

[Cite as *State v. Bulger*, 2018-Ohio-5346.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 106516

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DEON J. BULGER

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-17-614706-B

BEFORE: E.A. Gallagher, A.J., Stewart, J., and Boyle, J.

RELEASED AND JOURNALIZED: December 27, 2018

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EILEEN A. GALLAGHER, A.J.:

{¶1} Defendant-appellant Deon Bulger appeals his convictions entered in the Cuyahoga County Court of Common Pleas. For the following reasons, we affirm.

Facts and Procedural History

{¶2} On February 28, 2017, Bulger was indicted on charges of aggravated murder, two counts of aggravated robbery, murder, five counts of felonious assault, three counts of attempted murder, discharge of a firearm on or near prohibited premises and two counts of having weapons while under disability. With the exception of the having weapons while under disability counts, all counts contained one- and three-year firearm specifications. The weapons while under disability counts were bifurcated and tried to the bench. The remaining counts proceeded to a jury trial where the following evidence was adduced.

{¶3} This case involves three brothers, Jonathan Menter, Stephen Menter and Jeffrey Menter and their friend, Daniel Wood. Jonathan was a drug dealer. On the morning of August 10, 2016, Jonathan met with Christopher Hill, a man to whom he had previously sold marijuana

on six or seven occasions. Jonathan and Hill consummated a drug transaction at that time and Hill then introduced Jonathan to a man known by a nickname that began with an “R.” Jonathan made an in-court identification of appellant at trial as the man whom Hill had introduced to him.

Bulger produced a “wad of money” and told Jonathan he would contact him for the purpose of completing another drug transaction. Jonathan told Bulger to contact him through Hill.

{¶4} Jonathan had plans to drive to Columbus, Ohio that evening with Stephen, Jeffrey and Wood to attend a concert. Prior to leaving Cleveland, Jonathan exchanged text messages with Hill setting up the drug transaction that was to be completed before he left for Columbus. Stephen agreed to drive Jonathan to the location where the drug deal was to take place. Stephen drove his car with Wood in the passenger seat, Jonathan in the right rear passenger seat and Jeffrey in the left rear passenger seat.

{¶5} Through text messages, Hill instructed Jonathan to park in the driveway of 17602 Tarkington Avenue near East 176th street. When the brothers arrived, they were initially wary because the house at that address appeared to be abandoned but, after exchanging further texts with Hill, Stephen backed his car into the driveway of 17602 Tarkington Avenue. Shortly thereafter, Bulger and an unidentified black male approached the vehicle. Bulger and Jonathan briefly argued over how to proceed with the transaction during which Bulger circled the car and leaned into the open driver’s side window near Stephen. The unidentified male remained near the front passenger window.

{¶6} Bulger demanded that Jonathan provide the drugs to him. Stephen told him not to hand Bulger the drugs causing Bulger and his compatriot to draw hand guns. Bulger instructed the occupants not to move and pointed his firearm at Stephen. Stephen replied, “you’re not going to shoot me” and began to drive. Bulger immediately began shooting at Stephen who was

struck twice. One bullet entered Stephen's left upper arm near his left shoulder, crossed through his chest striking both lungs and exited near his right armpit. A second bullet entered Stephen's left back, severed his spine, struck his hepatic vein, liver and diaphragm before exiting his lower right chest. Wood was also struck when a bullet grazed his left leg. Shell casings recovered from the scene indicated that nine shots were fired.

{¶7} After Stephen was struck by Bulger's gunfire, the car accelerated, out of control, crossed the street, crashed through a garage opposite the address where the drug deal was to occur and traveled into a neighboring backyard before crashing into a tree. Bulger and his accomplice fled the scene. Stephen died from his wounds.

{¶8} Jonathan and Jeffrey remained on scene and initially related to police a story about the reason they had come to 17602 Tarkington Avenue. However, after they were informed that Stephen had died, they admitted that they had been present for the purpose of a drug transaction connected to Hill.

{¶9} Hill provided police with the nickname of "Radio" as the means of identifying the shooter. Homicide investigators learned from a detective in the Gang Impact Unit that the nickname "Radio" corresponded to Bulger. A six-pack photo array was completed and shown separately to Jonathan, Jeffrey and Wood. Jonathan and Wood identified Bulger in the photo arrays as the shooter. Jeffrey selected an unrelated individual with the caveat "if his hair was shorter" but also found Bulger's photo to be familiar if he was "thinner." At trial, all these men identified Bulger as the man who shot Stephen.

