[Cite as *State v. Turner*, 2023-Ohio-1929.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

TRAESHAUN TURNER,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 22 MA 0017

Criminal Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 20 CR 573

BEFORE:
David A. D'Apolito, Cheryl L. Waite, Mark A. Hanni, Judges.

JUDGMENT:
Affirmed.

Atty. Gina DeGenova, Mahoning County Prosecutor, and *Atty. Edward A. Czopur*, Assistant Prosecuting Attorney, 21 West Boardman Street, 6th Floor, Youngstown, Ohio 44503, for Plaintiff-Appellee and

Atty. Rhonda G. Santha, 6401 State Route 534, West Farmington, Ohio 44491, for Defendant-Appellant.

Dated: June 8, 2023

D'Apolito, P.J.

{¶1} Appellant, Traeshaun Turner, appeals his convictions following a trial by jury in the Mahoning County Court of Common Pleas for murder in violation of R.C. 2903.02(A)(D), an unclassified felony, with a firearm specification pursuant to R.C. 2941.145(A); attempted murder, a felony of the first degree in violation of R.C. 2923.02(A)(D) with a firearm specification pursuant to R.C. 2941.145(A); felonious assault, a felony of the second degree in violation of R.C. 2903.11(A)(D)(1)(a), with a firearm specification pursuant to R.C. 2941.145(A); and having a weapon under disability in violation of R.C. 2923.13(A)(2)(B).

{¶2} Appellant, who conceded discharging a firearm at the victims, asserted self-defense at trial. He claimed that the male victim, Ishmael Sharron Bethel, who died as a result of gunshot wounds, made a lethal threat then brandished and fired a weapon at Appellant. The female victim, D.W.[1], who suffered a gunshot wound to the arm, and a second eye-witness who is Bethel's former girlfriend, testified that Bethel neither brandished nor fired a handgun during the confrontation. Although the trial court instructed the jury on self-defense, Appellant was convicted on all charges.

{¶3} In this appeal, Appellant advances two assignments of error, a due process claim and an ineffective assistance of counsel claim. Both assignments of error are predicated upon testimonial evidence that Bethel's hands were bagged and swabbed for gunshot residue as a matter of procedure, but the test results were never produced by the state. The state argues that the swabs were never processed, and insofar as a violation of *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194 (1963) only occurs when exculpatory evidence is withheld, no due process violation occurred. The state further argues that the decision to forego gunshot residue testing by Appellant's trial counsel falls within the ambit of trial strategy, as the results of the test are speculative and could have established that Bethel had not fired a handgun that evening.

{¶4} For the following reasons, Appellant's convictions are affirmed.

[1] D.W. (d.o.b. 9/30/03) was sixteen when the crimes occurred and seventeen when she testified at trial.

FACTS

{¶5} It is undisputed that Bethel intervened during Appellant's effort to collect a $40 debt from D.W. It is likewise undisputed that Appellant travelled to the Southern Tavern on Glenwood Avenue in Youngstown, Ohio on September 8, 2020, for the sole purpose of collecting the debt, after seeing a post on D.W.'s Facebook Live account transmitted roughly five minutes before the fatal encounter.

{¶6} D.W. testified that she and Appellant were friendly in March of 2020, however their friendship waned over time and she had not seen him for several months. During the course of their short-lived friendship, Appellant either gave or loaned $40 to D.W.

{¶7} On the evening of September 8, 2020, D.W. was aware Appellant was viewing her Facebook Live post, and he arrived at the bar roughly five minutes after determining her location. D.W. conceded that Appellant had already attempted to collect the debt through a female intermediary prior to September 8, 2020, but D.W. "blew the female off." (Trial Tr., p. 210.)

{¶8} Appellant testified that he approached D.W. in the empty lot opposite the Southern Tavern, at the corner of Glenwood Avenue and Cleveland Avenue, a popular gathering place for bar patrons. According to Appellant, he asked D.W. to repay her indebtedness, and she agreed to repay the debt without objection.

{¶9} On direct examination, D.W. testified that Appellant approached her from behind, tapped on her shoulder, and asked, "where my money at." D.W. testified that she "couldn't even say nothing [sic]." (*Id.* at 214.) However, she later conceded on cross-examination that she had $1,500 in her purse that evening, and voluntarily reached in her purse to retrieve the money to satisfy the debt.

