**[Cite as *State v. Hollis* , 2010-Ohio-3945.]**

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
PICKAWAY COUNTY

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| STATE OF OHIO, | : | |
| | : | |
| Plaintiff-Appellee, | : | Case No. 09CA9 |
| | : | |
| vs. | : | **Released: August 5, 2010** |
| | : | |
| JAMES J. HOLLIS, | : | DECISION AND JUDGMENT |
| | : | ENTRY |
| Defendant-Appellant. | : | |

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APPEARANCES:

Benjamin J. Partee, Chillicothe, Ohio, for Appellant.

Judy C. Wolford, Pickaway County Prosecutor, Circleville, Ohio, for Appellee.

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McFarland, P.J.:

**{¶1}** This is an appeal from a Pickaway County jury verdict finding Appellant guilty of complicity to murder, an unspecified felony, in violation of R.C. 2923.03 and 2903.02(A). On appeal, Appellant raises two assignments of error, contending that (1) the trial court erred in denying his Criminal Rule 29 motion for acquittal as the state failed to present sufficient evidence to support a conviction for complicity to murder; and (2) that his conviction was against the manifest weight of the evidence. Because we conclude that Appellant's conviction was supported by sufficient evidence,

we cannot conclude that the trial court erred in denying Appellant's Crim.R. 29 motion for acquittal as to the charge of complicity to murder. As such, we overrule Appellant's first assignment of error. Further, in light of our conclusion that Appellant's conviction was supported by competent, credible evidence, we overrule Appellant's second assignment of error. Accordingly, the judgment of the trial court is affirmed.

FACTS

**{¶2}** The victim, an 83 year-old woman named Mary E. Cook, lived at 213 W. Corwin St. in Circleville, Ohio. She had an arrangement with her neighbor whereby she would pin her drapes closed each night and then unpin them each morning, to signal that she was okay. When her neighbor arrived home in the late afternoon on July 21, 1990, he noticed that Mary's drapes were still closed and he called the police. The Circleville police arrived soon after to conduct a well-being check. Upon arriving, the responding officers found the doors to Mary's house locked, no signs of forced entry, and an open window with an overturned bucket placed under it in the back of the house.[1] With one officer hoisting the other officer through the window, entry was gained into the house where Mary was found dead in her bed. Her body was nude and blood-soaked linens were found wrapped

[1] The record indicates that this was not unusual as Mary normally left the window open in order for cats to go in and out of the house.

around her head. Her house appeared to have been ransacked. All of the bed linens were removed, packaged and sent to BCI for analysis, which identified the presence of pubic hairs that did not belong to the victim. Also, it was determined that saliva located on bite marks left on the victim belonged to someone other than the victim.

**{¶3}** Although several individuals, including Appellant, were questioned as part of the police investigation surrounding Mary's murder, no charges were brought. Appellant, when questioned, offered an alibi, claiming to have been with friends at a party in Washington Court House at the time of the victim's murder. Two years later, when questioned again after committing other various crimes, Appellant voluntarily submitted pubic hair and saliva standards. Test results based upon these standards indicated that Appellant was not a match to the evidence recovered from the crime scene and as such, he was removed from the suspect list for the murder of Mary Cook.

**{¶4}** It was not until several years later, sometime in late 2005 or early 2006, once DNA analysis had become available, that some of the evidence gathered at the crime scene, specifically the pubic hairs, were resubmitted for testing. In July of 2007, the Circleville police department was notified that a match had been identified, linking Appellant's DNA to the crime.

Specifically, the testing indicated that pubic hairs found on the bedding wrapped around the victim's head which had been recovered from the crime scene were a low level match to Appellant's DNA profile.[2] Based upon this, Appellant was arrested.

**{¶5}** At this point, all of the evidence gathered on the day of the crime was resubmitted to BCI for retesting. During this process, additional pubic hairs were identified in the bedding that was wrapped around the victim's head. This additional testing indicated there was only a 1 in 28,340,000,000,000 chance that the newly identified pubic hairs did not belong to Appellant.[3] Additional DNA evidence in the form of semen and saliva were discovered at this time also. Testing on these samples did not match Appellant, and instead indicated that another individual was also present at the scene of the crime.

