State v. McLoyd

2023-Ohio-4306 (2023) | Cited 0 times | Ohio Court of Appeals | November 30, 2023

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT COUNTY OF CUYAHOGA

STATE OF OHIO, :

Plaintiff-Appellee, : No. 112092 v. :

TAMARA MCLOYD, :

Defendant-Appellant. :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED RELEASED AND JOURNALIZED: November 30, 2023

Criminal Appeal from the Cuyahoga County Common Pleas Court Case Nos. CR-22-666570-A and CR-22-669473-A

Appearances:

Attorney, and Kevin Filiatraut, Assistant Prosecuting Attorney, for appellee.

Michael Gordillo, for appellant

ANITA LASTER MAYS, A.J.:

Defendant- convictions and sentence and asks this court to reverse her convictions, vacate her

sentence, and remand to the trial court for a new trial. We affirm. {¶2} McLoyd is appealing two lower court cases that were joined for trial;

CR-22-666570-) and CR-22-669473-). In 666570,

McLoyd was found guilty of two counts of aggravated murder, unclassified

felonies, in violation of R.C. 2903.01(A) and (B); two counts of murder, unclassified felonies, in violation of R.C. 2903.02(B); one count of aggravated robbery, a first-degree felony, in violation of R.C. 2911.01(A)(1); two counts of felonious assault, first-degree felonies, in violation of R.C. 2903.11(A)(1) and (2); one count of grand theft, a fourth-degree felony, in violation of R.C. 2913.02(A)(2); one count of petty theft, a first-degree misdemeanor, in violation of R.C. 2913.02(A)(4); and one count of having weapons while under disability, a third-degree felony, in violation of R.C. 2923.13(A)(2). One-, three-, and seven-year firearms specifications and forfeiture specifications were attached to the aggravated murder, murder, aggravate robbery, felonious assault, and grand theft counts, while forfeiture specifications were attached to the petty theft and having weapons while under disability counts.

{¶3} In 669473, McLoyd was found guilty of aggravated robbery, a first-degree felony, in violation of R.C. 2911.01(A)(1); and having weapons while under disability, a third-degree felony, in violation of R.C. 2923.13(A)(2). The aggravated robbery count had one- and three-year firearms specifications attached to it. After a jury trial that heard the majority of the counts and a bench trial that considered the having weapons while under disability counts, McLoyd was found guilty of all counts and sentenced to life in prison with the possibility of parole after 47 years.

I. Facts and Procedural History

{¶4} On December 25, 2021, parking lot of the Cross Creek Apartments. Hernandez had recently signed a lease

and was in the process of moving in. Hernandez was unloading his suitcases from

his vehicle and observed two individuals walking towards him. Hernandez spoke

This individual also brandished a gun and was wearing a mask. Hernandez could

not tell if the person was a man or woman, but was able to determine that the

individual was African-American.

{¶5} Hernandez gave the individual the keys to his vehicle, walked toward

his apartment complex, and called 911. that a gold Toyota was taken from Hernandez at gunpoint. Officer Grammes

noticed that surveillance cameras were located on the building, but was unable to

review the footage at that time because it was Christmas Day. At the time,

Hernandez described the gun color as gray and black, but at trial, testified that the

gun was red. When questioned about the discrepancy, Hernandez explained that

he meant he saw two red dots on the gun. {¶6} .

When they arrived, they observed EMS at the apartments. They learned that

someone had been shot, later identified as Officer who was in the ambulance and was being transported by EMS to the hospital.

shoes were located. Officer Salim searched for shell casings from the gun used to

shoot Officer Bartek, but could not locate them, which indicated to Officer Salim

that a revolver could have possibly been used to shoot Officer Bartek. Officer Salim

accessed the surveillance video and observed the shooting along with Detective

. .

