[Cite as *State v. McCoy*, 2009-Ohio-4284.]

COURT OF APPEALS
MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

	:	JUDGES:
STATE OF OHIO	:	William B. Hoffman, P.J.
	:	John W. Wise, J.
Plaintiff-Appellee	:	Julie A. Edwards, J.
	:	
-vs-	:	Case No. CT 2008 0020
	:	
	:	
GLENN P. MCCOY	:	O P I N I O N

Defendant-Appellant

CHARACTER OF PROCEEDING:	Criminal Appeal from Muskingum County Court of Common Pleas Case No. CR 2004 0233
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	August 20, 2009

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
D. MICHAEL HADDOX, EXQ. Muskingum County Prosecutor Law Administration Building 27 North Fifth Street, Second Floor Zanesville, Ohio 43701-3438	W. JOSEPH EDWARDS, ESQ. 523 S. Third Street Columbus, Ohio 43215

Edwards, J.

{¶1} Appellant, Glenn P. McCoy, appeals a judgment of the Muskingum County Common Pleas Court convicting him of aggravated murder (R.C. 2903.01(B)) with a specification that the crime occurred during the commission of aggravated robbery (R.C. 2929.04(A)(7)), and of aggravated robbery (R.C. 2911.01(A)(3)). He was sentenced to a term of life imprisonment without the possibility of parole for aggravated murder and the attached specification and to 10 years incarceration for aggravated robbery, to be served consecutively. Appellee is the State of Ohio.

STATEMENT OF FACTS AND CASE

{¶2} During June of 2003, appellant was employed by a tree service company in Coshocton, Ohio. He worked with Joe Babcock at the tree service. In late June, appellant went to Babcock's home to see Babcock's motorcycle. Appellant wanted to ride the motorcycle, but Babcock was not appropriately insured. Appellant waited at the front door while Babcock retrieved the motorcycle keys from the bedroom.

{¶3} The next afternoon Babcock returned home from work and drank a glass of ice water while waiting for his wife to return from shopping. When his wife returned, she told him she thought he was gone because his motorcycle was not in the garage. Babcock discovered that the keys and $5,000.00 in cash were missing from the drawer where he kept them, and the motorcycle was gone.

{¶4} On July 19, 2003, Babcock's brother called him from work to report that he just saw appellant ride by on the stolen motorcycle. He followed appellant, but later called to say that he lost appellant at the bridge, and appellant was heading toward Zanesville. Babcock and a friend drove to Zanesville to attempt to find appellant.

{¶5} Once in Zanesville, Babcock located appellant riding his stolen motorcycle. Babcock came up on appellant's left side and "blasted him," meaning he struck him in the face. Tr. 265, 275. The bike fell on top of appellant and Babcock then "put the boot to him." Tr. 265. Babcock went through appellant's pockets and retrieved $2,500.00 in cash. Babcock took his motorcycle and his money while appellant ran down Linden Street in the direction of Weaver's Cycle. The left mirror on the motorcycle had been damaged and was held together with black electrical tape.

{¶6} Meanwhile the same afternoon, Donna Weaver was working at her business, Weaver's Cycle Shop. Around 3:15 p.m., Brian Taylor and his friend Nathan arrived at the shop. Brian was in the U.S. Navy stationed in Norfolk, and while visiting family in Zanesville he wanted to show Donna his new lime green motorcycle. While in the shop, Brian helped Donna with a four-wheeler which wasn't working. His friend Adam came in the shop with his mother, and the mailman dropped off the mail. Two young teens on bicycles stopped to inquire about the price of a motorcycle. At 3:28 p.m., Brian received a call on his cell phone from his cousin, and 5-10 minutes later he left the shop.

{¶7} In the same part of town, Terry and Randy McConnell prepared to open a local restaurant, Phil's Seafood, from about 2:00 p.m. - 4:00 p.m. Terry was the head chef and Randy worked in seafood preparation. During the process of getting the restaurant ready to open, Terry went to the dumpster in the back alley numerous times. At about 3:45 p.m. - 3:55 p.m., Terry noticed a pair of brand new red and black motorcycle gloves in the dumpster. He had no use for them and wasn't going to jump in

the dumpster for them, but told his brother Randy about the gloves. Randy thought his child could use them and retrieved them from the dumpster.

