[Cite as *State v. Greer*, 2009-Ohio-4228.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91983

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MAURICE GREER

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-504423

BEFORE: Sweeney, J., Gallagher, P.J., and Dyke, J.

RELEASED: August 20, 2009

JOURNALIZED:

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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), is filed within ten (10) 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. II, Section 2(A)(1).

JAMES J. SWEENEY, J.:

{¶ 1} Defendant-appellant, Maurice Greer ("defendant"), appeals his aggravated murder conviction. After reviewing the facts of the case and pertinent law, we affirm.

{¶ 2} On November 8, 2007, a neighbor was leaving Ruby Griffin-Green's house at 383 East 152nd Street in Cleveland, at approximately 4:00 p.m., when she discovered Griffin-Green's 17-year-old great grandson, Brandon Griffin ("the victim"), lying face down behind the bushes surrounding the front porch. The victim was dead after being shot seven times.

{¶ 3} On December 7, 2007, the defendant was charged with one count of aggravated murder in violation of R.C. 2903.01(A) with a three-year firearm specification. On June 23, 2008, a jury found defendant guilty as charged. On July 31, 2008, the court sentenced defendant to life in prison with parole eligibility after 33 years. The following testimony was elicited at trial:

{¶ 4} Martina Lanier testified that she had known the victim since grade school and she met the defendant through the victim. Lanier testified that the victim was homosexual. Lanier also testified that she communicated with the victim and the defendant through MySpace, which is a social networking website where users create personal pages that can be viewed by their friends. Lanier stated that on MySpace, "You have a status thing where you can say what you are doing and how you're feeling at the time." Lanier testified that before the

shooting, the defendant's MySpace page at one time said, "These niggers think it's a game to lock and load," and at another time said, "Pow, one to the head, now you're dead." In explaining what "lock and load" means, Lanier testified, "Basically about to get his guns and do what he ---." Additionally, the defendant posted on his MySpace page a picture of himself with a gun in the waistband of his pants.

{¶ 5} Lanier testified that when she found out the victim was murdered, she went on the defendant's MySpace page, and saw that the defendant "had deleted everybody who was associated with Brandon." In other words, the defendant had deleted Lanier as a friend.

{¶ 6} Lanier also testified that the victim sent her a text message via his cell phone two days before his death that stated the following about the defendant: "Girl, he trip'n." In explaining what "trip'n" means, Lanier testified, "That I got an attitude or I'm about to get mad."

{¶ 7} Frederick Lamar testified that he knew the victim through mutual friends and he knew the defendant through MySpace. Lamar is a transsexual who goes by the name "Kiki," and the defendant knew he was a man. Lamar testified that sometime in November 2007, the victim drove the defendant to Lamar's house so the defendant and Lamar could have sex. Lamar testified that the defendant did not have a gun that day.

{¶ 8} Quinton Harris, who is a transsexual also known by the name "Chanel," testified that he was a friend of the victim's who met the defendant on

MySpace. Harris testified that although he never met the defendant face- to-face, he saw a picture on defendant's MySpace page of the defendant with a gun:

{¶ 9} "Q: Did there come a time when you retrieved this photograph for the Cleveland Police Department?

{¶ 10} "A: Yes.

{¶ 11} "Q: How did that come about?

{¶ 12} "A: The police brought [me] down to the station and they were asking me about the murder – [if] like, I had information on the internet. I run the page – after Brandon got killed, all the stuff went off [the defendant's] page and I had to go through his friend's list to get the picture.

{¶ 13} "Q: What happened after Brandon was killed?

{¶ 14} "A: After Brandon was killed [the defendant] changed his page. He had put guns on the page with him holding them. After Brandon passed, he changed his page and took it off so I had to go [to] his friends to get the picture.

{¶ 15} "Q: So the defendant had no MySpace page after Brandon was killed?

{¶ 16} "A: He had the MySpace, but he took the gun pictures off.

{¶ 17} "Q: So how were you able to retrieve that photograph then for the Cleveland Police?

{¶ 18} "A: I went through his friend's list."

{¶ 19} Robert Terry testified that he was a friend of the victim. The two spoke daily and saw each other three to four times a week. Terry was with the

victim when the victim drove the defendant to visit Kiki. According to Terry, the defendant was carrying a gun that day.

