

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

STATE OF OHIO,	:	APPEAL NO. C-080261
	:	TRIAL NO. B-0700777
Plaintiff-Appellee,	:	
	:	<i>JUDGMENT ENTRY.</i>
vs.	:	
DERRYCK HENSON,	:	
Defendant-Appellant.	:	

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

After a jury trial, defendant-appellant Derryck Henson was found guilty of murder.² He was sentenced to prison for a period of 15 years to life. He now appeals that conviction.

Richard Mohammad worked with Cincinnati's Human Relations Commission and Ceasefire Cincinnati, an anti-gun organization. He was also a recovering drug addict. Toward the end of 2006, he apparently began to relapse.

On December 29, Muhammad met with his estranged wife for lunch. He told her that, if anything happened to him, she should tell the police that the person responsible was a man named Phillip and that Phillip's mother worked at a restaurant called Dukester's.

Late that evening, Muhammad met with Angel Ferguson and two others in a hotel room. Ferguson lived at the hotel with her husband. She was a friend of

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

² R.C. 2903.02(A).

Muhammad and often used drugs with him at the hotel. Ferguson testified that Muhammad often lent his car to drug dealers as payment for the drugs he received.

Ferguson called a man named Phillip Harris to buy some drugs from him. Muhammad had previously bought drugs from Harris, having lent him his car in payment for a previous drug transaction. When Harris arrived at the hotel room, he asked Muhammad for money for the drugs. Muhammad refused to pay him because Harris had wrecked Muhammad's car the last time Muhammad had lent it to him.

Harris then told Muhammad that he would be right back. Ferguson testified that she thought that he was leaving to get more drugs. Harris returned to the hotel room and demanded entry. Ferguson recognized his voice and let him in, after Harris said that he "didn't have anything."

Harris wore a mask when he entered the room. Henson also came in wearing a hooded sweatshirt with the hood pulled over his face. Henson walked in behind Harris, who told him, "That's him, fuck him up." Henson pulled out a gun and shot Muhammad three times in the torso, killing him. Harris and Henson then ran out of the hotel and drove off.

Shortly thereafter, Ferguson called Harris and asked him why they had shot Muhammad. Harris asked her whether Muhammad was dead. When Ferguson responded that she did not know, Harris repeatedly told her, "You don't know nothing."

Police interviewed Ferguson, who told them that she feared retaliation. She later moved from the hotel where the shooting had occurred. She identified Henson from a still photograph taken from the surveillance camera at the hotel, stating that Henson was the man who had shot Muhammad. She also said that Henson had a tear-shaped tattoo on his face that had not been covered by the hood.

When Henson was interviewed by police, he first gave them a false name. He also initially denied being at the hotel, but later changed his story when he was shown the surveillance photograph. He admitted that he was one of the two people in the photograph. He then told police he was selling drugs at the hotel. He said that he heard arguing and went to investigate. He ran from the hotel after the shots were fired. He admitted being in the room when the shooting had occurred and claimed that Harris was the shooter. Even though Henson claimed to fear Harris, he nonetheless ran out of the hotel, got into a car, and drove off with him.

Ferguson's testimony was taken by agreement of the parties at a deposition. The agreement stipulated that the deposition testimony would be used at the trials of both Harris and Henson. According to the record, Ferguson entered a witness-protection program with the assistance of local law enforcement. The record also indicates that law enforcement officers might also have assisted Ferguson's husband with problems that might have arisen in his parole. Her whereabouts at the time of trial were unknown.

In Henson's first two assignments of error, he claims that the use of Ferguson's deposition at trial was improper. He claims that (1) its admission violated Evid.R. 804 and the Confrontation Clause, and (2) the failure to disclose the favorable treatment given to Ferguson denied his right to due process.

As to the first assignment of error, Henson first argues that the state failed to show that Ferguson was unavailable to testify at trial. But the record fails to establish that he made that argument below, and he has therefore forfeited the argument on appeal.³ Nonetheless, the trial court indicated that "the State has made

³ See *State v. Tabler*, 5th Dist. No. CT2008-0038, 2009-Ohio-2669, at ¶13, citing *State v. Williams* (1977), 51 Ohio St.2d 112, 364 N.E.2d 1364, paragraph one of the syllabus.

efforts to find Ms. Ferguson, and she's not available at this point." We also note that we have held that the State had sufficiently shown Ferguson's unavailability in the case of Henson's codefendant.⁴

Additionally, Henson argues that the testimony should not have been used because the state failed to demonstrate its reliability. The problem with this argument is that it is premised on the assumption that "initial counsel was unaware of previous statements made by Angel to Detective Randolph the night of the murder and unaware of benefits Angel received as part of the witness protection program." But, on this record, we cannot say what prior counsel knew or did not know. Prior counsel made no statements about lack of knowledge in the record. And the state indicated at one point that "the defense was fully aware of the Angel Ferguson situation. At the time of the deposition, it was fully discussed. The reason that the State wanted to do the deposition was that she was frightened and she was held at an undisclosed location and she was moving to Florida. So the defense was totally aware of that situation." Absent a showing in the record that prior counsel was unaware of the details of the arrangements, we must presume regularity below and credit the failure to explore these issues in detail—the need to relocate Ferguson and the provisions made to do so—to trial strategy.

