[Cite as *State v. Hudson*, 2009-Ohio-6454.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91803

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

TONIO HUDSON

DEFENDANT-APPELLANT

JUDGMENT:
CONVICTION AFFIRMED, SENTENCE REVERSED AND REMANDED FOR RESENTENCING

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-510582

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

RELEASED: December 10, 2009

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) 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(C) 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(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

MELODY J. STEWART, J.:

{¶ 1} Defendant-appellant, Tonio Hudson, appeals his convictions for aggravated murder, murder, and two counts of aggravated robbery with firearm specifications. While we find no merit to appellant's assignments of error, we find that at sentencing the trial court should have merged the aggravated murder and murder convictions. Therefore, we affirm the convictions, reverse the sentences, and remand for resentencing.

{¶ 2} On May 28, 2007, the victim, Marcell Bell, was shot while sitting in the driver's seat of his car in the parking lot of the Hunter Hills apartment complex in Euclid, Ohio. He died later that night at the hospital as a result of gunshot wounds to his face, neck, and wrist.

{¶ 3} The victim's friend, Martin Powers, Jr., was sitting in the car next to the victim at the time of the shooting. According to Powers, Bell was looking for his car keys when Hudson approached the car, pointed a gun at Bell, and demanded money. Bell refused to give appellant money. Hudson demanded money from Bell a second time. When Bell refused for the second time, Hudson shot out the rear passenger window on the driver's side. After Bell refused appellant's third demand for money, Hudson fired two more shots into the car. Powers jumped out of the car and ran. Bell also ran from the car. Powers and Bell ran down a hill toward Euclid Avenue and appellant ran up the hill toward Glenridge Avenue. When Bell stumbled and fell, Powers saw that Bell had been

shot in the face. Powers said he did not know Bell had been shot until he saw Bell holding his face. Powers ran up to his house and told someone to call 911. His father came out and the two ran to the victim and tried to help him. Powers told the responding officer that "Montana" shot Bell. He testified that he had met appellant, who he knew as "Montana," for the first time earlier that evening. Powers said his brother, Frederick Andrews, introduced them.

{¶ 4} Andrews testified that he lived in a house next door to the Hunter Hills apartment complex with his mother, stepfather, and brothers. He met the appellant two months before the shooting and knew him as "Montana." The appellant told Andrews that he lived up the hill on Grand Avenue.

{¶ 5} According to Andrews, on the day of the shooting he went to a picnic with his brother, Powers, and Bell. They returned home and were sitting in Bell's car in the parking lot of the apartment complex. Hudson approached him looking to buy some marijuana. After Hudson decided not to buy from Andrews, Bell offered to sell him some. Hudson decided not to buy from Bell either and walked away. Andrews got out of the car and went to his house to change clothes.

{¶ 6} Once inside the house, Andrews heard two or three gunshots. Andrews ran down the stairs, looked out the window and saw Bell and his brother, Powers, running. He ran out the back door and saw Bell fall on the driveway with blood coming from his face. Andrews testified that when he was leaving the parking lot, just before the shooting, the only individuals in the lot were Powers, Bell, Hudson, and himself.

{¶ 7} Other witnesses, Shana Thompson and Ezell Oliver, residents of the apartment complex who knew the victim and were familiar with appellant, testified they saw Hudson approach Bell's car just prior to hearing gunshots. The police obtained physical evidence from a search of appellant's mother's home on Glenridge Avenue, that included an empty box of 9 millimeter Luger ammunition that matched the type of shell casings found at the scene, photographs, a cell phone with phone calls made to Florida immediately after the shooting, and an address book with appellant's name and birthday written inside.

{¶ 8} Hudson was arrested on October 23, 2007 in a Florida hotel room by a United States marshall, who was a member of the Northern Ohio Violent Fugitive Task Force, and who had tracked Hudson to that location. On May 15, 2008, the Cuyahoga County Grand Jury indicted Hudson on two counts of aggravated robbery and two counts of aggravated murder with felony murder specifications. All counts carried three-year firearm specifications. The state subsequently dismissed the felony murder specifications. The trial court denied Hudson's motion to suppress evidence and identification, and the case proceeded to a jury trial. On the first count, the jury found Hudson not guilty of aggravated murder as charged but guilty of the lesser included charge of murder. On the remaining counts and on all of the firearm specifications, the jury found Hudson guilty as charged. The trial court sentenced Hudson to a prison term of 28 years to life. Hudson appeals this judgment raising seven assignments of error.

