[Cite as *State v. Tracey*, 2016-Ohio-5255.]

COURT OF APPEALS
MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. Sheila G. Farmer, P.J.
Plaintiff - Appellee	:	Hon. Patricia A. Delaney, J.
	:	Hon. Craig R. Baldwin, J.
-vs-	:	
	:	
JOSHUA TRACEY	:	Case No. CT2015-0040
	:	
Defendant - Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Muskingum County Court of Common Pleas, Case No. CR2015-0026
JUDGMENT:	Affirmed
DATE OF JUDGMENT:	August 1, 2016

APPEARANCES:

For Plaintiff-Appellee

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Baldwin, J.

{¶1} Defendant-appellant Joshua Tracey appeals his conviction and sentence from the Muskingum County Court of Common Pleas on one count of aggravated robbery and one count of tampering with evidence. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} On January 21, 2015, the Muskingum County Grand Jury indicted appellant on one count of aggravated burglary in violation of R.C. 2911.11(A)(2), a felony of the first degree, one count of aggravated robbery in violation of R.C. 2911.01 (A)(1), a felony of the first degree, and one count of attempted kidnapping in violation of R.C. 2923.02(A), a felony of the second degree. Appellant also was indicted on one count of tampering with evidence in violation of R.C. 2921.12(A)(1), a felony of the third degree, one count of aggravated menacing in violation of R.C. 2903.21(A), a misdemeanor of the first degree, and one count of receiving stolen property in violation of R.C. 2913.51(A), a felony of the fourth degree. The first three offenses were accompanied by firearm specifications. Appellant entered a plea of not guilty to the charges.

{¶3} Subsequently, a jury trial commenced on June 16, 2015. The following testimony was adduced at trial.

{¶4} Kylee Stewart testified that on December 17, 2014, she was in a relationship with appellant and that she was living "[f]rom house to house." Trial Transcript at 201. On the date in question, Stewart went over to Justin Davis's house to get high. According to her, Davis was just a friend. During the night of December 17, 2014, appellant called Stewart who, because she was unable to understand him, hung up the phone. Stewart

testified that appellant then called back and told her to walk outside. She walked outside and, after not seeing appellant, walked back inside.

{¶5} Stewart testified that when she walked into the hallway, she saw appellant with a gun in his hand and a white bag. According to Stewart, appellant held the gun up to her head and told her to go outside. While appellant had not threatened to shoot her before, Stewart testified that he had shot in her vicinity the night before when he shot the air conditioner with the same gun. Stewart then yelled that appellant had a gun. Stewart further testified that appellant took her phone and her money, both which were in her bra, as they were going outside. When asked how much money she had, Stewart indicated that she did not know exactly, but thought that she had a couple of hundred dollars on her. Some of the money had been given to Stewart by appellant, some of it she had earned herself and some other people had given her for drugs.

{¶6} During cross-examination, Stewart was asked about her testimony that appellant had a bag in one hand and a gun in the other. When asked which hand he used to take her cell phone and money out of her bra, she testified that appellant had the bag around his arm and that she was unsure which hand he used. She further testified that her recollection of events was sketchy because she was high on December 17, 2014.

{¶7} Justin Davis testified that on December 17, 2014, he was living with his grandmother and that he was friends with Stewart and knew appellant. At some point during the evening, he heard Stewart say that appellant had a gun. Davis testified that he walked out into the living room and saw Stewart, but did not see appellant. Davis then called 9-1-1. When the police arrived on the scene, Davis told the officer what Stewart had said. Davis testified that while he was outside on his porch at the time, he saw

someone who was behind his trailer come walking out. At the time, Davis was unable to tell who the man was. According to Davis, the man was walking up the street "kind of fast" and kept going when Officer Hood told him to stop. Trial Transcript at 247. Officer Hood then went after the man until the two were out of sight.

{¶8} The next witness to testify was Officer Chevy Hood of the Perry County Sheriff's Office who, on December 17, 2014, was an officer with the South Zanesville Police Department. Officer Hood testified that he was dispatched in response to a call about a male with a gun threatening Stewart. According to the Officer, when Davis and Stewart answered the front door and were asked what had happened, "they both pointed out into the yard and said that's Josh, he has a gun." Trial Transcript at 252. After Officer Hood told appellant to stop, appellant turned around and started walking in the other direction. Officer Hood then yelled at him to stop, but appellant, who was hunched over, started jogging away and the Officer chased him to appellant's mother's house. Appellant ran into the house and shut the door. When Sandra Hauser, appellant's mother, opened the door, Officer Hood saw appellant taking items out of his pockets and shoving them into the couch. The Officer did not find any handgun on appellant or in the immediate area.

