

[Cite as *State v. Berry*, 2004-Ohio-5485.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 83756

STATE OF OHIO

Plaintiff-Appellee :

vs.

TRACY BERRY

Defendant-Appellant :

:
:
:
:
:
:
:
:
:
:

JOURNAL ENTRY

and

OPINION

DATE OF ANNOUNCEMENT
OF DECISION:

October 14, 2004

CHARACTER OF PROCEEDING:

Criminal appeal from
Court of Common Pleas
Case No. CR-436143

JUDGMENT:

AFFIRMED

DATE OF JOURNALIZATION:

APPEARANCES:

For Plaintiff-Appellee:

WILLIAM D. MASON
Cuyahoga County Prosecutor
AMY VENESILE, Assistant
GEORGE RUKOVENA
1200 Ontario Street
Cleveland, Ohio 44113

For Defendant-Appellant:

THOMAS REIN
526 Superior Avenue, Suite 930
Cleveland, Ohio 44114

COLLEEN CONWAY COONEY, J.:

{¶ 1} Defendant-appellant Tracy Berry (“Berry”) appeals his conviction for aggravated robbery and murder. We find no merit to this appeal and affirm.

{¶ 2} Berry was charged in a four-count indictment with aggravated murder, aggravated murder while in the course of committing, or attempting to commit, aggravated robbery, aggravated murder, and murder, each with a firearm specification. The following evidence was presented at trial.

{¶ 3} On the afternoon of April 6, 2003, the 15-year-old victim was waiting for a bus at the intersection of East 131st Street and Miles Avenue when Berry confronted him. According to the testimony of DeShon Prince, who was with Berry and Damario Hammond on the day of the incident, they were driving on East 131st Street, when Berry spotted the victim at the bus stop. Berry indicated to his companions that the victim had “jumped” his younger brother. Hammond parked the car, and he and Berry exited.

{¶ 4} Berry confronted the victim, and the two “squared up” as if to fight. Hammond crept behind the victim, striking him twice in the back of the head. Prince further testified that, following Hammond’s initial punches, Berry then punched the victim several times. Following Berry’s punches, the victim fell to the ground, and Berry kicked him numerous times. After Hammond returned to the car, Berry continued to kick the victim. Prince told Berry to stop. Berry continued kicking the victim until Hammond shouted at him to “come on.” They left the victim lying in the street.

{¶ 5} Witnesses to the incident called the police, and one witness administered CPR until paramedics arrived. The victim was taken to the hospital, where he died shortly thereafter. The coroner testified that the cause of death was a “fatal cerebral concussion” and swelling of the brain

“due to blunt impacts to the head.” He explained that “one of the blows to [victim’s] head essentially short-circuited his brain.” The coroner further opined that the punch near the victim’s left eye was most likely the “fatal blow.”

{¶ 6} The police apprehended Berry and the two other men shortly after the incident and returned to the scene. Karen Barhams, who witnessed the attack, identified Berry and Hammond as the men who beat the victim. She testified at trial that Berry punched the victim in the face several times, including near his eye, and continued to punch him even after the victim attempted to cover his face. She further stated that Berry attempted to take the victim’s shoes.

{¶ 7} Barhams’ daughter was also present at the bus stop and saw the attack. She corroborated her mother’s testimony, stating that Berry punched and kicked the victim several times and tried to take off the victim’s shoes. The State presented three other witnesses, who also observed Berry attacking the victim. They also testified that Berry repeatedly kicked the victim as he lay on the ground. After the close of the State’s case, Berry moved for a Crim.R. 29 dismissal of all the charges, which the court granted as to the firearm specifications but denied as to the remaining four counts.

{¶ 8} The jury found Berry not guilty of the first two counts of the indictment but guilty of aggravated robbery and murder. At the sentencing hearing, the trial court imposed three years in prison for the aggravated robbery and fifteen years to life for the murder, to run concurrently.

{¶ 9} Berry appeals, raising four assignments of error.

{¶ 10} Sufficiency of the Evidence

{¶ 11} In his first assignment of error, Berry contends that the trial court erred by denying his Crim.R. 29 motion because there was insufficient evidence presented to convict him of aggravated robbery and murder.

{¶ 12} A challenge to the sufficiency of the evidence supporting a conviction requires a court to determine whether the State has met its burden of production at trial. *State v. Thompkins*, 78 Ohio St.3d 380, 390, 1997-Ohio-52. On review for sufficiency, courts are to assess not whether the State’s evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction. *Id.* 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.

{¶ 13} Berry was convicted of felony murder as defined in R.C. 2903.02(B), which provides in pertinent part:

{¶ 14} “(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 * * *.”