{¶ 9} In the first assignment of error, Hudson argues that he was denied his constitutional right to confront and cross-examine a prosecution witness when the trial court limited his questioning of the United States marshall about the woman who accompanied Hudson to the hotel room in Florida immediately prior to his arrest. Appellant additionally challenges the trial court's finding that the information sought was not relevant.

{¶ 10} "The limitation of * * * cross-examination lies within the sound discretion of the trial court, viewed in relation to the particular facts of the case. Such exercise of discretion will not be disturbed in the absence of a clear showing of an abuse of discretion." *State v. Trimble*, 122 Ohio St.3d 297, 2009-Ohio-2961, at ¶266, citing *State v. Acre* (1983), 6 Ohio St.3d 140, 145. In order to find an abuse of discretion, we must determine the trial court's decision was unreasonable, arbitrary, or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983) 5 Ohio St.3d 217, 450 N.E.2d 1140.

{¶ 11} The record reflects that after the state elicited testimony from the marshall as to the details of Hudson's arrest in Florida, defense counsel attempted to question the marshall as follows:

{¶ 12} "Counsel: This female who was at this apartment, or motel, what's her name?

{¶ 13} "Marshall: I don't know her name.

{¶ 14} "Counsel: You didn't come to take her name down after you made the arrest?

{¶ 15} "Marshall: No.

{¶ 16} "Counsel: "You let her go?

{¶ 17} "Marshall: We did.

{¶ 18} "Counsel: She just went home?

{¶ 19} "Marshall: I don't know what she did.

{¶ 20} "* * *

{¶ 21} "Counsel: Who's [sic] name was the room in.

{¶ 22} "Marshall: I don't even know. We didn't even check that.

{¶ 23} "Counsel: This girl, did you use her to help get Tonio to this motel room?

{¶ 24} "Marshall: I have been instructed by the U.S. Attorney General's Office and the United State's Office of Counsel not to answer questions like that."

{¶ 25} Defense counsel objected and argued that the line of questioning was necessary to rebut the state's attempt to pursue a flight instruction. A United States attorney explained to the court that the witness was not authorized to answer certain questions posed by the defendant. The trial court continued the questioning to the following day to allow the state to submit a motion in limine. After reviewing the motion along with a memo from the Department of Justice Office of General Counsel outlining the nonprivileged areas the witness was authorized to testify about, and after a United States attorney stated for the record that the information sought by the defense was classified, the court granted the motion and limited the cross-examination of the marshall. The court

also stated that the evidence defense counsel sought to elicit from the witness was not relevant.

{¶ 26} At issue in this case is the applicability of the regulations found at Title 28 of the Code of Federal Regulations, Sections 16.21 et seq., relating to disclosure of information by employees of the Department of Justice. We note first that agencies of the United States government may draft procedural rules and regulations that govern requests for information and the agency's determination of whether it will release the information. See *United States ex rel. Touhy v. Ragen* (1951), 340 U.S. 462. The regulations at issue in this case have been upheld as valid. *United States v. Allen* (C.A.10, 1977), 554 F.2d 398.

{¶ 27} 28 C.F.R. § 16.22 provides in pertinent part:

{¶ 28} "(a) In any federal or state case or matter in which the United States is not a party, no employee or former employee of the Department of Justice shall, in response to a demand, produce any material contained in the files of the Department, or disclose any information relating to or based upon material contained in the files of the Department, or disclose any information or produce any material acquired as part of the performance of that person's official duties or because of that person's official status without prior approval of the proper Department official in accordance with §§ 16.24 and 16.25 of this part.

