

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

STATE OF OHIO,	:	APPEAL NO. C-070825
Plaintiff-Appellee,	:	TRIAL NO. B-0704724
vs.	:	<i>JUDGMENT ENTRY.</i>
RICHARD EBERHART, III,	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.<sup>1</sup>

After a jury trial, defendant-appellant Richard Eberhart, III, was convicted of murder<sup>2</sup> with a three-year firearm specification and having a weapon while under a disability.<sup>3</sup> The trial court sentenced Eberhart to a minimum of 23 years to life in prison. Eberhart appeals his convictions and sentence. We affirm.

In the early morning of June 1, 2007, Darrell Jefferson was shot with a .45-caliber handgun in the rear parking lot of a recording studio in the Bond Hill section of Cincinnati. The shots continued as Jefferson ran from his assailant to his mother-in-law's house, where he collapsed. He died at the hospital two hours later. Eberhart was identified as Jefferson's shooter.

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<sup>1</sup> See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

<sup>2</sup> R.C. 2903.02(A).

<sup>3</sup> R.C. 2923.13(A)(3).

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A warrant was issued for Eberhart's arrest. Eberhart turned himself in to the police and denied shooting Jefferson. Eberhart gave the police an alibi: he had allegedly been riding with his friend Reggie Tidwell in Tidwell's yellow Camaro to purchase liquor at a Northern Kentucky liquor store between 11:30 p.m. and 12 a.m. Eberhart stated that when he and Tidwell had returned to Bond Hill, the police were investigating the shooting.

But the state debunked Eberhart's alibi at trial. Videotaped surveillance demonstrated that Eberhart had not been at the liquor store as he had claimed. And Tidwell testified that he had been at his aunt's home at the time of the shooting, without Eberhart, and that he did not own a yellow Camaro.

Additionally, another friend of Eberhart's, Thomas Merritt, testified that he had seen Eberhart shoot Jefferson with either a .45-caliber or a 9-mm handgun in the parking lot behind the recording studio. Merritt gave a detailed description of the shooting. This description was consistent with Merritt's statement to the police on the same day of the shooting, and it was also consistent with the physical and forensic evidence gathered during the investigation. According to Merritt, the men had been arguing in front of Eberhart's girlfriend's car before Eberhart pulled out the gun and shot Jefferson. Jefferson grabbed his chest, turned, and ran, and Eberhart followed in hot pursuit. Merritt also testified that, about ten seconds after the chase had begun, Craig Love, the owner of the studio, had fired a shot in the direction of Jefferson and Eberhart, but they were too far away.

Yet another friend of Eberhart's, Derrick Solomon, testified that Eberhart had called him shortly after the shooting and apologized for "messing up" the recording studio, which belonged to Solomon's brother. Cellular-phone records confirmed that Eberhart had called Solomon at that time.

Eberhart stipulated at trial that on the date of the murder he was under a disability that had prevented him from possessing a firearm.

In his first assignment of error, Eberhart argues that the trial court erred to his prejudice by allowing “other acts” evidence in violation of Evid.R. 404(B). Specifically, Eberhart contends that the court allowed two witnesses to testify that Eberhart had carried a gun in the past. The state argues that this testimony was used to establish Eberhart’s opportunity to possess a weapon and to commit the crimes. But no limiting instruction was given to this effect.

We review the admission of this propensity testimony under a plain-error standard because Eberhart did not object to it at trial.<sup>4</sup> Notice of plain error is to be taken with utmost caution, and plain error does not exist unless it can be said that but for the error the outcome of the trial would clearly have been otherwise.<sup>5</sup> That is not the case here because even if the trial court erred, the strength of the state’s evidence rendered the disputed testimony inconsequential to the finding of guilt. Accordingly, we overrule the first assignment of error.

In his second assignment of error, Eberhart contends that the trial court erred by denying his request to instruct the jury on voluntary manslaughter. Voluntary manslaughter is an inferior degree of murder.<sup>6</sup> Before instructing on manslaughter in a murder case, the trial court must determine whether evidence of reasonably sufficient provocation occasioned by the victim has been presented to warrant such an instruction.<sup>7</sup>

In this case, the evidence sufficiently demonstrated that Eberhart and Jefferson had had a “beef” over a trivial matter in the weeks before the shooting, and that they had argued immediately before the shooting. But these circumstances were insufficient to

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<sup>4</sup> See Crim.R. 52(B).

<sup>5</sup> *State v. Long* (1978), 53 Ohio St.2d 91, 372 N.E.2d 804.

<sup>6</sup> *State v. Shane* (1992), 63 Ohio St.3d 630, 632, 590 N.E.2d 272.

<sup>7</sup> *Id.* at paragraph one of the syllabus.

establish the serious provocation necessary for a voluntary-manslaughter instruction.<sup>8</sup> Moreover, Eberhart has not shown prejudice from the lack of such an instruction, when he otherwise maintains that the state failed to prove his presence at the shooting. Accordingly, his second assignment of error is not well taken.

Eberhart challenges the sufficiency of the evidence to support his convictions in his third and fifth assignments of error. Specifically, he claims that the state failed to present any credible evidence tying him to the crimes.

Sufficiency is a test of adequacy—the evidence, when viewed most favorably to the state, must establish each element of the offense beyond a reasonable doubt.<sup>9</sup> In this case, the state presented eyewitness testimony from Merritt identifying Eberhart as Jefferson’s shooter. The physical and forensic evidence corroborated Merritt’s testimony. This evidence was more than adequate to establish that Eberhart was Jefferson’s shooter, and the third and fifth assignments of error are overruled.

In his fourth assignment of error, Eberhart challenges the weight of the evidence to support his conviction. In reviewing a claim that a conviction is against the manifest weight of the evidence, this court acts as a “thirteenth juror.”<sup>10</sup> We note, however, that assessing the credibility of witnesses is primarily for the trier of fact.<sup>11</sup>

Eberhart argues that Merritt was not a credible witness. We recognize Merritt’s interest in deflecting blame from himself, but Merritt’s credibility was bolstered by the other evidence and his prior consistent statement to the police. Importantly, the state successfully crippled Eberhart’s alibi. We cannot say that the jury clearly lost its way in

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<sup>8</sup> *Id.* at 637-638.

<sup>9</sup> See *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus.

<sup>10</sup> *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541.

<sup>11</sup> *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, paragraph one of the syllabus.

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concluding that Eberhart was guilty of the offenses. Accordingly, we overrule the fourth assignment of error.

In his final assignment of error, Eberhart contends that his sentence was “excessive” and thus contrary to law. We disagree. The court imposed the mandatory indefinite term of 15 years to life for the murder conviction, plus a mandatory three-year term for the firearm specification, and a consecutive five-year term, the maximum, for the weapon-under-a-disability conviction. This sentence was in accordance with the sentencing statutes and was not contrary to law.<sup>12</sup> Accordingly, we overrule the sixth assignment of error and affirm the trial court’s judgment.

Further, a certified copy of this Judgment Entry shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

**HILDEBRANDT, P.J., CUNNINGHAM and DINKELACKER, JJ.**

*To the Clerk:*

Enter upon the Journal of the Court on January 14, 2009  
per order of the Court \_\_\_\_\_.  
Presiding Judge

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<sup>12</sup> *State v. Traore*, 1st Dist. No. C-060802, 2007-Ohio-6334, at ¶14, citing *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, ¶100.