Supreme Court of Ohio Clerk of Court - Filed October 09, 2015 - Case No. 2011-1978

IN THE SUPREME COURT OF OHIO

STATE OF OHIO PLAINTIFF-APPELLEE **-vs-** **BENNIE L. ADAMS** DEFENDANT-APPELLANT	CASE NO.: **2011-1978** ON APPEAL FROM **MAHONING COUNTY** COURT OF APPEALS, **SEVENTH APPELLATE DISTRICT.** COURT OF APPEALS Case No. **08 MA 246** **DEATH PENALTY CASE**

STATE OF OHIO-APPELLEE'S MOTION FOR RECONSIDERATION

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Application for Reconsideration

Under S.Ct.Prac.R. 18.02, this Court utilizes its reconsideration authority to "correct decisions which, upon reflection, are deemed to have been made in error." *Dublin City Schools Bd. of Edn. v. Franklin Cty. Bd. of Revision*, 139 Ohio St.3d 212, 2014 Ohio 1940, 11 N.E.3d 222, quoting *State ex rel. Huebner v. W. Jefferson Village Council*, 75 Ohio St.3d 381, 383, 662 N.E.2d 339 (1995). "[A]n application for reconsideration must call to the attention of the appellate court an obvious error in its decision or point to an issue that had been raised but was inadvertently not considered." *State v. Himes*, 7th Dist. No. 08 MA 146, 2010 Ohio 332, ¶ 4, citing *Juhasz v. Costanzo*, 7th Dist. No. 99 CA 294, 2002 Ohio 553.

Here, this Court vacated Defendant's death sentence after it concluded that "the state failed to produce evidence to prove all elements of aggravated burglary," and accordingly, found "insufficient evidence to support the finding of the R.C. 2929.04(A)(7) capital specification." *State v. Adams*, Slip Opinion No. 2015 Ohio 3954, ¶ 288. Defendant, however, "has *not* challenged the sufficiency of the evidence as to each predicate offense. Rather, his theory is that the instructions and jury forms left open the possibility of a nonunanimous jury verdict as to the capital specification, and therefore violated his constitutional right to a unanimous verdict." (Emphasis sic.) *Id*. at ¶ 262.

Thus, this Court must reconsider its conclusion that there was "insufficient evidence to support the finding of the R.C. 2929.04(A)(7) capital specification[,]" because the State was deprived the opportunity to demonstrate to this Court that it did in fact produce evidence that prove each and every element of aggravated burglary after Defendant failed to challenge the sufficiency of the underlying predicate offenses.

Law and Argument

A. THE STATE PRESENTS SUFFICIENT EVIDENCE WHEN NO RATIONAL TRIER OF FACT COULD FIND ANY ESSENTIAL ELEMENT NOT PROVEN BEYOND A REASONABLE DOUBT AFTER ALL EVIDENCE AND REASONABLE INFERENCES DRAWN THEREFROM ARE VIEWED IN A LIGHT MOST FAVORABLE TO THE PROSECUTION.

First, this Court must reconsider whether State presented sufficient evidence that Defendant purposely caused Gina Tenney's death while committing Aggravated Burglary.

Sufficiency is a legal standard that is applied to determine whether the evidence admitted at trial is legally sufficient to support the verdict as a matter of law. *See State v. Thompkins*, 78 Ohio St.3d 380, 1997 Ohio 52, 678 N.E.2d 541. The relevant inquiry is whether there existed adequate evidence to submit the case to the jury. *State v. Lewis*, 7th Dist. No. 03 MA 36, 2005 Ohio 2699. According to this Court,

> 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, paragraph two of the syllabus (1991). Given that, sufficiency is a test of adequacy. Again, whether the evidence presented in a case is legally sufficient to sustain a verdict is a matter of law—this follows as a logical complement to Criminal Rule 29(A), which governs motions for acquittal—and not a matter of fact. And on a sufficiency challenge, *the facts are taken as true*. *Id.*; *accord*

