[Cite as *State v. Barton*, 2019-Ohio-580.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
BELMONT COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

JOSEPH EDWARD BARTON,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 15 BE 0082

Criminal Appeal from the
Court of Common Pleas of Belmont County, Ohio
Case No. 15 CR 33

BEFORE:
Gene Donofrio, Cheryl L. Waite, Kathleen Bartlett, Judges.

JUDGMENT:
Affirmed

Atty. J. Flanagan, Prosecutor's Office, Courthouse Annex 1, 147-A West Main Street, St. Clairsville, Ohio 43950, NO BRIEF FILED, for Plaintiff-Appellee and

Atty. Rhys Cartwright-Jones, 42 North Phelps Street, Youngstown, Ohio 44503, for Defendant-Appellant.

Dated:
February 6, 2019

Donofrio, J.

{¶1} Defendant-appellant, Joseph Barton, appeals from a Belmont County Common Pleas Court judgment convicting him of aggravated murder, following a jury trial.

{¶2} On the morning of October 15, 2012, a fire broke out at Julian Townsend's mobile home on Wegee Road in Shadyside, Ohio. Investigators found Townsend's dismembered remains among the fire debris. Upon conducting an examination, the deputy coroner discovered that Townsend had been shot and stabbed multiple times before his body was dismembered and burned.

{¶3} The ensuing investigation led police to look into appellant. Appellant and Townsend lived on the same road. On the evening before the fire, appellant had been at Townsend's trailer helping Townsend chop firewood. He had several saws with him. Appellant claimed that Townsend brought him home to his own trailer that evening and he did not learn of the fire until the next morning when he drove past the scene with his nephew. Townsend's phone records revealed that appellant's girlfriend had called Townsend's trailer both the night of October 14 and the morning of October 15. On the morning of the fire, the scene was swarming with police and firefighters. As appellant's nephew drove past the fire scene with appellant in his car, appellant ducked down. Appellant went to his nephew's house where he showered, washed his clothes, and then went to buy new clothes. Appellant also got a haircut on October 16. Hair retrieved from the barbershop had gasoline on it.

{¶4} On February 5, 2015, a Belmont County Grand Jury indicted appellant on one count of aggravated murder, a first-degree felony in violation of R.C. 2903.01(B).

{¶5} The matter proceeded to a jury trial on December 8, 2015. The jury found appellant guilty as charged. The trial court subsequently sentenced appellant to life in prison without the possibility of parole.

{¶6} Appellant filed a timely notice of appeal on December 30, 2015. This court promptly appointed counsel. Counsel requested, and this court granted, four extensions of time. Counsel then moved to withdraw from the case at the end of 2016,

after representing appellant for a year. This court appointed current counsel on March 17, 2017. New counsel also requested four extensions of time. This court granted the first three requests and denied the fourth ordering counsel to file a brief, which he did on May 15, 2018.

{¶7} We subsequently granted plaintiff-appellee, the State of Ohio's, motion for an extension of time. But the state failed to file a brief in this matter. Therefore, pursuant to App.R. 18(C), "this court may accept the appellant's statement of the facts and issues as correct and reverse the judgment if appellant's brief reasonably appears to sustain such action."

{¶8} Appellant now raises two assignments of error.

{¶9} Appellant's first assignment of error states:

> THE TRIAL COURT ERRED IN ALLOWING PSEUDO-SCIENCE INTO EVIDENCE, SUCH TO VIOLATE VARIOUS OF BARTON'S SIXTH AMENDMENT RIGHTS.

{¶10} Appellant argues that the trial court erred in admitting the hair comparison evidence.

{¶11} At trial, the state called Joshua Friedman, a trace evidence examiner at the FBI laboratory, to testify regarding hair comparisons. Friedman had compared hair recovered from Weaver's Barbershop, where appellant had his hair cut shortly after the fire, with a known sample of appellant's hair. Over appellant's objection, the trial court found Friedman to be an expert in the area of hair comparison. (Tr. 458-460). Friedman testified that the hair recovered from Weaver's Barbershop was microscopically consistent with the known sample of appellant's hair. (Tr. 474). Therefore, Friedman testified that appellant could be included as a possible source of the hair from the barbershop. (Tr. 492).

