

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	
v.	:	Nos. 10AP-601 and 10AP-659
	:	
Gary L. Robinson,	:	(C.P.C. No. 09CR-05-2798)
	:	
Defendant-Appellant.	:	(REGULAR CALENDAR)

D E C I S I O N

Rendered on April 19, 2011

Ron O'Brien, Prosecuting Attorney, and *Seth Gilbert*, for appellee.

Yeura R. Venters, Public Defender, and *John W. Keeling*, for appellant.

APPEALS from the Franklin County Court of Common Pleas

TYACK, J.

{¶1} Gary L. Robinson ("appellant") is appealing from his conviction on charges of murder and tampering with evidence. He assigns four errors for our consideration:

ASSIGNMENT OF ERROR NUMBER ONE

THE TRIAL COURT ERRED WHEN IT ENTERED JUDGMENT AGAINST THE DEFENDANT ON THE CHARGES OF MURDER AND TAMPERING WITH EVIDENCE WHEN THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN THE CONVICTIONS AND THE

CONVICTIONS WERE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE SINCE THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT THE DEFENDANT COMMITTED THE ACTS CHARGED.

ASSIGNMENT OF ERROR NUMBER TWO

IT WAS PLAIN ERROR NOT TO ORDER A MISTRIAL AFTER THE STATE IMPROPERLY ELICITED TESTIMONY FROM THE LEAD INVESTIGATING DETECTIVE THAT HE AND THE OTHER INVESTIGATORS BELIEVED THAT THE DEFENDANT "HAD KILLED TAMMI CAMPBELL" AND TO FURTHER ALLOW THE DETECTIVE TO TESTIFY THAT THEY HAD INVESTIGATED OTHER SUSPECTS AND FOUND NO EVIDENCE WHATSOEVER TO LINK THEM TO THE MURDER WHEN THIS TYPE OF AN OPINION IS INADMISSIBLE AND EXTREMELY PREJUDICIAL. IT WAS PLAIN ERROR TO ALLOW A LAY WITNESS TO EXPRESS HIS OPINION THAT THE DEFENDANT HAD COMMITTED THE MURDER.

ASSIGNMENT OF ERROR NUMBER THREE

THERE WERE NUMEROUS ERRORS IN THE TRIAL THAT PREVENTED THE DEFENDANT FROM RECEIVING A FAIR TRIAL. SOME OF THE ERRORS WERE NOT OBJECTED TO BUT RISE TO THE LEVEL OF PLAIN ERROR, EITHER INDIVIDUALLY OR COLLECTIVELY, AND THE DEFENDANT WAS DEPRIVED OF HIS RIGHT TO A FAIR TRIAL AND DUE PROCESS OF LAW BECAUSE OF THESE ERRORS.

ASSIGNMENT OF ERROR NUMBER FOUR

THE TRIAL COURT ERRED WHEN IT ORDERED THE DEFENDANT TO PAY RESTITUTION, OVER OBJECTION, IN THE AMOUNT OF \$185,180.08 TO THE GROVE CITY DIVISION OF POLICE TO COMPENSATE FOR THE UNSUCCESSFUL SEARCH OF A DUMPSITE BECAUSE THE COURT HAD NO AUTHORITY TO MAKE SUCH AN AWARD.

{¶2} We initially address the first assignment of error since it allows for a development of the facts and evidence in this case.

{¶3} Tammi Campbell disappeared in the early morning hours of June 13, 1999. She has not been seen since and her body has never been found.

{¶4} At the time of her disappearance, Campbell was living with appellant. Appellant claimed that Campbell told him she was going out to meet with a drug dealer/friend on a nearby railroad track. Telephone records showed that she had had two conversations with the drug dealer/friend in the early morning hours of June 13, 1999. The man, Anthony McElroy, claimed that she never showed up for the meeting.

{¶5} Based upon claims from Sandra Gabbard, another girlfriend of appellant, police searched the yard of appellant's parents and found some of Campbell's jewelry buried there. Appellant always denied to police that he had any involvement in Campbell's death. However, he was alleged to have told Gabbard that he killed Campbell. He was also alleged to have made incriminating statements to Michael Patterson, a friend and fellow motorcycle club member, about how best to kill someone and how best to conceal a body. Patterson also testified that appellant made a motion across his throat when asked if he killed Campbell. In many ways, the case turned upon the believability of Gabbard and Patterson, although several other witnesses testified.

{¶6} Sufficiency of the evidence is the legal standard applied to determine whether the case should have gone to the jury. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52. In other words, sufficiency tests the adequacy of the evidence and asks whether the evidence introduced at trial is legally sufficient as a matter of law to

support a verdict. *Id.* "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* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus, following *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781. The verdict will not be disturbed unless the appellate court finds that reasonable minds could not reach the conclusion reached by the trier of fact. *Jenks* at 273. If the court determines that the evidence is insufficient as a matter of law, a judgment of acquittal must be entered for the defendant. See *Thompkins* at 387.