**{¶6}** On June 6, 2008, Appellant was indicted for complicity to aggravated murder, an unspecified felony, in violation of R.C. 2923.03 and 2903.01(B), and complicity to murder, an unspecified felony, in violation of R.C. 2923.03 and 2903.02(A). Appellant pled not guilty to the charges and the matter proceeded to a jury trial.

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[2] This initial testing indicated there was a 1 in 682 chance that the recovered pubic hairs did not belong to Appellant.

[3] Although Appellant challenged the collection, handling and analysis of this DNA evidence at the trial of this matter, he does not raise such challenges on appeal and instead argues alternative theories as to how it could have legitimately gotten there.

**{¶7}** At trial, the State presented multiple witnesses, including Officer Tom Royster, Sergeant Donald Barton, Dr. Michael Geron, Dr. Patrick Fardal, Detective Kevin Clark, Michelle Yezzo and Mark Losko. Officer Royster testified to being contacted to conduct a well-being check on Mary Cook on July 21, 1990, pursuant to a call from Mary's neighbor. He testified that upon arriving at the house, he found newspapers from the last two days on Mary's front porch, and he also found an open window in the rear with an overturned bucket beneath it. He explained that he hoisted another officer through the window in order to enter the house. Upon entering the house the officers found Mary Cook's body in her bedroom.

**{¶8}** Sergeant Barton testified to being dispatched to Mary Cook's home. He testified that when he arrived Officer Royster was present, as well as a Lieutenant Kinney, and that Coroner Geron, assistant prosecutor Gene Long and BCI arrived while he was there. He testified that the condition of Mary's house indicated signs of struggle. He testified that the bed spread, mattress cover, pink fitted bed sheet, nightgown and pillow case that were wrapped around the victim's head were removed and placed into a large plastic bag to be held as evidence, and were sent to BCI for testing. Sergeant Barton testified a second time at trial, explaining that as part of the murder investigation, Appellant was questioned approximately three days

after the murder because his name had been provided as someone who had done yard work for Mary. He stated that Appellant provided an alibi during the interview, which was verified, and that as a result they focused on other suspects.

**{¶9}** Pickaway County Coroner Michael Geron, M.D. also testified. He testified that the victim was found dead, nude and "spread eagled" in the bed, her head wrapped in blood-soaked clothing. He testified that the victim appeared to have suffered multiple blows to her head by a blunt object and also stated that the victim had bite marks on her right breast and lower right leg. He testified that the exact time of death was unknown, but that in his opinion she had been dead at least 12 to 14 hours.

**{¶10}** Dr. Patrick Fardal, retired chief forensic pathologist for Franklin County who performed the autopsy on the victim, also testified at trial. He testified that the victim had sustained traumatic injuries from a foreign object to her head, face and eye had sustained a broken neck. He also testified that her autopsy indicated that she has sustained injuries in her vaginal and anal areas from apparent insertion of a foreign object. Dr. Fardal testified that swabs were taken to test for saliva and semen. He testified that the victim's cause of death was a fracture of her sixth cervical vertebra.

**{¶11}** Detective Kevin Clark testified that he spent days after the victim's murder canvassing the neighborhood to develop a list of potential suspects, compiling names of over forty individuals who were questioned. He explained that after two years, Appellant's name kept coming up and that in 1992 Appellant was brought back in for questioning. It was during this round of questioning that Appellant voluntarily submitted saliva and pubic hair standards, which were sent to BCI. The form submitted to BCI along with the standards indicated that Appellant was a black male, rather than accurately stating he was a biracial male. Based upon the results of this submission, Appellant was ruled out as a suspect.

**{¶12}** Detective Clark further testified that a decision was made in 2006 to resubmit the hairs that had been recovered from the crime scene for additional testing, due to the availability of new DNA testing methods. At that point, an initial, although low-level, match was made with Appellant, indicating that the hairs submitted had a 1 in 682 chance of not belonging to Appellant. Detective Clark explained that Appellant was arrested based upon the information and that Appellant was again interviewed. The record reflects that a tape recording of Appellant's interview was played for the jury. In the recording, Appellant acknowledges having known Mary Cook and that he performed various odd jobs for her. He stated that he had been

in her house on several occasions prior to her death and had used her bathroom. As such, he offered some theories as to how his pubic hair may have legitimately gotten into her house and once again claimed to have been at a party in Washington Court House on the night of the victim's murder.