{¶12} Appellant suggests that we should review this assignment of error de novo, as opposed to reviewing for abuse of discretion. He claims a de novo review is necessary because this is "an error of another dimension and merits the same standard of review as a motion to suppress."

{¶13} Case law is clear, however, that an appellate court is to review a trial court's admission of expert testimony for an abuse of discretion. *State v. McKelton*, 148 Ohio St.3d 261, 2016-Ohio-5735, 70 N.E.3d 508, ¶ 161. An abuse of discretion is more than a mere error in law or judgement; it implies that the trial court's decision was unreasonable, arbitrary, or unconscionable. *State v. Adams*, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980).

{¶14} Appellant first asserts expert testimony was not appropriate because a lay person can determine this issue. He contends that a lay person can compare two hairs and decide if the hairs are similar or not.

{¶15} Pursuant to Evid.R. 702:

> A witness may testify as an expert if all of the following apply:
>
> (A) The witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons;
>
> (B) The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony;
>
> (C) The witness' testimony is based on reliable scientific, technical, or other specialized information.

{¶16} In this case, Friedman testified that as a trace evidence examiner with the FBI he examines and compares hairs, fibers, fabric, and cordage. (Tr. 456). In addition to his bachelor’s and master’s degrees, in order to become a trace evidence examiner, Friedman completed a year-and-a-half training program at the FBI. (Tr. 457). His training included studying reference collections, successfully completing competency exams, moot courts, and oral boards. (Tr. 457). He has been qualified as an expert approximately 15 other times. (Tr. 458).

{¶17} In microscopically examining hairs, Friedman testified he is able to discern the three different layers of a hair and, using the characteristic found therein, he can make multiple determinations including: whether the hair is human or animal; if it is

human, whether its ancestry is European, African, Asian, or Native American; the area of the body from which the hair came; whether the hair was naturally shed or forcibly removed; whether the hair has been dyed; and whether the hair has been damaged. (Tr. 462-463).

{¶18} Based on his testimony, Friedman met the Evid.R. 702 requirements to be qualified as an expert in microscopic hair comparison. First, while a lay person may be able to compare two hairs and note certain similarities a lay person most likely could not discern the three layers of a hair and use those characteristics to make the numerous determinations Friedman testified he could make such as whether the hair is human or animal and whether the hair has been dyed or damaged. Second, Friedman gained specialized knowledge in hair comparison from his year-and-a-half training course with the FBI, which included passing competency exams. And third, Friedman's testimony was based on specialized information regarding hair comparison. Thus, the trial court did not abuse its discretion in allowing Friedman to testify as an expert in the area of hair comparison.

{¶19} Second, appellant claims the expert's testimony was improper because he testified that the hair "could be included" as a contributing fiber. He asserts the words "could be included" suggests the same certainty as DNA evidence, which he argues is not appropriate.

{¶20} Friedman's testimony does not convey the same certainty as DNA evidence. Friedman specifically testified that "hairs are not a means of personal identification" and that he could not determine "that a hair came from a person to the exclusion of all other people." (Tr. 464). Instead, he stated that due to the variation in microscopic characteristics, the presence or absence of those characteristics make hair comparisons meaningful. (Tr. 464). And he specifically stated that he could not say that the hairs came from appellant. (Tr. 477). He only stated that the submitted hairs were microscopically consistent with appellant's known sample. (Tr. 492-493). Friedman stated that if the hairs are inconsistent, the analysis ends. (Tr. 492). If they are consistent, then they are sent on for mitochondrial DNA testing. (Tr. 492).

{¶21} We cannot conclude that the trial court abused its discretion in allowing this testimony. Friedman very plainly explained to the jury that he could not determine

whether the hairs from the barbershop came from appellant. He also explained that the hair comparison was used to determine whether to send the hairs on for mitochondrial DNA testing. In no way did Friedman suggest he could identify the hairs as coming from appellant or that hair comparison was similar to DNA evidence. Thus, the trial court properly allowed Friedman's testimony.

{¶22} Accordingly, appellant's first assignment of error is without merit and is overruled.

