STATE v. WADDY, 09AP-1197 (6-28-2011)

2011-Ohio-3154

State of Ohio, Plaintiff-Appellee, v. Warren Waddy,

Defendant-Appellant.

No. 09AP-1197.

Court of Appeals of Ohio, Tenth District.

Rendered on June 28, 2011.

REGULAR CALENDAR

[EDITOR'S NOTE: This case is unpublished as indicated by the issuing court.]

APPEAL from the Franklin County Court of Common Pleas, C.P.C. No. 86CR-10-3182.

Ron O'Brien, Prosecuting Attorney, and *Steven L. Taylor*, for appellee.

Carpenter, Lipps & Leland, LLP, Kort Gatterdam; W. Joseph Edwards, for appellant.

DECISION

BROWN, J.

{¶ 1} This is an appeal by defendant-appellant, Warren Waddy, from a judgment of the Franklin County Court of Common Pleas denying appellant's motion to vacate his death sentence based on a claim of mental retardation.

{¶ 2} On September 25, 1987, a jury found appellant guilty of aggravated murder and various other crimes, and the trial court sentenced him to death. This court affirmed appellant's sentence and conviction on appeal. *State v. Waddy* (Nov. 2, 1989), 10th Dist.

No. 87AP-1159. Upon further appeal, the Supreme Court of Ohio affirmed this court's decision. *State v. Waddy* (1992), **63 Ohio St.3d 424**.

{¶ 3} On June 6, 1995, appellant filed a petition for post-conviction relief, raising 15 claims, including a claim that he was mentally retarded. The trial court dismissed appellant's petition without an evidentiary hearing, holding that res judicata barred appellant's mental retardation claim because it could have been raised on direct appeal. This court affirmed the trial court's decision. *State v. Waddy* (June 10, 1997), 10th Dist. No. 96APA07-863.

{¶ 4} The United States Supreme Court subsequently held, in 2002, that executing mentally retarded persons is "excessive and that the Constitution `places a substantive restriction on the State's power to take the life' of a mentally retarded offender." *Atkins v. Virginia* (2002), **536 U.S. 304**, **317**, **122 S.Ct. 2242**, **2252**, quoting *Ford v. Wainwright* (1986), **477 U.S. 399**, **405**, **106 S.Ct. 2595**, **2599**. *Atkins*, however, "did not establish procedures for determining whether a person is mentally retarded." *State v. Were*, **118 Ohio St.3d 448**, **2008-Ohio-2762**, ¶ **175**. Rather, the Supreme Court left it to the states to develop appropriate ways to implement

Atkins. Id. In December of 2002, the Supreme Court, in *State v. Lott*, **97 Ohio St.3d 303**, 2002-Ohio-6625, set forth the procedures Ohio would follow in adjudicating a capital defendant's *Atkins* claim.

{¶ 5} On May 30, 2003, appellant filed a second petition for post-conviction relief, alleging he was mentally retarded. The trial court dismissed appellant's petition without an evidentiary hearing. On appeal, this court reversed and remanded, finding appellant was "entitled to an evidentiary hearing and funding for an expert to develop his *Atkins* claim." *State v. Waddy*, 10th Dist. No. 05AP-866, **2006-Ohio-2828**, ¶ **48**.

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{¶ 6} Following remand, the trial court conducted a hearing on January 26, 2009. On November 25, 2009, the trial court issued a decision and entry denying appellant's motion to vacate his death sentence, finding that appellant had failed to prove, by a preponderance of the evidence, that he is mentally retarded.

{¶ 7} On appeal, appellant sets forth the following three assignments of error for this court's review:

> FIRST ASSIGNMENT OF ERROR: The trial court's finding that Appellant is not or was not mentally retarded is contrary to the manifest weight of the evidence and is contrary to the Due Process Clause of the **Fifth** and **Fourteenth Amendments** and is contrary to the **Eighth Amendment's** prohibition against cruel and unusual punishment.
>
> SECOND ASSIGNMENT OF ERROR: The trial court's failure to properly consider the Flynn effect and standard error of measurement in determining whether Appellant is MR is contrary to the Due Process Clause and the Equal Protection Clause of the Ohio and United States Constitutions and is contrary to the **Eighth Amendment's** prohibition against cruel and unusual punishment.
>
> THIRD ASSIGNMENT OF ERROR: Appellant was deprived of his state and federal constitutional rights to Due Process and Equal Protection of the laws and right to be free from cruel and unusual punishment when the trial court failed to require that the hearing on mental retardation be conducted before a jury.

{¶ 8} Appellant's first and second assignments of error are interrelated and will be considered together. Under the first assignment of error, appellant argues that the trial court erred in finding he is not mentally retarded. Under the second assignment of error, appellant maintains that the trial court failed to properly consider both the "Flynn effect" and the standard error of measurement in determining the issue of mental retardation.