{¶7} Det. Simonelli observed the surveillance video and confirmed that the

shoes and black masks found at the scene belonged to Officer Bartek. He also observed the shooting of Officer Bartek and his car, a Mazda, and cellphone being stolen. . Simonelli and Officer Salim observed on the video. Officer Bartek sustained a gunshot wound to the right side of his back, which caused a liter of blood to pool inside of his body. fleeing from the assailant, but died within seconds of the shooting after collapsing between two cars. {¶8} The surveillance video also showed that the assailant, with a gun in hand, approached Officer Bartek from behind, causing Bartek to put both of his hands in the air. Officer Bartek gave items to the assailant with both of his hands weapon. However, Officer Bartek missed and fell away and tried to run. The assailant fired in the air and then shot Officer drove past Officer Bartek, while he was on the ground.

{¶9} Also viewed during this time was the surveillance video from the Hernandez robbery. The video showed that the assailant who brandished a gun and robbed Hernandez was wearing a white face mask and a dark-colored jacket with a white stripe down the arm. The jacket also had a separate dot of color on the left shoulder that was a logo for the jacket.

{¶10} A BOLO 1 . Officers from a neighboring police department observed the stolen vehicle and began pursuit. The driver of the stolen Mazda crashed the vehicle, and was detained by police. brought in for questioning. . Butler who implicated McLoyd, the appellant, in the

robbery and homicide of

Officer Bartek. Butler also gave Det. Legg access to his Instagram account and cell

1 An acronym used by law enforcement to warn law enforcement or the general public. phone. another person, Cedrick, facilitating the trading of stolen vehicles. These messages

also demonstrated that McLoyd

the night she robbed and killed him.

{¶11} . unit, was tasked, along with other departments and members of law enforcement,

. Det. Odea was notified that the

vehicle had been recovered and that McLoyd was a suspect. Det. Odea looked at

McLoyd . McLoyd posted a video to

her account detailing her current location and the vehicle she was driving. Det.

Odea went to the location and observed McLoyd getting into the vehicle at a gas

station. McLoyd, and three other occupants of the vehicle, were detained by police

and were advised of their Miranda rights. Officers located a firearm in the door of

McLoyd was observed sitting. Officers

observed that the gun was a stainless-steel revolver with a black handle and a red

marking on the sight. Later, ballistics testing showed that the gun, a .357 Magnum

revolver had been fired. The bullet recovered from Of same number of lands and grooves as the test-fired bullets from the gun, but the

autopsy bullet was too damaged to definitively state the bullet found in Officer

. Additionally, McLoyd revolver. {¶12} During McLoyd McLoyd admitted to having Officer

initially denied shooting him. However, McLoyd eventually admitted to shooting

Officer Bartek. She told officers that she was scared and did not mean to shoot him. McLoyd evening after the shooting. McLoyd and they were consistent with what officers observed her wearing on the surveillance video at the time of the shooting.

{¶13} Officers also searched McLoyd evidence. They McLoyd posted messages suggesting that she was looking for a car to steal. Later, around the time of the theft, she posted that she stole a car from the west side, where the Cross Creek Apartments are located. Also, McLoyd posted videos and photos of herself wearing the same outfit the assailant was observed wearing in the surveillance video on December 25, 2021, at the time of the Hernandez robbery. The photos also showed a dashboard of a Toyota Corolla, the same make and model of the car stolen from Hernandez.

{¶14} After McLoyd was booked and processed in the county jail, she called her mother on a recorded phone call where she admitted to killing Officer Bartek. She also confirmed that the Instagram account being used as evidence of both robberies was hers. She admitted that Officer Bartek was on the ground when she shot him.

{¶15} On January 7, 2022, McLoyd was indicted for the robbery and homicide of Officer Bartek. On March 13, 2022, McLoyd filed a motion to suppress her video-recorded statement that was made after she was mirandized and taken into police custody. On April 22, 2022, McLoyd was indicted for the robbery of

Hernandez. On May 26, 2022, the state filed a motion to join the two indictments

for trial, and McLoyd objected to joinder. On May 27, 2002, there was hearing on

McLoyd . However, McLoyd

instructed her trial counsel to withdraw the motion.

