[Cite as *State v. Calhoun*, 2009-Ohio-2361.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91328

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

WILLIAM CALHOUN

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-497811

BEFORE: Jones, J., Stewart, P.J., and Dyke, J.

RELEASED: May 21, 2009

JOURNALIZED:

ATTORNEY FOR APPELLANT

Michael P. Maloney
24441 Detroit Road
Suite 300
Westlake, Ohio 44145

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor

BY: Brett Kyker
Assistant Prosecuting Attorney
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

LARRY A. JONES, J.:

{¶1} Defendant-appellant, William Calhoun, appeals the judgment of the lower court. Having reviewed the arguments of the parties and the pertinent law, we hereby affirm the lower court.

{¶2} On June 26, 2007, the Cuyahoga County Grand Jury returned a ten-count indictment against defendant-appellant, William Calhoun, in case number CR-07-497811. Count 1 charged appellant with aggravated murder in violation of R.C. 2903.01(A), and included death penalty specifications. Count 2 charged appellant with attempted murder in violation of R.C. 2903.02 and R.C. 2923.02. Count 3 charged appellant with felonious assault in violation of R.C. 2903.11(A)(1). Count 4 charged appellant with felonious assault in violation of R.C. 2903.11(A)(2). Count 5 charged appellant with retaliation in violation of R.C. 2921.05(B). Counts 2 through 5 each contained one- and three-year firearm specifications. Counts 6 and 7 charged appellant with having a weapon while under a disability in violation of R.C. 2923.13(A)(2). Counts 8 and 9 charged appellant with having a weapon while under disability in violation of R.C. 2923.13(A)(3). Count 10 charged appellant with carrying a concealed weapon in violation of R.C. 2923.12(A)(2).

{¶3} On March 3, 2008, trial commenced. Appellant elected a jury trial with

{¶4} respect to Counts 1through 5 and Count 10 of the indictment. Appellant elected a bench trial with respect to Counts 6 through 9. At the close of the State's case, appellant moved for judgment of acquittal. The motion was denied as to all ten counts. At the close of all of the evidence, the defense renewed its motion for judgment of acquittal. Again, the motion was denied as to all ten counts. On March 14, 2008, following deliberations, the jury returned a guilty verdict as indicted in Counts 1 through 5 and Count 10 of the indictment. The trial court returned a verdict of guilty as indicted in Counts 6 through 9 of the indictment.

{¶5} On April 2, 2008, the mitigation phase of the trial commenced with respect to Count 1 of the indictment. On April 3, 2008, the jury returned a recommendation of life in prison without eligibility of parole. The trial court followed the jury's recommendation with respect to Count 1 and sentenced appellant to life in prison without eligibility of parole. With respect to Counts 2 through 10 of the indictment, the trial court sentenced appellant to an aggregate term of 23 years of incarceration. The trial court ordered that the 23 years of incarceration be served prior to, and in addition to, the life sentence.

{¶6} In the early morning hours of March 18, 2007, the decedent, Curtis Johnson, was shot several times while parked in his driveway at 1100 E. 74th St. in Cleveland Ohio. Mr. Johnson was hospitalized and eventually died as a result

of the gunshot injuries. There were two shooters and one eyewitness to the shooting. Appellant was identified as one of the shooters.

{¶7} Appellant assigns three assignments of error on appeal:

{¶8} [1.] "The trial court erred in admitting hearsay statements identifying appellant as the assailant."

{¶9} [2.] "The trial court erred in not merging counts one and five for purposes of sentencing."

{¶10}[3.] "The trial court erred in limiting impeachment evidence on cross[-] examination of Juwuan Leonard."

First Assignment of Error - Hearsay

{¶11}Appellant argues in his first assignment of error that the trial court erred in admitting hearsay statements identifying him as the assailant.

{¶12}Ohio Rule of Evidence 801(C) provides that, "hearsay" is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Ohio R.Evid. defines a statement as, "an oral or written assertion" or "nonverbal conduct of a person, if it is intended by him as an assertion."

{¶13}Ohio Rule of Evidence 804(B)(6), commonly referred to as the Rule of Forfeiture by Wrongdoing, provides the following:

{¶14}"A statement offered against a party if the unavailability of the witness is due to the wrongdoing of the party for the purpose of

preventing the witness from attending or testifying. However, a statement is not admissible under this rule unless the proponent has given to each adverse party advance written notice of an intention to introduce the statement sufficient to provide the adverse party a fair opportunity to contest the admissibility of the statement."

