

[Cite as *State v. Howard*, 2010-Ohio-358.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91649

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ANDREW HOWARD, JR.

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-484050

BEFORE: Jones, J., Gallagher, A.J., and Sweeney, J.

RELEASED: February 4, 2010

JOURNALIZED:

ATTORNEY FOR APPELLANT

Aaron T. Baker
William L. Summers
The Illuminating Bldg., #2020
55 Public Square
Cleveland, Ohio 44113

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor

BY: Thorin Freeman
Assistant Prosecuting Attorney
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

LARRY A. JONES, J.:

{¶ 1} Appellant-defendant, Andrew D. Howard Jr. (“Howard”), appeals his conviction of murder with a three-year firearm specification and having a weapon while under a disability. Having reviewed the arguments of the parties and the pertinent law, we hereby affirm the judgment of the lower court.

STATEMENT OF THE CASE

{¶ 2} Howard was initially charged with two counts of aggravated murder, each with an attached felony specification, one- and three-year firearm specifications, and one count of having a weapon while under disability. On July 28, 2006, Howard was declared indigent and assigned a public defender.

{¶ 3} On January 16, 2007, the lower court held a hearing regarding Howard’s Motion to Grant Defendant Grand Jury Transcript and Minutes. The motion was granted on January 25, 2007. On that day, the court ordered the court reporter to prepare the transcript of the grand jury proceedings for in-camera inspection. Howard then filed a Motion to Dismiss, and that motion was granted in part on March 26, 2007. On April 16, 2007, the court granted Howard’s February 28, 2007 Motion to Compel Discovery, ordering the state to comply with discovery by April 18, 2007. On August 13, 2007, a jury trial began. However, on August 14, 2007, the trial court granted Howard’s request for a mistrial.

{¶ 4} On October 29, 2007, new defense counsel entered an appearance with the court, and on November 1, 2007, this case was reassigned to another

common pleas court judge. On March 28, 2008, Howard waived his right to a trial by jury. On April 7, 2008, the first day of the bench trial, the court viewed the scene of the crime and declared Rondalyn Wynn (“Wynn”) a material witness. At the close of the state’s case, Howard made a Rule 29 Motion for Acquittal. The motion was denied.

{¶ 5} On April 18, 2008, the lower court judge found Howard guilty of the lesser included offense of murder, inclusive of the three-year firearm specification; and guilty of having a weapon while under a disability. On May 19, 2008, the court held a sentencing hearing. Howard was sentenced to life in prison with parole eligibility after 15 years. The minimum 15-year sentence was consecutive to the three-year firearm specification sentence. Howard was also sentenced to five years on the having a weapon while under disability charge. This sentence was ordered to be served concurrently to the 18-year total on the murder and three-year firearm specification sentences. Accordingly, Howard was sentenced to a total minimum of 18 years.

STATEMENT OF THE FACTS

{¶ 6} On April 26, 2006, the victim, Albert Sturdivant (“Sturdivant”), was shot and died of a single gunshot wound to the chest. The shooting occurred in the parking lot of an apartment building located at 883 Parkwood Avenue in Cleveland, Ohio.

{¶ 7} Witness, Donald Drake (“Drake”), stated that he was putting gas in a white minivan that was in the parking lot on the night of the murder. Drake

further stated that he saw Howard in front of the van on the night of the shooting. Wynn lived at the Pentecostal Apartments in April 2006. Dennis Edwards (“Edwards”) was Wynn’s boyfriend at that time. Wynn’s apartment was on the first level and led to the door that allowed direct access to the parking lot. Wynn owned a car that was immobile and was parked in the lot.¹

{¶ 8} At approximately 10:00 p.m. on April 26, 2006, Wynn and Edwards were lying in bed watching television. They heard a loud crash and thought that someone might be trying to steal Wynn’s car. They jumped out of bed and ran to the back door of the apartment building that led directly to the parking lot. When Wynn looked out the window of the back door, she saw a truck that had backed into her car and also saw an individual wearing a black hoodie running toward the back door.

{¶ 9} When Wynn saw the individual’s face, she recognized him as Howard. As Howard approached the door, Wynn asked him if he was okay. Wynn did not observe any other individuals in the lot at that time. When Wynn walked around the crashed vehicles, she saw the truck doors open and witnessed a man who was having difficulty breathing, and his eyes were rolling toward the back of his head. Wynn then retrieved her cordless phone from her apartment window and called 9-1-1. Wynn did not talk to the police at first when

¹Tr. 38.

they arrived on the scene because “Andrew was still in the hallway while everything was going on.”²

{¶ 10} Later in the evening, a detective from the Cleveland Police Department questioned Wynn about Howard being in the building. Fearing retribution, Wynn originally denied that Howard was in the building.