{¶10} It is undisputed that Bethel, who was the long-time boyfriend of D.W.'s cousin and recently released from prison, forcefully interrupted the conversation, and in an expletive-laden rant told D.W. that repayment was not required. Appellant told Bethel to "stay out of it." (*Id.* at 459.)

{¶11} According to Appellant, Bethel was "clutching his hand like in his pocket like he got [sic] his gun." (*Id.* at 460.) Appellant continued later in his testimony, "[Bethel's]

going like this, he was digging in his pocket going like this (indicating) back and forth, rocking back and forth with it like that." (*Id.* at 474.)

{¶12} Both Appellant and D.W. testified that: (1) Bethel instructed Appellant to forgive the debt and stay away from D.W; and (2) Bethel informed Appellant that attempting to collect a $40 debt is how "bitch-ass niggas" get killed. (*Id.*)

{¶13} Appellant explained that he retreated to his automobile to extricate himself from the volatile situation. However, Bethel and D.W. followed Appellant after the initial confrontation. D.W. and Appellant both testified that Appellant's driver's-side door separated Appellant and the couple. (*Id.* at 217.)

{¶14} Bethel's expletive-laden rant continued, to which Appellant responded, "fuck you, you bitch-ass nigga." (*Id.* at 462.) Appellant testified that Bethel responded by pulling a gun from his belt, prompting Appellant to reach for the handgun on his driver's side seat. Specifically, Appellant testified that he "seen [sic] something black, a black gun, reach for * * * [he] reached in [his] car off [his] seat and grabbed [his] gun."

{¶15} According to Appellant, both men began shooting, so Appellant crouched behind his driver's-side door for cover. Appellant testified that Bethel fired his gun at Appellant as he walked from Appellant's automobile. (*Id.* at 464.) Based on the state's closing argument, Appellant appears to have testified that Bethel reached around his midsection with his left hand and under his right arm to shoot at Appellant while Bethel walked from Appellant's automobile.[2] (*Id.* at 488-502.)

{¶16} D.W. testified that she never saw Bethel brandish or fire a handgun at the scene. According to D.W.'s testimony, she and Bethel turned and began to walk away. When the couple was roughly eight to ten feet from Appellant, Appellant began shooting, "pop, pop, pop, pop, pop, pop". (*Id.* at 219.) D.W. testified she had "played with" a semiautomatic pistol in Appellant's possession when they spent time together in early 2020. (*Id.* at 225.) She further testified that she "turned around on the first shot." (*Id.* at 240.)

[2] Appellant's testimony on cross-examination is that Bethel was "shooting like this (indicating)." (*Id.* at p, 502.) During closing argument, the state asserted, "[Appellant] testified that [Bethel] was walking away shooting like that (indicating). Really? Because [that is] how people shoot. Walking away, reaching behind them – oh, he used his left hand, like this (indicating). Really? That was his testimony." (*Id.* at p. 514.)

{¶17} Bethel was shot in his back, the back of his arm, and his buttocks. D.W. was shot in her right arm. D.W. saw Appellant with a handgun run to his automobile and flee the scene. Then she saw Bethel laying on the ground "with a whole bunch of people around him." (*Id.* at 222.)

{¶18} Breosha Moses, a Southern Tavern patron parked in the lot on Cleveland Avenue and Bethel's former girlfriend, offered the following testimony. She conceded that she had consumed two or three alcoholic beverages and smoked marijuana before the events giving rise to this appeal.

{¶19} Moses testified that Bethel and D.W. were seated in Moses' automobile having a conversation that evening in the parking lot across from the Southern Tavern. Moses was not aware of the circumstances that caused Bethel and D.W. to be standing by Appellant's automobile later that evening. Moses' automobile was parked in the lot, while Appellant's automobile was parked along Cleveland Avenue, which is perpendicular to Glenwood Avenue. The automobiles were facing one another, but separated by a few other automobiles.

{¶20} Moses testified that the parties were not arguing, otherwise she would have heard their voices. However, she recognized that there was a dispute based on Bethel's gesticulations toward D.W. Moses confirmed that Appellant's driver's-side door separated Appellant from the couple.

{¶21} After a conversation lasting roughly a minute, D.W. "[took] off walking first." (*Id.* at 251.) Bethel threw his arms up in the air, in what appeared to Moses to be frustration, and "turn[ed] around" and "[took] off walking." (*Id.* at 252.) Moses testified that she did not see Bethel brandish or fire a handgun. (*Id.* at 264.)