{¶ 15} Here, felonious assault was the underlying offense of violence. Felonious assault, a second degree felony, is defined by R.C. 2903.11:

{¶ 16} “(A) No person shall knowingly * * *

• * *

{¶ 17} (2) Cause or attempt to cause physical harm to another or to another’s unborn by means of a deadly weapon or dangerous ordnance.”

{¶ 18} Berry was also convicted of aggravated robbery, as defined in R.C. 2911.01:

{¶ 19} “(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:

• * *

{¶ 20} (3) Inflict, or attempt to inflict, serious physical harm on another.”

{¶ 21} Berry argues that there was insufficient evidence to convict him of murder because the State failed to prove that his actions proximately caused the death of the victim. He maintains that because the coroner was unable to identify the “fatal blow” that actually caused the victim’s death, a reasonable juror could not conclude that he caused the victim’s death.

{¶ 22} This argument, however, fails to recognize that the State presented an alternate theory at trial that Berry was an aider and abettor to Hammond’s felonious assault of the victim. Ohio’s complicity statute, R.C. 2923.03(A), provides:

{¶ 23} “(A) No person, acting with the kind of culpability required for the commission of an offense, shall * * *

{¶ 24} {tc \11 ““(A) No person, acting with the kind of culpability required for the commission of an offense, shall * * *}

{¶ 25} (2) Aid or abet another in committing the offense;

• * *

{¶ 26} (F) Whoever violates this section is guilty of complicity in the commission of an offense, and shall be prosecuted and punished as if he were a principal offender. A charge of complicity may be stated in terms of this section, or in terms of the principal offense.”

{¶ 27} Thus, regardless of who actually delivered the “fatal blow,” the jury could have found Berry guilty of murder if there was evidence he “aided and abetted” Hammond. Here, the record is replete with evidence that Berry and Hammond brutally attacked the victim. Several witnesses testified that Berry repeatedly punched the victim in the face and kicked him numerous times as the victim lay on the ground. Construing this evidence in a light most favorable to the prosecution, we cannot say that the trial court erred by denying Berry’s motion for acquittal.

{¶ 28} Furthermore, we find that there was sufficient evidence presented to convict Berry of aggravated robbery. Contrary to Berry’s assertion, two witnesses testified that Berry attempted to remove the victim’s shoes prior to leaving the scene.

{¶ 29} Accordingly, Berry’s first assignment of error is overruled.

{¶ 30} Manifest Weight of the Evidence

{¶ 31} In his second assignment of error, Berry argues that his conviction is against the manifest weight of the evidence.

{¶ 32} In evaluating a challenge to the verdict based on manifest weight of the evidence, a court sits as the thirteenth juror and intrudes its judgment into proceedings which it finds to be fatally flawed through misrepresentation or misapplication of the evidence by a jury which has “lost its way.” *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52. As the Ohio Supreme Court declared:

{¶ 33} “Weight of the evidence concerns ‘the inclination of the greater amount of credible evidence offered in a trial, to support one side of the issue rather than the other. It indicates clearly to the jury that the party having the burden of proof will be entitled to their verdict, if, on weighing the evidence in their minds, they shall find the greater amount of credible evidence sustains the issue which is to be established before them. Weight is not a question of mathematics, but depends on its effect in inducing belief.’ * * *

{¶ 34} 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.” Id. at 387.

{¶ 35} Berry contends that his murder conviction is unsupported by the evidence because the State failed to prove that he intended to cause the victim’s death. However, under the felony murder statute, a defendant may be found guilty of murder even if he did not “intend” to cause the victim’s death. *State v. Miller*, 96 Ohio St.3d 384, 2002-Ohio-4931, ¶ 31-34. Rather, the critical issue is whether the defendant had the requisite culpable mental state to support a conviction for the underlying felony offense. Id. See, also, *State v. Irwin*, Hocking App. No. 03CA13,03CA14, 2004-Ohio-1129.

{¶ 36} As stated above, felonious assault was the underlying offense supporting the felony murder charge. To sustain a conviction for felony murder, the jury had to find that Berry “knowingly” caused physical harm to the victim. As the Ohio Supreme Court explained in *Miller*, “a person acts *knowingly, regardless of purpose*, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature.” *Miller*, supra, at ¶31 (emphasis in original). In the instant case, the evidence overwhelmingly demonstrated that Berry knowingly caused physical harm to the victim. Berry repeatedly punched and kicked the victim, even after the victim was lying on the ground and trying to protect himself. Accordingly, we cannot say that Berry’s murder conviction constitutes a “manifest miscarriage of justice.”