Thompkins, supra; *State v. Bridgeman*, 55 Ohio St.2d 261 (1978). And "[i]t is well-established that the appellate court is to consider *all* of the testimony before the jury, *whether or not it was properly admitted*." (Emphasis sic.) *State v. Peeples*, 7th Dist. No. 07 MA 212, 2009 Ohio 1198, ¶ 17, citing *State v. Yarbrough*, 95 Ohio St.3d 227, ¶ 80 (2002), citing *Lockhart v. Nelson*, 488 U.S. 33, 40-42 (1988); and citing *State v. Goff*, 82 Ohio St.3d 123, 138 (1998).

Further, the reviewing court must view "***inferences reasonably drawn therefrom in the light most favorable to the prosecution***," (Emphasis added.) *State v. Green*, 117 Ohio App.3d 644, 650, 691 N.E.2d 316 (1st Dist. 1996), quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717, 720 (1st Dist. 1983), and "will not reverse a jury verdict where there is substantial evidence upon which a jury could reasonably conclude that all the elements of an offense have been proven beyond a reasonable doubt." *Green*, 117 Ohio App.3d at 650, quoting *State v. Eley*, 56 Ohio St.2d 169, 383 N.E.2d 132, syllabus (1978). And because the evidence is viewed in a light most favorable to the prosecution, the "reviewing court ***cannot resolve evidentiary conflicts in favor of appellant*** or substitute its evaluation of witness credibility for the jury's." (Emphasis added.) *Green*, 117 Ohio App.3d at 650, citing *State v. Waddy*, 63 Ohio St.3d 424, 588 N.E.2d 819 (1992).

1. THE STATE PRESENTED SUFFICIENT EVIDENCE THAT DEFENDANT PURPOSELY CAUSED GINA TENNEY'S DEATH WHILE COMMITTING AGGRAVATED BURGLARY.

The State presented sufficient evidence that illustrated Defendant's cold and calculated plan to murder, rape, and steal from Gina Tenney because of her continued

rejection of his attempts and desires to become more than just neighbors. (Trial Tr., Vol. I, at 93.)

This Court's majority concluded that the State failed to present sufficient evidence to support Defendant's conviction for aggravated burglary, because this Court reasoned that the State did not present evidence to establish *when and where Defendant raped and murdered Gina Tenney*: "The state presented no direct physical evidence to establish where the rape occurred. It presented no evidence of blood or semen stains found in the apartment, and no witness testified to seeing evidence of a struggle. Nor was there circumstantial evidence that the rape occurred in the apartment (for example, that her bed was stripped and the sheets missing)." *Adams*, Slip Opinion No. 2015 Ohio 3954, ¶ 285.

Reconsideration of this issue would prevent a manifest miscarriage of justice, because the State *did* present direct and circumstantial evidence that demonstrated that Defendant raped Gina Tenney *inside* her apartment *before* he murdered her.

First, this Court noted that one of Gina Tenney's potholder (State's Exhibit No. 47.) was found in Defendant's apartment. *See id.* at ¶ 281. But, contrary to this Court's majority opinion, the potholder is "circumstantial evidence that the rape occurred in the apartment." *See id.* at ¶ 285.

Dale Luax testified that he analyzed the hair samples found on State's Exhibit No. 47—the potholder found in Defendant's apartment that matched another in Gina Tenney's apartment. (Trial Tr., Vol. IV, at 561.) The potholder revealed "negro hair fragments, also Caucasian pubic and head hairs that were red in color." (Trial Tr., Vol. IV, at 563.) While Laux was unable to do any comparisons with the "negro hair

fragments," he concluded that the red, Caucasian pubic and head hairs were consistent with hair belonging to Gina Tenney. (Trial Tr., Vol. IV, at 563.) Det. Blanchard testified that the potholder found in Defendant's apartment was covered in hairs and dirt. (Trial Tr., Vol. I, at 156-157.)

