

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BROWN COUNTY

STATE OF OHIO,	:	CASE NO. CA2014-06-010
Plaintiff-Appellee,	:	
	:	<u>OPINION</u>
- vs -	:	6/8/2015
	:	
JOSEPH NICHOLAS TRZECIAK,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BROWN COUNTY COURT OF COMMON PLEAS
Case No. CR2013-2179

Jessica Little, Brown County Prosecuting Attorney, Mary McMullen, 510 East State Street, Georgetown, Ohio 45121, for plaintiff-appellee

Rapp Law Office, William J. Rapp, One East Main Street, Amelia, Ohio 45102, for defendant-appellant

S. POWELL, P.J.

{¶ 1} Defendant-appellant, Joseph Nicholas Trzeciak, appeals from his conviction in the Brown County Court of Common Pleas for murder following a jury trial. For the reasons outlined below, we affirm.

{¶ 2} On August 7, 2013, a Brown County Grand Jury returned an indictment charging Trzeciak with murder in violation of R.C. 2903.02(A), an unclassified felony, with an

included firearm specification. Pursuant to R.C. 2903.02(A), "[n]o person shall purposely cause the death of another or the unlawful termination of another's pregnancy." The charge stemmed from the June 7, 2013 shooting death of Trzeciak's cousin, James Mootispaw, at the Hyde Park Apartments in Mt. Orab, Brown County, Ohio as James attempted to flee with \$1,200 of Trzeciak's money. The matter proceeded to a four-day jury trial that concluded on May 1, 2014. Following its deliberations, the jury found Trzeciak guilty as charged. The trial court then sentenced Trzeciak to a total aggregate term of 18 years to life in prison.

{¶ 3} Trzeciak now appeals from his conviction, raising three assignments of error for review.

{¶ 4} Assignment of Error No. 1:

{¶ 5} THE TRIAL COURT ERRED BY GIVING IMPROPER AND INACCURATE INSTRUCTIONS TO THE JURY.

{¶ 6} In his first assignment of error, Trzeciak argues the trial court erred and abused its discretion by providing improper and inaccurate instructions to the jury. We disagree.

{¶ 7} Initially, Trzeciak argues the trial court erred by finding "intentional shots at a person intended to stop that person is, *per se*, purposeful for a murder charge." According to Trzeciak, this determination led the trial court to improperly instruct the jury by substituting its own judgment for that of the jury in regards to the purpose element of murder. However, that is not what the trial court actually did. Rather, the trial court merely found the evidence did not support an instruction on the lesser included offense of reckless homicide. As discussed more fully below, to warrant an instruction on a lesser included offense, "there must be 'sufficient evidence' to 'allow a jury to reasonably reject the greater offense and find the defendant guilty on a lesser included offense.'" *State v. Tolle*, 12th Dist. Clermont No. CA2014-06-042, 2015-Ohio-1414, ¶ 11, quoting *State v. Trimble*, 122 Ohio St.3d 297, 2009-Ohio-2961, ¶ 192. That is simply not the case here. Therefore, Trzeciak's first argument is

without merit.

{¶ 8} Next, Trzeciak argues the trial court erred by providing the jury with a confusing instruction in regards to the purpose element of murder. Specifically, Trzeciak claims the trial court erred by instructing the jury as follows:

When the central idea, essence, or gist of the offense is a prohibition against or forbidding of conduct of a certain nature, a person acts purposely if his or her specific intention was to engage in conduct of that nature, regardless of what he or she may have intended to accomplish by his or her conduct.

{¶ 9} In support of this claim, Trzeciak cites to the Ohio Supreme Court's decision in *State v. Wilson*, 74 Ohio St.3d 381 (1996), wherein the Supreme Court found "the 'gist of the offense' language is confusing in a murder prosecution which requires 'purpose.'" *Id.* at 393. Trzeciak also cites to the Fourth District Court of Appeals' decision in *State v. Petit*, 4th Dist. Vinton No. 99CA529, 2000 WL 897993 (July 5, 2000), a case in which the Fourth District found the use of the so-called "gist of the offense" language in a murder prosecution "did not make clear to the jury that appellant needed to specifically intend to cause the death of the victim[.]" *Id.* at *4.

