[Cite as *State v. Washington*, 2010-Ohio-3175.]

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

STATE OF OHIO,	:	APPEAL NO. C-090561 TRIAL NO. B-0808679
Plaintiff-Appellee,	:	*D E C I S I O N.*
vs.	:	
TODD KENDAL WASHINGTON,	:	
Defendant-Appellant.	:	

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: July 9, 2010

Joseph T. Deters, Hamilton County Prosecuting Attorney, and *Philip R. Cummings*, Assistant Prosecuting Attorney, for Plaintiff-Appellee,

Laurie M. Harmon, for Defendant-Appellant.

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

DINKELACKER, Judge.

I. Facts and Procedure

{¶1} Defendant-appellant, Todd Kendal Washington, appeals convictions for one count of aggravated murder under R.C. 2903.01(A) and one count of aggravated robbery under R.C. 2911.01(A)(3). We find no merit in his five assignments of error, and we affirm his convictions.

A. August 2008 Robbery

{¶2} Evidence presented at a bench trial showed that the convictions resulted from two separate incidents with two separate victims. The victim of the aggravated robbery was Thomas Walker. Walker and Washington had attended school and played basketball together. They were not close friends, but they knew each other. Walker was staying with his grandmother and aunt in the St. Leger apartment complex. During his visit, he had received $500 in cash.

{¶3} At approximately 11:00 p.m., a girl told Walker that Washington wanted to see him in the alley. Walker met Washington and the two walked side by side. Suddenly, Washington stopped, pointed a gun at Walker, and said, "Give it up!"

{¶4} As Walker reached into his pocket to get the money, Washington pulled the trigger, but the gun jammed. Washington then struck Walker in the face two or three times with the gun. He then took Walker's money, cellular phone, keys, and shorts.

{¶5} Walker ran from the scene and called the police. He subsequently identified Washington's photograph from a photographic lineup. He suffered gashes to his cheek and eye that required stitches.

{¶6} Earlene Simmons, Walker's aunt, became concerned about him when he did not check in as he usually did and went looking for him. Someone came and told her that he was lying in the hallway, bleeding. She and others found Walker in the hallway with his face swollen. She saw the paramedics come and take him to an ambulance on a stretcher. She later saw him at the hospital after he had received stitches.

B. September 2008 Murder

{¶7} The murder victim, Donald Williams, was also acquainted with Washington. In September 2008, Williams and his fiancée, Termara Hoover, drove to the St. Leger apartment complex, where Williams had grown up, to invite friends to the couple's upcoming wedding. Hoover and the couple's daughters remained in the van while Williams went to speak to his friends.

{¶8} Hoover noticed that Washington was watching Williams from a nearby porch. She said that he had watched for 15 to 20 minutes. As Williams returned to the van, Washington moved off the porch toward him. He timed his approach to intercept Williams just before Williams got to the van.

{¶9} Williams recognized Washington and said, "Oh, Kendal?" Washington then raised a gun and shot Williams four to five times. Williams fell to the ground moaning, "My stomach is burning[,]" and his eyes rolled back in his head. Nearby neighbors called 911. Washington fled from the scene on foot, going behind the apartment complex.

{¶10} Simmons and Linda Swann were eyewitnesses to the shooting. Both recognized Washington as the shooter. Simmons was walking home from a nearby store when she heard shots fired. She saw Washington shooting a gun and saw a man fall down in the street. Swann was sitting on her front stoop, about 50 to 75 feet away, when

she saw Williams walking toward his van. She then saw Washington come out on the sidewalk, shoot Williams, and run away.

{¶11} After the shots were fired, Hoover got out of the van to tend to Williams. She stated that she had heard Williams tell police officers that Washington had shot him and that he thought it was a "hit." Then, he died. Hoover did not know Washington and did not know why he would have shot Williams.

{¶12} Sergeant Michael Machenheimer and Officer Ronald Fuller from the Cincinnati police arrived on the scene while Williams was lying injured in the street. Machenheimer asked Williams if he knew who had shot him, and he said, "Yes, his name is Kendal." Fuller testified that Williams had told him that "Kendal shot me." Neither officer remembered him saying it was a hit.

II. Prior Calculation and Design

{¶13} In his first assignment of error, Washington contends that the trial court erred in convicting him of aggravated murder. He argues that the state presented insufficient evidence of prior calculation and design. This assignment of error is not well taken.

