[Cite as *State v. Blevins*, 2018-Ohio-3583.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 106115

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JEAN BLEVINS

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-15-597731-B

BEFORE: Blackmon, J., Kilbane, P.J., and E.T. Gallagher, J.

RELEASED AND JOURNALIZED: August 30, 2018

ATTORNEYS FOR APPELLANT

Mark Stanton
Cuyahoga County Public Defender

Noelle A. Powell
Assistant Public Defender
Courthouse Square, Suite 200
310 Lakeside Avenue
Cleveland, Ohio 44113

ATTORNEYS FOR APPELLEE

Michael C. O'Malley
Cuyahoga County Prosecutor

Andrew F. Rogalski
Assistant County Prosecutor
The Justice Center, 9th Floor
1200 Ontario Street
Cleveland, Ohio 44113

PATRICIA ANN BLACKMON, J.:

{¶1} Appellant, Jean Blevins ("Jean"), appeals from his convictions for felonious assault, involuntary manslaughter, aggravated assault, and having a weapon while under disability. He assigns the following errors for our review:

> I. The jury's verdicts finding [Jean] guilty of felonious assault, involuntary manslaughter, aggravated assault, and having weapons while under disability are not supported by the manifest weight of the evidence and his convictions of those offenses violates his rights to a fair trial and due process as protected by the constitutions of the United States and of the state of Ohio.
>
> II. [Jean] was denied his Six Amendment right to counsel because counsel failed to secure adequate time for crucial pretrial preparation and was ineffective as a result.
>
> III. [Jean's] sentence was excessive and unconstitutionally disparate to the sentences received by his codefendant.
>
> IV. The verdict form on count six (involuntary manslaughter) only supports a conviction for a felony of the third degree because the verdict form did not state the required finding that the death was the proximate result of committing or attempting to commit a felony.

{¶2} Having reviewed the record and pertinent law, we affirm. The apposite facts follow.

{¶3} Jean and his cousin, Barry Blevins ("Barry"), were indicted in a thirteen-count indictment in connection with the October 11, 2014 shooting death of David Garrett ("Garrett"). As is relevant herein, Jean was charged with murder, felonious assault, voluntary manslaughter, involuntary manslaughter, and aggravated

assault, all with one-and-three-year firearm specifications, and having a weapon while under disability. Barry pled guilty to a single count of voluntary manslaughter with a three-year firearm specification, and was sentenced to fourteen years of imprisonment.[1] The case against Jean proceeded to a jury trial.

{¶4} The evidence presented by the state of Ohio indicated that Barry and Garrett's family became involved in an ongoing feud since 2006 after Phillip Simpson ("Munchie") and Barry were charged with drug trafficking, and the Garretts believed that Barry cooperated with police. On the night of the shooting, Garrett and various family members went downtown to the Lavish Ultra Lounge to celebrate a birthday.

{¶5} According to the testimony of Garrett's fianceé, Ciara Stewart ("Stewart"), Garrett and Barry became involved in a discussion about Munchie, who was serving time in prison. Stewart asked Garrett to dance with her in order to end his conversation with Barry, but he refused and the discussion became increasingly heated. One of Barry's friends, "Boy George," also attempted to direct Garrett away, and Garrett's uncles and Barry's friends also came over to the area. At that point, the owner of the Lavish Ultra ordered everyone to leave.

{¶6} Stewart went to get her car, but moments later, a huge fight erupted in the parking lot. According to Stewart, Barry and Boy George were assaulting Garrett. Garrett broke free and made his way toward Stewart's car, but before he could get in her

[1] *See State v. Barry Blevins*, 8th Dist. Cuyahoga No. 105023, 2017-Ohio-4444 (affirming the sentence).

vehicle, Jean emerged from a nearby vehicle and tossed something to Barry. Immediately after that, Stewart saw Barry aim and fire a weapon at Garrett, killing him, as shots rang out from both sides of the parking lot. As Stewart exited the car to comfort Garrett, she observed Jean return to his vehicle and drive off, while Barry removed his shirt and fled on foot, still holding the gun.

{¶7} Stewart identified Jean in a photo array and again in court. She also testified that video of the parking lot depicted her vehicle and some of the events that transpired in the parking lot. Stewart denied that Barry produced the weapon from his waistband, but she acknowledged that her original statement to police said that he had done so.

