[Cite as *State v. Howard*, 2015-Ohio-2854.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101359

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

RAYDON T. HOWARD

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-13-577940-B

BEFORE: McCormack, P.J., E.T. Gallagher, J., and Boyle, J.

RELEASED AND JOURNALIZED: July 16, 2015

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TIM McCORMACK, P.J.:

{¶1} Defendant-appellant Raydon T. Howard appeals his conviction for felonious assault and the trial court's denial of Howard's motion for a new trial. Following a thorough review of the record, we affirm.

Procedural History

{¶2} Howard was charged in a multiple-count indictment, along with codefendants, James Kennedy, III ("Kennedy"), Henry G. Anderson ("Anderson"), and Kadaiza M. Smith ("Smith"), for an incident that occurred on August 27, 2013. He was charged in Count 3 with felonious assault, in violation of R.C. 2903.11(A)(1), and in Count 4, felonious assault with a deadly weapon, in violation of R.C. 2903.11(A)(2), both of which contained one- and three-year firearm specifications. Howard was also charged with having weapons while under disability, in violation of R.C. 2923.13(A)(2), in Count 5, and having weapons while under disability, in violation of R.C. 2923.13(A)(3), in Count 6. He entered a plea of not guilty and the matter proceeded to a jury trial.

{¶3} On January 16, 2014, the jury found Howard guilty of felonious assault in violation of R.C. 2903.11(A)(1) in Count 3 and guilty of the attendant three-year firearm specification. The jury, however, found Howard not guilty of the one-year firearm specification. The jury also found Howard not guilty of felonious assault in Count 4 and

not guilty of both counts of having weapons while under disability. Because the jury's verdict was inconsistent — guilty of brandishing a firearm, yet not guilty of having a firearm — the court held a hearing prior to sentencing. Finding the jury's verdict inconsistent, the court determined that the jury lost its way with regard to the firearm specifications and dismissed the finding of guilt on the three-year firearm specification.

{¶4} During this post-trial hearing, the court also heard Howard's motion for a new trial. Following arguments, the court denied the motion for a new trial.

{¶5} On April 11, 2014, the court sentenced Howard to eight years in prison on the felonious assault. Howard now appeals his conviction.

Evidence at Trial

{¶6} In August 2013, Howard and codefendants Anderson, Howard's cousin, and Smith, Howard's girlfriend, resided together in an apartment on the west side of Cleveland. Anderson testified that in the early morning hours of August 27, while he was on the east side of town, he received a phone call from Howard. Howard told Anderson that he had just been robbed and he was in the hospital getting staples in the back of his head. Smith and Howard drove to the east side to pick Anderson up and bring him back home. Anderson stated that Howard brought him home so that Howard could show Anderson how the robbery happened. Anderson testified that Howard told him he thought Deontae Tarver, Howard's brother, had robbed him because Tarver had stolen Howard's house keys and because he believed everyone else was too afraid of

Howard to rob him. Howard informed Anderson that $3,600 and a .380 automatic pistol were taken during the robbery.

{¶7} While pacing the house, talking about the robbery from the evening before, and awaiting a phone call, Howard and Anderson "grabbed guns," a .40 caliber pistol and a 9 mm Luger. According to Anderson, Howard phoned Kennedy soon after the robbery to let him know that "something had happened" and that he was looking for Tarver. Howard asked Kennedy to let him know when he would be seeing Tarver. Anderson testified that Kennedy, in fact, called Howard three or four hours after they had returned home and retrieved the guns.

{¶8} After the phone call, Howard, Anderson, and Smith drove to the area of West 38th Street and Denison Avenue. Howard and Anderson were both wearing "hoodies." Smith parked the car on West 37th Street, one block away. Anderson testified that he and Howard then "loaded up [their] guns" and walked down an alley in Tarver's direction. Anderson stated that they parked one block away "[j]ust in case something was to happen we can run to the car and get away without the car being seen."

{¶9} Tarver lived with Menyatta Hinton, his girlfriend, and her aunt in the aunt's home on West 38th Street and Denison Avenue. Tarver testified that on August 27, 2013, after he had awakened, he walked across the street to a neighbor, Paul's house. After speaking with Paul, Tarver phoned Kennedy and asked Kennedy to meet with him so that he could get in touch with his brother, Howard. When Kennedy arrived at Paul's house, Tarver phoned Howard, using Kennedy's cell phone. According to Tarver,

Howard told him that he was having some problems with someone on West 65th Street and Detroit Avenue and he wanted Tarver to "ride with him." Howard advised Tarver that he would be there in a little while, which Tarver understood to mean approximately a half hour. Tarver waited on Paul's porch with Paul and Kennedy.