{¶8} At 4:00 p.m., Sandra Jones, who operated an alteration and consignment shop next to Weaver's Cycle, closed her business for the day. She saw that the sign on the door of Weaver's Cycle was flipped from open to closed. She thought this was strange because Donna's car was still there, Donna was not scheduled to close until 5:00 p.m. and Donna never closed early.

{¶9} Also at 4:00 p.m., appellant entered The Barn, a local bar in the same part of Zanesville. About half an hour later, Vickie Chason, a driver for the Starbright Cab Company, received a call for a fare at The Barn and picked up appellant. According to Ms. Chason, "[H]e looked real hot. I mean, you know, real sweaty hot." Tr. 494-95. He had welt marks on the side of his face. Appellant told her he had been working in construction in Florida, came up here with a truck, got laid off or lost the job and was stranded here. He first asked the cabbie to take him to the Travel Lodge motel, then he asked if there was a bar in the area. She replied that the "I-Bar," or Imperial Bar, was in the area. She took appellant to the bar and he paid her fare from a wad of cash in his pocket.

{¶10} Ivan Smith arrived at Weaver's Cycle at 4:40 p.m. - 4:45 p.m. to pick up a part. He had telephoned the shop earlier in the day, and Donna told him she had the part and would be open until 5:00 p.m. However, when he arrived the sign on the door was flipped to "closed." Ivan went back to his truck and waited a few minutes, then got out and tried the front door. He discovered that the door was unlocked. He yelled for

Donna and received no response. He checked the office and found Donna's purse which appeared to have been rummaged through. He smelled fresh smoke in the air.

{¶11} Ivan eventually noticed that the cash register drawer was open and the register tape and part of the register were on the floor. Ivan knew Donna's son Mark, and called his home, reaching Mark's wife, Shannon Weaver. Shannon told him to check the restroom. Ivan noticed boxes and debris in the back of the shop but did not investigate that area further. When he could not find Donna, Ivan called 911.

{¶12} When the police arrived, Patrolman Halsey of the Zanesville Police Department noticed boxes piled in an aisle of the shop. When he walked closer he noticed some fabric and a human finger sticking out from under the boxes. Patrolman Halsey moved a box and found the body of Donna Weaver. He checked for a pulse and found none. An autopsy later revealed that Mrs. Weaver died from blunt force trauma to her head and neck, resulting in a fractured skull, contusions of the brain and a brain hemorrhage. Both of her clavicles and numerous ribs were fractured, and she had defensive wounds on her hands and fingers. Officers processed the scene and discovered footprints on the showroom floor, which were preserved for future comparison.

{¶13} Joe Babcock watched the evening news on television that evening to see if the program covered his altercation with appellant. When he saw the news report of the murder, he called the number on the screen to report his altercation that afternoon with appellant in the same geographical area as the murder. During the course of dinner service at Phil's Seafood, Terry and Randy McConnell heard reports of the murder. While driving home from work that night, they wondered if the gloves they

found in the dumpster had a connection to the murder. They called the police and gave the gloves to police. Later investigation revealed that this type of glove was on display at Weaver's Cycle.

{¶14} Police obtained surveillance video from two businesses on Linden Avenue. On the first video, obtained from Armco, appellant is observed walking northbound on Linden Avenue minutes before the last customers left the motorcycle shop. He was wearing an Ohio State football jersey with the numeral one on the front and back. On the second video, appellant is seen entering The Barn at about 4:00 p.m. At 4:29 p.m., appellant is seen leaving the bar in a cab.

{¶15} On July 30, 2003, Patrolman Mike Choma and Patrolman Ken Grey responded to a call of a suspicious male and female possibly running a scam in Hartman's Racing Shop. The report stated that they left the shop in a grey Honda Accord. The car was spotted at Juanita's restaurant, and there was a warrant out for the arrest of the female owner of the vehicle. When a man and a woman exited the restaurant and got into the vehicle, police approached the car and placed the woman under arrest. The man, who was later determined to be appellant, fled on foot and was apprehended after a foot chase.