{¶8} Delonda Holiday ("Holiday") testified that gunshots broke out in the parking lot as she and Stewart went to Stewart's vehicle. Holiday saw Jean, whom she knew prior to the incident, driving a blue car. According to Holiday, Jean got out of a car and gave Barry a gun. There was a hail of gunfire, and Garrett was hit.

{¶9} Maurice Thompson ("Thompson") testified that he knew Barry and Jean prior to the shooting. Thompson stated that he was waiting for friends in the parking lot of Lavish Ultra at the time of the incident. He observed a crowd fighting, then saw Jean separate from the crowd and proceed toward a car parked on Cooley Avenue, an adjacent side street. Thompson next observed Jean "return to the ruckus" a few minutes later. After that, there were gunshots. Thompson admitted that he did not witness Garrett being shot, and he also admitted that he first mentioned hearing the gunshots at the Lavish Ultra Lounge during his prosecution in an unrelated case.

{¶10} Angel Ortiz testified that his home is located next to Lavish Ultra, and that he has a video surveillance system. After the shooting, Ortiz found a weapon near his garage and called the police. The police obtained the gun and home security video that captured the events in the parking lot of Lavish Ultra.

{¶11} Cleveland Police Detective Todd Clemens ("Det. Clemens") testified that he found two Federal .40-caliber Smith & Wesson shell casings on the west side of the parking lot. Four .45-caliber shell casings and four 9 mm shell casings were located on the opposite side of the parking lot.

{¶12} Dr. Dan Galita ("Dr. Galita"), a forensic pathologist with the Cuyahoga County Medical Examiner's Office, testified that Garrett died from a single gunshot that penetrated the left side of his chest, toward the back, and lacerated his aorta. The bullet traveled from back to front, and left to right.

{¶13} Curtiss Jones ("Jones"), a trace evidence analyst with the Cuyahoga County Medical Examiner's Office, testified that he examined various swabs from Garrett's hands and also examined his clothing. According to Jones, there was no gunshot residue on Garrett's body, indicating that Garrett was shot from a distance of at least five feet. Samples from Garrett's hands were also negative for trace metal detection. The back of Garrett's shirt had a bullet hole from the entrance of the bullet. Blood found in other samples was submitted for further DNA analysis.

{¶14} Detective James Kooser ("Det. Kooser"), a firearms examiner with the Cuyahoga County Regional Forensic Laboratory, testified that the weapon recovered in

this matter was a Heckler & Koch .40-caliber Smith & Wesson pistol with 13 .40-caliber rounds in the magazine. The bullet recovered during Garrett's autopsy was also .40-caliber, and Det. Kooser determined that it was fired from the Heckler & Koch pistol. The two .40-caliber casings found near the west side of the parking lot were also fired from this weapon.

{¶15} Carey Baucher ("Baucher"), a DNA analyst with the Regional Forensic Laboratory, testified that in this investigation, she used the "True Allele" software program for analyzing genotypes in order to determine the statistical probabilities for the profiles found in a mixed sample. According to Baucher, this program performs the mathematical analysis not by using "new math," but by performing more complicated mathematical calculations to deal with mixed samples. Baucher testified that this program had undergone peer review and validation, and was "the best program" for such analyses.[2] According to Baucher, the trigger, muzzle, and magazine of the weapon recovered in this matter contained a mixture of five contributors, and Jean's DNA represented the highest percentage of each the mixture. There was insufficient information to determine if Barry's DNA was on the muzzle and trigger, but his DNA was not on the magazine.

{¶16} Barry testified that he had been close friends with Garrett's family. However, after Munchie was arrested for drug possession, the family believed that Barry

[2]The record indicates that in 2017, the state forwarded its DNA analyses to the defense and the defense was granted expert assistance for its own DNA analysis at the state's expense. Later, the defense withdrew a previously filed motion in limine.

had served as an informant against him. Over the years, Garrett's family confronted Barry, blaming him for Munchie's imprisonment.

{¶17} Barry testified that he saw Garrett at the Lavish Ultra Lounge. As Barry explained that he did not provide information to the police about Munchie, another Garrett relative approached him aggressively. Barry stated that he walked outside to avoid a problem, but the Garrett group followed after him. One family member spat on him, and they began to physically attack him. Barry's friend, Boy George, tried to pull the attackers off of him, but the fight escalated.