{¶23} Appellant's second assignment of error states:

> THE TRIAL COURT ERRED IN ALLOWING A CONVICTION EITHER IN THE FACE OF INSUFFICIENT EVIDENCE OR AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶24} Here appellant contends his conviction is both unsupported by sufficient evidence and against the manifest weight of the evidence.

{¶25} First, we will consider whether appellant's conviction is supported by sufficient evidence.

{¶26} Sufficiency of the evidence is the legal standard applied to determine whether the case may go to the jury or whether the evidence is legally sufficient as a matter of law to support the verdict. *State v. Smith*, 80 Ohio St.3d 89, 113, 684 N.E.2d 668 (1997). In essence, sufficiency is a test of adequacy. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). Whether the evidence is legally sufficient to sustain a verdict is a question of law. *Id.* In reviewing the record for sufficiency, 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. *Smith*, 80 Ohio St.3d at 113.

{¶27} The jury convicted appellant of aggravated murder in violation of R.C. 2903.01(B), which provides in relevant part: "No 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 arson, arson * * *."

{¶28} We must examine the state's case to determine whether it presented evidence going to each element of aggravated murder.

{¶29} Misty Whitlach, Townsend's daughter was the first witness. Whitlach testified that her father was a frail man, weighing only 108 pounds. (Tr. 306). She stated that Townsend had wood on his property that he wanted to cut, but he was physically unable to do the work. (Tr. 306). She also stated that he had a log splitter on his property. (Tr. 306).

{¶30} Steve Williams lived in the next trailer down the road from Townsend's trailer. He testified that on the morning of October 15, 2012, he was walking his dog down Wegee Road. (Tr. 319). When he first went past Townsend's property, he noticed wood cut up on the property. (Tr. 309). When Williams passed Townsend's property on his way back home, he noticed a younger man standing by Townsend's car. (Tr. 321). The car was idling. (Tr. 321). As he continued to walk back toward his own trailer, Williams heard a "big explosion." (Tr. 322-323). He turned back to see smoke pouring out of Townsend's trailer. (Tr. 322-323). Williams then ran back to the bridge that went across the creek to Townsend's property. (Tr. 323). He saw Townsend's car starting across the bridge toward him. (Tr. 323-324). When the car got near Williams, the driver covered his face and continued to drive east at a high rate of speed. (Tr. 324). After realizing he could not do anything else to help, Williams ran home and called 911. (Tr. 328).

{¶31} The 911 director testified that Williams' call to 911 reporting the fire was placed at 8:57 a.m. (Tr. 347).

{¶32} Volunteer firefighter and state highway patrol officer, Jason Greenwood, responded to the scene. Greenwood testified that the fire was concentrated in the living room of the trailer. (Tr. 382). He noticed a gas can on the porch. (Tr. 382). Once the fire was extinguished, as Greenwood was searching through the debris, he found a human head. (Tr. 388).

{¶33} A state fire marshal investigator arrived with a K-9 trained to detect accelerants. He testified that the K-9 indicated three areas in the living room and one area outside where it detected accelerants. (Tr. 411).

{¶34} Michael Stellfox is an investigator with the Ohio State Fire Marshal. Stellfox testified as to the state of the trailer and described samples that he collected.

{¶35} The deputy coroner testified that Townsend had been stabbed, shot, and dismembered before his body was burned. (Tr. 864, 868, 869, 871-872). The coroner opined that Townsend's body parts had been separated by a power saw given the appearance of the cuts. (Tr. 878).

{¶36} Georgeanne Bishop cuts hair at Weaver's Barbershop. Bishop testified that on October 16, 2012 (the day after the fire), a man came into the barbershop and wanted a short haircut. (Tr. 426-427). She noticed that the man's shoulder-length hair had been pulled out in spots. (Tr. 426). The man indicated to her that he had been in a fight. (Tr. 426). She noticed some cuts on the man and stated that he looked like he had been in a fight. (Tr. 427). Bishop cut the man's hair into a short crew cut. (Tr. 427).