{¶16} of indictments for one trial. Journal entry No. 124459514 (Jun. 3, 2022). In the

:

If the evidence at trial comes in as expected by the prosecution then the defendant will not be able to demonstrate prejudice because one subset of the evidence will be dedicated to proving the events of Christmas Day and the other subset of the evidence will go towards proof beyond a reasonable doubt of the aggravated murder and . In the absence of such prejudice, joinder

join the indictments in case numbers CR 22-666570 and CR 22- 669473 is granted.

Id.

{¶17} McLoyd was found guilty on all counts and sentenced to life in prison.

She filed this appeal assigning seven errors for our review: 1. The trial court prejudiced appellant and committed reversible error by incorrectly advisi indictment meant that the grand jury found appellant was more

likely than not guilty;

2. Joinder of the cases for trial was impermissibly prejudicial to the appellant;

3. evidence;

4. evidence;

5. The trial court committed reversible error prejudicing appellant by permitting hearsay testimony into evidence;

6.

7. The trial court committed reversible error prejudicing the appellant when it imposed an

unconstitutional sentence upon appellant pursuant to the Reagan Tokes law.

II. Jury Advisement

{¶18} In McLoyd prejudiced her and committed reversible error by incorrectly advising the petit jury

McLoyd was

{¶19} During voir dire, the trial court made the following statements:

An indictment is returned when the prosecutor presents evidence to a grand jury. When the prosecutor presents evidence to a grand jury, that proceeding is almost always one-sided. In other words, the Defendant or Defendants or their representatives are not present at the grand jury proceedings. Moreover, a grand jury, which is composed of people like yourselves who do this duty for several weeks at a time and hear a fair number of cases, it does not have to be unanimous, and a grand jury is only asked to determine whether there is probable cause to believe that a person suspected of committing a crime committed the crime. If the grand jury does find probable cause to believe that appears more likely than not that the person did commit the crime, then that grand jury returns an indictment and it comes here for your consideration.

* * *

At trial, though, the Defendants are presumed innocent. That presumption stays in place until you as a jury have found that the proof is such as to exclude every reasonable doubt of the guilt of any particular Defendant on a particular charge.

Reasonable doubt is present when after the jurors have carefully considered a charge they cannot say that they are firmly convinced of the truth of a charge. Reasonable doubt is a doubt based upon reason and common sense. Reasonable doubt is not mere possible doubt, because everything related to human affairs or dependent upon moral evidence is open to some possible or imaginary doubt. Proof beyond a reasonable doubt is proof of such character that an ordinary person would be willing to rely and act upon it in the most important of his or her affairs.

Tr. 159 161.

{¶20} McLoyd have the same meaning. Because the probable cause standard does not have a

quantification into percentages, it depends on the totality of the circumstances.

She further argues that she was entitled to a presumption of innocence, and the

state has the burden of production regarding the elements of a criminal offense. {¶21} McLoyd, however, did not object to this instruction at trial, and thus

has waived all but a plain error review on appeal.

failed to raise an error affecting substantial rights at trial, an appellate court

reviews the error under the plain error standard in Crim.R. State v. Pugh,

8th Dist. Cuyahoga No. 111099, 2022-Ohio-3038, ¶ 17, quoting State v. Perry, 101

Ohio St.3d 118, 2004-Ohio-297, 802 N.E.2d 643, ¶ 14. and prejudicial although neither objected to nor affirmatively waived which, if

permitted, would have a material adverse effect on the character and public

Id., citing Schade v. Carnegie Body Co., 70

Ohio St.2d 207, 209, 436 N.E.2d 1001 (1982).

{¶22} The trial court clearly explained the reasonable doubt standard to the

jury and stated that defendants are presumed innocent. McLoyd has not

ly adverse effect on

the proceedings or prejudiced her in anyway.

{¶23} Therefore, McLoyd

III. Joinder of Cases

A. Standard of Review

{¶24} State v. Davenport, 8th Dist. Cuyahoga Nos. 112004 and

112005, 2023-Ohio-2953, ¶ 30, citing State v. Torres, 66 Ohio St. 2d 340, 343, 421

N.E.2d 1288 (1981). State v. Price, 8th Dist. Cuyahoga No. 111921, 2023-Ohio-3790, ¶ 32, quoting State v. Weaver, Slip

Opinion No. 2022-Ohio-4371, ¶ 24. Id. B. Law and Analysis

{¶25} In McLoyd of the cases for trial was impermissibly prejudicial.

