

ORIGINAL

IN THE
SUPREME COURT OF OHIO

STATE OF OHIO	:	NO. 2013-0414
Plaintiff-Appellant	:	On Appeal from the Hamilton County Court of Appeals, First Appellate District
vs.	:	
JOSEPH HARRIS	:	Court of Appeals Case Number C-110472
Defendant-Appellee	:	

MERIT BRIEF OF PLAINTIFF-APPELLANT

Joseph T. Deters (0012084P)
Prosecuting Attorney

Judith Anton Lapp (0008687P)
Assistant Prosecuting Attorney

230 East Ninth Street, Suite 4000
Cincinnati, Ohio 45202
(513) 946-3009
Fax No. (513) 946-3021

COUNSEL FOR PLAINTIFF-APPELLANT, STATE OF OHIO

Wendy R. Callaway
Attorney at Law
2089 Sherman Avenue, Suite 20
Cincinnati, Ohio 45212
(513) 351-9400

COUNSEL FOR DEFENDANT-APPELLEE, JOSEPH HARRIS

RECEIVED
SEP 26 2013
CLERK OF COURT
SUPREME COURT OF OHIO

FILED
SEP 26 2013
CLERK OF COURT
SUPREME COURT OF OHIO

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STATEMENT OF THE CASE

Harris was charged on October 29, 2010 with Aggravated Murder, Murder, Aggravated Robbery and Having Weapons While Under Disability. (T.d. 1) On December 30, 2010, Harris filed a Suggestion of Incompetency and a Plea of Not Guilty by Reason of Insanity (NGRI). (T.d. 20, 21) He was found competent to stand trial and the case was tried to a jury beginning on June 20, 2011. (T.d. 24) An entry stating the NGRI plea was withdrawn was entered eight days later. (T.d. 80) The jury found Harris guilty as charged, and a pre-sentence investigation was conducted. (T.d. 81-84) 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 Aggravated Murder conviction; Aggravated Robbery: eight years; Having Weapons Under Disability: five years. (T.d. 94, 95) He also received the consecutive, mandatory three-year term on a gun specification. (A co-defendant, Ryan Bennie, was acquitted of all charges.)

Harris appealed his convictions to the First District Court of Appeals. The court reversed his conviction because the state had presented the testimony of a psychologist during its case-in-chief on the issue of whether Harris had feigned mental illness. On February 6, 2013, this Court accepted jurisdiction on that issue.

STATEMENT OF THE FACTS

On September 26, 2010, 18-year old Shane Gulleman drove from his home in rural Indiana to a Cincinnati neighborhood known for its violence and drug trafficking. Sometime around 12:30 a.m., Shane sought out Joseph Harris in order to buy Oxycontin to support his heroin and morphine addiction. During the transaction, Harris shot Shane 8 or 9 times, with one bullet directly to the head. He was found slumped over on the driver's side of his car, and died at the scene. An autopsy revealed that all gunshot wounds traveled from the right side of Shane's body to the left, indicating that he was facing forward in his seat when he died. (T.p. 601)

Two people known to Harris identified him at or near the location of the murder. Khristina Willis heard gunshots coming from the parking lot where Shane's body was found, and saw Harris and another man running away from the parking lot immediately afterwards. (T.p. 506, 509) Sherron Peoples was in the parking lot when Gulleman drove in and parked. After Harris got in the front passenger seat, Peoples heard gunshots. Afterwards, Harris and a second man ran by with guns drawn. (T.p. 699) Peoples later called Crimestoppers, after which police were able to obtain both Gulleman and Harris' cell phone numbers. (T.p. 1113, 1117)

Text records showed that Harris agreed to sell Gulleman seven Oxycontin pills for \$210. (T.p. 1117; State's Exhibit 16-A) Gulleman texted that he would arrive at the agreed-upon location in 30 minutes. (T.p. 1122) Twenty or twenty-five minutes after the murder, Harris texted an unidentified caller with the message "Don't say shit." (T.p. 1177)

Four inmates from the Hamilton County Justice Center testified that Harris had planned to rob a buyer, *did* in fact rob the buyer, a man named "Shane," and then repeatedly shot him with a .45. caliber weapon. (T.p. 1068, 1185, 1097) Harris said he often robbed customers during drug sales, and that when Shane acted like he didn't want to give up his money, he shot him. (T.p. 994, 1063, 1097) He asked another inmate to testify against co-defendant Bennie and to pin the murder on someone else. (T.p. 1062) Harris said that he was going to go to the psychiatric ward and fake being "crazy," just as two others on the same pod were doing. (T.p. 1061, 1062) He later told another inmate that because his plan failed, he would claim that he was not at the location of the murder. (T.p. 1096)

Harris testified at trial and admitted that he met with Shane Gulleman to sell him Oxycontin pills. (T.p. 1221) He said that Gulleman hesitated and turned his body sideways to reach something in the back seat. Thinking it might be a gun, Harris shot at Gulleman repeatedly

before running away. (T.p. 1221, 1222) He denied feigning insanity or incompetency and accused the inmate witnesses of lying. At the same time, he admitted that much of what they said was true, but stated that “they added on some stuff.” (T.p. 1249)

