

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

State of Ohio

Court of Appeals No. L-11-1202

Appellee

Trial Court No. CR0201003247

v.

Terrance Lee Taylor

DECISION AND JUDGMENT

Appellant

Decided: November 22, 2013

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Timothy F. Braun, Assistant Prosecuting Attorney, for appellee.

Tim A. Dugan, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶1} Appellant, Terrance Taylor, appeals a July 27, 2011 judgment of conviction, entered against him after a jury trial in the Lucas County Court of Common Pleas. At trial, the jury found appellant guilty of murder, a violation of R.C. 2903.02(B) and

2929.02, an unclassified felony, and of aggravated robbery, a violation of R.C.

2911.01(A)(1) and a first degree felony. The guilty verdicts also included findings of R.C. 2941.145 firearm specifications on both counts.

{¶2} The criminal charges against appellant were brought by indictment on December, 21, 2010, and arise out of an incident that occurred on December 12, 2010, in Toledo, Ohio in which Mark Ward was shot to death. The first count of the indictment charged appellant with aggravated murder, a violation of R.C. 2903.01(B) and (F). The count also included an R.C. 2941.145 firearm specification. On the first count, the jury found appellant not guilty of the aggravated murder charge, but found him guilty of murder, a lesser included offense. The second count of the indictment was the aggravated robbery charge which was tried to a guilty verdict.

{¶3} The parties agreed at sentencing that the murder and aggravated robbery offenses were allied offenses of similar import and should be merged at sentencing. Based upon merger, the state requested the trial court to sentence appellant only on the murder count and accompanying firearm specification.

{¶4} In the July 27, 2011 judgment, the trial court reported on the murder and aggravated robbery guilty verdicts, imposed sentence on the murder conviction, and dismissed the aggravated robbery conviction. The court ordered appellant to serve an indefinite term of 15 years to life in prison on the murder conviction and an additional

mandatory consecutive three year term of imprisonment on the accompanying firearm specification. The court also sentenced appellant to five years postrelease control.

{¶5} Appellant appealed the July 27, 2011 judgment to this court and asserts five assignments of error on appeal:

Assignments of Error

1. Appellant's convictions were not supported by legally sufficient evidence.
2. Appellant's convictions fell against the manifest weight of the evidence.
3. The trial court erred by instructing the jury on the lesser included charge of murder.
4. The trial court failed to follow the proper procedure for merging allied offenses.
5. The trial court erred by ordering appellant to serve a mandatory five year term of post-release control.

{¶6} The evidence at trial was undisputed that Dorcas Stephens resided at a house located at 1520 Bell Avenue in Toledo, Ohio, on December 12, 2010. A group of individuals, known to Stephens, came to her house. Mark Ward, Derrick Pierce, John Winfield, Deirdre Taylor, and appellant arrived first. Seatrieon Holmes and Andre

Woodson arrived later. Most of the group had known each other for many years.

Appellant and Deirdre Taylor are brother and sister. John Winfield is their half-brother.

{¶7} Mark Ward had once resided in the neighborhood and was visiting friends.

Ward had been sharing bottles of cognac with a group, walking through the neighborhood before he came to the Stephens house. Dorcas Stephens testified that when the group arrived at the house they had been drinking and were loud and obnoxious. They waited on someone to bring more cognac to drink.

{¶8} After a dispute between Ward and both Winfield and appellant over money and who paid for the bottles of cognac, John Winfield shot and killed Mark Ward at the residence. Stephens, appellant, and all others of the group were in the residence at the time of the shooting.

{¶9} Key testimony against appellant was provided by two witnesses: Deidre Taylor (appellant's sister) and Dorcas Stephens. Deidre Taylor testified that she saw John Winfield hand appellant a gun before the shooting and that appellant, with the gun in hand, "walked to the front door and shut the front door and said wasn't nobody leaving." Deidre testified further that Mark Ward responded and "said he wasn't no punk and wouldn't nobody take nothing from him."

{¶10} According to Ms. Taylor, appellant then handed the gun back to John Winfield. Winfield paced the floor talking and then Winfield and Mark Ward argued over who paid the most money for the alcohol. "Next thing you know, John shot Mark."

{¶11} Dorcas Stephens testified that both appellant and John Winfield demanded money from Mark Ward. According to Stephens, Mark Ward responded stating “ain’t gonna take nothing from Baby Herc [Ward’s nickname],” and then Ward tore his coat off and threw it on the floor. Dorcas Stephens testified that she tried unsuccessfully to stop Ward from arguing further and heard appellant tell Ward “[M]an, you gonna give my brother his money or whatever, take his liquor and do what you want to do, don’t keep disrespecting, don’t disrespect my brother or whatever.”

