[Cite as *State v. Chinn*, 2017-Ohio-8546.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 16AP-602
v.	:	(C.P.C. No. 15CR-3416)
Angelo R. Chinn,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on November 2, 2017

Ron O'Brien, Prosecuting Attorney, and *Seth L. Gilbert*, for appellee.

Angelo Chinn, pro se.

ON APPLICATION TO REOPEN

HORTON, J.

{¶ 1} A jury convicted defendant-appellant, Angelo R. Chinn, of felonious assault under R.C. 2903.11 and attempted murder under R.C. 2903.02, both with firearm, drive-by, and repeat offender specifications. Chinn appealed and this court affirmed the conviction. *State v. Chinn*, 10th Dist. No. 16AP-602, 2017-Ohio-4408. Chinn has filed an application to reopen his direct appeal under App.R. 26(B), asserting ineffective assistance of appellate counsel. For the reasons set forth below, we deny the application.

I. FACTUAL AND PROCEDURAL BACKGROUND

{¶ 2} We incorporate the recitation of the facts giving rise to Chinn's indictment and his trial from the direct appeal:

> A grand jury indicted Chinn on July 14, 2015, on one count of felonious assault under R.C. 2903.11 and one count of attempted murder under R.C. 2923.02. Because the indictment alleged that Chinn had committed the offenses by discharging a firearm from a vehicle and had previous violent

felony convictions, the counts carried firearm specifications under R.C. 2941.145(A), drive-by shooting specifications under R.C. 2941.146(A), and repeat violent offender specifications under R.C. 2941.149(A). (July 14, 2015 Indictment.)

Trial commenced on June 20, 2016. The prosecution's first witness was Phyllis Regina James-Amir, who had met Chinn at their place of employment and began a relationship with him. (Tr. at 32-34.) James-Amir testified that she had been sleeping in her car at her place of employment before her shift on the night of July 4, 2015, when Chinn approached and began pounding on the car window. (Tr. at 42-44.) She started the car and as she began to drive away, Chinn tried to stop her by placing his hands on the hood of the car. (Tr. at 45-46.) Chinn got in his car and followed her at a high speed and James-Amir tried to evade him. (Tr. at 45-47.) Suddenly her car window blew out after a sound like a tire blowing out, and Chinn sped away. (Tr. at 47-49.) She realized that Chinn had fired a weapon at her. James-Amir pulled her car into a strip mall and called 911. (Tr. at 49-50.)

Officer Zachary West responded to the 911 call. (Tr. at 80.) He testified that James-Amir was shaken and frightened, and had to be escorted out of her vehicle. He stated that "the driver's side window was shattered completely out." (Tr. at 81.)

Detective Ronald Lemon testified that he arrested Chinn at his mother's house. (Tr. at 99.) He described the gun used in the incident to Chinn's mother, who said that she owned a gun fitting the description. (Tr. at 100-01.) After Chinn's mother consented to a search of the home, she took Detective Lemon to where the gun was stored in her bedroom. (Tr. at 102-03.) The gun had one spent shell casing and one live round inside. (Tr. at 105.) During an interview after Chinn's arrest, he told Detective Lemon that the shooting was an accident and that he had not intended to harm James-Amir. (Tr. at 129.)

Erica Pattie testified as a forensic firearms expert. (Tr. at 158.) She testified that the gun in question, a Derringer pistol, had to be fully cocked after loading and have the safety off before it would discharge. (Tr. at 163-64.) On cross-examination, she stated that it would be possible for the weapon to be accidentally discharged. (Tr. at 167.)

Before jury deliberations, Chinn's attorney proposed a jury instruction with the following definition of "accident": "An

> accident is a mere physical happening or event and not reasonably foreseen as a natural result of an unlawful act." (Tr. at 142.) The trial court overruled the request to include the instruction. (Tr. at 150.)
>
> The jury returned a guilty verdict on the felonious assault and attempted murder charges, as well as the firearm and drive-by shooting specifications for those offenses. (Tr. at 229-30.) The trial court separately convicted Chinn of the repeat offender specification. (Tr. at 234.) After merging the offenses, the trial court sentenced Chinn to a total of 25 years imprisonment. (Aug. 25, 2015 Jgmt. Entry.)

Id. at ¶ 2-8.

