No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

GERQUAN BELTON, *PETITIONER*

V.

STATE OF OHIO, *RESPONDENT*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *State v. Belton*, Slip Opinion No. 2017-Ohio-7827.]

SLIP OPINION NO. 2017-OHIO-7827

THE STATE OF OHIO, APPELLEE, *v.* BELTON, APPELLANT.

[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *State v. Belton*, Slip Opinion No. 2017-Ohio-7827.]

Court of appeals' judgment affirmed on the authority of State v. Aalim.

(No. 2016-1270—Submitted April 4, 2017—Decided September 27, 2017.)

APPEAL from the Court of Appeals for Hamilton County, No. C-150358.

{¶ 1} The judgment of the court of appeals is affirmed on the authority of *State v. Aalim*, ___ Ohio St.3d ___, 2017-Ohio-2956, __ N.E.3d ___.

O'CONNOR, C.J., and O'DONNELL, KENNEDY, FRENCH, and DEWINE, JJ., concur.

O'NEILL, J., dissents for the reasons stated in his dissenting opinion in *State v. Aalim*, ___ Ohio St.3d ___, 2017-Ohio-2956, __ N.E.3d ___, would reverse the judgment of the court of appeals pursuant to *State v. Aalim*, ___ Ohio St.3d ___, 2016-Ohio-8278, __ N.E.3d ___, and would remand the cause to the juvenile court for an amenability determination consistent with R.C. 2152.12(B).

FISCHER, J., not participating.

Timothy Young, Ohio Public Defender, and Charlyn Bohland, Assistant Public Defender, for appellant.

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

STATE OF OHIO,	:	APPEAL NO. C-150358 TRIAL NO. B-1303992
Plaintiff-Appellee,	:	*JUDGMENT ENTRY.*
vs.	:	
GERQUIN BERNARD BELTON,	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court. *See* S.Ct.R.Rep.Op. 2; App.R. 11.1(E); Loc.R. 11.1.1.

Following a jury trial, defendant-appellant Gerquin Bernard Belton was convicted of one count of aggravated murder under R.C. 2903.01(B) and two counts of aggravated robbery under R.C. 2911.01(A)(1), all with accompanying firearm specifications. Belton was 16 years old at the time of the offenses. He was originally charged as a juvenile, but the Hamilton County Juvenile Court transferred jurisdiction to the Hamilton County Court of Common Pleas under the statutes governing mandatory bindovers. We find no merit in Belton's six assignments of error, and we affirm his convictions.

In his first assignment of error, Belton contends that the juvenile court erred in transferring jurisdiction of his case to the court of common pleas. Bindover was mandatory under R.C. 2152.10(A)(1) as long as there was probable cause to believe

that Belton had committed the act charged. R.C. 2152.12(A). To meet this standard, the state had to produce evidence that raised more than a mere suspicion of guilt, but it did not have to produce evidence proving guilt beyond a reasonable doubt. See *In re A.J.S.*, 120 Ohio St.3d 185, 2008-Ohio-5307, 897 N.E.2d 629, ¶ 62; *In re Moore*, 1st Dist. Hamilton Nos. C-090576, C-090577 and C-090578, 2010-Ohio-3991, ¶ 22.

In this case, the state presented sufficient evidence to establish probable cause that Belton had purposely engaged in conduct that would have constituted aggravated murder if committed by an adult. Therefore, the trial court did not err in binding him over to the common pleas court.

Belton contends that one of the state's witnesses was not credible. But even though we review the probable-cause determination de novo, we still defer to the juvenile court's determination regarding the credibility of witnesses. *In re A.J.S.* at ¶ 51; *In re Moore* at ¶ 21. He also argues that no physical evidence linked him to the crimes. But, even in a trial, no rule of law exists that a witness's testimony must be corroborated by physical evidence. *State v. Thomas*, 1st Dist. Hamilton No. C-120561, 2013-Ohio-5386, ¶ 45.