Further, the Seventh District relied upon this specific fact—the potholder found with head and pubic hairs in Defendant's apartment—when it concluded that the aggravating circumstance was established beyond a reasonable doubt:

> Specifically, appellant was the victim's downstairs neighbor, who often watched her and called her late at night. She feared him. She changed her number soon after the calls began. He once slipped an odd card under her door. Her ATM card was found in his pocket the morning her body was found. There was credible evidence that he used the victim's car and ATM card the night of her murder. Her car was then parked back in front of their apartment. Her keys were found in his bathroom garbage can. ***Her potholder was found in his apartment. The potholder contained red head and pubic hair consistent with that of the victim; it also contained hair from an African–American***. Her stolen television was discovered in appellant's room with his fingerprints on it. Semen discovered in the victim's vagina was found to match appellant's DNA. As the victim knew appellant, a juror could conclude that to rape her would require him to kill her. Ligature marks on her neck and wrists establish that a cord was used, showing the death was not an accidental result of the other felonies.

(Emphasis added.) *State v. Adams*, 7th Dist. No. 08 MA 246, 2011 Ohio 5361, ¶ 355.

Thus, a reasonable inference drawn from the dirt, head hair, and pubic hairs found on the potholder establishes that Defendant raped Gina Tenney *inside* her apartment, and afterwards used the potholder to wipe himself and the crime scene, after which, he threw the potholder in his trash can in an attempt to conceal evidence of his crime.

Second, Det. Blanchard testified that while there were no signs of a forced entry to Gina Tenney's apartment on December 30, 1985, Tenney's apartment did appear in

"disarray." (Trial Tr., Vol. I, at 187, 201.) Det. Blanchard explained that "[t]here were some overturned items, tables perhaps, something like that." (Trial Tr., Vol. I, at 201-203.)

Thus, the State presented direct evidence that a struggled occurred inside the apartment, and a reasonable inference drawn from Det. Blanchard's testimony is that Defendant struggled with Gina Tenney *inside* her apartment *before* she was murdered that evening.

Defendant "essentially stalked his young neighbor until he eventually forced his way into her apartment, hit her, raped her, strangled her with a cord, tied her wrists, suffocated her, stole her car, dumped her body in the river, tried to get money from her bank account, returned to her apartment to steal her television, and cleaned up trace evidence with her potholder." *Adams*, supra at ¶ 366.

Therefore, in viewing "***inferences reasonably drawn therefrom in the light most favorable to the prosecution***," (Emphasis added.) *Green*, 117 Ohio App.3d at 650, the State *did* present direct and circumstantial evidence Defendant raped Gina Tenney *inside* her apartment *before* he murdered her.

Accordingly, the evidence supported the jury's finding that the aggravating circumstance was established beyond a reasonable doubt, because a rational trier of fact could have found each means of committing the crime of aggravated murder in the course of the alleged R.C. 2929.04(A)(7) predicate offenses—rape, kidnapping, aggravated robbery, *and* aggravated burglary. *See Adams*, Slip Opinion No. 2015 Ohio 3954, at paragraph three of the syllabus.

B. <u>IN AN APPEAL OF A DEATH SENTENCE BASED ON AN R.C. 2929.04(A)(7) SPECIFICATION, WHEN ONE OR MORE PREDICATE OFFENSE IS ALLEGED BUT THE JURY HAS NOT MADE A FINDING AS TO WHICH PREDICATE OFFENSE WAS COMMITTED, A REVIEWING COURT MUST DETERMINE WHETHER THERE IS SUFFICIENT EVIDENCE TO SUPPORT ONLY ONE OF THE ALTERNATIVE PREDICATE OFFENSES.</u>

Second, assuming that this Court does not reconsider the sufficiency of the aggravated burglary, this Court must reconsider whether a reviewing court should determine under R.C. 2929.05(A) if there is sufficient evidence to support *one or all* of the alternative predicate-offense theories when more than one predicate offense is alleged but the jury has not made a finding as to which predicate offense was committed when reviewing a death sentence based on the R.C. 2929.04(A)(7) specification.