{¶ 3} The sole assignment of error on appeal asserted that the trial court erred when it failed to include Chinn's requested jury instruction. Applying the test for review of jury instructions set forth in *State v. Dodson*, 10th Dist. No. 10AP-603, 2011-Ohio-1092, ¶ 6, we held that the trial court did not abuse its discretion when it refused to present Chinn's requested instruction because it was not a correct statement of the law. *Chinn* at ¶ 7-8. We also noted that the trial court's decision not to include the instruction did not hamper the defense that Chinn's attorney presented, which depended on a theory of accidental discharge of the weapon and Chinn's assertion that he had not intended to fire the weapon. *Id.* at ¶ 11.

{¶ 4} Chinn subsequently filed a motion to reopen the appeal under App.R. 26(B), on the grounds that he received ineffective assistance of counsel during his direct appeal.

II. ANALYSIS

{¶ 5} Under App.R. 26(B), "[a] defendant in a criminal case may apply for reopening of the appeal from the judgment of conviction and sentence, based on a claim of ineffective assistance of appellate counsel." To present the claim, the applicant must state "[o]ne or more assignments of error or arguments in support of assignments of error that previously were not considered on the merits in the case by any appellate court or that were considered on an incomplete record because of appellate counsel's deficient representation." App.R. 26(B)(2)(c). In addition, the applicant must present "[a] sworn statement of the basis for the claim * * * [describing] the manner in which the deficiency prejudicially affected the outcome of the appeal." App.R. 26(B)(2)(d).

{¶ 6} A reviewing court must grant the application "if there is a genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal." App.R. 26(B)(5). When reviewing an applicant's claim of ineffective assistance of counsel, a court applies the standard set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). *State v. Reed*, 74 Ohio St.3d 534, 535 (1996). In the context of an application under App.R. 26(B)(5), the *Strickland* standard requires that the applicant "show that counsel was deficient for failing to raise the issue he now presents and that there was a reasonable probability of success had that issue been presented on appeal." *State v. Lee*, 10th Dist. No. 06AP-226, 2007-Ohio-1594, ¶ 2. "An appellate attorney has wide latitude and the discretion to decide which issues and arguments will prove most useful on appeal. Furthermore, appellate counsel is not required to argue assignments of error that are meritless." *State v. Davis*, 10th Dist. No. 09AP-689, 2011-Ohio-1023, ¶ 8, citing *Lee* at ¶ 2.

{¶ 7} Chinn presents four assignments of error, and we will consider each in turn.

A. First Assignment of Error

> The Defendant-Appellant's convictions were not supported by sufficiently credible Evidence and were against the Manifest Weight of the Evidence.

{¶ 8} Chinn's first assignment of error asserts that his appellate counsel was ineffective for failing to raise a manifest weight of the evidence challenge on appeal.

{¶ 9} The manifest weight of the evidence analysis requires the appellate court to consider the state's evidence as an additional, or "thirteenth juror." *State v. Thompkins*, 78 Ohio St.3d 380, 387 (1997). After "reviewing the entire record," the appellate court " 'weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.' " *State v. McKnight*, 107 Ohio St.3d 101, 112, 2005-Ohio-6046, ¶ 71, quoting *Thompkins*, quoting *State v. Martin*, 20 Ohio App.3d 172 (1st Dist.1983). "The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *Id.*

{¶ 10} After reviewing the record, we conclude that Chinn's appellate counsel was not ineffective for failing to raise a manifest weight argument during the direct appeal

because the weight of the evidence clearly supported the jury's verdict. The victim testified that after unsuccessfully attempting to stop her from driving away from her workplace, Chinn pursued her in his vehicle and engaged in a high speed chase after her that culminated with him firing a gun into her car. Chinn admitted to firing the weapon but denied having any intent to kill the victim.

{¶ 11} Chinn argues that there "was no actual evidence" of felonious assault because "[t]he alleged victim, by her own testimony, was never touched." (Application at 6.) However, a defendant commits felonious assault with or without actually inflicting injury, as long as there is an "attempt to cause physical harm" to the victim. R.C. 2903.11(A)(2). The victim's testimony and Chinn's admission that he discharged the pistol provided more than adequate evidence of an attempt to harm her.

