[Cite as *State v. Hough*, 2010-Ohio-2770.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91691

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

TERRANCE M. HOUGH, JR.

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-499308

BEFORE: Celebrezze, J., McMonagle, P.J., and Dyke, J.

RELEASED: June 17, 2010

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), 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).

FRANK D. CELEBREZZE, JR., J.:

{¶ 1} Appellant, Terrance Hough, appeals his convictions for aggravated murder and attempted murder claiming the state did not show that he acted with prior calculation and design, that the state introduced improper "other acts" and victim-impact evidence, and that his counsel was ineffective. After a thorough review of the record and based on the following case law, we affirm appellant's convictions.

{¶ 2} On July 4, 2007, a group of friends were watching the city of Cleveland's fireworks display. Following the display, Jacob Feichtner, Katherine Risby, Bruce Anderson, Donald Walsh, Katherine Nicholas, Mary Ellen Skora, and Valorie Skora went to the home of Jacob Feichtner's father on Sky Lane Drive in Cleveland. They arrived at approximately 11:00 p.m., and Jacob and Donald began to light off a few fireworks of their own. The rest of the group watched from the front lawn and driveway. Neighbors in at least two houses across the street were outside to watch the fireworks display as well. Sometime before midnight, after the display had wound down, Valorie went inside the Feichtners' home, the neighbors went inside their homes, and Mary Ellen left to go home.

{¶ 3} Appellant lived next door to the Feichtners. Just after midnight, he left his home with a .40 caliber Beretta semiautomatic handgun loaded with nine hollow-point rounds of ammunition. He crossed his yard and

approached Jacob Feichtner, who was standing in the Feichtners' driveway. Appellant stated, "You fucking kids won't be doing this shit no more," or "I bet you guys won't be doing this anymore." Jacob responded, "What are you going to do to do? Shoot me? Put the gun down and go back inside." Upon hearing Jacob's statement, appellant raised his gun and shot Jacob once in the chest. Jacob fell backwards and shouted, "Man you just fucking shot me." Appellant responded by shooting Jacob in the chest twice more, killing him.

{¶ 4} Katherine Risby was seated next to where Jacob was standing. Mistaking the gunshots for firecrackers, she tucked her head down by her legs and asked if Jacob was setting off firecrackers behind her back. Appellant shot her twice in the back, killing her. Bruce Anderson, who was seated next to Ms. Risby, tried to roll out of the way, but appellant shot him twice in the back, killing him.

{¶ 5} With every shot, appellant shouted "yeah." Within moments, three people had been shot and killed in the Feichtners' driveway. Appellant then turned and began walking back toward his home.

{¶ 6} Katherine Nicholas, who was on the Feichtners' front lawn, began screaming. Appellant turned and took aim at Ms. Nicholas. Her fiancé, Donald Walsh, ran to her and pushed her out of the way. Walsh was hit in his left arm by appellant's eighth shot, shattering the bones in his arm.

Appellant fired his last round at the pair and hit Ms. Nicholas in her finger. Appellant then shrugged his shoulders and walked back to his home, leaving behind the five people who had been in the Feichtners' yard that night — three dead or dying in the driveway and two injured and struggling to get inside the Feichtners' house.

{¶ 7} Down the street on Sky Lane Drive, off-duty Cleveland police detective Joseph Bovenzi heard what he knew to be gunshots. He retrieved a gun from inside his home and headed toward the area where he thought the shots had originated. Det. Bovenzi arrived in the front yard of the Feichtners' home and was directed to appellant's house next door in his search for the gunman. He found appellant seated at the kitchen table. Det. Bovenzi asked appellant what had happened and appellant responded, "I snapped. I snapped. I shot those people. Did I kill them?" Appellant was arrested.

{¶ 8} A Cuyahoga County grand jury returned a capital indictment against appellant charging him with three counts of aggravated murder with prior calculation and design in violation of R.C. 2903.01(A), with mass murder and firearm specifications; and two counts of attempted murder in violation of R.C. 2903.02 and R.C. 2923.02.

