

[Cite as *State v. Youngblood*, 2009-Ohio-3008.]

**IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
CLARK COUNTY**

STATE OF OHIO	:	
	:	Appellate Case No. 07-CA-118
Plaintiff-Appellee	:	
	:	Trial Court Case No. 05-CR-0347
v.	:	
	:	(Criminal Appeal from
VICTOR YOUNGBLOOD	:	Common Pleas Court)
	:	
Defendant-Appellant	:	
	:	

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OPINION

Rendered on the 19th day of June, 2009.

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BROGAN, J.

{¶ 1} Victor Youngblood appeals from his conviction and sentence on charges of attempted murder, tampering with evidence, and a firearm specification.

{¶ 2} Youngblood advances three assignments of error on appeal. First, he

contends his attempted murder conviction is against the manifest weight of the evidence. Second, he raises an ineffective assistance of counsel claim based on his attorney's failure to object to his entire jury panel being white. He also argues that he was denied his right to a jury drawn from a cross section of the community. Third, he claims ineffective assistance of counsel based on his attorney's failure to move for a new trial upon discovering juror misconduct.

{¶ 3} The record reflects that Youngblood represented himself in a July 2005 jury trial on charges of attempted murder, two counts of felonious assault, tampering with evidence, having a weapon while under disability, and a firearm specification. The charges stemmed from his role in the non-fatal shooting of a woman named Tina Snow during a planned drug transaction. A jury found Youngblood guilty on one count of felonious assault with a firearm specification and on the evidence-tampering charge. He was acquitted on the other felonious assault charge, and the State dismissed the weapon-under-disability charge. The jury failed to reach a verdict on the attempted-murder charge. On appeal, we reversed Youngblood's convictions, finding that he did not knowingly and intelligently waive his right to counsel. See *State v. Youngblood*, Clark App. No. 05CA0087, 2006-Ohio-3853.

{¶ 4} Youngblood was retried in September 2007 on charges of attempted murder, felonious assault, tampering with evidence, and a firearm specification. Following this trial, at which Youngblood was represented by counsel, a jury found him guilty on all counts. Prior to sentencing, the trial court found that attempted murder and felonious assault were allied offenses of similar import. The State elected to proceed to sentencing on the attempted-murder count. The trial court then imposed an aggregate

eighteen-year sentence for attempted murder, evidence tampering, and the firearm specification. This timely appeal followed.

{¶ 5} Youngblood's first assignment of error challenges the weight of the evidence to support his attempted-murder conviction. When a conviction is challenged on appeal as being against the weight of the evidence, an appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider witness credibility, 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 ordered." *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52. A judgment should be reversed as being against the manifest weight of the evidence "only in the exceptional case in which the evidence weighs heavily against the conviction." *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶ 6} Although a weight-of-the-evidence argument permits a reviewing court to consider the credibility of witnesses, that review must be tempered by the principle that weight and credibility questions are primarily for the trier of fact. *State v. Goldwire*, Montgomery App. No. 19659, 2003-Ohio-6066, at ¶13, citing *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. "Because the factfinder * * * has the opportunity to see and hear the witnesses, the cautious exercise of the discretionary power of a court of appeals to find that a judgment is against the manifest weight of the evidence requires that substantial deference be extended to the factfinder's determinations of credibility. The decision whether, and to what extent, to credit the testimony of particular witnesses is within the peculiar competence of the factfinder, who has seen and heard the witness." *Id.* at ¶14, quoting *State v. Lawson* (Aug. 22, 1997),

Montgomery App. No. 16288.

{¶ 7} Upon review, we conclude that Youngblood's attempted-murder conviction is not against the manifest weight of the evidence. Tina Snow, the victim, testified that she arranged to meet Youngblood at the Drake motel in the early morning hours of January 1, 2005. The purpose of the meeting was for Youngblood to sell Snow crack cocaine. Snow arrived first and waited in a van with a companion, James Foster. Youngblood subsequently arrived in a blue pick-up truck. Snow testified that she exited the van and approached Youngblood's vehicle. As she did so, he stood and waited just inside the opened door of his truck. Snow walked up and also stood beside the opened door. She indicated that she wanted to buy \$30 worth of crack cocaine. According to Snow, Youngblood responded by putting his arm around her and saying, "I have something for you." He then placed a small caliber handgun against her throat and fired it. Snow began to run after the first shot and remembered little else about the incident. She did testify, however, that Youngblood shot her more than once and that she thought she was going to die.

{¶ 8} Snow's testimony was corroborated by that of Michael Wolbert, who resided at the Drake motel. Wolbert recalled being in his room and hearing a loud "pop." He looked outside and saw "Victor Youngblood point a gun at a girl and firing it." After what he believed was four or five shots, he saw the girl stagger and collapse. Wolbert testified that he also saw Youngblood get into a blue pick-up truck and leave the scene. Shortly thereafter, detective Ethan Cox responded to a report that the truck had crashed into a car on South Clairmont Street. Cox arrived at the crash site and found Youngblood's unoccupied truck. He discovered a .22 caliber seven-shot revolver inside

the vehicle. The handgun had seven spent bullet casings inside the cylinder. Subsequent testing revealed some of Youngblood's own blood on the weapon. None of Snow's blood was found anywhere inside the vehicle or on the weapon. Police eventually located Youngblood in Indiana, where he was arrested in April 2005 and returned to Ohio.