Related to this argument, Henson claims that his inability to cross-examine Ferguson on these matters violated his right to due process. We disagree.

A defendant has a constitutional right of access to evidence.⁵ In *Brady v. Maryland*,⁶ the United States Supreme Court held that the prosecution's suppression

⁴ *State v. Harris* (Nov. 12, 2008), 1st Dist. No. C-080153, citing *State v. Tolbert* (May 7, 1999), 1st Dist. No. C-980622.

⁵ *State v. South*, 162 Ohio App.3d 123, 2005-Ohio-2152, 832 N.E.2d 1222, at ¶10, citing *State v. Benson*, 152 Ohio App.3d 495, 2003-Ohio-1944, 788 N.E.2d 693, at ¶10.

⁶ (1963), 373 U.S. 83, 87, 83 S.Ct. 1194.

of evidence that is favorable to the defendant violates his due-process rights if the evidence is material to guilt or punishment, regardless of the prosecution's intentions.⁷ Evidence is "material" if there is a "reasonable probability" that disclosure would produce a different result.⁸ The United States Supreme Court has qualified this definition, stating that a "reasonable probability" of a different trial result is demonstrated by showing that the prosecution's suppression of the evidence "undermine[d] confidence in the outcome of the trial."⁹

The information at issue was thoroughly addressed with other witnesses, and with it, counsel was able to lodge a strong attack on Ferguson's credibility in closing argument. Since the information came in, was thoroughly presented, and effectively utilized, we can only conclude that Henson received a fair trial that resulted in a verdict worthy of confidence. The fact that the "undisclosed" evidence was actually used during Henson's trial makes this case much different than those cited by Henson in which the evidence was never presented.¹⁰ Henson's first two assignments of error are overruled.

In his third assignment of error, Henson claims that the trial court improperly allowed testimony that he had given the police the wrong identifying information, in violation of his *Miranda* rights.¹¹ In his fourth assignment of error, he claims that the use of these statements during the state's closing argument constituted prosecutorial misconduct. But asking questions about identity is not subject to the

⁷ See, also, *State v. Johnston* (1988), 39 Ohio St.3d 48, 60, 529 N.E.2d 898.

⁸ *United States v. Bagley* (1985), 473 U.S. 667, 682, 105 S. Ct. 3375, 87 L. Ed. 2d 481.

⁹ *Kyles v. Whitley* (1995), 514 U.S. 419, 434, 115 S. Ct. 1555.

¹⁰ See, e.g., *Kyles v. Whitley* (1995), 514 U.S. 419, 422, 115 S.Ct. 1555, 1569 (evidence first introduced in post-conviction hearing); *State v. Johnston* (1988), 39 Ohio St.3d 48, 529 N.E.2d 898 (evidence first introduced in motion for new trial); *Giglio v. United States* (1974), 405 U.S. 150, 92 S.Ct. 763 (evidence first introduced in motion for new trial).

¹¹ *Miranda v. Arizona* (1966), 384 U.S. 436, 86 S.Ct. 1602.

restrictions of *Miranda*.¹² Accordingly, it did not amount to prosecutorial misconduct when the state made reference to Henson's changing story about his identity. His third and fourth assignments of error are overruled.

In his final assignment of error, Henson claims that the trial court erred when it refused to allow him to present evidence indicating that his co-defendant was more likely to have been the shooter. Henson wanted to present testimony that Harris had set someone on fire because of an unpaid debt. But this did not have the degree of similarity to the incident in question necessary to permit admission under Evid.R. 404. The fact that Harris resorted to violence in order to collect drug money owed to him was hardly a "behavioral fingerprint" for the murder in this case. We overrule his assignment of error.

Therefore, we affirm the trial court's judgment.

A certified copy of this judgment entry is the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

PAINTER, P.J., CUNNINGHAM and DINKELACKER, JJ.

To the Clerk:

Enter upon the Journal of the Court on August 26, 2009

per order of the Court _____
Presiding Judge

¹² See *State v. Wolf*, 8th Dist. No. 83632, 2004-Ohio-5023; *State v. Cheatam*, 5th Dist. No. 06-CA-88, 2007-Ohio-3009, at ¶92.