

[Cite as *State v. Fayne*, 2004-Ohio-4625.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 83267

| | | |
|---------------------|---|---------------|
| STATE OF OHIO, | : | |
| | : | |
| | : | JOURNAL ENTRY |
| Plaintiff-Appellee | : | |
| | : | AND |
| v. | : | |
| | : | OPINION |
| CARLOS FAYNE, | : | |
| | : | |
| | : | |
| Defendant-Appellant | : | |

| | |
|--------------------------------------|--------------------------|
| DATE OF ANNOUNCEMENT OF DECISION: | <u>SEPTEMBER 2, 2004</u> |
|--------------------------------------|--------------------------|

| | |
|--------------------------|--|
| CHARACTER OF PROCEEDING: | Criminal appeal from Common Pleas Court, Case Nos. CR-421687 and CR-421497. |
|--------------------------|--|

| | |
|-----------|-----------|
| JUDGMENT: | AFFIRMED. |
|-----------|-----------|

DATE OF JOURNALIZATION:

APPEARANCES:

| | |
|--------------------------|--|
| For Plaintiff-Appellee: | William D. Mason Cuyahoga County Prosecutor George Rukovena Assistant County Prosecutor 9 th Floor Justice Center 1200 Ontario Street Cleveland, OH 44113 |
| For Defendant-Appellant: | Frank A. Raso LaPlace 2101 Richmond Road, 2 nd Floor Beachwood, OH 44122 |

TIMOTHY E. McMONAGLE, J.:

{¶1} Defendant-appellant, Carlos Fayne, appeals from the judgment of the Common Pleas Court, rendered after a jury verdict, finding him guilty of murder with a firearm specification, attempted murder with a firearm specification, two counts of having a weapon while under a disability, felonious assault with a firearm specification, and kidnapping with a firearm specification. Fayne contends that he was denied his Sixth Amendment right to effective assistance of counsel and his right to self-representation, his convictions were against the manifest weight of the evidence, and the trial court erred in consolidating his cases for trial. Finding no merit to the appeal, we affirm the trial court.

{¶2} This case is about a gang war between the Crumb Street Boys and the Red Hot gang. Fayne, a member of the Red Hot gang, was charged with the attempted murder of Edward Jones on March 19, 2002, and the murder of Robert Clinton on March 21, 2002. Both Jones and Clinton were members of the rival Crumb Street gang.

{¶3} Fayne was indicted in Case No. 421687 for the shooting of Edward Jones on one count of attempted murder with two firearm specifications, one count of felonious assault with two firearm specifications, having a weapon while under a disability, and one count of kidnapping with two firearm specifications.

{¶4} He was also indicted in Case No. 421497 for the murder of Robert Clinton on one count of aggravated murder with three firearm specifications, and two counts of having a weapon while under a disability. The cases were consolidated for trial.

{¶5} At trial, Edward Jones testified that he is a member of the Crumb Street Boys, a group of boys who hang out on Crumb Street in Cleveland. Jones' friend, Troy Baker, is also a member of the Crumb Street Boys.

{¶6} According to Jones, in the late evening hours of March 18 and early morning of March 19, 2002, he and Troy were in a restaurant called the Chinese Bar. Jones testified that as he put his arm around a girl and snuggled close to her, Adrian Bolling, a member of the Red Hot gang, walked over and accused Edwards of "trying to disrespect him" because the female was his girlfriend. According to Jones, he and Bolling stood "face to face" swearing at each other, ready to fight. Fayne, who was also at the restaurant that night with several members of his gang, sat several seats down observing the incident. Security personnel escorted Jones, Bolling and their friends outside and they left the bar.

{¶7} At approximately noon on March 19, Troy and his girlfriend picked up Jones at his house. Troy drove his girlfriend home and then he and Jones went back to Troy's house to pick up some articles of clothing left there by his girlfriend. When they returned to her house to drop off the clothes, Troy parked the car in an empty lot across the street and then walked across the street to the rear of the house. Jones, who was sitting in the front passenger seat, stayed in the car.