{¶37} Robert Weaver owns Weaver's Barbershop. He testified that sheriff's deputies came to the barbershop and inquired if he remembered a customer from earlier in the week who had long hair cut short and if he still had the hair. (Tr. 594). He stated that he did. (Tr. 594). Weaver remembered the customer because it was "an unusual situation, getting long hair cut that short." (Tr. 595). Weaver testified that the hair was in the waste basket and because it was cut in long lengths, instead of short lengths like most hair, it was easy for him to retrieve it. (Tr. 594). Weaver stated that he put the hair in a bag for the deputies. (Tr. 594).

{¶38} Joshua Friedman is a trace evidence examiner for the FBI. He examined eight hairs given to him that were recovered from Weaver's Barbershop. (Tr. 470, 474). He compared those hairs to known sample hairs from appellant. (Tr. 472). He was able to determine that the eight hairs came from a Caucasian. (Tr. 474). Friedman was also able to determine that appellant could be included as a possible source of those eight hairs from the barbershop. (Tr. 474, 493). Freidman did note, however, that he could not say that the hairs came from appellant to the exclusion of all other people, only that appellant could be included a possible source of the hairs. (Tr. 474-475).

{¶39} Constance Fisher is a biologist forensic examiner for the FBI. She supervises the mitochondrial DNA testing. Fisher explained that mitochondrial DNA is

different from nuclear DNA in that it is inherited only from a person's mother. (Tr. 500). Consequently, mitochondrial DNA is not unique to a single individual to the exclusion of all others. (Tr. 500-501). Fisher tested two hairs from the barbershop sample and compared them to the known DNA standard from appellant. (Tr. 509-511). She determined that the mitochondrial DNA sequence from the hair had a common base at every position with the known sample from appellant. (Tr. 514). Fisher was then able to determine that no more than 31 out of 1,000 Caucasians have that same mitochondrial DNA sequence. (Tr. 515).

{¶40} Christa Rajendram is a forensic pathologist at the state fire marshal's lab. She tested the hairs recovered from the barbershop for ignitable liquids. She testified that her testing revealed there was gasoline on the hair. (Tr. 1260). Rajendram also tested some items recovered from the scene of the fire. She testified that both clothing from the victim and debris from the victim's sofa both tested positive for gasoline. (Tr. 1262-1267).

{¶41} Townsend's brother, Jesse, testified that he talked to Townsend the night prior to the fire. (Tr. 436). Jesse stated that he called Townsend in the evening and appellant answered the phone. (Tr. 436). Jesse spoke to both appellant and Townsend. (Tr. 436-437). They indicated that appellant had been splitting wood for Townsend and that they were both drinking. (Tr. 437-439). The next morning, after learning of the fire, Townsend's daughter called Jesse to see if Townsend was with him. (Tr. 439). Upon learning of the fire, Jesse and his girlfriend drove over towards Townsend's trailer. (Tr. 441). On their way, they found Townsend's car sitting down the road from appellant's trailer. (Tr. 441).

{¶42} Darla Rader was Townsend's friend. Rader called Townsend the evening before the fire around 7:30 p.m. (Tr. 558-559). When she called Townsend's trailer, a man who identified himself as appellant answered the phone. (Tr. 559). Rader testified that appellant was rude to her and did not want her to talk to Townsend. (Tr. 560-561). She asked appellant if Townsend was ok and he replied "I don't know" and told her that he would have to carry Townsend to the phone. (Tr. 562). Appellant repeatedly told Rader she could not talk to Townsend and not to call back again. (Tr. 562-563). After she persisted for some time, appellant eventually let her briefly speak to Townsend.

(Tr. 565). She stated that Townsend asked her "what's happening?" and told her he would call her later. (Tr. 565-566).

{¶43} Hasson Lowry worked for the Ohio Bureau of Criminal Identification and Investigation (BCI) in computer forensics. He was called to appellant's trailer to look into a DVR that was hooked up to a camera monitoring the outside of appellant's trailer. (Tr. 614, 616). Lowry explained that the DVR feed on October 15, 2012 (the day of the fire), showed appellant sticking his head out of the trailer. (Tr. 645-646). It then showed detectives pulling up approximately five minutes later on a side street at 3:10 p.m. (Tr. 642). The officers left after a minute. (Tr. 646-647). Approximately six minutes later, at 3:18 p.m., the DVR feed showed a car backing into appellant's drive. (Tr. 628, 647). It then showed appellant exit his trailer holding a white sheet full of something. (Tr. 628). It showed appellant run to the back of the vehicle, open the hatch, throw in the white sheet bundle, and close the hatch. (Tr. 628). It then showed appellant jump into the front seat and the vehicle drove away. (Tr. 628).