{¶ 10} Like the Ohio Supreme Court found in *Wilson*, when read in isolation, the so-called "gist of the offense" language utilized by the trial court could lead to some confusion in a murder prosecution. However, it is well-established that this court must consider jury instructions in their entirety, not merely in isolation. *State v. Delawder*, 4th Dist. Scioto No. 10CA3344, 2012-Ohio-1923, ¶ 30, citing *State v. Price*, 60 Ohio St.2d 136 (1979), paragraph four of the syllabus. In turn, "[i]nstructions that, in their totality, are sufficiently clear to permit the jury to understand the relevant law will not be the cause of a reversal upon appeal." *State v. Dougherty*, 12th Dist. Preble No. CA2013-12-014, 2014-Ohio-4760, ¶ 48, quoting *State v. Stevens*, 5th Dist. Morgan No. 07-CA-0004, 2008-Ohio-6027, ¶ 44. "[T]he trial court's use of the 'gist of the offense' language does not have the effect of diluting the state's

burden of proof when the term 'purposefully' is otherwise properly defined in the instructions." *State v. Lewis*, 11th Dist. Lake No. 2012-L-074, 2013-Ohio-3974, ¶ 75, citing *State v. Hamilton*, 8th Dist. Cuyahoga No 86520, 2006-Ohio-1949, ¶ 46.

{¶ 11} Here, when read in context with the remainder of the trial court's jury instructions, the trial court provided the jury with sufficient instructions in regards to the purpose element of murder. For instance, as the trial court correctly stated as part of its instructions to the jury, "[a] person acts purposely when it is his or her specific intention to cause a certain result." The trial court also instructed the jury that in order to find Trzeciak guilty, "[i]t must be established in this case that at the time in question there was presented in the mind of the defendant a specific intention to cause the death of James Andrew Mootispaw." The trial court further instructed the jury that "[p]urpose is a decision of the mind to do an act with a conscious objective of producing a specific result or engaging in specific conduct. To do an act purposely is to do it intentionally and not accidentally."

{¶ 12} These instructions are substantially similar to the relevant definition of "purposely" as found in R.C. 2901.22(A), as well as the model jury instructions provided by the Ohio Jury Instructions manual. Therefore, unlike the Fourth District's decision in *Petit*, when considering the jury instructions in their entirety, we find the trial court properly instructed the jury on the purpose element of murder. See *State v. Bailey*, 8th Dist. Cuyahoga No. 81498, 2003-Ohio-1834, ¶ 56. In reaching this decision, we note that Trzeciak's trial counsel also correctly informed the jury as part of his closing argument that "the definition for 'purpose' is a specific intent to cause the death." Accordingly, Trzeciak's second argument is similarly without merit.

{¶ 13} Finally, Trzeciak argues the trial court erred by failing to instruct the jury on the

lesser included offense of reckless homicide.¹ However, a party is not entitled to an instruction on a lesser included offense unless the evidence presented at trial would reasonably support both an acquittal on the crime charged and a conviction on the lesser included offense. *State v. Vore*, 12th Dist. Warren No. CA2011-08-093, 2012-Ohio-2431, ¶ 20. In turn, an instruction on a lesser included offense is not warranted simply because the defendant offers "some evidence" to establish the lesser-included offense. *State v. Gatliff*, 12th Dist. Clermont No. CA2012-06-045, 2013-Ohio-2862, ¶ 50, citing *State v. Shane*, 63 Ohio St.3d 630, 632-633 (1992). Rather, as noted above, "there must be 'sufficient evidence' to 'allow a jury to reasonably reject the greater offense and find the defendant guilty on a lesser included offense.'" *Tolle*, 2015-Ohio-1414 at ¶ 11, quoting *Trimble*, 2009-Ohio-2961 at ¶ 192.

{¶ 14} Trzeciak claims the trial court should have instructed the jury on reckless homicide because there was no evidence he intended to kill James, his cousin, when he fired three shots into James' back and head as James attempted to flee with \$1,200 of his money. Instead, Trzeciak claims he "merely intended to stop the decedent (and not to kill)." According to Trzeciak, "[t]hat would necessitate a finding of not guilty of murder because it was not his specific intent to cause the death of the decedent."

{¶ 15} Yet, it is a universally held principle that "persons are presumed to have intended the natural, reasonable and probable consequences of their voluntary acts." *State v. Garner*, 74 Ohio St.3d 49, 60 (1995). Although it should generally go without saying, "[t]he 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. Majid*, 8th Dist. Cuyahoga No. 96855, 2012-Ohio-1192, ¶ 23, quoting *State v. Brown*, 8th Dist. Cuyahoga No. 68761, 1996

1. The parties do not dispute that reckless homicide is a lesser included offense of murder. See *State v. Gray*, 12th Dist. Butler No. CA2010-03-064, 2011-Ohio-666, ¶ 25.

