[Cite as *State v. Bell*, 2009-Ohio-4783.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

STATE OF OHIO	:	
	:	Appellate Case No. 22448
Plaintiff-Appellee	:	
	:	Trial Court Case No. 07-CR-802
v.	:	
	:	(Criminal Appeal from
DIAHNTAE BELL	:	Common Pleas Court)
	:	
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the 11th day of September, 2009.

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FAIN, J.

{¶ 1} Defendant-appellant Diahntae Bell appeals from his convictions and sentence for Murder, Burglary and Having a Weapon Under a Disability. Bell claims that his convictions for Murder and Burglary must be overturned due to a defect in the indictment. He further contends that the convictions are not supported by the weight of the evidence. Bell argues that the trial court erred by failing to merge the two Burglary convictions and that trial counsel was ineffective for failing to seek an instruction on Voluntary Manslaughter as a lesser-included offense of Murder.

{¶ 2} We conclude that there is competent, credible evidence in the record upon which a jury could reasonably find Bell guilty of the charged offenses. We further find that even if the indictment was defective, Bell failed to demonstrate that such defect resulted in multiple errors throughout the trial as required by *State v. Colon*, 118 Ohio St. 3d 264, 2008-Ohio-1624 and *State v. Colon*, 119 Ohio St. 3d 204, 2008-Ohio-3749. We also conclude that the trial court did not err by failing to merge the Burglary charges as there is evidence in the record to support the finding that Bell committed two separate acts at two different times with two differing purposes. Finally, Bell's claim of ineffective assistance of counsel fails, because he did not overcome the presumption that counsel's actions were based upon a sound trial strategy.

{¶ 3} The judgment of the trial court is Affirmed.

I

{¶ 4} On February 27, 2007, Cassandra Graves and Quiana Lott were

residents of an apartment located at 5157 Embassy Place in Harrison Township. On that date, they noticed Bell coming out of an apartment located next door at 5155 Embassy Place. That apartment was being rented by Graves's sister, Donitta Harvey, who was in prison at that time. Graves and her brother Deangelo Epps were watching Harvey's apartment while she was in prison, and they had a key to the apartment. Bell was carrying a DVD player identified as belonging to Harvey. When Bell was confronted by Graves and Lott he claimed that he had permission to enter the apartment. He ultimately relinquished the DVD player and went to another apartment located at 5151 Embassy Place. Graves called the police to report Bell. When the police arrived, Bell had left the scene.

{¶ 5} Almost two hours later, Bell returned to the apartment complex where he was observed pacing back and forth behind the apartments. Bell confronted the residents of 5157 and claimed that he had no reason to steal the DVD player. At that time, Lott became nervous, telephoned her brother Diamond Washington, and asked him to come over. At one point, Bell went back to the apartment located at 5151 and told the occupants, Lamicah Helton and Lamond Chambers, that he had left his keys in 5155. Both Helton and Chambers approached the residents of 5157, seeking to gain access to 5155 in order to look for the keys; their requests were refused. Thereafter, Bell again confronted the residents of 5157 and asked them to look for his keys. At that point, Larue Bailey, another resident of 5157, had returned to the apartment. He and Washington went over to 5155 to look for the keys, but did not find them.

{¶ 6} After Washington and Bailey went back inside 5157, Bell attempted to

enter 5155 through the kitchen window. He was stopped by Washington and Bailey. Washington and Bell began to "tussle," and a gun was pulled out. As the men fought, Bell was shot in the hand and thereupon dropped the gun. Washington kicked the gun over to Bailey, who was later observed holding the gun at his side, pointed downward. At some point, the fight ended, with Washington returning inside to 5157. Bell was then observed walking back to the truck and retrieving a gun. Thereafter, he was observed shooting Bailey.

{¶ 7} Following the shooting, Bell ran back and entered Helton's apartment, but immediately exited through the front door. Helton and Chambers took their children and left the apartment complex in a vehicle. The police responded to the scene. Bailey was transported to the hospital, where he was pronounced dead. Approximately fifteen minutes after the shooting, police received information that Bell was inside an apartment located at 5148 Northcutt Place, a short distance from Embassy Place. Bell was apprehended. A few days later, the handgun used to kill Bailey was found in a trash can in Trotwood. No fingerprints were obtained from the gun.

{¶ 8} Bell was indicted on six counts, as follows: Count One – Felony Murder; Count Two – Murder; Count Three – Felonious Assault; Count Four – Burglary; Count Five – Burglary; and Count Six – Having a Weapon Under a Disability. With the exception of the Burglary charge in Count Four of the indictment, all of the charges carried firearm specifications. Following a jury trial, Bell was convicted on Counts One, Four, Five and Six.[1] The trial court sentenced Bell to a prison term of twenty-

[1] The jury was unable to reach a verdict on the firearm specification attached to

three years to life. From his conviction and sentence, Bell appeals.