{¶10} Anderson testified that while he and Howard walked down the alley, away from the parked car, he observed Tarver and Kennedy walk down the street and then he saw Tarver enter the house. Anderson stated that he stood on the sidewalk in front of the house and Howard stood in the grass when he watched Tarver get off the porch, walk over to them, and greet them. Tarver offered Anderson a cigarette, which he refused. Anderson told Tarver, "You know we run this west side." According to Anderson, Howard then "looked at [Tarver] funny" and Tarver bowed his head down. Tarver began pacing and walked closer to Howard. Anderson told Tarver to get his hands out of his pockets. Tarver did not comply. Anderson testified that the fourth time he told Tarver to take his hands out of his pockets, he saw the handle of a gun come halfway out of Tarver's pocket. He stated that he then "upped [his] gun" and shot Tarver in the chest and stomach. Anderson testified that Howard was looking at him before the shooting and nodded his head toward Anderson, which Anderson understood to mean "go ahead and shoot" Tarver.

{¶11} Anderson testified that as he began to "take off running" after shooting Tarver, Howard pulled out his gun, said, "Bitch, I got you now," and shot Tarver, who was lying on the ground. They both ran, got in Smith's car, and drove away. Anderson

initially told police that Howard shot Tarver in the stomach. However, during trial, he testified that Howard shot Tarver in the leg. Anderson explained that Howard had aimed at Tarver's stomach or leg, and he could not distinguish which one Howard shot. After shooting twice, Anderson's gun had jammed, and once in the car, he gave the gun to Howard to "unjam it." Anderson testified that after the shooting, Howard told his brother Jason that he and Anderson had shot Tarver because Tarver robbed Howard. Anderson was later arrested with the gun he used to shoot Tarver.

{¶12} Tarver testified that he first caught sight of Howard and Anderson as they were coming from an alley, toward the front of the house. They were wearing hoodies with the hoods "pulled on and tied," and Howard had a bulge in his hoodie pocket that looked like a gun imprint or "something shaped like a gun." When they approached Tarver, Howard walked to the grass without saying anything to Tarver. Tarver stated that he offered Anderson a cigarette and asked, "What's up? What's going on?" He testified that Anderson then "said something that made chills run down my spine," while reaching in his pocket. That's when Tarver saw the back end of a gun. Tarver then put his hand on his own gun, which was in his pants.

{¶13} According to Tarver, Howard asked Tarver if he was "strapped," to which Tarver replied, "Yeah." At this point, someone approached Howard and pulled his hood down, exposing the staples in Howard's head. Tarver said he became angry upon seeing staples in his brother's head and asked, "Man, who did this shit to you?" Tarver testified that Anderson then said, "Fuck you," and he started shooting.

{¶14} Tarver fell in the driveway and did not remember feeling anything after three shots. He saw Anderson and Howard run away, and then he saw his girlfriend and several people surround him, trying to help. He stated that he coughed up blood and then passed out. The next thing he remembered was awaking from a coma. Tarver sustained two gunshot wounds to the chest and one to the lower leg. He experienced nerve loss from the waist down, the loss of his appendix and right kidney, a stomach wound, and needed colon surgery. He is now paralyzed from the waist down.

{¶15} Hinton, Tarver's girlfriend, testified that she heard four gunshots, looked out the window of her aunt's house, and observed Tarver lying in the driveway. She attempted to help him.

{¶16} A neighbor, Lorrie Burns, testified that she heard three gunshots and then saw two men wearing hoodies running away from another man lying in the driveway across the street from her house. Burns stated that the two men ran down the alley toward West 37th Street.

{¶17} Lonnie Criss, another neighbor, testified that he heard "at least five shots" and then observed two black men wearing black hoodies running down West 37th Street and get into a black car in front of his house. Criss stated that the men appeared to be in a hurry because "they pulled across the street so fast and backed up so fast, that they were trying to get out of there." He asked his wife to write down the license plate number. Thereafter, he heard screaming from the next street over, which was West 38th Street. He drove to West 38th Street and observed a man lying on the ground, bleeding from his

mouth and chest. The man was surrounded by people trying to help him. Criss provided the police with a description of the car and its license plate number.