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{¶ 9} Under Ohio law, "`a trial court's decision granting or denying a postconviction petition filed pursuant to R.C. **2953.21** should be upheld absent an abuse of discretion; a reviewing court should not overrule the trial court's finding on a petition for postconviction relief that is supported by competent and credible evidence.'" *State v. White*, **118 Ohio St.3d 12**, **2008-Ohio-1623**, ¶ **45**, quoting *State v. Gondor*, **112 Ohio St.3d 377**, **2006-Ohio-6679**.

{¶ 10} In *Lott*, the Supreme Court "set forth the `substantive standards and procedural guidelines' for determining mental retardation in Ohio." *Were* at ¶ 176, quoting *Lott* at ¶ 11. The court in *Lott* "adopted clinical

definitions of mental retardation, cited with approval in *Atkins* for evaluating an individual's claim of mental retardation." *Were* at ¶ 176. Under Ohio law, a capital defendant "must raise and prove mental retardation by presenting evidence that he or she (1) suffers from `significantly subaverage intellectual functioning,' (2) experienced `significant limitations in two or more adaptive skills, such as communication, self-care, and self-direction,' and (3) manifested `onset before the age of 18.'" Id., quoting *Lott* at ¶ 12.

{¶ 11} The Supreme Court in *Lott* acknowledged that, although IQ tests are "one of the many factors that need to be considered, they alone are not sufficient to make a final determination on this issue." *Lott* at ¶ 12. The court held, however, "that there is a rebuttable presumption that a defendant is not mentally retarded if his or her IQ is above 70." Id. A capital defendant "bears the burden of establishing that he is mentally retarded by a preponderance of the evidence." Id. at ¶ 21.

{¶ 12} In the instant case, the sole witness at the January 26, 2009 hearing was Dr. Jeffrey L. Smalldon, a psychologist, called as a witness by the state. Dr. Smalldon's

areas of practice involve both clinical and forensic psychology. He provided an overview of the legal standard for mental retardation, noting there is a rebuttable presumption that an individual with an IQ over 70 is not mentally retarded, and that a capital defendant is required to show adaptive deficits in two out of ten areas of functioning. He further noted that the American Association on Mental Retardation ("AAMR") defines mental retardation to include an IQ score of approximately 70 to 75 or below. Dr. Smalldon was familiar with the Diagnostic and Statistical Manual, Fourth Edition ("DSM-IV"), and the standards and criteria set forth for diagnosing mental retardation. According to the DSM-IV, diagnosis for mental retardation should utilize a standardized, individually administered intelligence test.

{¶ 13} In addressing the criterion for intellectual functioning, Dr. Smalldon reviewed appellant's history of IQ testing, including two tests administered to appellant before the age of 18, and one test administered when appellant was an adult. In 1966, appellant, then age 13, took a test administered in the Richmond, Virginia public school system, in which he was classified in the slow learner range, representing an IQ range between 80 and 89. Appellant was administered a second IQ test on October 21, 1968, in which he received a full scale score of 72 on the Wechsler Intelligence Scales for Children ("WISC"), including a verbal score of 79, and a performance score of 71.

{¶ 14} Appellant also took an IQ test as an adult, administered by Dr. Smalldon. Specifically, in 1995, appellant's prior appellate counsel retained Dr. Smalldon to conduct a clinical and neuropsychological evaluation of appellant "for results of possible use in their representation of him on appeal." (Tr., 15.) That year, Dr. Smalldon interviewed appellant on five occasions, and the psychologist performed an "extensive battery of

psychological and neuropsychological assessment measures," including administration of the Wechsler Adult Intelligence Scale-Revised ("WAIS-R"). (Tr., 17.) Based upon this assessment, Dr. Smalldon determined that appellant had a full scale IQ of 83.

{¶ 15} During the 2009 hearing, Dr. Smalldon opined that, in reviewing all of the information in the case, appellant "is not mentally retarded." (Tr., 104.) Dr. Smalldon noted that, at the time he tested appellant in 1995, mental retardation was "something I would have brought to counsel's attention." (Tr., 111.) He further testified that nothing had changed his opinion as a result of the *Atkins* decision.

{¶ 16} In its decision denying appellant's motion to vacate his death sentence, the trial court observed that appellant had been given three IQ tests at various times during his life, that he had never been diagnosed as mentally retarded, nor had he ever tested at 70 or below on an IQ test. In considering the guidelines in *Lott*, the trial court concluded that appellant failed to prove any of the elements required to establish mental retardation.