{¶9} Officer Hood testified that after searching appellant again before putting him into his cruiser, he found a soft black holster in the front waistband of appellant's pants and a wad of over $500.00 in cash. When he spoke again with Stewart, who was crying and upset, she told him that appellant had hit her in the head with the barrel of his gun which was a stainless steel revolver. Davis told Officer Hood that, although he did not see

appellant, he heard appellant's voice and after he heard the front door shut, saw appellant walking through the yard. Neither Stewart nor Davis exhibited any injuries.

{¶10} Chief Eric Finley of the Village of South Zanesville testified that when he was looking around Sandra Hauser's house in the daylight the next morning, he saw a white bag underneath the porch in the back. The bag was a large trash bag. Chief Finley had spoken with Renee Tracey, appellant's aunt, who told him that appellant had been at her house the night before the day of the incident and that when appellant left, he had a large white garbage bag full of clothes with him. The white bag under the porch contained a loaded revolver. The gun had been stolen.

{¶11} At trial, Rachel Penrod testified that, on December 17, 2014, she was appellant's girlfriend. Penrod testified that, on December 16, 2014, she was riding around with appellant getting high when they drove by Justin Davis's house. Penrod testified that after appellant threw a beer bottle at the window, she said "good, he was with your bitch [Stewart] last night and they robbed me." Trial Transcript at 326-327. According to her, Penrod met Stewart in a Wal-Mart and gave Stewart money and Stewart "gave me candy for dope." Trial Transcript at 327. Appellant, according to Penrod, then turned the car around and tried getting out of the car, but she stopped him. At the time, appellant had a gun. Penrod testified that although she was high that night, she was not having difficulty remembering what had occurred and that her testimony was true and accurate. Penrod, who has previous felony convictions and was in rehabilitation, testified on cross-examination that she had not been promised anything or threatened concerning her testimony.

{¶12} On June 17, 2015, the second day of trial, defense counsel sought to recall Penrod as a court's witness. Defense counsel initially indicated to the trial court that that morning, appellant's mother had told him that she had received text messages from Kylee Stewart in which Stewart indicated that she had been threatened, that she needed to testify in a particular way or risk going to prison herself. Defense counsel later clarified to the trial court that the statements had been made by Rachel Penrod, not Stewart. Defense counsel stated that the messages were texted on Saturday and that appellant's mother did not review "those from Sunday or Monday." Trial Transcript at 354. Defense counsel told the court that he had no prior knowledge of the statements before Penrod was called so could not cross-examine her as to them. The following discussion was held on the record:

{¶13} MR. McVAY: Your Honor, may I read the texts into the record?

{¶14} THE COURT: Yes.

{¶15} MR. McVAY: First one indicates, at least according to - -

{¶16} THE COURT: There should be a time and date on that.

{¶17} MR. McVAY: I was just going to say that.

{¶18} THE COURT: Okay.

{¶19} MR. McVAY: It indicates, according to the phone at least, that it was Saturday, June 13th at 8:02 p.m. from Penrod, Rachel. And she says, I'm a coward that has absolutely no balls.

{¶20} The next text, again, Saturday, June 13, 8:05 p.m., from again Rachel, the prosecutor told me if I didn't go say what I told was the truth he would fuck me.

{¶21} Next one, June 13th at 8:06 p.m., from Penrod Rachel, that's exactly what he said, so either witness or go to prison with more charges.

{¶22} Next one, Saturday, June 13th at 8:06 p.m., nothing I said back then was good. Nothing. With nothing being in all capital letters. I'm almost to the point of going to prison because to feel like this is hell.

{¶23} And that would be the end of the communications on that date and time.

{¶24} THE COURT: What's inconsistent based on her testimony?

{¶25} MR. McVAY: What's inconsistent is she says that the things that she said happened were not the truth, as I - -

{¶26} THE COURT: Where does it say that?

