

[Cite as *State v. Hooper*, 2010-Ohio-4041.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	C.A. CASE NO. 22883
v.	:	T.C. NO. 2006 CR 3938
	:	
LAVONE HOOPER	:	(Criminal appeal from Common Pleas Court)
	:	
Defendant-Appellant	:	

OPINION

Rendered on the 27th day of August, 2010.

.....

KELLY D. MADZEY, Atty. Reg. No. 0079994, Assistant Prosecuting Attorney, 301 W. Third Street, 5th Floor, Dayton, Ohio 45422
Attorney for Plaintiff-Appellee

FRANK A. MALOCU, Atty. Reg. No. 0055228, 2100 First National Plaza, 130 W. Second Street, Dayton, Ohio 45402
Attorney for Defendant-Appellant

.....

BROGAN, J.

{¶ 1} Lavone A. Hooper was found guilty by a jury in the Montgomery County Court of Common Pleas of one count of murder and two counts of kidnapping. He was sentenced to an aggregated term of imprisonment of twenty-five years to life. Hooper appeals from his conviction.

{¶ 2} The trial court did not abuse its discretion in allowing evidence of Hooper’s prior

conviction for gross sexual imposition involving the same victim, as this conviction was relevant to his motive and probative of whether the victim would have willingly left her apartment with him. The trial court did not abuse its discretion in admitting DNA evidence collected by the coroner's office or in excluding evidence whose source could not be established. We find no cumulative error, and the jury's verdict was neither supported by insufficient evidence nor against the manifest weight of the evidence. For all of these reasons, the judgment of the trial court will be affirmed.

I

{¶ 3} Edith Morehead lived in the Cornell Ridge apartment complex in Dayton, Ohio, with her young daughter, Talia. On Monday evening, October 28, 1996, Morehead spoke with two of her neighbors, who observed that she had several people in her apartment. Neither neighbor thought that anything was amiss at that time. The next morning, the same neighbors noticed that Talia was unsupervised in the apartment and was playing in the courtyard in her pajamas. When questioned, Talia stated that her mother had gone to the store. One of the neighbors, Kami Clemons, cared for Talia for several hours. Clemons did not know how to contact Morehead's family, so she returned to Morehead's apartment several times hoping that someone would call. Eventually, Morehead's mother did call the apartment, and Clemons explained that she was there with Talia but that Morehead's whereabouts were unknown. Both Clemons and Morehead's mother were concerned because it was very out of character for Morehead to leave Talia alone for so long and because Morehead's purse and keys were still at the apartment. After checking with several hospitals, Morehead's family filed a missing person

report on Tuesday evening.

{¶ 4} On Wednesday, October 30, 1996, Morehead's battered body was discovered on a wooded trail behind Hickorydale Elementary School.¹ She was dressed in a nightshirt and boxer shorts and was wearing only one shoe. The nightshirt had been pulled open and several buttons were missing. Morehead's other shoe, a bloody towel, and a rock marked with blood were nearby. Blood spatter was located in a radius of approximately five feet around the body, which included a substantial amount of blood on the ground as well as on surrounding bushes as high as three feet. Morehead's shoes were muddy on the tops and sides, but were not particularly muddy on the bottom. Her hands and fingernails were covered with blood and mud. Drag marks were visible along a portion of the trail. Although there was no identification on the body, the police learned of the missing person report filed by Morehead's family, and the coroner confirmed the identification.

{¶ 5} The autopsy revealed that Morehead had died of blunt force trauma to her head and a stab wound to her chest, which punctured her left lung. She had skull fractures on the right side of her head. Based on the thickness of the bone that had been fractured, the deputy coroner, Dr. David Smith, opined that a "good deal of force" had been required to inflict these injuries. The injuries to Morehead's brain were extensive. The stab wound was three inches deep. Dr. Smith concluded that Morehead had been alive when the injuries were inflicted and that she could have lived minutes or a few hours thereafter. A variety of evidence was collected from Morehead's body, including oral, vaginal, and rectal swabs.

¹Hickorydale Elementary School has since been demolished.

{¶ 6} The police worked on Morehead's case for approximately one year, but the case was not solved.

{¶ 7} The Miami Valley Regional Crime Lab ("MVRCL") began conducting DNA analysis in 2000 but, due to limited resources, it could not process all of its old cases. In 2004, MVRCL received a federal grant to send evidence from some of its cold cases to a private lab for DNA analysis. The evidence from Morehead's case was one of these cases but, initially, no match was identified. In 2006, Hooper's DNA was entered into the database, and MVRCL was notified that Hooper's DNA matched the DNA collected in Morehead's case. Hooper's DNA was found on the vaginal and anal swabs taken from Morehead's body. MVRCL then ran its own test to confirm the DNA test results, and the Dayton Police Department reopened the case.