{¶18} According to Barry, Garrett pulled a gun and began pistol whipping him. At that point, Boy George grabbed Garrett. Garrett aimed his weapon at Boy George, then Barry ran to his car and got his own weapon, and he and Garrett exchanged gunfire. After that, Barry fled and hid the weapon under a bucket in a nearby backyard.

{¶19} Barry testified that he used his own weapon, and that Jean was not present during the shooting. However, Barry stated that Jean had once briefly handled his weapon and the magazine for "a minute or two a couple of days before" the shooting. Barry also testified that, in his first statement to police, he falsely stated that he had obtained the weapon by wrestling it away from one of the Garrett family members during the altercation. Barry stated that he made this false statement because he knew he was prohibited from having a weapon due to his prior drug conviction. Barry also testified that he initially told police that his car had been parked on Cooley Avenue. However, he

claimed the car was actually parked in the parking lot of Lavish Ultra Lounge, so the gun was within his reach.

{¶20} The court dismissed the charge of discharging a weapon near prohibited premises, and the jury convicted Jean of felonious assault, involuntary manslaughter, aggravated assault, firearm specifications, and having a weapon while under disability. The trial court sentenced Jean to a total of thirteen years of imprisonment and five years of postrelease control.

Manifest Weight of the Evidence

{¶21} In the first assigned error, Jean argues that his convictions are against the manifest weight of the evidence because the state's key testimony contained accounts that changed over time and were conflicting.

{¶22} In *Thompkins*, the court explained a challenge to the manifest weight of the evidence as follows:

> Weight of the evidence concerns "the inclination of the *greater amount of credible evidence*, offered in a trial, to support one side of the issue rather than the other. It indicates clearly to the jury that the party having the burden of proof will be entitled to their verdict, if, on weighing the evidence in their minds, they shall find the *greater amount of credible evidence* sustains the issue which is to be established before them. Weight is not a

> question of mathematics, but depends on its *effect in inducing belief*." (Emphasis added.) *Black's* [*Law Dictionary* (6th Ed.1990) 1594].
>
> When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a "'thirteenth juror'" and disagrees with the factfinder's resolution of the conflicting testimony. [Quoting *Tibbs v. Florida*, 457 U.S. 31, 45, 102 S. Ct. 2211, 2220, 72 L.Ed.2d 652 (1982)]. *See also State v. Martin* (1983), 20 Ohio App.3d 172, 175, * * *, 485 N.E.2d 717, 720-721 ("The court, reviewing the entire record, 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. 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., 78 Ohio St.3d at 386.

{¶23} Although we review credibility when considering the manifest weight of the evidence, we are cognizant that determinations regarding the credibility of witnesses and the weight of the testimony are primarily for the trier of fact. *State v. Adhikari*, 2017-Ohio-460, 84 N.E.3d 282, ¶ 48 (8th Dist.), citing *State v. Bradley*, 8th Dist. Cuyahoga No. 97333, 2012-Ohio-2765, ¶ 14, and *State v. DeHass*, 10 Ohio St.2d 230,

227 N.E.2d 212 (1967). The trier of fact is best able "to view the witnesses and observe their demeanor, gestures, and voice inflections, and use these observations in weighing the credibility of the proffered testimony." *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, ¶ 24. The jury may take note of any inconsistencies and resolve them accordingly, "believ[ing] all, part, or none of a witness's testimony." *Adhikari*, quoting *State v. Raver*, 10th Dist. Franklin No. 02AP-604, 2003-Ohio-958, ¶ 21.

{¶24} In this matter, Stewart testified that Garrett and Barry were involved in a heated discussion inside Lavish Ultra Lounge, and that once outside, a huge fight erupted in the parking lot. She testified that Garrett broke free from a physical attack, but before he could make it to her automobile, Jean emerged from a nearby vehicle and tossed something to Barry, and Barry then shot Garrett. Stewart's prior statement indicated that Jean pulled the weapon from his waistband. Holiday saw Jean get out of a vehicle and give Barry a gun. Thompson saw Jean separate from the crowd that was fighting, go to a parked car, and return to the fight immediately before shots were fired. Barry maintained that after Garrett pistol-whipped him, he shot his own weapon, killing Garrett. He stated that Jean was not present but did briefly handle the weapon and magazine on an earlier occasion. Physical evidence indicated that Garrett had not handled a weapon, and he was shot on the left side of his chest toward his back, from a distance of at least five feet. Jean was the major DNA contributor on the trigger, handle, muzzle and magazine of the weapon, and Barry's DNA was not on the magazine.