{¶18} Sergeant Thomas Shoulders, the Cleveland police officer in charge of the investigation, testified that the police investigation showed Smith, Howard's girlfriend, as the owner of the vehicle Criss had seen in front of his house on August 27, 2013. The investigation revealed that Smith and Howard lived together. The investigation also revealed that two men fled the scene of the shooting on August 27 and then entered Smith's car.

{¶19} Sergeant Shoulders stated that he spoke with Tarver approximately one week after the shooting. Based upon this interview, Sergeant Shoulders obtained arrest warrants for Anderson and Howard.

{¶20} Sergeant Shoulders testified that two bullet casings and one bullet fragment were recovered from the scene of the shooting. The bullet casings matched the 9 mm handgun that was recovered at the time of Anderson's arrest. The bullet fragment, however, could not be identified, and it did not match the 9 mm handgun.

Assignments of Error

I. The state failed to produce sufficient evidence necessary to sustain the defendant's conviction for felonious assault.

II. The defendant's conviction was against the manifest weight of the evidence.

III. The defendant was denied effective assistance of counsel.

IV. The trial court erred by not granting defendant's motion for a new trial.

Sufficiency and Manifest Weight of the Evidence

{¶21} Howard claims that the state failed to provide sufficient evidence to support his conviction for felonious assault. He also argues that his conviction was against the manifest weight of the evidence.

{¶22} When assessing a challenge of sufficiency of the evidence, a reviewing court examines the evidence admitted at trial and determines whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus. "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." *Id.* A reviewing court is not to assess "whether the state's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction." *State v. Thompkins*, 78 Ohio St.3d 380, 390, 678 N.E.2d 541 (1997).

{¶23} While the test for sufficiency of the evidence requires a determination whether the state has met its burden of production at trial, a manifest weight challenge questions whether the state has met its burden of persuasion. *Thompkins* at 390. Also unlike a challenge to the sufficiency of the evidence, a manifest weight challenge raises a factual issue.

> "The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines 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. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction."

Id. at 387, quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983). A finding that a conviction was supported by the manifest weight of the evidence, however, necessarily includes a finding of sufficiency. *State v. Howard*, 8th Dist. Cuyahoga No. 97695, 2012-Ohio-3459, ¶ 14, citing *Thompkins* at 388.

{¶24} "[T]he weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts." *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus. When examining witness credibility, "the choice between credible witnesses and their conflicting testimony rests solely with the finder of fact and an appellate court may not substitute its own judgment for that of the finder of fact." *State v. Awan*, 22 Ohio St.3d 120, 123, 489 N.E.2d 277 (1986). A factfinder is free to believe all, some, or none of the testimony of each witness appearing before it. *State v. Ellis*, 8th Dist. Cuyahoga No. 98538, 2013-Ohio-1184, ¶ 18.

{¶25} Howard was convicted of felonious assault in violation of R.C. 2903.11(A)(1), which provides that "[n]o person shall knowingly * * * [c]ause serious physical harm to another * * *." A person acts knowingly, regardless of his or her purpose, "when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature." R.C. 2901.22(B).

{¶26} The state argued that Howard was a principal offender or, in the alternative, that he acted as an aider or abettor in order to commit the offense. Ohio's complicity statute provides that "[n]o person, acting with the kind of culpability required for the commission of an offense, shall * * * [a]id or abet another in committing the offense." R.C. 2923.03(A)(2). Under R.C. 2923.03(F), a person who is guilty of complicity in the commission of an offense "shall be prosecuted and punished as if he were a principal offender. A charge of complicity may be stated * * * in terms of the principal offense."