{¶ 12} Chinn also argues that the state failed to prove the element of intent, and that the evidence produced at trial showed only that he was "mad" and "can be said to have been **reckless**." (Emphasis sic.) (Application at 6.) According to Chinn, if he had been "really trying to kill the victim, he would have shot all his bullets," but because he only shot one, the evidence did not prove that he had the necessary intent to support the charges. (Application at 7.)

{¶ 13} A charge of attempted murder under R.C. 2903.02 requires the state to " ' "prove that the defendant engaged in conduct that, if successful, would have resulted in purposely causing the death of another." ' " *State v. Mosley*, 10th Dist. No. 14AP-639, 2015-Ohio-1390, ¶ 37, quoting *State v. Knight*, 10th Dist. No. 12AP-317, 2013-Ohio-1462, ¶ 26, quoting *State v. Helms*, 7th Dist. No. 08MA199, 2012-Ohio-1147, ¶ 27. *See also* R.C. 2923.02(A) (defining attempt). Under R.C. 2901.22(A), a person acts purposely "when it is the person's specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is the offender's specific intention to engage in conduct of that nature."

{¶ 14} We have previously held that a defendant's "act of pointing a firearm and firing it in the direction of another human being is an act with death as a natural and probable consequence." *State v. Sevilla*, 10th Dist. No. 06AP-954, 2007-Ohio-2789, ¶ 10, citing *State v. Turner*, 10th Dist. No. 97APA05-709 (Dec. 30, 1997). Furthermore, "[a]

jury may infer an intention to kill where the natural and probable consequence of a defendant's act is to produce death and the jury may conclude from all the surrounding circumstances that a defendant had an intention to kill." *Sevilla* at ¶ 10, citing *State v. Edwards*, 26 Ohio App.3d 199 (10th Dist.1985). Death was a natural and probable consequence of Chinn's act of pointing the pistol into the victim's car and firing it. The jury reasonably inferred an intention to kill from this act. Chinn's assertion that the evidence does not demonstrate intent because he restrained himself by firing only one shot is absurd. If the bullet had struck the victim, it could very well have killed her. The state proved Chinn's intent with the testimony of the victim and Chinn's own admission to the detective that he fired the gun.

{¶ 15} This evidence also demonstrates Chinn's intent to commit felonious assault. The offense requires a defendant to "knowingly * * * [c]ause or attempt to cause physical harm to another." R.C. 2903.11(A)(2). "A person acts knowingly, regardless of purpose, when the person is aware that the person's conduct will probably cause a certain result or will probably be of a certain nature." R.C. 2901.22(B). The jury's finding that Chinn acted with the purposeful intent to cause the death of another when committing the offense of attempted murder "necessarily includes" the element of knowingly causing physical harm sufficient to prove felonious assault. *State v. Sullivan*, 10th Dist. No. 07AP-247, 2008-Ohio-391, ¶ 16. Thus, the weight of the evidence introduced by the state proved the mens rea element of both offenses.

{¶ 16} Finally, Chinn argues that his appellate counsel was ineffective for failing to assign error to the admission of testimony that he claims should have been excluded under Evid.R. 403(A).[1] (Application at 8.) However, Chinn fails to name any witness that gave such testimony or cite to any portion of the record containing the allegedly prejudicial statements by witnesses that should have been ruled inadmissible.

{¶ 17} Based on the foregoing, we conclude that there was no probability that a manifest weight argument would have had any success in Chinn's initial appeal. *Lee* at ¶ 2. Chinn's appellate counsel was not ineffective for failing to bring a meritless argument. *Davis* at ¶ 8. Accordingly, the first assignment of error is overruled.

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[1] Chinn mentions a Double Jeopardy violation in his argument in support of the first assignment of error, which will be addressed in the fourth assignment of error. (Application at 8.) He also contends that the evidence was legally insufficient, but fails to make any argument in support of that contention.

B. Second Assignment of Error

> The Appellant contends that his sentence is contrary to law and excessive, both under the Statutes and Constitution; when although the overriding purposes of felony sentencing are to protect the public from future crime and to punish the offender, the imposition of a maximum, mandatory and consecutive sentence of 25 years in prison; when a shorter sentence is not demeaning to the seriousness of the conduct and this sentence is not consistent with the sentences for similar crimes committed by similar offenders and; alternatively, despite trial counsel's failure to argue, Appellant could not be convicted of and sentenced for both Felonious Assault and Attempted Murder as well as both Firearm Specifications and Drive-By Specifications as, under the facts and law, both sets of charges are Allied Offenses of Similar Import under O.R.C. Section 2941.25.