{¶ 17} Appellant argues that the evidence demonstrates he carried his burden of proving mental retardation prior to age 18. Appellant contends that the 1966 test, in which his IQ score fell within the range of 80 to 89, is of limited value because the record does not indicate what type of IQ test was administered, or whether the test was approved by the AAMR. Appellant further contends that there is no indication whether this test was given in a group or individual setting.

{¶ 18} Appellant similarly argues that there are problems with the WAIS-R test, which he took in 1995 as an adult, in which he received a full scale score of 83. Appellant notes that the WAIS-R was "normed" in 1979-1980, and he contends that the test was out of date with population norms at the time it was administered by Dr. Smalldon.

{¶ 19} Appellant maintains that the most accurate of the three tests is the WISC, administered on October 21, 1968, in which he achieved his lowest test score (72). Appellant argues that a full scale score of 72, without accounting for any standard error of measurement or adjustment for the Flynn effect, is within the range of mental retardation pursuant to the AAMR and DSM-IV guidelines (70 to 75).

{¶ 20} Appellant further argues that the trial court should have adjusted (downward) his IQ test scores to account for a phenomenon known as the "Flynn effect." In general, the Flynn effect, a theory published by political scientist James R. Flynn, "argues that IQ scores have gone up over the years, and that when a test is administered years after its publication, the results should be adjusted downward to account for the lapse in time between publication and its administration." *Thomas v. Quarterman* (C.A.5, 2009), **335 Fed.Appx. 386**, **390**. See also *Wiley v. Epps* (C.A.5, 2010), **625 F.3d 199**, **214** ("the Flynn effect provides a reduction in IQ scores to account for inflation in the score based on the number of years since the test was normalized"). The theory "attributes the general rise of I.Q. scores of a population over time to the use of outdated testing procedures, emphasizing the need for the repeated renormalization of I.Q.-test standard deviations over time." *In re Salazar* (C.A.5, 2006), **443 F.3d 430**, **433**.

{¶ 21} Courts throughout the country have reached differing views with respect to application of the Flynn effect. Some courts have questioned its validity. See *State v. Dunn* (La. 2010), **41 So.3d 454**, **470**, fn. 16 (noting that while the Flynn effect "may be a theory utilized by certain practitioners, this court has not specifically accepted the theory as scientifically valid"); *Maldonado v. Thaler* (C.A.5, 2010), **625 F.3d 229**, **238** ("neither this court nor the [Texas Court of Criminal Appeals] has recognized the Flynn Effect as

scientifically valid"); *Green v. Johnson* (C.A.4, 2008), **515 F.3d 290**, **300**, fn. 2 ("neither *Atkins* nor Virginia law appears to require expressly that [the Flynn effect] be accounted for in determining mental retardation status").

{¶ 22} Other courts, however, have given recognition to the theory. See *Walker v. True* (C.A.4, 2005), **399 F.3d 315**, **323** ("on remand the district court should consider the persuasiveness of Walker's Flynn Effect evidence"); *Thomas v. Allen* (C.A.11, 2010), **607 F.3d 749**, **758** ("[b]ecause there

is no uniform consensus regarding the application of the Flynn effect in determining a capital offender's intellectual functioning, and there is no Alabama precedent specifically discounting a court's application of the Flynn effect, we cannot say that the district court clearly erred in applying it").

{¶ 23} This court, in addressing the theory in the context of an *Atkins-Lott* claim, has held that "a trial court must consider evidence presented on the Flynn effect, but, consistent with its prerogative to determine the persuasiveness of the evidence, the trial court is not bound to, but may, conclude the Flynn effect is a factor in a defendant's IQ score." *State v. Burke*, 10th Dist. No. 04AP-1234, **2005-Ohio-7020**, ¶ **51**.

{¶ 24} In the present case, appellant submitted as part of his evidence an article by Flynn, in which the author noted an upward trend in IQ scores over time. James R. Flynn, Tethering the Elephant: Capital Cases, IQ and the Flynn Effect, 12 Psychology, Public Policy, and Law 170 (2006). (Defendant's Exhibit K.) During the hearing, defense counsel questioned Dr. Smalldon about the Flynn effect. Dr. Smalldon explained that the premise of the Flynn effect is that an individual who takes a test 15 years after the test is "normed" is likely to score higher than the person who took the test shortly after the test first was introduced. In order to compensate for such inflation, Flynn recommends

subtracting "0.3 IQ points per year from the scores of defendants for every year that passed between when the test was normed and when the test was taken." (Defendant's Exhibit K, Flynn, Tethering the Elephant at 179.) With respect to Flynn's findings of an upward trend, Dr. Smalldon testified: "I don't think Flynn understands particularly well why it occurs, but he has just documented the fact it does occur as he moved further away from the time that the norms from a particular IQ test were established." (Tr., 82.)

