[Cite as *State v. Alford*, 2010-Ohio-2493.]

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

STATE OF OHIO Plaintiff-Appellee	:	C.A. CASE NO. 23332
vs.	:	T.C. CASE NO. 08-CR-1936
ANTONIO M. ALFORD Defendant-Appellant	:	(Criminal Appeal from Common Pleas Court)

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O P I N I O N

Rendered on the 4th day of June, 2010.

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Mathias H. Heck, Jr., Pros. Attorney; Michele D. Phipps, Atty. Reg. 0069829, Asst. Pros. Attorney, Montgomery County Courts Building, P.O. Box 972, 301 West Third Street, Dayton, OH 45422
Attorneys for Plaintiff-Appellee

Marshall G. Lachman, Atty. Reg. No. 0076791, 75 North Pioneer Boulevard, Springboro, OH 45066
Attorney for Defendant-Appellant

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GRADY, J.:

{¶ 1} Defendant, Antonio Alford, appeals from his convictions and sentence for felonious assault, murder, having weapons while under disability, and tampering with evidence.

{¶ 2} On May 11, 2008, Laquan Sanford was shot multiple times

in the Northland Village Apartment Complex in Dayton. Sanford died as a result of the wounds from the gunshots. Pamela Burns and J'Leone Harraway, residents of the apartment complex, identified Defendant as the person who shot Sanford. Defendant was arrested. After he was read his *Miranda* rights, Defendant made a statement to the police confessing to shooting Sanford in the chest in retaliation for his brother's murder.

{¶ 3} On September 9, 2008, the Montgomery County Grand Jury indicted Defendant on two counts of felonious assault in violation of R.C. 2903.11(A)(1) and (A)(2) (counts 1 and 2); three counts of murder in violation of R.C. 2903.02(A) and (B) (counts 3 through 5); one count of discharge of a firearm on or near prohibited premises in violation of R.C. 2923.162(A)(3) (count 6); three counts of having weapons while under disability in violation of R.C. 2923.13(A)(1) and (3) (counts 7 through 9); and one count of tampering with evidence in violation of R.C. 2921.12(A)(1) (count 10). Each count carried a three-year firearm specification. R.C. 2929.14 and 2941.145. (Dkt. 2).

{¶ 4} Defendant filed a motion to suppress his statement to the police. (Dkt. 10). Following an evidentiary hearing, the trial court overruled the motion to suppress. (Dkt. 16). After a jury trial, Defendant was found guilty as charged in the indictment, except for a not guilty verdict on count 6 of the

indictment, discharge of a firearm on or near prohibited premises, along with the firearm specification on that particular count.

{¶ 5} On March 11, 2009, the trial court sentenced Defendant to eight years for the count of felonious assault in violation of R.C. 2903.11(A)(2); fifteen years to life on each of the three counts of murder; five years on each of the three counts of having weapons while under a disability; and five years for the one count of tampering with evidence. The trial court merged the one count of felonious assault under R.C. 2903.11(A)(1) with the three counts of murder, but did not merge the count of felonious assault under R.C. 2903.11(A)(2). The trial court also merged two of the three counts of having weapons while under a disability. The trial court concluded that:

{¶ 6} "The merged sentence in Counts 3, 4, and 5 are to be served CONSECUTIVELY to count 2 and 10; the sentence in Count 7 and the merged sentence in Counts 8 and 9 are to be served CONCURRENTLY to each other and CONSECUTIVELY with Counts 2, 3, 4, 5, and 10. The Court hereby imposes . . . an additional term of THREE (3) years ACTUAL INCARCERATION on the Firearm Specification, which shall be served CONSECUTIVELY to and prior to the definite term of imprisonment for a TOTAL COMBINED TERM OF IMPRISONMENT THIRTY-SIX (36) YEARS TO LIFE." (Dkt. 52).

{¶ 7} Defendant filed a timely notice of appeal.

FIRST ASSIGNMENT OF ERROR

{¶ 8} "THE TRIAL COURT ERRED IN OVERRULING THE APPELLANT'S MOTION TO SUPPRESS."