Davenport at ¶ 27 quoting Torres at 343; Crim.R. 13;

Crim.R. 8(A).

and expense, diminishing the inconvenience of witnesses and minimizing the

Id.

. 13 allows two different indictments to be tried together offenses * * * Id.

Crim.R.

the same or similar character, or are based on the same act or transaction, based on two or more acts or transactions connected together or constituting parts

Id.

{¶26} Here, in the instant case, the trial court reasoned that

[t]hese offenses occurred exactly one week apart. Both offenses involved the use of a gun [with] the object of the robbery being the vehicle controlled by the victim. Both offenses occurred at the same relative time of day (late afternoon) and at the same location the Cross Creek Apartment complex. Both offenses involved the same video system recording the events.

Judgment entry Nos. 666570 and 669473. {¶27} conduct is found when the evidence interlocks and the events occur in close

proximity in location and time; or when the offenses are part of a common scheme

or plan and similarly, occur over Davenport at ¶ 28. See

also State v. Hamblin, 37 Ohio St.3d 153, 158, 524 N.E.2d 476 (1988); State v.

Dean, 146 Ohio St.3d 106, 2015-Ohio-4347, 54 N.E.3d 80, ¶ 62.

{¶28} McLoyd argues that she was prejudiced by the joinder under Crim.R.

14. Crim.R. 14 provides, in relevant part:

If it appears that a defendant or the state is prejudiced by a joinder of offenses or of defendants in an indictment, information, or complaint, or by such joinder for trial together of indictments, information or complaints, the court shall order an election or separate trial of counts, grant a severance of defendants, or provide such other relief as justice requires.

{¶29} .

Davenport at ¶

30, quoting Torres, 66 Ohio St.2d 340, 343.

Id.

{¶30} either 1) the evidence in the joined cases could be introduced in separate trial as

. 404(B); or (2) by showing that the evidence as Id. at ¶ 32, citing State v. Diar, 120 Ohio St.3d

460, 2008-Ohio-6266, 900 N.E.2d 565, ¶ 96.

{¶31} In this case, we determine that the evidence was simple and direct.

McLoyd argues that the evidence concerning the assailants who robbed Hernandez

was lacking and the video surveillance of the Bartek killing was insufficient quality.

However, McLoyd . There were messages on McLoyd phone implicating her in the Hernandez robbery. There were pictures and videos

of McLoyd wearing the same clothes of the assailant in the surveillance video on

her Instagram.

{¶32} Additionally, McLoyd confessed to the police that she shot Officer

Bartek. Her DNA was found on the gun used in the shooting as well as on the

clothes she wore the night of shooting. McLoyd also confessed to her mother that

she shot Officer Bartek during a recorded call from the jail. Text messages on

McLoyd in both robberies. McLoyd has failed to

demonstrate how she was prejudiced by the joinder of the cases.

{¶33} Therefore, McLoyd

IV. Sufficiency and Manifest Weight of the Evidence

A. Standard of Review

{¶34} State v. Hester, 8th Dist. Cuyahoga No. 108207, 2019-Ohio-5341, ¶ 16, quoting

State v. Thompkins, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997).

{¶35} test for sufficiency requires a determination of whether the

Id. at ¶ 17, quoting State v.

Bowden, 8th Dist. Cuyahoga No. 92266, 2009-Ohio-3598, ¶ 13. 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

Id., quoting State v. Jenks, 61 Ohio

St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus.

{¶36} Id. at ¶ 18, quoting

Thompkins at 387. whether the evidence is legally sufficient to support a verdict as a matter of

law, * * * weight of the evidence addresses the evidence

Id., quoting State v. Wilson, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d

1264, ¶ 25, citing Thompkins at 386-387. whose evidence is more persuasive Id., citing

Thompkins at 387. record, the reasonable inferences, and the credibility of the witnesses to determine

created such a manifest miscarriage of justice that the conviction must be reversed Id., quoting State v. Martin, 20 Ohio App.3d 172, 485

N.E.2d 717 (1st Dist.1983).