{¶ 11} A few days after the shooting, and after the F.B.I. had been to the apartment building questioning witnesses, Wynn received a telephone message from Howard. He indicated that Wynn needed to look for him because he was looking for her. Wynn believed this to mean that she needed to talk to Howard before he found her. Later in the same day, Wynn received a second similar message from Howard. After the telephone calls, Wynn, while en route to the store, saw Howard. The two of them spoke, and Howard told Wynn that he killed the victim over \$200.00.³ Howard also told Wynn that he would kill whoever snitched on him.

{¶ 12} Edwards stated that while standing at the back door, he saw people standing across the street. He went back to the apartment to put on his shoes, and then returned to the parking lot. Edwards stated that he walked toward the crash and saw a body. Edwards also stated that he saw Howard later and Howard told him that “the brother tried to rob me.”⁴

²Tr. 49.

³Tr. 62.

⁴Tr. 199.

ASSIGNMENT OF ERROR

{¶ 13} Howard assigns one assignment of error on appeal:

{¶ 14} “[1.] The state failed to present sufficient evidence to sustain appellant’s conviction, and the court erred in denying the appellant’s Rule 29 Motion for Acquittal, in violation of appellant’s right to Due Process, as guaranteed by Article I, Section 10 of the Ohio Constitution and the Sixth and Fourteenth Amendments to the United States Constitution.”

LEGAL ANALYSIS

Motion for Acquittal

{¶ 15} Howard argues that the trial court should have granted his motion for acquittal because the evidence was insufficient to support his convictions. We disagree. The sufficiency of the evidence standard of review is set forth in *State v. Bridgeman* (1978), 55 Ohio St.2d 261, 381 N.E.2d 184, syllabus.

{¶ 16} “Pursuant to Criminal Rule 29(A), a court shall not order an entry of judgment of acquittal if the evidence is such that reasonable minds can reach different conclusions as to whether each material element of a crime has been proved beyond a reasonable doubt.” See, also, *State v. Apanovitch* (1987), 33 Ohio St.3d 19, 23, 514 N.E.2d 394; *State v. Davis* (1988), 49 Ohio App.3d 109, 113, 550 N.E.2d 966.

{¶ 17} *Bridgeman* must be interpreted in light of the sufficiency test outlined in *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus in which the Ohio Supreme Court held:

“An appellate court’s function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence submitted 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. (*Jackson v. Virginia* [1979], 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560, followed.)”

{¶ 18} After reviewing the evidence in a light most favorable to the state, we find that the evidence could convince a rational trier of fact that the state had proven beyond a reasonable doubt each element of the charge of murder, having a weapon while under a disability, and firearm specifications.

{¶ 19} In the instant case, the evidence demonstrates that Howard was in the parking lot immediately before the victim was killed. Howard was seen fleeing the scene by Edwards and Wynn. Both Edwards and Wynn testified that they witnessed Howard coming from the area where the victim was immediately after the shooting. Edwards also testified that Howard told him that the person in the truck tried to rob him. Howard was also seen in the parking lot by Drake immediately before gunshots were heard.

{¶ 20} In addition to the testimony above, there is evidence that Howard threatened Wynn on at least two occasions. Wynn testified that Howard told her that he would kill whoever is snitching on him and Wynn further testified that she received two messages from Howard immediately after the F.B.I. came to the apartment building questioning witnesses and looking for him. Wynn also

testified that Howard indicated that Wynn needed to find him before he found her. Moreover, Howard told Wynn that he killed Sturdivant over a \$200.00 debt.

{¶ 21} Although Howard was not seen with a firearm, there is evidence establishing that he was seen in the parking lot immediately before and after the murder. Howard immediately tried to get in contact with Wynn, an eyewitness, right after the F.B.I. came looking for him. Howard admitted to killing Sturdivant, and threatened to kill anyone who snitched on him.

{¶ 22} While the evidence in the case at bar is circumstantial, it has enough weight to convict appellant. Direct evidence of fact is not required and circumstantial evidence may be more certain, satisfying, and persuasive than direct evidence. *State v. Jackson* (1991), 57 Ohio St.3d 29, 565 N.E.2d 549.

{¶ 23} Circumstantial evidence and direct evidence are indistinguishable so far as the jury's fact-finding function is concerned, and thus all that is required of the jury is that it weigh all of the evidence, direct and circumstantial, against the standard of proof beyond a reasonable doubt. *State v. Tierney*, Cuyahoga App. No. 78847, 2002-Ohio-2607.

{¶ 24} Consequently, viewing the evidence in the light most favorable to the state, we conclude that any rational trier of fact could have found that the state proved all of the essential elements of the instant charges beyond a reasonable doubt. Thus, the trial court properly denied Howard's motion for acquittal.

{¶ 25} Accordingly, Howard's assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

LARRY A. JONES, JUDGE

SEAN C. GALLAGHER, A.J., and
JAMES J. SWEENEY, J., CONCUR