As Justice O'Donnell's dissenting opinion pointed out, "[i]f the evidence of guilt is sufficient to support a finding of guilt of aggravated murder, it is also sufficient to uphold the penalty recommended by the same jury that found guilt, because in order to prove an aggravated murder conviction and the aggravating circumstance necessary to impose the sentence of death in this case, the state is required to prove the same elements beyond a reasonable doubt." *Adams*, Slip Opinion No. 2015 Ohio 3954, ¶ 305 (O'Donnell, J., dissenting).

This is wholly consistent with this Court's previous conclusion "that when the jury unanimously reaches a verdict, the individual jurors need not agree on which of the alternative bases support their individual findings." *State v. Johnson*, 112 Ohio St.3d 210, 219 (2006), citing *State v. Skatzes*, 104 Ohio St.3d 195, ¶ 55 (2004), following *Schad v. Arizona*, 501 U.S. 624, 111 S.Ct. 2491 (1991).

In *State v. Johnson*, the defendant was charged and convicted in a nearly identical fashion to the one here:

> Both the charge and specification alleged that Johnson committed the murder "while" committing or "while" fleeing after committing other felonies. The trial court instructed the jury in this regard that the term "while" means that "the death must occur as part of acts leading up to or occurring during or immediately after the commission of kidnapping, rape, aggravated robbery and the death was directly associated with the commission of the kidnapping, rape *or* aggravated robbery or flight immediately after the commission of those crimes."

(Emphasis sic.) *Johnson*, 112 Ohio St.3d at 219. Like Defendant, Johnson argued that because the trial court instructed the jury in the alternative, it cannot be determined which underlying felony was associated with the aggravated murder. *See id.*

In *Johnson*, this Court reasoned that it rejected a similar argument in *State v. Skatzes*. *See id*., citing *Skatzes*, 104 Ohio St.3d at 195, ¶¶ 51-53. In *Skatzes*, the trial court instructed the jury on the five alternative purposes contained in the kidnapping statute, but did not instruct the jury to reach a unanimous verdict as to which of those alternative purposes was the basis for each kidnapping charge. *See Johnson*, 112 Ohio St.3d at 219, citing *Skatzes*, 104 Ohio St.3d at 205. This Court found no error and concluded that "when the jury unanimously reaches a verdict, the individual jurors need not agree on which of the alternative bases support their individual findings." *Id.*, following *Schad*, 501 U.S. at 624.

In support, this Court relied upon the U.S. Supreme Court's opinion in *Schad v. Arizona*. *See Skatzes*, 104 Ohio St.3d at 205, following *Schad*, 501 U.S. at 624. In *Schad*, the defendant was convicted of first-degree murder after the State presented alternative theories of premeditated murder and felony-murder to the jury. *See id*. The jury was not

required (through its instructions) to unanimously find the defendant guilty on one of those alternative theories of guilt. *See id*. "The *Schad* court found that different mental states of moral and practical equivalence (premeditated and felony murder) may serve as alternative means to satisfy the mens rea element for the single offense of murder, without infringing upon the constitutional rights of the defendant." *Id*.

In *Schad*, the U.S. Supreme Court explained:

> We have never suggested that in returning general verdicts in [cases proposing multiple theories] the jurors should be required to agree upon a single means of commission, any more than the indictments were required to specify one alone. In these cases, as in litigation generally, "different jurors may be persuaded by different pieces of evidence, even when they agree upon the bottom line. Plainly there is no general requirement that the jury reach agreement on the preliminary factual issues which underlie the verdict."

Skatzes, 104 Ohio St.3d at 205-206, quoting *Schad*, 501 U.S. at 631-632, quoting *McKoy v. N. Carolina*, 494 U.S. 433, 449 (1990) (Blackmun, J., concurring).

Most notably, the U.S. Supreme Court cited to *Schad* when it recognized that it had never "set aside a general verdict because one of the possible bases of conviction was * * * merely unsupported by sufficient evidence." *Griffin v. United States*, 502 U.S. 46, 56, 112 S.Ct. 446 (1991), citing *Schad*, 501 U.S. at 630-631.