{¶27} As previously stated by this court in *State v. Langford*, 8th Dist. Cuyahoga No. 83301, 2004-Ohio-3733, ¶ 20, 21:

> In order to constitute aiding and abetting, the accused must have taken some role in causing the commission of the offense. *State v. Sims*, 10 Ohio App.3d 56, 10 Ohio B. 65, 460 N.E.2d 672 (1983). "The mere presence of an accused at the scene of the crime is not sufficient to prove, in and of itself, that the accused was an aider and abettor." *State v. Widner* (1982), 69 Ohio St.2d 267, 269, 431 N.E.2d 1025, 1027. * * * A person aids or abets another when he supports, assists, encourages, cooperates with, advises, or incites the principal in the commission of the crime and shares the criminal intent of the principal. *State v. Johnson*, 93 Ohio St.3d 240, 245-246, 2001-Ohio-1336, 754 N.E.2d 796. "Such intent may be inferred from the circumstances surrounding the crime." *Id.* at 246.
>
> Aiding and abetting may be shown by both direct and circumstantial evidence, and participation may be inferred from presence, companionship, and conduct before and after the offense is committed. *State v. Cartellone*, 3 Ohio App.3d 145, 150, 3 Ohio B. 163, 444 N.E.2d 68 (1981), citing *State v. Pruett*, 28 Ohio App.2d 29, 34, 273 N.E.2d 884 (1971).

{¶28} Here, Anderson testified that Howard called him in the early morning hours of August 27 and told him that he had just been robbed and he was in the hospital getting staples in the back of his head. He told Anderson that he believed Tarver robbed him.

Howard picked up Anderson, brought him back to his house, and gave him a gun. Howard then set up a meeting with Tarver, and they both proceeded to Tarver's location, where they loaded their weapons. Tarver testified that he spoke with Howard that morning and Howard informed Tarver that he had problems with someone and wanted Tarver to ride with him.

{¶29} Howard's girlfriend, Smith, drove Anderson and Howard to Tarver's location, parking the car one block away, on West 37th Street, in order to make a fast getaway. Armed with guns, Anderson and Howard walked through an alley and approached Tarver at a neighbor's home. Anderson testified that at one point during the confrontation, Howard nodded to him, which Anderson understood to mean that Howard was instructing him to shoot Tarver. Anderson then shot Tarver twice, and Tarver fell to the ground. Witnesses testified they heard several gunshots and saw two men wearing hoodies running down the alley to West 37th Street and escape in what was later discovered to be Smith's car.

{¶30} The foregoing evidence, if believed, was sufficient to support Howard's conviction for felonious assault as an aider and abettor of Anderson. The evidence showed that Howard took an active role in causing the assault on Tarver. Howard was upset about being robbed and being injured during the robbery. He believed Tarver was responsible for the robbery and his injuries, and he arranged for a meeting with Tarver. He armed Anderson with a gun and, with the assistance of his girlfriend, drove Anderson to Tarver's location. And according to Anderson, Howard gave him a nod,

which Anderson understood to be Howard's instructions to shoot. Finally, neighbors witnessed two males running from the scene and escaping in Smith's car. Howard's conduct therefore, before, during, and after the shooting, demonstrated more than mere presence at the scene of the crime.

{¶31} Howard contends that Anderson admitted that Howard's nod could have had different meanings. However, although acknowledging that the nod could have been interpreted differently, Anderson testified that he believed the nod meant for him to "go ahead and shoot." And the jury was free to believe Anderson's testimony, as the credibility of the witnesses is an issue for the trier of facts. The jury was, in fact, specifically instructed to evaluate Anderson's testimony as Howard's accomplice "to determine its quality and worth or its lack of quality and worth."

{¶32} In light of the above, and in viewing the evidence in a light most favorable to the prosecution, we find that any rational trier of fact could have found the essential elements of felonious assault proven beyond a reasonable doubt. We therefore find sufficient evidence to demonstrate that Howard aided and abetted Anderson by setting in motion the series of events that culminated in the felonious assault.

{¶33} We further find that after reviewing the entire record, we cannot say the jury clearly lost its way and created a manifest miscarriage of justice. In carefully analyzing the evidence and considering the credibility of the witnesses, the jury concluded that Howard was not guilty of felonious assault with a deadly weapon or having weapons while under disability, but rather, he was guilty of supporting, assisting, encouraging, or

inciting Anderson in the commission of the felonious assault and he shared Anderson's criminal intent. *See State v. Johnson*, 93 Ohio St.3d 240, 245-246, 754 N.E.2d 796 (2001). Howard's conviction is therefore not against the manifest weight of the evidence.

{¶34} Howard's first and second assignments of error are overruled.

Ineffective Assistance of Counsel

{¶35} In his third assignment of error, Howard claims that he was denied the effective assistance of trial counsel where (1) counsel failed to request that the weapons under disability charges be bifurcated from the other charges, and (2) counsel failed to call Smith and Kennedy as witnesses.

