

[Cite as *In re Shad*, 2009-Ohio-3611.]

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

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| IN RE: RAYMOND SHAD | : | APPEAL NOS. C-080965 |
| | | C-081174 |
| | : | TRIAL NOS. 08-6164 |
| | | 08-6979 |
| | : | |
| | : | <i>DECISION.</i> |
| | : | |

Criminal Appeal From: Hamilton County Juvenile Court

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: July 24, 2009

Joseph T. Deters, Hamilton County Prosecuting Attorney, and *Ronald W. Springman*, Assistant Prosecuting Attorney, for Appellee,

Timothy J. McKenna, for Appellant.

Please note: This case has been removed from the accelerated calendar.

SYLVIA S. HENDON, Presiding Judge.

{¶1} Appellant Raymond Shad was adjudicated delinquent for the offenses of aggravated menacing and abduction with two firearm specifications. Following his adjudications, Shad filed a motion for a new trial. The trial court denied the motion and committed Shad to the Ohio Department of Youth Services for one and a half years.

{¶2} Shad now appeals, raising five assignments of error for our review. For the following reasons, the judgment of the trial court is affirmed.

Factual Background

{¶3} At trial, William Longmire testified that, on April 23, 2008, he had been living at Shad's house with Shad and his father. On the evening of the 23rd, a young man named Jay had come to Shad's house with the intention of selling Shad a gun. Longmire testified that Jay had first displayed the gun inside the house, and then Jay and Shad had stepped onto Shad's deck and had fired the gun into the air several times.

{¶4} According to Longmire, when Jay and Shad returned inside, Jay accused Longmire of taking his cellular phone. Following this accusation, Shad placed the gun in Longmire's face and forced him to walk around the house at gun-point in search of the phone. Longmire testified that he was terrified that Shad would shoot him. Longmire was able to flee when Shad ordered him to track down Shad's dog, which had escaped out the back door. Instead of retrieving the dog, Longmire ran to the Springfield Township Police Department and reported the incident.

{¶5} Springfield Township police officer Daniel Carter testified that Longmire had reported the incident to him at the police station. According to Carter, Longmire was upset and visibly shaken, and cried as he explained the events. Carter testified concerning the statements that Longmire had made, which corroborated Longmire's testimony at trial. After speaking with Longmire, Officer Carter went to Shad's home and found shell casings on the deck.

{¶6} Shad testified on his own behalf and stated that Jay had come to his house and offered to sell him the gun, but that he had declined to purchase it. According to Shad, only Jay had fired the gun. And Shad further denied holding Longmire at gunpoint. Shad stated that Jay had carried the gun the entire time that they were searching for Jay's phone. Shad further posited that, in his belief, Jay had threatened Longmire and had coerced Longmire into blaming the incident on Shad.

Motion for a New Trial

{¶7} In his first assignment of error, Shad alleges that the trial court erred in denying his motion for a new trial based on newly discovered evidence.

{¶8} Following his adjudications, Shad had filed a motion for a new trial based on the fact that William Longmire had recanted his testimony. The motion asserted that, following the trial, Longmire had visited Shad's counsel and told counsel that it had been Jay who had held him at gunpoint and marched him around the house. The trial court held a hearing on this motion. At this hearing, Longmire testified that he had, in fact, told Shad's counsel that he had lied during trial. But Longmire further testified that his statements to Shad's counsel had been lies, and that his trial testimony had been truthful and accurate. According to Longmire, he had lied to Shad's counsel because he was fearful that Shad would retaliate against

him for his testimony upon being released from the Department of Youth Services. Longmire further stated at this hearing that both Shad and Jay had held him at gunpoint. The trial court denied Shad's motion for a new trial.

{¶9} This court reviews the trial court's ruling on a motion for a new trial for an abuse of discretion.¹ An abuse of discretion "connotes more than an error of law or of judgment; it implies an unreasonable, arbitrary or unconscionable attitude on the part of the court."²

{¶10} A motion for a new trial on the grounds of newly discovered evidence is appropriately granted when the 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."³

{¶11} The law is clear that "[n]ewly discovered evidence which purportedly recants testimony given at trial is 'looked upon with the utmost suspicion.'"⁴ Further, when a motion for a new trial based on newly discovered evidence relies on recanted testimony, "the court must determine which of the contradictory testimonies of the recanting witness is credible and true and would the recanted testimony have materially affected the outcome of the trial."⁵

{¶12} In this case, the trial court properly denied Shad's motion for a new trial. Given that Longmire had testified that his initial recantation was a lie, the trial

¹ *State v. Schiebel* (1990), 55 Ohio St.3d 71, 564 N.E.2d 54, paragraph one of the syllabus.

² *Pembaur v. Leis* (1982), 1 Ohio St.3d 89, 91, 437 N.E.2d 1199.

³ *State v. Petro* (1947), 148 Ohio St. 505, 76 N.E.2d 370, syllabus.

⁴ *State v. Guidry*, 4th Dist. Nos. 04CA36 and 06CA36, 2007-Ohio-4422, ¶32, quoting *State v. Wilburn* (Dec. 22, 1999), 4th Dist. No. 98CA47.