II

{¶ 9} Bell's First Assignment of Error states as follows:

{¶ 10} "APPELLANT'S CONVICTIONS MUST BE OVERTURNED DUE TO A FATALLY DEFECTIVE INDICTMENT WHICH FAILED TO SPECIFY MENS REA."

{¶ 11} Bell contends that the indictment was defective because Counts One, Four and Five omitted the mens rea elements necessary to charge those offenses, in violation of the holding in *State v. Colon*, 118 Ohio St. 3d 264, 2008-Ohio-1624.

{¶ 12} "The purposes of an indictment are to give an accused adequate notice of the charge, and enable an accused to protect himself or herself from any future prosecutions for the same incident." *State v. Buehner*, 110 Ohio St. 3d 403, 2006-Ohio-4707, ¶ 7, citing *Weaver v. Sacks* (1962), 173 Ohio St. 415, 417. In *Colon*, the Ohio Supreme Court "held that omission of mens rea elements when charging offenses other than strict-liability offenses, for which no culpable mental state is required to commit the offense, is a structural error and therefore fatal." *State v. Gillispie*, Montgomery App. No. 22666, 2009-Ohio-1634, ¶5. That holding was subsequently modified, and the Court made clear "that where a defective indictment was not inextricably linked to other errors, plain error analysis, rather than structural error analysis, would be appropriate." *State v. Taylor*, Montgomery App. No. 22564, 2009-Ohio-806, ¶ 17, citing *State v. Colon,* 119 Ohio St.3d 204, 2008-Ohio-3749, ¶ 7.

{¶ 13} Before we even get to an analysis under *Colon I* or *Colon II*, we must

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Count Five – Burglary.

first determine whether the indictment was defective. We begin with the claim that the indictment was defective with regard to the charges of Burglary as set forth in Counts Four and Five. Bell claims that neither count included a mens rea and thus did not put him on notice of the elements of the charges against him.

{¶ 14} Bell was charged, in Count Four, with Burglary in violation of R.C. 2911.12(A)(3). That section states that "no person, by force or stealth or deception, shall * * * [t]respass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure, with purpose to commit in the structure or separately secured or separately occupied portion of the structure any criminal offense * * *."

{¶ 15} The burglary charge as set forth in the statute and the indictment explicitly provides the mens rea element of "purposely." The level of intent to commit this burglary offense is clearly stated in the statute and is properly set forth in the indictment. Thus, we conclude that the indictment is not defective with regard to this charge, and the holding in *Colon* is inapplicable.

{¶ 16} Bell was also charged with Burglary in violation of R.C. 2911.12(A)(4) which provides:

{¶ 17} "(A) No person, by force, stealth, or deception, shall do any of the following:

{¶ 18} "(4) Trespass in a permanent or temporary habitation of any person when any person other than an accomplice of the offender is present or likely to be present."

{¶ 19} We conclude that even if this charge in the indictment was defective,

that error would not have risen to the level of plain error. First, Bell fails to state how the omission of the mens rea resulted in prejudice. He does not contend that he did not receive adequate notice of the nature of the offense, or that his counsel was unable to prepare a defense on his behalf. Further, unlike in *Colon I*, Bell has made no showing that any defect led to errors throughout the proceedings. The trial court clearly instructed the jury regarding the elements of the offense, and there is no showing that the jury did not understand its charge.

{¶ 20} Finally, with regard to Count One – Felony Murder, Bell contends that the indictment was defective because this charge was predicated upon the offense of Felonious Assault, but the indictment failed to set forth the mens rea for Felonious Assault.

{¶ 21} Felony Murder is proscribed by R.C. 2903.02(B), which provides that "[n]o 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." In this case, Bell was found guilty of causing Bailey's death while committing Felonious Assault in violation of R.C. 2903.11(A)(1). That statute provides that "[n]o person shall knowingly * * * cause serious physical harm to another."

{¶ 22} The indictment in this case charged that Bell "did cause the death of another, to-wit: Larue Bailey, as a proximate result of committing or attempting to commit an offense of violence, to wit: Felonious Assault (serious physical harm), in violation of 2903.11(A)(1) * * *."

{¶ 23} Again, even if we were to find that the indictment was defective, Bell has failed to demonstrate *Colon II* structural error, because there is no showing that

the error permeated the trial resulting in multiple errors. And Bell again fails to demonstrate prejudice rising to the level of plain error.

{¶ 24} The First Assignment of Error is overruled.