Dr. Carla Dreyer examined Harris for competency and insanity. She testified during the state’s case-in-chief on the limited issue of whether Harris feigned mental illness. She explained to the jury that psychologists typically use “observations, clinical interview[s] and psychological testing” to detect feigning and malingering. (T.p. 897) She said she had interviewed Harris in the past on an unrelated issue, and that she compared the results of intelligence and psychological testing done in the past with the results from the current evaluation. (T.p. 899) Based on this, she concluded that he was feigning mental illness. (T.p. 904) She did not discuss any of the facts of the case and did not relay any statements made by Harris during the interview.

While the Court of Appeals recognized that a defendant’s statements during a competency evaluation may be admitted for purposes other than guilt, it reiterated that this must be done during the case-in-chief. *State v. Harris*, 1st Dist. No. C-110472, ¶ 24, 2013 WL 454904 (February 6, 2013). The court ruled that Dr. Dreyer’s testimony was admitted to bolster the state’s claim that Harris intended to feign mental illness, and in turn, lent credibility to the testimony of inmates who relayed what Harris had said to them while in jail awaiting trial. This may have been harmless “if it only went to whether Harris had shot Gulleman,” but the Court ruled that because Harris testified that he did not *rob* Gulleman, it became reversible error. *Id. at* ¶ 27. Because he changed his defense mid-trial, and because Dr. Dreyer’s testimony “emphasized Harris’ questionable credibility,” it could have affected how the jury viewed Harris’ testimony. *Id.* This, according to the court, constituted reversible error.

ARGUMENT IN SUPPORT OF PROPOSITION 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.

A defendant who admits his guilt to a psychologist during a mental evaluation is constitutionally protected from having that statement used against him at trial. But he enjoys no such protection when he intentionally lies to the examiner in a blatant attempt to feign mental illness to avoid responsibility for his crimes. And when the state uncovers these lies – whether through the examining psychologist's opinion or through the testimony of inmates to whom the defendant boasted – the state must be permitted to present them as evidence to the jury. The requirement that the prosecution wait until rebuttal to refute evidence of insanity should not be applied where an insanity plea was pursued as a ruse and was never intended as a viable defense.

Malingering Is Not Protected by R.C. 2945.371(J)

R.C. 2945.371(J) protects a defendant from having any statement made during a mental evaluation used against him on the issue of guilt at trial. It 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 * * *." This complies with United States Supreme Court case law regarding the constitutional protections of a defendant's Fifth Amendment right against self-incrimination and the Sixth Amendment right to counsel during a court-ordered mental evaluation. *See Buchanan v. Kentucky*, 483 U.S. 402, 433, 107 S. Ct. 2906, 2923, 97 L. Ed. 2d 336 (1987); *Estelle v. Smith*, 451 U.S. 454, 101 S. Ct. 1866 (1981).

In 1997, the Ohio Legislature added the following language: “[B]ut, 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.” R.C. 2945.371(J). Nothing in the legislative history of the statute suggests what purpose such a witness would be called for. Nor does it suggest what type of non-guilt-related evidence was contemplated for admissibility through such a witness. But case law interpreting this subsection holds that the prosecution may introduce a defendant’s statements during a mental evaluation for reasons *other than* statements that tend to implicate him in the crime. And it distinguishes between the introduction of inadmissible statements of factual evidence of the crime charged and admissible evidence of a defendant’s psychological state.

The Psychologist’s Opinion of Harris’ Malingering

In the present case, psychologist Carla Dreyer testified on the limited issue of whether Harris feigned incompetence or insanity. After preliminary background questions, Dr. Dreyer explained that she interviewed Harris by virtue of his Suggestion of Incompetency and a plea of Not Guilty By Reason of Insanity. She testified that she had interviewed him previously on an unrelated issue and that this provided her with a baseline from which to assess his current situation. (T.p. 899) Dr. Dreyer stated her conclusion that Harris was competent to stand trial and that he did not meet the criteria for a plea of NGRI. She also explained the terms “malingering” and “feigning” and how they can be detected by an examiner. The prosecutor then asked “Did you reach any opinions with respect to whether or not Mr. Harris was malingering or attempting to malingering symptoms of a mental illness with respect to either of those two issues?” (T.p. 904) She answered “Yes. And in my opinion at that time he was malingering both cognitive and psychiatric difficulties.” (T.p. 904) Based upon a comparison of his prior interview and test

scores, she concluded that “[h]e was in my opinion feigning some symptoms and probably exaggerating others.” (T.p. 905)

Through other lay witnesses, the state presented evidence that while in jail awaiting trial, Harris went from inmate to inmate, bragging about murdering Shane Gulleman during a robbery and about how he was going to avoid prison by “acting crazy,” a common ploy. The state witnesses testified that Harris concocted plans to get one inmate to pin the murder on another, and asked several men to lie for him at trial. Despite this independent evidence of the sham interview with Dr. Dreyer, the First District Court of Appeals reversed Harris’ conviction because she testified about Harris’ malingering during the case-in-chief, rather than in rebuttal. This was done despite the fact that Dr. Dreyer did not testify about *any* factual issues of guilt and did not ever repeat *any* statement Harris made during the mental evaluation. She did not summarize any part of the interview and did not testify about any facts of the robbery and murder. Her testimony showed Harris’ intent to obfuscate and mislead authorities in an attempt to escape prosecution.