{¶25} From all of the foregoing, and after reviewing the entire record, we cannot say that the jury clearly lost its way and created a manifest miscarriage of justice in convicting Jean in this matter. Although Stewart's trial testimony differed from her original statement, and there were other inconsistencies regarding the exact manner in which Jean provided Barry with the weapon, the jury was free to resolve them, and the manner in which they did so is supported by the eyewitness testimony and the physical evidence, including the forensic evidence, DNA analysis, and medical evidence.

{¶26} The assigned error lacks merit.

Ineffective Assistance of Counsel

{¶27} In the second assigned error, Jean argues that his trial counsel was ineffective for failing to request a continuance for additional DNA preparation, and proceeding to trial without a defense DNA report.

{¶28} We review a claim of ineffective assistance of counsel under a two-part test that requires the defendant to demonstrate: (1) trial counsel's performance fell below an objective standard of reasonable representation; and (2) prejudice arose from the deficient performance. *State v. Bradley*, 42 Ohio St.3d 136, 141-143, 538 N.E.2d 373 (1989), citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

{¶29} In evaluating the alleged deficiencies in performance, our review is highly deferential to counsel's decisions because there is a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. *Bradley* at 142-143, citing *Strickland* at 689. Judicial scrutiny of counsel's performance is to be

highly deferential, and reviewing courts are to refrain from second-guessing the strategic decisions of trial counsel. *State v. Carter*, 72 Ohio St.3d 545, 558, 651 N.E.2d 965 (1995). Debatable trial tactics generally do not constitute a deprivation of effective counsel. *State v. Dean*, 146 Ohio St.3d 106, 2015-Ohio-4347, 54 N.E.3d 806, ¶ 278.

{¶30} To show prejudice, a defendant must prove that the lawyer's deficiency was so serious that there is a reasonable probability the result of the proceeding would have been different. *Strickland* at 694.

{¶31} With regard to whether counsel committed an error in failing to obtain a defense DNA report, we note that the Ohio Supreme Court has held that the failure to call a defense DNA expert and to instead rely on cross-examination does not constitute ineffective assistance of counsel. *State v. Nicholas*, 66 Ohio St.3d 431, 436, 613 N.E.2d 225 (1993), citing *State v. Thompson*, 33 Ohio St.3d 1, 10-11, 514 N.E.2d 407 (1987). Counsel's decision to rely on cross-examination of the state's DNA expert may be a legitimate tactical decision because the results of defense DNA testing might not have turned out to be favorable to the defense. *See State v. Foust*, 105 Ohio St.3d 137, 2004-Ohio-7006, 823 N.E.2d 836, ¶ 97; *State v. Hartman*, 93 Ohio St.3d 274, 299, 2001-Ohio-1580, 754 N.E.2d 1150.

{¶32} With particular regard to True Allele, we note that this program was accepted in *State v. Mathis*, Cuyahoga C.P. No. CR-16-611539-A (Apr. 13, 2018). *See generally People v. Wakefield*, 47 Misc.3d 850, 9 N.Y.S.3d 540, 2015 NY Misc LEXIS

306 (Sup. Ct. Schenectady, February 9, 2015) (compilation of cases accepting True Allele).

{¶33} In this instance, during his pretrial preparation, defense counsel obtained the data relied upon by the state and was also granted funds for a defense expert. He filed a motion in limine and also requested an admissibility hearing under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). Shortly before commencement of trial, however, defense counsel stated that he did not obtain a final expert DNA report. He stated that the True Allele program had been accepted by the court, and that numerous challenges to it were rejected, so he withdrew the *Daubert* challenge. At that point, the court asked Jean if he concurred with counsel's decision and Jean stated,"[t]hey got my DNA, they got my DNA. Not just going to keep fighting it." During trial, defense counsel extensively cross-examined Baucher about her DNA findings, her use of True Allele, and the conclusions set forth in her report. Further, counsel's approach reconciled Baucher's conclusions with Barry's testimony that Jean briefly handled the weapon and magazine but did not fire the weapon.

{¶34} From the foregoing, we find no trial error under *Strickland*. Defense counsel may have reasonably concluded, as a legitimate tactical decision, that it was futile to challenge the state's DNA findings. *Foust*, 105 Ohio St.3d 137 at ¶ 125. Moreover, in light of Jean's acknowledgment regarding the DNA, we find no prejudice.