{¶ 25} During direct examination, Dr. Smalldon testified that the Flynn effect "is the subject of pretty arcane and, to me, often fairly opaque arguments being made currently by statisticians and epidemiologists on both sides of the argument, whether or not it ought to be applied to lower IQ scores in certain contexts or whether it shouldn't." (Tr., 152-53.) Dr. Smalldon stated that the Flynn effect "is very seldom used to lower IQ scores," and that the "only context" for advocating the theory "has typically been made in * * * death penalty cases." (Tr., 153.) He testified that "[p]art of the critique of the procedure that Flynn advocates is that it is not necessarily applicable to an individual's IQ score," and that debate on the theory "has not been resolved in favor of Flynn's contention that individual IQ scores should be lowered." (Tr., 154.) Dr. Smalldon was asked to review an article submitted as an exhibit by the state in which the authors surveyed psychologists as to whether IQ scores should be adjusted to accommodate the Flynn effect.**[fn1]** Dr. Smalldon testified that the conclusion of the survey was that "there is definitely not a standard to adjust for the Flynn effect." (Tr., 152.)

{¶ 26} The state argues that the record does not support appellant's claim that the trial court disregarded evidence as to the Flynn effect. We agree. In its decision, the trial court acknowledged this court's directive in *Burke* that a trial court must consider Flynn effect evidence. Specifically, the trial court held in part: "[A]s directed by *Burke*, the Court has considered the Flynn effect and concludes that it is not a factor that would justify a finding that Waddy's test scores should be adjusted to the extent necessary to establish, by a preponderance of the evidence, that he is mentally retarded." While the trial court was required to consider the persuasiveness of appellant's Flynn effect evidence, it was "not bound to" accept appellant's argument that his IQ scores should be reduced because of the Flynn effect. *Burke* at ¶ 51. Rather, it was within the court's discretion to

weigh all of the evidence, including Dr. Smalldon's opinion testimony with respect to whether it was standard practice to lower individual IQ scores based upon the theory.

{¶ 27} Further, despite appellant's contention that the most reliable test was the one administered to him on October 21, 1968, resulting in his lowest IQ score (72), the state presented contrary evidence. Specifically, Dr. Smalldon opined that the most reliable test was the one administered to appellant in 1995, in which he achieved a performance IQ estimate of 87, a verbal IQ estimate of 81, and a full scale score of 83. Dr. Smalldon deemed the 72 score appellant received on the WISC in 1968 as "a low estimate." (Tr., 128.) During the hearing, Dr. Smalldon expressed the view that various factors may have affected appellant's earlier test score; he believed "there were behavioral observations * * * attached to" appellant's earlier IQ tests that "could reasonably lead to an inference that the examiners didn't view Mr. Waddy as a real motivated test subject." (Tr., 105-06.) The state's expert also expressed the opinion that

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"you can't score higher than you are capable of scoring, but you can score lower than you are capable of scoring for a wide variety of different reasons." (Tr., 33.) He opined that if appellant was motivated and "functioning at his best * * * he would fall towards the lower end of the average range," meaning "mid-80s, mid-to high 80s" as a "best estimate." (Tr., 127.) Based upon his review of appellant's records, Dr. Smalldon opined that appellant "is not mentally retarded." (Tr., 104.)

{¶ 28} The state notes that Dr. Smalldon has been previously recognized as "fully qualified" to render an opinion on mental retardation. See *State v. Frazier*, **115 Ohio St.3d 139**, **2007-Ohio-5048**, ¶ **167** (finding Dr. Smalldon "fully qualified to render an opinion that Frazier is not mentally retarded," and that "Dr. Smalldon * * * has presented evidence about mental retardation in numerous capital cases," including *State v. Elmore*, **111 Ohio St.3d 515**, **2006-Ohio-6207**, ¶ **157-58**; *State v. Ketterer*, **111 Ohio St.3d 70**, **2006-Ohio-5283**, ¶ **224**; and *State v. Thomas*, **97 Ohio St.3d 309**, 2002-Ohio-6624, ¶ 118).

{¶ 29} In the present case, Dr. Smalldon provided opinion testimony that appellant did not have significantly subaverage intellectual functioning and that, based upon "the sum total of the information * * * available," appellant was not mentally retarded. (Tr., 104.) In concluding that the 1995 test score was the most accurate, Dr. Smalldon cited potential reasons for the lower score on the earlier test, and he testified that it is not possible for a test-taker to fake a higher IQ score. See, e.g., *Green v. Johnson* (C.A.4, 2008), **515 F.3d 290**, **300** ("evidence in the state habeas record established that although a person can fake a lower I.Q. score, a higher I.Q. score cannot be faked"). Dr. Smalldon opined that appellant's full scale score of 83 "is a good number; maybe a slightly low estimate of his full scale IQ." (Tr., 128.) He further opined that the 72 score from the

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1968 WISC test was not indicative of appellant's true IQ. In general, "[t]he weight to be given the evidence and the credibility of the expert witnesses are primarily for the trier of the fact." *Were* at ¶ 178. Upon review of the evidence presented, including the opinion testimony of Dr. Smalldon, the trial court could have reasonably concluded that appellant's 1995 test score of 83 was the most reliable indicator of his intellectual functioning.