{¶ 8} When the case was reopened in 2006, Detective Patricia Tackett was assigned to the case. She reexamined the evidence, interviewed 15-20 witnesses, and began to look for a connection between Hooper and Morehead. She interviewed Hooper and noticed inconsistencies in his account. Hooper told Tackett that he had been adjudicated a delinquent many years earlier because he had "messed around" with Morehead, but, contrary to the DNA evidence, he claimed that he had not seen her since the adjudication. Although he claimed that the police had talked with him after Morehead's death, Tackett could find no evidence that Hooper had ever been interviewed or identified as a suspect during the earlier investigation.

{¶ 9} Tackett also interviewed Jeffrey Peters, a cousin of Hooper, who was imprisoned at the time. Peters recounted a phone conversation with Hooper in 1996 in which Hooper said he had "messed around" with Morehead in the woods and "he said he think he did something," meaning he might have killed her. Hooper had been "sort of crying" during this phone call.

Peters heard of Morehead's death a few days after this conversation. Peters gave no additional details about the alleged admission, but he did state that he and Hooper had often played in the woods behind Hickorydale Elementary School when they were younger and that Hooper had been very familiar with that area.

{¶ 10} On December 5, 2006, Hooper was indicted on two counts of kidnapping, one count of rape, and one count of murder. On January 12, 2007, Hooper was indicted on an additional count of rape. Hooper pled not guilty, and a trial was scheduled. Hooper filed a motion in limine seeking to prevent the State from offering evidence of his prior adjudication as a delinquent, but the trial court denied the motion, allowing the State to use that evidence to show motive.

{¶ 11} Hooper was tried by a jury on June 23 - 27, 2008. The jury found him guilty of murder and on both counts of kidnapping, but it found him not guilty on the two counts of rape. He was sentenced to ten years on each kidnapping and to fifteen years to life for murder. The kidnapping convictions were to be served concurrently, but consecutively to the sentence for murder.

{¶ 12} Hooper appeals from his conviction, raising four assignments of error.

II

{¶ 13} Hooper's first assignment of error states:

{¶ 14} I. "THE TRIAL COURT COMMITTED PLAIN ERROR BY ALLOWING THE STATE TO ADMIT EVIDENCE OF THE DEFENDANT'S PRIOR BAD ACTS."

{¶ 15} Hooper claims that the trial court erred in allowing the State to introduce evidence

that he had previously been adjudicated a delinquent for committing gross sexual imposition because the prejudice resulting therefrom outweighed the probative value of the prior adjudication. He contends that his “gross sexual imposition adjudication provide[d] no probative value to establish the motive“ in this case, as the State claimed. He also asserts that he was prejudiced by Detective Tackett’s “repeated reference to the ‘rape charge’” in the prior case during her testimony at trial.

{¶ 16} The following representations about Hooper’s juvenile record are undisputed. Hooper was charged as a juvenile with rape and kidnapping involving the same victim as in this case, Edith Morehead. The charge was eventually reduced to gross sexual imposition; Hooper admitted this offense and was adjudicated a delinquent. He was placed on probation, but his subsequent involvement in other offenses which violated his probation resulted in his incarceration at the Department of Youth Services.

{¶ 17} Hooper filed a motion in limine to prevent the State from referring to his prior adjudication at trial, and the trial court held a hearing on the motion before trial began. Initially, the State argued that the gross sexual imposition conviction showed Hooper’s motive, claiming that Hooper had attacked Morehead out of vengeance for his incarceration only two months after being released from DYS. However, the juvenile court file did not substantiate the State’s claim regarding the proximity of this offense to Hooper’s release from DYS, because some documents were missing from the record.

{¶ 18} Thereafter, the State offered two other arguments for the admissibility of the prior adjudication. First, the State argued that the victim’s prior prosecution of Hooper for a sexual offense tended to show that she would not have voluntarily left her apartment with him or

engaged in sexual conduct with him in this instance. Thus, the evidence was relevant to elements of rape and kidnapping: whether the victim had been compelled, by force or threat of force, to submit to sexual conduct or to leave her apartment with Hooper. Second, the State argued that the victim's willingness to prosecute Hooper for a prior sexual offense gave him a motive to kill her when he attacked her a second time.

