

IN THE SUPREME COURT OF OHIO
2016

STATE OF OHIO,

Case No. 12-1212

Plaintiff-Appellee,

-vs-

On Appeal from the
Franklin County Court
of Common Pleas

CARON E. MONTGOMERY,

Common Pleas Case
No. 10CR-12-7125

Defendant-Appellant.

DEATH PENALTY CASE

**MEMORANDUM OF PLAINTIFF-APPELLEE STATE OF OHIO OPPOSING
MOTION FOR RECONSIDERATION**

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**MEMORANDUM OF PLAINTIFF-APPELLEE STATE OF OHIO OPPOSING
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This Court issued its 6-1 decision on August 24, 2016, rejecting defendant's various arguments and affirming the convictions and sentences in all respects. Defendant has now filed a motion for reconsideration. Because "[a] motion for reconsideration shall not constitute a reargument of the case", see S.Ct.Prac.R. 18.02(B), and because defendant provides no grounds warranting reconsideration, the motion should be denied.

A.

Defendant reargues the case in contending under his first proposition of law that there was no evidence supporting the capital specification that the murder of Tahlia was committed for the purpose of escaping detection, apprehension, trial, or punishment. This Court addressed the issue and found that the evidence was sufficient and was not against the manifest weight of the evidence. Opinion, ¶¶61-80.

Defendant nevertheless seeks to revisit the matter by contending that the State produced no "evidence" at all to support the specification because the State only presented the testimony of Detective Croom. Defendant apparently believes that Croom's testimony was not "evidence." Several points come to mind in response.

First, Croom's testimony was not the only evidence. The State introduced without objection the autopsy reports and DNA lab reports, and it also introduced many photographs of the crime scene and victims' injuries. There was more than just Croom's testimony.

Second, defendant's argument comes too late. Defendant's earlier briefing did not challenge whether "evidence" was introduced but, rather, whether the facts established by the evidence were sufficient to establish that he killed Tia first. As the State pointed out, see State's Brief, at 15-17, the order of the killings was not critical to proving the specification since defendant was killing all of the witnesses. This Court agreed. Opinion, ¶¶ 76-77. In any event, even if the order of killing mattered, the State showed in its briefing that the evidence was sufficient to support the conclusion that Tia or Tyron was killed before Tahlia. See State's Brief, at 17-18. Defendant's order-of-killing argument was legally and factually wrong.

Defendant is raising a different argument here by contending that the State failed to produce any "evidence" at all. If defendant wished to challenge whether the State produced "evidence," defendant should have done so in the prior briefing. This issue cannot be raised for the first time in a motion for reconsideration.

Third, defendant did more than just fail to raise the issue of whether "evidence" was produced. The defense actually *conceded* in its earlier briefing that the State produced "evidence." Defendant's Merit Brief, at 3, 4, 5, 11 ("Evidence Presented to the Three Judge Panel"; "Evidence of the crime was presented * * *"; "Evidence was presented * * *"; "The State presented evidence * * *"; "Much of the evidence was introduced * * *"; "The State introduced evidence * * *"; "the State's evidence"). Having conceded in the original briefing that "evidence" was introduced, defendant cannot take the opposite tack now and claim no "evidence" was introduced.

Fourth, the defense is simply wrong in contending that the State failed to

produce “evidence.” As stated before, the State introduced the autopsy reports, DNA reports, and a number of photographs. All of these matters were undoubtedly “evidence”. Indeed, in the trial court, the defense contended that the autopsy reports alone would establish everything the State needed to prove. (VII, 8 – specifications “are all established in reality through the coroner’s report itself”; reports show “there would have been one act after another, supporting the idea that one was done to cover up the other”)

In addition, Croom’s testimony was “evidence” too. This Court recognized that “[t]he State presented the following *evidence* through its sole witness, Detective Dana Croom * * *.” Opinion, ¶ 4 (emphasis added). Croom’s testimony included a number of matters within his personal knowledge, especially the photographic evidence of the crime scene. And while Croom testified without objection to a number of other matters that would qualify as hearsay, the defense never objected to any of the evidence based on hearsay. The defense only objected to the photographic evidence on the basis that the evidence was unnecessary and inflammatory.