{¶ 30} We further note that, assuming the trial court had found persuasive appellant's Flynn evidence, an adjustment to the 1995 score for the Flynn effect would have resulted in a deduction of approximately five points, i.e., an adjusted score of 78. Thus, even accounting for the Flynn effect, a Flynn-adjusted score of

78 would be well above the score of 70 that, under Ohio law, creates a rebuttable presumption "that a defendant is not mentally retarded." *Lott* at ¶ 12.

{¶ 31} Appellant further contends that the trial court erred in failing to take into consideration the standard error of measurement which, he maintains, could have lowered his score by as much as five points. Appellant notes that Dr. Smalldon agreed that, pursuant to the DSM-IV, there is a standard error of measurement of approximately five points in assessing IQ. Appellant argues that any test score can be five points higher or five points lower based upon measurement error, and thus his IQ score of 72 on the 1968 test could be as low as 67. Appellant maintains that the trial court only acknowledged his argument regarding standard error of measurement, but that the court did not address its applicability.

{¶ 32} One federal court has explained: "A standardized IQ test's mean score is typically 100, with a standard deviation of 15; thus, a score of about 70 is approximately

two standard deviations from the mean." *Wilson v. Quarterman* (E.D.Tex. 2009), No. 6:06-cv-140. Further, "IQ tests typically have a five point standard error of measurement, which means that any score actually represents a score that could be five points higher or lower." Id. The standard error of measurement is "an interpretative tool that reflects the idea that I.Q. scores have a ninety-five percent confidence interval, and thus an individual's true score is somewhat within a five-point range of the reported score." *Walker v. Kelly* (C.A.4, 2010), **593 F.3d 319**, **336**. In *Burke* at ¶ 53, this court held that measurement error "must be considered in determining an individual's IQ score." Specifically, this court held that "the AAMR standard requires adjustment of IQ scores to account for a margin of error," and that a trial court "must adjust, however nominally, an IQ score for measurement error and consider an expert's testimony regarding size or degree of the measurement error applicable to the particular intelligence test." Id. at ¶ 54.

{¶ 33} As noted, appellant contends that the trial court failed to address the issue of standard error of measurement. While the trial court's decision references appellant's claim that "the margin of error relating to his IQ test scores should result in an adjustment of the scores," there is arguably a lack of analysis as to this issue. We note, however, a lack of evidence in the record supporting appellant's argument that any of his scores should be automatically adjusted downward to account for the standard error of measurement. Specifically, while Dr. Smalldon acknowledged during his testimony that the standard error of measurement on the full scale IQ is approximately plus or minus five points, he further testified that the standard error of measurement does not mean that a clinician will automatically subtract five points from a score. Rather, a clinician would "look at all of the information that's available in trying to draw an inference about how

accurate that particular obtained IQ score is." (Tr., 126.) As to appellant's IQ scores, Dr. Smalldon testified that "there is no reason to automatically deduct five points" from any score he had achieved. (Tr., 127.)

{¶ 34} Courts in other jurisdictions have held that a capital defendant must show more than mere speculation that a test score should be lowered based upon standard error of measurement. In *Hedrick v. True* (C.A.4, 2006), **443 F.3d 342**, the petitioner argued that his IQ score of 76 should have been lowered when taking into account the standard error of measurement. The court held, however, that "only speculation on our part would lower Hedrick's IQ score of 76. As Hedrick concedes, the [standard error of measurement] could potentially increase his IQ score to 81." Id. at 368. See also *Walton v. Johnson* (C.A.4, 2006), **440 F.3d 160**, **178** ("Walton can only speculate that this standard

measurement error (which a mental health expert can take into account to either *raise or lower* a given IQ test score by as much as five points, actually *lowered* his given score of 77 enough to meet Virginia's mental retardation standard") (emphasis sic); *Ledford v. Head* (N.D.Ga., 2008), No. 1:02-CV-1515-JEC (noting that "the standard error of measurement simply means that an IQ score can overestimate or underestimate a person's true level of intellectual functioning," and finding, under evidence presented, "[t]here is no basis for assuming that the standard error of measurement lowered petitioner's score enough to meet Georgia's mental retardation standard").