As Justice O'Donnell's dissenting opinion also pointed out, while *Johnson* and *Skates* are consistent with the U.S. Supreme Court's holding in *Griffin* and *Sochor v. Florida*, 504 U.S. 527, 112 S.Ct. 2114 (1992), the majority's opinion runs counter to *Griffin* and *Sochor*. *See Adams*, Slip Opinion No. 2015 Ohio 3954, ¶ 307 (O'Donnell, J., dissenting).

Regarding general verdicts, the U.S. Supreme Court recognized "that a general jury verdict was valid so long as it was legally supportable on one of the submitted grounds—even though that gave no assurance that a valid ground, rather than an invalid one, was actually the basis for the jury's action." *Griffin*, 502 U.S. at 49. The Court reasoned that "when a jury returns a general verdict on a count of an indictment that alleges alternative means of committing the offense, it is presumed that the jury entered the verdict only on grounds supported by sufficient evidence." *Adams*, Slip Opinion No. 2015 Ohio 3954, ¶ 310 (O'Donnell, J., dissenting), citing *Griffin*, 502 U.S. at 49-50. Thus, the Court concluded that "when a jury returns a guilty verdict on an indictment charging several acts in the conjunctive, * * * the verdict stands if the evidence is sufficient with respect to any one of the acts charged." *Id.* at 56-57, quoting *Turner v. United States*, 396 U.S. 398, 420, 90 S.Ct. 642 (1970).

In *Sochor*, like Defendant's case, the Court extended its application in *Griffin* to a capital case where there was insufficient evidence to support one of the four aggravating circumstances authorizing the imposition of the death penalty. In *Sochor*, the Court relied upon *Griffin* when it rejected the defendant's argument that his death sentence must be vacated "'if the jury was allowed to rely on any of two or more independent grounds, one of which is infirm,' explaining that 'it was no violation of due process that a trial court instructed a jury on two different legal theories, one supported by the evidence, the other not,' because a jury 'is indeed likely to disregard an option simply unsupported by evidence.'" *Adams*, Slip Opinion No. 2015 Ohio 3954, ¶ 312 (O'Donnell, J., dissenting), quoting *Sochor*, 504 U.S. at 538.

Here, the bottom line is that the jury unanimously agreed that Defendant purposely caused the death of Gina Tenney while committing a felony—aggravated felony-murder. Defendant "essentially stalked his young neighbor until he eventually forced his way into her apartment, hit her, raped her, strangled her with a cord, tied her wrists, suffocated her, stole her car, dumped her body in the river, tried to get money from her bank account, returned to her apartment to steal her television, and cleaned up trace evidence with her potholder." *Adams*, supra at ¶ 366.

Like the U.S. Supreme Court in *Griffin* and *Sochor*, this Court must not presume that the general verdict rests on a ground that the evidence does not support, but rather presume that the "jury acted rationally, honestly, and intelligently and disregarded any alternative means of committing the capital specification not proven by the evidence." *Adams*, Slip Opinion No. 2015 Ohio 3954, ¶ 323 (O'Donnell, J., dissenting).

Therefore, in an appeal of a death sentence based on an R.C. 2929.04(A)(7) specification, when one or more predicate offense is alleged but the jury has not made a finding as to which predicate offense was committed, a reviewing court must determine whether there is sufficient evidence to support only *one* of the alternative predicate offenses.

Conclusion

WHEREFORE, State of Ohio-Appellee hereby requests that this Honorable Court to Reconsider Defendant-Appellant Bennie L. Adams' Proposition of Law No. 21.

Respectfully Submitted,

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Certificate of Service

I certify that a copy of the State of Ohio's Motion was sent via **U.S. Regular Mail** to counsel for Defendant, **John B. Juhasz, Esq.**, and **Lynn Maro, Esq**., at 7081 West Boulevard, Suite 4, Youngstown, OH 44512, on October 9, 2015.

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