{¶ 9} Trial began on April 15, 2008 and concluded on May 15, 2008 with verdicts of guilty on all charges. The mitigation phase of the trial began

on May 20, 2008. At its conclusion, the jury recommended life without parole. The judge sentenced appellant to a life sentence for each count of aggravated murder, ten years for each count of attempted murder, and three years for the firearm specifications, all to be served consecutively.

{¶ 10} Appellant appeals from his convictions assigning four errors for our review.

Law and Analysis

Prior Calculation and Design

{¶ 11} Appellant first argues that "[t]he evidence cannot sustain the element of prior calculation and design for the three convictions of aggravated murder, R.C. 2903.01(A)." He suggests that the evidence adduced at trial showed that he snapped and shot five people without any prior consideration or planning. We disagree.

{¶ 12} In *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, the Ohio Supreme Court re-examined the standard of review to be applied by an appellate court when reviewing a claim of insufficient evidence: "An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted 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.)" Id. at paragraph two of the syllabus.

{¶ 13} Aggravated murder as set forth in R.C. 2903.01(A) provides that "[n]o person shall purposely, and with prior calculation and design, cause the death of another or the unlawful termination of another's pregnancy." This statute was amended, according to the 1973 Technical Committee Comment to Am.Sub.H.B. No. 511, because "[b]y judicial interpretation of the former Ohio law, murder could be premeditated even though the fatal plan was conceived and executed on the spur of the moment. See, *State v[.] Schaffer* [(1960), 113 Ohio App. 125, 177 N.E.2d 534]. The section employs the phrase, 'prior calculation and design,' to indicate studied care in planning or analyzing the means of the crime, as well as a scheme compassing the death of the victim. Neither the degree of care nor the length of time the offender takes to ponder the crime beforehand are critical factors in themselves, but they must amount to more than momentary deliberation." See *State v. Keenan* (1988), 81 Ohio St.3d 133, 157, 689 N.E.2d 929.

{¶ 14} *State v. Jenkins* (1976), 48 Ohio App.2d 99, 355 N.E.2d 825, lists some factors used to determine whether a trial court can properly instruct the jury on murder committed with prior calculation and design. These factors

include: "whether the accused knew the victim prior to the crime, as opposed to a random meeting, and if the victim was known to him whether the relationship had been strained; whether thought and preparation were given by the accused to the weapon he used to kill and/or the site on which the homicide was to be committed as compared to no such thought or preparation; and whether the act was drawn out over a period of time as against an almost instantaneous eruption of events. These factors must be considered and weighed together and viewed under the totality of all circumstances of the homicide." Id. at 102, 355 N.E.2d 825.

{¶ 15} In *Jenkins*, a major factor to the finding that the state did not offer sufficient evidence of prior calculation and design was that "the defendant did not know the victim, that there had been no previous disagreement, and that the meeting was at random." Id. at 103, 355 N.E.2d 825. Here, appellant knew the victims. He had expressed his displeasure with the gatherings that took place at the Feichtners' home over the years. He had a strained relationship with the Feichtners spanning some five years and included 12 complaints to the police.

{¶ 16} Appellant also showed deliberation in his choice of a weapon. His wife testified that there were several guns in various locations throughout their home. She further testified that shortly before the shootings, she heard appellant get out of bed, go into the kitchen, then walk

out the front door. Appellant had the choice of several firearms to take out of his house that night. He could have chosen the closest handgun located in the closet in his bedroom, but he did not. He opted to go out of his way to the kitchen where he kept a handgun on the top shelf in the cabinet next to the refrigerator. This indicates that appellant made a deliberate choice of which weapon to use to carry out his plan.

{¶ 17} Testimony was adduced that showed appellant exited his house after the small fireworks display was over and after the neighbors across the street, who had been watching the display, all returned to their homes. He then walked across his yard and confronted Jacob, a person with whom he had a strained relationship over the years, and stated something to the effect of "You fucking kids won't be doing this shit anymore." His actions took only a short amount of time, but, on the whole, the evidence shows a plan where appellant intended to kill those making noise in the yard next to his house and anyone who could identify him as the gunman.