{¶ 20} Terry further testified that the victim said that the defendant was upset about various transsexuals calling him. Asked if the victim ever told Terry "anything about any concerns he had about [the defendant]," Terry replied, "Yes."

{¶ 21} Terry also testified that he spoke with the victim on the phone on November 7, 2007, moments before the victim was shot. While Terry was speaking with the victim, he heard "a voice that * * * sounded like * * * [the defendant's] voice." Terry asked the victim if it was the defendant, and the victim replied, "Yes."

{¶ 22} Griffin-Green testified that on the evening of November 7, 2007, the victim, who lived with her, was at home. At approximately 7:10 p.m., Griffin-Green was in her upstairs bedroom when she heard gunshots. Griffin-Green went downstairs, yelling for the victim, but could not find him. She went outside and saw a cell phone lighting up on the tree lawn. She took the phone inside and recognized that the incoming call was from the victim's cell phone. She answered the call. The male caller, who did not identify himself, said, "You got my cell phone and I want it." Griffin-Green asked where the victim was, and the caller said, "He's at the store with Robert." Shortly after this, a man came to pick up the phone. Griffin-Green did not see the victim. Griffin-Green testified that she knew the defendant because he and the victim

were friends. Additionally, she testified that it was not defendant who picked up the cell phone after the shooting.

{¶ 23} Layton White testified that on November 7, 2007, at approximately 7:30 p.m., the defendant was running toward him on East 152nd Street, and as the defendant passed him, the defendant said, "I just murked somebody." White further testified that he took that to mean, "I just killed somebody." White did not say anything to the defendant, nor did White hear gunshots before seeing the defendant.

{¶ 24} White testified that at a November 21, 2007 memorial service for the victim, he told a community activist that he had information about who killed the victim. He and another witness gave a statement to the police implicating the defendant. Additionally, White testified that sometime in May 2008, someone handed him a cell phone. A person who sounded like the defendant was on the line, and asked him why he told, to which White replied, because "it was wrong."

{¶ 25} D.W.[1] testified that he was walking on East 152nd Street with White on the evening of November 7, 2007, when he heard "about seven" gunshots. D.W. saw the defendant running from the direction from which he heard the shots. Asked if he heard the defendant say anything, D.W. replied, "I heard – he said something – sounded like he said murk. * * * He said he murked him."

[1] D.W. is referred to herein by his initials in accordance with this Court's established policy regarding non-disclosure of identities of juveniles.

{¶ 26} D.W. stated that he and White gave statements to the police regarding "who killed Brandon." D.W. also testified that he spoke with the defendant once on the phone since the shooting. When asked, "Did [the defendant] tell you not to tell," D.W. replied, "Yes."

{¶ 27} Martel Thomas testified that he attended Villa Angela-St. Joe's High School with the defendant and the victim. Thomas also testified that, at some point after the victim's death, Shacory Bender called him to a friend's house on East 250th Street. Approximately 30 minutes after Thomas arrived, the defendant came to the house. Thomas, Bender, and the defendant watched a local news report of the victim's murder on Bender's cell phone. Thomas asked the defendant and Bender if they were involved in the victim's death. Thomas testified that, "They both just told me, no. From knowing [the defendant], I believed him, but not Shacory. He was just an acquaintance."

{¶ 28} Thomas testified that Bender told the defendant to go upstairs and get the gun. The defendant came back downstairs with a gun and a box of ammunition with some of the bullets missing. Both the gun and the ammunition were packed into a T-Mobile box. Thomas took the gun with the following plan: "I was going to sell it and then give [the defendant and Bender] back profit." Thomas put the box in the trunk of his car. The next day, Thomas went to work. Thomas's mom went to see Thomas at work and took the gun and bullets from the trunk of Thomas's car.

{¶ 29} Thomas testified that Bender contacted him after the fact and said, "Are you ever going to pay us?"

{¶ 30} Sonya Thompkins, who is Thomas's mother, testified that her son's girlfriend told her that her son had a gun. Thompkins got the gun from Thomas's trunk while he was at work. Thompkins testified that she received a text message on her cell phone from the defendant stating, "Martel, you know you got something that belongs to me. I want it back." Thompkins also talked to Bender "on probably three separate occasions" regarding the gun. Thompkins testified that the defendant and Bender went to her son's workplace asking for the gun or the money.