{¶8} According to Jones, as he was waiting for Troy to return, he looked up and saw Fayne and Bolling running toward the car. Fayne put a gun in Jones' face and told him to get out of the car

or he was going to kill him. When Jones got out of the car, begging not to be killed, Fayne told Bolling, "take care of your business," and Bolling then hit Jones in the jaw. As Jones began running away, Fayne shot him two times. One bullet hit him in the stomach; the other bullet hit his leg, grazing his penis. Jones admitted on cross-examination that the fighting between the rival gangs started when one of the Crumb Street Boys stole drugs worth approximately \$2500 from a member of the Red Hot gang.

{¶9} Troy testified that he heard two shots as he opened the door to his girlfriend's house. He ran to the front of the house and saw Fayne, who had a black gun in his hand, and Bolling, running away. Troy testified that he had seen the same gun several days earlier when Bolling pulled the gun, but did not shoot it, during a fight at the Chinese Bar between several of Troy's friends and Fayne and his friends.

{¶10} Cleveland police officer Frank Gerhart responded to a radio dispatch regarding the shooting. He testified that Jones told him that Fayne had shot him and, further, that he (Gerhart) found two .45 caliber spent shell casings on the street.

{¶11} Bobby Lee Herris testified that, two days later, in the early afternoon of March 21, 2002, he was outside the laundromat at East 74th and Superior where he was employed. He heard a gunshot, looked across the street, and saw a young man running in the Family Dollar Store parking lot. The young man was holding his stomach with one hand and held a gun in his other hand. Herris saw him fall to the ground in the parking lot and then he

heard three more gunshots. Herris did not see the victim shoot his gun.

{¶12} John Reed testified that he was waiting in his car in the parking lot of the Family Dollar Store at approximately 2 p.m. on March 21, 2002, when a male ran in front of his car and began shooting. Reed got down in his seat to hide. When the shooting stopped, Reed discovered that a bullet had gone through the front windshield of his car.

{¶13} Calvin Bates, a telephone installer, was pulled up to the pay phone in the parking lot of the Family Dollar Store in the early afternoon of March 21, 2002, sitting in his van and working on the phone through the driver's window when he heard gunshots. As he looked in his passenger door mirror, he saw a young man run away from the store and then behind his truck. Bates estimated that he heard seven to nine shots and testified that the shots sounded like they came from an automatic weapon.

{¶14} Cleveland police detective JoMarie Patrici testified that she responded to the scene shortly after the shooting. She found three spent shell casings on the ground and recovered a bullet pellet from the rear window ledge of Reed's car, all of which were from .45 caliber bullets.

{¶15} Cleveland police officer Andrew Harasimchuk also responded to the scene. He observed the victim, later identified as Robert Clinton, lying on the ground behind the telephone truck and found a 9mm handgun, which was jammed, near Clinton's head.

{¶16} Cleveland police officer William Phillips testified that shortly after the shooting on March 21, he saw Fayne driving a car in the area. He stopped Fayne and arrested him. As Phillips and his partner drove Fayne downtown for questioning, Fayne told the officers that he was involved with the shooting, it involved the Crumb Boys and the Red Hot gang, and "it had been going on for some time and was going to continue." Fayne also told the officers that he shot Clinton in self-defense.

{¶17} Fayne subsequently signed a written statement, in which he described the shooting as follows:

{¶18} "Today I was in the Family Dollar Store talking to one of my little dudes so Buster come in and asked if anybody got some weed and I said yea, I got some weed. He went to the car and I said I would be there in five minutes. I grabbed my weed on the side of the store. I hopped in the back of his car. I was about to sell him the weed and I looked up and when I did I saw J Rock [Clinton] talking on a cell phone and walking to the car and he had a gun in his hand in his sleeve. I pulled out my pistol and laid down on the seat and shot out the window. Then I jumped out and then Jerrell started shooting at me. He was in two-door black Berretta. I took off running while he was shooting at me. ***"

{¶19} The next day, Fayne was interviewed by Detective Leroy Gilbert regarding the shooting of Edward Jones. Fayne denied knowing Jones and further denied that he had shot him on March 19.

Fayne admitted that he owned a .45 caliber automatic pistol but told Gilbert that he had left it in someone else's car.