{¶ 9} Following the shooting, Snow was transported to a hospital emergency room. There she was examined by doctor Lofton Misick. He testified that he observed seven small-caliber gunshot wounds to Snow's neck, shoulder, and back. He also stated that he did not see what he believed were any exit wounds, suggesting that the bullets remained lodged in her body.

{¶ 10} On appeal, Youngblood relies primarily on his own testimony to support his manifest-weight argument. Youngblood testified at trial that he was well acquainted with Snow, who previously had bragged about her husband's Mafia connections and about her and her husband's involvement in an unsolved murder. Youngblood admitted arriving at the Drake motel to engage in a drug transaction. He testified that he exited his pick-up truck and saw Snow and her companion, James Foster, walking toward him. Youngblood explained that he refused to sell Snow any drugs because he was suspicious of Foster, who he did not know. According to Youngblood, tempers rose as he and Foster "squared up" to fight. Youngblood then saw Foster pull out a handgun. Youngblood responded by grabbing Foster's hand and the gun. Youngblood testified that a struggle ensued and that the gun fired once. After a brief pause in the action, he and Foster continued fighting for control of the gun. As they did so, Foster kept pulling the trigger. According to Youngblood, he eventually disarmed Foster and hit him with the

gun. When Foster continued to advance, Youngblood tried to shoot him but the gun was empty. Youngblood then struck Foster again and fled in the pick-up truck, taking the gun with him.

{¶ 11} Youngblood also cites the trial testimony of Dr. Kent Harshbarger, a defense witness. Harshbarger testified that he could not determine, based on a review of medical records, how many times Snow had been shot. He was unable to determine how many entrance or exit wounds she had. He noted, however, that a photograph of one of Snow's x-rays revealed the presence of what appeared to be a single bullet lodged in her body. He testified that the measurements of this bullet, seven millimeters by fifteen millimeters, were a "little bit" larger than a .22 caliber bullet. Youngblood additionally relies on the testimony of police sergeant Eric Sullivan, who also testified as a defense witness. Sullivan stated that he examined the crime scene and found what appeared to be a spent .38 caliber bullet in the parking lot.

{¶ 12} On appeal, Youngblood contends Snow's story about being shot without provocation makes no sense. He also points out the absence of her blood inside his pick-up truck. He reasons that "if she were shot seven times while standing in the door of [the truck], it would be virtually impossible for there not to be her blood all over the car." Youngblood also stresses the presence of his own blood on the .22 caliber revolver found in his truck. He contends the manifest weight of the evidence supports a finding that he struggled with Foster in self defense and that Foster fired the shots that struck Snow. Youngblood additionally claims the discovery of a spent .38 caliber bullet at the scene supports an inference that another, larger gun fired by someone else may have shot Snow.

{¶ 13} Despite Youngblood's arguments, we do not find that his attempted-murder conviction is against the manifest weight of the evidence. The alleged absence of a motive for Youngblood to shoot Snow was argued to the jury by defense counsel. The jury was free to consider the lack of an apparent motive when evaluating the credibility of the witnesses. We do note, however, that Youngblood admitted drinking and smoking marijuana just before the shooting. It may be that he simply was not in his right mind when he shot Snow. In any event, the State was not required to prove motive, and an absence of proof on the issue does not render Youngblood's conviction against the weight of the evidence.

{¶ 14} As for the lack of Snow's blood in Youngblood's truck, no one testified that he shot her seven times while she was standing inside the vehicle's door. To the contrary, Snow testified that he placed a gun against her neck and fired once while she was standing there. She then began running away. Because the small-caliber gun was touching Snow's skin when it was fired, there may have been little external bleeding the moment the bullet entered her body. Or it may be that she was standing in such a way that blood did not fall into the truck. These were matters for the jury to resolve in evaluating the evidence and assessing the credibility of the witnesses.

{¶ 15} The presence of Youngblood's own blood on the .22 caliber handgun found in his car reasonably may be explained in a way that does not suggest his conviction is against the weight of the evidence. Indeed, Youngblood simply may have cut himself at some point in the process of shooting Snow, fleeing the scene, and crashing his truck into another vehicle. Again, this was a matter for the jury to resolve in weighing the evidence and assessing witness credibility.