{¶ 18} Chinn argues that his appellate counsel was ineffective for failing to argue that his sentence was "illegal" and contrary to law, citing *State v. Williams*, 148 Ohio St.3d 403, 2016-Ohio-7658. A defendant convicted of an offense has the right to appeal a sentence that is "contrary to law." R.C. 2953.08(A)(4). An appellate court may only "increase, reduce, or otherwise modify a sentence that is appealed" if "it clearly and convincingly finds" that the sentence is contrary to law. R.C. 2953.08(G)(2)(b).

{¶ 19} In *Williams*, a trial court had ordered the merger of three offenses that were allied offenses of similar import, but then erred when it "imposed concurrent sentences on each of the three offenses instead of sentencing on only one offense." *Id.* at ¶ 3. The Supreme Court of Ohio held as follows:

> A court only has authority to impose a sentence that conforms to law, and R.C. 2941.25 prohibits the imposition of multiple sentences for allied offenses of similar import. Thus, when a sentencing court concludes that an offender has been found guilty of two or more offenses that are allied offenses of similar import, in conformity with *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, 922 N.E.2d 182, it should permit the state to select the allied offense to proceed on for purposes of imposing sentence and it should impose sentence for only that offense. Accordingly, imposing separate sentences for allied offenses of similar import is contrary to law and such sentences are void. Therefore, res judicata does not preclude a court from correcting those sentences after a direct appeal.

Williams at ¶ 2.

{¶ 20} Here, the record does not reflect any sentencing error under *Williams*. The judgment entry states that "Counts One and Two merge for sentencing purposes and the State of Ohio elects to proceed on Count Two," the attempted murder charge. (July 27, 2016 Jgmt. Entry.) The entry then states:

> The Court hereby imposes the following sentence: ELEVEN (11) YEARS as to Count Two, consecutive to THREE (3) YEARS as to Firearm Specification, consecutive to FIVE (5) YEARS as to Drive-By Specifications, consecutive to SIX (6) YEARS as to Repeat Violent Offender Specifications, for a total of TWENTY-FIVE (25) YEARS, at the Ohio Department of Rehabilitation and Correction.

{¶ 21} Chinn was not sentenced for both the felonious assault and attempted murder convictions, as he asserts in the assignment of error. After the trial court merged the offenses, he received an 11-year sentence for only Count 2, attempted murder. The remaining portion of the sentence resulted from the imposition of drive-by, firearm, and repeat violent offender specifications. Under R.C. 2929.14(B)(2)(d), a repeat violent offender specification must be served "consecutively to and prior to the prison term imposed for the underlying offense." Consecutive sentences were also required for the drive-by and firearm specifications. R.C. 2929.14(C)(1)(a). Because the 11-year sentence for the underlying offense of attempted murder was authorized by statute, it was not illegal. R.C. 2923.02(E)(1) (classifying attempted murder as "a felony of the first degree"); R.C. 2924.14(A)(1) (allowing a maximum prison term of 11 years for a first degree felony). Chinn's appellate counsel was not ineffective for failing to argue a non-existent error. The second assignment of error is overruled.

C. Third Assignment of Error

> The Defendant-Appellant was deprived of the effective assistance of Trial Counsel during the trial proceedings.

{¶ 22} Chinn makes two arguments to support his contention that his appellate counsel was ineffective for failing to argue that he had received ineffective assistance of trial counsel. First, he asserts that his trial attorney was ineffective for failing to raise an objection under Evid.R. 403(B) to testimony that "inflame[d] the passions of the jury and added substantially to the risk of conviction on facts unrelated to actual guilt."