To the extent that Croom testified to information arising from out-of-court statements of others, such unobjected-to hearsay became part of the evidence in the case, and the panel as trier of fact could consider it. *State v. Petro*, 148 Ohio St. 473, 500, 76 N.E.2d 355 (1947) (“when hearsay testimony is admitted without objection it may properly be considered and given its natural probative effect as if it were in law admissible, the only question being with regard to how much weight should be given thereto”; internal quotation marks omitted); *Diaz v. United States*, 223 U.S. 442, 450,

32 S.Ct. 250, 56 L.Ed. 500 (1912) (“when evidence of that character is admitted without objection, it is to be considered and given its natural probative effect as if it were in law admissible”).

This Court correctly found that the State had produced sufficient “evidence” on all of the specifications. Opinion, ¶¶158-161

Fifth, defendant ignores the evidentiary value of defendant’s guilty plea itself. While this Court has concluded that R.C. 2945.06 calls for the panel to determine guilt for the capital specifications, it is notable that nothing in the statutory text requires that the panel ignore the guilty plea that already took place before it. The guilty plea was a complete admission of guilt. Crim.R. 11(B)(1). When combined with the other evidence presented, the panel had ample evidence that defendant was guilty of the (A)(3) escaping specification. This Court found that “there was significant evidence of Montgomery’s guilt” and that “[t]he evidence of Montgomery’s guilt was overwhelming * * *.” Opinion, ¶¶ 90, 103. And the defense had conceded below that the autopsy reports themselves would have been sufficient.

Sixth, defendant errs in complaining that the State did not argue for the escaping specification. Given that the defense had already conceded that the specification was established by the autopsy reports alone, there would have been little reason to argue that already-conceded point. In any event, the panel did not entertain argument from either side, (VII, 163-64), and so the absence of closing argument on this point by the State is hardly surprising or significant.

Seventh, the State incorporates by reference all of its merit briefing regarding

the first proposition of law. (See State’s Merit Brief, at 7-18)

Finally, the State notes that finding the “evidence” to be insufficient on the (A)(3) escaping specification would not warrant any reversal of the death sentences as to Tahlia and Tyron. As to Tyron, his counts did not include that specification and therefore the death sentence as to Tyron could not be affected. As to Tahlia, the death sentence was amply supported by the course-of-conduct and under-13 aggravating circumstances, and the trial panel downplayed the escaping specification as receiving only “some weight”. Stc.Op., 6. In the end, the panel found that defendant’s mitigation evidence paled in comparison to the aggravating circumstances and that “the aggravating circumstances not only outweighed, but overwhelmed the mitigating factors, beyond any reasonable doubt.” Id. at 10, 11. Moreover, this Court’s independent reweighing would cure any possible error in the trial panel’s weighing the escaping specification in light of the two overwhelming unquestioned aggravators, which this Court acknowledged were themselves entitled to overwhelming and great weight. Opinion, ¶ 187.

B.

Defendant next seeks to reargue his second proposition of law regarding his arguments related to his use of two medications at the time of his jury waiver and guilty pleas. This Court thoroughly canvassed the record and found that there was no basis to overturn the jury waiver or guilty pleas. Opinion, ¶¶ 21-60.

Defendant’s criticisms largely amount to the contention that *Mink* and *Ketterer* control and require reversal. But this Court addressed these very points and

rejected them, mentioning those two cases repeatedly. Opinion, ¶¶ 44-57. Of course, to the extent defendant relies on Justice O’Neill’s dissenting opinion, this Court already considered those matters as part of the process of issuing its ruling. There is nothing warranting reconsideration here.

As discussed in the State’s original merit briefing, which the State incorporates by reference here, see State’s Brief, at 19-31, the appellate record shows that defendant repeatedly indicated that he understood what was going on and understood what rights he was giving up and understood what options he was pursuing. Defendant is severely mistaken in claiming that only an “expert” could conclude he was competent. Defendant’s repeated admissions that he actually understood things showed that he in fact understood things.

Moreover, we *do* have the benefit of two experts, i.e., two certified capital attorneys who reported no problem with competency. Even though the attorneys were not psychologists, they were legal experts experienced in dealing with clients and experienced with knowing when and how clients are able to assist in their own defense. The fact that no one on the spot saw any need for a competency evaluation completely undercuts defendant’s claim that the medications were somehow affecting his competency. As this Court noted, defendant is not really challenging his competency but rather is merely alleging that some greater inquiry could have been made. Opinion, ¶ 48.