{¶ 35} Similarly, in considering the record in the instant case, including the testimony of Dr. Smalldon, any downward adjustment of appellant's scores due to standard error of measurement would have been speculative at best. Here, the only testimony presented on this issue was Dr. Smalldon's opinion that appellant's score

should not be automatically reduced based upon the standard error of measurement, and the trier of fact could have reasonably concluded that the preponderance of the evidence did not establish that appellant's true IQ score was more likely to be lower than higher based upon measurement error. *Walton* at 178. See also *State v. Lawson*, 12th Dist. No. CA2007-12-116, **2008-Ohio-6066**, ¶ **21** ("when considering the standard error of measurement, and that the record showed an equal likelihood of his IQ being above 70 as below 70," trial court did not err in concluding that appellant failed to rebut presumption he is not mentally retarded with any credible evidence).

{¶ 36} Moreover, as noted in our discussion above, in light of the uncontradicted testimony of Dr. Smalldon, the trier of fact could have reasonably concluded that appellant's most reliable IQ test was the one administered in 1995, in which he achieved a full scale score of 83. Applying a standard error of measurement of plus or minus five points to the 1995 test would represent a range between 78 to 88, with the lowest score in the range (78) still eight points higher than the threshold score of 70 that raises a rebuttable presumption that a capital defendant is not mentally retarded. *Lott* at ¶ 12.

{¶ 37} Upon review, we find that the trial court did not abuse its discretion in finding that appellant's IQ scores raised the presumption that he was not mentally retarded, and that appellant failed to sustain his burden of rebutting that presumption. *State v. Bedford*, 1st Dist. No. C-100735, **2011-Ohio-2054**, ¶ **19** (capital defendant "presumptively not mentally retarded" where IQ tests administered to him yielded scores of 70 and 76, respectively). Accordingly, the trial court did not err in finding that appellant failed to satisfy the criterion of "significantly subaverage intellectual functioning."

{¶ 38} In addition to finding that appellant did not demonstrate significantly subaverage intellectual functioning, the trial court made a further determination that appellant failed to meet the second prong of *Lott*, i.e., related limitations in two or more adaptive skill areas. In general, "[t]he adaptive-behavior component of the mental-retardation evaluation focuses on the effects of the defendant's intellectual-functioning limitations on his life skills." *Bedford* at ¶ 21.

{¶ 39} According to the AAMR, mental retardation is defined as "`substantial limitations in present functioning * * * characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health

and safety, functional academics, leisure, and work.'" *Atkins* 536 U.S. at 309, fn. 3, 122 S.Ct. at 2245. Similarly, the DSM-IV defines "the essential feature" of mental retardation as "significantly subaverage general intellectual functioning * * * that is accompanied by significant limitation in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health and safety" with onset before the age of 18. (Defendant's Exhibit B at 39.)

{¶ 40} With respect to the issue of adaptive deficits, appellant argues there is ample evidence of significant limitations in the areas of functional academic skills, "social/interpersonal" skills, communication, self-direction, work, self-care, and home living. In support, appellant cites the fact that he was expelled from school in the fourth grade and never returned to public schooling. Further, appellant describes his work

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history as menial in nature, and argues that he relied on others for his every need even into adulthood. Appellant also contends that Dr. Smalldon failed to use any of the adaptive testing scales approved by the AAMR, such as the Vineland or AAMR adaptive behavior scales.

{¶ 41} Much of appellant's background information was set forth in the psychological evaluation prepared by Dr. Smalldon in 1995, admitted during the 2009 hearing as Defendant's Exhibit A. According to that report, appellant was expelled from school in the fourth grade after pushing a teacher. As a youth, he was evaluated at the Educational Therapy Center in Virginia. He was subsequently committed to the Virginia State Department of Welfare, and later placed at the Beaumont School for Boys. After his second release from the Beaumont School for Boys, appellant left home at age 17 and relocated to Washington, D.C., where he lived with a variety of friends and relatives. At approximately age 20, appellant relocated to Detroit, but moved to Cincinnati to live with Betty Thompson, "who reportedly introduced him to both cocaine and heroin." (Defendant's Exhibit A at 14.) At about this time, appellant "first began selling cocaine, as well as using it." (Defendant's Exhibit A at 14.) In 1975, appellant was arrested and charged with receiving stolen property, and he served a two-year sentence. After his release, he relocated to Columbus, and "obtained an apartment of his own." (Defendant's Exhibit A at 14.) Appellant worked performing janitorial services.

{¶ 42} Around 1977, appellant took welding classes and again began selling drugs. He returned to prison in 1982 on a theft by deception charge. After his release from prison in 1984, appellant returned to Columbus. In November of 1984, he attended Mansfield Business College in Columbus, training to become an "office specialist."