{¶ 18} "[P]rior calculation and design can be found even when the killer quickly conceived and executed the plan to kill within a few minutes." *State v. Coley*, 93 Ohio St.3d 253, 264, 2001-Ohio-1340, 754 N.E.2d 1129. In *State v. Conway*, 108 Ohio St.3d 214, 2006-Ohio-791, 842 N.E.2d 996, the Ohio Supreme Court held that one's actions could display a plan to kill. In *Conway*, upon hearing that his brother had been stabbed, Conway retrieved a

gun from his car and began shooting at the alleged perpetrator. The Court held that "[a]lthough they took only a few minutes, Conway's actions went beyond a momentary impulse and show that he was determined to complete a specific course of action. Such facts show that he had adopted a plan to kill." Id. at ¶46. In the instant case, appellant conceived a plan to kill and acted on that plan with brutal composure.

{¶ 19} Evidence of a preconceived plan is not the only way to prove the element of prior calculation and design. The state can also offer "evidence that the murder was executed in such a manner that circumstantially proved the defendant had a preconceived plan to kill. See, e.g., *State v. Cassano*, 96 Ohio St.3d 94, 2002-Ohio-3751, 772 N.E.2d 81; [*State v. Goodwin* (1999)], 84 Ohio St.3d 331, 703 N.E.2d 1251; *State v. Campbell* (2000), 90 Ohio St.3d 320, 738 N.E.2d 1178." *State v. Trewartha*, 165 Ohio App.3d 91, 2005-Ohio-5697, 844 N.E.2d 1218, ¶19. This "allows the state to satisfy its burden by showing that the murder was executed in such a manner that circumstantially proves a preconceived notion that the victim would be killed regardless of the situation. [*State v. Taylor* (1997),] 78 Ohio St.3d 15, 676 N.E.2d 82; *State v. Palmer* (1997), 80 Ohio St.3d 543, 687 N.E.2d 685. Thus, if the victim is killed in a cold-blooded, execution-style manner, the killing bespeaks aforethought, and a jury may infer prior calculation and design. See [*State v. Campbell* (2000), 90 Ohio St.3d 320, 330], 738 N.E.2d 1178;

Palmer at 570, 687 N.E.2d 685; *Taylor* at 21, 676 N.E.2d 82; *State v. Mardis* (1999), 134 Ohio App.3d 6, 19, 729 N.E.2d 1272." Id. at ¶33.

{¶ 20} Here, appellant shot three people multiple times at close range. His statement upon first confronting Jacob can properly be construed by a reasonable trier of fact as evidencing his intent to kill. These execution-style killings bespeak aforethought and provide circumstantial evidence that appellant acted with prior calculation and design.

{¶ 21} Appellant argues that he "just snapped" when he heard Jacob's comment and made an instantaneous decision to kill. This argument is contradicted by his actions of selecting a gun from inside his home and taking it outside after those watching the fireworks across the street had gone back inside their homes. This argument is also undercut by the comment appellant made before anyone addressed him.

{¶ 22} The evidence in the record could convince a reasonable trier of fact that the element of prior calculation and design had been met by the state. Appellant's convictions for aggravated murder are supported by sufficient evidence, and therefore, his first assignment of error is overruled.

"Other Acts" Evidence

{¶ 23} Appellant next argues that "[t]he trial court erred by allowing prejudicial other acts evidence to be introduced to the jury." He would classify testimony and images of other firearms introduced at trial as prejudicial "other acts" evidence. We disagree.

{¶ 24} Appellant argues that the testimony of Cleveland police officer Jeffrey Sampson offered improper evidence of the number and type of firearms found in appellant's home. Officer Sampson testified that the Cleveland Police recovered several handguns and long-barreled firearms from within appellant's home. The state offered photographs of those weapons and presented two handguns — which were later withdrawn — in addition to the one used in the killings. Appellant argues this was improper "other acts" evidence and was irrelevant.