{¶14} R.C. 2903.01(A) provides that "[n]o person shall purposely, and with prior calculation and design, cause the death of another[.]" To prove prior calculation and design, the state must show a "scheme designed to implement the calculated decision to kill."[1]

{¶15} No bright-line test exists that "emphatically distinguishes between the presence or absence of 'prior calculation and design.' "[2] Momentary deliberation is

[1] *State v. Coley*, 93 Ohio St.3d 253, 263, 2001-Ohio-1340, 754 N.E.2d 1129; *State v. Byrd*, 1st Dist. No. C-050490, 2007-Ohio-3787, ¶48.
[2] *Coley*, supra, quoting *State v. Taylor*, 78 Ohio St.3d 15, 20, 1997-Ohio-243, 676 N.E.2d 82; *Byrd*, supra, at ¶48.

insufficient.[3] But prior calculation and design can exist when the killer quickly conceives and executes the plan to kill within a few minutes.[4]

{¶16} Hoover testified that she saw Washington on a nearby porch as Williams got out of their van to talk to friends, and that he watched Williams for 15 to 20 minutes. As Williams approached the van, Washington timed his approach so that he intercepted Williams before Williams reached the van. Then, he shot Williams five times. Other witnesses' versions of the events coincided with Hoover's.

{¶17} This sequence of events showed more than momentary deliberation or an "almost instantaneous eruption of events[.]"[5] Even though only 15 to 20 minutes elapsed, the facts were sufficient to show that Washington had "adopted a plan to kill."[6] Consequently, the state presented sufficient evidence to show prior calculation and design.

{¶18} Our review of the record shows that a rational trier of fact, after viewing the evidence in a light most favorable to the prosecution, could have found that the state had proved beyond a reasonable doubt all the elements of aggravated murder under R.C. 2903.01(A). Therefore, the evidence was sufficient to support the conviction.[7] Washington contends that Hoover's testimony was not credible, but matters as to the credibility of evidence were for the trier of fact to decide.[8] Consequently, we overrule Washington's first assignment of error.

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[3] *State v. D'Ambrosio*, 67 Ohio St.3d 185, 196, 1993-Ohio-170, 616 N.E.2d 909; *State v. Richardson* (1995), 103 Ohio App.3d 21, 24, 658 N.E.2d 321.
[4] *Coley*, supra, at 264; *Byrd*, supra, at ¶48.
[5] See *Richardson*, supra, at 25.
[6] See *Coley*, supra, at 263.
[7] See *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus; *State v. Crawford*, 1st Dist. No. C-070816, 2008-Ohio-5764, ¶38-44.
[8] *State v. Bryan*, 101 Ohio St.3d 272, 2004-Ohio-971, 804 N.E.2d 433, ¶116; *State v. Jones*, 1st Dist. No. C-080518, 2009-Ohio-4190, ¶43.

III. Hearsay

{¶19} In his second assignment of error, Washington contends that the trial court erred in admitting Williams's hearsay statements into evidence as dying declarations. He contends that the evidence did not show that Williams believed that death was imminent. This assignment of error is not well taken.

{¶20} Evid.R. 804(B)(2) sets forth the dying-declaration exception to the general prohibition against hearsay. It provides that "[i]n a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant, while believing that his or her death was imminent, concerning the cause or circumstances of what the declarant believed to be his or her impending death" are not excluded by the hearsay rule if the declarant is unavailable as a witness.

{¶21} To make dying declarations admissible, the evidence must show that the deceased's statements were made under "a sense of impending death, which excluded from the mind of the dying person all hope or expectation of recovery."[9] While the declarant's mental condition at the time he or she made the statements is decisive, it is often difficult to determine if a declarant sensed that his or her death was rapidly approaching.[10]

{¶22} The evidence in this case supports the trial court's finding that Williams believed that his death was imminent. He had been shot four to five times at close range, and he had fallen to the ground, stating "my stomach is burning." He squeezed his fiancée's hand as she implored him to stay with her. His eyes kept rolling back in his head, and his breathing was labored. Although he was able to tell police officers that "Kendal" had shot him, he died moments later. Under the

[9] *State v. Ray*, 8th Dist. No. 93435, 2010-Ohio-2348, ¶40; *State v. Woods* (1972), 47 Ohio App.2d 144, 147, 352 N.E.2d 598, quoting *Robbins v. State* (1857), 8 Ohio St. 131, 164.
[10] *State v. Morales*, 1st Dist. Nos. C-070776 and C-080214, 2009-Ohio-1800, ¶16; *Woods*, supra, at 147.

circumstances, we cannot hold that the trial court abused its discretion in admitting the statements into evidence as dying declarations.[11]

{¶23} This case is distinguishable from *Woods*, supra, on which Washington relies. In that case, the court held the evidence did not show that the declarant had sensed that his death was imminent.[12] The declarant did not die until the day after he had been shot. At the hospital, he did not state that he thought he was going to die; he only complained about pain in his leg. The attending physician also testified that he did not believe that the declarant thought he was going to die.