{¶10} The jury found Bulger guilty of aggravated murder, two counts of aggravated robbery, murder and four counts of felonious assault as well as all of the attached firearm specifications. The jury found Bulger not guilty of three counts of attempted murder and one

count of discharge of a firearm on or near prohibited premises. The trial court returned a verdict of guilty on both counts of having weapons while under disability.

{¶11} At sentencing, the trial court merged both counts of aggravated robbery, two counts of felonious assault and the count of murder into the aggravated murder charge and their attendant firearm specifications as allied offenses. As to the aggravated murder charge, the trial court imposed a prison term of life with the possibility of parole after thirty years to be served consecutive, and subsequent, to the three-year term on the attached firearm specification. The court imposed prison terms of eight years on the remaining felonious assault charges and ordered those counts to be served concurrent to the prison term for aggravated murder. The court ordered the attached three-year firearm specifications on both counts to be served consecutively with the three-year firearm specification attached to the aggravated murder count. Finally, the trial court merged the two counts of having weapons while under disability and imposed a prison term of three years.¹

Law and Analysis

I. In-Court Identification

{¶12} In his first assignment of error, Bulger argues that the trial court erred in denying his motion to suppress the pretrial identifications made by Jonathan and Wood because the photo arrays were unduly suggestive and the identification process was unreliable.

{¶13} A motion to suppress presents a mixed question of law and fact. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶ 8. Thus, we give deference

¹ On October 22, 2018 we remanded this matter to the trial court for correction of the record pursuant to App.R. 9(E). On December 11, 2018 the trial court issued a nunc pro tunc sentencing entry clarifying that Bulger's weapons while under disability count was to be served concurrently with the underlying charges in counts 1, 8 and 11 in conformity with the trial court's pronouncement at Bulger's sentencing.

to the trial judge's factual findings, but we review the application of law to the facts de novo. *Id.*; see also *State v. Davis*, 8th Dist. Cuyahoga No. 83033, 2004-Ohio-1908.

{¶14} R.C. 2933.83 governs the administration of photo lineups and is aimed at preventing the use of unnecessarily suggestive procedures. *State v. Fields*, 8th Dist. Cuyahoga No. 99750, 2014-Ohio-301, ¶ 11. R.C. 2933.83(A)(8) defines a photo lineup as “an identification procedure in which an array of photographs * * * is displayed to an eyewitness[.]”

{¶15} R.C. 2933.83 requires any law enforcement agency that conducts photo lineups to adopt specific procedures for conducting the lineups, including the use of a blind administrator. R.C. 2933.83(B). If, however, it is impracticable for a blind administrator to conduct the lineup, then the administrator must state in writing the reason for that impracticability. R.C. 2933.83(B)(2).

{¶16} Under R.C. 2933.83(C)(1), a trial court must consider evidence of a failure to comply with the required lineup procedures in adjudicating motions to suppress eyewitness identifications. R.C. 2933.83(C)(1), however, does not provide an independent basis to suppress evidence and a trial court errs in relying solely on the statute in suppressing an identification. The overriding analysis remains whether the procedure was “impermissibly suggestive.” *State v. Wells*, 8th Dist. Cuyahoga No. 98388, 2013-Ohio-3722, ¶ 84, citing *State v. Henry*, 6th Dist. Lucas No. L-11-1157, 2012-Ohio-5552 (failure to strictly comply with blind administrator component does not necessarily result in reversible error).

{¶17} In reviewing the admissibility of out-of-court identifications, courts use a two-prong test. *State v. Davis*, 8th Dist. Cuyahoga No. 101502, 2015-Ohio-1144, ¶ 19. First, the trial court must determine whether the identification procedures were so impermissibly suggestive as to give rise to a substantial likelihood of misidentification. *Id.*, citing *State v.*

Monford, 190 Ohio App.3d 35, 2010-Ohio-4732, 940 N.E.2d 634, ¶ 38 (10th Dist.), and *Neil v. Biggers*, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972). The defendant has the burden of demonstrating that the procedures used were unnecessarily suggestive. *State v. Quarterman*, 8th Dist. Cuyahoga No. 99317, 2013-Ohio-4037, ¶ 26.