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(Defendant's Exhibit A at 16.) In the psychological evaluation Dr. Smalldon noted that, around 1985, appellant presented a document to Kay Drake, a woman he was involved with at the time. Appellant characterized the document as "a declaration of his personal commitment to a variety of different goals and endeavors." (Defendant's Exhibit A at 17.) Those goals and endeavors included "meeting highly specific income projections from working in the real estate business; earning enough money so he could retire and `[m]ake a better life for [himself] and [his] children'; helping his brother and sister buy their first house; investing some of his money to `help the community' [and] halting his drug use completely." (Defendant's Exhibit A at 17.)

{¶ 43} During the 2009 hearing, Dr. Smalldon defined adaptive deficits as capacities for effectively handling the demands of day-to-day living in the community. According to Dr. Smalldon, it was "debatable" whether appellant met the adaptive behavior

component. (Tr. 106.) Dr. Smalldon distinguished between limitations and adaptive behavior related to intelligence versus adaptive behavior problems related to anti-social behavior or other issues. Dr. Smalldon testified that appellant "has some significant adaptive limitations," but [t]he question is how significant and to what extent, if at all, they are tied to his intellectual deficits." (Tr., 119.) Dr. Smalldon identified only one of appellant's limitations as related to limited intelligence. Specifically, appellant's "low academic achievement is in part related to his intellectual limitations." (Tr., 119.) Dr. Smalldon opined: "I don't believe that his adaptive deficits — at least most of them — are related to deficits in IQ." (Tr., 162.) In reviewing the available data, Dr. Smalldon believed there was "ample evidence of mild, brain-related impairment * * * of uncertain

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origin" with respect to appellant. (Tr., 46-47.) He further testified, however, that the brain impairment was not serious enough to cause appellant to be mentally retarded.

{¶ 44} Dr. Smalldon cited evidence that appellant was a primary caregiver for a small child for a number of years, and that he attended a business college and "did well enough to get an accumulative grade point average * * * of around 2.3, a B-minus, C-plus average, in a curriculum that he hoped was going to prepare him to be an office specialist." (Tr., 104-05.) Dr. Smalldon also considered the handwritten autobiography that appellant prepared for his attorneys at the time of his murder trial. According to the expert, the document, including the grammar, writing, and organization, was "pretty well written in a way that I would not have expected of someone who is mentally retarded." (Tr., 148.)

{¶ 45} On cross-examination, Dr. Smalldon was questioned about utilizing tests such as the Vineyard Adaptive Behavior Scales or the AAMR Adaptive Behavior Scales. While noting that such tests "are available," he stated that "the data * * * they produce is often of pretty limited significance when you are trying to assess adaptive functioning in the community of someone who you are assessing in a prison setting, particularly after they have been in prison for years, because those sometimes were not normed on that population." (Tr., 93.) Under such circumstances, Dr. Smalldon observed, those tests "are of limited assistance." (Tr., 93.)

{¶ 46} With respect to the 1995 evaluation, Dr. Smalldon acknowledged that he had not interviewed appellant's family members or school teachers. Dr. Smalldon testified, however, that he met with appellant on five occasions, and that he "administered a pretty extensive battery of psychological and neuropsychological assessment

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measures." (Tr., 17.) Dr. Smalldon stated that, had he determined at the time that appellant was mentally retarded, "I would have perceived that as one important finding to relate to the attorneys who had retained me." (Tr., 18.)

{¶ 47} The trial court, in considering this prong of the *Atkins/Lott* test, held in part:

> [A]t no point has the Defendant ever been classified as MR based on assessments of his conceptual, social, and practical skills. In fact, there is evidence that the Defendant has throughout his life exhibited at least a basic set of adaptive skills that have allowed him to function in the real world.
>
> The Defendant has been employed in various jobs, including as a cab driver. * * * The Defendant has also maintained his own apartment, succeeded as a drug dealer, and attended welding school and business school, though he did not finish either. * * * The Defendant was at one point entrusted

> with the care of his own daughter,
> showing at least a basic set of adaptive skills
> required to care for a small child. * * *
>
> The Defendant has antisocial traits, as evidenced
> by his expulsion from school and subsequent
> violent record. * * * A person who does not
> finish school will be more likely to exhibit poor
> academic skills. The State argues that menial
> labor and poor academic skills are not an
> indication of MR, but rather reflect antisocial
> personality traits. This Court
> agrees. Dr. Smalldon testified that, based on his
> consideration of the sum total of information
> that was available to him, the Defendant was not
> MR. * * * This assessment was based partly on the
> information regarding the Defendant's role as a
> caregiver to a small child, and
> his attendance at Business College. * * *
>
> Therefore, based on the evidence and testimony
> presented, this Court holds that the Defendant
> has failed to show by a preponderance of the
> evidence that he suffered from significant
> limitations in adaptive skills which would allow
> a court to classify him as MR. The Defendant
> exhibits a myriad of antisocial traits that,
> while impairing his ability to succeed
> in society, do not impair him so as to merit a MR
> classification.