{¶16} Catherine Jones, the woman arrested outside Juanita's restaurant, knew appellant as "Gary McCracken." She met him at the I-Bar on July 7, and they started dating a week later. Appellant initially stayed at the Travel Lodge in Zanesville, but around July 22 or 23, he moved in with her at her father's home. Appellant told Catherine he was from Florida and was in Zanesville on vacation. When she met him, he had a blue motorcycle, but the motorcycle disappeared around July 19. She saw

him the evening of July 19, and his leg was injured. He told her his motorcycle was in storage at his uncle's house because he couldn't drive it with the broken mirror. He told her he injured his leg riding a four-wheeler with his uncle.

{¶17} When Catherine Jones' car was inventoried by police, a black duffel bag was found in the backseat. Inside the duffel bag police found a clear bag with the name "Suzuki" on it, containing a bolt. The box the bolt would have been in at Weaver's Cycle was missing from the parts room of the shop, and found on the counter of the shop, along with a card from a package of red size XXL Fox gloves.

{¶18} Appellant's Fila tennis shoes were sent to the Bureau of Criminal Investigation (BCI) in London, Ohio. The lifts taken from the footprints in the store were the same brand, tread pattern, and tread size as the shoes belonging to appellant. BCI also compared DNA found in the racing gloves with a known sample taken from appellant and found DNA in the gloves consistent with appellant's profile.

{¶19} On August 25, 2004, appellant was indicted by the Muskingum County Grand Jury with one count of aggravated murder in violation of R.C. 2903.01(A) with a specification that the crime was committed during an aggravated robbery in violation of R.C. 2929.04(A)(7), one count of aggravated murder in violation of R.C. 2903.01(B) with a specification that the crime was committed during an aggravated robbery, in violation of R.C. 2929.04(A)(7), and one count of aggravated robbery in violation of R.C. 2911.01(A)(3). Appellant entered pleas of not guilty to all three counts.

{¶20} On April 6, 2006, appellant filed a motion to eliminate the death penalty as a sentencing option pursuant to *Atkins v. Virginia* (2002), 536 U.S. 304, 122 S.Ct. 2242, and *State v. Lott*, 97 Ohio St.3d 303, 779 N.E.2d 1011, 2002-Ohio-6625, because of his

status as a person with mental retardation. Attached to the motion was a psychological evaluation prepared by Dr. Jeffrey Smalldon finding appellant to be mildly mentally retarded. The state obtained an evaluation of appellant by Dr. James Karpawich, who reached a similar conclusion to that reached by Dr. Smalldon. The parties stipulated to admission of the doctors' reports, and the court found that appellant met the requirements of mental retardation as set forth in *Atkins* and *Lott* and removed the death penalty as a sentencing option. However, the specifications were not removed, and life in prison without a possibility of parole remained a possible sentencing option.

{¶21} The case proceeded to jury trial on February 4, 2008. Prior to trial, the court granted the state leave to enter a nolle prosequi as to count one of the indictment (R.C. 2903.01(A)) and the accompanying specification. The matter proceeded to trial on one count of aggravated murder with its specification and one count of aggravated robbery. Appellant did not present any evidence in his defense at the guilt phase of the trial. The jury found appellant guilty as charged.

{¶22} Because of the guilty finding on the specification, the case proceeded to the sentencing phase on February 19, 2008. Because the death penalty had been excluded from consideration, the sentencing choices before the jury were life imprisonment without parole eligibility for 25 years, life imprisonment without parole eligibility for 30 years and life imprisonment without the possibility of parole. The state rested after asking the court to re-admit into evidence all of the evidence, testimony and exhibits admitted during the state's case-in-chief at the guilt phase of the trial. In mitigation, appellant presented the testimony of his brother Mark McCoy and Dr. Smalldon. The jury returned a recommendation of life imprisonment without the

possibility of parole. After receiving a pre-sentence investigation report, the court entered judgment of sentence in accordance with the jury's recommendation on the conviction of aggravated murder, and sentenced appellant to 10 years incarceration on the aggravated robbery conviction, to be served consecutively.

{¶23} Appellant assigns the following errors on appeal:

{¶24} "I. STRUCTURAL ERROR OCCURS WHEN AN EVIDENTIARY HEARING IS NOT HELD PRIOR TO TRIAL WHEN SUFFICIENT INDICIA OF INCOMPETENCY EXISTS TO CALL INTO DOUBT APPELLANT'S COMPETENCY TO STAND TRIAL CONTRA THE U.S. AND OHIO CONSTITUTIONS.