{¶ 19} The court allowed the State to use the evidence of the prior adjudication “for the limited purpose of establishing motive,” and asked counsel to submit limiting instructions at the appropriate time. Defense counsel also asked that the jury be informed of the difference between sexual contact, which an element of gross sexual imposition, and sexual conduct, which is an element of rape. The State did not object to this request.

{¶ 20} At the end of trial, the court gave the following instruction regarding Hooper's prior conviction:

{¶ 21} “Evidence was received about a prior juvenile conviction. An adjudication of delinquency is a judgment in a legal proceeding finding a juvenile responsible for a delinquent act. This is referred to as other acts evidence in this case. For purposes of this other act, sexual contact means any touching of an erogenous zone of another including without limitation the thigh, genitals, buttocks, pubic region or that [sic] the person is a female, a breast. For the purpose of sexually arousing or gratifying either person.

{¶ 22} ***

{¶ 23} “Concerning the other acts evidence, if you find that the evidence of the other act is true, you may consider that evidence only as those other acts may explain the circumstances of the charges in this case, form or [sic] part of the immediate background of the charges in this

case, or as it may be provide [sic] evidence of motive for the charges in this case.

{¶ 24} “The evidence of other acts was not received and you may not consider it to prove the character of a witness or of the defendant in order to prove that the person acted in conformity of that character. The evidence of other acts you heard cannot be considered for any other purpose than what I have just mentioned.”

{¶ 25} A trial court has broad discretion in the admission or exclusion of evidence, and so long as it exercises its discretion in conformity with the rules of procedure and evidence, its judgment will not be reversed absent a clear showing of an abuse of discretion with attendant material prejudice to the defendant. *State v. Haines*, 112 Ohio St.3d 393, 2006-Ohio-6711, at ¶50; *State v. Powell*, 177 Ohio App.3d 825, 2008-Ohio-4171, at ¶33.

{¶ 26} Evid.R. 402 and Evid.R. 403 permit the admission of relevant evidence if its probative value is not substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury. Evid.R. 404 generally prohibits the use of evidence of a person’s character, including other crimes, wrongs, or acts, to prove that he acted in conformity therewith on a particular occasion. However, Evid.R. 404(B) permits evidence of other crimes, wrongs, or acts for other purposes, “such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” Likewise, R.C. 2945.59 permits the use of evidence that shows or tends to show the commission of another crime by a defendant if that evidence is relevant to his motive, intent, the absence of mistake or accident on his part, or if his scheme, plan, or system in doing an act is material.

{¶ 27} The record demonstrates that the trial court was very conscientious in its

consideration of this issue. Hooper had previously been adjudicated a delinquent based on Morehead's accusations. Because he was charged with sex offenses and murder *of the same victim*, the trial court concluded that Hooper's prior adjudication for gross sexual imposition was probative of his motive. Both Evid.R. 404(B) and R.C. 2945.59 permit the use of a prior conviction for this purpose. Moreover, the trial court minimized any unfair prejudice to Hooper by giving a limiting instruction to the jury. The court did not abuse its discretion in permitting the State to present evidence of Hooper's prior adjudication.

{¶ 28} Hooper also objects to Detective Tackett's references at trial to "rape" in recounting her interviews with Hooper. Detective Tackett worked the case when it was reopened in May 2006, and she went to interview Hooper. At trial, she recounted that, when she had asked Hooper about his acquaintance with Morehead, he mentioned her prior accusation of "rape," and that despite Hooper's estimation that he had not seen Morehead since the juvenile case "four or five years" earlier, the "actual rape charge" had been in 1994. In response to his objection, the trial court instructed the jury that Detective Tackett was permitted to use the term "rape" when she was quoting something that Hooper had said, but that all other references to "rape" would be stricken. In our view, the trial court did not abuse its discretion in handling this issue as it did.

{¶ 29} The first assignment of error is overruled.

III

{¶ 30} Hooper's second assignment of error states:

{¶ 31} II. “THE TRIAL COURT COMMITTED PLAIN ERROR BY ALLOWING THE ADMISSION OF DNA EVIDENCE WITHOUT DIRECT TESTIMONY AS TO HOW IT WAS COLLECTED.”

{¶ 32} Hooper claims that the State failed to authenticate the vaginal and rectal swabs that were collected during Morehead’s autopsy, which were subsequently found to contain his DNA. He asserts that he was prejudiced by the lack of evidence about how these specimens were collected and by his inability to cross-examine the person who collected them.