{¶ 9} In *Miranda v. Arizona* (1966), 384 U.S. 436, 478-479, 86 S.Ct. 1602, 16 L.Ed.2d 694, the Supreme Court held that a defendant who is subjected to custodial interrogation must be advised of his or her constitutional rights and make a knowing and intelligent waiver of those rights before statements obtained during the interrogation will be admissible. The warnings required by *Miranda* are satisfied where, prior to the initiation of questioning, the police fully apprise the suspect of the State's intention to use his statements to secure a conviction and inform him of his rights to remain silent and to have counsel present if he so desires. *State v. Dailey* (1990), 53 Ohio St.3d 88, 90, citing *Moran v. Burbine* (1986), 475 U.S. 412, 420, 106 S.Ct. 1135, 89 L.Ed.2d 410.

{¶ 10} In a pretrial suppression hearing, when the admissibility of a confession is challenged by the accused, the burden is upon the prosecution to prove compliance with *Miranda*; that a knowing, intelligent, and voluntary waiver of Defendant's rights was obtained or occurred and that the inculpatory statement was voluntary. *State v. Kassow* (1971), 28 Ohio St.2d 141. However, once a case for the above elements is established, the

criminal defendant then has the burden of proving his claim of involuntariness. Id.

{¶ 11} Detective Brad Daugherty of the Montgomery County Sheriff's Office questioned Defendant after he was taken into custody. Detective Daugherty testified that he informed Defendant of his *Miranda* rights prior to questioning him and that Defendant stated that he understood his rights. Detective Daugherty advised Defendant of his *Miranda* rights using the Sheriff Office's standard pre-interview form. Detective Daugherty testified that after he read each of the rights on the form to Defendant, he then obtained an oral acknowledgment from Defendant that Defendant understood each of his rights. (Tr. 17-18). Defendant also read the waiver of rights portion of the form to Detective Daugherty. Although Defendant refused to sign a written waiver of his rights, he orally waived his rights and consented to speaking to Detective Daugherty without an attorney. (Tr. 19, 29). Defendant told Detective Daugherty that "he did not want an attorney and that he would speak with [Detective Daugherty] without one." (Tr. 19). Detective Daugherty testified that Defendant appeared to understand all of Detective Daugherty's questions and never requested an attorney or invoked his right to remain silent. (Tr. 21-22).

{¶ 12} Defendant's refusal to sign a waiver form is not conclusive evidence that his waiver was involuntary. *State v.*

Scott (1980), 61 Ohio St.3d 155, 161; *North Carolina v. Butler* (1979), 441 U.S. 369, 373, 99 S.Ct. 1755, 60 L.Ed.2d 286. Detective Daugherty testified that Defendant received the requisite Miranda warnings and orally waived his *Miranda* rights. The State has shown compliance with *Miranda* that a knowing, intelligent, and voluntary waiver of Defendant's rights was obtained and that Defendant's confession was voluntary. *State v. Kassow* (1971), 28 Ohio St.2d 141. Defendant failed to present evidence showing otherwise. Therefore, the trial court did not err in overruling Defendant's motion to suppress.

{¶ 13} The first assignment of error is overruled.

SECOND ASSIGNMENT OF ERROR

{¶ 14} "THE JURY'S VERDICTS SHOULD BE REVERSED AS THEY WERE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶ 15} A weight of the evidence argument challenges the believability of the evidence in relation to the reasonable doubt standard, and asks which of the competing inferences suggested by the evidence is more believable or persuasive. *State v. Hufnagle* (Sept. 6, 1996), Montgomery App. No. 15563. The proper test to apply to that inquiry is the one set forth in *State v. Martin* (1983), 20 Ohio App.3d 172, 175:

{¶ 16} "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 lost its way

and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." Accord: *State v. Thompkins* (1997), 78 Ohio St.3d 380.

{¶ 17} The credibility of the witnesses and the weight to be given to their testimony are matters for the trier of facts to resolve. *State v. DeHass* (1967), 10 Ohio St.2d 230. In *State v. Lawson* (Aug. 22, 1997), Montgomery App. No. 16288, we observed:

{¶ 18} "Because the factfinder . . . has the opportunity to see and hear the witnesses, the cautious exercise of the discretionary power of a court of appeals to find that a judgment is against the manifest weight of the evidence requires that substantial deference be extended to the factfinder's determinations of credibility. The decision whether, and to what extent, to credit the testimony of particular witnesses is within the peculiar competence of the factfinder, who has seen and heard the witness."