{¶15}This rule is based upon the doctrine that a defendant, by his own wrongdoing, can forfeit his right to confront witness. This well-established doctrine of evidence law was most recently recognized by both the United States Supreme Court and the Ohio Supreme Court in *Crawford v. Washington*, 541 U.S. 36 (2004), and *State v. Hand*, 107 Ohio St.3d 378 (2006), respectively.

{¶16}In *Crawford* , the U.S. Supreme Court examined those instances where a defendant has the right to confront witnesses under the Confrontation Clause of the Sixth Amendment of the U.S. Constitution. *Crawford* held that the Confrontation Clause bars the "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross-examination." Id. at 53-54. However, "non-testimonial" evidence is not barred; further, the Supreme Court acknowledged the exception to the Confrontation Clause when the Court noted that "the rule of forfeiture by wrongdoing*** extinguishes confrontation claims on essentially equitable grounds." *Crawford*, at 61.

{¶17} Although only a few Ohio cases have addressed this issue, they have all recognized that Ohio's common-law of evidence incorporates a rule of forfeiture similar to the federal rule. See *State v. Kilbane* (April 3, 1979), Cuyahoga App. Nos. 38428, 38383, 38433; *State v. Liberatore* (December 3, 1983), Cuyahoga App. No. 46784 ("[T]he evidence in Steele clearly indicated that the defendants had procured the witness' unavailability. The evidence in the instant case is far from clear that defendant procured Mata's 'unavailability.'"); *State v. Brown* (April 24, 1986), Cuyahoga App. No. 50505, ("[T]he victim expressed concern that the defendant's brother had threatened her mother and her children. An accused cannot rely on the confrontation clause to preclude extrajudicial evidence from a source which he obstructs.") See, also, *Steele v. Taylor*, 684 F.2d 1193, 1200-04 (6th Cir. 1982) (federal habeas corpus review of the conviction in *Kilbane*), cert. denied, 460 U.S. 1053 (1983).

Standard

{¶18} The offering party must show (1) that the party engaged in wrongdoing that resulted in the witness's unavailability, and (2) that one purpose was to cause the witness to be unavailable at trial. See *United States v. Houlihan*, 92 F.3d 1271, 1279 (1st Cir. 1996) ("waiver by homicide") ("[I]t is sufficient in this regard to show that the evildoer was motivated in part by a desire to silence the witness; the intent to deprive the prosecution of testimony need not be the actor's sole motivation."), cert. denied, 519 U.S. 1118 (1997).

{¶19}In the case at bar, Curtis Johnson was originally shot by appellant on October 29, 2006. The very next day, the victim scribbled appellant's nickname, "Booka," on a piece of paper at the hospital when he was asked who shot him. In addition, the victim was also presented with a photo array that included appellant's picture. After viewing the photo array, the victim identified appellant as the shooter. On November 25, 2006, the victim made a written statement identifying appellant as the shooter.

{¶20}Appellant was subsequently indicted in Case No. CR-07-490330 and a trial was set for March 21, 2007. Sometime before trial, the victim told various family members that appellant and/or his friends had contacted him and tried to bribe him not to testify at the trial. On March 18, 2007, just three days before trial, Curtis Johnson was ambushed in his driveway and shot a second time by appellant. After he was shot, but before losing consciousness, Curtis Johnson identified appellant as one of the shooters.

{¶21}The State properly demonstrated that Calhoun engaged in wrongdoing that resulted in the witness's unavailability, and the State further demonstrated that one of Calhoun's reasons for shooting the victim was to cause the witness to be unavailable at trial. This is demonstrated by the attempted bribes, police officer testimony, ballistics tests, witness identifications, and other evidence presented at trial. Accordingly, Calhoun forfeited his right to confront

Curtis Johnson in this case, and the trial court did not err in allowing Curtis Johnson's statements to be admitted as evidence at trial.

{¶22}Accordingly, appellant's first assignment of error is overruled.

Second Assignment of Error - Sentencing

{¶23}Appellant argues in his second assignment of error that the trial court erred in not merging Counts 1 and 5 for purposes of sentencing. We do not find merit in appellant's argument.