{¶12} Dorcas Stephens testified that she was easing towards the front door to leave the house and heard “steady arguing and then I heard, pow.” She turned and saw Mark Ward still standing and John Winfield standing there with the gun. She took off and heard more shots as she left the house.

{¶13} According to Deidre Taylor, Winfield then told her after the shooting “to go in Mark’s pocket,” and that when she complied and took money out, Winfield “snatched” the money out of her hands. At the time of his arrest, appellant held \$323 in cash on his person, including a one dollar bill in his wallet that was stained with Mark Ward’s blood.

{¶14} We consider the assignments of error out of turn.

Jury Instruction on Murder

{¶15} Under Assignment of Error No. 3, appellant contends that the trial court erred by instructing the jury on felony murder. As previously discussed, the indictment charged appellant with aggravated murder (a violation of R.C. 2903.01(B) and (F)). Over

appellant's objection, the trial court also instructed the jury on felony murder (a violation R.C. 2903.02(B) and 2929.02) as a lesser included offense. Appellant contends under Assignment of Error No. 3 that an instruction on the lesser included offense was not warranted under the facts.

{¶16} The Ohio Supreme Court recently summarized the two-tier analysis required in determining whether to instruct a jury on a lesser included offense:

The question of whether a particular offense should be submitted to the finder of fact as a lesser included offense involves a two-tiered analysis. *State v. Evans*, 122 Ohio St.3d 381, 2009-Ohio-2974, 911 N.E.2d 889, ¶ 13. The first tier, also called the “statutory-elements step,” is a purely legal question, wherein we determine whether one offense is generally a lesser included offense of the charged offense. *State v. Kidder*, 32 Ohio St.3d 279, 281, 513 N.E.2d 311 (1987). The second tier looks to the evidence in a particular case and determines whether “a jury could reasonably find the defendant not guilty of the charged offense, but could convict the defendant of the lesser included offense.” *Evans* at ¶ 13, quoting *Shaker Hts. v. Mosely*, 113 Ohio St.3d 329, 2007-Ohio-2072, 865 N.E.2d 859, ¶ 11. Only in the second tier of the analysis do the facts of a particular case become relevant. *State v. Deanda*, 136 Ohio St.3d 18, 2013-Ohio-1722, 989 N.E.2d 986, ¶ 6.

{¶17} Appellant does not dispute the trial court's determination that felony murder is a lesser included offense to aggravated murder as charged in this case. Appellant argues that the instruction on murder was not warranted under the facts because the evidence at trial did not reasonably support a jury verdict of not guilty to aggravated murder, the charged offense.

{¶18} The indictment charged appellant with aggravated murder, a violation of R.C. 2903.01(B) and (F). At the time of the offense, R.C. 2903.01(B) and (F) provided:

2903.01 Aggravated murder

* * *

(B) No person shall *purposely cause the death of another* or the unlawful termination of another's pregnancy while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit, kidnapping, rape, aggravated arson, arson, aggravated robbery, robbery, aggravated burglary, burglary, terrorism, or escape.

* * *

(F) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in section 2929.02 of the Revised Code.

(Emphasis added.)

{¶19} Appellant was convicted of murder, a violation of R.C. 2903.02 and R.C. 2929.02. R.C. 2903.02(B) provides:

2903.02 Murder

* * *

(B) 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 section 2903.03 or 2903.04 of the Revised Code.

{¶20} R.C. 2929.02 sets forth penalties for murder.

{¶21} Appellant argues that the evidence at trial established that John Winfield shot Mark Ward multiple times and afterwards ordered Deidre Taylor to take Ward's money from his pocket. Winfield immediately grabbed the money from Deidre Taylor's hand when she complied. Appellant also argues that the evidence against Winfield clearly established that Winfield committed aggravated robbery and based upon the facts also committed aggravated murder. Appellant contends that it would have been unreasonable to believe Winfield committed anything other than aggravated murder and that appellant's own criminal liability, as a claimed aider and abettor, is tied to Winfield's. Appellant claims the trial court erred in instructing the jury on the lesser included offense of murder. He contends that a jury could not reasonably have found him

not guilty of the aggravated murder, but convict him of the lesser included offense of murder.