{¶37}

Id. at ¶ 19, quoting Thompkins at 546-547.

Id.

quoting Thompkins at 387. resolution of the conflicting evidence and, in effect,

Id.

{¶38} Id. at ¶ 20. behaviors are not evident in a written transcript. Demeanor is not what the witness

Id.

to the court of appeals Id.

Id., quoting State v. DeHass, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph

one of the syllabus. {¶39} Id. at ¶ 21, quoting Barberton v. Jenney, 126 Ohio

St.3d 5, 2010-Ohio-2420, 929 N.E.2d 1047, ¶ 20.

{¶40} Id. at ¶ 22, quoting

Thompkins at 547. Id. quoting

State v. Robinson, 8th Dist. Cuyahoga No. 96463, 2011-Ohio-6077.

B. Law and Analysis

{¶41} In McLoyd

her convictions are not support by sufficient evidence and they are against the

manifest weight of evidence. Specifically, McLoyd argues that the evidence was

insufficient to conclude that she was the one who robbed Hernandez. She also

contends that text messages from her phone were hearsay, and therefore

impermissible evidence. Further, she argues that without these messages, there

.

{¶42} Circumstantial evidence corroborates the information taken from

Butler and McLoyd and ballistics reports, in addition to McLoyd her mother. State v. Kyle, 8th Dist. Cuyahoga No. 108702, 2020-Ohio-3281, ¶ 26. See State v. Durr, 58 Ohio St.3d 86, 568 N.E.2d 674 (1991).

required to draw an inference from the evidence to the proposition that it is offered

Id., quoting State v. Cassano, 8th Dist. Cuyahoga No. 97228, 2012-Ohio-4047, ¶ 13.

Id., quoting Cassano, at ¶ 13. See also State v. Hartman, 8th Dist. Cuyahoga No. 90284, 2008-Ohio- Circumstantial evidence is the proof of facts by

direct evidence from which the trier of fact may infer or derive by reasoning other

{¶43} Id. at ¶ 27, citing State v. Santiago, 8th Dist. Cuyahoga No. 95333, 2011-Ohio-1691, ¶ 12. circumstantial evidence, those differences are irrelevant to the probative value of

Id., quoting Cassano, at ¶ 13.

Id., quoting State v. Lott, 51 Ohio St.3d 160, 167, 555 N.E.2d 293 (1990). {¶44} As previously stated, the surveillance video from the Hernandez

robbery showed that the assailant who brandished a gun and robbed Hernandez,

was wearing a white face mask and a dark-colored jacket with a white stripe down

the arm. The jacket also had a separate dot of color on the left shoulder that was a

logo for the jacket. McLoyd posted videos and photos of herself wearing the same

outfit the assailant was observed wearing in the surveillance video on December 25, 2021, at the time of the Hernandez robbery. The photos also showed a dashboard of a Toyota Corolla, the same make and model of the car stolen from Hernandez.

{¶45} As it pertains to the murder of Officer Bartek, McLoyd confessed to the police that she shot Officer Bartek stating that it was an accident and she was scared. Her DNA was found on the gun used in the shooting as well as on the clothes she wore the night of shooting. McLoyd also confessed to her mother that she shot Officer Bartek during a recorded call from the jail. Text messages on McLoyd in both robberies. There was sufficient evidence to demonstrate that McLoyd robbed Hernandez and killed Officer Bartek.

{¶46} Additionally, McLoyd weight of the evidence. McLoyd has not demonstrated that the jury lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. Given the evidence stated above, McLoyd also has not demonstrated that the evidence weighs heavily against her convictions. She does not cite conflicting testimony or identify testimony that was not credible. She only argues that the evidence should not have reached the jury. Her arguments regarding the permissibility of the evidence are addressed in the review of the next assignment of error.

{¶47} Therefore, McLoyd overruled.

V. Hearsay

A. Standard of Review

{¶48} State v. Jacinto, 2020-Ohio-3722, 155 N.E.3d 1056 (8th Dist.),

¶ 60, citing State v. McKelton, 148 Ohio St.3d 261, 2016-Ohio-5735, 70 N.E.3d

508, ¶ 97.