{¶36} In order to establish a claim of ineffective assistance of counsel, Howard must prove (1) his counsel was deficient in some aspect of his representation, and (2) there is a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In Ohio, every properly licensed attorney is presumed to be competent, and therefore, a defendant claiming ineffective assistance of counsel bears the burden of proof. *State v. Smith*, 17 Ohio St.3d 98, 100, 477 N.E.2d 1128 (1985). And counsel's performance will not be deemed ineffective unless and until the performance is proven to have fallen below an objective standard of reasonable representation and, in addition, prejudice arises from counsel's performance. *State v. Iacona*, 93 Ohio St.3d 83, 105, 752 N.E.2d 937 (2001).

{¶37} Furthermore, decisions on strategy and trial tactics are generally granted wide latitude of professional judgment, and it is not the duty of a reviewing court to analyze the trial counsel's legal tactics and maneuvers. *State v. Gau*, 11th Dist. Ashtabula No. 2005-A-0082, 2006-Ohio-6531, ¶ 35, citing *Strickland*. Courts must generally refrain from second-guessing trial counsel's strategy, even where that strategy is "questionable," and appellate counsel claims that a different strategy would have been more effective. *State v. Jalowiec*, 91 Ohio St.3d 220, 237, 744 N.E.2d 163 (2001). It is generally presumed that the failure to call witnesses to testify is ordinarily a matter of trial strategy and does not necessarily constitute ineffective assistance of counsel. *State v. Duncan*, 8th Dist. Cuyahoga No. 99665, 2013-Ohio-5746, ¶ 10, citing *State v. Coulter*, 75 Ohio App.3d 219, 230, 598 N.E.2d 1324 (12th Dist.1992). The defendant must show that the witness's testimony would have "'significantly assisted the defense and affected the outcome of the case.'" *State v. Griffith*, 8th Dist. Cuyahoga No. 97366, 2012-Ohio-2628, ¶ 29, quoting *State v. Dennis*, 10th Dist. Franklin No. 04AP-595, 2005-Ohio-1530, ¶ 22.

{¶38} Here, Howard argues that counsel was ineffective for failing to request that the weapons charges be bifurcated from the other charges. The jury, however, found Howard not guilty of the two counts of having weapons while under disability. And Howard has failed to demonstrate how the failure to bifurcate the weapons charges "taint[ed] the entirety of the proceedings" to the extent that the outcome of the trial would

have been different. *State v. Thompson*, 8th Dist. Cuyahoga No. 96929, 2012-Ohio-921, ¶ 40.

{¶39} Howard also argues that counsel was ineffective for failing to call Smith and Kennedy as witnesses. First, the record shows, and Howard concedes, that Smith would have asserted her Fifth Amendment privilege had she been called to testify at Howard's trial. Calling Smith as a witness would therefore not have been helpful to Howard. Second, defense counsel argued in his motion to sever the trials that Smith's testimony could negatively impact Howard, stating that "[it] [s]ounds like [Smith] is basically accused of trying to cover for [Howard]" and "the jury * * * may be tempted to think, hmm, obviously Mr. Howard must have done something wrong because she's out there lying for him." Counsel noted that if the jury concluded that Smith was lying on the stand that "she's lying because of something bad [Howard] did." Calling Smith as a witness could therefore possibly be harmful to Howard's case, had she not elected to assert her Fifth Amendment right. As such, under this scenario, defense counsel's decision not to call Smith as a witness would not be considered deficient performance; rather, it was a tactical decision.

{¶40} Howard contends that trial counsel's failure to call Kennedy also demonstrated ineffective assistance. Here, the record shows that trial counsel, aware of codefendant Kennedy's likely testimony prior to trial, elected not to call Kennedy as a witness. Rather, he chose to submit Kennedy's affidavit only to "corroborate" Smith's affidavit and as evidence in mitigation of sentencing. It is possible that defense counsel

weighed the risks of calling the codefendant to testify, considered any credibility issues, and strategically determined not to call Kennedy. It is also entirely possible that Kennedy could have asserted his privilege against self-incrimination, as the charges against him were still pending at the time of Howard's trial. Therefore, the fact that trial counsel elected not to call Kennedy to testify may be considered sound trial strategy.