{¶ 25} "The admission or exclusion of evidence rests within the sound discretion of the trial court." *State v. Jacks* (1989), 63 Ohio App.3d 200, 207, 578 N.E.2d 512. Therefore, "[a]n appellate court which reviews the trial court's admission or exclusion of evidence must limit its review to whether the lower court abused its discretion." *State v. Finnerty* (1989), 45 Ohio St.3d 104, 107, 543 N.E.2d 1233. A trial court abuses its discretion when it acts in an unreasonable, arbitrary, or unconscionable manner. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

{¶ 26} With regard to the admissibility of "other acts" evidence, it is well established that evidence tending to prove that the accused has committed other acts independent of the crime for which he is on trial is inadmissible to show that the defendant acted in conformity with his bad character. *State v. Gumm*, 73 Ohio St.3d 413, 426, 1995-Ohio-24, 653 N.E.2d 253.

{¶ 27} However, the evidence of other weapons in appellant's home goes to one of the elements of prior calculation and design; namely, the choice of weapon. *Jenkins* at 102, 355 N.E.2d 825. The fact that other weapons were located throughout appellant's home, including his bedroom, speaks to his conscious decision to choose a particular firearm to carry out his plan. This is not "other acts" evidence, but proper, relevant evidence admitted at trial under Evid.R. 402.[1] This evidence was not offered to show that appellant somehow acted in conformity with a character trait or prior act, but rather to prove a required element of the charged crime.

{¶ 28} Appellant also complains that the state elicited testimony from his wife that he had been verbally abusive and physically violent toward her. On direct examination, Mrs. Hough testified that she "never thought [appellant] could hurt anybody." The testimony appellant takes issue with

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[1] This rule states: "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by the Constitution of the State of Ohio, by statute enacted by the General Assembly not in conflict with a rule of the Supreme Court of Ohio, by these rules, or by other rules prescribed by the Supreme Court of Ohio. Evidence which is not relevant is not admissible."

was offered to rebut that characterization of appellant. Generally, "[e]vidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion[.]" Evid.R. 404(A). However, "[e]vidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same is admissible * * *." Evid.R. 404(A)(1).

{¶ 29} In attempting to establish that he was a person incapable of harming another, appellant opened the door to rebut that characterization on cross-examination. See *State v. Jalowiec*, 91 Ohio St.3d 220, 232, 2001-Ohio-26, 744 N.E.2d 163 (finding that testimony consisting of "'[h]e is a great guy,'" could be "rebutted under Evid.R. 404(A)(1), in particular with evidence of prior crimes of violence.").

{¶ 30} Appellant also failed to object to this testimony at trial and thus has waived all but plain error. "Errors that arise during a trial that are not brought to the attention of the court are ordinarily waived and may not be raised on appeal unless there is plain error, i.e., but for the error, the outcome of the trial clearly would have been otherwise." *State v. McKee*, 91 Ohio St.3d 292, 294, 2001-Ohio-41, 744 N.E.2d 737. Applying this standard, it cannot be said that admission of this brief testimony about an instance where appellant grabbed the arm of his wife rises to the level of plain error. Appellant's second assignment of error is overruled.

Improper Victim-Impact Evidence

{¶ 31} Appellant next argues that "[t]he trial court erred by permitting the jury to consider victim-impact evidence in the culpability phase of trial." He takes issue with the testimony of Roland Feichtner, Jacob's father, when he testified about his service in Vietnam and seeing the bodies of his friends killed there, as well as his seeking counseling.

{¶ 32} Victim-impact evidence is excluded from the guilt phase of a trial because "it is irrelevant and immaterial to the guilt or innocence of the accused; it principally serves to inflame the passion of the jury." *State v. Carlisle*, Cuyahoga App. No. 90223, 2008-Ohio-3818, ¶53. "True victim-impact evidence, pursuant to the terms of R.C. 2930.13, 2930.14 and 2947.051, shall be considered by the trial court prior to imposing sentence upon a defendant, not during the guilt phase of the proceedings. Evidence relating to the facts attendant to the offense, however, is clearly admissible during the guilt phase." *State v. Fautenberry*, 72 Ohio St.3d 435, 440, 1995-Ohio-209, 650 N.E.2d 878. The Ohio Supreme Court went on to hold that "[e]vidence relating to the facts attendant to the offense is 'clearly admissible' during the guilt phase, even though it might be characterized as victim-impact evidence." *State v. McKnight*, 107 Ohio St.3d 101, 2005-Ohio-6046, 837 N.E.2d 315, ¶98.