The Court of Appeals’ ruling essentially blocked the use of any evidence that a defendant committed intentional fraud through malingering unless that defendant proceeds on a plea of Not Guilty by Reason of Insanity and opens the door to evidence of his psychological state. This grants permission for a defendant who intends to deceive the examiner, and thus, the court, to raise an insincere plea of NGRI as a trial tactic. It permits the defendant to gamble on whether he can con a psychologist with the assurance that his attempt to defraud the court will be shielded by R.C. 2945.371(J). In *Kentucky v. Buchanan*, the dissent registered concern that a defendant seeking a diagnosis for the purpose of treatment should not have “lingering fears” that the contents of his discussions during such an examination could be used against him at trial. *Supra*.

But there, the defendant was sincere in his request for such a pre-trial treatment evaluation and was proceeding on a mental status defense of extreme emotional disturbance. Here, there was never an intention to obtain treatment, as evidenced by Harris' statements to other inmates. Such a blatant and obvious manipulation of the legal system cannot be permitted.

Consciousness of Guilt and R.C. 2945.371(J)'s Prohibition Against the Introduction of a Defendant's Statements on the Issue of Guilt

The First District also addressed the prosecutor's argument that evidence of malingering was admissible to show consciousness of guilt. When responding to defense objections to Dr. Dreyer's appearance as a witness, the prosecutor stated that her testimony would corroborate that of the jailhouse inmates to whom Harris admitted his crime and his plan to fake an insanity defense. The prosecutor stated "But also like evidence of flight, it is evidence of a consciousness of guilt. And the law is very clear that I'm allowed to use any evidence that sheds (light) on the defendant's consciousness, since I can't step into the defendant's mind and know what he knows or what he's thinking * * *." (T.p. 881) Even though the appellate court agreed that the state could present evidence of lying about identity, flight, escape, concealment, resistance to arrest, and other related conduct during its case-in-chief, it ruled that evidence of lying to a psychologist could only be introduced on rebuttal. (*See State v. Hand*, 107 Ohio St.3d 378, 2006-Ohio-18, 840 N.E.2d 151.) This ruling, by its nature, equated evidence of consciousness of guilt with "statements." Nothing in R.C. 2945.371(J) militates this result. Presenting an opinion regarding feigning and malingering is not the same as presenting specific statements of a defendant that reflect on factual issues of guilt.

The appellate court rejected the state's argument that Dr. Dreyer did not testify about any facts of the case. The court came to this conclusion despite the fact that Dr. Dreyer testified that psychologists base their opinion on malingering by looking at "multiple data points," none of

which included the facts of the crime. “So we use observations, clinical interview and psychological testing typically.” (T.p. 897) Due to Harris’ previous interview, Dr. Dreyer could compare his functioning over time to assess his current competency or insanity. “I had his old testing in there, his old clinical observations and a wealth of data that was obtained in terms (of) his history and functioning.” (T.p. 900) Dr. Dreyer did not report even *one* instance during the interview that centered on a discussion of *any* facts of the case. Her testimony was based solely on her observations and his answers during psychological and intelligence testing. Again, nothing in R.C. 2945.371 suggests that a defendant’s answers to psychological or intelligence test questions constitute statements on the issue of guilt.

Significantly, Dr. Dreyer’s testimony represented only one piece of the evidence that reflected on Harris’ credibility. Independent of Dr. Dreyer, the state presented evidence that Harris repeatedly told other inmates that he robbed his victim and killed him when he hesitated to hand over the cash to pay for Oxycontin pills. He threatened witnesses, tried to convince inmates to lie for him, to name others as the murderer, and to fake his own insanity. It was not the opinion of these lay witnesses that Harris was faking mental illness; Harris *told* them that he was going to “act crazy” and reported back after its failure. Evidence of Harris’ malingering, shown through Dr. Dreyer’s testimony, was relevant to show his continuing efforts to manipulate witnesses and the court in order to cover up his guilt in Gulleman’s robbery and murder. Her testimony was admissible and Harris should not be permitted to use R.C. 2945.371(J) to bar the state from exposing his plan to the jury during its case-in-chief.