{¶41} Moreover, Howard has failed to demonstrate that the outcome of the proceedings would have been different had Kennedy testified. Kennedy's purported eyewitness testimony essentially provides that Anderson, alone, shot Tarver and Howard never drew or displayed a weapon. One could speculate that Kennedy's testimony may have been helpful in determining that Howard did not commit assault with a deadly weapon or dangerous ordnance (as charged in Count 4) or that he possessed a weapon while under disability (Counts 5 and 6). The jury, however, found Howard not guilty of those charges. Howard has therefore failed to demonstrate how the outcome of the trial would have been different had Kennedy testified.

{¶42} In light of the above, Howard has failed to overcome the presumption that counsel's decision not to call Smith and Kennedy to testify was a reasonable trial strategy. Even if we assume that counsel's failure to call Smith or Kennedy to testify was deficient, Howard failed to demonstrate prejudice. The record shows, rather, that trial counsel engaged in a vigorous defense that resulted in Howard's acquittal of all but one charge.

{¶43} Howard was not denied the effective assistance of trial counsel, and his third assignment of error is overruled.

Motion for a New Trial

{¶44} In his fourth assignment of error, Howard claims that the trial court erred when it denied his motion for a new trial, arguing two bases upon which a new trial should have been granted: newly discovered evidence and witness misconduct.

{¶45} A motion for a new trial is governed by Crim.R. 33, which provides that a new trial should not be granted unless it affirmatively appears that the defendant was prejudiced or was prevented from having a fair trial. *State v. Hough*, 8th Dist. Cuyahoga Nos. 98480 and 98482, 2013-Ohio-1543, ¶ 21, citing Crim.R. 33(E)(5). The trial court's decision to grant a new trial "is an extraordinary measure that should be used only when the evidence presented weighs heavily in favor of the moving party." *State v. Price*, 8th Dist. Cuyahoga No. 92096, 2009-Ohio-480, ¶ 14. We review a trial court's decision regarding a motion for new trial for an abuse of discretion. *State v. Schiebel*, 55 Ohio St.3d 71, 564 N.E.2d 54 (1990), paragraph one of the syllabus. We therefore will not reverse a trial court's refusal to grant a new trial unless it appears that the matter asserted as a ground for a new trial materially affects the substantial rights of the defendant. *State v. Glover*, 8th Dist. Cuyahoga No. 93623, 2010-Ohio-4112, ¶ 10.

{¶46} Under Crim.R. 33(A), a new trial may be granted upon motion of the defendant for any of the following causes affecting materially his or her substantial rights:

(2) Misconduct of * * * the witnesses for the state;

* * *

> (6) When new evidence material to the defense is discovered, which the defendant could not with reasonable diligence have discovered and produced at the trial.

{¶47} Crim.R. 33(B) provides that a motion for a new trial shall be filed within 14 days after the verdict was rendered, with the exception of a motion for a new trial based upon newly discovered evidence, in which case the motion shall be filed within 120 days of the verdict. *See State v. Stansberry*, 8th Dist. Cuyahoga No. 71004, 1997 Ohio App. LEXIS 4561, * 6 (Oct. 9, 1997) (motion for new trial based upon the misconduct of a witness); *State v. Smith*, 8th Dist. Cuyahoga No. 100588, 2014-Ohio-4799, ¶ 7 (motion for new trial based upon newly discovered evidence). If the defendant does not file a motion for a new trial within the time prescribed, the defendant must show by clear and convincing evidence that he or she was unavoidably prevented from filing the motion for a new trial. Crim.R. 33(B).

{¶48} In order to prevail on a motion for a new trial based upon newly discovered evidence, the defendant must demonstrate that the new evidence

> "(1) discloses a strong probability that it will change the result if a new trial is granted, (2) has been discovered since the trial, (3) is such as could not in the exercise of due diligence have been discovered before the trial, (4) is material to the issues, (5) is not merely cumulative to former evidence, and (6) does not merely impeach or contradict the former evidence."

State v. Barnes, 8th Dist. Cuyahoga No. 95557, 2011-Ohio-2917, ¶ 23, quoting *State v. Petro*, 148 Ohio St. 505, 76 N.E.2d 370 (1947), syllabus.

{¶49} Prior to the sentencing hearing, Howard filed a motion for a new trial, claiming that he had obtained "newly discovered evidence." He attached the affidavit of Smith in support of his motion. Howard also submitted the affidavit of Kennedy, not as a basis for a new trial, but rather as "corroboration" for Smith's affidavit.

