

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio

Court of Appeals No. L-12-1101

Appellee

Trial Court No. CR0201201060

v.

Joseph R. Hunter

DECISION AND JUDGMENT

Appellant

Decided: October 25, 2013

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
David F. Cooper, Assistant Prosecuting Attorney, for appellee.

Clayton M. Gerbitz, for appellant

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Joseph R. Hunter appeals a March 30, 2012 judgment of conviction entered against him in the Lucas County Court of Common Pleas pursuant to a jury verdict at trial. In the judgment, the trial court convicted Hunter on all counts of a four count indictment charging:

1. Count 1, involuntary manslaughter, a violation of R.C. 2903.04(A), a felony of the first degree with an R.C. 2941.145 firearm specification;

2. Count 2, attempt to commit murder, a violation of R.C. 2923.02 and 2903.02, a felony of the first degree with an R.C. 2941.145 firearm specification;

3. Count 3, felonious assault, a violation of R.C. 2903.11(A)(2), a felony of the second degree with an R.C. 2941.145 firearm specification;

4. And Count 4, aggravated robbery, a violation of R.C. 2911.01(A)(1), a felony of the first degree with an R.C. 2941.145 firearm specification.

{¶ 2} On the involuntary manslaughter conviction, the trial court sentenced appellant to serve a ten year prison term. On the attempt to commit murder conviction, the court imposed a nine year prison term. The court found that Counts 2 (felonious assault) and 3 (aggravated robbery) are allied offenses of similar import and imposed no sentence on Count 3. On the Count 4 aggravated robbery conviction, the trial court sentenced appellant to serve ten years in prison.

{¶ 3} The court also imposed a three year prison sentence on firearm specifications to Counts 1, 2, and 4 and ordered that the sentences be served concurrently to each other and consecutive to the sentences imposed on Counts 1, 2, and 4. In total, the court imposed an aggregate prison sentence of 32 years for the convictions.

{¶ 4} Appellant filed a timely notice of appeal of the March 30, 2012 judgment to this court.

{¶ 5} The criminal charges arose out of an armed robbery of the Express Carryout at 1920 Mulberry Street in Toledo, Ohio on November 21, 2011, by two armed men, who were both wearing masks. One of the men was shot and killed by the store clerk during the course of the robbery. Video recordings from surveillance cameras at the store were placed in evidence at trial. They depict events both inside and outside the store on the day of the robbery.

{¶ 6} Three eyewitnesses testified at trial. One (Beverly Leese) was a store customer who entered the store while the robbery was in progress. The other two (Lawrence Johnson and Jeffery Price) were men who testified that they were walking towards the store on the morning of the robbery and saw a man running towards them with gun in hand from the direction of the store. The two men identified appellant at trial as the man who ran by them with a gun and that both men had known appellant for years. They also testified that afterwards, when they reached the store, the store clerk told them not to enter, because he had just killed a man.

{¶ 7} This is an *Anders* case. Pursuant to procedures announced in *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), counsel for appellant states that he is unable to find meritorious grounds for this appeal. Counsel filed an *Anders* appellate brief, asserting a potential assignment of error on appeal. Included in the brief is a motion by appellate counsel to withdraw as counsel for appellant.

{¶ 8} Counsel mailed a copy of the appellate brief, including his request to withdraw as counsel, to appellant. In a letter accompanying the brief, counsel notified

appellant of his right to file his own assignments of error and appellate brief within 45 days of receipt of the *Anders* brief. Although the court granted appellant additional time to file his own assignments of error and appellate brief, appellant has not filed his own assignments of error or brief.

{¶ 9} The potential assignment of error raised in the *Anders* brief states:

I. The verdict of the trial court was against the manifest weight of the evidence.

{¶ 10} A challenge to a jury verdict on manifest weight of the evidence grounds involves application of the analysis stated in *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997):

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. *Tibbs*, 457 U.S. at 42, 102 S.Ct. at 2218, 72 L.Ed.2d at 661. See, also, *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 20 OBR 215, 219, 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.”).

{¶ 11} Under the potential assignments of error, it is argued that the jury verdict is against the manifest weight of the evidence on two issues. The first is whether appellant was the masked perpetrator who fled the scene. The second is whether it was reasonably foreseeable that during the course of the aggravated robbery the store clerk would shoot the accomplice 34 times and kill him.

{¶ 12} The evidence at trial established that the Toledo Police received notice of a robbery in progress at the carryout by silent alarm on November 21, 2011, at 9:41 a.m. Trial testimony established that Toledo Police arrived at the scene after the incident, at approximately 9:44 a.m. Appellant offered the testimony of his sister at trial to establish an alibi. Ms. Holland, however, was uncertain as to appellant’s whereabouts between 8:15 a.m. and 10:30 a.m. on the morning of the robbery and admitted that afterwards appellant hid from police until his arrest.

{¶ 13} The state argues that the evidence at trial of appellant’s guilt in participating in the robbery while armed with a handgun which he used to shoot at the clerk while he fled the scene was overwhelming.