{¶20} Subsequent testing by the police department forensics unit and the Cuyahoga County Coroner's Office indicated that there was no trace gunshot residue found on Clinton's hands. In addition, the testing indicated that the bullet removed from Clinton's body was consistent with a .45 caliber automatic weapon.

The tests also indicated that the two .45 caliber shell casings recovered from the scene of Jones' shooting and the three .45 caliber shell casings recovered from the scene of Clinton's shooting all came from the same weapon.

{¶21} The jury subsequently found Fayne guilty of the charges as set forth above and the trial court sentenced him to a total term of twenty-three years to life in prison.

INEFFECTIVE ASSISTANCE OF COUNSEL

{¶22} In his first assignment of error, Fayne argues that his assigned counsel was ineffective.

{¶23} In order to establish ineffective assistance of counsel, a defendant must demonstrate that counsel's performance fell below an objective standard of reasonable representation and that he was prejudiced by that performance. *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph two of the syllabus, *certiorari denied* (1990), 497 U.S. 1011. Prejudice is established when the defendant demonstrates "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland v. Washington* (1984), 466 U.S. 668, 694.

{¶24} In evaluating a claim of ineffective assistance of counsel, a court must be mindful that there are countless ways for an attorney to provide effective assistance in a given case and it must give great deference to counsel's performance. *Id.* at 689. "Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance ***." *Id.* Trial tactics and strategies, even if debatable, do not constitute a denial of effective assistance of counsel. *State v. Clayton* (1980), 62 Ohio St.2d 45, 49.

{¶25} Fayne first contends that his trial counsel was ineffective because he did not give an opening statement. A decision to waive opening argument, however, is a matter of trial strategy which we will not second guess. *Bradley*, 42 Ohio St.3d at 136.

{¶26} Likewise, a defense counsel's selection of witnesses to call at trial falls within the purview of trial tactics. *State v. Coulter* (1992), 745 Ohio App.3d 219, 230. Thus, we find no merit to Fayne's argument that counsel was ineffective because he did not call an alibi witness. Moreover, the record reflects that Fayne did not tell his attorney prior to trial that he wanted to claim an alibi nor was a notice of alibi filed prior to trial as required by Crim.R. 12.1. In light of these facts, counsel's decision not to call Fayne's grandmother, who apparently would have testified that Fayne was at home watching "Jerry Springer" with her when Edwards was shot, appears more than reasonable.

{¶27} Fayne also contends that defense counsel was ineffective in cross-examining Edward Jones because, although Jones admitted on direct examination that he gave a statement to the police at the hospital, counsel did not ask to review the statement prior to cross-examination to check for any inconsistencies nor did he move for an in camera inspection of the statement. Even if counsel's failure to review the statement were unreasonable, however, Fayne has failed to demonstrate that, but for counsel's actions, there is a reasonable probability that the result of the trial would have been different.

{¶28} Finally, Fayne contends that counsel was ineffective for not presenting any affirmative evidence of self-defense regarding the shooting of Robert Clinton. Fayne contends that counsel should have presented evidence regarding Clinton's "violent nature" and evidence pertinent to why Clinton's loaded 9mm gun, which was found on the ground next to him at the scene, was jammed. We find nothing to indicate that counsel's representation on this issue fell below an objective standard of reasonableness.

{¶29} First, the record reflects that Fayne's self-defense claim was put into evidence in the State's case when Detective Kovach, who interviewed Fayne regarding Clinton's murder, read Fayne's statement regarding the shooting into the record. With respect to Clinton's alleged violent nature, defense counsel elicited testimony from Jones on cross-examination that Clinton was involved in the shooting of Carl Lewis, a member of the Red Hot gang, several days prior to his own murder. With respect to

Fayne's argument that counsel should have presented evidence regarding Clinton's jammed weapon, the record reflects that Detective Kovach testified that, other than the three .45 caliber shell casings and one .45 caliber bullet pellet recovered from the rear window ledge of Reed's car, no other casings or bullets were found at the scene. Moreover, none of the witnesses testified that they ever saw Clinton fire his weapon. In addition, forensic scientist Curt Jones testified that the trace metal detection tests performed on Clinton's hands were negative for gunshot primer residue. In light of this evidence, it appears that counsel made a strategic decision, which we will not second guess, to emphasize inconsistencies in the State's theory of the case, rather than focus on the jammed weapon.