{¶ 33} In *Fautenberry*, the testimony at issue consisted of "expressions from the victim's family, the victim's employer and the arresting officer concerning the impact of [the victim's] death on his survivors and the appropriate sentence that should be imposed. Specifically, the victim-impact evidence indicated that each individual who was interviewed wanted appellant to receive 'the maximum sentence' available under the law." Id. at 438, 650 N.E.2d 878.

{¶ 34} In the present case, this small portion of Mr. Feichtner's testimony can properly be characterized as victim-impact evidence because it is not "related to the facts attendant to the offense." *Fautenberry* at 440, 650 N.E.2d 878. However, this brief testimony did not result in prejudice to appellant. The testimony complained of in *Fautenberry* regarded the sentence that should be imposed by the court. Here, no statement by Roland Feichtner involved what appellant's sentence should be, only that Mr. Feichtner had seen dead bodies before while serving his country in Vietnam and that he was seeking counseling. This does not rise to the level of improper victim-impact evidence as that complained of in *Fautenberry* in light of all the evidence against appellant.

{¶ 35} Overwhelming evidence of appellant's guilt existed. The jury did not need to resort to sympathy for the victims in order to convict appellant. Eyewitness testimony, ballistics evidence, gunshot residue results, and

appellant's own admissions all demonstrated that he was the gunman on the Feichtners' lawn that Fourth of July night. See *State v. Lorraine* (1993), 66 Ohio St.3d 414, 420-421, 613 N.E.2d 212 (in determining whether prejudice exists, evidence that would cause a jury to empathize with a victim must be viewed against all of the facts of a case). Appellant argues that this testimony made the jury more "conviction-prone," but with the wealth of evidence against him, that is not a valid argument.

{¶ 36} The jury likewise did not use this testimony to appellant's detriment in the penalty phase of the trial because it recommended that appellant receive life without parole rather than the death penalty. "'Absent an indication that the panel was influenced by or considered the victim impact evidence in arriving at its sentencing decision,' the admission of such is not reversible error." *Fautenberry* at 439, 650 N.E.2d 878, quoting *State v. Post* (1987), 32 Ohio St.3d 380, 384, 513 N.E.2d 754.

{¶ 37} Even though this brief, unsolicited testimony was made during the guilt phase, it did not result in prejudice to appellant. Appellant's third assignment of error is overruled.

Ineffective Assistance of Counsel

{¶ 38} Finally, appellant argues that he "was denied effective assistance of counsel at trial." He claims that trial counsel failed to request a limiting instruction for the other firearms found at his home, that counsel failed to

object to the questioning of his wife about prior instances of violence, statements about his temperament, testimony regarding his treatment of the victims, and the state's closing arguments.

{¶ 39} In order to substantiate a claim of ineffective assistance of counsel, the appellant is required to 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, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Brooks* (1986), 25 Ohio St.3d 144, 495 N.E.2d 407.

{¶ 40} In reviewing a claim of ineffective assistance of counsel, it *must* be presumed that a properly licensed attorney executes his legal duty in an ethical and competent manner. *State v. Smith* (1985), 17 Ohio St.3d 98, 477 N.E.2d 1128; *Vaughn v. Maxwell* (1965), 2 Ohio St.2d 299, 209 N.E.2d 164.

{¶ 41} The Ohio Supreme Court held in *State v. Bradley* (1989), 42 Ohio St.3d 136, 141-142, 538 N.E.2d 373, that "'[w]hen considering an allegation of ineffective assistance of counsel, a two-step process is usually employed. First, there must be a determination as to whether there has been a substantial violation of any of defense counsel's essential duties to his client. Next, and analytically separate from the question of whether the defendant's Sixth Amendment rights were violated, there must be a determination as to

whether the defense was prejudiced by counsel's ineffectiveness.' *State v. Lytle* (1976), 48 Ohio St.2d 391, 396-397, 2 O.O.3d 495, 498, 358 N.E.2d 623, 627, vacated in part on other grounds (1978), 438 U.S. 910, 98 S.Ct. 3135, 57 L.Ed.2d 1154. This standard is essentially the same as the one enunciated by the United States Supreme Court in *Strickland v. Washington* (1984), 466 U.S. 668 * * *."