{¶ 29} "* * *

{¶ 30} "(c) If oral testimony is sought by a demand in any case or matter in which the United States is not a party, an affidavit, or, if that is not feasible, a

statement by the party seeking the testimony or by his attorney, setting forth a summary of the testimony sought and its relevance to the proceeding, must be furnished to the responsible U.S. Attorney. Any authorization for testimony by a present or former employee of the Department shall be limited to the scope of the demand as summarized in such statement."

{¶ 31} Subsequent sections of this chapter set forth the procedure to be followed after a matter is referred to a United States attorney pursuant to section 16.22 and the procedure for an administrative appeal should the requested approval be denied.

{¶ 32} In cases such as this, this court has found that the constitutional issue of whether these regulations deny defendants a Sixth Amendment right to call and cross-examine witnesses is not reached until the defendants follow the procedures and then have their demands denied. *State v. O'Neal* (July 25, 1985), Cuyahoga App. No. 44551, citing *United States v. Marino* (C.A.6, 1981), 658 F.2d 1120; *State v. Cisternino* (July 10, 1980), Cuyahoga App. Nos. 39894 and 39916, citing *United States v. Allen,* 554 F.2d at 406. The record in the instant case demonstrates that appellant did not comply with the requirement to submit an affidavit or statement summarizing the testimony desired and its relevancy so that the Department of Justice could consider the request and determine whether to grant permission for the testimony. Accordingly, we do not reach the constitutional claim.

{¶ 33} Appellant also contends that the trial court erred in finding the information he sought to elicit from the witness was not relevant. In a proffer to the court, he explained that he sought information relating to the circumstances of appellant being at the hotel that night, whether the woman was paid by the government to get appellant to the hotel, and in whose name the hotel room was registered. He argued generally that such information was important to refute the state's efforts to obtain a flight instruction.

{¶ 34} The evidence shows that the victim was shot on May 28, 2007 in Ohio and appellant was arrested five months later in Florida. Appellant fails to demonstrate how information relating to whether the woman had been paid by the government to get appellant to the hotel on the night he was arrested is relevant to refute the state's contention of flight. Also, the witness provided the information sought relating to the motel room when he stated on cross-examination that he did not know in whose name the room was registered. Accordingly, we find no abuse of discretion in the trial court's determination that the evidence sought was not relevant.

{¶ 35} In his second assignment of error, appellant asserts that the trial court erred in failing to declare a mistrial after the government witness stated that appellant had a criminal record.

{¶ 36} The record reflects that in the exchange between the state of Ohio and United States Marshall Place, relative to how he discovered appellant was in Florida, Place testified that he knew appellant "had a previous residence in

Florida and attended school there, had a criminal history there." Defense counsel immediately objected. The trial court sustained the defense objection and expressly instructed the jury to disregard the officer's statement. Appellant later moved for a mistrial that was denied by the trial court.

{¶ 37} We review the trial court's decision on a motion for a mistrial under an abuse of discretion standard. *State v. Barnes*, Cuyahoga App. No. 90690, 2008-Ohio-5602; *State v. Garner*, 74 Ohio St.3d 49, 1995-Ohio-168. A mistrial should not be ordered in a criminal case merely because some error or irregularity has intervened, unless the substantial rights of the accused or the prosecution are adversely affected; this determination is made at the discretion of the trial court. *State v. Goerndt*, Cuyahoga App. No. 88892, 2007-Ohio-4067, citing *State v. Reynolds* (1988), 49 Ohio App.3d 27, 33. A mistrial need be declared only "when the ends of justice so require and a fair trial is no longer possible." *State v. Franklin* (1991), 62 Ohio St.3d 118, 127.

{¶ 38} Appellant argues that the officer's statement gave the jury prejudicial information about appellant that would be impossible for the jury to ignore. Appellant relies upon *State v. Allen* (1987), 20 Ohio St.3d 53. In the *Allen* case, the trial court, over defense objection, revealed to the jury the defendant's two prior DUI convictions under the mistaken belief that the prior convictions were an essential element of the DUI offense for which defendant was being tried. The Ohio Supreme Court noted that "the existence of a prior offense is such an inflammatory fact that ordinarily it should not be revealed to the jury unless

specifically permitted under statute or rule." Id. at 55. The court further stated that it was not persuaded that the defendant would have been convicted without the disclosure to the jury of the two prior convictions.