{¶22} We disagree. In our view the overwhelming evidence of Winfield's guilt is not determinative. Purpose to kill must be proved as an essential element of the crime of aggravated murder even where the defendant is prosecuted as an aider and abettor to the crime. *State v. Scott*, 61 Ohio St.2d 155, 166, 400 N.E.2d 375 (1980); *Clark v. Jago*, 676 F.2d 1099, 1104 (6th Cir.1982); *State v. Pruett*, 3rd Dist. Seneca No. 13-85-2, 1986 WL 6435, *2 (May 29, 1986). The aider and abettor "must himself have the purpose or specific intent to cause the death of the victim before he can be found guilty of aggravated murder as an aider or abettor." *State v. Whitfield*, 2d Dist. Montgomery No. 22432, 2009-Ohio-293, ¶ 21.

{¶23} Purpose to kill is not an element of the crime of felony murder under R.C. 2903.02(B). The intent required for conviction of felony murder under R.C. 2903.02(B) is the intent to commit the underlying felony offense. *State v. Maynard*, 10th Dist. Franklin No. 11AP-697, 2012-Ohio-2946, ¶ 17.

{¶24} We conclude there is competent credible evidence in the record on which to conclude that a jury could reasonably find appellant not guilty of aggravated murder, but guilty of the lesser included offense of murder and that the trial court did not err in instructing the jury on the lesser included offense.

{¶25} We find appellant's Assignment of Error No. 3 not well-taken

Sufficiency of the Evidence

{¶26} Under Assignment of Error No. 1, appellant contends that appellant's convictions of murder and aggravated robbery are not supported by sufficient evidence. Sufficiency of the evidence is "that legal standard which is applied to determine whether the case may go to the jury or whether the evidence is legally sufficient to support a jury verdict as a matter of law." *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997), quoting Black's Law Dictionary (6 Ed.1990) 1433. In *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), the Ohio Supreme Court outlined the analysis required to apply this standard:

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. (*Jackson v. Virginia* [1979], 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560, followed.) *Id.* at paragraph two of the syllabus.

Aggravated Robbery

{¶27} The murder conviction is based upon the underlying offense of aggravated robbery, a violation of R.C. 2911.01(A)(1). R.C. 2911.01(A)(1) provides:

(A) No person, in attempting or committing a theft offense, as defined in section 2913.01 of the Revised Code, or in fleeing immediately after the attempt or offense, shall do any of the following:

(1) Have a deadly weapon on or about the offender's person or under the offender's control and either display the weapon, brandish it, indicate that the offender possesses it, or use it.

{¶28} The aggravated robbery charge included an R.C. 2941.145 firearm specification. As to the firearm specification, the state was required to prove "that the offender had a firearm on or about the offender's person or under the offender's control while committing the offense and displayed the firearm, brandished the firearm, indicated that the offender possessed the firearm, or used it to facilitate the offense." R.C. 2941.145.

{¶29} The trial court instructed the jury on complicity with respect to the offenses charged in the indictment and to the lesser included offense of murder. R.C. 2923.03 provides:

2923.03 Complicity

(A) No person, acting with the kind of culpability required for the commission of an offense, shall do any of the following:

* * *

(2) Aid or abet another in committing the offense;

{¶30} In *State v. Johnson*, 93 Ohio St.3d 240, 754 N.E.2d 796 (2001), the Ohio Supreme Court identified the evidence necessary to support a conviction for complicity by aiding and abetting:

To support a conviction for complicity by aiding and abetting pursuant to R.C. 2923.03(A)(2), the evidence must show that the defendant supported, assisted, encouraged, cooperated with, advised, or incited the principal in the commission of the crime, and that the defendant shared the criminal intent of the principal. Such intent may be inferred from the circumstances surrounding the crime. *Id.* at syllabus.

{¶31} Appellant contends that the evidence is legally insufficient to show that he aided and abetted Winfield in committing aggravated robbery. Appellant argues the evidence shows that it was Deirdre Taylor who took money from Ward's body, not appellant and that the evidence does not show appellant either took Ward's coat or that he was ever in possession of it. Appellant claims that the evidence does not show that he committed any act in furtherance of the robbery by Winfield.

{¶32} Treating the testimony of Deirdre Taylor and Dorcas Stephens as true, the evidence showed that both appellant and Winfield had argued with Ward and demanded money from him before the shooting. The testimony also showed that appellant introduced a deadly weapon into mix, appellant having taken a gun from Winfield, stood at the only exit from the house with gun in hand, and told everyone not to leave the residence. According to Deirdre, appellant then gave the gun back to Winfield. After further argument with Ward over money involving both appellant and Winfield, Winfield shot and killed Mark Ward, took Ward's money, and left.