{¶49} admission of evidence, including whether evidence constitutes hearsay and

In re A.M., 8th Dist. Cuyahoga No. 110551,

2022-Ohio-612, ¶ 22, citing Solon v. Woods, 8th Dist. Cuyahoga No. 100916, 2014-

Ohio-5425, ¶ 10.

Id., citing

State v. Maurer, 15 Ohio St.3d 239, 473 N.E.2d 768 (1984).

B. Law and Analysis {¶50} In McLoyd

committed reversible error by permitting hearsay testimony into evidence. First,

McLoyd 11 call was impermissible. She

argues that the 911 call was a testimonial, out-of-court statement offered for its

truth, and not subject to cross-examination.

{¶51} Preliminarily, we note that McLoyd did not object to the admission of

the text messages or the 911 call during the trial, and thus, we review only for plain

error. Under Crim.R. 52(B), plain errors affecting substantial rights may be

noticed by an appellate court even though they were not brought to the attention

of the trial court. To constitute plain error, there must be (1) an error, i.e., a

deviation from a legal rule, (2) that is plain or obvious, and (3) that affected

substantial rights, i.e., affected the outcome of the case. State v. Barnes, 94 Ohio

St.3d 21, 27, 759 N.E.2d 1240 (2002).

{¶52} Cleveland v. Myles, 8th

Dist. Cuyahoga No. 111309, 2022-Ohio-4504, ¶ 25, quoting State v. Martin, 2016-

Ohio-225, 57 N.E.3d 411, ¶ 59 (5th Dist.).

{¶53} . statement describing or explaining an event or condition made while the declarant

was perceiving the event or condition, or immediately thereafter unless

Id. at ¶ 26, quoting Evid.R. 803(1). . is the spontaneity of the statement; it must be either contemporaneous with the

Id., quoting State v. Essa, 194 Ohio

App.3d 208, 2011-Ohio-2513, 955 N.E.2d 429, ¶ 126 (8th Dist.).

underlying this hearsay exception is the assumption that statements or

perceptions, describing the event and uttered in close temporal proximity to the

Id., quoting State v. Dixon, 152 Ohio

App.3d 760, 2003-Ohio-2550, 790 N.E.2d 349, ¶ 12 (3d Dist.). courts have routinely held that 911 calls are admissible as present sense

Id., quoting Ohio v. Scott, 1st Dist. Hamilton Nos. C-200385 and

C-200403, 2021-Ohio-3427, ¶ 17. See also State v. Smith, 2017-Ohio-8558, 99

{¶54}

analysis, there is no bright line rule as to what amount of elapsed time precludes a

Id. at ¶ 27, quoting State v. May, 3d Dist.

Logan No. 8-11-19, 2012-Ohio-5128, ¶ 42. present sense impression exception applies even where the

911 call is made up to

Id., citing State v. Travis, 165 Ohio App.3d 626,

2006-Ohio-787, 847 N.E.2d 1237, ¶ 37 (2d Dist.). {¶55} In this case, the surveillance video demonstrates that the robbery of

Hernandez occurred at approximately 4:20 p.m. Hernandez immediately called

911, and by 4:30 p.m., officers were dispatched to the scene. Given this evidence,

11 call is admissible as an excited utterance or under the present

sense impression exception to the hearsay rule. McLoyd

Hernandez was no longer in danger is misplaced and is not a factor is determining

whether the call is testimonial in nature.

{¶56} Second, McLoyd contends that the Instagram messages between

Butler and Cedric were inadmissible because McLoyd was not a part of the

conversation. McLoyd also argues that these messages were used to form a key

Officer Bartek. However, McLoyd

. These

messages were not admitted to demonstrate McLoyd robbed and killed Officer

Bartek, but rather to explain why the police asked McLoyd about the messages

when she confessed. The trial court did not allow any testimony about the specifics

of the interview with Butler. While observing the video of McLoyd

during the trial, the police were shown asking McLoyd about the information

. His actual messages were not entered into

evidence. Tr. 803. {¶57} After reviewing this assignment of error for plain error, we cannot conclude, given the evidence, that an error occurred.