{¶25} "II. IF THE COURT FINDS THAT THE ERROR STATED ABOVE IS NOT STRUCTURAL, APPELLANT CONTENDS THAT HE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF HIS STATE AND FEDERAL CONSTITUTION (SIC) RIGHTS.

{¶26} "III. THE TRIAL COURT ERRED WHEN IT ENTERED JUDGMENT AGAINST THE APPELLANT WHEN THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN A CONVICTION AND WAS NOT SUPPORTED BY THE MANIFEST WEIGHT OF THE EVIDENCE."

I

{¶27} In his first assignment of error, appellant argues that the court erred in not sua sponte holding a competency hearing to determine his competence to stand trial. Appellant did not request a competency hearing at any point of the proceedings, nor did counsel raise the issue of appellant's competency to the court at any time. However, appellant argues that, based on the psychological report of Dr. Jeffrey Smalldon finding

appellant to have an I. Q. level of 65 which classifies him as mildly mentally retarded, coupled with the doctor's opinion that appellant would have deficits in problem solving, abstract thinking, self-regulation and control of impulses, the court should have sua sponte raised the issue of competency. Appellant argues that *State v. Were*, 94 Ohio St.3d 173, 761 N.E.2d 591, 2002-Ohio-481, requires this Court to reverse appellant's convictions and remand for a new trial and a competency hearing.

{¶28} The due process right of a criminal defendant who is legally incompetent not to be subjected to trial is fundamental to our adversarial system of justice. Id. at 174, citing *State v. Berry* (1995), 72 Ohio St.3d 354, 359, 650 N.E.2d 433, 438, citing *Pate v. Robinson* (1966), 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815, and *Drope v. Missouri* (1975), 420 U.S. 162, 95 S. Ct. 896, 43 L.Ed.2d 103. The United States Supreme Court has defined the test for competence to stand trial as whether the defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as factual understanding of the proceedings against him." *Dusky v. United States* (1960), 362 U.S. 402, 402, 80 S.Ct. 788, 789, 4 L.Ed.2d 824, 825.

{¶29} R.C. 2945.37 codified the criminal defendant's right to a competency hearing:

{¶30} "(B) In a criminal action in a court of common pleas, a county court, or a municipal court, the court, prosecutor, or defense may raise the issue of defendant's competence to stand trial. If the issue is raised before the trial has commenced, the court shall hold a hearing on the issue as provided in this section. If the issue is raised

after the trial has commenced, the court shall hold a hearing on the issue only for good cause shown or on the court's own motion."

{¶31} "A defendant is presumed competent to stand trial, unless it is proved by a preponderance of the evidence in a hearing under this section that because of his present mental condition he is incapable of understanding the nature and objective of the proceedings against him or of presently assisting in his defense." *Were* at 174, citing 142 Ohio Laws, Part I, 755-756. An evidentiary competency hearing is constitutionally required whenever the record reflects sufficient indicia of incompetency to call into doubt the defendant's competency to stand trial. Id. at paragraph 2 of the syllabus.

{¶32} In *Were*, defense counsel filed a pretrial motion requesting a competency hearing. The trial court ordered a competency evaluation, and based on the results of such evaluation, found the defendant competent to stand trial without holding an evidentiary hearing.

{¶33} The Supreme Court found in *Were* that the record was replete with suggestions of incompetency. Id. at 175. Defense counsel directly raised the issue and asked for a hearing by pretrial motion, after opening arguments, during the trial, and before the mitigation phase began. Id. At a status conference, defense counsel indicated to the court that based on his experience as a part-time referee in probate court handling civil commitments, he believed the defendant exhibited signs of paranoia and harbored suspicion against the defense team which counsel did not believe could be overcome. Id. Counsel filed two motions to withdraw and a motion to continue, citing appellant's "bizarre belief' that counsel was taping conversations and turning the

tapes over to the state and citing appellant's refusal to speak to the defense team or accept their correspondence. Id. at 176. In addition, the defendant's pro se motions, letters, and statements to the court reflected his belief that his attorneys were racially biased, had threatened his life, were conspiring with the prosecution and had failed to adequately prepare for the mitigation phase. Id. Based on these facts, the Ohio Supreme Court found the court erred in not holding a competency hearing. Id. at 177.