**{¶13}** Additional testing was ordered after this interview. Specifically, all of the materials that were wrapped around the victim' head were resubmitted to BCI. Michelle Yezzo, retired forensic scientist from BCI also testified on behalf of the State at trial, explaining her role in testing the samples submitted right after the crime, prior to the availability of DNA testing. She testified that she initially determined, based upon the information provided to her which stated that Appellant was a black male, that the hairs recovered from the crime scene were not his, as they were Caucasian hair. She explained that had she known that Appellant was biracial, she would not have excluded him at that time.

**{¶14}** Finally, Mark Losko, a DNA forensic scientist at BCI, testified for the State. He explained his role in re-testing the hairs recovered from the crime scene, once the evidence was resubmitted to BCI. He testified that his initial tests indicated there was a 1 in 682 chance that the hairs recovered did not belong to Appellant. After obtaining these initial results, all of the items that had been wrapped around the victim's head on the night of her murder

were resubmitted to BCI for additional testing. Mark Losko testified that in examining these items he found additional pubic hairs, as well as semen. Losko testified that DNA comparison performed on the hairs indicated only a 1 in 28,340,000,000,000 chance that they did not belong to Appellant, explaining that such a match is a "very rare profile." However, as with the saliva evidence, the semen did not match Appellant's DNA profile.

**{¶15}** After the completion of the State's case, Appellant moved for acquittal pursuant to Crim. R. 29. The trial court sustained the motion as to the complicity to aggravated murder count, but allowed the case to proceed as to the complicity to murder count, after which Appellant presented three alibi witnesses, including John Keaton, Timothy Buell and Lovie Marie Buell.

**{¶16}** Each of Appellant's alibi witnesses confirmed that Appellant was at a party in Washington Court House on the night of the victim's murder. John Keaton testified that he, Appellant and a few others left Circleville at approximately 5:00 p.m. on the evening of July 20, 1990, and went to a party at Timothy Buell's house in Washington Court House. He testified that they stayed there until approximately 3:00 in the morning, at which point they left and returned to Circleville. Keaton testified that the group returned to his house, where Appellant "crashed" in a chair and was

still there sleeping when Keaton later awoke. He also admitted on cross examination that he drank a lot that evening and smoked marijuana. Tim Buell and his wife, Lovie Marie Buell, essentially confirmed Appellant's alibi with their testimony, although in less detail.

**{¶17}** After hearing the evidence, the jury returned a verdict, finding Appellant guilty of complicity to murder. The trial court sentenced Appellant to an indefinite term of imprisonment of fifteen years to life. It is from this conviction that Appellant now brings his timely appeal, assigning the following errors for our review.

ASSIGNMENTS OF ERROR

"I. THE TRIAL COURT ERRED IN DENYING APPELLANT'S CRIMINAL RULE 29 MOTION TO ACQUIT AS THE STATE FAILED TO PRESENT SUFFICIENT EVIDENCE TO SUPPORT A CONVICTION FOR COMPLICITY TO MUR[DER].

II. APPELLANT'S CONVICTION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

ASSIGNMENT OF ERROR I

**{¶18}** In his first assignment of error, Appellant contends that the trial court erred in denying his Crim.R. 29 motion for acquittal, arguing that the State failed to produce sufficient evidence to support a conviction for complicity to murder.

**{¶19}** The standard of review for a Crim.R. 29(A) motion is generally the same as a challenge to the sufficiency of the evidence. See *State v. Hairston*, Scioto App. No. 06CA3081, 2007-Ohio-3880, at ¶ 16; *State v. Brooker*, Washington App. No. 06CA19, 2007-Ohio-588, at ¶ 8. Appellate courts must determine whether the evidence adduced at trial, if believed, supports a finding of guilt beyond a reasonable doubt. See *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386, 1997-Ohio-52, 678 N.E.2d 541; *State v. Jenks* (1991), 61 Ohio St.3d 259, 273, 574 N.E.2d 492.