Belton further argues that R.C. 2152.10 and 2152.12 violated his constitutional rights to due process, equal protection and the prohibition against cruel and unusual punishment. This court rejected all of these arguments in *State v. McKinney*, 1st Dist. Hamilton Nos. C-140743 and C-140744, 2015-Ohio-4398. Consequently, we overrule Belton's first assignment of error.

In his second assignment of error, Belton contends that the trial court erred by failing to remove a juror that had been sleeping during closing arguments and the jury instructions. The trial court has "considerable discretion in deciding how to

handle a sleeping juror." *State v. McKnight*, 107 Ohio St.3d 101, 2005-Ohio-6046, 837 N.E.2d 315, ¶ 184; *State v. Tapke*, 1st Dist. Hamilton No. C-060494, 2007-Ohio-5124, ¶ 37.

The record shows that Belton informed the court that a deputy sheriff had seen a juror sleeping during closing arguments and the jury instructions. The trial court questioned the juror, and she stated that she did not believe that she had fallen asleep and that she had listened to everything as best she could. The prosecutor stated that he had been sitting close to the juror and had not seen her sleeping. The trial court also stated that the court had not seen any jurors sleeping. The court denied a motion to have the juror excused because there was "no evidence to suggest that she did fall asleep."

Under the circumstances, we cannot hold that the trial court's failure to excuse the juror was so arbitrary, unreasonable or unconscionable as to connote an abuse of discretion. *See McKnight* at ¶ 186-187; *Tapke* at ¶ 40. The trial judge is in the best position to determine the nature of alleged jury misconduct and the appropriate remedies. *McKnight* at ¶ 184; *Tapke* at ¶ 37. Consequently, we overrule Belton's second assignment of error.

In his third assignment of error, Belton contends that the trial court erred in giving a jury instruction under *State v. Howard*, 42 Ohio St.3d 18, 537 N.E.2d 188 (1989), when the jury indicated they were deadlocked after only a few hours of deliberation. The *Howard* charge is a supplemental instruction for the court to give a deadlocked jury to encourage them to reach a verdict. *State v. McCoy*, 1st Dist. Hamilton No. C-090599, 2010-Ohio-5810, ¶ 57. The determination of whether a jury is irreconcilably deadlocked lies within the trial court's discretion. *State v.*

Gapen, 104 Ohio St.3d 358, 2004-Ohio-6548, 819 N.E.2d 1047, ¶ 127; *McCoy* at ¶ 59.

The record shows that the jury had been deliberating nine hours when it informed the court that it was at an impasse. This case involved multiple counts and specifications. After the court gave the *Howard* charge, the jury asked to review the testimony of two witnesses, indicating that it was not satisfied with its recollection of the testimony and that it was not truly deadlocked. *See McCoy* at ¶ 59. Nothing in the record shows any potential for coercion created by the court's instruction, and we find no abuse of discretion by the court in giving the *Howard* charge. *See Gapen* at ¶ 128-130; *McCoy* at ¶ 60; *State v. Carson*, 1st Dist. Hamilton No. C-040042, 2005-Ohio-902, ¶ 48-57. We, therefore, overrule Belton's third assignment of error.

In his fourth assignment of error, Belton contends that the state's evidence was not sufficient to support his convictions. In deciding if the evidence was sufficient, we neither resolve evidentiary conflicts nor assess the credibility of witnesses. *Thomas*, 1st Dist. Hamilton No C-120561, 2013-Ohio-5386, at ¶ 45. Our review of the record shows that a rational trier of fact, after viewing the evidence in a light most favorable to the prosecution, could have found that the state proved beyond a reasonable doubt all of the elements of aggravated murder and two counts of aggravated robbery, as well as the accompanying specifications. Therefore, the evidence was sufficient to support the convictions. *See State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus; *State v. Ojile*, 1st Dist. Hamilton Nos. C-110677 and C-110678, 2012-Ohio-6015, ¶ 48.