{¶ 16} Finally, as for the discovery of a spent .38 caliber bullet, the jury reasonably may have concluded that it was unrelated to the incident in question. The State made such an argument at trial, and the record contains evidence to support it. At least one witness, detective Ethan Cox, testified that the .38 caliber bullet was not found particularly close to the actual crime scene. In addition, the only weapon discovered by police was the .22 caliber revolver found in Youngblood's truck. We see virtually no evidence to support a finding that an unidentified second shooter was present that night using a .38 caliber handgun. We acknowledge Dr. Harshbarger did testify that the bullet he saw on the x-ray lodged in Snow's body appeared to be a "little bit" larger than a .22 caliber bullet. The jury reasonably may have concluded, however, that Harshbarger was simply wrong or, alternatively, that the bullet's original dimensions were altered a "little bit" when it struck Snow's body. In any event, Harshbarger did not testify that the bullet he saw on the x-ray appeared to be a .38 caliber bullet.

{¶ 17} After reviewing the record, weighing the evidence and all reasonable inferences, and considering witness credibility, we do not find that the jury clearly lost its way and created a manifest miscarriage of justice when it convicted Youngblood of attempted murder. Youngblood has failed to demonstrate that the evidence weighs heavily against his conviction. Accordingly, his first assignment of error is overruled.

{¶ 18} In his second assignment of error, Youngblood raises an ineffective assistance of counsel claim based on his attorney's failure to object to the entire jury panel being white. He also argues that he was denied his right to a jury drawn from a cross section of the community.

{¶ 19} While conceding that the record does not reveal the race of his jurors,

Youngblood contends we may infer the jury's racial composition based on the voir dire conducted by his trial attorney. Specifically, Youngblood points to questions about whether any of the jurors were uncomfortable around black people and whether they were bothered by the fact that he is black and the victim is white. Based on these questions, Youngblood urges us to find that his jury was all white and that his attorney provided constitutionally ineffective assistance "by failing to object or more fully develop the record in this regard."

{¶ 20} Upon review, we find Youngblood's argument to be unpersuasive. Ineffective assistance of counsel claims are evaluated under the two-prong analysis set forth in *Strickland v. Washington* (1984), 466 U.S. 668. To reverse a conviction based on ineffective assistance of counsel, an appellant first must demonstrate that his counsel's conduct was deficient in that it fell below an objective standard of reasonableness. When considering this issue, trial counsel is entitled to a strong presumption that his conduct falls within the wide range of reasonable assistance. *Id.* at 690. The second prong of *Strickland* requires a showing that counsel's errors were serious enough to create a reasonable probability that, but for the errors, the result of the proceeding would have been different. *Id.* at 687.

{¶ 21} In the present case, Youngblood cannot satisfy *Strickland*. As he concedes, the record does not reveal the race of his jurors. Defense counsel's questions do not establish that the entire jury panel was white. While questioning prospective jurors as a group, defense counsel asked whether anyone was uncomfortable around black people or bothered by the fact that Youngblood, a black man, allegedly shot a white woman. We cannot reasonably infer from these questions that *all* of the

prospective jurors were white. Defense counsel just as likely may have asked these questions if most, or even some, of the potential jurors were white (or Asian or Hispanic for that matter). Without being able to establish that his jury panel was all white, Youngblood cannot even begin to establish that defense counsel rendered ineffective assistance by failing to object to an all-white jury. Nor does the record demonstrate that Youngblood was denied his right to a jury drawn from a cross section of the community. Even assuming, arguendo, that his jury was all white, the record is devoid of evidence that the jury selection process itself was racially biased. Finally, Youngblood cannot prevail on his argument that defense counsel should have “develop[ed] the record” more fully regarding the composition of the jury. This argument necessarily depends on evidence outside the record to determine what, if anything, would have been uncovered if counsel had developed the record. Therefore, it is not cognizable on direct appeal. *State v. Bond*, Montgomery App. No. 20674, 2005-Ohio-3665, ¶10. The second assignment of error is overruled.

{¶ 22} In his third assignment of error, Youngblood claims ineffective assistance of counsel based on his attorney’s failure to move for a new trial after discovering juror misconduct. This argument concerns defense counsel’s filing of an October 11, 2007 motion for leave to move for a new trial. A memorandum accompanying the motion alleged that defense counsel had discovered information establishing unspecified juror misconduct. The trial court apparently never ruled on the motion for leave, and defense counsel never moved for a new trial. On appeal, Youngblood argues that leave was not required and that defense counsel provided ineffective assistance by failing to move for a new trial.

{¶ 23} Once again, we conclude that Youngblood cannot establish ineffective assistance of counsel on the present record. The motion for leave contains no factual allegations or evidence about the alleged juror misconduct or the source of the discovery. Therefore, it is impossible to assess the merits of the juror-misconduct allegation. If that allegation lacked merit, then defense counsel did not provide ineffective assistance by failing to move for a new trial. Because no new-trial motion was filed and because no evidence of actual juror misconduct is before us, Youngblood's argument necessarily depends on evidence outside the record. Therefore, it is not cognizable on direct appeal. *Bond*, supra. The third assignment of error is overruled.

{¶ 24} Having overruled each of Youngblood's assignments of error, we affirm the judgment of the Clark County Common Pleas Court.

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FAIN and FRENCH, JJ., concur.

(Hon. Judith L. French, from the Tenth District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio)

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