(Application at 10.) However, Chinn cites to no portion of the testimony of any witness to support this argument. Under App.R. 16(A)(7), an argument in support of an assignment of error must cite to the "parts of the record on which appellant relies." *See, e.g.*, *State v. Aikens*, 11th Dist. No. 2014-T-0124, 2016-Ohio-2795, ¶ 46 (noting that under App.R. 16(A)(7) "[i]t is appellant's responsibility to reference the record to find evidence that supports his argument"). Furthermore, under App.R. 12(A)(2), a "court may disregard an assignment of error presented for review if the party raising it fails to identify in the record the error on which the assignment of error is based." Without any indication of what testimony Chinn believes merited such an objection, we must disregard such a "blanket allegation of error" committed by his trial counsel. *State v. Hamilton*, 9th Dist. No. 96CA006456 (Apr. 2, 1997) (stating that an appellate court "will not comb the record looking for testimony that should have warranted an objection from defendant's attorney").

{¶ 23} Second, Chinn argues that his trial counsel was ineffective for stipulating to the fact of his prior convictions without "mak[ing] the State prove" them. (Application at 10.) A decision by defense counsel to stipulate to the fact of a defendant's prior conviction is generally considered a matter of trial strategy. *See, e.g.*, *State v. Roy*, 10th Dist. No. 14AP-986, 2015-Ohio-4959, ¶ 22. The record indicates that Chinn's trial attorney pursued a strategy of attacking the state's ability to prove the element of intent in both the attempted murder and felonious assault charges. This strategy is reflected in the closing statement, where he discussed the testimony of witnesses, Chinn's statement to the police detective, and the ballistic evidence. (Aug. 25, 2016 Tr. at 191.) "The fact that defense counsel may not have pursued every possible defense is not the test for a claim of ineffective assistance of counsel; rather, the issue is whether the defense chosen was objectively reasonable." *State v. Baker*, 111 Ohio App.3d 313, 323 (10th Dist.1996), citing *Strickland*. Chinn is silent as to why his trial attorney's decision to stipulate to the convictions and focus on the strategy presented was objectively unreasonable. Without such explanation, we reject the argument that the stipulation demonstrates ineffective assistance by Chinn's trial counsel. *State v. Booker*, 10th Dist. No. 15AP-42, 2015-Ohio-5118, ¶ 28 ("Appellant has failed to demonstrate that it was not objectively reasonable for his trial counsel to stipulate to his prior record and focus the court's attention on [a

witness's] credibility and the lack of other evidence against appellant."). Because there was "no reasonable probability of success had th[is] issue been presented on appeal," Chinn's appellate counsel was not deficient for failing to raise it. *Lee* at ¶ 2. Accordingly, the third assignment of error is overruled.

D. Fourth Assignment of Error

> The Defendant-Appellant's convictions and sentence, arising out of the same event, must be Allied Offenses of Similar Import under O.R.C. Section 2941.25, Ohio's Merger Statute; as well as being penalized twice for the same act; here, the State violated his constitutional rights against double jeopardy; that is, multiple punishments for the same offense; and the consecutive sentences added to the harm.

{¶ 24} Among the protections of the Double Jeopardy Clause of the United States Constitution, applicable to the states through the Fourteenth Amendment, is the prohibition on "multiple punishments for the same offense." *State v. Brown*, 119 Ohio St.3d 447, 450, 2008-Ohio-4569, ¶ 10. "Additionally, Article I, Section 10, of the Ohio Constitution provides, 'No person shall be twice put in jeopardy for the same offense.' " *Id.* The General Assembly has codified the protections of the Double Jeopardy Clause in R.C. 2941.25. *State v. Ruff*, 143 Ohio St.3d 114, 2015-Ohio-995, ¶ 12. The relevant portion of the statute provides that: "Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one." R.C. 2941.25(A).

{¶ 25} The discussion in the second assignment of error applies here. The judgment entry expressly states that the trial court merged the felonious assault and attempted murder convictions, and only sentenced Chinn for attempted murder. The trial court was required by statute to impose consecutive prison terms for the repeat violent offender, drive-by, and firearm specifications. R.C. 2929.14(B)(2)(d); R.C. 2929.14(C)(1)(a). Chinn suffered no cognizable Double Jeopardy violation. His appellate counsel was not ineffective for failing to raise this argument. Accordingly, the fourth assignment of error is overruled.

III. CONCLUSION

{¶ 26} Because there is no "reasonable probability of success" had any issue raised by Chinn been asserted on appeal, all assignments of error are overruled and his application to reopen the appeal under App.R. 26(B) is denied.

Application to reopen denied.

DORRIAN and LUPER SCHUSTER, JJ., concur.