**{¶20}** In other words, when reviewing a case to determine if the record contains sufficient evidence to support a criminal conviction, we must "examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is 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. Smith*, Pickaway App. No. 06CA7, 2007-Ohio-502, at ¶ 33, quoting *State v. Jenks* at paragraph two of the syllabus. See, also, *Jackson v. Virginia* (1979), 443 U.S. 307, 319, 99 S.Ct. 2781.

**{¶21}** The sufficiency of the evidence test "raises a question of law and does not allow us to weigh the evidence." *Smith* at ¶ 34, citing *State v.*

*Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717. Instead, the sufficiency of the evidence test " 'gives full play to the responsibility of the trier of fact [to fairly] resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts .' " *Smith* at ¶ 34, quoting *Jackson* at 319. This court will "reserve the issues of the weight given to the evidence and the credibility of witnesses for the trier of fact." *Smith* at ¶ 34, citing *State v. Thomas* (1982), 70 Ohio St.2d 79, 79-80, 434 N.E.2d 1356; *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, paragraph one of the syllabus.

**{¶22}** Appellant was convicted of complicity to murder, in violation of R.C. 2923.03 and 2903.02(A). The version of R.C. 2903.02 that was in effect at the time of the victim's murder provided in section (A) that "[n]o person shall purposely cause the death of another." R.C. 2923.03, forbidding complicity, states that "[n]o person, acting with the kind of culpability required for the commission of an offense, shall do any of the following: * * * (2) Aid or abet another in committing the offense; * * *." Thus, in order to support a conviction for complicity to murder by aiding and abetting, it must be shown that the defendant "supported, assisted, encouraged, cooperated with, advised, or incited the principal in the commission of the crime, and that the defendant shared the criminal intent of the principal." *State v.*

*Johnson* (2001), 93 Ohio St.3d 240, 2001-Ohio-1336, 754 N.E.2d 796, syllabus. The defendant's "intent may be inferred from the circumstances surrounding the crime." Id.

**{¶23}** Appellant argues that the State's only evidence consisted of a few of his pubic hairs found at the crime scene and that the presence of a second person's semen and saliva at the crime scene indicated that another individual actually raped and murdered the victim. Further, while Appellant concedes that his pubic hair was found in the victim's bedding, he argues that no evidence was presented placing him at the scene of the crime on the day in question, offering instead alternative theories as to how his pubic hairs might have been lost in the victim's house.[4]

**{¶24}** Despite the arguments advanced by Appellant, we find sufficient evidence to support Appellant's conviction for complicity to murder. The State argues that because Appellant's pubic hairs, not arm, head or beard hair, were found in the bedding that was wrapped around the victim's head, that Appellant's presence and involvement in the crime were established. The State acknowledges the presence of DNA of another individual and argues that although it was unable to establish which perpetrator performed which act against the victim, it was able to show that

[4] As previously noted, Appellant was familiar with the victim in that he had occasionally performed odd jobs for her. As such, he claimed that he had been in her house and had used her bathroom on previous occasions.

two people were present at the scene of the crime. The jury reasonably inferred, no doubt based upon the DNA evidence, that Appellant was one of the two individuals.

**{¶25}** On appeal, the State focuses its argument on the fact that the specific DNA of Appellant's that was found at the crime scene was in the form of pubic hair, as opposed to any other type of hair. At trial, the State emphasized that the pubic hair was found in the victim's bedding, which was found wrapped around her head, as opposed to being found in bathroom, where Appellant claimed he had been on prior visits to the victim's house. Further, at trial the State also placed much emphasis on the fact that an overturned bucket was found underneath an open window to the victim's house, which was the determined point of entry. The State demonstrated at trial that even with the bucket placed under the window, entry through the window required one individual to hoist the other individual up and through the window.[5] The State argued, and the jury apparently agreed, that this evidence indicated that two individuals, one of which was Appellant, cooperated together in entering the victim's residence, and ultimately murdering her.

[5] This was demonstrated through the testimony of the officers that initially responded to the victim's home for what began as a well-being check.