{¶34} In *State v. Skatzes*, 104 Ohio St. 3d 195, 819 N.E.2d 215, 2004-Ohio-6391, the court considered the issue raised by the instant case where defense counsel failed to request a competency hearing prior to trial but argued on appeal that the court erred in failing to sua sponte hold a hearing. In *Skatzes*, the defendant relied on the following indicia of incompetency in support of his claim: (1) he did not understand he was waiving constitutional rights by choosing to testify, (2) he did not understand the consequences of answering questions with speculative responses, (3) his use of colloquial phrases such as "I reckon" subjected him to ridicule by the prosecutor, (4) he lost a significant amount of weight pending trial, (5) other inmates testified that his nickname was "Crazy George" and he exhibited paranoia during the inmate takeover of the prison which led to the capital murder charge for which he was on trial, and (6) he had been suffering from stress and confusion at the time of the prison takeover. Id. at ¶148-154.

{¶35} The Supreme Court found that the record did not contain sufficient indicia of incompetence to have required the court to conduct a competency hearing. Id. at ¶157. None of the points raised suggested that the defendant did not understand the nature and objective of the proceedings against him or that he was unable to assist in

his defense. Id. Deference on such issues should be granted to those who see and hear what goes on in the courtroom. Id., citing *State v. Cowans* (1999), 87 Ohio St.3d 68, 84, 717 N.E.2d 298. Moreover, at no time did defense counsel suggest that Skatzes lacked competence. Id. at ¶158.

{¶36} In the instant case, the only indicia of incompetency suggested by appellant is his diagnosis of mild mental retardation and Dr. Smalldon's opinion of its affect on his reasoning ability. However, nothing in the record suggests that appellant did not understand the nature and objective of the proceedings against him or that he was unable to assist in his defense. The record does not reflect anything out of the ordinary in appellant's behavior and demeanor in the courtroom, and counsel at no point suggested that appellant was unable to assist counsel in his defense.

{¶37} Dr. Smalldon testified at the mitigation phase of the trial that he met with appellant on two occasions and appellant was cooperative and respectful during the time he spent with him. Tr. 968-69. While Dr. Smalldon's report issued to the court prior to trial states that the report was narrowly focused on appellant's eligibility for an *Atkins/Lott* exclusion from consideration of the death penalty, the report also states that initially defense counsel requested an evaluation of his overall psychological functioning. Dr. Smalldon's testimony at the mitigation hearing reflects that he found nothing which would indicate to him that appellant was incompetent to stand trial:

{¶38} "Q. Now, when we asked you to evaluate Mr. McCoy, did we give you any specific instructions as to what results we were looking for or what - - what we wanted you to do?

{¶39} "A. No.

{¶40} "Q. Okay. What did we ask you, or what did - - what did you see your role as in the evaluation which we requested?

{¶41} "A. My understanding is that I was being asked to do an evaluation of Mr. McCoy to assist defense counsel with clarifying his strengths and weaknesses both from a cognitive or intellectual point of view as well as from a personality point of view and to advise counsel if I became aware of any broadly defined mental health related issues that I thought may be of relevance to your representation of Mr. McCoy.

{¶42} "Q. Now, in the scope of that, there was never any discussion that we asked you or that you found that Mr. McCoy was incompetent to stand trial; isn't that correct?

{¶43} "A. No, I never suggested that.

{¶44} "Q. And was there ever any suggestion that Mr. McCoy was, for lack of a better term, insane for purposes of trial?

{¶45} "A. No." Tr. 962-63.

{¶46} "Q. All right. Now, in respect - - you mentioned the competency and the NGRI, or not guilty by reason of insanity, situation; and you said certainly you didn't find either one of those, and you have at no time suggested, have you, that Glenn McCoy did not know right form wrong?

{¶47} "A. No." Tr. 965-66.

{¶48} "Q. Okay. So boiling this all down, you found that Mr. McCoy is not incompetent?

{¶49} "A. That's correct.

{¶50} "Q. He was not insane?

{¶51} "A. Never suggested that, no.

{¶52} "Q. He knew right from wrong?

{¶53} "A. Yes." Tr. 996.