{¶33} In our view, the evidence at trial was sufficient to establish that appellant supported, assisted, encouraged, and cooperated with Winfield in committing a theft offense with a deadly weapon, a firearm. The evidence, if believed, established that appellant had displayed and Winfield brandished a firearm in committing the offense. Accordingly, we conclude that the evidence was sufficient to support appellant's conviction for aggravated robbery and to support the finding of the firearm specification.

Felony Murder

{¶34} As previously discussed, felony murder, pursuant to R.C. 2903.02(B), 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 * * *." Here the underlying felony on which the felony murder conviction is predicated is the R.C. 2911.01(A)(1) aggravated robbery of Mark Ward, a

first degree felony. We have concluded that there was sufficient evidence to support the aggravated robbery conviction. R.C. 2901.01(9)(a) identifies aggravated robbery as an offense of violence.

{¶35} Appellant argues that the evidence failed to show that he knowingly aided and abetted Winfield in committing murder. However, as we discussed under Assignment of Error No. 3, the intent required for conviction of felony murder under R.C. 2903.02(B) is the intent to commit the underlying offense. *State v. Maynard*, 10th Dist. Franklin No. 11AP-697, 2012-Ohio-2946, ¶ 17.

{¶36} The remaining elements of felony murder require a showing that appellant caused the death of Ward as a proximate result of appellant's committing or attempting to commit the aggravated robbery. "Under Ohio's felony murder doctrine, a defendant can be held liable for a death that results from the actions of his co-felon." *State v. Tuggle*, 6th Dist. Lucas No. L-09-1317, 2010-Ohio-4162, ¶ 100. The Second District Court of Appeals in *State v. Dixon*, 2d Dist. Montgomery No. 18582, 2002 WL 191582, * 5 (Feb. 8, 2002) explained the proximate cause analysis:

Under the "proximate cause theory," it is irrelevant whether the killer was the defendant, an accomplice, or some third party such as the victim of the underlying felony or a police officer. Neither does the guilt or innocence of the person killed matter. Defendant can be held criminally responsible for the killing regardless of the identity of the person killed or

the identity of the person whose act directly caused the death, so long as the death is the “proximate result” of Defendant’s conduct in committing the underlying felony offense; that is, a direct, natural, reasonably foreseeable consequence, as opposed to an extraordinary or surprising consequence, when viewed in the light of ordinary experience. *Id.*; *State v. Bumgardner* (August 21, 1998), Greene App. No. 97-CA-103, unreported; *State v. Lovelace* (1999), 137 Ohio App.3d 206, 738 N.E.2d 418.

{¶37} Treating the testimony of Deidre Taylor and Dorcas Stephens as true, appellant was an active participant in the aggravated robbery and acted with knowledge of the use of a firearm to commit the offense.

{¶38} Construing the evidence most favorably to the state, we conclude that there was sufficient evidence to support a conclusion that the aggravated robbery was the cause in fact of Mark Ward’s death and that his death was a direct, natural, and reasonably foreseeable consequence of the aggravated robbery. Accordingly, we conclude that the evidence was sufficient to support a conviction of appellant for R.C. 2903.02(B) felony murder.

{¶39} We find appellant’s Assignment of Error No. 1 not well-taken.

Manifest Weight of the Evidence

{¶40} Appellant was convicted of murder in violation R.C. 2903.02(B) with a firearm specification. Under R.C. 2903.02(B), the state was required to prove that

appellant “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.” The predicate underlying offense in this case was aggravated robbery, a violation of R.C. 2911.01(A)(1) and a first degree felony.

{¶41} Under Assignment of Error No. 1, we found that the aggravated robbery conviction is supported by sufficient evidence. Under Assignment of Error No. 2, appellant argues that the convictions for aggravated robbery and murder are against the manifest weight of the evidence.

{¶42} 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 at 387:

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.”).

{¶43} Weighing the evidence at trial and all reasonable inferences, the not guilty verdict to the aggravated murder charge can be understood to indicate a jury determination that the evidence failed to establish appellant purposely caused the death of Mark Ward. In our view, the convictions for aggravated robbery and murder demonstrate that the jury found the testimony of Dorcas Stephens and Deirdre Taylor credible and concluded that appellant aided and abetted John Winfield in theft of money from Ward through use of a deadly weapon and that Ward died as a proximate result.