{¶24} Washington also contends that Hoover's testimony that Williams had stated that the shooting was a "hit" was especially prejudicial. He points out that the only person who heard the alleged statement was Hoover. But the statement was admissible as a dying declaration, and the trier of fact was free to believe some, all, or none of any witness's testimony.[13]

{¶25} Further, even if the statement was not admissible, the case was tried to the court, and we must presume that the court considered only relevant, competent, and material evidence unless the record shows otherwise.[14] Nothing in the record shows that the court considered that statement in making its decision.

{¶26} Even if Williams's statements were not dying declarations, the trial court found that they would also have been admissible under the hearsay exception for excited utterances. Evid.R. 803(2) defines an excited utterance as "[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." Excited utterances are

[11] See *Morales*, supra, at ¶16; *State v. Early*, 6th Dist. No. L-01-1454, 2004-Ohio-471, ¶18-27.
[12] *Woods*, supra, at 147.
[13] *Jones*, supra, at ¶43.
[14] *State v. Frazier*, 115 Ohio St.3d 139, 2007-Ohio-5048, 873 N.E.2d 1263, ¶214; *State v. Brogan*, 1st Dist. No. C-070835, 2008-Ohio-5382, ¶10.

reliable because they do not entail an opportunity for the declarant to reflect, thus reducing the chance to fabricate or distort the truth.[15] In analyzing whether a statement is an excited utterance, "[t]he controlling factor is whether the declaration was made under such circumstances as would reasonably show that it resulted from impulse rather than reason and reflection."[16]

{¶27} In this case, Williams was under the stress of an undoubtedly startling condition—he had been shot four to five times. He immediately identified "Kendal" as the person who had just shot him.

{¶28} Further, the fact that he was responding to the police officers' questions did not preclude the admission of his statements as excited utterances. The admission of statements as excited utterances is not precluded by questioning that (1) is not coercive or leading; (2) facilitates the declarant's expression of what is already the natural focus of the declarant's thoughts; and (3) does not destroy "the domination of the nervous excitement over the declarant's reflective faculties."[17]

{¶29} In this case, the questioning met all three of these criteria, and Williams's statements were also admissible under the exception for excited utterances. Consequently, the trial court did not err in admitting Williams's statements into evidence, and we overrule his second assignment of error.

IV. Confrontation Clause

{¶30} In his third assignment of error, Washington again contends that the trial court erred in admitting Williams's hearsay statements into evidence. He argues that the statements were testimonial and that their admission violated his

[15] *State v. Wallace* (1988), 37 Ohio St.3d 87, 88, 524 N.E.2d 466; *State v. Lukacs*, 1st Dist. Nos. C-090309 and C-090310, 2010-Ohio-2364, ¶20.
[16] *Lukacs*, supra, at ¶21, quoting *State v. Tebelman*, 3rd Dist. No. 12-09-01, 2010-Ohio-481, ¶29.
[17] *State v. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235, 818 N.E.2d 229, ¶95, quoting *Wallace*, supra, at paragraph two of the syllabus.

right to confront the witnesses against him. This assignment of error is not well taken.

{¶31} The Sixth Amendment to the United States Constitution states, "In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him[.]" In *Crawford v. Washington*,[18] the United States Supreme Court held that the Confrontation Clause bars "testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross-examination."[19]

{¶32} The Court distinguished between testimonial and nontestimonial hearsay and held that only testimonial statements implicate the Confrontation Clause.[20] It did not comprehensively define "testimonial," but stated that the core class of testimonial statements "includes statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."[21] Further, the Confrontation Clause does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.[22]

{¶33} This court has held that the admission of dying declarations into evidence does not violate the Confrontation Clause.[23] We also pointed out in *Nix* that, even if it did, the statements in question in that case—a murder victim's dying declarations made to a police officer while the victim was lying on the sidewalk after

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[18] (2004), 541 U.S. 36, 124 S.Ct. 1354.
[19] Id. at 53-54; *Lukacs*, supra, at ¶10.
[20] *Crawford*, supra, at 68; *Lukacs*, supra, at ¶11.
[21] *State v. Arnold*, ___ Ohio St.3d ___, 2010-Ohio-2742, ___ N.E.2d ___, ¶13, quoting *Crawford*, supra, at 52.
[22] *Lukacs*, supra, at ¶11; *State v. Matthews*, 1st Dist. Nos. C-060669 and C-060692, 2007-Ohio-4881, ¶10.
[23] *State v. Nix*, 1st Dist. No. C-030696, 2004-Ohio-5502, ¶75-76. Accord *State v. Duncan*, 8th Dist. No. 87220, 2006-Ohio-5009, ¶22.

being shot—were not testimonial because the victim was not in police custody and because his statements were not the product of any form of structured questioning.