{¶ 33} Dr. David Smith, a former Deputy Coroner at the Montgomery County Coroner’s Office, performed the autopsy on Morehead in conjunction with Dr. Tookae. At trial, Dr. Smith testified that oral, rectal, and vaginal swabs, as well as hair clippings and combings and fingernail clippings, were routinely collected as part of autopsies and were collected in Morehead’s case. He acknowledged that he did not necessarily collect all of these items himself, and that trained assistants sometimes performed these tasks in his presence or the presence of Dr. Tookae. These items were then documented on an evidence sheet, placed in packages, labeled, and sealed. Dr. Smith testified that the swabs, hair clippings, and fingernails in Morehead’s autopsy were collected under his direction and control, in conformity with usual procedures.

{¶ 34} Hooper objected to the use of the evidence at trial because Dr. Smith could not recall whether he had personally handled the exhibits and sealed the packages. Hooper did not “[attack] the technical accuracy of the DNA results.”

{¶ 35} The State has the burden of establishing the chain of custody of a specific piece of evidence, but the State's burden is not absolute; “[t]he state need only

establish that it is reasonably certain that substitution, alteration or tampering did not occur.” *State v. Barzacchini* (1994), 96 Ohio App.3d 440, 457-458; *State v. Blevins* (1987), 36 Ohio App.3d 147, 150. While authentication of evidence is a condition precedent to its admission, the condition is satisfied when the evidence is “sufficient to support a finding that the matter in question is what its proponent claims.” Evid.R. 901(A); *State v. Hunter*, 169 Ohio App.3d 65, 2006-Ohio 5113, at ¶16. Evidence of a process or system to produce an accurate result is sufficient to satisfy the rule. Evid.R. 901(B)(9). Breaks in the chain of custody go to the weight afforded the evidence, not its admissibility. *Blevins*, 36 Ohio App.3d at 150; *State v. Qualls* (June 6, 1997), Clark App. No. 96-CA-68.

{¶ 36} The trial court did not abuse its discretion when it allowed Dr. Smith to testify about the routine procedures used during an autopsy and the collection of evidence therefrom, despite his acknowledgment that he may not have been the person who performed these tasks in this particular case. Dr. Smith’s testimony and his recognition of the evidence’s packaging and markings were sufficient to support a finding that the evidence was what he claimed it to be and that it was collected in conformity with the coroner’s office’s routine procedures. Any shortcomings in this identification went to the weight of the evidence, not its admissibility. Thus, the trial court did not err in admitting this evidence and in letting the jury assess its reliability.

{¶ 37} Hooper also claims that the court’s admission of the DNA evidence was “in direct contradiction” to its decision to exclude evidence that might have been helpful to the defense, namely a bloody shirt that was apparently collected during the initial investigation from the vehicle of a man who had some connection to the victim. The

shirt was recovered by Officer Dunsky, who had since moved out of state and could not be located. Some blood testing had been conducted on the shirt at the MVRCL.

{¶ 38} Because of Dunsky's unavailability, the defense could not establish the source of the shirt, and testimony about the blood testing was not allowed. Hooper argued that he should have been allowed to offer the shirt as evidence collected through usual police procedures the way the DNA evidence had been collected through usual coroner's office procedures. Hooper proffered evidence that the blood on the shirt had "matched" the acquaintance, meaning that, according to the "PGM typing" conducted on the shirt, the acquaintance fell within a large segment of the population – over forty percent – with the same PGM typing.

{¶ 39} The chain-of-custody concern presented by the unidentified shirt was not analogous to the authentication question presented by the autopsy exhibits. The trial court did not allow the shirt into evidence because it concluded that numerous impermissible inferences would have to be drawn to establish the relevance of the shirt, if any. Moreover, even if the evidence could have been offered about the source of the shirt, the helpfulness of the PGM testing was tenuous, at best. The trial court did not abuse its discretion when it refused to admit the unidentified shirt.

{¶ 40} The second assignment of error is overruled.

IV

{¶ 41} Hooper's third assignment of error states:

{¶ 42} III. "APPELLANT WAS DENIED A FAIR TRIAL DUE TO THE CUMULATIVE ERRORS PERMITTED AT TRIAL."

{¶ 43} Hooper claims that he was denied a fair trial due to the effect of cumulative error. He cites the issues discussed above: the references to his juvenile adjudication, the exclusion of the unidentified bloody shirt, the authentication of the DNA swabs, and the detective's references to his prior "rape" case.

