[Cite as *State v. Fitzgerald*, 2011-Ohio-719.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94916

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

BRANDAN FITZGERALD

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART; REVERSED IN PART AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-523992

BEFORE: Keough, J., Gallagher, P.J., and Rocco, J.

RELEASED AND JOURNALIZED: February 17, 2011

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KATHLEEN ANN KEOUGH, J.:

{¶ 1} Defendant-appellant, Brandan Fitzgerald, appeals from the common pleas court's judgment, rendered after a jury verdict, finding her guilty of three counts of attempted murder, two counts of felonious assault, and one count of aggravated riot, and sentencing her to three years in prison. She contends that (1) her convictions were not supported by sufficient evidence and were against the manifest weight of the evidence; (2) the trial court erred in denying her motion for a new trial; and (3) the trial court erred in sentencing. We affirm in part and reverse in part and remand.

I. Facts and Procedural History

{¶ 2} In May 2009, Fitzgerald was charged with three counts of attempted murder in violation of R.C. 2903.02(A) and 2923.02, with one- and three-year firearm

specifications; two counts of felonious assault in violation of R.C. 2903.11(A)(1) and (A)(2), with one- and three-year firearm specifications; and one count of aggravated riot in violation of R.C. 2917.02(A)(2).

{¶ 3} The events leading to the charges against Fitzgerald began with a fight between two 13-year-old girls. At approximately 8:00 p.m. on April 2, 2009, Fitzgerald drove a grayish-silver SUV to the home of 13-year-old B.L.,[1] located on Jesse Avenue in Cleveland, and parked in front of the house. Fitzgerald is the cousin of John Dix, her codefendant in this case, and the aunt of V.S., one of the girls involved in the fight. Dix's sisters, Dominique and Deanna Dix, Deanna's friend, Erin Bell, and Dix's stepdaughter, 13-year-old V.S., were in the SUV.

{¶ 4} V.S. got out of the SUV, knocked on the door of the home, and when B.L. answered, challenged her to a fight. B.L. first shut the door on V.S., but when V.S. knocked again, she came outside and fought with her. Fitzgerald and the other women in the SUV got out of the vehicle and surrounded B.L. and V.S., watching the fight. B.L. heard Fitzgerald tell V.S. to "beat her a–," while the other women encouraged V.S. to "keep fighting." B.L.'s sister, Br.L., who was watching the fight, testified that when B.L. pulled V.S.'s shirt over her head, Fitzgerald helped take it off so that V.S. could fight more easily.

{¶ 5} B.L.'s father, Jerome Hailey, was also outside watching the fight. He testified that when it ended, Fitzgerald apologized to him and then asked for V.S.'s cell

[1]We use initials to protect the identities of the minors involved in this incident.

phone. When he responded that the phone was "chalked" (i.e., gone), Dominique Dix threatened Hailey that she would "get somebody over here and f— y'all up and kill y'all."

{¶ 6} B.L.'s mother, Tamika Lewis, who had also watched the fight, testified that as the women and V.S. got in the SUV after the fight, she saw two of the women using their cell phones and heard them saying, "We're on Jesse."

{¶ 7} When the SUV was gone, Tamika walked around the corner to a neighbor's house to find out where V.S. lived. Hailey and B.L. followed in Hailey's pickup truck. As Tamika was speaking with the neighbors, she saw the same gray SUV that had just been at her house drive by; she observed that Fitzgerald was driving and a male was slumped down in the front passenger seat. Tamika estimated that no more than ten minutes had passed since the fight between B.L. and V.S.

{¶ 8} Sensing danger, Tamika immediately got in the front passenger seat of Hailey's truck and told him to drive home. B.L. climbed into the back seat of the truck. Arriving on their street, Tamika and Hailey saw that the gray SUV had pulled into the driveway of an abandoned house several doors down from their house. Hailey stopped his truck by the apron of the driveway to see what was happening. Tamika testified that she looked out the open passenger window of the truck and saw codefendant Dix emerge from the front passenger seat of the SUV with a rifle in his hands. She then saw two other men get out of the rear passenger seat of the SUV. After a moment, Hailey,

Tamika, and B.L. heard a click from the rifle and then the men ran down the driveway toward them.

{¶ 9} Hailey immediately put his truck in reverse and backed down the street; the three men ran after the truck, shooting at it. One bullet whizzed by Tamika's chest, another whizzed by the driver's side mirror, and another grazed B.L.'s ear. Two bullets entered houses on the street. The police subsequently collected 19 spent shell casings from an assault rifle littered across the driveway and the street.