{¶34} Similarly, in this case, Williams was lying in the street bleeding. He was not in police custody, and his statements were not the result of formal police questioning.[24] Therefore, his statements were not testimonial, and their admission did not violate the Confrontation Clause.

{¶35} The same logic would also have applied if the trial court had admitted Williams's statements as excited utterances. In the context of excited utterances to police officers, the United States Supreme Court has held that the key to determining whether statements are testimonial is whether the questioning by police or a police counterpart was seeking information needed to respond to a present emergency or whether it was seeking information about past events as part of the investigation of a crime.[25]

{¶36} In this case, the police were responding to the present emergency of Williams's shooting; they were trying to assist him and to catch the shooter before he endangered anyone else. Therefore, Williams's statements were not testimonial, and their admission into evidence did not violate the Confrontation Clause. We overrule his third assignment of error.

V. Severance

{¶37} In his fourth assignment of error, Washington contends that the trial court erred in denying his motion to sever the offenses for trial. He argues that the joinder of the offenses prejudiced him because the two incidents were completely

[24] Compare *State v. Robinson*, 1st Dist. No. C-060434, 2007-Ohio-2388, ¶14-15.
[25] *Davis v. Washington* (2006), 547 U.S. 813, 822, 126 S.Ct. 2266; *State v. Fry*, 125 Ohio St.3d 163, 2010-Ohio-1017, 926 N.E.2d 1239, ¶100-102; *Lukacs*, supra, at ¶24.

unrelated and because he wished to testify in the robbery case, but not in the murder case. This assignment of error is not well taken.

{¶38} We note that Washington filed, and the trial court denied, his motion to sever before trial. He did not renew his motion at the close of the state's evidence or at the close of trial. His failure to renew his motion has waived all but plain error on appeal.[26]

{¶39} Even if Washington had not waived the issue, we cannot hold that the trial court abused its discretion in denying his motion to sever. Two or more offenses may be charged in the same indictment if the offenses are "of the same or similar character, or are based on the same act or transaction, or are based on two or more acts or transactions connected together or constituting parts of a common scheme or plan, or are part of a course of criminal conduct."[27] The law favors joinder of charges that are of the same or similar character to conserve judicial resources, reduce the likelihood of incongruous results in successive trials, and diminish inconvenience to witnesses.[28]

{¶40} In this case, both incidents occurred within a five-week period in the same location. In both instances, Washington used a handgun to attempt to shoot the victim. In the Walker offense, the gun jammed, and Washington could not shoot, but in the Williams offense, Washington successfully shot and killed him. Both victims knew Washington and were able to identify him. The offenses were of the same or similar character, and they were sufficiently connected together to show a common scheme or plan. Thus, joinder of the offenses was proper.

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[26] *State v. Moshos*, 12th Dist. No. CA2009-06-008, 2010-Ohio-735, ¶77; *State v. Robertson*, 1st Dist. Nos. C-070151 and C-070159, 2008-Ohio-2562, ¶11.
[27] Crim.R. 8(A).
[28] *State v. Lott* (1990), 51 Ohio St.3d 160, 163, 555 N.E.2d 293; *Moshos*, supra, at ¶78; *State v. Webster*, 1st Dist. Nos. C-070027 and C-070028, 2008-Ohio-1636, ¶31.

{¶41} If the defendant would be prejudiced by an otherwise proper joinder, a trial court may grant a severance under Crim.R. 14.[29] The defendant bears the burden to prove prejudice and must show that the trial court abused its discretion in denying severance.[30]

{¶42} Washington claims that he was prejudiced because he wanted to testify regarding the robbery count, in which the evidence was weak because Walker was not a credible witness, but he wished to assert his right to remain silent on the murder count. He also contends that he wished to assert an unspecified affirmative defense on the robbery count.