{¶30} The record in this case reflects that defense counsel was well-prepared, knowledgeable about the case and the events that precipitated the shootings, and careful in his cross-examination of the various witnesses presented by the State. Because Fayne has failed to demonstrate either that his counsel's performance fell below an objective standard of reasonable representation or that he was prejudiced thereby, this assignment of error is overruled.

INSUFFICIENT EVIDENCE/MANIFEST WEIGHT OF THE EVIDENCE

{¶31} It is unclear from Fayne's brief whether he is arguing there was insufficient evidence to support his convictions or that his convictions were against the manifest weight of the evidence. Fayne assigns his second assignment of error as: "The

Appellant was denied due process of law, as guaranteed by the United States and Ohio Constitutions, when he was convicted and sentenced on evidence which was insufficient as a matter of law." In the argument portion for this assignment of error, however, he sets forth the test for a manifest weight argument and asserts that his convictions were against the manifest weight of the evidence. Accordingly, we analyze Fayne's convictions under both tests.

{¶32} 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. *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus.

{¶33} In Case No. 421687, regarding the shooting of Edward Jones, Fayne was convicted of attempted murder with a firearm specification, felonious assault with a firearm specification, kidnapping with a firearm specification, and having a weapon while under a disability.¹

¹Fayne was also convicted of one count of having a weapon while under a disability in Case No. 421497. During closing argument, counsel conceded Fayne's guilt regarding having a weapon while under a disability; we therefore will not consider whether his conviction on these counts was based on insufficient evidence or against the manifest weight of the evidence.

{¶34} R.C. 2903.02(A), regarding murder, provides that "no person shall purposely cause the death of another ***." R.C. 2923.02(A), the attempt statute, provides that "no person, purposely or knowingly *** shall engage in conduct that, if successful, would constitute or result in the offense." An offender is guilty of a firearm specification if the evidence demonstrates that the offender had a firearm on or about his person or under his control while committing the offense and displayed, brandished, or used the firearm to facilitate the offense. R.C. 2941.145. R.C. 2905.01, regarding kidnapping, provides that "no person, by force, threat, or deception *** shall remove another from the place where the other person is found or restrain the liberty of the other person *** (2) to facilitate the commission of any felony *** [or] (3) to terrorize, or to inflict serious physical harm on the victim ***." Finally, R.C. 2903.11, regarding felonious assault, provides that "no person shall knowingly *** cause or attempt to cause physical harm to another *** by means of a deadly weapon ***."

{¶35} Construing the evidence in a light most favorable to the prosecution, we hold that the State presented sufficient evidence such that a rational finder of fact could have found all of the elements of each offense in Case No. 421687 proven beyond a reasonable doubt.

{¶36} Edward Jones testified that, as he waited in the car, Fayne and Bolling ran up to the car and Fayne put a gun in his face and told him to get out of the car or he would kill him.

Jones testified further that when he got out of the car, Fayne told Bolling to "take care of your business," and Bolling then hit him in the face. When Jones started running away, Fayne shot him twice. Jones testified that he was in the hospital for almost one month as a result of his injuries.

{¶37} This testimony, if believed, was sufficient to establish that Fayne kidnapped Jones by pointing a gun at him and ordering him to get out of the car, attempted to murder him by shooting at him twice while he was running away, and, obviously, used a firearm while committing the offense. If believed, the testimony also established that Fayne knowingly caused physical harm to Jones by deliberately shooting him as he ran away.

{¶38} In Case No. 421497, regarding Clinton's murder, Fayne was found guilty of murder with a firearm specification, and having a weapon while under a disability. At trial, Cleveland police officer William Phillips testified that Fayne told him that he had shot Clinton and that the shooting involved a dispute between the Crumb Boys and the Red Hot gang. Likewise, Detective Denise Kovach testified that when she interviewed Fayne shortly after his arrest, he admitted to her that he had shot Clinton, but asserted that he did so in self-defense. Detective Kovach read Fayne's statement, quoted earlier, into the record. Construing this evidence in a light most favorable to the prosecution, a reasonable fact finder could have found that Fayne murdered Robert Clinton by shooting him. Accordingly, the evidence was sufficient as a matter of law.