{¶24}In *State v. Blankenship* (1988), 38 Ohio St.3d 116, 526 N.E.2d 816, the court set forth a two-part test to determine whether crimes charged are allied offenses of similar import:

> "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 then 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 that either the crimes were committed separately or that there was a separate animus for each crime, the defendant may be convicted of both offenses."[1]

{¶25}In *State v. Cabrales,* 118 Ohio St.3d 54, 2008-Ohio-1625, the Supreme Court of Ohio was asked to decide whether the offense of trafficking in a controlled substance and the offense of possession of that same controlled

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[1]Id., citing *State v. Mughni* (1987), 33 Ohio St. 3d 65, 67, 514 N.E.2d 870, 872, *State v. Talley* (1985), 18 Ohio St. 3d 152, 153-154, 18 Ohio B. 210, 480 N.E.2d 439, 441, *State v. Mitchell* (1983), 6 Ohio St. 3d 416, 418, 6 Ohio B. 463, 453 N.E.2d 593, 594.

substance constituted allied offenses of similar import. With respect to the first step of the two-part test set forth in *Blakenship*, the Court instructed as follows:

> "In determining whether offenses are allied offenses of similar import under R.C. 2941.25(A), courts are required to compare the elements of offenses in the abstract without considering the evidence in the case, but are not required to find an exact alignment of the elements. Instead, if, in comparing the elements of the offenses in the abstract, the offenses are so similar that the commission of one offense will necessarily result in commission of the other, then the offenses are allied offenses of similar import. (*State v. Rance*, 85 Ohio St.3d 632, 1999-Ohio-291, 710 N.E.2d 699, clarified.)"

Id. at paragraph one of the syllabus.

{¶26}In *State v. Phillips* (Dec. 13, 2001), Cuyahoga App. No. 79192, this court was asked to decide whether the offenses of felonious assault and retaliation constituted allied offenses of similar import. *Phillips* involved a defendant who had been indicted by the federal government for his participation in a drug ring. The federal indictment was secured with the grand jury testimony of Raycine Smith, a former courier in the drug ring. After pleading guilty to a federal conspiracy charge, but prior to commencing a term of incarceration, the defendant and his cohorts caused Raycine Smith to be splashed with a cup of sulfuric acid. The acid destroyed one of her eyes and melted skin and hair away from her face, neck, head, and torso.

{¶27}Applying the two-part test set forth by the Ohio Supreme Court in *Blakenship*, this court held:

> "Regardless of whether we make our determination based upon an abstract comparison of the implicated statutes, or a specific review and comparison of the facts of this case as they apply to the statutes, we conclude retaliation and felonious assault are not allied offenses. As the State plainly argued in its appellate brief, one may commit a felonious assault without the animus to retaliate against the victim; and one may retaliate without causing or attempting to cause serious physical harm as required by felonious assault. *Thus, without the need to consider Blankenship's second step, we determine retaliation and felonious assault are not allied offenses*."

(Emphasis added.)

{¶28}Although the crimes of felonious assault and retaliation found in *Phillips* are not identical to the crimes of aggravated murder and retaliation found in the case at bar, the rationale to be applied is the same. Because we found no case law in Ohio determinative of whether retaliation and aggravated murder are allied offenses, we frame this assigned error as one of first impression and proceed with the analysis set forth in *Blankenship*.

{¶29}Under the first step, we compare the elements of the applicable offenses. Calhoun was charged in Count 1 with aggravated murder under R.C. 2903.02(A). The elements of the offense are as follows: "No person shall purposely, and with prior calculation and design, cause the death of another***"

{¶30}Appellant was also charged in Count 5 with retaliation under R.C. 2921.05(B). That section provides: "(B) No person, purposely and by force or by unlawful threat of harm to any person or property, shall retaliate against the victim of a crime because the victim filed or prosecuted criminal charges."

{¶31}According to *Blankenship*, our threshold query is whether the elements of retaliation and aggravated murder correspond to such a degree that the commission of one crime would result in the commission of the other crime. We discover that Calhoun's argument fails to pass this threshold.

{¶32}Regardless of whether we make our determination based upon an abstract comparison of the implicated statutes, or a specific review and comparison of the facts of this case as they apply to the statutes, we conclude retaliation and felonious assault are not allied offenses.[2] *Phillips*.

{¶33}An individual may commit aggravated murder without the animus to retaliate against the victim; and one may retaliate without purposely, and with prior calculation and design causing the death of another, as required by aggravated murder.[3]

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[2]Appellant Calhoun *concedes* in his brief that strictly comparing the elements of the offenses in the case at bar likely will not show that they are allied offenses under a *Rance* analysis. *State v. Rance* (1999), 85 Ohio St.3d 632, 710 N.E.2d 699. Calhoun *also concedes* that this court has found that retaliation is not an allied offense to crimes such as felonious assault and intimidation. See *Phillips; State v. Smith*, Cuyahoga App. No. 88371, 2008-Ohio-3657. However, Calhoun notes that this court has not yet decided a case involving the crimes of retaliation and aggravated murder as allied offenses of similar import.