{¶ 48} The record in this case arguably contains evidence that appellant exhibits limitations in adaptive behavior. The trial court, however, concluded that any adaptive

deficits were primarily associated with anti-social traits, a view expressed by Dr. Smalldon. As noted, Dr. Smalldon attributed only one adaptive deficit as related to intellectual functioning, i.e., that appellant's "low academic achievement is in part related to his intellectual limitations." (Tr., 119.) At the time of his 1995 evaluation, Dr. Smalldon "was convinced that [appellant] had a personality disorder * * * that combined features of antisocial personality disorder and narcissistic personality disorder." (Tr., 137.) In addition, appellant exhibited "passive-aggressive personality traits." (Tr., 137.)

{¶ 49} Based upon the record and expert testimony presented, there was evidence upon which the trial court could have determined that appellant failed to show, by a preponderance of the evidence, that his adaptive behavior deficits "were the product of limitations in his intellectual functioning."
Bedford at ¶ 31 (capital defendant failed to rebut presumption that limitations in adaptive behavior, however significant, were the product of limitations in his intellectual functioning; both clinical psychologists who examined defendant attributed his social skill limitations to borderline personality disorder). See also *Wilson* ("of particular importance in the capital punishment context is whether the defendant's adaptive limitations are truly related to his subaverage intellectual functioning or instead related to a condition which does not render him less culpable for his actions, such as a personality disorder").

{¶ 50} Upon review, because there was evidence to support the trial court's finding that appellant failed to show either significant limitations in his intellectual functioning or related significant limitations in adaptive functioning, the trial court did not err in finding appellant failed to meet his burden of establishing mental retardation. Based upon the foregoing, appellant's first and second assignments of error are overruled.

{¶ 51} Under the third assignment of error, appellant asserts that the trial court deprived him of due process and equal protection rights by failing to require that the hearing on mental retardation be conducted before a jury. Appellant acknowledges, however, that the Supreme Court rejected such a claim in *Lott*. Appellant argues, nevertheless, that the procedure adopted in *Lott* fails to comport with constitutional requirements.

{¶ 52} Subsequent to the decision in *Lott*, the Supreme Court again addressed this issue in *Were* at ¶ 184, 186, holding in relevant part:

> *Lott* holds that the decision whether or not a defendant is mentally retarded "should be decided by the court and do[es] not represent a jury question. In this regard, a trial court's ruling on mental retardation should be conducted in a manner comparable to a ruling on competency (i.e., the judge, not the jury, decides the issue)." *Lott*, **97 Ohio St.3d 303**, 2002 Ohio 6625, **779 N.E.2d 1011**, at ¶ 18. *Were* invokes *Apprendi v. New Jersey* (2000), **530 U.S. 466**, **120 S.Ct. 2348**, 147 L.Ed.2d 435; *Ring v. Arizona* (2002), **536 U.S. 584**, **122 S.Ct. 2428**, 153 L.Ed.2d 556; *Blakely v. Washington* (2004), **542 U.S. 296**, **124 S.Ct. 2531**, 159 L.Ed.2d 403; and *United States v. Booker* (2005), **543 U.S. 220**, **125 S.Ct. 738**, 160 L.Ed.2d 621, in arguing that a jury must determine whether a capital defendant is mentally retarded.
>
> * * *
>
> Based on the *Apprendi* line of cases, *Were* claims that the determination of whether a capital defendant is mentally retarded was a factor that eliminated the possibility of a death sentence, and thus must be decided by the jury. The fact that a capital defendant is not mentally retarded, however, is not an aggravating circumstance that increases a defendant's punishment. Rather, the failure to find mental retardation simply means that the capital defendant remains eligible to be sentenced to death. Such a finding can affect a sentence only by mitigating it. Other jurisdictions that have considered this argument have reached similar conclusions. * * * We conclude that the trial court, not the jury, determines whether

> a capital defendant is mentally retarded. Nothing in the *Apprendi* line of cases requires otherwise.

{¶ 53} This court, which is bound by pronouncements of the Supreme Court, has rejected similar arguments. See *Burke* at ¶ 26 (noting that Supreme Court in *Lott* held that "the issue of mental retardation is a question of fact for the judge, not a jury, to determine" and that "we must follow Ohio Supreme Court precedent"). In light of the above precedent, appellant's third assignment of error is without merit and is overruled.

{¶ 54} Based upon the foregoing, appellant's three assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

Judgment affirmed.

FRENCH and CONNOR, JJ., concur.

[fn1] Hagan, Drogin, & Guilmette, Adjusting IQ Scores for the Flynn Effect: Consistent with the Standard of Practice? 39 Professional Psychology: Research & Practice (2008), 619. (State's Exhibit No. 6.)