

[Cite as *State v. Goldsmith*, 2008-Ohio-5990.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 90617

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ANTONIO GOLDSMITH

DEFENDANT-APPELLANT

JUDGMENT:
CONVICTION AFFIRMED; SENTENCE VACATED AND
REMANDED FOR RESENTENCING

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-490295

BEFORE: Kilbane, P.J., Blackmon, J., and Stewart, J.

RELEASED: November 20, 2008

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).

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MARY EILEEN KILBANE, P.J.:

{¶ 1} Defendant-appellant, Antonio Goldsmith (Goldsmith), appeals his conviction for murder. After reviewing the parties' arguments and pertinent case law, we affirm Goldsmith's conviction, vacate his sentence and remand for merger of the allied offenses.

{¶ 2} On December 21, 2006, a Cuyahoga County Grand Jury indicted Goldsmith with the following: one count of aggravated murder, one count of felony murder, and two counts of felonious assault. Each count included a three-year firearm specification.

{¶ 3} The facts giving rise to the instant case occurred on November 30, 2006, at Sam's Deli, located at 1241 Hayden Avenue, East Cleveland, Ohio. At approximately 7:35 p.m., Goldsmith drove a black 1991 Nissan Maxima into the parking lot of Sam's Deli. His friend, Derrick Boykins (Boykins) sat in the front passenger's seat.

{¶ 4} Goldsmith parked to the left of a 1999 Chevy Malibu. Jernel Walker (Walker) sat in the driver's seat of the Malibu, and his friend, Robert Thomas (Thomas), sat in the front passenger's seat. Goldsmith, Boykins, Walker and Thomas all knew each other.

{¶ 5} Goldsmith approached Walker, whose car window was rolled down. Boykins remained seated in the Maxima. Goldsmith took Walker's cellular phone from him. Walker got out of the car, and the parties exchanged words. Walker retrieved his cellular phone and got back inside of his Malibu. Goldsmith noticed that Walker had a bottle of Hennessy and he asked for some. Walker refused. Goldsmith then showed Walker his firearm, asked Walker if he wanted to die, and told him to leave the parking lot. Goldsmith then proceeded inside Sam's Deli and Walker closed the driver's side window.

{¶ 6} Shortly thereafter, Goldsmith came out of Sam's Deli and got into the driver's seat of the Maxima. Goldsmith pulled out a gun with his gloved hand and pointed it across the passenger's seat in which Boykins was sitting. Goldsmith shot four rounds at Walker, killing him. One bullet struck the driver's side door, one bullet struck Walker's shoulder, and two bullets struck Walker in the head. Boykins saw Goldsmith's gloved hand reach across his seat and then he saw sparks fly. Thomas saw gunshots come from Goldsmith's location and quickly ducked out of the Malibu to avoid being shot.

{¶ 7} On September 26, 2007, the case proceeded to a jury trial. On October 3, 2007, the jury returned the following verdict: not guilty of aggravated murder, however, guilty of the lesser included offense of murder; guilty of felony murder; and lastly, guilty of both counts of felonious assault. The jury also found Goldsmith guilty of the attached three-year firearm specifications.

{¶ 8} Also on October 3, 2007, the trial court sentenced Goldsmith to eighteen years to life in prison as follows: the trial court merged the three-year firearm specifications for sentencing to be served prior and consecutive to the balance of the sentence; fifteen years to life imprisonment for murder; fifteen years to life imprisonment for felony murder; and eight years of imprisonment for each count of felonious assault, to be served concurrently.

{¶ 9} Goldsmith appeals, asserting one assignment of error for our review.

ASSIGNMENT OF ERROR

“Appellant's conviction was against the manifest weight of the evidence.”

{¶ 10} Goldsmith argues that the verdict is against the manifest weight of the evidence.

{¶ 11} The Ohio Supreme Court set forth the following standard for evaluating a claim that a verdict is against the manifest weight of the evidence:

“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.