{¶7} Even though supported by sufficient evidence, a conviction may still be reversed as being against the manifest weight of the evidence. *Thompkins*, at 387. In so doing, the court of appeals, sits as a " 'thirteenth juror' " and, after " 'reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.' " *Id.* (quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175); see, also, *Columbus v. Henry* (1995), 105 Ohio App.3d 545, 547-48. Reversing a conviction as being against the manifest weight of the evidence should be reserved for only the most " 'exceptional case in which the evidence weighs heavily against the conviction.' " *Thompkins* at 387.

{¶8} As this court has previously stated, "[w]hile the jury may take note of the inconsistencies and resolve or discount them accordingly, see [*State v.*] *DeHass* [(1967),

10 Ohio St.2d 230], such inconsistencies do not render defendant's conviction against the manifest weight or sufficiency of the evidence." *State v. Nivens* (May 28, 1996), 10th Dist. No. 95APA09-1236. It was within the province of the jury to make the credibility decisions in this case. See *State v. Lakes* (1964), 120 Ohio App. 213, 217 ("It is the province of the jury to determine where the truth probably lies from conflicting statements, not only of different witnesses but by the same witness.")

{¶9} See *State v. Harris* (1991), 73 Ohio App.3d 57, 63 (even though there was reason to doubt the credibility of the prosecution's chief witness, he was not so unbelievable as to render verdict against the manifest weight).

{¶10} For purposes of a sufficiency review, the evidence supported the convictions. Gabbard testified that appellant admitted strangling Campbell shortly after appellant learned that Campbell was leaving him to move in with another man. Gabbard's testimony in this regard is supported by Patterson's testimony that appellant responded to Patterson's question of "did you?" with regard to Campbell with a motion which could be construed as slashing a throat. (Tr. 59.) To the extent the first assignment of error attacks the sufficiency of the evidence, it is overruled.

{¶11} Our analysis of the weight of the evidence calls upon us to re-weigh the evidence presented at trial, but only to a limited degree.

{¶12} The testimony regarding appellant's admissions of guilt was supported by the undeniable fact that Campbell's most prized possessions were found buried in the yard of appellant's parents. Appellant's claim that he buried the jewelry in order to keep himself from pawning it is patently incredible.

{¶13} The jury verdicts were not against the manifest weight of the evidence. The rest of the first assignment of error is overruled.

{¶14} The second assignment of error alleges that the trial court should have sua sponte granted a mistrial when a police detective involved in investigating the case expressed his personal opinion that appellant had killed Campbell. Because defense counsel did not object, the assignment of error is subject to a plain error analysis. Stated briefly, if the jury could be expected to have reached a different set of verdicts but for the detective's testimony, plain error has occurred.

{¶15} Significantly, the trial judge immediately took steps to assure that the detective's expression of opinion did not affect the jury. The judge immediately told the jury that the jury was the decision-maker, not the detective. The detective's opinion was to be considered only as an explanation for what he did in conducting the investigation and not for any other purpose.

{¶16} Further, a trial judge has a great deal of discretion in deciding whether or not to declare a mistrial, with or without a defense motion. See *State v. Glover* (1988), 35 Ohio St.3d 18. We cannot say in the context of this case that the trial judge abused his discretion in admonishing the jury to disregard the detective's opinion regarding guilt or innocence as opposed to declaring a mistrial part-way through the State's case.

{¶17} The jury was also capable of appropriately evaluating the detective's opinion as to whether or not the evidence incriminated other individuals. Certainly the jury was informed that Campbell called a drug dealer/friend shortly before she disappeared. The drug dealer/friend testified and his denial of responsibility for her

disappearance was capable of being evaluated. No significant evidence implicated anyone else. The outcome of the trial was not dictated by the detective's opinion.

{¶18} The second assignment of error is overruled.

{¶19} The third assignment of error suggests that other errors were made at trial which were not the subject of defense objections and which affected the trial outcome. The assignment of error focuses on the testimony of Patterson, who was a friend of appellant and a fellow member of the Roadmen Motorcycle Club.

{¶20} Appellant called Patterson on the night Campbell disappeared and left a message stating "she's gone, she's gone. T.J. gone." (Tr. 53.) Patterson felt appellant sounded "like he was in some kind of panic."

{¶21} Patterson is also the person who asked appellant "did you?" and received the nonverbal response of appellant grinning and running his index finger across his neck as in slashing a throat. (Tr. 59.)

{¶22} Patterson also engaged in a recorded telephone conversation with appellant and discussed with appellant the best way to dispose of a body. In the same conversation, appellant suggested that the best way to kill someone was with the bare hands because it leaves less evidence. Nothing about Patterson's testimony was inadmissible.

{¶23} The fact that both men were in a motorcycle club and that Patterson had a criminal history, did not make it inadmissible.

{¶24} The third assignment of error is overruled.

{¶25} The State of Ohio has admitted error with respect to the restitution order for the cost of the investigator. The fourth assignment of error is sustained.

{¶26} In summary, the first, second and third assignments of error are overruled. The fourth assignment of error is sustained. The judgment and sentence of the Franklin County Court of Common Pleas are affirmed except with respect to the restitution order. The case is remanded to the trial court solely for the purpose of entering a new restitution order.

*Judgment affirmed in part;
case remanded with instructions.*

FRENCH and CONNOR, JJ., concur.