{¶50} Howard asserts that codefendant Smith was unavailable at the time of trial because she had exercised her constitutional right against self-incrimination. According to the record, Smith was indicted on one count of obstructing justice. During a hearing in which the court addressed various pretrial motions, including Howard's motion to sever the trial, Smith's counsel indicated that Smith would be exercising her Fifth Amendment privilege against self-incrimination and would not be testifying at Howard's trial. Following Howard's trial and conviction, which occurred without the benefit of Smith's testimony, Smith pleaded guilty to an amended count of obstructing justice. Howard contends that Smith then became available, no longer having a need to assert the privilege. Thus, as Howard contends, Smith's testimony was "newly discovered evidence."

{¶51} In support of his position, Howard relies upon *State v. Condon*, 157 Ohio App.3d 26, 2004-Ohio-2031, 808 N.E.2d 912 (1st Dist.), in which the court of appeals held that evidence from a codefendant that was unavailable at trial because the codefendant had invoked his privilege against self-incrimination constituted newly discovered evidence. In reaching its decision, the court relied upon the minority view in the federal court system and its interpretation of the corresponding federal rule,

Fed.R.Crim.P. 33. *Id.* at ¶ 18. The First District, however, overruled its holding in *Condon* to the extent that it held that "newly available" evidence is synonymous with "newly discovered" evidence in *State v. McGlothin*, 1st Dist. Hamilton No. C-060145, 2007-Ohio-4707.

{¶52} Relying upon the majority view of the federal courts, the First District in *McGlothin* determined that the clear language of the rule dictates that "newly available" evidence cannot be equated with "newly discovered" evidence:

> "'[N]ewly available evidence' is not synonymous with 'newly discovered evidence.'" *United States v. Jasin*, 280 F.3d 355, 368 (3d Cir.2002). To consider the testimony of a codefendant after he has been sentenced as newly discovered evidence "would encourage perjury to allow a new trial once codefendants have determined that testifying is no longer harmful to themselves." *United States v. Reyes-Alvarado*, 963 F.2d 1184, 1188 (9th Cir. 1992). We agree with the reasoning of the Third Circuit that the majority view "establish[es] a straightforward bright-line rule, [and] is anchored in the plain meaning of the text." *Jasin* at 368. Accordingly, we adopt the majority view. To the extent that *State v. Condon* held otherwise, we overrule it.

McGlothin at ¶ 41; *see also State v. Lather*, 6th Dist. Ottawa No. OT-03-041, 2004-Ohio-6312 (for purposes of a motion to dismiss under Crim.R. 12(K), "newly available" evidence is not synonymous with "newly discovered" evidence where a witness refused to testify at defendant's trial and was later convicted on related charges and could now be compelled to testify). The court of appeals therefore held that the trial court did not err when it refused to grant the defendant's motion for a new trial, finding that the evidence offered in the codefendant's affidavit after the trial ended was not newly

discovered where defense counsel knew about the substance of the codefendant's testimony. *Id.* at ¶ 42.

{¶53} In light of the above, we find that although Smith's testimony was undoubtedly "newly available" following her conviction, the evidence offered in her affidavit was not "newly discovered." Defense counsel was likely aware of Smith's testimony prior to trial. Smith was Howard's girlfriend, they lived together at the time of the shooting, and they have a child together. Additionally, she drove Howard and Anderson from the apartment they shared to the scene and waited for them to return to the car before driving away. Finally, Howard moved to separate the trials of the codefendants because defense counsel initially intended to call Smith as a witness. Under these circumstances, it is reasonable to believe that Howard was aware of the substance of Smith's purported testimony at the time of his trial. Howard was therefore unable to satisfy the second prong of *Petro* — that the evidence had been discovered since the trial.

{¶54} Moreover, Smith's testimony merely contradicts the former evidence presented at trial, rather than offers new evidence. In her affidavit, Smith essentially stated that neither she nor Howard could identify the robbers from the previous incident, Howard was not armed when he went to West 38th Street to see Tarver, and Howard did not supply Anderson with a weapon. At trial, Anderson testified that Howard believed Tarver robbed him and Howard gave him the 9 mm handgun he used to shoot Tarver. Both Anderson and Tarver testified that Howard was armed when Howard and Anderson

confronted Tarver. Evidence that merely impeaches or contradicts evidence in the former trial is insufficient to support a motion for a new trial. *Petro*, 148 Ohio St. at 509, 76 N.E.2d 370. And based upon our review of the record, we find that Smith's testimony does not create a strong probability of a different result at trial. Her testimony therefore does not support the granting of a new trial.