{¶44} Carl Barton is appellant's brother. Barton testified that two days after the fire, appellant told him he had been at Townsend's cutting firewood and he was supposed to have gone back the next day (the day of the fire) to finish. (Tr. 728-730). Barton also testified that appellant never contacted law enforcement or went back to his trailer after he left with his cousin on October 15, 2012, despite the fact that law enforcement was searching his property and looking for him. (Tr. 739-742).

{¶45} The Shadyside Police Chief testified that Townsend's vehicle was found on Wegee Road. (Tr. 372). It was located just past appellant's trailer. (Tr. 373).

{¶46} BCI investigator Joshua Durst searched the fire scene and also located Townsend's car. He testified that the car was located on a "pull-off" area of Wegee Road. (Tr. 775-776). Inside the car, Durst located a pair of vice grips on the driver's side floorboard that appeared to have blood on them. (Tr. 810). He also testified that a shotgun and shotgun shell fragments were found near Townsend's remains. (Tr. 782-783, 794-795). And he stated that four gas cans were located next to the trailer. (Tr. 784-785). Additionally, Durst located a circular saw, a jigsaw, and some knives within the trailer. (Tr. 798-799).

{¶47} BCI forensic scientist Devonie Herdeman tested the blood on the vice grips found in Townsend's car for DNA evidence. Her testing revealed that the DNA from the blood on the vice grips was consistent with Townsend's DNA with a statistical result of one in two quintillion, 490 quadrillion. (Tr. 970-971). She also tested another DNA profile she found on the gearshift of Townsend's car. (Tr. 972). This DNA profile was a mixture with the major profile being consistent with Townsend and the minor profile being consistent with appellant. (Tr. 972). The statistical probability for that DNA on the gearshift was one in 251,700. (Tr. 980).

{¶48} April Stevey was appellant's "on-and-off" girlfriend. Stevey testified that on October 14, 2012 (the day before the fire), appellant called her from Townsend's phone. (Tr. 820). She also stated that she called Townsend's number in order to speak with appellant. (Tr. 821). Stevey additionally testified that she spoke with appellant at 10:01 a.m. and at 12:05 p.m. on the day of the fire. (Tr. 822). The calls in which Stevey spoke to appellant were placed from Stevey's phone to appellant's phone. (Tr. 1153, 1156). A call was also placed that day from Stevey's phone to Townsend's number at 10:26 a.m., which was after the fire was set. (Tr. 1148).

{¶49} Detective-Sergeant Douglas Cruse took photographs of appellant after he was arrested on October 18, 2012. The photographs showed various scratches, scrapes, and injuries to appellant's arm, leg, and chest in addition to a black eye and marks on his nose. (Tr. 1062-1069; Exs. 130-136).

{¶50} Brian Parker is appellant's nephew. Parker testified that on the morning of October 15, 2012 (the day of the fire), appellant called him and asked him to pick him up so that he could get a shower and do his laundry. (Tr. 1085). Parker stated that because appellant did not have running water at his trailer, appellant sometimes called Parker and asked to come to his house to do laundry and shower. (Tr. 1085). As Parker drove down Wegee Road to appellant's trailer, he noticed the fire trucks tending to a fire. (Tr. 1084). Parker stated when he arrived at appellant's trailer, appellant came out and put his clothes in the back of the vehicle. (Tr. 1090). Appellant then got into Parker's vehicle and Parker drove on Wegee Road back toward the fire scene. (Tr. 1090-1091). As they passed the fire scene, Parker noticed that appellant ducked down

in the car. (Tr. 1092). Appellant told Parker he had been there cutting wood the previous night. (Tr. 1093).

{¶51} When they arrived at Parker's house, appellant showered and washed his clothing. (Tr. 1098). Parker stated that appellant stayed with him until he was arrested on October 18, 2012. (Tr. 1101). During those few days, Parker took appellant to a second-hand store to buy different clothing. (Tr. 1104). He also testified that he may have taken him to Weaver's Barbershop. (Tr. 1105, 1109).