{¶ 12} Goldsmith was convicted of murder as set forth in R.C. 2903.02(A): “No person shall purposely cause the death of another ***.”

{¶ 13} Pertaining to the mens rea for murder under R.C. 2903.02(A), "purposely" is defined as:

“A person acts purposely when it is his specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature." R.C. 2901.22(A).

{¶ 14} "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." *State v. Mackey* (Dec. 9, 1999), Cuyahoga App. No. 75300. (Internal citations omitted.)

{¶ 15} In applying the law to the facts of this case, it is clear that Goldsmith purposely caused Walker's death. As Goldsmith walked into Sam's Deli, he showed Walker his gun, asked him if he wanted to die, and told Walker to leave the parking lot. (Tr. 724, 769, 893.) When Goldsmith exited the store, he shot Walker three times at close range, killing him. (Tr. 547-548, 642, 727, 771.)

{¶ 16} Thus, Goldsmith possessed a firearm when he committed murder on November 30, 2006. A firearm is an inherently dangerous instrumentality, the use of which is likely to produce death.

{¶ 17} Goldsmith was also convicted of felony murder as set forth in R.C. 2903.02(B), which reads:

"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."

{¶ 18} The Supreme Court of Ohio has held that:

"Felony murder as defined in R.C. 2903.02(B), with the underlying offense of violence being felonious assault, is supported by evidence that establishes that the defendant knowingly caused physical harm to the victim." *State v. Miller* (2002), 96 Ohio St.3d 384, syllabus.

{¶ 19} Thus, pertaining to the mens rea for felony murder and felonious assault: "The critical issue is whether the defendant had the requisite culpable mental state to support a conviction for the underlying felony offense." *State v. Hunter*, Cuyahoga App. No. 86048, 2006-Ohio-20.

{¶ 20} The initial underlying charge for felonious assault, as charged in count three of the indictment is set forth in R.C. 2903.11(A)(1): “No person shall knowingly *** [c]ause serious physical harm to another ***.” Further, R.C. 2903.11(A)(2) sets forth felonious assault as charged in count four of the indictment and reads as follows: “No person shall knowingly *** [c]ause or attempt to cause physical harm to another *** by means of a deadly weapon or dangerous ordnance.”

“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. A person has knowledge of circumstances when he is aware that such circumstances probably exist. R.C. 2901.22(B).” *Miller* at _31.

{¶ 21} Further, R.C. 2901.01(A)(5)(b) defines serious physical harm to persons as: “Any physical harm that carries a substantial risk of death ***.” In the case sub judice, Goldsmith pointed his gun and fired four times at Walker, he was aware that his conduct would probably cause serious physical harm to Walker, namely, his death. As the *Miller* court found: “If the jury did not believe that the defendant intended to cause *** [the victim’s] death, the evidence clearly supported the jury’s conclusion that the defendant knew that physical harm to *** [the victim] was probable.” *Id.* at _32.

{¶ 22} Further, Goldsmith not only caused serious physical harm but did so with a deadly weapon, namely, a firearm. Walker sustained serious physical harm when Goldsmith shot Walker three times: once in his left shoulder and twice near his left eye.

{¶ 23} Boykins testified that Goldsmith, after returning to the car from Sam’s Deli, reached across Boykins with a glove on his hand, and that Boykins next saw sparks in his

face. (Tr. 547-558.) Boykins heard about five shots and then saw Walker slumped over in the Malibu and Thomas trying to get out of the car. (Tr. 459.)

{¶ 24} Thomas testified that Goldsmith and Walker had a confrontation shortly before the shooting in which Goldsmith attempted to take Walker's cellular phone. (Tr. 718, 751.) Goldsmith and Walker had problems before that day. (Tr. 752.) After Walker retrieved his cellular phone from Goldsmith, Goldsmith asked Walker for some of his Hennessy and he refused. (Tr. 720.)