{¶54} In addition, one of appellant's cell mates in July of 2005 at the Zanesville County Jail testified that appellant claimed he couldn't have committed the crime because he was "locked up in Lancaster" at the time. Tr. 748. Further, he overheard appellant say to his dad in a telephone conversation, "You know what I did, I'm going to be in jail for awhile." Tr. 751. This evidence demonstrates that appellant had an understanding of the charges he was facing.

{¶55} While appellant did not testify in either phase of the trial, the following colloquy occurred between the court, defense counsel, and appellant at the end of the mitigation phase:

{¶56} "THE COURT: I believe the defense wanted to place another item on the record.

{¶57} "MR. KETCHAM: Yes, Your Honor. We wanted to record to reflect that we explained to Glenn McCoy his right to make an unsworn statement to the jury or to make a sworn statement in this proceeding. And we've discussed it with him thoroughly. It was his decision, I believe, to voluntarily not make a statement to the jury. Is that right, Glenn?

{¶58} "THE COURT: You'll have to speak up. That's - -

{¶59} "THE DEFENDANT: I said yeah." Tr. 1020.

{¶60} Nothing in this discussion indicates any concerns on counsel's part regarding appellant's ability to understand the nature of the proceedings or an inability

on the part of appellant to participate in his own defense. Counsel's statement to the court indicates an ability on his part to communicate with appellant about the case and appellant's ability to make decisions regarding his defense.

{¶61} The record does not contain sufficient indicia of incompetence to require the court to sua sponte hold a competency hearing. The first assignment of error is overruled.

II

{¶62} In his second assignment of error, appellant argues that counsel was ineffective for failing to request a competency hearing.

{¶63} A properly licensed attorney is presumed competent. *State v. Hamblin* (1988), 37 Ohio St.3d 153, 524 N.E.2d 476. Therefore, in order to prevail on a claim of ineffective assistance of counsel, appellant must show counsel's performance fell below an objective standard of reasonable representation and, but for counsel's error, the result of the proceeding would have been different. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Bradley* (1989), 42 Ohio St.3d 136. In other words, appellant must show that counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result. Id.

{¶64} Appellant has not demonstrated that counsel was ineffective for failing to request a competency hearing. As noted in assignment of error one, while Dr. Smalldon's report issued before trial states that it is narrowly tailored to the *Atkins/Lott* exclusion, the record reflects that he broadly examined appellant for issues related to the case and there was no suggestion that he was incompetent to stand trial. In

addition, for the reasons stated in assignment of error one, the record does not reflect sufficient indicia of incompetency to require a competency hearing. Therefore, appellant has not demonstrated that counsel's performance fell below an objective standard of reasonable representation, nor has he demonstrated that had he requested a hearing, the request would have been granted and he would have been found incompetent to stand trial.

{¶65} The second assignment of error is overruled.

III

{¶66} Appellant argues that the judgment convicting him of aggravated murder is against the manifest weight of the evidence and is supported by insufficient evidence. He argues that the evidence does not demonstrate that he committed any offense in the cycle shop other than the theft of a Suzuki bolt and a pair of motorcycle gloves.

{¶67} In determining whether a verdict is against the manifest weight of the evidence, the appellate court acts as a thirteenth juror "in reviewing the entire record, 'weighs the evidence and all reasonable inferences, considers the credibility of witnesses, and determines whether in resolving conflicts in evidence the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.'" *State v. Thompkins*, 78 Ohio St. 3d 380, 387, 678 N.E.2d 541, 1997-Ohio-52, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717.

{¶68} An appellate court's function when reviewing the sufficiency of the evidence is to 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. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus.

{¶69} Appellant was convicted of aggravated murder in violation of R.C. 2903.01(B):

{¶70} "No person shall purposely cause the death of another or the unlawful termination of another's pregnancy while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit, kidnapping, rape, aggravated arson, arson, aggravated robbery, robbery, aggravated burglary, burglary, terrorism, or escape."

{¶71} The offense carried a specification that the crime occurred during the commission of aggravated robbery, in violation of R.C. 2929.04(A)(7):

{¶72} "(A) Imposition of the death penalty for aggravated murder is precluded unless one or more of the following is specified in the indictment or count in the indictment pursuant to section 2941.14 of the Revised Code and proved beyond a reasonable doubt:

{¶73} "(7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary, and either the offender was the principal offender in the commission of the aggravated murder or, if not the principal offender, committed the aggravated murder with prior calculation and design."