{¶ 39} We find the *Allen* case readily distinguishable on the facts. In this case, there was a single, fleeting reference to appellant's criminal history. It was followed immediately by a curative instruction to the jury to disregard the answer given. A jury is presumed to follow the instructions, including curative instructions, given it by a trial judge. *State v. Henderson* (1988), 39 Ohio St.3d 24, 33. Given the curative instruction given by the trial court and the substantial evidence presented by the state concerning appellant's guilt, appellant has failed to show how he suffered any material prejudice. Accordingly, appellant's second assignment of error is overruled.

{¶ 40} In his third assignment of error, appellant contends that the convictions are against the manifest weight of the evidence. He argues that the testimony of the state's witnesses, particularly Powers and Andrews, are not worthy of belief.

{¶ 41} In his fourth assignment of error, appellant argues that because of the lack of credibility of the state's witnesses' testimony, the state failed to prove the essential elements of the offenses for which he was convicted. We will address these assignments together.

{¶ 42} Almost all of appellant's arguments relate to the weight, not the sufficiency, of the evidence. In *State v. Thompkins*, 78 Ohio St.3d 380,

1997-Ohio-52, paragraph two of the syllabus states: "The legal concepts of sufficiency of the evidence and weight of the evidence are both quantitatively and qualitatively different." Sufficiency is a test of adequacy. Whether the evidence is legally sufficient to sustain a verdict is a question of law. Id. at 386. 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." Id. at 387 (emphasis deleted). Weight is not a question of mathematics, but depends on its effect in inducing belief. Id.

{¶ 43} When reviewing the sufficiency of the evidence to support a criminal conviction, an appellate court examines 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.

{¶ 44} Appellant offers no argument to show that the state failed to establish any particular element of any of the charged offenses. His argument simply questions the credibility of each witness and alleges inconsistencies in the evidence. These are arguments going to the weight of the evidence, not sufficiency, and will be addressed separately below.

{¶ 45} The manifest weight of the evidence standard of review requires us to review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. *State v. Otten* (1986), 33 Ohio App.3d 339, paragraph one of the syllabus.

{¶ 46} We are mindful that the weight to be given the evidence and the credibility of the witnesses are matters primarily for the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. The trier of fact has the authority to "believe or disbelieve any witness or accept part of what a witness says and reject the rest." *State v. Antill* (1964), 176 Ohio St. 61, 67.

{¶ 47} Appellant argues that the jury's verdict is unreasonable because the state's primary witnesses were drunk and/or high on the night of the shooting and therefore lacked credibility as witnesses. He points to inconsistencies in the testimony about the time they returned to the apartment complex that night, the type of gun appellant used, and the shirt appellant was wearing. The record reflects that Andrews testified that they returned from the picnic around 10:30 to 11:00 p.m., while Powers puts the time earlier, closer to 8:00 or 8:30 p.m. Other witnesses put the time at between 9:00 and 10:00 p.m. Powers identified the gun as a revolver, when in fact the murder weapon was a semiautomatic. Powers testified that appellant wore a black shirt while other witnesses at the

scene told police that he wore a striped shirt. Appellant further challenges the witnesses' identification due to the passage of time from the shooting to the identification.

{¶ 48} Appellant is correct in his assertion that a witness's state of intoxication may raise a credibility issue. See *State v. Warren*, Cuyahoga App. No. 83709, 2004-Ohio-4477. The shooting happened on Memorial Day and most of the state's witnesses admitted to drinking alcohol prior to the shooting. Additionally, Andrews admitted to using marijuana earlier in the day at the picnic. Appellant is also correct that it is unclear from the testimony of these witnesses the exact times and details of each person's comings and goings around the time of the shooting. However, the real issue is not whether the witnesses had been drinking, but whether, given some level of intoxication and the inconsistencies, the testimony was sufficiently consistent and believable so that it was reasonable for the jury to accept. Id.

