

[Cite as *State v. Howard*, 2003-Ohio-3235.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO
STATE OF OHIO :

Plaintiff-Appellee : C.A. CASE NO. 19413
vs. : T.C. CASE NO. 01CR3982
CALVIN S. HOWARD : (Criminal Appeal from
Common Pleas Court)
Defendant-Appellant :

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O P I N I O N

Rendered on the _____ day of June, 2003.

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GRADY, J.

{¶1} Defendant, Calvin Howard, appeals from his convictions
and sentences for felonious assault and aggravated burglary.

{¶2} The victim of the offenses of which Defendant was
convicted is his former girlfriend, Yolanda Brooks. She did not
appear at trial when subpoenaed. Therefore, the trial court
permitted the State to introduce Brooks' testimony at
Defendant's preliminary hearing on the same charges.

{¶3} Brooks had testified that she arrived at her apartment in the early morning hours of November 25, 2001, to find Defendant inside. Defendant did not have her permission to be there. When Brooks asked Defendant to leave, he refused.

{¶4} Defendant and Brooks argued about whether Brooks was dating another man. The argument became heated, and Defendant struck Brooks about the head with his fists. When Brooks attempted to flee, Defendant stabbed Brooks in the leg.

{¶5} Brooks eventually managed to move Defendant out through the front door. Brooks then locked the door and called police. Defendant began pounding on the door, and while Brooks was still on the phone with police, Defendant kicked the door open, came back inside, and again assaulted Brooks with his fists.

{¶6} When police arrived they found the front door and deadbolt lock at Brooks' apartment were damaged. Brooks told police that Defendant had kicked in the door, that they fought, and that he stabbed her. Brooks was taken to Good Samaritan Hospital. At the hospital Dr. Royer, the emergency room treating physician, discovered a knife wound in Brooks' knee that was very deep, and observed that she had fresh facial injuries.

{¶7} Defendant was found by police in the parking lot of Brooks' apartment complex. He gave police a false name, and was

taken into custody when he began to walk away.

{¶8} None of the police officers who came into contact with Defendant that night observed any injuries or noticed him limping. Officers at the Montgomery County Jail noticed blood on Defendant's pants. When they asked Defendant if he was injured, he said "No." Defendant later told them that Brooks had stabbed him, and he showed them scratch marks on his right leg.

{¶9} Clothing Defendant wore on the night of the assault was examined at the crime lab. A tear was discovered in the left pants leg. There were no blood stains around this tear. Defendant's shirt and pants contained numerous blood stains, nearly all of it matching Brooks' blood type.

{¶10} Defendant was indicted on one count of felonious assault, R.C. 2903.11(A)(2), and one count of aggravated burglary, R.C. 2911.11(A)(1). This matter proceeded to a jury trial.

{¶11} Defendant testified that he was angry because Brooks was seeing another man. After Brooks let Defendant inside her apartment, they argued and then began to fight. Brooks charged at Defendant with a knife and stabbed him in the leg. While they struggled for control of the knife, Brooks fell over a table, accidentally stabbing herself in the leg. Defendant left when Brooks called police, because he was the subject of an

outstanding warrant.

{¶12} The jury found Defendant guilty of felonious assault and aggravated burglary. The trial court sentenced Defendant to two concurrent six year prison terms.

{¶13} Defendant has timely appealed to this court from his convictions and sentences.

FIRST ASSIGNMENT OF ERROR

{¶14} "VICTIM'S PRELIMINARY HEARING TESTIMONY WAS INADMISSIBLE HEARSAY AT THE TRIAL BECAUSE APPELLANT DID NOT HAVE A SIMILAR MOTIVE TO DEVELOP THE TESTIMONY OF THE VICTIM AT THE PRELIMINARY HEARING AS HE WOULD AT TRIAL, AND THEREFORE, THE TESTIMONY WAS NOT WITHIN THE HEARSAY EXCEPTION IN EVIDENCE RULE 804(B)(1) FOR FORMER TESTIMONY; THIS TESTIMONY VIOLATED THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND THE RIGHT TO CONFRONTATION GUARANTEED BY SECTION TEN ARTICLE ONE OF THE OHIO CONSTITUTION."

