

[Cite as *State v. Bishop*, 2007-Ohio-6197.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 89184

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

RAYNARD BISHOP

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-480393

BEFORE: Kilbane, J., Celebrezze, A.J., and Rocco, J.

RELEASED: November 21, 2007

JOURNALIZED:

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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).

[Cite as *State v. Bishop*, 2007-Ohio-6197.]
MARY EILEEN KILBANE, J.:

{¶ 1} On February 1, 2006, Cleveland Police arrested defendant-appellant Raynard Bishop (“Bishop”) and two codefendants. In the Cuyahoga County Juvenile Court, Bishop, born July 28, 1988, faced charges of delinquency on two complaints alleging that he (1) purposely caused the death of Frederick Smith while attempting to commit and/or after committing aggravated robbery while in possession of a weapon and (2) for aggravated robbery while in possession of a deadly weapon.

{¶ 2} On April 5, 2006, the juvenile court conducted a hearing on the State’s Juv.R. 30 motion for relinquishment of jurisdiction, and probable cause was found to bind over Bishop.

{¶ 3} On May 3, 2006, a Cuyahoga County Grand Jury returned an indictment charging Bishop with two counts of aggravated murder and two counts of aggravated robbery. A one-year firearm specification and three-year firearm specification attached to each count of aggravated murder and aggravated robbery.

{¶ 4} On June 16, 2006, Bishop waived his speedy trial right from June 16, 2006 to September 30, 2006. On October 18, 2006, Bishop filed a motion to dismiss for violation of his right to a speedy trial, which was denied on October 24, 2006.

{¶ 5} On November 15, 2006, the case proceeded to a jury trial. Bishop was acquitted on one count of aggravated murder, found not guilty of aggravated murder

but guilty of the lesser included offense of murder, guilty of one count of aggravated robbery, and not guilty of the firearm specifications.

{¶ 6} On November 27, 2006, the court sentenced Bishop to fifteen years to life on the murder charge, to be served concurrent to ten years for aggravated robbery.

{¶ 7} The facts giving rise to the instant case occurred on January 31, 2006, in which the victim, Frederick Smith (“Smith”) was robbed at gunpoint and then murdered just outside of his home, located at 485/487 East 127th Street in Cleveland, Ohio.

{¶ 8} Codefendant Mark Peterson (“Peterson”) testified that a couple of days prior to the incident, he and Bishop were standing on a street corner when Smith walked by and flaunted his cash. Peterson and Bishop then began discussing the possibility of robbing Smith.

{¶ 9} Nafeesa Salters, Smith’s girlfriend, testified that Bishop came to her home that she shared with Smith at approximately 10:30 a.m. on January 31, 2006, looking for Smith. Bishop returned to their home a second time at approximately 2:00 p.m.

{¶ 10} Later that day, Bishop called Peterson to tell him that Leonard Humphrey (“Humphrey”), also a codefendant, would participate in robbing Smith and that he should meet them immediately. Around 7:30 p.m., Bishop went back to

Smith's home and spoke with Smith outside for about one-half hour. Bishop and Smith were not close friends but knew each other from the neighborhood.

{¶ 11} While conversing, Humphrey approached Smith and Bishop with a firearm and proceeded to rob Smith and pretended to rob Bishop. Bishop threw fifteen dollars on the ground and ran away. Humphrey shot Smith in the leg and then shot him at close range in the temple, killing him. Peterson acted as a lookout further up the street. Bishop, Peterson, and Humphrey ran from the scene.

{¶ 12} Salters received a phone call from a neighbor who heard gun shots. Salters went outside but couldn't see anything. Salters went inside, retrieved a flashlight and proceeded to the back yard with a neighbor. Salters and the neighbor found Smith shot and not breathing.

{¶ 13} Bishop and Peterson returned to the scene shortly after. A crowd gathered, and the police, fire department, and an ambulance were present. Bishop identified himself to police as a victim of the robbery.

{¶ 14} Bishop, in the presence of his mother, wrote his first statement as though he were a victim to the robbery. Bishop, again in the presence of his mother, wrote his second statement confessing to his participation in Smith's robbery.

{¶ 15} Bishop appeals, raising six assignments of error.