⁵ *Id.*

court was justified in concluding that Longmire's recanted testimony would not have changed the outcome of the trial. Moreover, this newly discovered evidence would have merely impeached or contradicted Longmire's trial testimony.

{¶13} No abuse of discretion occurred, and Shad's first assignment of error is overruled.

Sufficiency and Weight

{¶14} In his second and third assignments of error, Shad argues that the trial court erred in not granting his Crim.R. 29 motion for an acquittal and that his adjudications were against the manifest weight of the evidence. We consider these assignments together.

{¶15} When determining whether a trial court properly overruled a Crim.R. 29 motion for an acquittal, this court employs the same standard that it would use when reviewing a challenge to the sufficiency of the evidence.⁶ Specifically, the 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."⁷ But when reviewing the manifest weight of the evidence, this court must review the record, weigh the evidence, and consider the credibility of the witnesses to determine whether the trier of fact lost its way and created a manifest miscarriage of justice.⁸

{¶16} Shad was adjudicated delinquent for abduction under R.C. 2905.02(A)(2), which provides that "[n]o person, without privilege to do so, shall knowingly * * * [b]y force or threat, restrain the liberty of another person under

⁶ *State v. Jordan*, 167 Ohio App.3d 157, 2006-Ohio-2759, 854 N.E.2d 520, ¶49.

⁷ *State v. Williams*, 74 Ohio St.3d 569, 576, 1996-Ohio-91, 600 N.E.2d 724.

⁸ *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541.

circumstances that create a risk of physical harm to the victim or place the other person in fear.” He was also adjudicated delinquent for aggravated menacing under R.C. 2903.21(A), which provides that “[n]o person shall knowingly cause another to believe that the offender will cause serious physical harm to the person.”

{¶17} In this case, Longmire testified that Shad had placed a gun in his face and forced him to march from room to room in Shad’s home while he searched for a missing cellular phone. Longmire stated that he was fearful that Shad would shoot him. Viewing this evidence in the light most favorable to the prosecution, we hold that the trial court could have found that Shad had committed both abduction and aggravated menacing. Shad’s motion for an acquittal was properly overruled. We further determine that Shad’s adjudications were not against the weight of the evidence. The trial court was in the best position to judge the credibility of the witnesses, and it was entitled to believe Longmire’s testimony and to discredit Shad’s.

{¶18} The second and third assignments of error are overruled.

Admission of Evidence

{¶19} In his fourth assignment of error, Shad alleges that the trial court erred in admitting improper and prejudicial bolstering evidence. Specifically, Shad asserts that it was error to admit into evidence the written statement of William Longmire through Officer Carter.

{¶20} We first note that Shad’s assignment of error is based on an incorrect supposition: that a written statement from Longmire was introduced into evidence in this case. Officer Carter did testify concerning the statements that Longmire had

made when reporting this incident. And while Carter mentioned that Longmire had provided a written statement, no such statement was ever admitted into evidence.

{¶21} Consequently, we review whether the trial court properly allowed Officer Carter to testify concerning Longmire’s statements and not whether a written statement was properly admitted.

{¶22} Following our review of the record, we conclude that Longmire’s statements to Officer Carter were properly admitted as excited utterances. Under Evid.R. 803, an excited utterance is “[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.” Longmire’s statements clearly related to a startling event, specifically being held at gunpoint. And the statements were made while Longmire was still under the stress of the incident. As we have stated, Officer Carter testified that Longmire was upset and visibly shaken, and had cried when reporting the incident.

{¶23} The fourth assignment of error is overruled.

Ineffective Assistance

{¶24} In his fifth assignment of error, Shad argues that he received ineffective assistance from his trial counsel because counsel had failed to produce Jay, the young man who had brought the gun to Shad’s house, to testify at trial.

{¶25} To succeed on a claim of ineffective assistance, it must be demonstrated that counsel’s performance was deficient and that the defendant was

prejudiced by the deficient performance.⁹ Counsel's performance will not be deemed deficient unless it fell below an objective standard of reasonableness.¹⁰

{¶26} The law is well settled that “a trial counsel's choice of witnesses with which to present evidence is a trial tactic.”¹¹ To demonstrate prejudice from counsel's failure to present a particular witness, it must be shown that “the testimony of the witness would have significantly assisted the defense and that the testimony would have affected the outcome of the case.”¹² In this case, the record does not demonstrate what testimony Jay would have provided. Consequently, we cannot determine that Jay's testimony would have affected the outcome of the case.

{¶27} Shad did not receive ineffective assistance of counsel, and the fifth assignment of error is overruled.

{¶28} Accordingly, the judgment of the trial court is affirmed.

Judgment affirmed.

HILDEBRANDT and SUNDERMANN, JJ., concur.

Please Note:

The court has recorded its own entry on the date of the release of this decision.

⁹ *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052.

¹⁰ *Id.* at 688.

¹¹ *State v. Jones*, 12th Dist. No. CA2001-03-056, 2002-Ohio-5505, ¶22.

¹² *Id.*