{¶ 42} "Even assuming that counsel's performance was ineffective, this is not sufficient to warrant reversal of a conviction. 'An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. Cf. *United States v. Morrison,* 449 U.S. 361, 364-365 [101 S.Ct. 665, 667-68, 66 L.Ed.2d 564] (1981).' *Strickland,* supra, 466 U.S. at 691, 104 S.Ct. at 2066. To warrant reversal, '[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' *Strickland,* supra, at 694, 104 S.Ct. at 2068." *Bradley* at 142.

{¶ 43} Appellant first argues that counsel failed to ask for a limiting instruction for the other firearms recovered from his home. As explained above, this was relevant evidence to show a conscious choice of which firearm appellant chose to use to carry out his plan. A limiting instruction would

have been properly denied by the trial court as this was not "other acts" evidence as appellant claims.

{¶ 44} Appellant also argues that trial counsel failed to object to several portions of testimony and a statement by the prosecutor in closing arguments. He alleges that the testimony regarding the injuries and subsequent treatment of Donald Walsh were improper victim-impact evidence presented in the guilt phase of his trial and should have been objected to. However, as previously noted, the Ohio Supreme Court has held that "[e]vidence relating to the facts attendant to the offense is 'clearly admissible' during the guilt phase, even though it might be characterized as victim-impact evidence." *State v. McKnight*, supra.

{¶ 45} The wounds appellant inflicted on Donald Walsh are facts attendant to the offense that show he was shot and seriously wounded by appellant. See *State v. Cunningham*, 105 Ohio St.3d 197, 2004-Ohio-7007, 824 N.E.2d 504, ¶81. While some of the testimony regarding the follow-up care and search for a bone donor may have been beyond the permissible scope, appellant has failed to point to how this testimony prejudiced him in light of the overwhelming evidence of his guilt in the record.

{¶ 46} Appellant also takes issue with counsel's failure to object to other testimony indicating that he was "such a hot head" and that he "belonged in

the country."[2] Again, appellant has failed to demonstrate that the exclusion of this testimony would have had any bearing on the outcome of the trial. *State v. Hutton*, 100 Ohio St.3d 176, 2003-Ohio-5607, 797 N.E.2d 948, ¶44. This brief testimony did not contribute to the finding of guilt given the extensive evidence against appellant.

{¶ 47} Appellant also argues that the state made inappropriate comments during closing arguments, which his trial counsel failed to object to. In closing arguments, the prosecutor commented on the character of the people appellant had killed. However, "a reasonable attorney may decide not to interrupt his opponent's closing argument. *State v. Keene* [], 81 Ohio St.3d 646, 668, [1998-Ohio-342,] 693 N.E.2d 246. Objections can "'disrupt the flow of a trial'" and "'are considered technical and bothersome by the fact-finder.'" A decision not to interrupt during closing arguments reflects an 'objective standard of reasonable representation.'" (Internal citations omitted.) *State v. Myers,* 97 Ohio St.3d 335, 2002-Ohio-6658, 780 N.E.2d 186, ¶154.

{¶ 48} Finally, appellant complains that trial counsel was ineffective for not properly filing a motion to waive court costs. Appellant's attorney filed a motion to waive court costs based on appellant's indigency 16 days after the court imposed costs of $7,741.10. While appellant argues that once court

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[2] Appellant argues this testimony was a veiled assertion that he is racist.

costs are assessed the matter becomes res judicata,[3] in this case the court granted appellant's motion and the state failed to appeal. Therefore, appellant was not prejudiced by his trial counsel submitting the motion after sentencing had been imposed.

Judgment affirmed.

It is ordered that appellee recover from 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.

FRANK D. CELEBREZZE, JR., JUDGE

CHRISTINE T. McMONAGLE, P.J., and
ANN DYKE, J., CONCUR

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[3] *State v. Clevenger*, 114 Ohio St.3d 258, 2007-Ohio-4006, 871 N.E.2d 589