{¶58} Therefore, McLoyd

VI. Ineffective Assistance of Counsel

A. Standard of Review

{¶59}

State v. Virostek, 8th

Dist. Cuyahoga No. 110592, 2022-Ohio-1397, ¶ 62, citing State v. Bradley, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraph two of the syllabus; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

This court has held that to establish ineffective assistance of counsel

for failure to file a motion to suppress, one must prove that: (1) there was a basis

to suppress the evidence in question and (2) that failure to file the motion to

suppress caused pre State v. Marneros, 8th Dist. Cuyahoga No. 109258,

2021-Ohio-2844, ¶ 17, citing State v. Garcia, 8th Dist. Cuyahoga No. 94386, 2010-Ohio-5780, ¶ 8; State v. Robinson, 108 Ohio App.3d 428, 433, 670 N.E.2d 1077

(3d Dist.1996). file a motion to suppress is not per se ineffective

Id., citing Garcia at ¶ 8 (citations omitted).

failure to file a motion to suppress constitutes ineffective assistance of counsel only Id., citing State v. Willis, 8th Dist.

Cuyahoga No. 89044, 2008-Ohio-444, ¶ 48 (citations omitted).

B. Law and Analysis

{¶61} In McLoyd counsel was ineffective because he withdrew her motion to suppress. On March 13, 2022, McLoyd filed a motion to suppress her video-recorded statement that was made after she was mirandized and taken into police custody. According to the record, McLoyd made the decision to withdraw the motion. The record reflects that McLoyd orally withdrew the motion at the hearing.

{¶62}

State v. Debose, 8th Dist. Cuyahoga No. 109531, 2022-Ohio-837, ¶ 20, citing Strickland v. Washington, 466 U.S. 668, 685-686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Id., citing State v. Davis, 159 Ohio St.3d 31, 2020-Ohio- 309, 146 N.E.3d

{¶63} Id. at ¶ 23, quoting State v. Bradley, 42 Ohio St.3d 136, 141, 538 N.E.2d 373 (1989). As a general matter, to establish ineffective assistance of counsel, a defendant must demonstrate: (1) deficient performance by counsel, reasonable errors, the outcome of the proceeding would have been different.

Strickland at 687-688, 694; Bradley, at paragraphs two and three of the syllabus. Strickland at 694.

Id. at ¶ 21.

{¶64} McLoyd decision to withdraw the motion to suppress. 3/13/2022 motion to suppress evidence. The defendant orally withdrew the Journal entry No. 124183087 (May 31, 2022). She also does not demonstrate any evidence that the motion would have been successful if the

hearing moved forward.

{¶65} Therefore, McLoyd

VII. Reagan Tokes Law

{¶66} In McLoyd error, she challenges the

application of the Reagan Tokes Law to her sentence. McLoyd

error is overruled pursuant to the decision in State v.Hacker, Slip Opinion No.

2023-Ohio-2535, where the Ohio Supreme Court recently addressed similar

arguments and found the Reagan Tokes Law to be constitutional. The Hacker Court determined the law does not violate the separation-of-powers doctrine, the

right to a jury trial, or the right to due process. Id. at ¶ 41.

{¶67} Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the

common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule

27 of the Rules of Appellate Procedure.

_____ ANITA LASTER MAYS, ADMINISTRATIVE JUDGE

MARY J. BOYLE, J., CONCURS; FRANK DANIEL CELEBREZZE, III, J., CONCURS (WITH SEPARATE OPINION)

FRANK DANIEL CELEBREZZE, III, J., CONCURRING:

I concur fully with my esteemed colleagues in the majority opinion.

I write separately to express my dismay and exasperation with the current state of gun control in the state of Ohio. The erosion of gun control in Ohio has placed more deadly weapons in the hands of inexperienced and unqualified people to the detriment of not only ordinary civilians, but all public servants.