{¶55} Howard also submits the affidavit of codefendant Kennedy, offered only as "corroboration" for Smith's affidavit. To the extent he relied upon Kennedy's affidavit as a basis for a new trial, however, we find that Kennedy's testimony is likewise not "newly discovered" evidence. Kennedy, like Smith, had charges pending against him at the time of Howard's trial, which later resulted in a conviction. The record shows that defense counsel was likely aware of the substance of Kennedy's testimony and elected not to call him as a witness at trial, despite Howard's contention that Kennedy was "a willing witness." Howard cannot now rely on Kennedy's testimony as a basis for a new trial, because allowing the testimony of a codefendant who has been sentenced as "newly discovered" evidence would encourage perjury from codefendants who have determined that testifying is no longer harmful to themselves. *McGlothin*, 1st Dist. Hamilton No. C-060145, 2007-Ohio-4707, at ¶ 41.

{¶56} Finally, Howard argued that witness misconduct warranted a new trial. Specifically, he asserts that Sergeant Shoulders gave false and misleading testimony regarding the location of a bullet fragment recovered from the scene that would suggest that someone stood over Tarver and fired his gun.

{¶57} On direct examination, Sergeant Shoulders testified that two bullet casings and one bullet fragment were collected from the crime scene. He stated that the two casings matched the 9 mm handgun recovered during Anderson's arrest, but the bullet fragment could not be identified, nor did it match the 9 mm handgun. When questioned on cross-examination about Anderson's statement to the police that Howard shot Tarver in either the stomach or the leg, Sergeant Shoulders stated, "I believe he said he shot him in the leg, but he shot at him when he was down on the ground, which would be consistent with the fragment that was found, but I don't recall him saying exactly where he shot him." Thereafter, defense counsel questioned the sergeant regarding the location of the bullet fragment:

> Q: And the only other shell casing that was not susceptible to any type of analysis was a lead core fragment, correct? That's the one that could not be traced to any gun, am I right?
>
> A: Correct, the fragment that was found.
>
> Q: And that particular lead core fragment wasn't found on the ground. That was actually dug out of a garage in the back of the property, wasn't it?
>
> A: I believe there was one found in the garage and I thought that was found somewhere else. Wasn't there one, I believe, found on the ground by the individual?
>
> Q: Which one was found in the garage? Do you know for sure?
>
> A: I don't recall which one was found — one was found in the garage, and then one was found on the ground by the individual.
>
> Q: You don't know which one is which?
>
> A: I don't know. I don't recall which one —

{¶58} We note, initially, that Howard's motion for a new trial based upon witness misconduct was untimely. The verdict was rendered on January 16, 2014, and Howard filed his motion for new trial on March 25, 2014. Howard therefore exceeded the 14-day time period permitted under Crim.R. 33(B). Further, there was no showing that Howard was unavoidably prevented from filing such motion. Nonetheless, the trial court held a hearing on Howard's motion, considered the arguments, and determined that a new trial was not warranted.

{¶59} In light of the above exchange, we cannot find the trial court abused its discretion when it denied Howard's motion for a new trial based upon alleged witness misconduct. Although Sergeant Shoulders arguably implied that the unidentified bullet fragment was located near Tarver's body, thus suggesting someone stood over Tarver and shot him, defense counsel effectively cross-examined the sergeant. To that extent, the sergeant acknowledged that he could not recall which fragment was recovered and where. Furthermore, the jury found Howard not guilty of both counts of having a weapon while under disability. Howard has therefore failed to demonstrate that he was prejudiced by the sergeant's testimony.

{¶60} Based upon the foregoing, we find the trial court did not abuse its discretion in denying Howard's motion for a new trial. We therefore overrule his fourth assignment of error.

{¶61} Judgment affirmed.

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

The court finds there were reasonable grounds for this appeal.

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

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

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TIM McCORMACK, PRESIDING JUDGE

EILEEN T. GALLAGHER, J., and
MARY J. BOYLE, J., CONCUR