{¶ 16} ASSIGNMENT OF ERROR NUMBER ONE

"The juvenile division of the common pleas court improperly relinquished jurisdiction over the charges against the juvenile appellant

where probable cause was not established and therefore the general division of common pleas court lacked jurisdiction over the juvenile appellant.”

{¶ 17} Bishop argues that the juvenile court erred in granting the State’s Juv.R. 30 motion to transfer jurisdiction to the General Division of the Common Pleas Court for criminal prosecution. We disagree.

{¶ 18} The standard upon which a juvenile may be tried as an adult in a criminal proceeding is set forth in R.C. 2152.12 and Juv.R. 30. Juv.R. 30(B) mandates transfer, “[i]n any proceeding in which transfer of a case for criminal prosecution is required by statute upon a finding of probable cause, the order of transfer shall be entered upon a finding of probable cause.”

{¶ 19} R.C. 2152.10(A)(1)(a) sets forth the criteria for mandatory or discretionary bindover:

“(A) A child who is alleged to be a delinquent child is eligible for mandatory transfer and shall be transferred as provided in section 2152.12 of the Revised Code in any of the following circumstances:

“(1) The child is charged with a category one offense and ***:

“(a) The child was sixteen years of age or older at the time of the act charged.”

{¶ 20} The complaint filed in Juvenile Court alleged that Bishop purposely caused the death of Smith while attempting to commit and/or after committing aggravated robbery while in possession of a weapon, and for aggravated robbery

while in possession of a deadly weapon. Bishop was seventeen years old on the date of the crimes at issue in this case. Therefore, pursuant to R.C. 2152.10, Bishop is eligible for mandatory transfer to the General Division of the Court of Common Pleas for criminal prosecution.

{¶ 21} Additionally, mandatory bindover occurs upon satisfaction of the following:

“After a complaint has been filed alleging that a child is a delinquent child for committing an act that would be aggravated murder *** if committed by an adult, the juvenile court at a hearing shall transfer the case if the child was sixteen or seventeen years of age at the time of the act charged and there is probable cause to believe that the child committed the act charged.” R.C. 2152.12(A)(1)(a).

{¶ 22} In applying the law to the facts of this case, we already determined that Bishop was seventeen years old on January 31, 2006.

{¶ 23} Next, we review for probable cause as to whether or not Bishop committed an act that if committed by an adult would be aggravated murder. “[A] juvenile court at a bindover hearing need not ‘find as fact that the accused minor is guilty of the offense charged. It simply finds the existence of probable cause to so believe.’” *State v. Iacona*, 93 Ohio St.3d 83, 2001-Ohio-1292, quoting, *State v. Whiteside*, 3rd Dist. No. 1-81-32, 6 Ohio. App.3d 30. The *Iacona* court further held:

“[T]he state must provide credible evidence of every element of an offense to support a finding that probable cause exists to believe that the juvenile committed the offense before ordering mandatory waiver of juvenile court jurisdiction pursuant to R.C. 2151.26(B) [currently R.C. 2152.10(A)]. *** In meeting this standard the state must produce evidence that raises more than a mere suspicion of guilt, but need not provide evidence proving guilt beyond a reasonable doubt.

Accordingly, in determining the existence of probable cause the juvenile court must evaluate the quality of the evidence presented by the state in support of probable cause as well as any evidence presented by the respondent that attacks probable cause.”

{¶ 24} Aggravated murder as set forth in R.C. 2903.01(B) states: “No person shall purposely cause the death of another *** while committing or attempting to commit *** aggravated robbery ***.” Aggravated robbery, as charged, reads:

“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 *** 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 **** .” R.C. 2911.01(A)(1).

{¶ 25} Cleveland Police Officer Harry Matlock (“Matlock”) testified at the bindover hearing that Peterson provided police with a written statement. Peterson’s statement implicated Bishop in the robbery and murder of Smith. Matlock further testified that neighbor Antoine Powell (“Powell”) and Salters corroborated various portions of Peterson’s statement and Bishop’s second statement corroborated much of the same.

{¶ 26} Specifically, the evidence revealed that Bishop and his codefendants, Peterson and Humphrey, agreed to commit theft by stealing money from Smith. Bishop and his codefendants committed the theft offense by using a firearm. Lastly, while committing the act of aggravated robbery, Humphrey shot and killed Smith at point blank range. Therefore, we find the existence of probable cause as required

pursuant to R.C. 2152.12(A)(1)(a). Further we find that the juvenile court did not improperly relinquish jurisdiction over the charges against Bishop.