***Case Law Distinguishing Factual Evidence of Guilt and Issues of a Defendant’s
Psychological State***

In *State v. Cooley*, this Court interpreted R.C. 2945.39(D), a prior version of the statute, and held that it only prohibited the use of a defendant’s statement during a court-ordered

examination 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). Cooley withdrew his NGRI plea prior to trial in a capital murder case, but raised an alleged mental disorder in the penalty phase. He objected to the admission of a statement he made to an examining physician that he hit his victims, arguing that it reflected on the issue of guilt. This Court held that the statement had no immediate relevance to the alleged disorder, but did reflect on the degree of his involvement in the crime. It was therefore inadmissible. The court held, however, that it constituted harmless error because Cooley made *the same admission* to several other witnesses that he beat and killed the victims. (The court did not make any distinction between the value of the physician's testimony and that of the lay witnesses, as was done by the First District Court of Appeals in this case.)

In 2001, the Ninth District Court of Appeals applied *Cooley* and held that the amended statute maintained similar language and "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 *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 *Mathes*, the state was permitted to question a psychologist during its case-in-chief about a defendant's statements regarding his use of alcohol and any hostility felt towards the victim on the night of his murder. Although Mathes initially pled NGRI and made these statements during his court-ordered evaluation, he withdrew the plea prior to trial. The court stated: "The evidence at issue, defendant's statements about how much alcohol he had consumed on night of June 2 and the early morning hours of June 3, 1999, and whether he was hostile

toward the victim that night, went solely to the issue of Mathes' mental state. These statements did not constitute admissions of guilt, nor did they implicate Mathes in Stanfield's killing in any way." *Id. at 5*. No further appeals were taken from this decision.

Two years later, in *State v. Armstrong*, the Ninth District struck down a defendant's argument that evidence of malingering during a mental evaluation constituted inadmissible evidence of guilt. Armstrong had raised an affirmative defense of insanity. The appellate court stated that evidence of malingering 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. Although the prosecution elicited this testimony through cross-examination of a defense expert and through the testimony of a state expert on rebuttal, the *Armstrong* case is cited because it illustrates the point that evidence of malingering can be distinguished from evidence of guilt.

Dr. Dreyer did not testify to any words uttered by Harris that implicated himself in the murder of Shane Gulleman. She testified to the limited issue of malingering based on observations and testing. This could be gleaned from body language, inflection, tone of voice, eye movement, and in response to intelligence questions that evaluate a person's understanding of basic terminology of the English language. (See T.p. 905) Her report from the evaluation was not used at trial and she did not testify about any facts of the crime, i.e., factual issues of guilt. Her opinion regarding Harris' deceitful conduct was relevant to show the lengths to which he went to manipulate and deceive the court system. It corroborated the evidence of other state witnesses to whom Harris discussed his plan and its failure. It spoke to his credibility and showed a consciousness of guilt, both issues that were relevant to the state's case.

The First District's Analysis of Harris' Shifting Defense and Harmless Error

The First District took a confusing path to reach its conclusion that Dr. Dreyer's testimony constituted reversible error. The court stated that "[u]ntil 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." *State v. Harris*, 1st Dist. No. C-110472, ¶ 26, 2013 WL 454904 (February 6, 2013). The court then found that because Harris denied robbing Gulleman, Dr. Dreyer's opinion regarding malingering constituted a comment on Harris' credibility that "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." *Id at.* ¶ 27.

First, a defendant's credibility is always relevant to the case. Dr. Dreyer's opinion could certainly be considered by the jury in assessing his guilt. As stated, R.C. 2945.371(J) prohibits "statements" made during a mental evaluation. It does not prohibit impressions and conclusions about a defendant's malingering. Second, the defense in this case, as in many cases, definitely "shifted" numerous times during the trial. The state cannot predict or fathom what twists and turns the defense might take, and evidence that sheds light on credibility should not be restricted according to how a defendant chooses to try his case. Here, at the time of trial, both the NGRI plea and a Notice of Alibi were outstanding. (T.d. 21, 51) The state was therefore on notice that Harris planned on presenting evidence of insanity and at the same time, allege that he was at the home of his sister watching her children, spending time with his sister and her friend, "and never leaving the house on the dates of the offense." (T.d. 51) When defense counsel objected to Dr. Dreyer's appearance on the fourth day of trial, he stated for the first time that "* * * technically

if I have to withdraw what we filed six months ago, I will withdraw it right now.” (T.p. 882) He did not, however, during the next five days of trial testimony. Only on the sixth day of trial, when the case had gone to the jury, did he file an entry withdrawing this plea. (*See* T.d. 80) Such an ambiguous, last-minute representation should not have had any effect on whether evidence of malingering constituted inadmissible evidence on Harris’ credibility.