{¶ 19} This court will not substitute its judgment for that of the trier of facts on the issue of witness credibility unless it is patently apparent that the trier of facts lost its way in arriving at its verdict. *State v. Bradley* (Oct. 24, 1997), Champaign App. No. 97-CA-03.

{¶ 20} In arguing that his conviction is against the manifest weight of the evidence, Defendant claims that "the testimony of all the witnesses who claim to have been at the scene the night of the shooting conflicted greatly . . . [and] [w]hen all the conflicting testimony is weighed, it is clear that the jury lost its

way in finding the Defendant guilty . . . .” (Brief, p. 9-10). We do not agree.

{¶ 21} Defendant confessed to Detective Daugherty that he shot Sanford in the chest. J’Leone Harraway and Pamela Burns both testified that they saw Defendant shooting at Sanford. Although there may have been minor conflicts in the testimony regarding the precise details of the clothing worn by the person who shot Sanford, Defendant’s counsel brought these discrepancies to the jury’s attention. Based on Defendant’s confession and the eyewitness testimony, the jury could reasonably conclude that Defendant committed the offenses of which he was convicted. The trier of facts did not lose its way in choosing to believe the State’s witnesses, which it had a right to do. *State v. DeHass* (1967), 10 Ohio St.2d 230.

{¶ 22} Reviewing the record as a whole, we cannot say that the evidence weighs heavily against a conviction, that the trier of facts lost its way in choosing to believe the State’s witnesses, or that a manifest miscarriage of justice occurred. Defendant’s convictions are not against the manifest weight of the evidence.

{¶ 23} The second assignment of error is overruled.

THIRD ASSIGNMENT OF ERROR

{¶ 24} “THE TRIAL COURT ERRED BY OVERRULING APPELLANT’S MOTION FOR ACQUITTAL SINCE THE STATE FAILED TO SUPPLY SUFFICIENT EVIDENCE AS TO ALL THE ELEMENTS NECESSARY TO SUPPORT THE CHARGES AGAINST THE DEFENDANT.”

{¶ 25} When considering a Crim.R. 29 motion for acquittal, the trial court must construe the evidence in a light most favorable to the State and determine whether reasonable minds could reach different conclusions on whether the evidence proves each element of the offense charged beyond a reasonable doubt. *State v. Bridgeman* (1978), 55 Ohio St.2d 261. The motion will be granted only when reasonable minds could only conclude that the evidence fails to prove all of the elements of the offense. *State v. Miles* (1996), 114 Ohio App.3d 738.

{¶ 26} A Crim.R. 29 motion challenges the legal sufficiency of the evidence. A sufficiency of the evidence argument challenges whether the State has presented adequate evidence on each element of the offense to allow the case to go to the jury or sustain the verdict as a matter of law. *State v. Thompkins* (1997), 78 Ohio St.3d 380. The proper test to apply to such an inquiry is the one set forth in paragraph two of the syllabus of *State v. Jenks* (1991), 61 Ohio St.3d 259:

{¶ 27} "An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt."

{¶ 28} Defendant argues that the trial court erred in overruling his Crim.R. 29 motion for acquittal based upon insufficient evidence, because "the State did not present sufficient evidence to prove that the Defendant was the shooter based on all the inconsistencies regarding who was present at the time, the weather conditions, and the description of the clothes worn by the shooter." (Brief, p. 11).

{¶ 29} We note that Defendant did not identify any particular element of the offenses of which he was charged and convicted that the State failed to prove beyond a reasonable doubt. Moreover, Defendant does not challenge his conviction on the one count of tampering with evidence, so that particular conviction will not be addressed in this assignment of error.

{¶ 30} To prove the two counts of felonious assault charged, the State was required to prove beyond a reasonable doubt that Defendant "(1) [c]ause[d] serious physical harm to another or to another's unborn" and "(2) [c]ause[d] or attempt[ed] to cause physical harm to another or to another's unborn by means of a deadly weapon or dangerous ordnance." R.C. 2903.11(A)(1) and (2).

{¶ 31} To prove the three counts of murder charged, the State was required to prove beyond a reasonable doubt that Defendant "purposely cause[d] the death of another or the unlawful termination of another's pregnancy" and "cause[d] 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 section 2903.03 or 2903.04 of the Revised Code." R.C. 2903.02(A) and (B).