{¶15} Defendant argues that the trial court abused its discretion and denied his Sixth Amendment right of confrontation by admitting Yolanda Brooks' preliminary hearing testimony at his trial as an exception to the rule against hearsay pursuant to Evid.R. 804(B)(1). We disagree.

{¶16} Yolanda Brooks testified at Defendant's preliminary hearing in Dayton Municipal Court. Though she was subpoenaed by the State to testify at Defendant's trial, Brooks failed to

appear. The State's efforts to locate Brooks and secure her attendance at trial were unsuccessful. The State then asked the trial court to admit Brooks' preliminary hearing testimony in evidence as a hearsay exception pursuant to Evid.R. 804(B)(1). Defendant objected. The trial court held a hearing, following which it granted the State's request and admitted Brooks' preliminary hearing testimony.

{¶17} A trial court has broad discretion with respect to whether to admit or exclude evidence, and its decision will not be disturbed on appeal absent an abuse of discretion. *State v. Noling*, 98 Ohio St.3d 44, 2002-Ohio-7044. An abuse of discretion means more than just an error of law or an error in judgment. It implies an arbitrary, unreasonable, unconscionable attitude on the part of the trial court. *State v. Adams* (1980), 62 Ohio St.2d 51.

{¶18} When a witness is unavailable for trial, the witness's prior testimony may be admitted in evidence if the proponent of that evidence demonstrates that the witness is unavailable to testify at trial and that the previous testimony bears an adequate indicia of reliability. *Ohio v. Roberts* (1980), 448 U.S. 56; *State v. Madison* (1980), 64 Ohio St.2d 322; R.C. 2945.49. Evid.R. 804(B)(1), which codified the common law hearsay exception for former testimony, states:

{¶19} "The following are not excluded by the hearsay rule if

the declarant is unavailable as a witness:

{¶20} "Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop

{¶21} the testimony by direct, cross, or redirect examination. Testimony given at a preliminary hearing must satisfy the right to confrontation and exhibit indicia of reliability."

{¶22} Defendant does not contest that Brooks was unavailable to testify at his trial. Thus, the issues presented are whether the preliminary hearing afforded Defendant an opportunity and similar motive to test and develop Brooks' testimony on cross-examination in order to impeach Brooks, and whether Brooks' testimony at that preliminary hearing satisfied Defendant's right of confrontation and exhibited sufficient indicia of reliability.

{¶23} Defendant argues that the requirements of Evid.R. 804(B)(1) for admitting Brooks' preliminary hearing testimony were not met because he did not have an opportunity and similar motive to develop Brooks' testimony on cross-examination at the preliminary hearing as would exist at trial. We disagree.

{¶24} The charges against Defendant at both the preliminary hearing and at trial were identical, and the criminal conduct the State sought to prove was the same in both proceedings. Furthermore, Brooks' statements at the preliminary hearing were made under circumstances closely approximating a trial. That hearing was held before a judicial tribunal that recorded the proceedings. Brooks was under oath. Defendant was represented by counsel. Defendant's attorney had the opportunity and did, in fact, subject Brooks to substantial and meaningful cross-examination that tested Brooks' credibility and the reliability of her statements. *State v. Madison, supra*, quoting *California v. Green* (1970), 399 U.S. 149; *Weissenberger, Ohio Evidence* (2003), Section 804.14 at p. 520.

{¶25} An identical motive to develop testimony is not required by Evid.R. 804(B)(1), but only a similar motive. *Weissenberger, Ohio Evidence* (2003), Section 804.17 at p. 523. When it held that the cross-examination of Brooks at the preliminary hearing provided Defendant an opportunity and similar motive to cross-examine as would exist at trial, the trial court made several important observations. The court found that Defendant's cross-examination of Brooks was extensive, twice as long as her direct examination. The subjects covered during that cross-examination included whether Brooks had been drinking at the time of this incident, whether

Defendant had trespassed in entering Brooks' apartment, relative to the aggravated burglary charge, whether Brooks hit Defendant and was the aggressor, whether Brooks and Defendant physically struggled over the knife, that in connection with Defendant's claim that he was defending himself from attack by Brooks and that she accidentally stabbed herself during their struggle, and whether Brooks had stabbed Defendant during their altercation.