Plain Error in the Face of Ample Independent Evidence of Harris’ Malingering

Even more disturbing than the First District’s finding of error in the admission of Dr. Dreyer’s testimony during the case-in-chief was its finding that this was not harmless error. The court found that its analysis of harmless error changed because Harris’s defense shifted from a denial that he was involved in the crime to an admission that he shot Gulleman but did not rob him. According to the First District, this defense changed the effect of Dr. Dreyer’s testimony. “We agree that, given Harris’ 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.” ¶ 27. The court did not explain why the jury could not be affected in a reasonable way or why this was impermissible. Here, as in *State v. Cooley, supra*, the state presented ample evidence that Harris told multiple inmates that he had intended to rob Shane Gulleman, *did*, in fact rob Shane Gulleman, and then murdered Shane Gulleman. Dr. Dreyer’s testimony did not include any confession about the crime or any admissions that even *intimated* any fact about the crime. It relied solely on observations and the results of psychological and intelligence testing that was wholly unrelated to the crime itself. The appellate court held that there was sufficient evidence of the robbery to overcome a Crim. R. 29

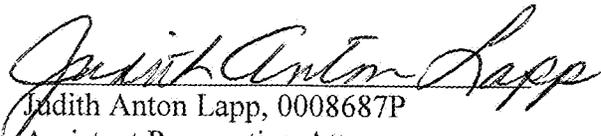
Motion for Acquittal, thus acknowledging the testimony of all four inmates who testified about Harris' admissions that he carried out his plan to rob Shane Gulleman. The jury was free to consider all of the evidence before it that reflected on Harris' credibility, and it cannot be said that absent Dr. Dreyer's testimony, the verdict would have been different. The court's finding that because it could have "reasonably affected" the jury is not dispositive of the issue.

CONCLUSION

Nothing in R.C. 2945.371(J) or its legislative history prohibits the state from presenting evidence that a defendant lied during a mental health evaluation, requested by the defense, in order to escape responsibility for his crime. And the state should not be barred from revealing this fraudulent conduct to the jury during its case-in-chief. Based on this, the state asks this Court to clarify the interpretation of the statute for Ohio courts and to remove any protection for a defendant's intentional fraud. In doing so, this Court should reverse the First District Court of Appeals' decision to grant Harris a new trial.

Respectfully,

Joseph T. Deters, 0012084P
Prosecuting Attorney


Judith Anton Lapp, 0008687P

Assistant Prosecuting Attorney
230 East Ninth Street, Suite 4000
Cincinnati, Ohio 45202
Phone: 946-3009

Attorneys for Plaintiff-Appellant, State of
Ohio

PROOF OF SERVICE

I hereby certify that I have sent a copy of the foregoing Merit Brief, by United States mail, addressed to Wendy R. Callaway, 2089 Sherman Avenue, Suite 20, Cincinnati, Ohio 45212, counsel of record, this 25th day of September, 2013.


Judith Anton Lapp, 0008687P
Assistant Prosecuting Attorney

APPENDIX

ORIGINAL

IN THE
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STATE OF OHIO	:	NO. 2013- 13-0414
Plaintiff-Appellant	:	On Appeal from the Hamilton County Court of Appeals, First Appellate District
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JOSEPH HARRIS	:	Court of Appeals Case Number C-110472
Defendant-Appellee	:	

NOTICE OF APPEAL OF PLAINTIFF-APPELLANT, STATE OF OHIO

Joseph T. Deters (0012084P)
Prosecuting Attorney

Judith Anton Lapp (0008687P)
Assistant Prosecuting Attorney

230 East Ninth Street, Suite 4000
Cincinnati, Ohio 45202
(513) 946-3009
Fax No. (513) 946-3021

COUNSEL FOR PLAINTIFF-APPELLANT, STATE OF OHIO

Wendy R. Callaway
Attorney at Law
2089 Sherman Avenue, Suite 20
Cincinnati, Ohio 45212
(513) 351-9400
(513) 351-4345 (fax)

Timothy Young
Ohio Public Defender
250 E. Broad Street, Suite 1400
Columbus, Ohio 43215-2998

COUNSEL FOR DEFENDANT-APPELLEE, JOSEPH HARRIS

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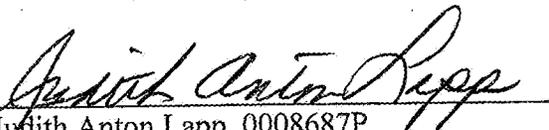
IN THE
SUPREME COURT OF OHIO

STATE OF OHIO : NO. 2013-
Plaintiff-Appellant :
vs. : NOTICE OF APPEAL OF
JOSEPH HARRIS : PLAINTIFF-APPELLANT, STATE
Defendant-Appellee : OF OHIO

Plaintiff-Appellant, State of Ohio, hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Hamilton County Court of Appeals, First Appellate District, entered in Court of Appeals Case Number C-110472 rendered on February 6, 2013. This case involves a felony and is of public or great general interest.