WL 86627, *6 (Feb. 29, 1996). Therefore, even when considering the evidence in a light most favorable to Trzeciak, just as the trial court in this case found, the jury could not have reasonably concluded Trzeciak acted merely recklessly when he fired three shots into his cousin James' back and head as James attempted to flee with \$1,200 of his money. Accordingly, Trzeciak's third argument is likewise without merit.

{¶ 16} In light of the foregoing, and having found no merit to any of the three arguments advanced by Trzeciak herein, Trzeciak's first assignment of error is overruled.

{¶ 17} Assignment of Error No. 2:

{¶ 18} THE TRIAL COURT ERRED BY FAILING TO EXCLUDE PREJUDICIAL EVIDENCE.

{¶ 19} In his second assignment of error, Trzeciak argues the trial court erred and denied him a fair trial by permitting the state to display an image of him that contained his name and the word "murder" to the jury on three separate occasions.² However, as the record makes clear, after each of the three times the disputed image was shown, the trial court gave a curative instruction to the jury explaining that the image was not evidence and should not be used as part of their deliberations in any way.

{¶ 20} Specifically, as the trial court instructed the jury after the image was first displayed without objection:

Counsel, before we start, that first slide, that we just placed in front of you, basically said, "Joseph Trzeciak Murder." That is not evidence that Mr. Trzeciak did anything. It is, merely, their preparation packet, generated by their office. Just so that it's clear.

{¶ 21} Thereafter, upon holding an unrecorded sidebar discussion with both parties,

2. The disputed image is not part of the record before this court. Nevertheless, the trial court described the image as "white, that had a star by one picture and, then, a photograph of Mr. Trzeciak, on the right, and then, 'Murder,' underneath Mr. Trzeciak's name, that's much like an interoffice title that the Prosecutor's Office generated here, for their purposes."

the trial court instructed the jury that the image:

is not evidence that Mr. Trzeciak did – in the commission of any type of murder, should not be used, in that regard. It is, merely, kind of like a memo caption for the State. So, you'll disregard it, for any purposes, in your deliberations. Understood?

All jurors responded in the affirmative.

{¶ 22} Next, after the image was displayed to the jury for a second time, the trial court again instructed the jury:

Again, ladies and gentlemen of the jury, I am certain that you can set aside any type of implications that that photograph would indicate that is not evidence. It cannot be used, by you. I will reiterate – reiterate that, each time it shows up. I think the presentation is hard to not have that.

Are all of you certain about what my admonition is, that you cannot use that, do you-all agree with that?

All jurors again responded in the affirmative.

{¶ 23} Finally, after the image was displayed to the jury for the third time, the trial court repeated its instruction that:

you are not – you will [not] use that particular slide, or any fashion, or to imply, in any way, that there is any guilt, at this point in time or any time. That is not evidence; do you understand that?

All jurors once again responded in the affirmative. The disputed image was then removed from the state's presentation and not displayed to the jury again.

{¶ 24} As the record makes clear, the trial court gave a curative instruction to the jury immediately after each of the three times the disputed image was displayed. It is well-established that "[c]urative instructions are presumed to be an effective way to remedy errors that occur during trial." *State v. Parker*, 5th Dist. Stark No. 2013CA00217, 2014-Ohio-3488, ¶ 36, citing *State v. Treesh*, 90 Ohio St.3d 460 (2001). Moreover, as this court has stated previously, "a jury is presumed to follow instructions given by the trial court." *State v.*

Carpenter, 12th Dist. Butler No. CA2005-11-494, 2007-Ohio-5790, ¶ 20, citing *Pang v. Minch*, 53 Ohio St.3d 186 (1990). This is particularly true here given the fact that the jury affirmatively stated on the record that they understood the image was not evidence and that it could not be used by them during their deliberations in any way. Therefore, although it may have been better practice for the state not to include the disputed image within its presentation to the jury, we cannot say it deprived Trzeciak of a fair trial. While the constitution does guarantee individuals the right to a fair trial, it does not guarantee that the trial be perfect. *State v. Collins*, 12th Dist. Butler No. CA90-10-208, 1991 WL 254636, *5 (Dec. 2, 1991), citing *United States v. Hasting*, 461 U.S. 499, 508-509, 103 S.Ct. 1974 (1983). Accordingly, Trzeciak's second assignment of error is overruled.