III

{¶ 25} The Second Assignment of Error provides:

{¶ 26} "THE TRIAL COURT ERRED BECAUSE THE APPELLANT'S CONVICTIONS WERE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶ 27} In this assignment of error, Bell contends that the convictions for Burglary and Murder are against the manifest the weight of the evidence. Specifically, he claims that the State failed to link the gun used to kill Larue Bailey to him, and thus failed to prove the elements of Murder and of Having a Weapon Under Disability. He further claims that the record contains varying accounts of the murder, which mandated an acquittal on those charges. Bell also contends that the State failed to prove that he used force, stealth or deception to enter the apartment rented by Harvey. Finally, he claims that the State failed to demonstrate that any person was present, or likely to be present, in the Harvey apartment.

{¶ 28} When reviewing a judgment under a manifest weight standard of review "[t]he 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 [factfinder] 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 evidence weighs heavily against the conviction." *State v. Thompkins*, 78 Ohio St. 3d 380, 386, 1997-Ohio-52, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶ 29} We begin with the claim that the State failed to prove that Bell used force, stealth or deception to gain admittance to Harvey's apartment. We note that the record demonstrates that prior to the time Bell initially entered the apartment, the apartment doors had been closed. Bell was observed coming out of the back door of the apartment, and no one had let him into the apartment and no one was observed with him. This evidence is sufficient to support the inference that Bell opened the door to the apartment in order to gain access thereto. This court has held that the force necessary to open a closed door constitutes force sufficient to satisfy the Burglary statute. See, *State v. Austin*, Montgomery App. No. 20445, 2005-Ohio-1035, ¶ 17, citing *State v. Gregg* (Oct. 26, 1992), Champaign App. No. 91-CA-15.

{¶ 30} We next address the claim that the State failed to establish that someone was present, or likely to be present, in the apartment. Bell bases this claim upon the fact that Harvey was in prison on the date in question. However, the evidence establishes that Harvey's sister and brother and their families were watching over the apartment, and that they were actually in the apartment on a regular basis. Thus, we conclude that the State presented evidence sufficient to establish this element of the offense.

{¶ 31} Next, Bell contends that the State failed to prove that he shot Bailey. Specifically, he argues that the State failed to connect him to the gun used in the shooting. He notes that the gun was found in a trash can in Trotwood, and that he

did not have time between the shooting and his arrest to get to Trotwood and back to Northcutt Place. He further notes that his fingerprints were not found on the gun.

{¶ 32} Bell's argument ignores the fact that the record contains the testimony of Lamicah Helton, which, if believed by the jury, supports a finding that Bell shot Bailey. Helton specifically testified that she observed Bell shoot Bailey. Another witness, Dejuan Cantrell, testified that he saw a black man dressed in black shoot Bell and then run into Helton's apartment. This testimony corroborates other eye-witness testimony indicating that Bell was dressed in dark clothing and that he went into Helton's apartment immediately following the shooting. Furthermore, Diamond Washington's testimony corroborates Helton's identification of Bell as the shooter. Therefore, regardless of how the gun was transported to Trotwood or whether Bell's prints were on the gun, there is competent evidence establishing him as the person who shot Bailey.[2]

{¶ 33} Bell complains that there is some discrepancy in the testimony of some of the witnesses. However, after reviewing over twelve hundred pages of transcript, we conclude that any claimed discrepancies are minor, and are more a case of different people observing the unfolding events from different locations.

{¶ 34} In sum, we conclude that the State established that Bell shot Bailey, who died as a consequence of his injury. The State also established that Bell had the gun in his possession, even though he had a previous felony conviction. Finally, the State established both counts of Burglary, by showing that Bell used force to trespass

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[2] As the State points out, Bell had ample time to dispose of the gun. After the shooting, he ran through Helton's apartment, and was not apprehended until approximately fifteen minutes later at a nearby apartment.

and by showing that persons were likely to be in the apartment. We conclude that the jury did not lose its way in returning verdicts of guilty on this evidence. Therefore, we find that the convictions are not against the manifest weight of the evidence.

{¶ 35} The Second Assignment of Error is overruled.

IV

{¶ 36} Bell's Third Assignment of Error is as follows:

{¶ 37} "THE TRIAL COURT ERRED IN NOT MERGING THE TWO BURGLARY CHARGES."

{¶ 38} Bell argues that the two burglary charges are allied offenses of similar import and should have been merged pursuant to 2941.25.

{¶ 39} R.C. 2941.25 provides:

{¶ 40} "(A) 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.

{¶ 41} "(B) Where the defendant's conduct constitutes two or more offenses of dissimilar import pursuant to R.C. 2941.25(B), or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them."