Respectfully submitted,

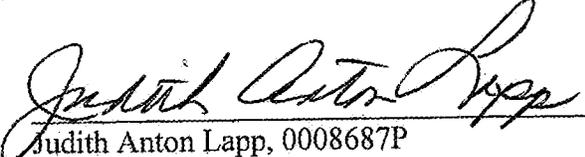
Joseph T. Deters
Prosecuting Attorney


Judith Anton Lapp, 0008687P
Assistant Prosecuting Attorney
230 East Ninth Street, Suite 4000
Cincinnati, Ohio 45202
Phone: (513) 946-3009

Attorneys for Plaintiff-Appellant, State of Ohio

PROOF OF SERVICE

I hereby certify that I have sent a copy of the foregoing Notice of Appeal of Appellant, State of Ohio, by United States mail, addressed to Wendy R. Callaway, attorney at law, 2089 Sherman Avenue, Suite 20, Cincinnati, Ohio 45212, Cincinnati, counsel of record, and to Timothy Young, Ohio Public Defender, 250 E. Broad Street, Suite 1400, Columbus, Ohio 43215-2998, this 14th day of March, 2013.


Judith Anton Lapp, 0008687P
Assistant Prosecuting Attorney

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

STATE OF OHIO,

Plaintiff-Appellee,

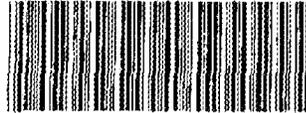
vs.

JOSEPH HARRIS,

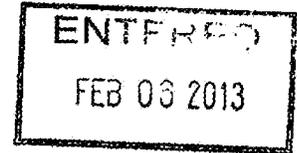
Defendant-Appellant.

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: _____

Presiding Judge

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

STATE OF OHIO,	:	APPEAL NO. C-110472
Plaintiff-Appellee,	:	TRIAL NO. B-1006801-A
vs.	:	<i>OPINION.</i>
JOSEPH HARRIS,	:	PRESENTED TO THE CLERK
Defendant-Appellant.	:	OF COURTS FOR FILING
		FEB 06 2013

COURT OF APPEALS

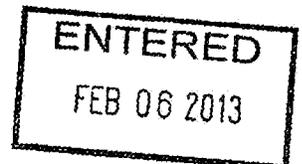
Criminal Appeal From: Hamilton County Court of Common Pleas

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.



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

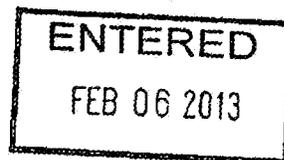
Per Curiam.

{¶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.



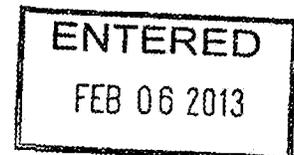
¹ Rule 7(K) requires that the presiding criminal judge hold the nondisclosure hearing.

{¶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.

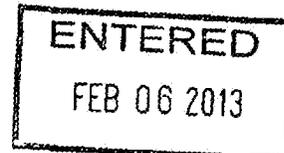
{¶6} Khristina Willis testified that she had lived in Winton Terrace in February 2010. Willis stated that on the night of September 25, 2010, she had been walking to a store in the neighborhood and had seen Harris pull out a gun and ask a group of people "where the money and weed at." According to Willis, 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



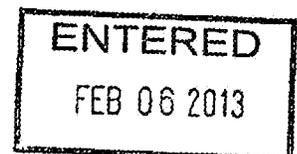
that he had seen a gun in Harris's hand, and that he had known Harris to carry a .45-caliber gun.

{¶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."

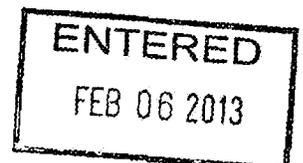
{¶13} Gary Brown testified that he had been in the Hamilton County Justice Center while Harris and Bennie were held there. According to Brown, Harris had told him that "[Gulleman] had that roll on him and he act like he didn't want to give



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.

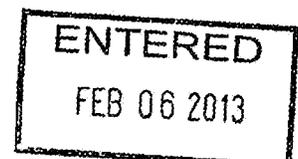


Gray also testified that Harris had told him about the shooting: "And it was supposed to be, you know I guess a robbery because he was supposed to have 85 Oxycontin pills, Mr. Harris did, and he was going to rob, you know Mr. Gulleman. But it did not go as planned because Mr. Gulleman didn't want to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

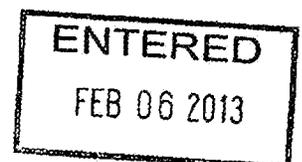
{¶18} At the conclusion of the trial, the jury found Harris guilty as charged.² Following a sentencing hearing, the trial court merged the murder count with the aggravated murder count and sentenced Harris to life without the possibility of parole for aggravated murder, with a consecutive three-year 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.

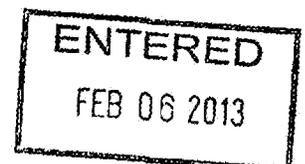


the state called the psychiatrist to testify about the defendant's lack of remorse and future dangerousness. *Id.* at 458. In the course of his testimony, the psychiatrist related statements that the defendant had made about the crime itself. *Id.* at 464. The Supreme Court concluded that the examination 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.

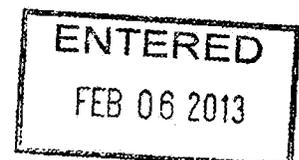
{¶23} The state argued at trial, and argues now on appeal, that Dreyer's testimony about Harris's malingering, in conjunction with the testimony that Harris



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. Cooley*, 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.