{¶ 27} Bishop argues that pursuant to *State v. Hanning* (1999), 10th Dist. No. 98AP-380, 1999 Ohio App. LEXIS 400, the trial court erred in finding Bishop subject to mandatory bindover regarding his aggravated robbery charge. However, Bishop's argument fails in two respects: first, R.C. 2152.12 mandates that the juvenile court "transfer the case" upon satisfaction of R.C. 2152.12(A)(1)(a), not merely the sole charge of aggravated murder; second, the Ohio Supreme Court held in *Agee v. Russell, Warden*, 92 Ohio St.3d 540, 2001 Ohio-1279, that *Hanning* does not apply to mandatory bindover cases under former section R.C. 2151.26(B)(3) (currently R.C. 2152.10(A)(1)(a)), but applies solely to R.C. 2151.26(B)(4)(b) (currently R.C. 2152.10(A)(2)(b)). As our analysis demonstrates, Bishop is subject to mandatory bindover under R.C. 2152.10(A)(1)(a) and R.C. 2152.12(A)(1), and thus, *Hanning* is inapplicable to the case at bar.

{¶ 28} Bishop's first assignment of error is overruled.

{¶ 29} ASSIGNMENT OF ERROR NUMBER TWO

"The trial court erred by denying appellant's motion to suppress statements."

{¶ 30} Bishop contends that the trial court erred when it denied his motion to suppress the statements he provided to police because they were involuntarily given. We disagree.

{¶ 31} The standard of review regarding motions to suppress is set forth by the Ohio Supreme Court as follows:

“Appellate review of a motion to suppress presents a mixed question of law and fact. When considering a motion to suppress, the trial court assumes the role of trier of fact and is therefore in the best position to resolve factual questions and evaluate the credibility of witnesses. Consequently, an appellate court must accept the trial court’s findings of fact if they are supported by competent, credible evidence.

Accepting these facts as true, the appellate court must then independently determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard.”

State v. Burnside (2003), 100 Ohio St.3d 152. (Internal citations omitted.)

{¶ 32} We must thus consider whether the facts of this case comply with *Miranda v. Arizona* (1966), 384 U.S. 436 under a de novo review.

{¶ 33} A thorough review of the record reveals competent, credible evidence supporting the trial court’s determination that Bishop was provided with the requisite *Miranda* warnings. Bishop approached police at the scene on his own volition and identified himself as a victim of the robbery under investigation. (Tr. 384.) Officer Combs separated Bishop from everyone else for his safety and protection as a crime victim. (Tr. 385-87.) Bishop called his mother in the presence of Officer Sowa, at the scene of the crime. (Tr. 464.) Police, pursuant to procedure, took Bishop to the station to allow Bishop to make a victim statement. (Tr. 465.) Police also spoke with Bishop’s mother prior to transport. (Tr. 465.) At 11:45 p.m., Bishop, in the presence

of his mother, made his victim statement. (Tr. 466, 468.) There are no facts that demonstrate he was not free to leave or that he was restrained at any time leading up to his victim statement.

{¶ 34} Police did not suspect that Bishop was anything other than a victim of the crime until Bishop and his mother were reviewing his initial statement. (Tr. 474-75.) During this time, police received Peterson's statement implicating Bishop in commission of the crimes. Thereafter, Officer Sowa was present as Bishop was recited his *Miranda* rights. (Tr. 476.) Officer Sowa testified:

“He was told that he had the right to remain silent, that anything he said could and would be used against him in a court of law. He had a right to have an attorney present during any questions and if he could not afford one, one would be appointed free of charge. He was then asked if he understood those rights and he stated yes, he did. He was then asked if he wanted to make a statement, he answered in the affirmative that yes, he did.”

{¶ 35} The police informed him that he was being placed under arrest for aggravated murder and aggravated robbery. (Tr. 477.) Bishop's mother was present the entire time. (Tr. 477.) Bishop's second statement is dated February 1, 2006, at 3:40 a.m., and states the following: “you may/will be charged with: Murder[.]” Bishop's second statement also read, in part:

“Before making any statement that may be used against you at the time of your trial, we wish to repeat the instructions issued prior to oral interrogation, that you have the right to remain silent, and that anything you say may be used against you. You have the right to have an attorney present while making this statement. Do you understand your rights as stated above? A.: [Yes] Q. Do you care to make any written statement? A.: [Yes]”

{¶ 36} Thus, it cannot be said that Bishop’s second statement was involuntarily induced. We find that the trial court did not err in denying Bishop’s motion to suppress.