{¶ 31} Thompkins further testified that she "found out [about] the murder one or two days later after receiving the gun." She said that she held onto the gun "for quite sometime." When Thompkins found out that the defendant was arrested in association with the victim's murder, she turned the gun and the box of bullets over to the police.

{¶ 32} James Ealey, a firearms examiner in the Scientific Investigations Unit of the Cleveland Police Department, testified that "six spent .380 shell casings with RP as the manufacturer, and one spent .380 casing with a WW manufacturer" were found at the scene of the crime. He also testified that these seven casings were fired from the "Hi-Point .380 caliber semi-automatic pistol, model CF" that Thompkins turned over to police. Additionally, Ealey testified that

the six bullets recovered from the victim's body were fired from the same Hi-Point pistol.

{¶ 33} Linda Jones, who works for the City of Cleveland's crime scene unit as a fingerprint examiner, testified that she processed the murder weapon, but recovered no fingerprints from it. However, she lifted a latent thumb print off the side of the "black plastic live round holder" found inside the cardboard ammunition box. Michelle Johnson, another fingerprint examiner for the City of Cleveland, identified the thumb print as defendant's.

{¶ 34} Carey Baucher, who is a forensic scientist at the Cuyahoga County Coroner's Office, analyzed the DNA associated with the instant case, and found the following: DNA "from two or more people" was found on the murder weapon, including the magazine. "Martel Tompkins cannot be excluded as being a possible contributor to this mixture. * * * Brandon Griffin and Maurice Greer are excluded as being possible contributors to this mixture."

{¶ 35} Defendant now appeals, raising four assignments of error for our review. The first assignment of error states as follows:

{¶ 36} "I. The evidence is insufficient [to] sustain a conviction for the element of prior calculation and design."

{¶ 37} When reviewing sufficiency of the evidence, an appellate court must determine "[w]hether, 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.

{¶ 38} In the instant case, the defendant was found guilty of aggravated murder in violation of R.C. 2903.01(A), which states that "[n]o person shall purposely, and with prior calculation and design, cause the death of another * * *."

{¶ 39} In *State v. McCree*, Cuyahoga App. No. 87951, 2007-Ohio-268, at ¶70, this Court stated the following regarding "prior calculation and design":

{¶ 40} "'Prior calculation and design' is not defined in the Ohio Revised Code, but is considered to be more than just an instantaneous decision to kill. *State v. Clark*, Cuyahoga App. No. 83474, 2004-Ohio-5964, at ¶26, citing *State v. Jones*, 91 Ohio St.3d 335, 348, 2001-Ohio-57. In *State v. Taylor* (1997), 78 Ohio St.3d 15, 18-20, the Supreme Court of Ohio concluded that 'it is not possible to formulate a bright-line test that emphatically distinguishes between the presence or absence of "prior calculation and design."' Several factors, including whether the accused and the victim knew each other, whether there was thought or preparation in choosing the murder weapon or the murder site, and whether the act was 'drawn out' or 'an almost instantaneous eruption of events' should be considered under the totality of the circumstances of the homicide to determine whether there was prior calculation and design. *State v. Jenkins* (1976), 48 Ohio App.2d 99, 102. Prior calculation and design can be found even when the plan to kill was quickly conceived and executed. *State v. Coley*, 93 Ohio St.3d 253,

263, 2001-Ohio-1340, citing *State v. Palmer*, 80 Ohio St.3d 543, 567-568, 1997-Ohio-312; *State v. Green*, 90 Ohio St.3d 352, 358, 2000-Ohio-182."

{¶ 41} In the instant case, the defendant argues that the State relied on improperly admitted evidence to support the prior calculation and design element of aggravated murder.

{¶ 42} The State, on the other hand, argues that sufficient evidence was presented to show that the defendant acted with prior calculation and design. The State further argues that appellate courts are permitted to examine all evidence, including improperly admitted evidence, when reviewing a sufficiency challenge. See *State v. Brewer*, 121 Ohio St.3d 202, 2009-Ohio-593.

{¶ 43} Our review of the evidence shows that the victim and the defendant knew each other. The defendant had been in contact with several transsexuals on MySpace, and the victim, who was gay, facilitated a sexual encounter with the defendant and one transsexual approximately a week before the victim was murdered. Additionally, the victim said the defendant was upset about transsexuals calling him and described the defendant as "trip'n" two days before the murder.