{¶52} Caleb Watson is a manager for AT&T. Watson testified regarding phone records for calls to and from Townsend's landline at his trailer on the day before and the day of the fire. Watson testified that a call was made from Radar (Townsend's friend) to Townsend's line at 6:43 p.m. (Tr. 1144). Watson testified that multiple brief calls were placed from Townsend's phone line to April Stevey (appellant's girlfriend) the evening before the fire beginning at 5:54 p.m. and continuing until 6:35 p.m. (Tr. 1139-1143). And on the morning of the fire, a phone call was placed from Stevey's phone to Townsend's line at 10:26 a.m., after the fire had been set. (Tr. 1148). Additionally, on the morning of the fire, appellant placed a call from his phone to his cousin Parker's phone at 9:57 a.m. (Tr. 1152-1153).

{¶53} As to sufficiency, appellant argues that the state's best evidence is that he was "there" on the day of the murder. He asserts mere presence is insufficient to establish criminal culpability.

{¶54} There is no question that Townsend was shot, stabbed, and dismembered and his trailer was set on fire. Thus, these elements of aggravated murder requiring the death to be purposely caused and caused while committing aggravated arson are clearly met. The question is whether the state proved that appellant was the perpetrator of this crime.

{¶55} The state's case is based entirely on circumstantial evidence. "Circumstantial evidence is defined as '[t]estimony not based on actual personal knowledge or observation of the facts in controversy, but of other facts from which deductions are drawn, showing indirectly the facts sought to be proved. * * *'" *State v. Nicely*, 39 Ohio St.3d 147, 150, 529 N.E.2d 1236 (1988), quoting Black's Law Dictionary (5 Ed.1979) 221.

{¶56} Circumstantial evidence and direct evidence have the same probative value. *State v. Dodds*, 7th Dist. No. 05 MA 236, 2007-Ohio-3403, ¶ 88, citing *State v. Jenks*, 61 Ohio St.3d 259, 272, 574 N.E.2d 492 (1991). "A conviction based on purely circumstantial evidence is no less sound than a conviction based on direct evidence." *State v. Begley*, 12th Dist. No. CA92-05-076, 1992 WL 379379, *2, citing *State v. Apanovitch*, 33 Ohio St.3d 19, 27, 514 N.E.2d 394 (1987).

{¶57} Construing the evidence in a light most favorable to the state, as we are required to do, proves the following.

{¶58} Appellant and Townsend were neighbors. Appellant went to Townsend's trailer on October 14, 2012, to help him cut up firewood. The two were splitting wood together and drinking. Appellant brought his chainsaws and a gas can. While appellant was at Townsend's property, he called his girlfriend several times from Townsend's phone. Additionally, appellant answered the phone when Townsend's girlfriend called at 6:43 p.m. Appellant spoke to Townsend's girlfriend for some time before allowing Townsend to speak with her. He indicated to Townsend's girlfriend that he was not sure if Townsend was ok and he would have to carry him to the phone. Townsend's girlfriend did speak to Townsend, who indicated that he would call her back later.

{¶59} Shortly before 9:00 a.m. on October 15, 2012, a neighbor noticed a "younger" man standing on Townsend's property by Townsend's car. The neighbor then heard an explosion and saw that Townsend's trailer was on fire. Next, he saw Townsend's car drive past him at a high rate of speed.

{¶60} At 9:57 a.m., appellant called his cousin asking if the cousin could pick him up so that he could shower and wash his laundry.

{¶61} At 10:26 a.m., appellant's girlfriend attempted to call appellant at Townsend's trailer.

{¶62} At 3:18 p.m., appellant's cousin Parker pulled into appellant's driveway. Appellant ran out of his trailer holding a white sheet full of something that he put in the back of Parker's car. Appellant then got in the car and they drove away. As Parker drove past the fire scene, where police and firefighters remained, appellant ducked down. When they arrived at Parker's house, appellant showered and washed his

clothing. He also went and purchased new clothing. Appellant never went back to his trailer despite the fact that law enforcement was searching it and looking for him.