{¶ 44} The Supreme Court of Ohio has recognized that numerous harmless errors may cumulatively deprive a defendant of a fair trial and thus may warrant the reversal of his conviction. *State v. DeMarco* (1987), 31 Ohio St.3d 191, paragraph two of the syllabus. However, having thoroughly reviewed the record and Hooper's assigned errors, we cannot conclude that cumulative error occurred in this case.

{¶ 45} The third assignment of error is overruled.

V

{¶ 46} Hooper's fourth assignment of error states:

{¶ 47} "IV. "APPELLANT'S CONVICTIONS WERE NOT SUPPORTED BY SUFFICIENT EVIDENCE AND THE JURY'S VERDICTS WERE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶ 48} Hooper contends that "no evidence was presented to suggest that [he] caused the death" of Morehead. He also claims that the jury's "finding that a lack of force precluded a guilty verdict for rape, while contemporaneously finding force to establish kidnapping and murder [was] contradictory."

{¶ 49} 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 to sustain the verdict as a matter of law. *State v. Thompkins*, 78 Ohio St.3d

380, 386, 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: “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.” In contrast, when reviewing a judgment under a manifest weight standard of review, “[t]he court reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which evidence weighs heavily against the conviction.” *Thompkins*, supra, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶ 50} Hooper was convicted of one count of murder, in violation of R.C. 2903.02(A), which provides that no person shall purposely cause the death of another. He was also convicted of two counts of kidnapping, in violation of R.C. 2905.01(A)(2) and R.C. 2905.01(B)(2). R.C. 2905.01(A)(2) provides that no person, by force or threat of force, shall remove another from the place where the other person is found or restrain the liberty of the other person, for the purpose of facilitating the commission of a felony or flight thereafter. R.C. 2905.01(B)(2) states that no person, by force, threat,

or deception, shall knowingly restrain another of the other person's liberty, under circumstances that either create a substantial risk of serious physical harm or cause physical harm to the victim.

{¶ 51} Morehead's mother and her neighbors testified that she did not normally leave her young daughter unattended in her apartment or leave her apartment in her pajamas. Morehead's mother also testified that it was unlike Morehead to leave the apartment without her purse, keys, and identification. This evidence, coupled with the gruesome discovery of Morehead's body two days later, was probative of whether Morehead left the apartment by force or threat of force.

{¶ 52} The crime scene and forensic evidence tell the rest of the story. Mud deposited on the tops and sides of Morehead's shoes and lines scraped into the trail near where Morehead was found indicated that she had been dragged, rather than walked, down the trail. Her skull had been fractured in a place and manner that required the use of significant force, and a bloodied rock was found near her body. Morehead also had facial injuries and had been stabbed in the chest. The DNA evidence recovered from Morehead's body indicated that Hooper's semen was on the rectal and vaginal swabs taken from her body. According to a forensic scientist from the MVRCL, semen "realistically" remains in the body for only 24 to 40 hours. This evidence and testimony placed Hooper with Morehead within 24 to 40 hours of her death, although he told the police that he had not seen her in several years.

{¶ 53} The State also presented testimony from Hooper's cousin, Jeffrey Peters, that Hooper was very familiar with the wooded area in which the body was found and that, before Peters learned that Morehead had been killed, Hooper had told him that he

had “messed around” with her in those woods and had possibly killed her.

{¶ 54} Viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could have found the essential elements of kidnapping and murder proven beyond a reasonable doubt. Moreover, the jury’s verdict does not suggest that it clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.

{¶ 55} Finally, we reject Hooper’s argument that his acquittal of rape charges somehow “contradicted” the findings of guilt for kidnapping and murder, because force was required for all of the offenses. “Although the verdicts appear to be inconsistent, the Supreme Court has held that an inconsistency in a verdict cannot arise out of inconsistent responses to different counts. *State v. Brown* (1984), 12 Ohio St.3d 147, ***, syllabus; *Griffin v. State* (1868), 18 Ohio St. 438, 444-445, ***. The court has held that an inconsistency can only arise when the jury gives inconsistent responses to the same count. *Brown* at syllabus; accord *State v. Gleason* (1996), 110 Ohio App.3d 240, 245, ***. The court explained that each count in an indictment charges a distinct offense and is independent of all other counts. Following that reasoning, the court found that a jury’s decision as to one count is independent of and unaffected by the jury’s finding on another count.” *State v. Washington* (1998), 126 Ohio App.3d 264.

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

VI

{¶ 57} The judgment of the trial court will be affirmed.

.....

DONOVAN, P.J., and GRADY, J., concur.

Copies mailed to:

Mathias H. Heck, Jr.
Kelly D. Madzey
Frank A. Malocu
Hon. Gregory F. Singer