{¶ 37} Bishop’s second assignment of error is overruled.

ASSIGNMENT OF ERROR NUMBER THREE

“The trial court erred by denying appellant’s motion to dismiss for want of speedy trial.”

{¶ 38} Bishop argues that the trial court erred by denying his motion to dismiss for violation of his speedy trial rights. We disagree.

{¶ 39} The Sixth Amendment of the United States Constitution and Section 10, Article I of the Ohio Constitution guarantee an accused the right to a speedy and public trial. The standard of review that appellate courts apply to speedy trial issues is to count days as set forth in R.C. 2945.71. *State v. Stevens*, Cuyahoga App. No. 87693, 2006-Ohio-5914.

{¶ 40} Trial must be held within 270 days of arrest in order to effectuate a speedy trial. See R.C. 2945.71(C). However, each day spent in jail acts as 3 days towards speedy trial time, thus 90 days time. See R.C. 2945.71(E). Extensions may be granted against speedy trial time upon, “the accused’s own motion, and the period of any reasonable continuance granted other than upon the accused’s own motion ***.” R.C. 2945.72(H).

{¶ 41} Bishop must first establish a prima facie case for violation of his speedy trial rights. *State v. Craig*, Cuyahoga App. No. 88039, 2007-Ohio-1834. The State then has the burden to establish events that toll Bishop's speedy trial time. *Id.*

{¶ 42} Applying the law to the facts in this case, we find that Bishop fails to make a prima facie case for the violation of his speedy trial rights. The speedy trial days set forth in R.C. 2945.71 begin to run when jurisdiction is transferred from juvenile court to the general division of the Common Pleas Court; namely, April 5, 2006, in the instant case. *State ex rel. Williams v. Court of Common Pleas* (1975), 42 Ohio St.2d 433. Thus, Bishop's speedy trial time began to run on April 6, 2006, and continued until June 16, 2006, constituting 62 days of his 90 days speedy trial time.

{¶ 43} On June 16, 2006, Bishop signed his speedy trial waiver, effective through September 30, 2006, thus tolling his speedy trial time. See R.C. 2945.72(H).

Thereafter, all six continuances were at defense counsel's request through November 13, 2006, also tolling Bishop's speedy trial time. See R.C. 2945.72(H). Lastly, trial did not commence until November 15, 2006, without any explanation. Where there exists ambiguity, the record is construed in favor of the accused. *Stevens*, *supra*. Therefore, two more days of Bishop's speedy trial time ran from November 13, 2006 until November 15, 2006, thus totaling 64 speedy trial days.

{¶ 44} Thus, in reviewing the facts and in calculating Bishop’s speedy trial time, we find that Bishop was brought to trial within the statutorily prescribed speedy trial time.

ASSIGNMENT OF ERROR NUMBER FOUR

“The trial court erred by instructing the jury on the lesser included offense of murder pursuant to R.C. 2903.02(B) and denying appellant’s request that the jury be instructed on the lesser included offense of involuntary manslaughter.”

{¶ 45} Bishop argues that the trial court erred when it failed to include a jury instruction on the lesser included offense of involuntary manslaughter. We disagree.

{¶ 46} Involuntary manslaughter, as set forth in R.C. 2903.04, is a lesser included offense of aggravated murder, R.C. 2903.01(A). *State v. Thomas* (1988), 40 Ohio St.3d 213. Even where a lesser included offense is established, a jury instruction on a lesser included offense is warranted only when the evidence adduced at trial supports it. *Id.*

“[A] charge on the lesser included offense is required only where the evidence presented at trial would reasonably support both an acquittal on the crime charged and a conviction upon the lesser included offense. Resultingly, an instruction on the lesser included offense of involuntary manslaughter will be given in a murder trial only when on the evidence presented, the jury could reasonably find against the state on the element of purposefulness and still find for the state on the defendant’s act of killing another.” *Id.*

{¶ 47} The requisite mental state for aggravated murder and murder is to “purposely” cause the death of another. See R.C. 2903.01; R.C. 2903.02. “A

person acts purposely when it is his specific intention to cause a certain result ***.”