{¶63} Townsend's car was located near appellant's trailer. Vice grips were found inside the car with Townsend's blood on them. DNA found on the gearshift of Townsend's car was consistent with appellant's DNA with the statistical probability of one in 251,700.

{¶64} Appellant had his hair cut the day after the fire. The hair recovered from the barbershop was consistent with appellant's hair with the statistic that of 31 out of 1,000 Caucasians have that same mitochondrial DNA. Gasoline was present on the hair.

{¶65} The items recovered from the fire, including clothing from the victim, tested positive for gasoline. A gas can was found on the porch.

{¶66} While the above evidence is circumstantial, it indicates that appellant was more than just "there" at Townsend's trailer.

{¶67} Every criminal prosecution requires the state to prove that the defendant is the person who committed the crime. *State v. Mascarella*, 7th Dist. No. 15 MA 0102, 2017-Ohio-8013, ¶ 31, quoting *State v. Tate*, 140 Ohio St.3d 442, 2014-Ohio-3667, 19 N.E.3d 888, ¶ 15. As is the case with any other fact, the state can prove the defendant's identity by circumstantial or direct evidence. *Id.*, citing *State v. Jenks*, 61 Ohio St.3d 259, 272-273, 574 N.E.2d 492 (1991).

{¶68} In this case, the state presented sufficient circumstantial evidence to prove appellant was the perpetrator. The state presented sufficient facts from which the jury could deduce that appellant was not only present at Townsend's trailer but that he murdered Townsend and set his trailer on fire.

{¶69} Next, we turn to appellant's argument that his conviction is against the manifest weight of the evidence.

{¶70} In determining whether a verdict is against the manifest weight of the evidence, an appellate court must review the entire record, weigh the evidence and all reasonable inferences and determine 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. *Thompkins*, 78 Ohio St.3d at 387.

"Weight of the evidence concerns 'the inclination of the *greater amount of credible evidence*, offered in a trial, to support one side of the issue rather than the other.'" *Id.* (Emphasis sic.) In making its determination, a reviewing court is not required to view the evidence in a light most favorable to the prosecution but may consider and weigh all of the evidence produced at trial. *Id.* at 390.

{¶71} Yet granting a new trial is only appropriate in extraordinary cases where the evidence weighs heavily against the conviction. *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983). This is because determinations of witness credibility, conflicting testimony, and evidence weight are primarily for the trier of the facts who sits in the best position to judge the weight of the evidence and the witnesses' credibility by observing their gestures, voice inflections, and demeanor. *State v. Rouse*, 7th Dist. No. 04-BE-53, 2005-Ohio-6328, ¶ 49, citing *State v. Hill*, 75 Ohio St.3d 195, 205, 661 N.E.2d 1068 (1996); *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus. Thus, "[w]hen there exist two fairly reasonable views of the evidence or two conflicting versions of events, neither of which is unbelievable, it is not our province to choose which one we believe." *State v. Dyke*, 7th Dist. No. 99-CA-149, 2002-Ohio-1152.

{¶72} Reversing a conviction based on weight of the evidence after a jury trial is so extreme that it requires the unanimous vote of all three appellate judges rather than a mere majority vote. *Thompkins*, 78 Ohio St.3d at 389, citing Section 3(B)(3), Article IV of the Ohio Constitution (noting that the power of the court of appeals is limited in order to preserve the jury's role with respect to issues surrounding the credibility of witnesses).

{¶73} In addition to the state's evidence set out above, we must also consider the evidence presented by the defense.

{¶74} Rose Barton is appellant's sister. She testified that on the morning of the fire, her boyfriend called her when he learned of a trailer fire on Wegee Road. (Tr. 1292-1293). She stated that she hung up with him and called appellant to check on him. (Tr. 1293). Rose stated that appellant answered the phone at his trailer and he sounded normal. (Tr. 1293).

{¶75} David Frye lived on the same road as Townsend and appellant at the time of the fire. Frye testified that he spoke with Townsend and appellant two days before the fire. (Tr. 1296). Appellant told Frye that he was going to cut some firewood for Townsend the next day. (Tr. 1268). The next day, Frye testified that appellant stopped at his house and asked if he could have some oil for his chainsaw. (Tr. 1299). Frye gave him a gallon of oil. (Tr. 1299). He then watched appellant walk toward Townsend's trailer with his chainsaw and a small gas can. (Tr. 1299). Frye stated that appellant was doing this in the daylight and was not sneaking around. (Tr. 1300).