Belton also argues that his convictions were against the manifest weight of the evidence. After reviewing the record, we cannot say that the trier of fact lost its way

and created such a manifest miscarriage of justice that we must reverse Belton's convictions and order a new trial. Therefore, the convictions were not against the manifest weight of the evidence. *See State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997); *Thomas*, 1st Dist. Hamilton No. C-120561, 2013-Ohio-5386, at ¶ 48.

Belton primarily argues that the state's witnesses were not credible, but matters as to the credibility of evidence are for the trier of fact to decide. *State v. Bryan*, 101 Ohio St.3d 272, 2004-Ohio-971, 804 N.E.2d 433, ¶ 116; *Thomas* at ¶ 48. Consequently, we overrule Belton's fourth assignment of error.

In his fifth assignment of error, Belton argues that the trial court erred in overruling his motion for a new trial. He sought a new trial under Crim.R. 33(A)(1), which allows for a new trial for "irregularity in the proceedings, or in any order or ruling of the court, or abuse of discretion by the court, because of which the defendant was prevented from having a fair trial." He argued that the trial court abused its discretion by not removing the sleeping juror, an argument we have already found to be without merit. He also sought a new trial under Crim.R. 33(A)(4) which allows for a new trial if the verdict is not sustained by sufficient evidence, also an argument that we have found to be without merit.

The decision whether to grant a new trial lies within the trial court's discretion. *State v. Schiebel*, 55 Ohio St.3d 71, 564 N.E.2d 54 (1990), paragraph one of the syllabus; *State v. Ritze*, 154 Ohio App.3d 133, 2003-Ohio-4580, 796 N.E.2d 566, ¶ 6 (1st Dist.). "New-trial motions are not to be granted lightly." *State v. Baker*, 1st Dist. Hamilton Nos. C-080157 and C-080159, 2009-Ohio-4188, ¶ 69. The trial court held a hearing on Belton's motion and fully considered it. He has not

demonstrated that the trial court's decision to overrule the motion was so arbitrary, unreasonable, or unconscionable as to connote an abuse of discretion. *See State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, 840 N.E.2d 1032, ¶ 130; *Thomas* at ¶ 31. Therefore, we overrule Belton's fifth assignment of error.

In his sixth assignment of error, Belton contends that the trial court erred in sentencing him because it failed to provide him with various notifications. First, he argues that the court failed to notify him that he should not ingest or be injected with a drug of abuse and that he would be required to submit to random drug testing in prison as required by R.C. 2929.19(B)(2)(f). But this court has held that R.C. 2929.19(B)(2)(f) does not confer any substantive rights on the defendant. Therefore, the court's failure to comply with the requirements of that section did not prejudice Belton and was harmless error. *See State v. Finnell*, 1st Dist. Hamilton Nos. C-140547 and C-140548, 2015-Ohio-4842, ¶ 60; *State v. Haywood*, 1st Dist. Hamilton No. C-130525, 2014-Ohio-2801, ¶ 18.

Next, Belton argues that the trial court erred in failing to inform him of his right to earn prison-time credit under R.C. 2967.193 for his participation in various prison programs. But the version of the statute in effect at the time of Belton's sentencing did not require the court to do so. *See Finnell* at ¶ 61; *Haywood* at ¶ 17.

Finally, Belton contends that the trial court erred in failing to notify him that he would be required to submit to DNA testing and of the consequences of failing to provide that sample under R.C. 2901.07(B). Again, this court has held that the statute does not confer any substantive rights on the defendant. Therefore, the court's failure to notify Belton about DNA testing was harmless and did not prejudice him. *See State v. Taylor*, 1st Dist. Hamilton No. C-150488, 2016-Ohio-4548, ¶ 5-6.

Consequently, the trial court did not err in sentencing Belton. We overrule his sixth assignment of error and affirm his convictions.

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

CUNNINGHAM, P.J., MOCK and STAUTBERG, JJ.

To the clerk:

Enter upon the journal of the court on July 13, 2016
per order of the court

Presiding Judge