{¶22} According to Moses, Appellant drew his gun and began shooting. Moses exited the driver's side of her automobile and ran around to the back of the automobile for cover.

{¶23} After Appellant fled the scene, Moses approached Bethel who was lying on the ground. She testified that numerous people were stealing his belongings. Moses saw a bullet protruding from Bethel's chest, so she called emergency services. (*Id.* at 257.)

{¶24} Appellant testified that he fled down Glenwood Avenue, but his escape was short-lived because his automobile began to shake and was "smoking real bad." (*Id.* at

468.) He parked the automobile, exited to investigate the problem, and discovered a gunshot hole in the hood. Appellant continued to drive the sputtering automobile to a local fast food restaurant, where his brother, who is a mechanic, met Appellant to assess the damage. Unable to repair the vehicle, Appellant and his brother abandoned it, then attempted but failed to retrieve it the following morning, as it stalled at the intersection of Zedaker and Maple.[3] (*Id.* at 494.)

{¶25} Moses identified Appellant from a picture after D.W. identified him as the perpetrator. When Appellant was questioned following his identification by D.W. and Moses, he denied being present in the parking lot opposite the Southern Tavern on the evening of September 8, 2020.

{¶26} Elizabeth Rae Mooney, M.D., the forensic pathologist from the Cuyahoga County Medical Examiner's Office who performed the autopsy on Bethel, testified that the trace department in the medical examiner's office swabs the hands of all victims in a gunshot wound case, both homicide and suicide. (*Id.* at 348.) Following Mooney's testimony regarding the toxicology report from Bethel's autopsy, defense counsel asked, "And did anybody request any other testing be done of this person, of this body?" Mooney responded, "Not that I'm aware of." (*Id.* at 347.)

{¶27} Defense counsel continued, "Did anybody – have you ever talked to anybody from Youngstown Police about this case?" Mooney responded, "I don't believe so." Defense counsel then asked, "Anybody request a gunshot residue test on this person, on this body?" Mooney testified that testing is outside of her purview. (*Id.* at 347-348.)

{¶28} In his closing argument, Appellant's trial counsel argued that the presence of spent ammunition from two types of firearms, and a gunshot hole in the rear windshield of the automobile parked behind Appellant's automobile at the scene, corroborated Appellant's version of the events. Neither firearm was recovered. Although Appellant's automobile was impounded, neither the state nor defense counsel examined the automobile for the purpose of trial. However, photographs of Appellant's automobile that

[3] Zedaker Street does not intersect with a street named "Maple." Based on a mapquest.com search of Youngstown, Ohio, it appears that the prosecutor asked Appellant if the automobile "die[d] on Zedaker and [Mabel.]" Appellant responded, "it [did not] die. It just started doing the smoking shit again." (*Id.* at 494.)

were admitted at trial depict a bullet hole in the hood a few inches above and to the right of the hood ornament.

ASSIGNMENT OF ERROR NO. 1

APPELLANT WAS DENIED DUE PROCESS OF LAW BY APPELLEE WHEN TRIAL PROCEEDED FORWARD WITHOUT THE GUNSHOT RESIDUE TEST RESULTS OF THE DECEASED VICTIM.

{¶29} Appellant's trial counsel did not challenge the state's failure to test the swabs or produce the test results during discovery before the lower court. Arguments raised for the first time on appeal are reviewed for plain error. See Crim.R. 52(B) ("Plain errors or defects affecting substantial rights" may be noticed although they were not brought to the attention of the court.); *State v. Rogers*, 143 Ohio St.3d 385, 2015-Ohio-2459, 38 N.E.3d 860, ¶ 22 (an appellate court's invocation of plain error requires the existence of an obvious error which affected substantial rights).

{¶30} Appellant predicates his first assignment of error on the Eighth District's opinion in *State v. Hale*, 8th Dist. Cuyahoga No. 100447, 2014-Ohio-3322. In that case, Hale pleaded guilty to one count of involuntary manslaughter with a three-year firearm specification and was sentenced to a prison term of eight years.

{¶31} Hale filed a motion to withdraw his guilty plea when the state disclosed at the trial of Hale's co-defendant that gunshot primer residue was found on the victim's hand. The results of the gunshot residue test were requested by Hale but were not produced by the state. Hale's co-defendant was acquitted.