{¶ 37} Further, we find that the aggravated robbery conviction is supported by the evidence. Contrary to Berry’s assertion, we find no evidence that the jury acted out of passion due to the brutal beating of the victim. To the contrary, substantial credible evidence existed proving each element of the offense. Here, two eyewitnesses testified that Berry attempted to take the victim’s shoes. Based on this testimony alone, we cannot say that the jury clearly “lost its way” by finding Berry guilty.

{¶ 38} Berry’s second assignment of error is overruled.

{¶ 39} Jury Instructions

{¶ 40} Berry contends in his third assignment of error that the trial court erred by providing a “flight” instruction because it placed an unfair burden on him to testify and explain his flight. However, Berry never objected to the jury instruction. “Failure to object to a jury instruction constitutes a waiver of any claim of error relative thereto, unless, but for the error, the outcome of the trial clearly would have been otherwise.” *State v. Underwood* (1983), 3 Ohio St.3d 12, syllabus. See, also, *State v. Williford* (1990), 49 Ohio St.3d 247, 251.

{¶ 41} We find no error, plain or otherwise, in the trial court’s instruction. Here, the trial court provided the following instruction pertaining to “flight”:

{¶ 42} “* * * in this case there may be – there may be evidence tending to indicate that the defendant, Tracy Berry, fled from the vicinity of the alleged crime. In this connection you’re instructed that flight in and of itself does not raise a presumption of guilt, but it may show consciousness of guilt or a guilty connection with the crime. If, therefore, you find the defendant did flee from the scene of the alleged crimes, you may consider the circumstances in the case in determining the guilt or innocence of the defendant.”

{¶ 43} Berry contends that this instruction constituted a violation of his constitutional right not to testify because it essentially placed a burden on him to explain why he fled the scene. In support of this argument, he relies on *State v. Fields* (1973), 35 Ohio App.2d 140, and this court’s decisions in *State v. Williams* (Dec. 17, 1992), Cuyahoga App. No. 61262 and *State v. Harris* (Apr. 10, 1986), Cuyahoga App. No. 50117. We find these cases clearly distinguishable.

{¶ 44} First, the instruction provided in *Fields* was materially different from the instruction in the instant case. In *Fields*, the trial court instructed the jury that “flight in and of itself does not raise a presumption of guilt, but unless satisfactorily explained * * *.” The trial court further instructed the jury that it could consider defendant’s flight as evidence of guilt if the defendant failed to satisfactorily explain his conduct. Because such language requires a defendant to “satisfactorily explain” the reason for his flight, the appellate court held that the instruction violated the defendant’s constitutional right to remain silent. In contrast, the instruction given in the instant case did not contain the same impermissible language nor did it imply that the defendant had any duty to explain his flight.

{¶ 45} Moreover, in *Williams* and *Harris*, this court followed the holding in *Fields* because the jury instructions in those cases were similar to the one given in *Fields*. This court reiterated that an instruction requiring a defendant to “satisfactorily explain” his flight violated the defendant’s

constitutional right not to testify. Unlike these cases, the trial court herein did not use language in its instruction to suggest that Berry must explain his flight. Further, the court clearly instructed the jury that Berry was not required to testify and that his silence was not to be used against him. Accordingly, we find that the jury instruction did not violate Berry's constitutional right. See *State v. Pitts* (Sept. 30, 1997), Lucas App. No. L-96-259.

{¶ 46} Accordingly, we overrule Berry's third assignment of error.

{¶ 47} In his final assignment of error, Berry argues that the trial court denied him a fair trial by refusing to instruct the jury on the lesser included offense of reckless homicide.

{¶ 48} Berry correctly asserts that reckless homicide is a lesser included offense of murder as defined in R.C. 2903.02(B). See *State v. Day*, Cuyahoga App. No. 83138, 2004-Ohio-1449, citing *State v. Jones*, Cuyahoga App. No. 80737, 2002-Ohio-6045, ¶9. However, "an instruction on a lesser included offense is warranted only if the jury could reasonably conclude that the evidence supported the lesser charge and did not support the greater charge." *Id.*, citing *State v. Kidder* (1987), 32 Ohio St.3d 279. The evidence in the instant case showed that Berry repeatedly punched and kicked the victim. It further demonstrated that Berry continued to beat the victim even after Prince told him to stop. Finally, after beating and kicking the victim, Berry left him lying in the street. Based on this evidence, the jury could not reasonably conclude that the evidence supported a conviction for reckless homicide and not murder.

{¶ 49} Accordingly, Berry's final assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover of appellant its 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 Cuyahoga County Court of Common Pleas 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.

PATRICIA ANN BLACKMON, P.J. and

SEAN C. GALLAGHER, J. CONCUR

JUDGE

COLLEEN CONWAY COONEY

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).