**{¶26}** As such, after reviewing the foregoing evidence in a light most favorable to the State, we believe that any rational trier of fact could have found the essential elements of complicity to murder proven beyond a reasonable doubt. Thus, we find sufficient evidence to support Appellant's conviction and, as a result, conclude that the trial court did not err in denying Appellant's Crim.R. 29 motion for acquittal. Accordingly, we overrule Appellant's first assignment of error.

ASSIGNMENT OF ERROR II

**{¶27}** In his second assignment of error, Appellant contends that his conviction is against the manifest weight of the evidence.

**{¶28}** "The legal concepts of sufficiency of the evidence and weight of the evidence are both quantitatively and qualitatively different." *State v. Thompkins* at 386. Sufficiency is a test of the adequacy of the evidence, while "[w]eight of the evidence concerns 'the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other[.]' " *State v. Sudderth*, Lawrence App. No. 07CA38, 2008-Ohio-5115, at ¶ 27, quoting *Thompkins* at 387.

**{¶29}** "Even when sufficient evidence supports a verdict, we may conclude that the verdict is against the manifest weight of the evidence, because the test under the manifest weight standard is much broader than

that for sufficiency of the evidence." *Smith* at ¶ 41. When determining whether a criminal conviction is against the manifest weight of the evidence, we "will not reverse a conviction where there is substantial evidence upon which the [trier of fact] could reasonably conclude that all the elements of an offense have been proven beyond a reasonable doubt." *State v. Eskridge* (1988), 38 Ohio St.3d 56, 526 N.E.2d 304, paragraph two of the syllabus. See, also, *Smith* at ¶ 41. We "must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial granted." *Smith* at ¶ 41, citing *State v. Garrow* (1995), 103 Ohio App.3d 368, 370-371, 659 N.E.2d 814; *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717. However, "[o]n the trial of a case, * * * the weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts." *State v. DeHass* at paragraph one of the syllabus.

**{¶30}** In support of this assignment of error, Appellant reminds us that he presented three alibi witnesses, all of which told the same basic story. He also challenges the jury's determination of guilt, which he claims was based solely upon the presence of his pubic hair at the crime scene. Appellant

argues that he presented several different scenarios as to how his pubic hair may have been lost in the victim's home. He also argues that while the State proved that another person was present at the scene of the crime, by virtue of the presence of another person's semen and saliva on the victim's person and bedding, that it failed to prove that Appellant was present on the night of the crime. Thus, Appellant essentially argues that no rational trier of fact could have found that the State proved all of the essential elements of the crime.

**{¶31}** Despite these arguments, we find that Appellant's conviction is not against the manifest weight of the evidence. In making this finding, we considered much of the same evidence that we discussed in our resolution of Appellant's sufficiency of the evidence challenge. Most importantly, the DNA evidence links Appellant to the crime. Further, the additional DNA evidence which indicated the presence of another individual at the scene of the crime, as well as the testimony indicating that two people were necessary in order to gain access to the victim's residence through the open window, allowed the jury to infer that Appellant, at the very least, assisted and/or cooperated with another individual to enter the victim's home and participate in her murder.

**{¶32}** In light of this evidence, we cannot conclude that the jury lost its way and created a manifest miscarriage of justice by finding Appellant guilty of complicity to murder. We acknowledge that Appellant denied any involvement in the commission of the crime, presented alternative theories as to how his DNA could have gotten into the victim's residence, and offered three alibi witnesses. However, it is obvious that the jury did not find those theories or evidence to be credible, but rather relied on the evidence presented by the State, which is well within its province as the trier of fact. As such, we overrule Appellant's second assignment of error. Accordingly, we affirm the judgment of the trial court.

**JUDGMENT AFFIRMED.**

**JUDGMENT ENTRY**

It is ordered that the JUDGMENT BE AFFIRMED and that the Appellee recover of Appellant 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 Pickaway County Common Pleas Court to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

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

Abele, J. and Kline, J.: Concur in Judgment and Opinion.

For the Court,

BY: _____
Matthew W. McFarland
Presiding Judge

**NOTICE TO COUNSEL**

**Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.**