{¶35} The second assigned error lacks merit.

Sentence

{¶36} In the third assigned error, Jean argues that his sentence is erroneous because it is inconsistent with and disproportionate to the sentence received by Barry, who, Jean claims, has greater culpability.

{¶37} When reviewing felony sentences, we apply the standard of review set forth in R.C. 2953.08(G)(2). *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231. R.C. 2953.08(G)(2) specifies that an appellate court may increase, reduce, modify, or vacate and remand a challenged felony sentence if the court clearly and convincingly finds either that the record does not support the sentencing court's findings or the sentence is otherwise "contrary to law."

{¶38} Consistency in sentencing is required under R.C. 2929.11(B), which states that a felony sentence should be "consistent with sentences imposed for similar crimes committed by similar offenders." In *State v. Brewster*, 8th Dist. Cuyahoga No. 103789, 2016-Ohio-3070, this court observed that consistency, under R.C. 2929.11(B), relates to the sentences in the context of sentences given to other offenders; whereas proportionality relates solely to the punishment in the context of the offender's conduct, i.e., does the punishment fit the crime. *Id*. at ¶ 10. "Consistency is not synonymous with uniformity." *State v. Moore*, 2014-Ohio-5135, 24 N.E.3d 1197, ¶ 18 (8th Dist.). The court is not required to make express findings that the sentence is consistent with other similarly situated offenders. *State v. Richards*, 8th Dist. Cuyahoga No. 83696, 2004-Ohio-4633, ¶ 10; *State v. Harris*, 8th Dist. Cuyahoga No. 83288, 2004-Ohio-2854, ¶

23. Courts are given broad discretion in applying the statutory objectives to their respective evaluations of individual conduct at sentencing. *State v. Georgakopoulos*, 8th Dist. Cuyahoga No. 81934, 2003-Ohio-4341, ¶ 10. However, the record must adequately demonstrate that the trial court considered the objectives of R.C. 2929.11(B). *Id*. at ¶ 27.

> **{¶39}** With regard to consistency among codefendants, this court has stated:
>
> The courts have not interpreted the notion of consistency to mean equal punishment for codefendants. *State v. Harder*, 8th Dist. Cuyahoga No. 98409, 2013-Ohio-580, ¶ 7. Consistency is not synonymous with uniformity. *State v. Black*, 8th Dist. Cuyahoga No. 100114, 2014-Ohio-2976, ¶ 12. Rather, the consistency requirement is satisfied when a trial court properly considers the statutory sentencing factors and principles. *State v. O'Keefe*, 10th Dist. Franklin Nos. 08AP-724, 08AP-725 and 08AP-726, 2009-Ohio-1563, ¶ 41. "'[C]onsistency is achieved by weighing the factors enumerated in R.C. 2929.11 and 2929.12 and applying them to the facts of each particular case.'" *State v. Wells*, 8th Dist. Cuyahoga No. 100365, 2014-Ohio-3032, ¶ 12, quoting *State v. Lababidi*, 8th Dist. Cuyahoga No. 100242, 2014-Ohio-2267, ¶ 16. Consistency "'requires a trial court to weigh the same factors for each defendant, which will ultimately result in an outcome that is rational and predictable.'" *State v. Georgakopoulos*, 8th Dist. Cuyahoga No. 81934, 2003-Ohio-4341, ¶ 26, quoting *State v. Quine*, 9th Dist. Summit No. 20968, 2002-Ohio-6987, ¶ 12.
>
> "Consistency accepts divergence within a range of sentences and takes into consideration the trial court's discretion to weigh statutory factors." *State v. Hyland*, 12th Dist. Butler No. CA2005-05-103, 2006-Ohio-339. *See also State v. Switzer*, 8th Dist. Cuyahoga No. 102175, 2015-Ohio-2954; *State v. Armstrong*, 2d Dist. Champaign No. 2015-CA-31, 2016-Ohio-5263; *State v. Murphy*, 10th Dist. Franklin No. 12AP-952, 2013-Ohio-5599, ¶ 14.

> "Although the offenses may be similar, distinguishing factors may justify dissimilar treatment." *State v. Dawson*, 8th Dist. Cuyahoga No. 86417, 2006-Ohio-1083, ¶ 31.

State v. Cargill, 8th Dist. Cuyahoga No. 103902, 2016-Ohio-5932, ¶ 11-12.