{¶44} We conclude that the jury verdicts do not present a miscarriage of justice. Rather, the convictions for aggravated robbery and murder, with firearm specifications, are fully supported by the evidence.

{¶45} Accordingly, we find Assignment of Error No. 2 not well-taken.

{¶46} Under Assignment of Error No. 4, appellant argues that the trial court erred procedurally in its judgment with respect to merger of allied offenses. In the trial court, the parties agreed that the murder and aggravated robbery offenses are allied offenses of similar import and should be merged at sentencing. The state requested the trial court to sentence appellant on the offense of murder alone.

{¶47} In its judgment, the trial court did sentence appellant on the lesser included offense of murder alone. However, with respect to the aggravated robbery charge, the judgment also provided: “The State hereby dismisses the conviction in Count 2 along with the firearm specification due to the counts merging.”

{¶48} For purposes of allied offenses “a ‘conviction’ consists of a guilty verdict and the imposition of a sentence or penalty.” *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, 922 N.E.2d 18, ¶ 12. Under *Whitfield*, there was no conviction for aggravated robbery. There was a determination of guilt by jury verdict. We treat the trial court’s judgment as dismissing the determination of guilt on the aggravated robbery count.

{¶49} The Ohio Supreme Court instructed in *Whitfield* that the procedure to be used in merging allied offenses for sentencing does not involve dismissing the determination of guilt for the merged offense:

Because R.C. 2941.25(A) protects a defendant only from being punished for allied offenses, the determination of the defendant’s guilt for committing allied offenses remains intact, both before and after the merger of allied offenses for sentencing.^{FN2} Thus, the trial court should not vacate or dismiss the guilt determination. *Id.* at ¶ 27.

{¶50} Following *Whitfield*, in *State v. Anderson*, 124 Ohio St.3d 513, 2010-Ohio-1109, 924 N.E.2d 1109, ¶ 3, the Ohio Supreme Court reversed an appellate court

judgment that “directed the trial court to vacate the finding of guilt on one of the allied offenses.”

{¶51} The parties agree that the trial court judgment is procedurally incorrect. Appellant argues the error undermines the murder conviction. The state argues that it is harmless and further that appellant raised no objection to it in the trial court when the state proposed the procedure.

{¶52} Appellant has not cited any authority to the court supporting its contention that the procedural error on the aggravated robbery sentencing had any effect on the murder conviction. With respect to the murder conviction, the trial court followed procedure. The judgment included a determination of guilt on the murder charge by jury verdict and imposition of sentence on the murder offense alone. These two elements meet the requirements for a conviction of murder for purposes of allied offenses analysis. *See Whitfield* at ¶ 12. Accordingly, we agree that the procedural error leaves the murder conviction unaffected. The error concerned the aggravated robbery count alone.

{¶53} In view of the determination that the trial court failed to follow the proper procedure for merging allied offenses in its treatment of the merged offense of aggravated robbery, we find Assignment of Error No. 4 well-taken.

{¶54} We vacate the trial court judgment to the extent it “dismisses the conviction in Count 2 along with the firearm specification due to the counts merging” and remand the case for resentencing on that count.

{¶55} Under Assignment of Error No. 5, appellant contends that the trial court erred by sentencing appellant to five years postrelease control on the conviction for murder. The parties agree that murder is an unclassified felony to which postrelease control does not apply. R.C. 2967.28.

{¶56} Accordingly, we find Assignment of Error No. 5 well-taken and remand this matter to the trial court so that the judgment of conviction may be corrected. No de novo resentencing hearing is required on the error. “Instead, appellant is simply entitled to a corrected judgment entry deleting any mention of postrelease control.” *State v. Williams*, 7th Dist. Mahoning No. 11-MA-24, 2012-Ohio-1475, ¶ 24; accord *State v. Silguero*, 10th Dist. Franklin No. 11AP-274, 2011-Ohio-6293, ¶ 16; *State v. Evans*, 8th Dist. Cuyahoga No. 95692, 2011-Ohio-2152, ¶ 10-11.

{¶57} We affirm the trial court judgment in part and reverse it in part. We reverse the judgment for error in sentencing for allied offenses on the aggravated robbery count and remand for resentencing on that count. We also reverse the trial court judgment to the extent it imposed a sentence of postrelease control on the murder conviction and remand to permit the trial court to correct the error. In all other respects we affirm. We order the state to pay the costs of this appeal, pursuant to App.R. 24.

Judgment affirmed in part,
and reversed in part.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27.
See also 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, P.J.

JUDGE

Thomas J. Osowik, 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>