{¶ 44} A picture was introduced into evidence of defendant with the handle of a gun sticking out of the waistband of his sweat pants. Asked "does the handle depicted in this photograph appear to be the same handle as the gun that you're holding in your hand, State's Exhibit 72 (which is the murder weapon)," Cleveland Police Detective Michael Smith replied, "Yes." Furthermore, there

was evidence that the defendant posted this picture on his MySpace page, along with comments such as, "These niggers think it's a game to lock and load," and "Pow, one to the head, now you're dead."

{¶ 45} The facts of this case show a strained relationship between the victim and the defendant prior to the homicide. The defendant arrived at the victim's house moments before the victim was shot. The murder, which happened in front of the victim's house, was not a chance encounter; rather, the evidence suggests that the defendant got a gun, went to the victim's house, and shot him seven times. This is sufficient evidence to show "a scheme designed to implement the calculated decision to kill." *State v. Cotton* (1978), 56 Ohio St.2d 8, 11. The defendant's first assignment of error is overruled.

{¶ 46} In the defendant's second assignment of error, he argues as follows:

{¶ 47} "II. The trial court erred by allowing hearsay and double hearsay statements to be elicited by the State and for the jury to improperly consider."

{¶ 48} Pursuant to Evid.R. 802, hearsay is not admissible in court. Under Evid.R. 801(C), the definition of hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." However, under Evid.R. 801(D)(2), the following is an admission by a party-opponent, and is not hearsay: a statement that is "offered against a party and is * * * the party's own statement * * *." Put another way, "[a] defendant's own out-of-court statements, offered against him at

trial, are not hearsay." *State v. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235, at ¶112.

{¶ 49} In the instant case, the defendant first argues that various statements he allegedly made were improperly introduced into evidence by the State as hearsay. However, as discussed previously, a defendant's out-of-court statement may be used against him at trial. Thus, the following statements are not hearsay under Evid.R. 801(D)(2), and are admissible: (1) Comments the defendant made on his MySpace page introduced through Lanier's testimony; (2) The defendant's statements via cell phone to White and D.W. after the murder took place questioning why White and D.W. gave the police defendant's name; (3) The defendant's text message via cell phone to Thompkins stating, "Martel, you know you got something that belongs to me. I want it back"; and (4) The picture on defendant's MySpace page of defendant with a gun in the waist band of his sweat pants introduced via Harris's testimony.

{¶ 50} Next, defendant argues that the statement the victim made to Terry during their cell phone conversation indicating that the defendant arrived at the victim's home moments before the victim was murdered was inadmissible hearsay. Specifically, Terry testified that when he asked the victim if it was the defendant's voice he heard in the background, the victim answered, "Yes. * * * I'm going to call you back." This statement is hearsay because Terry testified that the victim said the defendant arrived at his house, to prove that the defendant did,

in fact, arrive at the victim's house. Next, we determine whether this hearsay is admissible under one of the exceptions found in Evid.R. 803.

{¶ 51} Evid.R. 803(1) states that the following is an exception to the rule against hearsay: "Present Sense Impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter unless circumstances indicate lack of trustworthiness."

{¶ 52} In *State v. Wages* (1993), 87 Ohio App.3d 780, 787-88, we ruled that a similar statement was admissible, despite being hearsay, as a present sense impression.

{¶ 53} "[Witnesses] testified that, while they were on the telephone with the victim, at or near the time she met her demise, she stated hastily that she had to get off the telephone because the appellant had just pulled into her driveway. The trial court allowed this testimony * * * to come in under Evid.R. 803(1), present sense impression * * *.

{¶ 54} "The statement made by the victim was made as she was perceiving the appellant driving up her driveway. The requirement of the circumstantial guarantee of trustworthiness is met by the very nature of the victim's comment, despite the appellant's contention that the victim's observation needed to be independently verified."

{¶ 55} In following our ruling in *Wages*, we hold that, in the instant case, the victim's statement that the defendant arrived at his house is admissible under

Evid.R. 803(1). See, also, Evid.R. 803(3) (deeming admissible as an exception to the general rule against hearsay, a "statement of the declarant's then existing state of mind, emotion, sensation, or physical condition * * *" including statements concerning the speaker's intent or plan).

{¶ 56} Finally, the defendant argues that it was error for the court to admit into evidence the text message that the victim sent to Lanier, describing the defendant as "trip'n" two days before the murder. We start by determining that this statement is hearsay because Lanier testified that the victim said the defendant was "trip'n," or, in other words, "upset," to prove that the defendant was, in fact, upset. Next, we determine whether this statement is inadmissible hearsay or admissible as an exception to hearsay under Evid.R. 803.

