own friend testified that the defendant was the person who killed the victim, then fired between 30 and 50 rounds of ammunition. Significantly, Mr. Evans also testified that he knew the defendant carried different types of guns, sometimes carried multiple guns, and had both regular and extended clips of ammunition.

The State presented overwhelming evidence establishing that the defendant shot and killed Mr. Ferguson then shot Mr. Fagain eight times, then continued firing between twenty and fifty rounds of ammunition in the bar. Viewing this evidence in the light most favorable to the State, the State's evidence establishing all of the elements of the offenses of murder, attempted murder, felonious assault, and weapon under disability was overwhelming. The defendant's claims to the contrary lacked merit, and the court of appeals correctly affirmed his convictions.

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, August 23, 2013, to Levander Davis, #656-768, Allen Correctional Institution, P.O. Box 4501, Lima, Ohio 45802.

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