{¶32} The state argued that Hale did not allege that the victim discharged a firearm until after the gunshot residue report was disclosed in his co-defendant's trial, but the trial court sustained Hale's motion. The Eighth District summarily affirmed the trial court's decision based on the apparent *Brady* violation. The elements necessary to establish a *Brady* violation are:

(i) The evidence must be favorable to the accused;

(ii) The evidence must have been either willfully or inadvertently suppressed by the government;

(iii) Prejudice must have ensued.

{¶33} Here, Appellant's counsel concedes "[b]esides not knowing the results of any testing, it appears that we also do not know whether or not evidence from the deceased victim's bagged hands was ever tested at all." (Appellant's Brf., p. 10.) As a consequence, Appellant cannot establish that the evidence is favorable to him because there is no evidence in the record establishing that the test was performed and that Bethel had gunshot residue on his hands. Any claim that Appellee withheld exculpatory evidence is purely speculative, see *State v. Hanna*, 95 Ohio St.3d 285, 767 N.E.2d 678, 2002-Ohio-2221, ¶ 60, so Appellant has not met his burden to establish there was a *Brady* violation. *State v. Trimble*, 11th Dist. Portage No. 2015-P-0038, 2016-Ohio-1307, ¶ 29; See *State v. Moore*, 10th Dist. Franklin Nos. 11AP-1116 & 11AP-1117, 2013 WL 3968166 (Aug. 1, 2013). Insofar as Appellant cannot demonstrate a violation of *Brady, supra,* we find no due process violation has occurred and his first assignment of error has no merit.

ASSIGNMENT OF ERROR NO. 2

APPELLANT WAS DENIED EFFECTIVE LEGAL COUNSEL BY THE FAILURE TO REQUEST A CONTINUANCE OF THE TRIAL UNTIL THE RESULTS OF THE DECEASED VICTIM'S GUNSHOT RESIDUE WERE REPORTED.

{¶34} A claim of ineffective assistance of counsel requires a showing of both deficient performance and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In evaluating an alleged deficiency in performance, the reviewing court must determine whether there was "a substantial violation of any of defense counsel's essential duties to his client." *State v. Bradley*, 42 Ohio St.3d 136, 141, 538 N.E.2d 373 (1989). Appellate court review is highly deferential to defense counsel's decisions as there is a strong presumption counsel's conduct was within the wide range of reasonable professional assistance. *Id.* at 142-143, 538 N.E.2d

373, (there are "countless ways to provide effective assistance in any given case"), citing *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052.

{¶35} A reviewing court should not second-guess the strategic decisions of counsel. *State v. Carter*, 72 Ohio St.3d 545, 558, 651 N.E.2d 965 (1995). Even debatable trial tactics do not establish ineffective assistance of counsel. *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, 848 N.E.2d 810, ¶ 101.

{¶36} With respect to prejudice, a lawyer's errors must be so serious that there is a reasonable probability the result of the proceedings would have been different. *Carter*, 72 Ohio St.3d at 558, 651 N.E.2d 965. Lesser tests of prejudice have been rejected: "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Bradley*, 42 Ohio St.3d at 142, fn. 1, 538 N.E.2d 373, quoting *Strickland*, 466 U.S. at 693, 104 S.Ct. 2052. Prejudice from defective representation justifies reversal only where the results were unreliable or the proceeding was fundamentally unfair due to the performance of trial counsel. *Carter*, 72 Ohio St.3d at 558, 651 N.E.2d 965, citing *Lockhart v. Fretwell*, 506 U.S. 364, 369, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993).

{¶37} Appellant argues that his trial counsel should have requested a continuance of the trial in order to have a gunshot residue test performed on the swabs of Bethel's hands. However, we have previously determined that the results of the proposed tests are speculative, and therefore we conclude that trial counsel's performance was not defective. In other words, the results of the test could establish that Bethel did not have gunshot residue on his hands, which would bolster the state's case against Appellant.

{¶38} Even assuming arguendo that Appellant could demonstrate that his trial counsel's failure to request the continuance for testing of the swabs constituted deficient performance, the speculative nature of Appellant's claim likewise prevents him from demonstrating outcome-determinative prejudice. For the foregoing reasons, we find Appellant's second assignment of error is meritless.

CONCLUSION

{¶39} Appellant's due process and ineffective assistance of counsel claims are both predicated upon speculation regarding the results of a gunshot residue test. Accordingly, Appellant's convictions are affirmed.

Waite, J., concurs.

Hanni, 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 Mahoning County, Ohio, is affirmed. Costs to be waived.

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.