

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

STATE OF OHIO,	:	CASE NO. CA2014-07-159
Plaintiff-Appellee,	:	
	:	<u>OPINION</u>
- VS -	:	6/15/2015
	:	
DYLAN SHANE TOMPKINS,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR2013-08-1233

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M. POWELL, J.

{¶ 1} Defendant-appellant, Dylan Shane Tompkins, appeals his conviction in the Butler County Court of Common Pleas for felony murder and child endangering.

{¶ 2} Appellant was indicted in September 2013 on one count of felony murder in violation of R.C. 2903.02(B) and one count of child endangering in violation of R.C. 2919.22(B)(1) after the 13-month-old son of his girlfriend sustained a severe brain injury while under appellant's care and subsequently died. On July 3, 2014, following a bench trial,

the trial court found appellant guilty as charged, merged the charges for sentencing purposes, and sentenced appellant to 15 years to life in prison.

{¶ 3} Appellant appeals, raising one assignment of error:

{¶ 4} THE STATUTE UNDER WHICH THE APPELLANT WAS TRIED, CONVICTED AND SENTENCED IN THE INSTANT CASE, SECTION 2903.02(B) (MURDER) IS STRUCTURALLY DEFECTIVE AND UNCONSTITUTIONAL AND VIOLATES THE DUE PROCESS RIGHTS GRANTED UNDER BOTH THE U.S. AND OHIO CONSTITUTIONS IN THAT ATTEMPTS TO DO THE FOLLOWING: FIRST, DEFINE A CRIME BY THE USE OF NEGATIVES AS TO WHAT THE CRIME IS NOT, NOT WHAT THE CRIME PROPERLY DEFINED IS. SECOND, IT VIOLATES THE EQUAL PROTECTION CLAUSE BY GIVING PROSECUTORS UNDUE DISCRETION IN CHARGING SINCE MURDER UNDER 2903.02(B) AND INVOLUNTARY MANSLAUGHTER UNDER 2903.04 PROHIBIT IDENTICAL ACTIVITY AND SUBJECT OFFENDERS TO DIFFERENT PUNISHMENT AND FINALLY, THREE 2903(B) NEGATES THE REQUIREMENT THAT THE PROSECUTION PROVE NOT ONLY THE "ACTUS REUS" BUT ALSO THE ACTUAL "MENS REA" OF THE CRIME ALLEGED. [SIC]

{¶ 5} Appellant argues that R.C. 2903.02(B), the felony murder statute, is overbroad and void for vagueness and violates both his due process and equal protection rights because the statute (1) does not require the state to prove the culpable mental state of purpose to kill, and (2) gives prosecutors undue discretion in deciding whether to charge a defendant under the felony murder statute or under R.C. 2903.04, the involuntary manslaughter statute.

{¶ 6} We note that appellant failed to raise these arguments before the trial court. It is well-established that "the constitutionality of a statute must generally be raised at the first opportunity and, in a criminal prosecution, this means in the trial court." *State v. Awan*, 22

Ohio St.3d 120, 122 (1986). Thus, the failure to raise the issue of the constitutionality of a statute or its application, which issue is apparent at the trial court level, constitutes a waiver of that issue and need not be heard for the first time on appeal. *Id.* at syllabus; *State v. Myers*, 12th Dist. Madison No. CA2012-12-027, 2014-Ohio-3384, ¶ 12.

{¶ 7} However, such waiver is discretionary, and an appellate court may review claims of defects affecting substantial rights, even if they were not brought to the attention of the trial court, under a plain error standard of review. *In re M.D.*, 38 Ohio St.3d 149, 151 (1988); *State v. Miller*, 12th Dist. Clermont No. CA2011-04-028, 2012-Ohio-995, ¶ 39-40; Crim.R. 52(B). We notice plain error "with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *State v. Barnes*, 94 Ohio St.3d 21, 27 (2002).