{¶ 10} Two days after the incidents, Tamika picked Fitzgerald out of a photo array as the driver of the SUV. She also identified codefendant Dix as the man who had wielded the assault rifle.

{¶ 11} The trial court denied Fitzgerald's Crim.R. 29 motion for acquittal; the jury convicted her of all charges but acquitted her of the firearm specifications. The trial court subsequently denied Fitzgerald's motion for a new trial.

II. Sufficiency and Manifest Weight of the Evidence

{¶ 12} The State's theory at trial was that Fitzgerald aided and abetted Dix, one of the shooters, by driving him to the scene. In her first assignment of error, Fitzgerald contends that the trial court erred in denying her Crim.R. 29 motion for acquittal because her convictions were not supported by sufficient evidence. Specifically, she argues there was insufficient evidence that she was the driver of the SUV and, therefore, insufficient evidence that she aided and abetted Dix in the shooting. In her second assignment of error, she argues that her convictions were against the manifest weight of the evidence,

again because the evidence failed to demonstrate that she was the driver/accomplice. We consider these assignments of error together.

{¶ 13} Crim.R. 29(A) provides for a judgment of acquittal "if the evidence is insufficient to sustain a conviction of such offense or offenses." The test for sufficiency requires a determination of whether the prosecution met its burden of production at trial. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52, 678 N.E.2d 541. On review for sufficiency, courts are to assess not whether the State's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction. Id. "'The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.'" *State v. Robinson*, 124 Ohio St.3d 76, 2009-Ohio-5937, 919 N.E.2d 190, ¶34, quoting *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus.

{¶ 14} A manifest weight challenge, on the other hand, questions whether the prosecution met its burden of persuasion. *State v. Thomas* (1982), 70 Ohio St.2d 79, 80, 434 N.E.2d 1356. A reviewing court may reverse the judgment of conviction if it appears that 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." *Thompkins* at 387. A finding that a conviction was supported by the manifest weight of the evidence necessarily includes a finding of sufficiency. Id. at 388.

{¶ 15} Our review of the record demonstrates that the jury did not lose its way in concluding that Fitzgerald was the driver of the SUV and, hence, that she aided and abetted Dix in the shooting. Tamika testified that when she was at the neighbors' house shortly after the fight, she saw the same SUV that had been at her house earlier go by; she observed that Fitzgerald was driving. She testified that she was sure it was Fitzgerald because she "remember[ed] her face" and, further, as the SUV turned the corner, Fitzgerald "kept looking back at me." Likewise, Hailey testified that the SUV, with Fitzgerald driving, passed him as he waited in his pickup truck for Tamika to finish her conversation with the neighbors. Hailey testified that he was sure Fitzgerald was driving because when he looked out of the window of his truck at the SUV after it passed him, Fitzgerald put her head out of the window of the SUV and looked back at him. According to Hailey, "she seen me and I seen her when she had her head out the window." Hailey testified further that Fitzgerald's hair was in a ponytail when she was at his house during the fight, and still in a ponytail when she put her head out the window only ten minutes later.

{¶ 16} Hailey testified that after Fitzgerald put her head back in the vehicle, he saw the SUV turn left onto Jesse Avenue. Both Hailey and Tamika testified that when they arrived on their street only a minute or so later, the same SUV was parked in the driveway of an abandoned house several doors down from their house. A moment later, Dix and the other two men got out of the SUV and began shooting at Hailey's truck.

{¶ 17} Fitzgerald contends that this testimony, which clearly identified her as the driver of the SUV, was unreliable because Tamika and Hailey got only a "fleeting glance" at the driver of the SUV, did not mention that they saw Fitzgerald put her head out of the window in their statements to the police shortly after the incident, and "were not above fabricating" their testimony. She further contends that the identification was unreliable because State's witness Erin Bell testified that Fitzgerald and Dix were at home when the shooting occurred. Last, she contends that her vehicle was never identified as being the one involved in the shooting. None of these arguments has merit.

{¶ 18} First, despite Fitzgerald's assertion otherwise, Bell's testimony does not establish an alibi. Bell testified that she was one of the women who went with V.S. to fight B.L. She said that when the fight ended, they went to codefendant Dix's house, which was located only two to three minutes away from B.L.'s house. Bell said that she went into the house and stayed in the living room with several other people, but when they heard shots, they all ran upstairs. Significantly, Bell testified that she did not see either Dix or Fitzgerald from the time she entered the house until she came downstairs approximately ten minutes after hearing the shots. Thus, Bell's testimony did not establish that Fitzgerald and Dix were at Dix's home when the shots were fired.