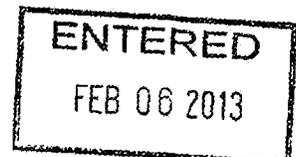
{¶25} We therefore conclude that the trial court erred when it allowed Dreyer to testify. The state argues that, even if we did conclude that the testimony was improper, any error would be harmless, as Harris took the stand in his own



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.

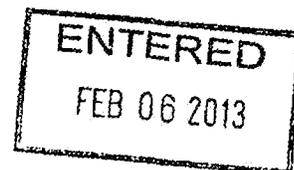
{¶27} We agree that, given Harris’s testimony, Dreyer’s testimony may have been harmless if it went only to whether Harris had shot Gulleman. But because the testimony was about Harris feigning symptoms, it emphasized Harris’s questionable credibility. Such questions about his credibility could have 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

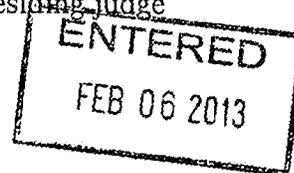


Harris's prior counsel that one of the witnesses, Sherron People, was a confidential informant, the witness had been approached on the street and threatened. According to the assistant prosecutor, that incident was the instigation for requesting an ex parte hearing with the presiding judge. The presiding 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

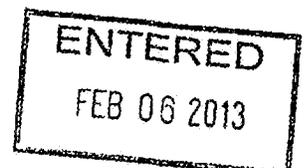


on the prosecutor's request to perpetuate the testimony of Peoples. The presiding judge granted the prosecutor's request, and Peoples was deposed with all attorneys and Harris and Bennie attending. The trial did not begin until June 15, so it is unclear how, given the length of time between the disclosure 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.

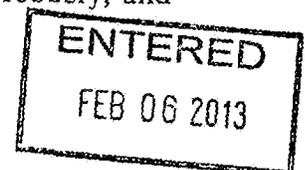
{¶36} The fifth assignment of error is that his convictions were based on insufficient evidence and were against the manifest weight of the evidence. Harris also asserts that the trial court erred when it denied his Crim.R. 29 motion for an acquittal.



{¶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.

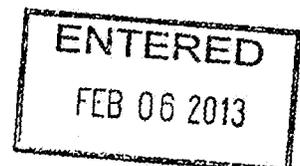
Judgment affirmed in part and reversed in part, and cause remanded.

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

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

Please note:

The court has recorded its own entry this date.



WestlawNext

NOTES OF DECISIONS (30)

Constitutional issues
 Duty of court, psychiatric evaluations
 Duty of examiner, psychiatric evaluations
 Fair trial, constitutional issues
 Ineffective assistance of counsel, constitutional issues
 Evidence, admissibility
 Post-conviction relief
 Probation revocation hearings
 Psychiatric evaluations
 Speedy trial

2945.371 Evaluations of mental condition
 B. ~~2945.371 Evaluations of mental condition~~ Title XXIX. Crimes--Procedure Effective: June 11, 2012 (Approx. 3 pages)

Title XXIX. Crimes--Procedure (Refs & Annos)

Chapter 2945. Trial (Refs & Annos)

Insanity

Enacted Legislation Amended by 2013 Ohio Laws File 25 (Am. Sub. H.B. 59)

Effective: June 11, 2012

R.C. § 2945.371

2945.371 Evaluations of mental condition

Currentness

(A) If the issue of a defendant's competence to stand trial is raised or if a defendant enters a plea of not guilty by reason of insanity, the court may order one or more evaluations of the defendant's present mental condition or, in the case of a plea of not guilty by reason of insanity, of the defendant's mental condition at the time of the offense charged. An examiner shall conduct the evaluation.

(B) If the court orders more than one evaluation under division (A) of this section, the prosecutor and the defendant may recommend to the court an examiner whom each prefers to perform one of the evaluations. If a defendant enters a plea of not guilty by reason of insanity and if the court does not designate an examiner recommended by the defendant, the court shall inform the defendant that the defendant may have independent expert evaluation and that, if the defendant is unable to obtain independent expert evaluation, it will be obtained for the defendant at public expense if the defendant is indigent.

(C) If the court orders an evaluation under division (A) of this section, the defendant shall be available at the times and places established by the examiners who are to conduct the evaluation. The court may order a defendant who has been released on bail or recognizance to submit to an evaluation under this section. If a defendant who has been released on bail or recognizance refuses to submit to a complete evaluation, the court may amend the conditions of bail or recognizance and order the sheriff to take the defendant into custody and deliver the defendant to a center, program, or facility operated or certified by the department of mental health or the department of developmental disabilities where the defendant may be held for evaluation for a reasonable period of time not to exceed twenty days.

(D) A defendant who has not been released on bail or recognizance may be evaluated at the defendant's place of detention. Upon the request of the examiner, the court may order the sheriff to transport the defendant to a program or facility operated or certified by the department of mental health or the department of developmental disabilities, where the defendant may be held for evaluation for a reasonable period of time not to exceed twenty days, and to return the defendant to the place of detention after the evaluation. A municipal court may make an order under this division only upon the request of a certified forensic center examiner.