R.C. 2901.22(A).

“Intent need not be proven by direct testimony. Purpose or intent can be established by circumstantial evidence. An intent to kill may be inferred ‘where the natural and probable consequence of a wrongful act is to produce death.’ Intent is not easily proven by direct evidence but is usually proven by reference to the surrounding facts and circumstances. Those surrounding facts and circumstances include the nature of the instrument used, its tendency to end life if designed for that purpose, and the manner in which any wounds were inflicted. A jury can infer intent to kill by the defendant’s use of a firearm, an inherently dangerous instrumentality, the use of which is likely to produce death.” (Internal citations omitted). *State v. Mackey*, Cuyahoga App. No. 75300, 1999 Ohio App. LEXIS 5902.

{¶ 48} The State’s theory of the case was that Bishop acted with complicity or as an aider and abettor in the crimes charged. The jury charge read, in part:

“An aider an abettor is when two or more persons have a common purpose to commit a crime and when one does one part and the other person performs the other part.

As to an aider and abettor only, the mere fact that a person is present when a criminal act is committed does not make him an aider and abettor unless he does some overt act in furtherance of the offenses charged in the indictment.

When two or more persons have a common purpose to commit a crime and one does one part and the second performs another, those acting together are equally guilty of that crime.”

{¶ 49} A review of circumstantial evidence reveals the following. Bishop acted as an aider and abettor in the instant case. Bishop, Humphrey and Peterson shared a common purpose to commit a robbery against Smith. Bishop went to Smith’s house three times on January 31, 2006. The third time Bishop arrived at Smith’s

house, Bishop led Smith outside where Humphrey could execute their planned robbery. Humphrey used a firearm during the commission of the planned robbery, an inherently dangerous instrumentality, designed for the purpose of ending life. Humphrey first shot Smith in the leg. Humphrey then shot Smith at point blank range in the temple, killing him.

{¶ 50} Thus, it cannot be said that the jury could reasonably find against the State on the element of purposefulness and still find for the State on Bishop's act of killing another.

{¶ 51} Bishop's fourth assignment of error is overruled.

ASSIGNMENT OF ERROR NUMBER FIVE

"The trial court erred when it denied defendant's motion for acquittal under Crim.R. 29 because the State failed to present sufficient evidence."

{¶ 52} Bishop argues that the trial court erred by denying his Crim.R. 29 motion for acquittal. We disagree.

{¶ 53} Crim.R. 29(A), which governs motions for acquittal, states:

"The court on motion of a defendant or on its own motion, after the evidence on either side is closed, shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment, information, or complaint, if the evidence is insufficient to sustain a conviction of such offense or offenses."

{¶ 54} Furthermore, in reviewing the sufficiency of the evidence, this court held:

"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. In reviewing 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. 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. The motion 'should be granted only where reasonable minds could not fail to find reasonable doubt.'" *State v. McDuffie*, Cuyahoga App. No. 88662, 2007-Ohio-3421. (Internal citations omitted.)

{¶ 55} The trial court granted Bishop's Crim.R. 29 motion for acquittal regarding the first count for aggravated murder pursuant to R.C. 2903.01(A) and denied the remainder of the motion.

{¶ 56} Bishop argues that there lacked sufficient evidence of purposefulness to satisfy aggravated murder under R.C. 2903.01(B): "No person shall purposely cause the death of another *** while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit *** aggravated robbery ***."

{¶ 57} As we already stated, "[a] person acts purposely when it is his specific intention to cause a certain result ***." R.C. 2901.22(A). "Intent can be established by circumstantial evidence." *State v. Carter*, Cuyahoga App. No. 87705, 2006-Ohio-6427.

"Those surrounding facts and circumstances include the nature of the instrument used, its tendency to end life if designed for that purpose, and the manner in which any wounds were inflicted. A jury can infer intent to kill by the defendant's use of a firearm, an inherently dangerous instrumentality, the use of which is likely to produce death." *Mackey*, supra. (Internal citations omitted.)