{¶39} While the test for sufficiency requires a determination of whether the State has met its burden of production at trial, a manifest weight challenge questions whether the State has met its burden of persuasion. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 390. When considering an appellant's claim that the conviction is against the weight of the evidence, the reviewing court sits, essentially, as a "'thirteenth juror' and [may] disagree with the fact finder's resolution of the conflicting testimony." *Thompkins*, supra at 387, quoting *Tibbs v. Florida* (1982), 457 U.S. 31, 42. The reviewing court must examine the entire record, weighing the evidence and considering the credibility of witnesses, while being mindful that credibility generally is an issue for the trier of fact to resolve. *State v. Thomas* (1982), 70 Ohio St.2d 79, 80. The court may reverse the judgment of conviction if it appears that the fact finder, in resolving conflicts in the evidence, "clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *Thompkins*, 78 Ohio St.3d at 387, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶40} Fayne argues that he was "basically convicted on the testimony of Edward Jones and Donald Drake." According to Fayne, the testimony of Jones should have been disregarded by the jury because he is a "known criminal" and the testimony of Drake should

have been disregarded because of the inconsistencies in his testimony.²

{¶41} Credibility, however, is generally an issue for the trier of fact to resolve. *Thomas*, 70 Ohio St.2d at 80. Here, the jury chose to believe Jones' testimony that Fayne shot him, despite his admitted membership in the Crumb Boys gang. Moreover, despite Fayne's assertion that Jones is a "known criminal," there was no evidence produced at trial indicating that Jones had any prior criminal convictions. Likewise, the jury was free to believe or disbelieve Drake's testimony. Furthermore, our review of the record indicates that there was sufficient evidence to convict Fayne on all charges even if the jury chose to completely disregard Drake's testimony.

{¶42} After reviewing the entire record, weighing the evidence and considering the credibility of the witnesses, we are not persuaded that the jury lost its way and created such a miscarriage of justice that Fayne's convictions must be reversed.

{¶43} Appellant's second assignment of error is overruled.

RIGHT TO SELF-REPRESENTATION

{¶44} In his third assignment of error, Fayne contends that he knowingly and intelligently waived his right to counsel

²Drake testified that he was incarcerated in the Cuyahoga County Jail in June 2002 with Fayne. According to Drake, while in jail, Fayne told him that he had walked up to Clinton and shot him as he [Clinton] walked out of the Dollar Store. Drake testified that Fayne never told him, however, that Clinton had a gun or shot at him first. Drake also testified that Fayne told him that he shot Edward Jones.

and, therefore, the trial court erred in refusing his request that he represent himself.

{¶45} A defendant in a state criminal trial has an independent constitutional right of self-representation and may proceed to represent himself without counsel when he voluntarily, knowingly and intelligently elects to do so. *State v. Gibson* (1976), 45 Ohio St.2d 366, paragraph one of the syllabus, citing *Faretta v. California* (1975), 422 U.S. 806. If a trial court denies the right to self-representation, when properly invoked, the denial is per se reversible error. *State v. Reed* (1996), 74 Ohio St.3d 534, citing *McKaskle v. Wiggins* (1984), 465 U.S. 168. To establish an effective waiver of the right to counsel, "the trial court must make sufficient inquiry to determine whether [the] defendant fully understands and intelligently relinquishes that right." *Gibson*, 45 Ohio St.2d 366, paragraph two of the syllabus.

{¶46} "This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused. To discharge this duty properly in light of the strong presumption against waiver of the constitutional right to counsel, a judge must investigate as long and as thoroughly as the circumstances of the case before him demand. The fact that an accused may tell him that he is informed of the right to counsel and desires to waive this right does not automatically end the judge's responsibility. To be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the

range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter." *Von Moltke v. Gillies* (1948), 332 U.S. 708, 723.