{¶18} Second, the trial court must determine whether the identification itself was unreliable under the totality of the circumstances. *Davis* at ¶ 19, citing *Monford* at ¶ 38. If the defendant fails to meet the first part of his or her burden, the court need not consider the totality of the circumstances under the second prong. *State v. Tate*, 2016-Ohio-5622, 70 N.E.3d 1056, ¶ 31 (8th Dist.) citing *State v. Green*, 117 Ohio App.3d 644, 691 N.E.2d 316 (1st Dist.1996). If the pretrial procedures were not suggestive, any remaining questions as to reliability go to the weight of the identification, not its admissibility. *Id.*

{¶19} If, on the other hand, the defendant demonstrates that the identification procedure was unduly suggestive, then it must be determined whether the witness was unreliable under the totality of the circumstances. *Davis* at ¶ 21. The factors that must be considered are (1) the witness's opportunity to view the offender; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the suspect; (4) the witness's level of certainty when identifying the suspect; and (5) the length of time between the crime and the confrontation. *Davis* at ¶ 21, citing *Biggers* at 199-200. "The focus is therefore upon the reliability of the identification and not the identification procedures themselves." *Davis* at ¶ 18, citing *State v. Smith*, 8th Dist. Cuyahoga No. 94545, 2011-Ohio-924. No one factor is dispositive. *In re T.W.*, 2017-Ohio-8875, 100 N.E.3d 1239, ¶ 7 (8th Dist.).

{¶20} Bulger argues that the photo arrays in this case were unnecessarily suggestive because only two of the six photos depicted a man with neck tattoos, only two of the photos

depicted a person in a white t-shirt and only one photo featured a man with both a neck tattoo and a white t-shirt. At trial, testimony was introduced that the shooter had a neck tattoo and was wearing a white t-shirt at the time of the commission of these crimes.

{¶21} We find no merit to Bulger’s argument. Bulger’s description of the photo array is inaccurate. Three of the six men in the array appear to have neck tattoos and four of the men appear to be wearing a white t-shirt. In addition, the photos contained in the photo array were obtained from BMV records. Lastly, as it pertains to the neck tattoos, a valid photo array does not require that the defendant be surrounded by people nearly identical in appearance. *State v. Davis*, 76 Ohio St.3d 107, 112, 1996-Ohio-414, 666 N.E.2d 1099; *State v. Bryson*, 8th Dist. Cuyahoga No. 98298, 2013-Ohio-934, ¶ 47. A photo array is not unduly suggestive if the other men shown along with the defendant look “relatively similar in age, features, skin tone, facial hair, dress, and photo background * * *.” *Bryson* at ¶ 43, quoting *State v. Jacobs*, 7th Dist. Mahoning No. 99-CA-110, 2002-Ohio-5240, ¶ 18. We find no evidence that the photo arrays were unduly suggestive. *See also State v. Campbell*, 8th Dist. Cuyahoga No. 99807, 2014-Ohio-493, ¶ 23-24 (refusing to find a photo array to be unduly suggestive where the appellant was the only individual picture with a tattoo.)

{¶22} Bulger also argues that the identification process was unreliable because the witnesses were all at the police station at the same time for the purpose of viewing the photo arrays and “[t]here is a possibility that the witnesses could have conferred.” However, Bulger’s argument is refuted by the record that reflects that the witnesses were separated prior to, and during, their photo array viewings and did not have an opportunity to interact until after that time.

{¶23} Lastly, Bulger argues that the photo arrays were unreliable because Jeffrey testified at trial that he selected an individual other than Bulger as the assailant at the conclusion of the

process in which he participated and that his selection was not fully recorded. We find no merit to Bulger's argument because 1) the discrepancy did not speak to the suggestiveness of the array, 2) the identification was video recorded and Jeffrey's full identification was documented and 3) the defense was able to fully examine Jeffrey about the selection at trial. Any error in the documentation of Jeffrey's selection was harmless.

{¶24} Because the pretrial procedures were not suggestive, any remaining questions as to the reliability of the identifications go to the weight of the evidence, not to its admissibility. *State v. Howard*, 8th Dist. Cuyahoga No. 100094, 2014-Ohio-2176, ¶ 17; *State v. Wills*, 120 Ohio App.3d 320, 325, 697 N.E.2d 1072 (8th Dist.1997).

{¶25} Bulger's first assignment of error is overruled.

II. Motion in Limine

{¶26} In his second assignment of error, Bulger argues that the trial court erred in denying his motion in limine to preclude the state from introducing the testimony of the detective from the Cleveland Police Department's Gang Impact Unit. Bulger argues that detective's testimony allowed the state to introduce irrelevant evidence and other acts testimony in violation of Evid.R. 401, 402, 403 and 404(B).