{¶ 14} A composite surveillance video was placed in evidence at trial and shows two armed men enter the carryout, force the clerk to the floor, and collect money and merchandise. One of the men was wearing a gray hoodie and dark pants. The video

shows that man approach a customer who entered the store while the robbery was in progress and take the customer to the back of store and through a doorway.

{¶ 15} Afterwards, the gray hooded man is seen again, with a gun in hand and pointing the gun to the front of the store as he ran down an aisle to the front door. The video continues outside and shows the gray hooded man running from the store, across the street, and down an intersecting street or alley. Later, the video shows two men coming from the opposite direction, towards the store, from the same street or alley taken by the perpetrator.

{¶ 16} Detective Terry Cousino of the Scientific Investigations Unit of the Toledo Police Department testified at trial that two nine millimeter shell casings were found on the floor of the first aisle at the back of the store and that damage in the store showed the trajectory of two bullets running from there to the front of the store.

{¶ 17} Beverly Leese testified that she lived in the area of the carryout and often frequented the store. According to her testimony, at approximately 9:30 a.m. on November 21, 2011, Leese entered the carryout and was confronted by a man wearing a gray hoodie, blue jeans, and gloves. The man had a mask over his face and had a pistol. The man took her by the arm to a bathroom in the back of the store and told her to give him everything she had. While searching her pockets, Leese heard gunshots from the front of the store. The man who had been with her went towards the front of the store. She then heard more gunshots. Leese testified that the man who confronted her was a black African-American male.

{¶ 18} Lawrence Johnson and Jeffery Price testified at trial that they were walking together down an alley towards the carryout on the morning of the robbery and both saw appellant running from the direction of the store towards them. Both testified that Hunter had a gun in hand as he ran and that they both knew Hunter and recognized him as he ran past. They both testified that Hunter was not wearing a mask when he ran by and that his face was clearly visible. Johnson testified that Hunter came within four to five feet of them as he ran and that his upper body clothing was gray in color and the lower clothing was black. Price testified that Hunter wore a gray sweatshirt and black sweatpants.

{¶ 19} Johnson and Price both testified that they continued on afterwards towards the carryout and heard shots. When they arrived at the front door to the store, the clerk told them not to enter because he had just killed someone.

{¶ 20} In our view, the record does not support any claim that a manifest miscarriage of justice occurred in the jury's resolution of a conflict between alibi testimony and eyewitness identification testimony on the issue of whether appellant was the gray hooded perpetrator who fled the scene. In our view, the alibi testimony did not preclude appellant from having committed the offense. The video evidence and eyewitness identification testimony strongly support a conclusion that appellant was the gray hooded perpetrator.

{¶ 21} The second manifest weight of the evidence argument concerns the weight of evidence supporting appellant's conviction of involuntary manslaughter, a violation of R.C. 2903.04(A) and a first degree felony. R.C. 2903.04(A) provides:

R.C. 2903.04 Involuntary manslaughter

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*. (Emphasis added.)

{¶ 22} Proximate cause is the applicable standard under R.C. 2903.04 for criminal responsibility for involuntary manslaughter. *State v. Chambers*, 53 Ohio App.2d 266, 269, 373 N.E.2d 393 (9th Dist.1977). The Ninth District Court of Appeals in *Chambers* outlined the proximate cause analysis under the statute:

[W]here a person, acting individually or in concert with another, sets in motion a sequence of events, the foreseeable consequences of which were known or should have been known to him at the time, he is criminally liable for the direct, proximate and reasonably inevitable consequence of death resulting from his original criminal act. *Id.* at syllabus.

{¶ 23} Appellant argues that it was not reasonably foreseeable that the store clerk would shoot and kill Lamar Allen, one of the perpetrators, during the armed robbery. Appellant argues that Allen's death was unforeseeable because Mr. Allen was shot 34 times. Foreseeability for purposes of criminal liability for involuntary manslaughter does not require that appellant foresee the precise consequences of his acts:

It is not necessary that the accused be in a position to foresee the precise consequence of his conduct; only that the consequence be foreseeable in the sense that what actually transpired was natural and

logical in that it was within the scope of the risk created by his conduct.

State v. Losey, 23 Ohio App.3d 93, 96, 491 N.E.2d 379 (10th Dist.1985).

{¶ 24} Appellant stands convicted as the gray hooded accomplice to Allen in the armed robbery of the Express Carryout. The evidence at trial demonstrates that the gray hooded perpetrator was an active participant in the armed robbery and acted with knowledge of the use of deadly weapons to commit the offense.

{¶ 25} Ohio has long recognized that such activity is understood to include a foreseeable risk of death to the robbers themselves:

The natural inclination of persons present during a robbery to forcibly defend themselves, their family and friends, and their property from theft and criminal aggression is a primal human instinct. *Chambers, supra*. Every robber or burglar knows when he attempts his crime that he is inviting dangerous resistance. *Id.* Add to this highly charged atmosphere the use of a firearm to facilitate the robbery, and the risk of serious physical harm or death to any person present, be it the intended victims, bystanders, or the wrongdoers themselves, becomes highly foreseeable. See *State v. Meek* (1978), 53 Ohio St.2d 35, 372 N.E.2d 341. *State v. Dixon*, 2d Dist. Montgomery No. 18582, 2002 WL 191582, *7 (Feb. 8, 2002).