{¶ 19} Further, any issues about Tamika and Hailey's credibility were for the jury to decide. *State v. DeHass* (1970), 10 Ohio St.2d 230, 227 N.E.2d 212. The record reflects that Fitzgerald's counsel cross-examined Tamika and Hailey regarding their identification of Fitzgerald. Both testified that it was still light enough when the incident

occurred for them to see Fitzgerald put her head out of the window of the SUV. With respect to their failure to include information about Fitzgerald putting her head out of the window and looking back at them in their statements to the police, Hailey explained on cross-examination that he remembered this detail later because "sometimes you remember stuff that you cannot remember when you are overwhelmed by everything at one time and you have time to think about it." Tamika explained that her statement did not contain the detail about Fitzgerald putting her head out of the window of the SUV "because everything was about John Dix." The jury heard their testimony and was free to believe all, part, or none of the testimony of each witness. *State v. Jackson* (1993), 86 Ohio App.3d 29, 33, 619 N.E.2d 1135.

{¶ 20} Finally, regarding Fitzgerald's argument that her car was never identified as being involved in the incident, Detective Hudelson testified that during his investigation, he learned from LEADS that Fitzgerald was listed as the secondary owner of a 2005 gray Saturn station wagon registered at her address. Detective Hudelson testified further that although that vehicle was never recovered from Fitzgerald, it matched the description of the vehicle involved in the shooting.

{¶ 21} After reviewing the entire record, weighing the evidence, and considering the credibility of the witnesses, we find the jury did not lose its way in concluding that Fitzgerald was the driver of the SUV during the shooting and, hence, that she aided and abetted codefendant Dix. Fitzgerald's convictions are not against the manifest weight of

the evidence and therefore, her sufficiency argument also fails. Accordingly, the trial court did not err in denying her Crim.R. 29 motion for acquittal.

{¶ 22} Appellant's first and second assignments of error are overruled.

II. Motion for New Trial

{¶ 23} Under Crim.R. 33(A), a trial court may grant a defendant's motion for a new trial upon a showing of various "causes affecting materially [the defendant's] substantial rights," including "that the verdict is not sustained by sufficient evidence" and "accident or surprise which ordinary prudence could not have guarded against." In her third assignment of error, Fitzgerald argues that the trial court erred in denying her motion for a new trial because she was unfairly surprised by Tamika and Hailey's testimony that they saw her put her head out of the window of the SUV when the SUV passed them while Tamika was at the neighbor's house. She contends that neither Tamika nor Hailey had mentioned this fact prior to trial and admission of this surprise testimony prejudiced her ability to properly defend herself, thereby depriving her of a fair trial. She also contends that Tamika and Hailey's testimony that she put her head out of the window was not credible and, therefore, there was insufficient evidence to support her convictions.

{¶ 24} A ruling on a motion for a new trial is within the trial court's discretion and will not be disturbed on appeal absent a showing of abuse of discretion. *State v. Gray*, 8th Dist. No. 94282, 2010-Ohio-5842, ¶17, citing *State v. Schiebel* (1990), 55 Ohio St.3d 71, 76, 564 N.E.2d 54. The term "abuse of discretion" implies that the court's attitude was

unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140. We find no abuse of discretion here.

{¶ 25} With respect to the alleged unfair surprise aspect of the testimony, the record indicates that defense counsel cross-examined Tamika and Hailey regarding their testimony, but made no objection whatsoever at trial about the testimony.

{¶ 26} Further, as discussed above, any credibility determinations about Tamika and Hailey's testimony were for the jury to decide. Defense counsel questioned them extensively regarding their failure to share any information about Fitzgerald putting her head out the window with the police prior to trial; upon questioning, they both explained why they had failed to do so. The jury heard their testimony and was free to believe or not believe it. We do not find the testimony so incredible as to find that the trial court abused its discretion in denying Fitzgerald's motion for a new trial.

{¶ 27} Appellant's third assignment of error is therefore overruled.

III. Allied Offenses

{¶ 28} In her fourth assignment of error, Fitzgerald contends that for purposes of sentencing, the three attempted murder convictions should merge into one, and the two felonious assault convictions should merge into that single conviction for attempted murder.

{¶ 29} The General Assembly has expressed its intent to permit multiple punishments for the same conduct under certain circumstances. Under R.C. 2941.25:

{¶ 30} "(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.

{¶ 31} "(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."