{¶ 32} To prove the three counts of having weapons while under disability charged, the State was required to prove beyond a reasonable doubt that Defendant "knowingly acquired, [had], carr[ied], or use[d] any firearm or dangerous ordnance" and was "a fugitive from justice" or was "under indictment for or has been convicted of any offense involving the illegal possession, use, sale, administration, distribution, or trafficking in any drug of abuse . . . ." R.C. 2923.13(A)(1) and (3).

{¶ 33} Defendant confessed to intentionally shooting Sanford in the chest, and there is eyewitness testimony that Defendant shot Sanford. There also is testimony that Sanford died as a direct result of the gunshot wounds inflicted by Defendant. Further, evidence was presented at trial that Defendant was a fugitive from justice and had two prior convictions for possession of cocaine at the time of the shooting. Viewing the evidence in a light most favorable to the State, as we must, we conclude that a rational trier of facts could find all of the essential elements of felonious assault, murder, and having weapons while under a disability proven beyond a reasonable doubt. Therefore, Defendant's convictions are supported by legally sufficient evidence.

{¶ 34} The third assignment of error is overruled.

FOURTH ASSIGNMENT OF ERROR

{¶ 35} "THE TRIAL COURT ERRED WHEN IT FAILED TO MERGE THE TWO FELONIOUS ASSAULT CHARGES AS ALLIED OFFENSES OF SIMILAR IMPORT."

{¶ 36} R.C. 2941.25 provides:

{¶ 37} "(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.

{¶ 38} "(B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, 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."

{¶ 39} "R.C. 2941.25 codifies the double jeopardy protections in the federal and Ohio constitutions, which prohibit courts from imposing cumulative or multiple punishments for the same criminal conduct unless the legislature has expressed an intent to impose them. R.C. 2941.25 expresses the legislature's intent to prohibit multiple convictions for offenses which are allied offenses of similar import per paragraph (A) of that section, unless the conditions of paragraph (B) are also satisfied." *State v. Barker*, Montgomery App. No. 22779, 2009-Ohio-3511, at ¶22, citing *State v. Rance*, 85 Ohio St.3d 632, 1999-Ohio-291.

{¶ 40} In determining whether offenses are allied offenses of similar

import under R.C. 2941.25, courts are not to employ a strict textual comparison of the offenses. *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625. Rather, offenses are allied "if, in comparing the elements of the offenses in the abstract, the offenses are so similar that the commission of one offense will necessarily result in commission of the other[.]" Id. at ¶26.

{¶ 41} In *State v. Harris*, 122 Ohio St.3d 373, 2009-Ohio-3323, Defendant Cornelius Harris shot Demon Meatchem twice during a robbery. A grand jury indicted Harris on three counts of aggravated robbery, three counts of robbery, and two counts of felonious assault in violation of R.C. 2903.11(A)(1) and (2). The Supreme Court held that felonious assault under R.C. 2903.11(A)(1) and felonious assault under R.C. 2903.11(A)(2) are allied offenses of similar import. Therefore, a defendant cannot be convicted of both offenses when both are committed with the same animus against the same victim. Id. at ¶20.

{¶ 42} Similar to the facts in *Harris*, Defendant was convicted of two counts of felonious assault in violation of R.C. 2903.11(A)(1) and (2) resulting from multiple shots of the same victim with the same animus. Therefore, the trial court erred when it failed to merge the two convictions for felonious assault into a single conviction pursuant to R.C. 2941.25. Id. at ¶21. Further, the surviving felonious assault offense should be merged with Defendant's offense of murder. *State v. Reid*, Montgomery App. No. 23409, 2010-Ohio-1686. We must reverse the judgment of conviction on the two felonious assault charges and remand to the trial court for resentencing.

***State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, at ¶25.**

{¶ 43} Defendant's fourth assignment of error is sustained. The case will be remanded to the trial court to merge Defendant's two offenses of felonious assault, merge the surviving felonious assault offense with Defendant's offense of murder, and to resentence Defendant accordingly. Otherwise, the judgment of the trial court will be affirmed.

DONOVAN, P.J. and RINGLAND, J. concur.

Hon. Robert P. Ringland, 12th District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.)

Copies mailed to:

Michele D. Phipps, Esq.
Marshall G. Lachman, Esq.
Hon. Barbara P. Gorman