{¶ 8} R.C. 2903.02(B), which became effective on June 30, 1998, provides that "No person shall cause the death of another as a proximate result of the offender's committing or attempting to commit an offense of violence that is a felony of the first or second degree and that is not a violation of [R.C.] 2903.03 or 2903.04." Under R.C. 2919.22(B)(1), child endangering is committed when one abuses a child under 18 years of age.

{¶ 9} Child endangering in violation of R.C. 2919.22(B)(1) is a felony of the second degree under R.C. 2919.22(E)(2)(d), is defined as an "offense of violence" under R.C. 2901.01(A)(9), and may therefore serve as a predicate offense for felony murder. *State v. Blanda*, 12th Dist. Butler No. CA2010-03-050, 2011-Ohio-411, ¶ 17.

{¶ 10} Appellant first argues the felony murder statute violates his due process rights because it relieves the state of proving a culpable mental state.

{¶ 11} Under R.C. 2903.02(B), "purpose to kill is not an element of the crime and need not be proven. Instead, the mens rea for felony murder is the intent that is required to commit the underlying predicate offense." *State v. Maynard*, 10th Dist. Franklin No. 11AP-

697, 2012-Ohio-2946, ¶ 17. "Thus, the mens rea element for felony murder under R.C. 2903.02(B) is satisfied when the state proves the intent required for the underlying felony." *Id.* at ¶ 23. However, this does not make the felony murder statute unconstitutional. *Id.* "[T]he General Assembly has chosen to define felony murder in this manner, and the General Assembly is presumed to know the consequences of its legislation." *State v. Miller*, 96 Ohio St.3d 384, 2002-Ohio-4931, ¶ 34.

{¶ 12} Other Ohio appellate districts have similarly and consistently held that R.C. 2903.02(B) does not violate due process rights. See *State v. Hayden*, 11th Dist. Lake No. 99-L-037, 2000 WL 973413 (July 14, 2000) (R.C. 2903.02[B] does not relieve the state of the burden of proving mens rea simply because the intent to kill is conclusively presumed so long as the state proves the required intent to commit the underlying felony); *State v. Pickett*, 1st Dist. Hamilton No. C-000424, 2001 WL 1591318 (Dec. 14, 2001) (same); *State v. Collins*, 5th Dist. Richland No. 2003-CA-0073, 2005-Ohio-1642 (same); *State v. Minifee*, 8th Dist. Cuyahoga No. 91017, 2009-Ohio-3089 (same); and *State v. Cherry*, 9th Dist. Summit No. 20771, 2002-Ohio-3738 (same).

{¶ 13} In the case at bar, the state presented evidence that appellant recklessly squeezed, struck, and shook the 13-month-old child, which caused a severe brain injury and eventually led to the child's death. Hence, the state satisfied the mens rea for murder under R.C. 2903.02(B) by proving the intent of the underlying felony, child endangering.¹

{¶ 14} Appellant also argues the felony murder statute violates his equal protection rights because it gives prosecutors undue discretion in deciding whether to charge a

1. To establish a violation of R.C. 2919.22(B)(1), child endangering, the state must prove beyond a reasonable doubt "(1) that the child is under eighteen years of age or a mentally or physically handicapped child under twenty-one years of age, (2) an affirmative act of abuse, and (3) which act was reckless, that is, perpetrated with heedless indifference to the consequences of the action." *State v. Haley*, 12th Dist. Butler No. CA2012-10-211, 2013-Ohio-4123, ¶ 10; *State v. Burdine-Justice*, 125 Ohio App.3d 707, 713 (12th Dist.1998).

defendant under the felony murder statute or under R.C. 2903.04, the involuntary manslaughter statute. In other words, appellant claims the two statutes prohibit identical conduct, yet those convicted of felony murder are subject to more severe punishment.

{¶ 15} This issue was addressed and aptly rejected by the Second Appellate District as follows:

A comparison of the felony murder statute, R.C. 2903.02(B), and the involuntary manslaughter statute, R.C. 2903.04(A), reveals that they do not prohibit identical activity and require identical proof. Causing another's death as a proximate result of committing *any* felony, which is sufficient to prove involuntary manslaughter, is not always or necessarily sufficient to prove felony murder. In order to prove felony murder the State is required to prove more: that the underlying felony is an offense of violence, defined in R.C. 2901.01(A)(9), that is a felony of the first or second degree, and not a violation of R.C. 2903.03 or 2903.04.