{¶ 25} Assignment of Error No. 3:

{¶ 26} THE VERDICT WAS AGAINST THE WEIGHT OF THE EVIDENCE.

{¶ 27} In his third assignment of error, Trzeciak argues his conviction must be reversed because it was against the manifest weight of the evidence. We disagree.

{¶ 28} A manifest weight of the evidence challenge examines the "inclination of the greater amount of credible evidence, offered at a trial, to support one side of the issue rather than the other." *State v. Barnett*, 12th Dist. Butler No. CA2011-09-177, 2012-Ohio-2372, ¶ 14. To determine whether a conviction is against the manifest weight of the evidence, the reviewing court must look at the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and determine whether in resolving the conflicts in the evidence, the trier of fact 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. Morgan*, 12th Dist. Butler Nos. CA2013-08-146 and CA2013-08-147, 2014-Ohio-2472, ¶ 34. However, while appellate review includes the responsibility to consider the credibility of witnesses and weight given to the evidence, these issues are primarily matters for the trier of

fact to decide. *State v. Barnes*, 12th Dist. Brown No. CA2010-06-009, 2011-Ohio-5226, ¶ 81. An appellate court, therefore, will overturn a conviction due to the manifest weight of the evidence only in extraordinary circumstances when the evidence presented at trial weighs heavily in favor of acquittal. *State v. Blair*, 12th Dist. Butler No. CA2014-01-023, 2015-Ohio-818, ¶ 43.

{¶ 29} In support of this claim, Trzeciak initially argues his conviction must be reversed because the state's only witness to identify him as the shooter, Darrell Mootispaw, the victim's older brother, was an admitted liar with a criminal record whose testimony conflicted with that of Trzeciak's own witnesses. However, while there may be some question as to Darrell's credibility, "[a]s the trier of fact is in the best position to judge the credibility of the witnesses, we will not disturb the [jury's] finding in regard to which version of events was credible, and which was not." *State v. Bonner*, 12th Dist. Butler No. CA2012-09-195, 2013-Ohio-3670, ¶ 13. Moreover, as the trier of fact, the jury was free to believe all, part of, or none of Darrell's testimony. See *State v. Widmer*, 12th Dist. Warren No. CA2011-03-027, 2012-Ohio-4342, ¶ 107. "[A] conviction is not against the manifest weight of the evidence simply because the trier of fact believed the prosecution testimony." *State v. Brown*, 12th Dist. Butler No. CA2013-03-043, 2014-Ohio-1317, ¶ 20.

{¶ 30} In so holding, we note that Trzeciak's conviction was not based solely on Darrell's testimony identifying Trzeciak as the shooter. Rather, the state also introduced evidence from Nicolette Ellswick, Trzeciak's former girlfriend, who testified Trzeciak told her "his cousin had tried to rob him and grab the money, so he shot him." Ellswick's statement to police was also admitted into evidence. As part of that statement, Ellswick informed police that Trzeciak said "he did what he had to do" to get his money back so he "shot him." Ellswick further testified that both Trzeciak and Trzeciak's mother, Brenda, had contacted her and pressured her not to testify. The state also introduced evidence that other witnesses

saw Trzeciak's truck speed away from the scene shortly after hearing a series of gunshots. There was also evidence that gunshot residue was discovered in Trzeciak's truck, as well as on Trzeciak's clothing. Therefore, as this is not one of those extraordinary cases where the evidence presented at trial weighed heavily in favor of acquittal, Trzeciak's first argument is without merit.

{¶ 31} Trzeciak also argues his conviction must be reversed because the jury "improperly found that his intent was to cause the death of the decedent." However, as this court has stated previously, "[b]ecause a firearm is an inherently dangerous instrument likely to cause death, a purposeful intent to kill may be inferred from the use of a firearm." *State v. Lloyd*, 12th Dist. Warren Nos. CA2007-04-052 and CA2007-04-053, 2008-Ohio-3383, ¶ 43. As noted above, the evidence in this case indicates Trzeciak fired three shots into his cousin James' back and head as James attempted to flee with \$1,200 of his money. The jury, therefore, did not clearly lose its way by finding Trzeciak acted with the purposeful intent to kill. Accordingly, Trzeciak's second argument is also without merit.

{¶ 32} In light of the foregoing, and having found no merit to either of the two arguments advanced by Trzeciak herein, Trzeciak's third assignment of error is overruled.

{¶ 33} Judgment affirmed.

RINGLAND and HENDRICKSON, JJ., concur.