{¶43} Washington relies upon *Cross v. United States*,[31] in which the court held that joinder of offenses is prejudicial when the accused wishes to testify on one but not the other of two joined offenses that are distinct in time, place, and evidence.[32] But as we have previously noted, the two offenses in this case were of the same or similar character and were connected.[33]

{¶44} Further, the court that decided *Cross* has narrowed its view of what constitutes prejudice.[34] The defendant must now show that he has both important testimony to give concerning one count and a strong need to refrain from testifying on the other. He must present enough information regarding the nature of the testimony he wishes to give on one count and his reasons for not wishing to testify on the other to satisfy the court that his claim of prejudice is genuine.[35]

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[29] *Coley*, supra, at 259; *Webster*, supra, at ¶32.
[30] *Coley*, supra, at 259; *Robertson*, supra, at ¶10.
[31] (C.A.D.C.1964), 335 F.2d 987.
[32] Id. at 989.
[33] See *United States v. Jacobs* (C.A.6, 2001), 244 F.3d 503, 507.
[34] *State v. Roberts* (1980), 62 Ohio St.2d 170, 177, 405 N.E.2d 247; *Unites States v. Scivola* (C.A.1, 1985), 766 F.2d 37, 42-43.
[35] *State v. Gardenshire* (Apr. 17, 1980), 8th Dist. Nos. 40814 through 40818; *Scivola*, supra, at 42-43; *Baker v. United States* (C.A.D.C.1968), 401 F.2d 958, 976-977.

{¶45} In the trial court in this case, Washington only asserted that he wished to testify regarding one offense but not the other, and that, if he could not testify about the alleged robbery, he would lose unspecified affirmative defenses. Thus, he failed to present sufficient information to show prejudice.

{¶46} Even if Washington had shown prejudice, a prosecutor can use two methods to negate claims of prejudice. First, if one offense would have been admissible under Evid.R. 404(B) in the trial of the other, no prejudice results from joinder. Second, the state can negate prejudice by showing that evidence of each crime joined is simple and direct.[36] The evidence in this case meets both of these tests.

{¶47} Consequently, we cannot hold that the trial court's decision to overrule Washington's motion to sever was so arbitrary, unreasonable, or unconscionable as to connote an abuse of discretion,[37] much less that it rose to the level of plain error.[38] We overrule Washington's fourth assignment of error.

VI. Discovery

{¶48} In his fifth assignment of error, Washington contends that the trial court erred in failing to impose a sanction for the prosecution's discovery violation. He argues that he was prejudiced by the state's failure to disclose Williams's statement to Hoover that the shooting was a "hit." This assignment of error is not well taken.

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[36] *Coley*¸ supra, at 259-261; *Webster*, supra, at ¶32.
[37] *State v. Clark*, 71 Ohio St.3d 466, 470, 1994-Ohio-43, 644 N.E.2d 331; *Lukacs*, supra, at ¶8.
[38] See *State v. Wickline* (1990), 50 Ohio St.3d 114, 119-120; 552 N.E.2d 913; *State v. Baldwin*, 1st Dist. No. C-081237, 2009-Ohio-5348, ¶6; *State v. Burrell*, 1st Dist. No. C-030803, 2005-Ohio-34, ¶15.

{¶49} The trial court has broad discretion to regulate discovery and to determine the appropriate sanction for a discovery violation.[39] The court must inquire into the circumstances surrounding the discovery violation and impose the least severe sanction consistent with the purpose of the rules of discovery.[40]

{¶50} The state disclosed in this case that it intended to use Williams's statements identifying "Kendal" as the person who had shot him. Even if the failure to disclose that Hoover had heard Williams say that the shooting was a "hit" was a discovery violation, Washington was not prejudiced because defense counsel knew about the statement from testimony Hoover had given about it at a previous hearing. Further, the record does not show that the trial court relied on that statement in finding Washington guilty of the murder.

{¶51} Washington asked for the statement to be excluded, a severe sanction. He did not ask for a continuance, which is the favored method to avoid prejudice from a discovery violation and to ensure that the charges against an accused are tried timely and fairly.[41]

{¶52} Under the circumstances, we cannot hold that the trial court abused its discretion by failing to impose a sanction for the alleged discovery violation. We overrule Washington's fifth assignment of error and affirm the trial court's judgment.

Judgment affirmed.

SUNDERMANN, P.J., and **HENDON, J.,** concur.

Please Note:

The court has recorded its own entry this date.

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[39] *State v. Wiles* (1991), 59 Ohio St.3d 71, 78, 571 N.E.2d 97; *Matthews*, supra, at ¶16.
[40] *Lakewood v. Papadelis* (1987), 32 Ohio St.3d 1, 511 N.E.2d 1138, paragraph two of the syllabus; *Matthews*, supra, at 16.
[41] *State v. Brewster*, 1st Dist. Nos. C-030024 and C-030025, 2004-Ohio-2993, ¶38.