{¶47} Here, two trial judges determined that Fayne's waiver of counsel was not made knowingly or intelligently. The first trial judge assigned to the case held a hearing in March 2003. During this hearing, Fayne gave a rambling, incoherent speech about "Holodeck Law," which Fayne explained is based on the television show "Star Trek," and its similarities to the American courtroom. He also told the trial judge that American courts are "rogue courts," he was the victim of a conspiracy, his "bill of indictments" were "fraudulent and erroneous," and the laws of the State of Ohio were never passed by the legislature, but only by the bar associations. He refused to tell the trial court how far he had gone in school, and bragged that he had already fired three court-appointed attorneys on his case. He also accused his latest attorney, a well-known and respected defense lawyer, of attacking him in the holding cell.

{¶48} At the conclusion of the hearing, the trial judge referred Fayne to the court psychiatric clinic for a competency evaluation. Subsequently, the judge received a letter from George W. Schmedlen, Associate Director of the clinic. Dr. Schmedlen wrote:

{¶49} "Dear Judge ***: You re-referred Mr. Carlos Fayne to the court psychiatric clinic on March 5, 2003 for a competency

to stand trial evaluation. Mr. Fayne refused to participate in the evaluation, claiming that his 'rights would be waived.' He continued to decline to participate even after it was explained to him in detail that he would not be waiving any rights and anything he said in the context of the competency evaluation could not be used against him on the issue of guilt.

{¶50} "Mr. Fayne appeared overconfident in his understanding of the law even when it was pointed out to him that his assumptions and claims were inaccurate. He stated that the judge, prosecutor and defense counsel were all against him. He stated the court would get \$750,000 if he were convicted.

{¶51} "Although he does not appear to be actively psychotic, he evidenced a number of idiosyncratic beliefs. He stated, for instance, that it was illegal that there were no witness statements³ and that he was confident his case would be thrown out as a result. Given the defendant's unusual ideas and unwarranted confidence that he would somehow escape his legal problems, I recommend that his competency be evaluated in an inpatient unit."

{¶52} The trial judge thereafter referred Fayne for an inpatient psychiatric evaluation. Although the report regarding Fayne's in-patient evaluation is not in the record, the trial judge summarized the report as stating that Fayne could assist an

³During the March hearing, Fayne repeatedly insisted that he had not received any witness statements from the prosecutor, even though the record establishes that the prosecutor had supplied discovery to each of Fayne's three lawyers.

attorney with his defense, without stating that he was capable of representing himself. Defense counsel agreed with this characterization of the report.

{¶53} Before ruling on Fayne's request to represent himself, the first judge recused herself and the case was reassigned. The next trial judge subsequently held another hearing regarding Fayne's request to represent himself at trial. The judge denied Fayne's request, finding that although Fayne understood the charges against him and the possible punishments, he did not understand the difference between direct and cross-examination, and was improperly under the impression that he would never be allowed to lead a witness in questioning. The judge also found that Fayne did not understand the difference between direct and circumstantial evidence. Most troubling to the trial judge was Fayne's assertion that it was his obligation to prove his innocence and his erroneous impression that putting his former attorney on the stand to testify regarding their personal differences would be helpful to his defense.

{¶54} Our review of the record similarly indicates that Fayne's waiver of counsel was neither knowing nor intelligent. In addition to the concerns expressed by the judge, Fayne told the judge that he did not know why he was charged, he felt it was up to the court to help him with his defense and subpoena witnesses for him, and the prosecution had the burden of proof regarding his affirmative defense of self-defense. He also indicated that he did not understand the distinction between argument and evidence when

he objected to the prosecutor's explanation of the facts of the cases, stating, "Objection, sir. He's making allegations. We haven't even started trial, yet he's talking about I shot and killed somebody."

{¶55} We recognize that a defendant need not himself have the skill and experience of a lawyer in order to represent himself.

Faretta v. California (1975), 422 U.S. 806, 835. However, the record must establish that the defendant "knows what he is doing and his choice is made with eyes open." *Id.* Here, although Fayne knew some legal buzz words, it is apparent that he did not have a rational understanding of the proceedings and, therefore, could not knowingly and intelligently waive his right to counsel.