{¶27} The admission of evidence lies within the broad discretion of a trial court, and a reviewing court should not disturb evidentiary decisions in the absence of an abuse of discretion that has created material prejudice. *State v. Noling*, 98 Ohio St.3d 44, 2002-Ohio-7044, 781 N.E.2d 88, ¶ 43, citing *State v. Issa*, 93 Ohio St.3d 49, 64, 2001-Ohio-1290, 752 N.E.2d 904. Within this broad discretion is the trial court's duty "to determine whether testimony is relevant and to balance its potential probative value against the danger of unfair prejudice." *State v. Clark*, 8th Dist. Cuyahoga No. 95928, 2011-Ohio-4109, ¶ 32. Evid.R. 402 allows the

admission of any relevant evidence so long as the probative value of that evidence is not outweighed by its prejudicial effect, it does not confuse the issue or mislead the jury. Evid.R. 403(A). Our inquiry is limited to whether the trial court acted unreasonably, arbitrarily or unconscionably in deciding to exclude the testimony. *State v. Wilson*, 8th Dist. Cuyahoga No. 104333, 2017-Ohio-2980, ¶ 38. Evid.R. 404(B) states that:

[E]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

{¶28} The state introduced the Gang Impact Unit detective for the purpose of establishing how the investigating detectives were able to link the nickname of “Radio,” provided by Hill, to Bulger. In ruling on Bulger’s motion to preclude the detective’s testimony, the trial court ruled that the detective could testify with the proviso that he not indicate to the jury that Bulger was allegedly involved with a gang. The detective testified that, as part of his job in the Gang Impact Unit, he collects and records the nicknames of residents in his district. The detective explained that not everyone with whom he is interacting is a gang member and it is not unusual for him to acquire information on a person only to later learn they are not involved with a gang.

{¶29} While the trial court allowed the state to ask a number of foundational questions about the detective’s work with the Gang Impact Unit that were largely irrelevant to this case, none of the testimony implicated Bulger as being associated with a gang. *See, e.g., State v. Wilson*, 8th Dist. Cuyahoga No. 104333, 2017-Ohio-2980, ¶ 43-44 (refusing to find prejudice to the defendant where a detective introduced irrelevant testimony regarding the status of various gangs within the city of Cleveland and holding that such testimony did not implicate Evid.R. 404(B) because the defendant was not implicated as being involved with a gang). Although the

detective's answers to some of the extraneous background questions referencing the Gang Impact Unit likely should have been excluded as irrelevant, we find any error in their admission to be harmless pursuant to Crim.R. 52(A). *Id.*; *State v. Mims*, 8th Dist. Cuyahoga No. 100520, 2014-Ohio-5338, ¶ 60; *State v. Bell*, 8th Dist. Cuyahoga No. 97123, 2012-Ohio-2624, ¶ 59. We cannot say the trial court abused its discretion in this instance.

{¶30} Furthermore, we note that after the trial court ruled on the motion in limine, Bulger failed to object to any of the references during the detective's testimony regarding his involvement with the gang impact unit. "[T]he denial of a motion in limine, does not preserve a claimed error for review in the absence of a contemporaneous objection at trial." *State v. Hill*, 75 Ohio St.3d 195, 203, 1996 Ohio 222, 661 N.E.2d 1068.

{¶31} Bulger's second assignment of error is overruled.

III. Sufficiency of the Evidence

{¶32} In his third assignment of error, Bulger argues that the state failed to present sufficient evidence to support his convictions.

{¶33} A challenge to the sufficiency of the evidence supporting a conviction requires a determination of whether the state met its burden of production. *State v. Hunter*, 8th Dist. Cuyahoga No. 86048, 2006-Ohio-20, ¶ 41. When reviewing sufficiency of the evidence, an appellate court must determine "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." *State v. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235, 818 N.E.2d 229, ¶ 77, quoting *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus. In a sufficiency inquiry, an appellate court does not assess whether the state's evidence is to be believed but whether, if believed, the evidence admitted at trial

supported the conviction. *State v. Starks*, 8th Dist. Cuyahoga No. 91682, 2009-Ohio-3375, ¶ 25; *Jenks* at paragraph two of the syllabus.

{¶34} Bulger’s sufficiency argument is limited to the state’s proof of identity. He argues that the state failed to present sufficient evidence identifying him as the shooter. Bulger’s argument lacks merit because the state introduced multiple witnesses that identified Bulger, placed him at the driver’s side window and described him shooting the victim. The physical evidence including the paths of the bullets that struck the victim, the location of the shell casings found at the scene and the bullet holes on the driver’s side of the vehicle supported this testimony.