While proof of felony murder, R.C. 2903.02(B), would always and necessarily prove involuntary manslaughter, R.C. 2903.04(A), the converse is not true. Proof of involuntary manslaughter is not sufficient to prove felony murder except in those particular cases where an additional requirement is met: the underlying felony is an offense of violence that is a felony of the first or second degree. Because felony murder requires proof of this additional requirement, Dixon's equal protection argument lacks merit. Felony murder carries a higher penalty than involuntary manslaughter because the harm involved in committing the underlying offense is greater; an offense of violence that is a felony of the first or second degree, versus any felony. Thus, R.C. 2903.02(B) bears a rational relationship to a legitimate governmental interest, protecting the safety of citizens.

(Emphasis sic.) *State v. Dixon*, 2d Dist. Montgomery No. 18582, 2002 WL 191582, *3 (Feb. 8, 2002).

{¶ 16} Subsequently, other Ohio appellate districts adopted the Second Appellate District's holding and analysis in addressing the issue. See *State v. Jones*, 8th Dist. Cuyahoga No. 80737, 2002-Ohio-6045; *State v. Jennings*, 10th Dist. Franklin Nos. 09AP-70 and 09AP-75, 2009-Ohio-6840; see also *Collins*, 2005-Ohio-1642; and *State v. Reeds*, 11th

Dist. Lake No. 2007-L-120, 2008-Ohio-1781 (both holding that R.C. 2903.02[B] is constitutional and does not offend notions of equal protection).

{¶ 17} The Second Appellate District also found that "[t]he Equal Protection Clause is not violated simply because the defendant is convicted and sentenced under the statute carrying the greater penalty." *Dixon*, 2002 WL 191582 at *3. "Rather, equal protection prohibits selective enforcement of criminal laws based upon an unjustifiable standard such as race, religion, or other arbitrary classification." *Id.*; *United States v. Batchelder*, 442 U.S. 114, 123-124, 99 S.Ct. 2198 (1979) (when an act violates more than one criminal statute, the government may prosecute under either so long as it does not discriminate against any class of defendants). No such claim has been made by appellant in this case. The state's decision to charge appellant with felony murder rather than involuntary manslaughter, therefore, did not violate appellant's constitutional rights. *Dixon* at *3; *Jennings* at ¶ 94-95 (further finding that R.C. 2903.02[B] does not prohibit prosecuting an offender for felony murder simply because the offender could have also been charged with voluntary or involuntary manslaughter).

{¶ 18} Finally, we note that contrary to appellant's assertion, R.C. 2903.02(B) is neither overbroad nor void for vagueness because it defines "a crime by the use of negatives as to what the crime is not[.]" The fact that R.C. 2903.02(B) excludes voluntary manslaughter (R.C. 2903.03) and involuntary manslaughter (R.C. 2903.04) from its scope does not mean that felony murder occurs only when the offender's conduct might not also constitute voluntary or involuntary manslaughter. Rather, the exclusion of the two manslaughter statutes from the felony murder statute simply means that the predicate felony cannot be either voluntary or involuntary manslaughter. Because voluntary and involuntary manslaughter are the only two first and second degree felonies of violence in which causing the death of another is an element, their exclusion from the ambit of the felony murder

statute obviates the danger of which appellant complains.

{¶ 19} Further, the felony murder statute adequately defines the offense as causing the death of another as the proximate result of committing a first or second degree offense of violence. This differentiates the statute from R.C. 2903.04 which defines involuntary manslaughter as causing the death of another as a result of committing any degree felony and without regard to whether that predicate felony offense is an offense of violence. Thus, the felony murder statute adequately provides notice to offenders of the elements of the crime charged.

{¶ 20} In light of all of the foregoing, appellant's assignment of error is overruled.

{¶ 21} Judgment affirmed.

PIPER, P.J., and S. POWELL, J., concur.