{¶56} Appellant's third assignment of error is overruled.

CONSOLIDATION OF INDICTMENTS FOR TRIAL

{¶57} Fayne was indicted for the attempted murder of Edward Jones in Case No. 421687; he was indicted for Robert Clinton's murder in Case No. 421497. Upon the State's motion, the cases were consolidated for trial.

{¶58} On appeal, Fayne argues that the trial court erred in consolidating the cases. Fayne contends that he was prejudiced by the consolidation because his defense in each case was different: in the case involving Edward Jones, he intended to use an alibi witness, whereas he argued self-defense regarding Clinton's murder. According to Fayne, because he admitted that he shot Clinton, albeit in self-defense, trying the cases together allowed the jury to infer that he shot Jones, even though the

evidence in that case was marginal. Therefore, Fayne argues, consolidation erroneously produced an "all or nothing" result. We disagree.

{¶59} As this court stated recently in *State v. Frazier*, Cuyahoga App. No. 83024, 2004-Ohio-1121:

{¶60} "In general, the law favors joining multiple offenses in a single trial if the offenses charged are of the same or similar character. *State v. Lott* (1990), 51 Ohio St.3d 160, 163; see, also, *State v. LaMar*, 95 Ohio St.3d 181, 191-192, 2002-Ohio-2128. Crim.R. 8(A) provides as much and permits the joinder of offenses where 'two or more offenses *** are of the same or similar character, or are based on the same act or transaction, or are based on two or more acts or transactions connected together or constituting parts of a common scheme or plan, or are part of a course of criminal conduct.' Crim.R. 13 further permits a court to 'order two or more indictments *** to be tried together, if the offenses *** could have been joined in a single indictment ***.' Consequently, joinder is appropriate where the evidence is interlocking and the jury is capable of segregating the proof required for each offense. *State v. Czajka* (1995), 101 Ohio App.3d 564, 577-578. Nonetheless, if it appears that a criminal defendant would be prejudiced by such joinder, then the trial court is required to order separate trials. Crim.R. 14."

{¶61} A defendant cannot claim prejudice from the joinder, however, if, in separate trials, the State could introduce evidence

of the joined offenses as "other acts" under Evid.R. 404(B).⁴ *Lott*, supra at 163. In addition, a defendant is not prejudiced by joinder of the offenses if the "evidence of each crime joined at trial is simple and direct." *Id.* "Where simple and direct evidence exists, an accused is not prejudiced by joinder regardless of the nonadmissibility of evidence as 'other acts' under Evid.R. 404(B)." *Id.*

{¶62} Here, the cases were based on related facts stemming from an ongoing feud between two rival gangs. Even Fayne admitted that the feud "had been going on for some time and was going to continue." Accordingly, the shooting of Edward Jones and the murder of Robert Clinton were "connected together *** constituting parts of a common scheme or plan." Crim.R. 8(A).

{¶63} Moreover, even if we were to hold that evidence of the shooting of Edward Jones on March 19 would not have been admissible in a separate trial for Clinton's murder, we are satisfied that the evidence regarding the offenses was sufficiently "simple and direct" to negate Fayne's claim of prejudicial joinder. Clinton's murder occurred two days after Jones was shot. Clinton's murder occurred in a parking lot; Jones' shooting happened in an empty field. Jones survived and testified at trial; the other victim was killed. We find it highly unlikely that the jury was confused as to which evidence was relevant to Jones' shooting and which evidence was relevant to Clinton's

⁴This rule allows the admission of "other acts" evidence for purposes other than proving that the accused has the propensity to commit the criminal acts charged.

murder. Moreover, although Fayne asserts that the cases should have been severed because he "intended" to call an alibi witness regarding the shooting of Edward Jones, he did not call any such alibi witness at trial. Thus, we fail to see how Fayne would have defended differently if the cases had been severed.

{¶64} Appellant's fourth assignment of error is therefore overruled.

Affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Common Pleas Court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

TIMOTHY E. McMONAGLE
JUDGE

FRANK D. CELEBREZZE, JR., P.J., AND
ANTHONY O. CALABRESE, JR., J., CONCUR.

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).