[3]In addition to the Ohio Revised Code statutory definitions, common meaning is discussed in *Webster's Dictionary* which defines retaliate as, "to repay in kind; to return for the like; to get revenge." Murder is defined as "the crime of unlawfully killing a person esp. with malice aforethought." See *Merriam-Webster's Collegiate Dictionary*, Tenth Edition (1998).

{¶34}Comparing the elements of the two crimes, we do not find that the elements correspond to such a degree that the commission of retaliation necessarily results in the commission of aggravated murder. Aggravated murder may occur without retaliation. Likewise, retaliation may occur without the existence of aggravated murder.

{¶35}Accordingly, we find that the elements of the offenses in this case do not correspond to such a degree that the commission of one crime will result in the commission of the other. Thus, without the need to consider *Blankenship's* second step, we determine retaliation and aggravated murder are not allied offenses.

{¶36}Assuming arguendo, that we did analyze *Blankenship's* second step in this case, Calhoun's argument would still fail. This is primarily due to the fact that Calhoun's retaliation for Johnson's upcoming testimony began, prior in time and separate from, his crime of aggravated murder. Calhoun was seeking retaliation for Johnson's refusal to accept his bribe and for Johnson's upcoming testimony against Calhoun. The elements of retaliation as they occurred in this crime were separate and distinct from the animus in Calhoun's aggravated murder. The aggravated murder (shooting the victim in the car) occurred, separate and apart, from the retaliation. The aggravated murder cannot be said to be part of the retaliation offense, and Calhoun was properly convicted of both offenses. We find the lower court's actions to be proper.

{¶37}Accordingly, Calhoun's second assignment of error is without merit.

Third Assignment of Error - Impeachment Evidence

{¶38}Appellant argues in his third assignment of error that the lower court erred in limiting impeachment evidence on cross-examination of Juwuan Leonard.

{¶39}Pursuant to Ohio Crim.R. 16(B)(1)(g):

> "Upon completion of a witness' direct examination at trial, the court on motion of the defendant shall conduct an in camera inspection of the witness' written or recorded statement with the defense attorney and prosecuting attorney present and participating, to determine the existence of inconsistencies, if any, between the testimony of such witness and the prior statement.
>
> "If the court determines that inconsistencies exist, the statement shall be given to the defense attorney for use in cross-examination of the witness as to the inconsistencies.
>
> "If the court determines that inconsistencies do not exist the statement shall not be given to the defense attorney and he shall not be permitted to cross-examine or comment thereon.
>
> "Whenever the defense attorney is not given the entire statement, it shall be preserved in the records of the court to be made available to the appellate court in the event of an appeal.
>
> "The purpose of Criminal Rule 16(B)(1)(g) is to provide defense counsel with the opportunity to inquire during cross-examination of a witness as to inconsistencies between the direct testimony and a prior written statement of that witness."

State v. Wilson (1985), 23 Ohio App.3d 111, 114.

{¶40}Here, the lower court took a recess following the direct examination of Juwuan Leonard. During the recess, defense counsel was given the

opportunity to review Juwuan Leonard's prior written statement. Prior to commencing the cross-examination of Leonard, an in camera review of Leonard's prior written statement was held in the trial judge's chambers. During the in camera inspection, the lower court found the only inconsistency between Leonard's direct testimony and his prior written statement was with regard to his identification of a second shooter.

{¶41} During cross-examination of Leonard, defense counsel attempted to use the prior written statement to attack additional alleged inconsistencies brought out on cross-examination. Accordingly, as the subject matter of the cross-examination involved additional alleged inconsistencies, we find the trial court properly prohibited defense counsel from using the prior written statement in questioning Leonard.

{¶42} In addition, we note that appellant makes much of the fact that the shooting occurred at night in a dark area between houses and the shooting incident was "quick." Appellant also makes much of the fact that he believes the identification concerning "Squeaky" is not as definitive as it should be. However, these issues are peripheral and are not enough to invalidate Leonard's identification of Calhoun as a shooter in this case. We find appellant's argument that the darkness and speed at which the shooting occurred invalidates Leonard's identification of Calhoun as a shooter, to be unpersuasive.

{¶43}Accordingly, we find no error on the part of the lower court in its refusal to allow defense counsel to use Leonard's prior written statement, with respect to any alleged inconsistencies drawn out during cross-examination. Moreover, we find no abuse of discretion in the trial court's actions.

{¶44}Accordingly, appellant's third assignment of error is overruled.

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

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.

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LARRY A. JONES, JUDGE

MELODY J. STEWART, P.J., CONCURS;
ANN DYKE, J., CONCURS IN JUDGMENT ONLY