{¶ 42} A two-prong test is utilized to determine whether two or more offenses constitute allied offenses of similar import pursuant to R.C. 2941.25(A). First, the

statutory elements of the crimes are compared in the abstract, without reference to the facts of the case or to the defendant's conduct constituting the offense. If the offenses are found to be so similar that the commission of one offense will necessarily result in the commission of the other, then the offenses are allied offenses of similar import. *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625. Second, and relevant to this appeal, the defendant's particular conduct is reviewed to determine whether the defendant can be convicted of both crimes. If the court finds either that the crimes were committed separately or that there was a separate animus for each crime, the defendant may be convicted of both offenses. Id.

{¶ 43} As noted above, Bell was convicted of two counts of Burglary: one count in violation of R.C. 2911.12(A)(3) – trespass with purpose to commit a theft offense; and one count in violation of R.C. 2911.12(A)(4) – trespass when a person other than the defendant or accomplice is likely to be present. A review of the record reveals that Bell was initially discovered around 2:00 p.m., coming out of the door of Harvey's apartment at 5155 Embassy carrying a DVD player that was identified as belonging to Harvey. Upon being confronted, Bell relinquished the DVD player. He then went to the apartment of Lamicah Helton and Lamond Chambers, located at 5151 Embassy. Bell left the scene when the police responded to the call that Harvey's apartment had been burglarized.

{¶ 44} Two hours later, Bell was seen walking around outside the apartment complex. The evidence shows that Bell told several people that he believed he had left the keys to the truck he was driving in Harvey's apartment. When no one retrieved the keys for him, Bell attempted to enter the apartment through the kitchen

window. He was then apprehended by Diamond and Bailey.

{¶ 45} There is evidence in the record to support a finding that Bell burglarized the Harvey apartment via two separate entryways, at two separate times, and with two separate purposes. Therefore, we conclude that the trial court did not err by declining to merge the two Burglary counts. Accordingly, the Third Assignment of Error is overruled.

V

{¶ 46} Bell asserts the following for his Fourth Assignment of Error:

{¶ 47} "THE DEFENDANT'S RIGHT TO COUNSEL UNDER THE SIXTH AMENDMENT OF THE CONSTITUTION, AS INCORPORATED TO THE STATES VIA THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT, WAS VIOLATED BY INEFFECTIVE ASSISTANCE OF COUNSEL."

{¶ 48} Bell contends that he was denied the effective assistance of counsel at trial. because counsel failed to request a jury instruction for Voluntary Manslaughter as a lesser-included charge to Murder.

{¶ 49} The elements of Voluntary Manslaughter are set forth in R.C. 2903.03(A), which states:

{¶ 50} "No person, while under the influence of sudden passion or in a sudden fit of rage, either of which is brought on by serious provocation occasioned by the victim that is reasonably sufficient to incite the person into using deadly force, shall knowingly cause the death of another ***."

{¶ 51} Voluntary manslaughter is a lesser-included offense of murder. *State v.*

Shane (1992) 63 Ohio St. 3d 630, 632. Thus, a defendant charged with Murder is entitled to an instruction on Voluntary Manslaughter when the evidence presented at trial would reasonably support both an acquittal on the charged crime of Murder and a conviction for Voluntary Manslaughter.

{¶ 52} The question in this case is whether trial counsel acted improperly by failing to request a Voluntary Manslaughter instruction. An claim of ineffective assistance of counsel claim requires a demonstration that trial counsel's performance was deficient, and that the deficient performance prejudiced the defendant. *Strickland v. Washington* (1984), 466 U.S. 668; *State v. Bradley* (1989), 42 Ohio St.3d 136. There exists a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance and that a challenged decision might be considered sound trial strategy. *State v. Smith* (1985), 17 Ohio St. 3d 98, 100. Strategic trial decisions, even if ultimately unsuccessful, do not generally constitute ineffective assistance. *State v. Carter* (1995), 72 Ohio St.3d 545, 558. A review of the transcript reveals that Bell's defense was based upon the idea that Diamond Washington, rather than Bell, actually shot Bailey. Counsel raised the issue by intimating that Washington was summoned to the apartment complex by his sister, and that he came to the scene with a gun for the sole purpose of confronting Bell. Counsel also tried to bolster this account by portraying the witnesses as presenting inconsistent testimony regarding the shooting as well as by depicting the witnesses as being unable to accurately observe the shooting.

{¶ 53} While a criminal defendant is entitled to present inconsistent defenses to a jury, the presentation of inconsistent defenses entails obvious obstacles to

successfully persuading the jury. We are not prepared to hold that it is ineffective assistance of counsel to follow a trial strategy that eschews an inconsistent defense – in this case, an argument that Bell did not shoot Bailey, but, if he did, he was in a sudden passion or fit of rage.

{¶ 54} The Fourth Assignment of Error is overruled.

VI

{¶ 55} All of Bell's assignments of error having been overruled, the judgment of the trial court is Affirmed.

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DONOVAN, P.J., and GRADY, J., concur.

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