{¶26} The particular facts and circumstances of this case amply demonstrate that Defendant had a similar motive to test and develop Brooks' testimony by cross-examination at the preliminary hearing as would exist at trial. Defendant's primary complaint, however, is that at the time of the preliminary hearing he did not have access to or knowledge of certain evidence that was available at the later trial which would have been useful for his cross-examination of Brooks: a recording of the 911 call Brooks made to summon police, and forensic evidence indicating that Defendant's own blood was found on the inside of his pants and that there was a tear or hole in the left leg of those pants. Defendant claims that his ignorance of that evidence deprived him of the opportunity to use it during his cross-examination of Brooks to contradict and discredit her testimony. We are not persuaded.

{¶27} The forensic evidence, the tear in the leg of Defendant's pants and Defendant's own bloodstains that were

found on the inside of those pants, is only marginally relevant to Defendant's claim that Brooks stabbed him during their altercation. Defendant attempted to demonstrate that proposition by exhibiting some scratch marks on his right leg. However, the tear in the pants was on the left leg, not on the right leg where Defendant's scratches were located. Moreover, Defendant's bloodstains on the inside of the pants were not located near the tear in those pants. Forensic testing could not determine how or when the tear in the pants occurred. All of the other eight to ten bloodstains found on Defendant's clothing matched Brooks' blood type. The inconsistency between this forensic evidence and Brooks' preliminary hearing testimony is minimal, at best. Furthermore, these are not matters that Brooks' preliminary hearing testimony involved, and there is no reason to believe that she was even aware of them. Thus, the value of this forensic evidence in discrediting Brooks' former testimony is marginal, at best, if it has any value at all.

{¶28} With respect to the 911 tape, Brooks testified at the preliminary hearing that while she was on the phone with police, Defendant was banging on her door, and she told police they needed to hurry up and get there before he kicked the door down. Minutes later, while Brooks was still on the phone with police, Defendant kicked the door in, came back inside, and assaulted

Brooks again. This is the same story Brooks told to Det. Beane.

{¶29} The 911 tape reveals that Brooks told the 911 operator that Defendant was banging at her door. Toward the end of the tape there is a loud bang and Brooks yells: "He's in here." Shortly thereafter, the phone went dead. Clearly, the 911 tape does not contradict or discredit Brooks' testimony that Defendant kicked her door down and assaulted her merely because one does not hear the sound of Defendant hitting Brooks on the tape. Any variances between Brooks' testimony at the preliminary hearing and the 911 tape were minimal, at best. For the most part, that tape corroborates Brooks' former testimony.

{¶30} The record before us demonstrates that Defendant was not denied an adequate opportunity to test and develop Brooks' testimony at the preliminary hearing, and that Defendant subjected Brooks' testimony to meaningful cross-examination. Further, Defendant was not denied the right to exploit the forensic evidence or any other evidence in presenting his case at trial, as he was allowed to argue to the jury the claimed inconsistencies between the evidence and Brooks' testimony.

{¶31} The question of whether Brooks' testimony at the preliminary hearing satisfied Defendant's confrontation rights and exhibited indicia of reliability is a fact intensive inquiry that must be decided on a case-by-case basis.

{¶32} Historically, the opportunity for meaningful cross-

examination has been synonymous with indicia of reliability sufficient to satisfy the constitutional right of confrontation. *Ohio v. Roberts, supra; State v. Madison, supra.* Evid.R. 804(B)(1) is founded upon traditional policies of necessity and trustworthiness. The necessity lies in the fact that the declarant, once available as a witness, is now unavailable for trial. Trustworthiness is present because, by definition, the declarant was under oath and subject to direct and cross-examination as a means of developing testimonial evidence at the former hearing. Weissenberger, *Ohio Evidence* (2003), Section 804.12 at p. 517.