Notably, defendant does not dispute that the defense had the benefit of expert psychological assistance, including an evaluation by psychologist Stinson. As stated

by this Court :

{¶ 58} Additionally, defense counsel, who were appointed to represent Montgomery in January 2011, retained forensic psychologist Dr. Bob Stinson more than a year before Montgomery's plea hearing. Billing records demonstrate that Dr. Stinson spent many hours reviewing Montgomery's records, conducted five separate in-person evaluations with him, met with the defense team several times, and prepared a report. Since defense counsel retained an expert to evaluate Montgomery's mental health, presumably counsel had access, at the time of the plea, to information regarding his mental health and/or alleged incompetence. However, counsel offered no such evidence. Additionally, the fact that defense counsel retained Dr. Stinson more than a year before the plea hearing and, in that span of time, met with Montgomery on several occasions indicates that counsel's response to the panel's query about Montgomery's competence was not uninformed, as Montgomery now implies.

Opinion, ¶ 58.

The defense parses its words closely when it now contends that the attorneys "lacked the benefit of advice from an expert retained for competency purposes." (Motion for Reconsideration, at 5) In fact, Stinson would have had a wide mandate to inquire into any and all psychological issues, and any questions about past or present competency would have been a part of the mix.

Defendant's extensive quotation from the plea colloquy at pages 8 and 9 of the motion for reconsideration is emblematic of the fact that the defense is merely rearguing the same matters here. The same block-indented quotation appears at pages 16-17 of the defense merit brief. The defense is merely re-plowing the same ground.

Even in rearguing matters, the defense still fails to fully engage *all* of the

appellate record, which, as a whole, thoroughly refutes any possible claim of incompetency. Defendant seriously understates what the record shows. Defendant does not show any abuse of discretion on the trial court's part in failing to sua sponte order a competency evaluation or in failing to expand its already-extensive colloquy with defendant even further.

The State otherwise stands on its merit briefing in this regard.

C.

Defendant next argues that his trial counsel was ineffective in failing to object to the introduction of hearsay and the autopsy reports. This is mere reargument of the third proposition of law. The State stands on its merit briefing, which the State incorporates by reference. See State's Brief, at 36-38.

Defendant passionately argues that the autopsy reports were testimonial (this Court disagreed) and that other hearsay was testimonial and inadmissible. But defendant completely disregards the exercise of tactical judgment by the defense. As this Court acknowledged, trial counsel could conclude that it was better to have the information come in through a summary witness. Opinion, ¶ 95. Even if the trial counsel could legitimately object, trial counsel did not *have* to object and could reasonably conclude that it was better tactically to allow the State to use a summary witness. It was reasonable to try to minimize the presentation of the gruesome facts as much as possible, see Opinion, ¶ 101, rather than demanding the presentation of even more. “[T]he right of confrontation * * * is in the nature of a privilege extended to the accused, rather than a restriction upon him, and that he is free to assert it or to

waive it, as to him may seem advantageous.” *Diaz*, 223 U.S. at 450 (citation omitted).

The defense strains common sense in contending that defendant would have been better off having the coroner testify. Defendant was pleading guilty and not disputing the cause of death. Defendant was trying to accept responsibility and offer remorse. But demanding that the coroner testify and that the State bring in all witnesses would have clashed with that tactic by making it appear the defense was disputing things and by burying defendant’s acceptance of responsibility in a sea of evidence of criminality. Most importantly, having the coroner testify on these matters would have elicited even more detail about these horrendous throat-slashing killings. It was certainly reasonable for trial counsel not to adopt these self-defeating tactics.

In any event, defendant cannot show a reasonable probability of a different outcome if the State had been forced to call all of these witnesses. Even with Croom testifying as a summary witness, the evidence was overwhelming. With more witnesses and more evidentiary detail, the evidence would have been even more overwhelming.

As for defendant’s constitutional right to confrontation, defendant’s guilty pleas amounted to a waiver of the right to confrontation. While state law provides for further evidentiary submissions, this would be a matter of state law and not a question of constitutional dimension. In any event, even the constitutional right to confrontation can be waived/forfeited by the failure to assert it at the proper time. *State v. Pasqualone*, 121 Ohio St.3d 186, 2009-Ohio-315, 903 N.E.2d 270; *State v.*

Neyland, 139 Ohio St.3d 353, 2014-Ohio-1914, 12 N.E.3d 1112, ¶ 176. It was for the defense to decide how much it wished to exercise whatever confrontation rights defendant had, and the defense made the reasonable tactical judgment not to exercise those rights here. Again, no trial counsel ineffectiveness is shown here, and there is no basis for reconsideration.