{¶ 49} In this case, all of the witnesses' testimony was consistent with a finding that "Montana" killed Bell and that appellant was "Montana." On the night of the shooting, Powers, who was in the car with the victim at the time he was shot, told police that "Montana" shot Bell. Andrews and other witnesses testified that just before they heard gunshots they saw "Montana" approach the car in which the victim and Powers were sitting. During the police investigation it became known to police that appellant was "Montana." Four witnesses, including Powers and Andrews, then picked appellant out of separate photo

arrays and identified him as "Montana." Given these consistencies, we find sufficient evidence to support the convictions and do not find that the jury's verdict is against the manifest weight of the evidence.

{¶ 50} Appellant's third and fourth assignments of error are overruled.

{¶ 51} Appellant's fifth assigned error asserts that the trial court erred when it gave a flight instruction over his objection. Appellant argues that due to his inability to fully cross-examine the United States marshall, the flight instruction should not have been given, and further, that the mere presence of appellant in Florida does not give rise to a presumption of flight.

{¶ 52} Flight from justice "means some escape or affirmative attempt to avoid apprehension." *State v. Wesley*, Cuyahoga App. No. 80684, 2002-Ohio-4429, citing *United States v. Felix-Gutierrez* (C.A.9, 1991), 940 F.2d 1200, 1207. Flight from justice may be indicative of a consciousness of guilt. *State v. Taylor*, 78 Ohio St.3d 15, 27, 1997-Ohio-243; *State v. Eaton* (1969), 19 Ohio St.2d 145,160, vacated on other grounds (1972), 408 U.S. 935. The decision whether to issue an instruction on "flight" rests within the sound discretion of the trial court. Absent an abuse of discretion, the trial court's decision will not be reversed on appeal. *State v. Benjamin*, Cuyahoga App. No. 80654, 2003-Ohio-281. A trial court does not abuse its discretion by issuing an instruction on flight if sufficient evidence exists in the record to support the charge. Id.

{¶ 53} In this case, there was evidence that appellant made several calls to Florida immediately following the murder. Marshall Place testified that it became apparent early in his investigation that appellant had fled to Florida. Appellant was apprehended in Florida. On this record, sufficient evidence exists to support an instruction on flight. In the first assignment of error we addressed appellant's arguments concerning the trial court's limiting his cross-examination of the marshall and found no error.

{¶ 54} Appellant's fifth assignment of error is overruled.

{¶ 55} In the sixth assignment of error, appellant argues that the trial court should have suppressed some or all of the witnesses' identifications. He reasserts his credibility argument based upon the witnesses' alcohol consumption that night and additionally agues that the lighting in the parking lot was poor. He challenges Andrews's identification because it was initially based upon a single photograph and challenges Powers's identification because he viewed appellant's photograph in a newspaper prior to picking him out of a photo array. He argues that Thompson's and Oliver's identifications were tainted due to the passage of time. We disagree.

{¶ 56} "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*, 100 Ohio St.3d 152, 2003-Ohio-5372, at ¶8 (internal citations omitted).

{¶ 57} Courts apply a two-prong test in determining the admissibility of challenged identification testimony. First, appellant bears the burden of demonstrating that the identification procedure was unnecessarily suggestive. If this burden is met, the court must then consider whether the procedure was so unduly suggestive as to give rise to irreparable mistaken identification. *State v. Page*, Cuyahoga App. No. 84341, 2005-Ohio-1493, citing *Manson v. Brathwaite* (1977), 432 U.S. 98, 114. Therefore, even if the identification procedure is suggestive, as long as the challenged identification is reliable, it is admissible.

{¶ 58} Reliability is the linchpin in determining the admissibility of identification testimony, with factors affecting reliability including the opportunity of the witness to view the criminal at the time of the crime, the witness's degree of attention, the accuracy of the witness's prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation. *State v. Merrill* (1984), 22 Ohio App.3d 119, 121, citing *Neil v. Biggers* (1972), 409 U.S. 188, 199.