(E) If a court orders the evaluation to determine a defendant's mental condition at the time of the offense charged, the court shall inform the examiner of the offense with which the defendant is charged.

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(F) In conducting an evaluation of a defendant's mental condition at the time of the offense charged, the examiner shall consider all relevant evidence. If the offense charged involves the use of force against another person, the relevant evidence to be considered includes, but is not limited to, any evidence that the defendant suffered, at the time of the commission of the offense, from the "battered woman syndrome."

(G) The examiner shall file a written report with the court within thirty days after entry of a court order for evaluation, and the court shall provide copies of the report to the prosecutor and defense counsel. The report shall include all of the following:

(1) The examiner's findings;

(2) The facts in reasonable detail on which the findings are based;

(3) If the evaluation was ordered to determine the defendant's competence to stand trial, all of the following findings or recommendations that are applicable:

(a) Whether the defendant is capable of understanding the nature and objective of the proceedings against the defendant or of assisting in the defendant's defense;

(b) If the examiner's opinion is that the defendant is incapable of understanding the nature and objective of the proceedings against the defendant or of assisting in the defendant's defense, whether the defendant presently is mentally ill or mentally retarded and, if the examiner's opinion is that the defendant presently is mentally retarded, whether the defendant appears to be a mentally retarded person subject to institutionalization by court order;

(c) If the examiner's opinion is that the defendant is incapable of understanding the nature and objective of the proceedings against the defendant or of assisting in the defendant's defense, the examiner's opinion as to the likelihood of the defendant becoming capable of understanding the nature and objective of the proceedings against the defendant and of assisting in the defendant's defense within one year if the defendant is provided with a course of treatment;

(d) If the examiner's opinion is that the defendant is incapable of understanding the nature and objective of the proceedings against the defendant or of assisting in the defendant's defense and that the defendant presently is mentally ill or mentally retarded, the examiner's recommendation as to the least restrictive placement or commitment alternative, consistent with the defendant's treatment needs for restoration to competency and with the safety of the community.

(4) If the evaluation was ordered to determine the defendant's mental condition at the time of the offense charged, the examiner's findings as to whether the defendant, at the time of the offense charged, did not know, as a result of a severe mental disease or defect, the wrongfulness of the defendant's acts charged.

(H) If the examiner's report filed under division (G) of this section indicates that in the examiner's opinion the defendant is incapable of understanding the nature and objective of the proceedings against the defendant or of assisting in the defendant's defense and that in the examiner's opinion the defendant appears to be a mentally retarded person subject to institutionalization by court order, the court shall order the defendant to undergo a separate mental retardation evaluation conducted by a psychologist designated by the director of developmental disabilities. Divisions (C) to (F) of this section apply in relation to a separate mental retardation evaluation conducted under this division. The psychologist appointed under this division to conduct the separate mental retardation evaluation shall file a written report with the court within thirty days after the entry of the court order requiring the separate mental retardation evaluation, and the court shall provide copies of the report to the prosecutor and defense counsel. The report shall include all of the information described in divisions (G)(1) to (4) of this section. If the court orders a separate mental retardation evaluation of a defendant under this division, the court shall not conduct a hearing under divisions (B) to (H) of section 2945.37 of the Revised Code regarding that defendant until a

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report of the separate mental retardation evaluation conducted under this division has been filed. Upon the filing of that report, the court shall conduct the hearing within the period of time specified in division (C) of section 2945.37 of the Revised Code.

(I) An examiner appointed under divisions (A) and (B) of this section or under division (H) of this section to evaluate a defendant to determine the defendant's competence to stand trial also may be appointed to evaluate a defendant who has entered a plea of not guilty by reason of insanity, but an examiner of that nature shall prepare separate reports on the issue of competence to stand trial and the defense of not guilty by reason of insanity.

(J) No 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, 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. Neither the appointment nor the testimony of an examiner appointed under this section precludes the prosecutor or defense counsel from calling other witnesses or presenting other evidence on competency or insanity issues.

(K) Persons appointed as examiners under divisions (A) and (B) of this section or under division (H) of this section shall be paid a reasonable amount for their services and expenses, as certified by the court. The certified amount shall be paid by the county in the case of county courts and courts of common pleas and by the legislative authority, as defined in section 1901.03 of the Revised Code, in the case of municipal courts.

CREDIT(S)

(2012 H 487, eff. 6-11-12; 2011 H 153, eff. 9-29-11; 2009 S 79, eff. 10-6-09; 2001 S 122, eff. 2-20-02; 1996 S 285, eff. 7-1-97; 1980 H 965, eff. 4-9-81; 1980 H 900, S 297; 1978 H 565)

Notes of Decisions (30)

R.C. § 2945.371, OH ST § 2945.371

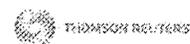
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