To begin, I want to express in no uncertain terms that I am an ardent supporter of both the Ohio Constitution, Article I, Section 4, that provides the right issue. I am a Navy veteran who served as intelligence during the Vietnam War. I am a member of the National Rifle Association. Since my election to the common pleas bench in 1992, and then the appellate bench in 2001, I have been an Ohio jurist that is passionate about stare decisis and a dedicated follower of the strict constructionism legal philosophy. Throughout my career on the bench, I have handled cases involving gun violence, but I have recently noticed a glaring frequency in the amount of these cases, especially where the violence has been directed at public servants, including police officers, firefighters, my fellow jurists, and my colleagues of the Ohio bar. I can no longer remain silent. The prevalence of guns and their increased usage in violent crimes, especially by young people, mandates checks by the General Assembly on gun ownership and usage.

In this case, McLoyd was 18 years old at the time she wielded a Smith & Wesson .357 magnum revolver and fatally shot Officer Bartek, even after he handed over his keys and phone he had nothing else to give her. She shot him in his back when he presented no danger or threat to her. She later flaunted the same

guns, 25-year-old Officer Bartek, who had his entire life and career in law enforcement ahead of him, left behind a grieving

family, including a mother, grandmother, brother, and twin sister.

McLoyd, at only 18 years old, was not permitted to purchase a

handgun under R.C. 2923.211(B), which precludes the sale of handguns to

individuals under 21 years of age who are not law enforcement officers or members

of the armed services. 2 No individual or seller of handguns was permitted to furnish

the handgun to her under R.C. 2923.21(A)(3). Nonetheless, as explained below,

McLoyd was easily able to obtain a handgun due to the relaxed laws surrounding

gun ownership in Ohio.

In recent years, Ohio has gradually loosened gun-control measures to

the detriment of civilians and public servants alike. As of June 2022, adults need

not obtain concealed handgun licensure or obtain a background check to purchase

a firearm. R.C. 2923.1

authorize courts to remove guns from individuals deemed to be imminent risks to

themselves or others, whether that risk is the result of mental health issues,

alcoholism, drug dependency, or criminal history. Red flag laws have been passed

in many states all along the political spectrum, such as California, Colorado, Florida,

Maryland, and Virginia. Safety is not a partisan issue.

2 The irony is not lost on me that McLoyd, at 18 years old, would have been legally permitted under Ohio law to purchase a semiautomatic assault rifle and high-capacity magazines, but not a handgun. In addition, Ohio law does not require any training to carry a

concealed weapon. As a result, deadly weapons are in the hands of inexperienced, untrained individuals who use guns to intimidate others or as an aid in criminal activity, rather than for personal defense and security, as the Ohio Constitution provides.

Restrictions on gun ownership not only promote the safety of our civilians and society as a whole but protect those who have devoted their lives to serving Ohio. There are a variety of public servants, but I am most concerned about those whose jobs are entrenched in the community, such as police officers, firefighters, members of the judiciary, and other government agents. I have no doubt that the increased gun violence and failure of the General Assembly to place restrictions on gun ownership has deterred many well-qualified and well-meaning individuals from seeking a career in public service, or has caused individuals who have offered their services to seek other employment. Not only does this disinterest or fear of public service perpetuate the very crimes we are trying to prevent, it prevents otherwise well-qualified, talented, and educated people from dedicating their lives to the service of our state.

One month ago, I presided over State v. Hatcher, 8th Dist. Cuyahoga No. 112552, 2023-Ohio-3884, where a firefighter was merely doing his job and investigating a potential fire hazard, when an individual brandished a gun. The firefighter and his team were not only prevented from investigating the hazard, but they became fearful for their lives. During the same week that Hatcher was released,

a trial judge in Washington County, Maryland, was shot and killed in his own driveway, while his wife and son were in the house, by an aggrieved party in a child custody case. These are just two recent examples among countless others, but the violence against public servants speaks for itself.

We cannot know whether gun control measures would have kept the serious responsibility that the General Assembly must use its legislative power to check. Without these checks to regulate guns, the quantity of firearms in the hands of those with ill-intent is increased. For the safety of civilians and public servants, the state of Ohio must act to better regulate the sale, distribution, and possession of firearms.