{¶ 59} The practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup or a photographic array, has been widely condemned as unnecessarily suggestive. *State v. Barnett* (1990), 67 Ohio

App.3d 760, 768, citing *Stovall v. Denno* (1967), 388 U.S. 293. However, as noted previously, this does not per se render the identification unreliable. The key issue is whether the identification was reliable. Courts have been reluctant to hold that a presentation of a single photograph of the defendant to a witness violates due process when external factors "prove" the accuracy of the identification. One of the strongest of these external factors that may be used to prove the accuracy of the identification is the situation where the witness already knew the perpetrator before the crime was committed. *Barnett* at 768.

{¶ 60} This is not a case where witnesses are asked to identify a criminal they had never seen before and saw only briefly at the time of the crime. This case involves witnesses who were familiar with the appellant but knew him only through a street name. Andrews testified that he knew appellant from years ago and had met him months before the shooting. Although he knew appellant's face, he knew him only by the name "Montana." In the days immediately after the shooting, police tried to put a name and face to "Montana" by showing Andrews photographs of individuals who might possibly be "Montana." Andrews viewed and rejected photographs of eight different people before identifying appellant as "Montana" from a single photograph. Andrews later picked appellant out of a six-picture photo array.

{¶ 61} Thompson and Oliver testified to meeting appellant months before the crime and to seeing him around the apartment complex on a regular basis. Powers testified to meeting appellant earlier the day of the shooting through his

brother. Thompson and Oliver testified to seeing appellant in the parking lot just minutes before the shooting. Powers testified that he was in the car when appellant shot Bell. All three separately identified appellant from a photograph array of six pictures, the make-up of which appellant has not challenged. All three were certain of their identification.

{¶ 62} Nothing in the record indicates that identification methods used by the police were so suggestive that they created a risk of misidentification. Furthermore, there is nothing in the record that indicates that the witnesses' identification was not reliable. Accordingly, appellant's sixth assignment of error is overruled.

{¶ 63} In his final assignment of error, appellant contends that the trial court failed to properly advise that both postrelease control and parole are part of his sentence and therefore he is entitled to a de novo resentencing.

{¶ 64} We find no merit to appellant's contention. The record reflects that the trial court adequately advised appellant of postrelease control relative to his aggravated robbery convictions. There was no need for the trial court to advise appellant of the terms of parole or the sanction for violating it. Parole is not a part of an offender's sentence. *State v. Baker*, Hamilton App. No. C-050791, 2006-Ohio-4902; *State v. Hamilton*, Hocking App. No. 05CA4, 2005-Ohio-5450. Parole does not extend the penalty for an offense, but offers the opportunity for early release. *State v. Clark*, 119 Ohio St.3d 239, 249, 2008-Ohio-3748. There is no guarantee of parole, only a possibility. Id. The trial court properly

sentenced appellant on the aggravated murder conviction to a term of life in prison with the possibility of parole in 25 years. Accordingly, appellant's seventh assignment of error is overruled.

{¶ 65} Finally, we note that Hudson was convicted and sentenced for two murder charges. "The Ohio Supreme Court has held that the conviction and sentence on two counts of murder for a single killing violates 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, citing *State v. Huertas* (1990), 51 Ohio St.3d 22, at 28. "[W]here 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, 447; *State v. Goldsmith*, Cuyahoga App. No. 90617, 2008-Ohio-5990.

{¶ 66} In this case, Hudson was sentenced to two concurrent prison terms for the murder of one victim. While Hudson did not argue this issue on appeal, we review for plain error pursuant to Crim.R. 52(B). "To constitute plain error, the error must be obvious on the record, palpable, and fundamental, so that it should have been apparent to the trial court without objection." *State v. Smith*, Cuyahoga App. No. 88371, 2008-Ohio-3657, discretionary appeal not allowed by 120 Ohio St.3d 1506, 2009-Ohio-361. We find that the trial court plainly erred by sentencing Hudson on two murder charges. Prior to sentencing, the trial court should have merged the murder conviction with the conviction for aggravated murder, resulting in a single conviction.

{¶ 67} Accordingly, Hudson's convictions are affirmed, however, his sentence is reversed and remanded for further proceedings consistent with this opinion.

It is ordered that appellee recover from 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.

MELODY J. STEWART, JUDGE

MARY EILEEN KILBANE, P.J., and
MARY J. BOYLE, J., CONCUR