{¶74} Aggravated robbery is defined in R.C. 2911.01(A)(3):

{¶75} "(A) No person, in attempting or committing a theft offense, as defined in section 2913.01 of the Revised Code, or in fleeing immediately after the attempt or offense, shall do any of the following:

{¶76} "(3) Inflict, or attempt to inflict, serious physical harm on another."

{¶77} The state presented evidence that Joe Babcock took his motorcycle and cash back from appellant, stranding him in Zanesville without transportation or money. He last saw appellant running down the street in the direction of Weaver's Cycle.

{¶78} The coroner placed the time of death somewhere around 3:30 p.m. - 3:40 p.m., give or take an hour. Brian Taylor testified that he left the shop with his friends five to ten minutes after receiving a phone call at 3:28 p.m. The McConnell brothers found the motorcycle gloves in the dumpster behind Phil's Seafood, in the same neighborhood as Weaver's Cycle, at 3:45 p.m. - 3:55 p.m. The gloves were later determined to have been taken from the cycle shop, and a DNA profile consistent with appellant's DNA was found in each glove. At 4:00 p.m., Sandra Jones noticed that the sign on the door of the cycle shop was flipped from "open" to "closed," but Donna Weaver's car was still in front of the shop. Surveillance cameras from area businesses placed appellant in the area of the cycle shop during this time frame.

{¶79} The cab driver who drove appellant from The Barn to the I-Bar noticed that he seemed sweaty and hot and had welts on his face. The coroner testified that Donna Weaver had defensive wounds on her hands and fingers.

{¶80} When appellant was arrested, he was found to have in his duffel bag a bolt which came from a box on the counter at the cycle shop. The Fila tennis shoes

which he was wearing were found to be a match in brand, tread pattern and tread size to the footprints left in the cycle shop.

{¶81} Further, while there is no direct evidence of appellant taking cash from the shop, the evidence demonstrated that the drawer on the cash register was opened and Donna Weaver's purse appeared to have been rummaged through. Joe Babcock testified that he had earlier removed $2,500.00 in cash from appellant's pockets. However, the surveillance camera at The Barn shows appellant handling a wad of cash, and the cab driver who picked appellant up at The Barn testified that he paid her from a wad of cash in his pocket.

{¶82} Viewing the evidence in a light most favorable to the state, a rational trier of fact could have found that appellant killed Donna Weaver in the course of committing aggravated robbery in the cycle shop. The evidence clearly placed appellant inside the cycle shop during the time frame which the coroner found the death most likely occurred, and between the time she was last seen alive by Brian Taylor and the discovery of the body after the 9-1-1 call from Ivan Smith. From the evidence of the bolt in appellant's duffel bag, the discarded gloves linked to appellant by DNA evidence and the wad of cash in appellant's possession shortly after the robbery, although cash had been taken from his pockets earlier, a rational trier of fact could have found that appellant committed a theft offense while in the cycle shop, and that he killed Donna Weaver in the course of committing the theft offense.

{¶83} We further cannot find that the jury clearly lost its way. As discussed in considering appellant's sufficiency of the evidence claim, there is direct evidence placing appellant at the scene and direct evidence that he committed a theft offense in

the cycle shop. The time in which appellant is placed at the scene corresponds to the time in which the coroner found the death most likely to occured, and between the time when Donna Weaver was last seen alive and the discovery of her body. Weighing the evidence and the reasonable inferences which can be drawn from the evidence, we do not find that in resolving conflicts in evidence the jury "clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *Thompkins* at 387.

{¶84} The third assignment of error is overruled.

{¶85} The judgment of the Muskingum County Common Pleas Court is affirmed.

By: Edwards, J.

Hoffman, P.J. and

Wise, J. concur

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JUDGES

JAE/r0812

[Cite as *State v. McCoy*, 2009-Ohio-4284.]

IN THE COURT OF APPEALS FOR MUSKINGUM COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
GLENN P. MCCOY	:	
Defendant-Appellant	:	CASE NO. CT 2008 0020

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Muskingum County Court of Common Pleas is affirmed. Costs assessed to appellant.

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JUDGES