{¶76} Appellant testified in his defense. He testified that he did not murder Townsend. (Tr. 1304-1305). He also testified that he did not stab, shoot, or dismember Townsend and did not set Townsend's trailer on fire. (Tr. 1305).

{¶77} As to the injuries visible on appellant days after the fire, appellant testified that on the day before the fire he was cutting up a tree on his property. (Tr. 1310). While he was working on the tree, appellant stated that part of the tree fell and struck him across the face. (Tr. 1311).

{¶78} Appellant stated that he then went to Townsend's property because he had told Townsend he would cut some wood for him. (Tr. 1314). He brought two saws and a small can of gas with him. (Tr. 1314). Appellant stated that he cut wood at Townsend's property until just before dark. (Tr. 1318). He stated that he took breaks during his time there and that he called Stevey a few times from Townsend's phone. (Tr. 1319). He denied talking to anyone else on Townsend's phone. (Tr. 1321-1322). Appellant testified that when he was done cutting wood, he moved Townsend's car because it was blocking the path he wanted to use to move the wood. (Tr. 1322-1323). Appellant stated that Townsend then drove him home around 8:00 or 8:30 p.m. (Tr. 1323-1324). When they arrived at his trailer, appellant stated that he then got behind the wheel and turned Townsend's car around for him. (Tr. 1324-1325). He claimed this was the last time he saw Townsend. (Tr. 1325).

{¶79} The next morning, appellant stated that his nephew Parker called and left him a message asking if he wanted to come over for dinner. (Tr. 1328-1329). Appellant stated he called Parker back and asked if he could do his laundry and take a shower at Parker's house. (Tr. 1329). Parker agreed and picked appellant up later that afternoon.

{¶80} (Tr. 1329). Appellant stated that he did not realize there was a fire at Townsend's until he drove by with Parker. (Tr. 1337-1338).

{¶81} Appellant stated that sometime between October 15 and 18, 2012, he got a haircut at Weaver's Barbershop. (Tr. 1341). He also testified that while filling up his chainsaw with gas some gas could get on his hands, which he could transfer to his hair while wiping his face. (Tr. 1342-1343).

{¶82} As to manifest weight, appellant argues the jury lost its way due to "awe" by "pseudo-scientific" evidence. He contends none of the scientific evidence carried much weight.

{¶83} Even if the state's evidence is purely circumstantial, when conflicting evidence is presented at trial, a conviction is not against the manifest weight of the evidence simply because the trier of fact believed the state's evidence. *State v. Merzlak*, 7th Dist. No. 15 MA 0179, 2016-Ohio-7039, ¶ 28.

{¶84} Appellant's conviction is not against the manifest weight of the evidence. Appellant contends that the jury was "awed" by "pseudo-scientific" evidence. But he has no support for this allegation. The jury likely did not find appellant to be believable. Appellant testified that he did not murder Townsend. He gave explanations for why he went to Parker's to shower and do his laundry, why his DNA might be in Townsend's car, and why there might be gasoline in his hair. But the jury obviously did not find appellant to be credible.

{¶85} It is not our place to second-guess the jury's credibility determinations. The jury sits in the best position to judge the witnesses' credibility because they can observe the witnesses' gestures, voice inflections, and demeanor. *Rouse*, 2005-Ohio-6328, ¶ 49, citing *Hill*, 75 Ohio St.3d 195; *DeHass*, 10 Ohio St.2d at paragraph one of the syllabus.

{¶86} Therefore, we cannot conclude appellant's conviction was against the manifest weight of the evidence.

{¶87} Accordingly, appellant's second assignment of error is without merit and is overruled.

{¶88} For the reasons stated above, the trial court's judgment is hereby affirmed.

Waite, P. J., Concurs. / Bartlett, J., Concurs.

For the reasons stated in the Opinion rendered herein, the assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Belmont County, Ohio, is affirmed. Costs to be taxed against the Appellant.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.