{¶ 26} We conclude that the evidence strongly supports a finding that Allen's shooting and death were within the scope of foreseeable risk from the armed robbery.

Accordingly, we conclude that the jury's verdict finding appellant guilty of involuntary manslaughter is not against the manifest weight of the evidence.

{¶ 27} We find appellant's potential Assignment of Error No. I not well-taken in both respects asserted.

{¶ 28} Under *Anders* procedure, appellate courts are to undertake their own independent examination of the record to determine whether any other issue of arguable merit is presented for appeal. One issue of arguable merit has been raised by the state. The state brings to the court's attention that an error occurred with respect to sentencing on the three firearm specifications.

{¶ 29} At sentencing, counsel for appellant argued that the three firearm specifications should be merged into a single offense and the court sentence appellant on a single firearm specification. The state acknowledges that it and the trial court agreed. According to the state, appellant should have been sentenced to a single three year mandatory consecutive term for a single firearm specification.

{¶ 30} The trial court's judgment, however, sentenced appellant on three firearm specifications but ordered the sentences to be served concurrently to each other:

An additional term is imposed as a mandatory and consecutive term pursuant to R.C. 2929.14(D)(1) of 3 years as to each Firearm Specification. The Firearm Specifications are to be served concurrently to each other, but consecutive to the sentences imposed in Counts 1, 2 and 4 for a total period of 32 years in prison.

{¶ 31} The state describes the error as a clerical mistake that should be corrected, even though the correction will not alter the length of appellant’s prison term imposed in the sentence. The state recommends that the court remand the case to the trial court to correct the mistake by use of a nunc pro tunc entry or that the court make the correction itself without remand.

{¶ 32} Our review of the record reflects that at sentencing, counsel for appellant argued that the three gun specifications should merge as allied offenses and appellant should be sentenced on a single firearm specification. The state agreed that the three gun specifications should merge. At the hearing the trial court pronounced sentence. The court stated that under Count 1, involuntary manslaughter, that it imposed a sentence of ten years in prison and “[a]s to that charge there will be a 3 year mandatory consecutive gun specification.” When pronouncing sentence on the attempt to commit murder and aggravated robbery charges, Counts 2 and 4, the court stated that the gun specifications on those charges merged with the original specification.

{¶ 33} Accordingly, this case presents a variance between the sentence announced at the sentencing hearing and the trial court’s subsequently filed judgment entry. This court has recognized that where “there exists a variance between the sentenced pronounced in open court and the sentence imposed by a court’s judgment entry, a remand for resentencing is required.” *State v. Robinson*, 6th Dist. Lucas No. L-10-1369, 2012-Ohio-6068, ¶ 79, quoting *State v. Pfeifer*, 6th Dist. Ottawa No. OT-10-013, 2011-Ohio-289, ¶ 8; *State v. Williams*, 987 N.E.2d 322, 2013-Ohio-726, ¶ 49 (6th Dist.).

{¶ 34} With respect to allied offenses of similar import, the Ohio Supreme Court has recognized that a defendant is prejudiced by failure to merge allied offenses even where the court imposes concurrent sentences for all counts that should have been merged. *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923, ¶ 31. The court reasoned in *Underwood*, that “even when the sentences are to be served concurrently, a defendant is prejudiced by having more convictions than are authorized by law.” *Id.*; *State v. Swiergosz*, 197 Ohio App.3d 40, 2012-Ohio-830, 965 N.E.2d 1070, ¶ 41 (6th Dist.).

{¶ 35} Issues of arguable merit exist for this appeal on whether the trial court erred in failing to merge three firearm specifications at sentencing and arising from a variance between the sentence as pronounced by the court at the sentencing hearing and the subsequently filed judgment entry filed with respect to those counts. Because arguable issues for appeal exist, we appoint counsel to pursue the appeal on appellant’s behalf and direct new counsel to prepare an appropriate appellate brief.

{¶ 36} Accordingly, appellate counsel’s motion to withdraw is found well-taken and is, hereby, granted. We appoint Karin Coble, 4334 W. Central Avenue, Suite 226, Toledo, Ohio 43615, as appellate counsel in this matter, and direct her to prepare an appellate brief discussing the arguable issues identified in this decision, and any further arguable issues which may be found in the record within thirty days of the date of this decision.

{¶ 37} The clerk is ordered to serve all parties, including Joseph R. Hunter, with notice of this decision. Service upon Mr. Hunter shall be by ordinary U.S. mail to Joseph R. Hunter #658892, Lebanon Correctional Institution, P.O. Box 56, Lebanon, Ohio 45036 or to appellant at another more current address.

Motion granted.

Mark L. Pietrykowski, J.

JUDGE

Thomas J. Osowik, J.

JUDGE

James D. Jensen, J.
CONCUR.

JUDGE

<p>This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.</p>