{¶40} Here, we cannot say that the trial court violated R.C. 2929.11(B) by imposing a 13-year prison term. Although Jean complains that Barry received a 13-year sentence, Barry was actually sentenced to 14 years of imprisonment. *State v. Barry Blevins*, 8th Dist. Cuyahoga No. 105023, 2017-Ohio-4444, ¶ 10. Further, the record in this case indicates that the trial court properly considered the statutory sentencing factors and principles, weighed them, and applied them accordingly. Moreover, even accepting Jean's claim that he was less culpable than Barry, Jean received less time than Barry. In short, the trial court reached outcomes that are predictable and reliable, and did not impose inconsistent terms.

{¶41} The third assigned error is without merit.

Involuntary Manslaughter

{¶42} Jean next argues that the trial court violated R.C. 2945.75 in sentencing him for involuntary manslaughter because he was convicted of involuntary manslaughter under R.C. 2903.04(B), a third-degree felony, but he was sentenced to involuntary manslaughter under R.C. 2903.04(A), a first-degree felony.

{¶43} Under R.C. 2945.75(A)(2), a guilty verdict shall state either the degree of the offense of which the offender is found guilty, or that such additional element or

elements are present; otherwise, a guilty verdict constitutes a finding of guilty of the least degree of the offense charged. However, in *State v. Woods*, 8 Ohio App.3d 56, 455 N.E.2d 1289 (8th Dist.1983), this court found substantial compliance with R.C. 2945.75 where the language of the offense in the indictment contained the additional aggravating element, and the charge to the jury likewise instructed the jury to determine whether the aggravating element was present.

{¶44} R.C. 2903.04 provides, in pertinent part:

> (A) No person shall cause the death of another or the unlawful termination of another's pregnancy as a proximate result of the offender's committing or attempting to commit a felony.
>
> (B) No person shall cause the death of another or the unlawful termination of another's pregnancy as a proximate result of the offender's committing or attempting to commit a misdemeanor of any degree * * *.
>
> (C) Whoever violates this section is guilty of involuntary manslaughter. Violation of division (A) of this section is a felony of the first degree. Violation of division (B) of this section is a felony of the third degree. * * *.

{¶45} In this matter, Jean's trial counsel insisted that an additional finding was required to determine whether the offense is a first-degree or third-degree felony. However, from the plain reading of the statute, no additional finding is necessary, because R.C. 2903.04(A) is a first-degree felony and R.C. 2903.04(B) is a third-degree felony.

{¶46} Further, the indictment charged Jean with first-degree felony involuntary manslaughter in violation of R.C. 2003.04(A) for causing Garrett's death as the proximate result of committing a felony. The jury charge provided:

> The defendant, Jean Blevins, is charged with involuntary manslaughter in violation of 2903.04(A) in Count 6 of the indictment. Before you can find the defendant guilty you must find beyond a reasonable doubt that on or about the 11th day of October and in Cuyahoga County, Ohio, the defendant Jean Blevins did cause the death of David L. Garrett and such death was the proximate result of Barry Blevins committing or attempting to commit the felony offense of aggravated assault.

{¶47} Additionally, according to the transcript of the proceedings, the verdict form given to the jury for this offense states:

> Count 6, involuntary manslaughter.
>
> Verdict: We the jury in this case being duly impaneled and sworn do find the defendant, Jean Blevins, guilty of involuntary manslaughter, in violation of 2903.04(A) of the Ohio Revised Code as charged in Count 6 of the indictment. (Tr. 1434-1435.)

{¶48} In light of the foregoing, we conclude that the jury was clearly charged with considering the first-degree felony offense of involuntary manslaughter in commission of a felony under R.C. 2903.04(A), and was not charged under R.C. 2903.04(B), the third-degree felony of this offense for a death occurring in connection with a misdemeanor. Moreover, as described in the transcript, the verdict form likewise plainly indicates that the jury found Jean guilty of R.C. 2903.04(A), a first-degree felony offense of involuntary manslaughter in commission of a felony, and not a third-degree or indeterminable level of this offense.

{¶49} The fourth assigned error is without merit.

{¶50} Judgment affirmed.

It is ordered that appellee recover of 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. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

PATRICIA ANN BLACKMON, JUDGE

MARY EILEEN KILBANE, P.J., and
EILEEN T. GALLAGHER, J., CONCUR