{¶ 25} Thereafter, Goldsmith showed Walker his gun, asked him if he wanted to die, and told Walker to leave the parking lot. (Tr. 724, 769, 893.) Thomas saw Goldsmith's gun and described it as little, ugly, and rusty. (Tr. 771.) Thomas heard shots and ducked to get out of the car. (Tr. 727.)

{¶ 26} The final element for both counts of murder as charged requires that the offender "caused the death of another." R.C. 2903.02(A) and R.C. 2903.02(B). Here, Goldsmith caused the death of another in light of the aforementioned facts and, in addition, the Cuyahoga County Coroner's office determined that the three shots that Walker sustained caused his death. (Tr. 642.) The three bullets that struck Walker came from the same gun. (Tr. 665.) Tests run on the fourth bullet were inconclusive. (Tr. 665.)

{¶ 27} Regarding Goldsmith's conviction for the attached three-year firearm specifications, R.C. 2941.145 requires:

“[T]hat 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.”

{¶ 28} Goldsmith had a firearm on his person and used it to facilitate murder and felonious assault.

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

{¶ 30} Goldsmith’s sole assignment of error is overruled.

{¶ 31} However, our analysis does not end here because we find plain error regarding Goldsmith’s conviction. Pursuant to Crim.R. 52(B), “[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.”

{¶ 32} Goldsmith is currently serving two concurrent terms of incarceration for killing one victim: one term of incarceration for murder pursuant to R.C. 2903.02(A), and the other for felony murder pursuant to R.C. 2903.02(B).

{¶ 33} Furthermore, Goldsmith is serving two concurrent terms of incarceration for felonious assault against one victim: one term of incarceration for felonious assault pursuant to R.C. 2903.11(A)(1) and the other for felonious assault pursuant to R.C. 2903.11(A)(2).

{¶ 34} According to R.C. 2941.25:

“(A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may

contain counts for all such offenses, but the defendant may be convicted of only one.

(B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them.”

{¶ 35} According to the Supreme Court of Ohio:

"In the first step, the elements of the two crimes are compared. If the elements of the offenses correspond to such a degree that the commission of one crime will result in the commission of the other, the crimes are allied offenses of similar import and the court must proceed to the second step. In the second step, the defendant's conduct is reviewed to determine whether the defendant can be convicted of both offenses. If the court finds either that the crimes were committed separately or that there was a separate animus for each crime, the defendant may be convicted of both offenses." *State v. Cabrales* (2008), 118 Ohio St.3d 54.

{¶ 36} As it pertains to Goldsmith’s murder convictions: “The Ohio Supreme Court has held that the conviction and sentence on two counts of murder for a single killing violated R.C. 2941.25 and the Double Jeopardy Clauses of the Ohio and United States Constitutions.” *State v. Hudson*, 9th Dist. No. 24009, 2008-Ohio-4075; See *State v. Huertas* (1990), 51 Ohio St.3d 22. “[Where] a defendant who kills only one victim is convicted of two aggravated murder counts, the trial court may sentence on only one count.” *State v. Waddy* (1992), 63 Ohio St.3d 424.

{¶ 37} In the instant case, felonious assault pursuant to R.C. 2903.11(A)(1) and R.C. 2903.11(A)(2) are allied offenses of similar import as well. *State v. Smith*, 1st Dist. No. C-070216, 2008-Ohio-2469. This is so because Goldsmith fired multiple shots at one victim in rapid succession and did not have a separate animus for each count of felonious assault.

{¶ 38} Thus, “although the aggregate sentence should remain the same, by law, the convictions should be merged.” *State v. Crowley* (2002), 151 Ohio App.3d 249.

{¶ 39} Goldsmith’s conviction is affirmed, sentence vacated and case remanded for resentencing.

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, PRESIDING JUDGE

PATRICIA A. BLACKMON, J., and
MELODY J. STEWART, J., CONCUR