Defendant is also engaging in reargument in contending that trial counsel should have called the psychologist and sex-abuse expert. This Court addressed those matters and found that ineffectiveness could not be shown on this appellate record. Opinion, ¶¶ 114-121. Defendant presents no basis for reconsideration on these points.

In this regard, defendant's citation to the *Hand* decision is a non-sequitur. *Hand* was not a capital case and had nothing to do with the consideration of mitigating evidence in a capital proceeding or with a trial counsel's tactical decision on what to present in the penalty phase.

Defendant is merely pitching the same make-weight argument that he made in his original briefing. Defendant is arguing that, in the absence of the experts testifying, the trial panel misused his juvenile problems as "aggravators" when, as a juvenile, he should not be held responsible for those problems. See Defendant's Merit Brief, at 33-38. However, regardless of this make-weight argument, it still remains true that the appellate record would be insufficient to reverse for ineffectiveness.

In addition, defendant's point is fundamentally flawed because the panel did *not* use his juvenile problems as aggravation. The defense engaged in a "blame the

mother” argument, asserting that she failed her son and did not supervise him and control him. The defense contended that defendant was just a “big old baby” as a juvenile who caused no problems of significance and was failed by the juvenile authorities.

In fact, to rebut these misleading points, the State pointed out several matters. Defendant’s misbehavior was so serious and so out of control that the mother could not reasonably be blamed. She was not merely “warehousing” defendant with the juvenile system. And the juvenile authorities did try to help defendant, and his misbehavior undercut those many efforts. For a fuller discussion of these matters, see State’s Brief, at 50-55.

What the defense desires is to have a one-way street in which any number of theories about the murderer’s decades-ago upbringing might be raised by the defense as potential mitigation. At the same time, the defense seeks to silence the prosecution from submitting evidence to rebut those theories and seeks to prevent the court from considering the full picture.

This is not how the adversarial process works. When the defense attempts to blame the parent, it should be expected that the prosecution and/or the court might recognize that the parent was doing the best she could with a child who was beyond her control. When the defense attempts to blame the “system” for failing to “fix” the defendant, it should be expected that the prosecution and/or the court might recognize that many efforts were made and the defendant resisted or undercut them. This is not the improper consideration of things as “aggravation” but merely setting the record

straight and considering the full picture in assessing how much or how little weight to give to the supposed defense “mitigation.”

In the end, the problems of a decades-ago upbringing amount to little as far as mitigation. Defendant committed mass murder of three victims, including two young children. There was overwhelming aggravation, and the mitigation, at best, paled in comparison. Defendant cannot show that trial counsel was ineffective in failing to present these experts.

D.

Defendant’s claim of cumulative error still fails as before, and defendant presents no ground for reconsideration on that point.

E.

In a footnote, defendant briefly notes that this Court referred to “witness-murder” in discussing proportionality review when it should have referred to the (A)(3) “escaping” specification instead. Motion for Reconsideration, at 3 n. 1. But defendant does not pursue the point any further and does not appear to contend that reconsideration is warranted in this regard. The State notes that this Court already found the death sentences proportionate to death sentences imposed in child-murder and course-of-conduct mass murders. Opinion, ¶ 190. The reference to “witness-murder” would be considered harmless in the overall proportionality review. In addition, this Court’s citation to *State v. Bethel*, 110 Ohio St.3d 416, 2006-Ohio-4853, 854 N.E.2d 150, ¶ 212, was still appropriate because *Bethel* in that paragraph also discussed proportionality in relation to cases involving the combination of the

escaping and course-of-conduct aggravating circumstances, which are two of the three aggravating circumstances involved in the killing of Tahlia.

There are other cases supporting proportionality for imposing death in relation to the (A)(3) escaping aggravating circumstance. *State v. Thompson*, 141 Ohio St.3d 254, 2014-Ohio-4751, 23 N.E.3d 1096, ¶ 313 (“We have also upheld the death penalty for other murders committed to escape detection under R.C. 2929.04(A)(3)”); *State v. Lawson*, 64 Ohio St.3d 336, 353, 595 N.E.2d 902 (1992).

Defendant’s motion for reconsideration should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent by email on September 8, 2016, to Kathryn L. Sandford, Kathryn.Sandford@opd.ohio.gov, Office of the Ohio Public Defender, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215, counsel for defendant-appellant.

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