{¶ 58} In the instant case, the evidence does not show that Bishop used a firearm while participating in the robbery. However, those who aid and abet in the commission of a crime “shall be prosecuted and punished as if he were a principal offender.” R.C. 2923.03(F).

{¶ 59} A review of the evidence reveals the following: Bishop, Humphrey and Peterson planned a robbery against Smith; Bishop went to Smith’s house three times on January 31, 2006; that evening, Bishop lured Smith out of his home and onto the sidewalk where he knew Humphrey would approach and conduct a robbery against Smith for the group; Humphrey used a firearm, an inherently dangerous instrumentality to execute the robbery; after Bishop and Smith threw their money to the ground, Humphrey shot Smith in the leg, and then a second time at close range, in the temple, an act very likely to produce death. Although Bishop did not shoot Smith twice, Bishop must be prosecuted and punished as if he were the principal offender, namely, Humphrey. As such, in viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could find the essential element of purposefulness beyond a reasonable doubt.

{¶ 60} Furthermore, Bishop argues that there lacks sufficient evidence of aggravated robbery, as set forth in count four of the indictment. As charged: “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 *** [i]nflict, or attempt to inflict, serious physical harm on another.” R.C. 2911.01(A).

{¶ 61} Regarding theft, the evidence shows that Bishop, Humphrey and Peterson agreed to commit a theft offense against Smith, namely, purposely depriving Smith of his cash by exerting control over the cash without Smith's consent. See R.C. 2913.02. Additionally, Humphrey inflicted serious physical harm upon Smith by shooting him in the leg and in the temple. In light of the complicity statute, R.C. 2923.03(F), Bishop must be prosecuted and punished as if he were Humphrey. Therefore, in viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could find the essential elements of aggravated robbery beyond a reasonable doubt.

{¶ 62} Bishop's fifth assignment of error is overruled.

ASSIGNMENT OF ERROR NUMBER SIX

"The convictions of murder and aggravated robbery are contrary to the manifest weight of the evidence."

{¶ 63} Bishop argues that his convictions for murder and aggravated robbery are against the manifest weight of the evidence. We disagree.

{¶ 64} In evaluating a claim that the verdict is against the manifest weight of the evidence, the Ohio Supreme Court set forth the following standard of review:

"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." *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52.

{¶ 65} First, “No person shall purposely cause the death of another ***.” R.C. 2903.02(A).

{¶ 66} Second, “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 *** [i]nflict, or attempt to inflict, serious physical harm on another.”

{¶ 67} Bishop argues that the quality of evidence against him was poor and unreliable, specifically: Peterson’s testimony is totally unreliable, that eyewitness Powell did not see Bishop at the scene of the crime, that Bishop did not use a gun, and lastly, that he lacked intent to kill and the intent to inflict serious physical harm.

{¶ 68} Although Peterson may have had credibility issues, “this court must be mindful that the weight of the evidence and the credibility of the witnesses are matters primarily for the trier of fact, and a reviewing court must not reverse a verdict where the trier of fact could reasonably conclude from substantial evidence that the State has proven the offense beyond a reasonable doubt.” *State v. Turner*, Cuyahoga App. No. 86916, 2006-Ohio-4098. Regardless of Peterson’s credibility, we still find that the verdict is not against the manifest weight of the evidence in light of Bishop’s own written statements to police and all other testifying witnesses.

{¶ 69} Although Bishop argues that Powell did not see him at the scene of the crime, Powell’s testimony does not give rise to the verdict being against the manifest weight of the evidence. For example, Salters testified that Smith was outside with

Bishop just moments before the shooting, thus placing Bishop at or near the scene of the crime.

{¶ 70} Having already applied the law to the facts of the case pertaining to purposefulness, we find that Bishop's verdict is not against the manifest weight of the evidence, particularly in light of Ohio's complicity statute set forth in R.C. 2923.03.

{¶ 71} Thus, in reviewing the entire record, in weighing all evidence and reasonable inferences, in considering the credibility of witnesses and in resolving conflicts in the evidence, we do not find that the jury clearly lost its way and created a manifest miscarriage of justice.

{¶ 72} Bishop's sixth assignment of error is overruled.

Judgment 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.

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

MARY EILEEN KILBANE, JUDGE

FRANK D. CELEBREZZE, JR., A.J., AND
KENNETH A. ROCCO, J., CONCUR