IV. Manifest Weight

{¶35} In his fourth assignment of error, Bulger argues that his convictions are against the manifest weight of the evidence.

{¶36} A manifest weight challenge attacks the credibility of the evidence presented and questions whether the state met its burden of persuasion at trial. *State v. Whitsett*, 8th Dist. Cuyahoga No. 101182, 2014-Ohio-4933, ¶ 26, citing *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541; *State v. Bowden*, 8th Dist. Cuyahoga No. 92266, 2009-Ohio-3598, ¶ 13. Because it is a broader review, a reviewing court may determine that a judgment of a trial court is sustained by sufficient evidence but nevertheless conclude that the judgment is against the weight of the evidence.

{¶37} In conducting such a review, this court remains mindful that the credibility of witnesses and the weight of the evidence are matters primarily for the trier of fact to assess. *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraphs one and two of the syllabus. Reversal on manifest weight grounds is reserved for the “exceptional case in which the evidence

weighs heavily against the conviction.” *Thompkins* at 387, quoting *State v. Martin*, 20 Ohio App.3d 172, 485 N.E.2d 717 (1st Dist.1983).

{¶38} Appellant argues that his convictions were against the manifest weight of the evidence because eyewitnesses to the event lacked credibility. We disagree. Jonathan testified that he had two separate interactions with Bulger on the day of the shooting. During a drug transaction earlier that day, he had an opportunity to speak with Bulger face to face for roughly a minute. He also testified that he argued with Bulger just prior to the shooting. Wood testified that he looked directly at Bulger during the shooting and said “I’ll never forget his face.” The jury was in the best position to judge the credibility of the eyewitness identification testimony in this case. We cannot say that its judgment is against the manifest weight of the evidence.

{¶39} Appellant’s fourth assignment of error is overruled.

V. Medical Examiner’s Manner of Death Testimony

{¶40} In his fifth assignment of error, Bulger argues that the trial court erred in allowing the medical examiner who performed the autopsy on Stephen to testify that the manner of death was a “homicide.” Bulger contends that the testimony was improper because it addressed the “ultimate issue” in the case.

{¶41} Manner of death is a determination, for public health purposes, that categorizes deaths. There are five commonly used manners of death provided by the National Association of Medical Examiners (NAME): natural, accidental, suicide, homicide and undetermined. Manner of death is a medicolegal term.

{¶42} NAME specifies in their categorization “it is to be emphasized that the classification of Homicide for the purpose of death certification is a ‘neutral’ term and neither

indicates nor implies criminal intent * * *.” Homicide occurs when death results from a volitional act committed by another person.

{¶43} In Ohio, there is no identifiable crime of Homicide. There are, instead, various degrees of the act of murder that are charged by the state. A trier of fact is charged with determining the ultimate issue as to whether an individual has been proven guilty of one of those “murder” crimes charged.

{¶44} As Bulger concedes, this court has previously rejected the argument he presently offers. *See State v. Jones*, 8th Dist. Cuyahoga Nos. 103290 and 103302, 2018-Ohio-498, ¶ 115-120. In *Jones*, we held that “it is clearly within the expertise of the coroner to give an opinion on whether a death is a homicide.” *Id.* at ¶ 118, quoting *State v. Simpson*, 11th Dist. Lake No. 93-L-014, 1994 Ohio App. LEXIS 4472 (Sept. 30, 1994); “The coroner’s factual determinations concerning the manner, mode and cause of death, as expressed in the coroner’s report and the death certificate, create a nonbinding rebuttable presumption concerning such facts in the absence of competent, credible evidence to the contrary.” *Id.* at ¶ 118, quoting *Vargo v. Travelers Ins. Co.*, 34 Ohio St.3d 25, 516 N.E.2d 226 (1987), paragraph one of the syllabus.

{¶45} Finally, although Bulger argues that the medical examiner’s testimony included improper hearsay, he failed to object to any alleged hearsay during the testimony and fails to cite specifically any such hearsay in the transcript on appeal. Therefore, we disregard this portion of his argument pursuant to App.R. 12(A)(2).

{¶46} Bulger’s fifth assignment of error is overruled.

{¶47} The judgment of the trial court is affirmed.

It is ordered that appellee recover of appellant share the 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 Cuyahoga County Court of Common Pleas to carry this judgment into execution.

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

EILEEN A. GALLAGHER, ADMINISTRATIVE JUDGE

MELODY J. STEWART, J., and
MARY J. BOYLE, J., CONCUR