{¶ 57} The State argues that this text message is admissible under Evid.R. 803(1) as a present sense impression. In *State v. Ellington*, Cuyahoga App. No. 84014, 2004-Ohio-5036, at ¶10, we held the following: "There is an assumption that statements or perceptions that describe events uttered during or within a short time from the occurrence of the event are more trustworthy than statements not uttered at or near the time of the event. Moreover, '[t]he key to the statement's trustworthiness is the spontaneity of the statement, either contemporaneous with the event or immediately thereafter. By making the statement at the time of the event or shortly thereafter, the minimal lapse of time between the event and statement reflects an insufficient period to reflect on the

event perceived – a fact which obviously detracts from the statement's trustworthiness.'" (Internal citations omitted.)

{¶ 58} In the instant case, a careful review of the transcript shows no evidence of an event or condition that preceded the victim's statement that the defendant was "trip'n." While we could infer that a specific event occurred prompting the victim to say this, it is also just as likely that the victim's statement was a general reflection or conclusion regarding the defendant's persona. Without a connection to an event or condition, we cannot say that this text message was a present sense impression. Therefore, the statement was inadmissible hearsay.

{¶ 59} Although we determine that the victim's text message to Lanier was inadmissible, we further conclude that any error stemming from this testimony is harmless. This text message is not a major factor in the State's case against the defendant. Furthermore, the evidence is cumulative as Terry testified that the defendant was upset with the victim. The defendant fails to show that absent evidence that he was "trip'n," the jury would have acquitted him of aggravated murder. See Crim.R. 52(A) (stating that an "error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded").

{¶ 60} Accordingly, defendant's second assignment of error is overruled.

{¶ 61} Defendant's third assignment of error states:

{¶ 62} "III. Trial counsel was ineffective for failing to request a mistrial after the jury was subjected to an emotional outburst during the decedent's grandmothers [sic] testimony."

{¶ 63} To substantiate a claim of ineffective assistance of counsel, a defendant must demonstrate that (1) the performance of defense counsel was seriously flawed and deficient, and (2) the result of appellant's trial or legal proceeding would have been different had defense counsel provided proper representation. *Strickland v. Washington* (1984), 466 U.S. 668; *State v. Brooks* (1986), 25 Ohio St.3d 144. In *State v. Bradley*, the Ohio Supreme Court truncated this standard, holding that reviewing courts need not examine counsel's performance if appellant fails to prove the second prong of prejudicial effect. *State v. Bradley* (1989), 42 Ohio St.3d 136. "The object of an ineffectiveness claim is not to grade counsel's performance." Id. at 143.

{¶ 64} Crim.R. 33(E)(5) provides in pertinent part as follows:

{¶ 65} "No motion for a new trial shall be granted * * * unless it affirmatively appears from the record that the defendant was prejudiced thereby or was prevented from having a fair trial."

{¶ 66} In *State v. Morales* (1987), 32 Ohio St.3d 252, the Ohio Supreme Court ruled that whether an emotional outburst in court deprived a criminal defendant of a fair trial by improperly influencing the jury is a question of fact to be determined by the trial court. This "'determination * * * will not be disturbed on review in the absence of evidence contrary to that determination clearly and

affirmatively appearing on the face of the record.' * * *Absent clear evidence in the record that the outburst improperly affected the jury, only the trial judge can authoritatively determine whether the jury was disturbed, alarmed, shocked or moved by the demonstration or whether the incident was of such a nature that it necessarily influenced the ultimate verdict of conviction. The answer to those questions invariably depends upon facts and circumstances which a reviewing court cannot ordinarily glean from the record." Id. at 255, citing *State v. Bradley* (1965), 3 Ohio St.2d 38, at syllabus.

{¶ 67} In the instant case, during Griffin-Green's testimony, the following colloquy occurred:

{¶ 68} "[THE WITNESS]: "He shot my baby – seven times. He never said – you give back my son. You killed him. And you shot him like he was a dog. You shot him seven times.

{¶ 69} "[DEFENSE COUNSEL]: Can we approach?

{¶ 70} "[THE WITNESS]: It was after – it was sad to make you – for you to do this to him.