{¶27} MR. McVAY: Nothing I said back then was good. Nothing. She's referring to that – she's being told to testify in accordance with, I believe - -

{¶28} THE COURT: The truth.

{¶29} MR. McVAY: - - what was said back then in her statements to the police.

{¶30} THE COURT: Just says it wasn't good means probably it wasn't good for this defendant which I think we heard wasn't good for the defendant.

{¶31} Trial Transcript at 355-357.

{¶32} When asked why he did not bring up the statements earlier, defense counsel indicated that he had just learned of them that day. According to him, appellant's mother had referenced him the night before that the texts had been sent, but at the time she did not have her cell phone with her. The trial court overruled appellant's motion to recall Penrod, finding that Penrod's statements were not inconsistent with her prior testimony.

{¶33} Appellant, after the State rested, made a Crim.R. 29 motion for judgment of acquittal. The motion was granted with respect to the receiving stolen property and aggravated menacing counts.

{¶34} At the conclusion of the evidence and at the end of deliberations, the jury, on June 17, 2015, found appellant not guilty of aggravated burglary and of the attempt to commit the offense of kidnapping. He was found guilty of aggravated robbery and tampering with evidence. The jury further found that appellant had a firearm on or about his person or under his control. As memorialized in an Entry filed on July 22, 2015, appellant was sentenced to nine (9) years in prison.

{¶35} Appellant now raises the following assignment of error on appeal:

{¶36} THE TRIAL COURT ERRED WHEN IT DID NOT ALLOW APPELLANT TO RECALL A STATE'S WITNESS AS A COURT WITNESS WHEN IT WAS DISCOVERED HER TESTIMONY MAY HAVE BEEN LESS THAN TRUTHFUL.

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{¶37} Appellant, in his sole assignment of error, argues that the trial court erred when it did not allow him to recall Rachel Penrod as a court witness.

{¶38} Evid.R. 614(A) states that "[t]he court may, on its own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called." "A trial court possesses the authority in the exercise of sound discretion to call individuals as witnesses of the court." *State v. Adams,* 62 Ohio St.2d 151, 404 N.E.2d 144 (1980), paragraph four of the syllabus. A trial court does not abuse its discretion in calling a witness as a court's witness "'when the witness's testimony would be beneficial to ascertaining the truth of the matter and there is some indication that the

witness's trial testimony will contradict a prior statement made to police.'" "*State v. Arnold,* 189 Ohio App.3d 507, 2010–Ohio–5379, 939 N.E.2d 218 (2nd Dist.), at ¶ 44. (Citations omitted). An abuse of discretion implies that the court's attitude was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore,* 5 Ohio St .3d 217, 450 N.E.2d 1140 (1983).

{¶39} In the case sub judice, we find that the trial court did not abuse its discretion in refusing to recall Rachel Penrod as a court witness because the trial court's decision was not arbitrary, unconscionable or unreasonable. The text messages that Penrod sent to appellant's mother were sent on Saturday, June 13, 2015, which is two days before the trial commenced. At such point, Penrod had not testified. As noted by appellee, appellant's mother had knowledge of the information and "had an opportunity to provide it to the defense counsel prior to Miss Penrod testifying." Trial Transcript at 355. After sending the messages, Penrod testified at trial that her testimony was true and accurate. On cross-examination, she testified that she had not been threatened or offered anything in exchange for her truthful testimony. Her testimony was not inconsistent with statements that she made to the police. Moreover, while defense counsel argued that Penrod's text statement to appellant's mother that "Nothing I said back then was good" was inconsistent with her trial testimony, the trial court disagreed stating that "[j]ust says it wasn't good means probably it wasn't good for this defendant which I think what we heard on here wasn't good for the defendant." Trial Transcript at 357. We concur that such statement is not inconsistent with Penrod's trial testimony.

{¶40} Finally, based on the evidence adduced at trial, we find that appellant was not prejudiced by any alleged failure to recall Penrod. At most, Penrod, as noted by

appellant, corroborated all of the other witnesses for the State who testified that appellant went to Justin Davis's house and had a gun.

{¶41} Appellant's sole assignment of error is, therefore, overruled.

{¶42} Accordingly, the judgment of the Muskingum County Court of Common Pleas is affirmed.

By: Baldwin, J.

Farmer, P.J. and

Delaney, J. concur.