{¶33} Where the declarant served as a witness under penalty of perjury, there exists a high degree of reliability that the substance of the prior testimony is accurate and complete, thus justifying its admission. *Id.*, at p. 518; *Madison, supra.* Under Evid.R. 804(B)(1), actual cross-examination is not a condition precedent to admission of former testimony. The mere opportunity to exercise the right to meaningful cross-examination suffices. Weissenberger, *Ohio Evidence*, (2003), Section 804.14 at p. 519-520; *Madison, supra.*

{¶34} Here, as we have already discussed at length, Defendant not only had an adequate opportunity and similar motive to test and develop by cross-examination Brooks' testimony at the preliminary hearing, Defendant actually did so.

Roberts, supra; Madison, supra. In commenting upon the indicia of reliability in this case, the trial court noted that Brooks' testimony at the preliminary hearing was not undermined by her cross-examination, but rather remained consistent. Moreover, Brooks' statements at the preliminary hearing were consistent with what she told police directly after the attack. See *Madison, supra.* We agree with the trial court that introduction of Brooks' preliminary hearing testimony did not deprive the Defendant of his right of confrontation.

{¶35} Finally, Defendant complains that Brooks' preliminary hearing testimony should not have been admitted because Brooks' absence at trial deprived the jury of the opportunity to see and hear Brooks testify and apply the usual tests for judging credibility. That concern might apply any time when Evid.R. 804(B)(1) is employed, because, necessarily, the declarant must be unavailable as a witness as a condition precedent to admitting the witness' former testimony. Weissenberger, *Ohio Evidence* (2003), Section 804.12 at p. 518. Such matters go to the weight to be given to the testimony, not its admissibility.

{¶36} On this record, the requirements of Evid.R. 804(B)(1) and Defendant's confrontation rights have been satisfied. We see no abuse of discretion on the part of the trial court in admitting Brooks' preliminary hearing testimony.

{¶37} Defendant's first assignment of error is overruled.

SECOND ASSIGNMENT OF ERROR

{¶38} "APPELLANT'S CONSTITUTIONAL RIGHT TO DUE PROCESS WAS VIOLATED BECAUSE THE GUILTY FINDING ON BOTH COUNTS BY THE JURY WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶39} Defendant claims that if one excludes the preliminary hearing testimony by the victim Brooks, the jury did not have sufficient evidence to convict him of felonious assault or aggravated burglary. Defendant is making an argument about the sufficiency, not the weight, of the evidence.

{¶40} A sufficiency of the evidence argument challenges whether the State has presented adequate evidence on each element of the offense to allow the case to go to the jury or sustain the verdict as a matter of law. *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52. The proper test to apply to such an inquiry is the one set forth in paragraph two of the syllabus of *State v. Jenks* (1991), 61 Ohio St.3d 259:

{¶41} "An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to 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."

{¶42} Defendant was convicted of violating R.C. 2903.11(A)(2) and R.C. 2911.11(A)(1), which provide respectively:

{¶43} "(A) No person shall knowingly do either of the following:

{¶44} "(2) Cause or attempt to cause physical harm to another or to another's unborn by means of a deadly weapon or dangerous ordnance."

{¶45} "* * *

{¶46} "(A) No person, by force, stealth, or deception, shall trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure, when another person other than an accomplice of the offender is present, with purpose to commit in the structure or in the separately secured or separately occupied portion of the structure any criminal offense, if any of the following apply:

{¶47} "(1) the offender inflicts, or attempts or threatens to inflict physical harm on another."

{¶48} Brooks' preliminary hearing testimony, coupled with the testimony by Officer Mullen regarding Brooks' statements to him describing these offenses, the forensic evidence, and the audiotape of Brooks' 911 call to police, if believed, would convince the average mind of Defendant's guilt. Viewing that

evidence in a light most favorable to the State, a rational trier of fact could find all of the elements of the charged offenses proven beyond a reasonable doubt. Defendant's convictions are supported by legally sufficient evidence. Moreover, the credibility of the witnesses and the weight to be given to their testimony are matters for the trier of facts to resolve. *State v. DeHass* (1967), 10 Ohio St.2d 230. The jury in this case acted well within their province in choosing to believe the State's version of the events rather than Defendant's.

{¶49} Defendant's second assignment of error is overruled. The judgment of the trial court will be affirmed.

BROGAN, J. and YOUNG, J., concur.

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