{¶ 71} "[THE COURT]: Hold it. Hold it a minute.

{¶ 72} "[DEFENSE COUNSEL]: You were –

{¶ 73} "[THE WITNESS]: He was a friend of his. Oh, my God.

{¶ 74} "[DEFENSE COUNSEL]: Hold on for one second.

{¶ 75} "[THE COURT]: Just hold it now for a minute.

{¶ 76} "[THE WITNESS]: Oh, my God. Oh my God. You killed him. You killed him.

{¶ 77} "[DEFENSE COUNSEL]: Your Honor, may we approach?

{¶ 78} "[THE COURT]: Yes. All right. Hold it, Mrs. Griffin. Hold it. I'm going to ask us to just relax and be quiet for a [moment].

{¶ 79} "[THE WITNESS]: You killed him. You killed him like that. Oh, God.

{¶ 80} * *.

{¶ 81} "[THE WITNESS]: I'm sorry, but he killed my baby.

{¶ 82} "[THE COURT]: All right. Ladies and gentlemen, what we're going to do – all right. We're going to just take a few minute break. You can return to our jury room. This will be say a few minutes.

{¶ 83} "Stay on this floor. Do not discuss this case at that point. And, of course, don't allow anyone to discuss it with you."

{¶ 84} The defendant argues that he was prejudiced by this testimony because the jury was allowed to consider that the victim's great-grandmother believed that the defendant was guilty. However, the defendant fails to show that the court would have granted a mistrial had he requested one. Furthermore, there is no indication that the result of the trial would have been different had the jury not heard Griffin-Green's outburst. See *State v. Gross*, 97 Ohio St.3d 121, 2002-Ohio-5524, at ¶65 (noting that "'it is difficult to conceive of an aggravated

murder trial that does not include an element of strong emotion'") (quoting *State v. Gross* (May 24, 1999), Muskingham App. No. CT 96-055).

{¶ 85} In the instant case, the court and defense counsel attempted to stop Griffin-Green when she became emotional and when she did stop, the court took a recess and excused the jury. In *State v. Bey* (Sept. 19, 1997), Lucas App. No. L-94-003, the Sixth District Court of Appeals of Ohio held that the trial court did not err when it chose to move on, after immediately returning the jurors to the jury room, rather than call attention to an emotional outburst during a murder trial. See, also, *State v. Scott*, 101 Ohio St.3d 31, 2004-Ohio-10, at ¶48 (holding that a mistrial was not warranted because "any emotion exhibited by [the victim's] family members did not create a disruption observable by the trial court judge").

{¶ 86} Accordingly, we cannot say that defense counsel was ineffective for not requesting a mistrial and the defendant's third assignment of error is overruled.

{¶ 87} In defendant's fourth and final assignment of error, defendant argues as follows:

{¶ 88} "IV. The jury verdict finding the appellant guilty of aggravated murder was against the manifest weight of the evidence."

{¶ 89} Specifically, the defendant argues that absent inadmissible hearsay, the only evidence that he is guilty of aggravated murder is his "cell phone at the scene and his fingerprints on the ammunition holder."

{¶ 90} The proper test for an appellate court reviewing a manifest weight of the evidence claim is as follows: "The appellate court sits as the 'thirteenth juror' and, reviewing the entire record, weighs all the reasonable inferences, considers the credibility of witnesses and determines whether, in resolving conflicts in 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." *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387.

{¶ 91} Because we found most of the alleged hearsay statements to be admissible in the second assignment of error, we find that it was not against the manifest weight of the evidence for the jury to convict the defendant of aggravated murder. The defendant was upset with the victim shortly before the murder took place. The defendant posted on his MySpace page that he was about to get a gun and there is a photograph of the defendant with what police later identified as the murder weapon in the waistband of his pants. The defendant arrived at the victim's house moments before multiple witnesses heard gunshots. The defendant was seen running away from the general direction of the victim's house moments after the victim was killed, and the defendant stated to two witnesses that he had just "murked" somebody. Finally, the defendant and Bender attempted to get rid of the murder weapon through a friend shortly after the victim was killed. We find that the jury did not lose its way in convicting the defendant of aggravated murder and the defendant's final assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant its 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 Court of Common Pleas 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.

JAMES J. SWEENEY, JUDGE

SEAN C. GALLAGHER, P.J., and
ANN DYKE, J., CONCUR