{¶ 32} Recently, in *State v. Johnson*, __ Ohio St.3d __, 2010-Ohio-6314, __ N.E.2d __, the Ohio Supreme Court overruled *State v. Rance* (1999), 85 Ohio St.3d 632, 710 N.E.2d 699, which required a comparison of statutory elements solely in the abstract under R.C. 2941.25, and held that the court must consider the defendant's conduct when determining whether two offenses are allied offenses of similar import subject to merger under R.C. 2941.25. *Johnson*, ¶44.

{¶ 33} Thus, "a defendant can be convicted and sentenced on more than one offense if the evidence shows that the defendant's conduct satisfies the elements of two or more disparate offenses. But if the conduct satisfies elements of offenses of similar import, then a defendant can be convicted and sentenced on only one, unless they were committed with separate intent." *State v. Williams*, 124 Ohio St.3d 381, 2010-Ohio-147, 922 N.E.2d 937, ¶36 (Lanzinger, J., concurring in part and dissenting in part).

{¶ 34} R.C. 2903.02, prohibiting murder, states that "no person shall purposely cause the death of another." "A person acts purposely when it is his specific intention to cause a certain result * * *." R.C. 2901.22(A). Fitzgerald contends there was insufficient evidence that Dix knew there were three people in the truck when he shot at it and, therefore, insufficient evidence that he had a specific intent to kill three people.[2] She argues that one who fires a weapon multiple times in a continuous sequence, without knowledge of the number of persons within range, acts with a single animus and, therefore, Dix (and she, as an aider and abettor) could have been convicted of only one count of attempted murder. We disagree.

{¶ 35} The Ohio Supreme Court has held that where a defendant commits the same offense against different victims during the same course of conduct, a separate animus exists for each victim. See, e.g., *State v. Franklin*, 97 Ohio St.3d 1, 2002-Ohio-5304, 776 N.E.2d 26, ¶48 (Defendant's conviction for six counts of aggravated arson resulting from fire to one home with six occupants upheld. "Even though appellant set only one fire, each aggravated arson count recognizes that his action created a risk of harm to a separate person."). See, also, *State v. Jones* (1985), 18 Ohio St.3d 116, 118, 480 N.E.2d

[2]To support Fitzgerald's convictions for aiding and abetting, the evidence had to demonstrate that she supported, assisted, encouraged, cooperated with, advised, or incited Dix in the commission of the crimes, and that she shared his criminal intent. *State v. Johnson*, 93 Ohio St.3d 240, 2001-Ohio-1336, 754 N.E.2d 796, at the syllabus. Accordingly, we analyze Dix's conduct and intent as the principal offender in determining whether the offenses Fitzgerald was convicted of as an aider and abettor are allied offenses.

408 ("When an offense is defined in terms of conduct towards another, then there is a dissimilar import for each person affected by the conduct.")

{¶ 36} Furthermore, both *State v. Cartellone* (1981), 3 Ohio App.3d 145, 444 N.E.2d 68, and *State v. Scott*, 7th Dist. No. 98 CA 124, 2001-Ohio-3359, which Fitzgerald cites to support her argument, can be readily distinguished from this case.

{¶ 37} In *Scott*, the defendant shot once into a vehicle that contained several persons; one person, not the intended victim, died from the shot. The defendant was convicted of aggravated murder of the victim and attempted murder of another passenger in the car. He argued on appeal that under the doctrine of transferred intent,[3] he could not be convicted of both offenses. But transferred intent is not the issue here; the issue is whether Dix intended to kill all three passengers in the truck when he shot at it.

{¶ 38} The *Cartellone* case involved three counts of felonious assault, and the issue on appeal was whether the defendant had a separate animus such that he could be punished for all three counts. The defendant had fired successive gunshots from a moving vehicle at the intended victim, who was standing in a driveway, some distance away from two bystanders who were standing behind the front screen door of the house. There was testimony that the defendant had clearly intended the shots to be directed only at the intended victim; hence, this court concluded there was not a separate animus for each count and therefore only one penalty could be imposed for the three counts.

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[3]The doctrine of transferred intent is a theory of imputed liability. Under the doctrine, the offender's intent to purposely kill the intended victim may be transferred to the actual victim who dies as a result of the bullet meant for the intended victim. Id.

{¶ 39} Here, however, Dix fired multiple shots at a moving vehicle with three people in it. There is no indication that the shots were directed at any one particular occupant of the vehicle; rather, the evidence demonstrated that the shots were generally aimed at the vehicle and all the passengers in it.

{¶ 40} Intent to kill "may be deduced from all the surrounding circumstances, including the instrument used to produce death, its tendency to destroy life if designed for that purpose, and the manner of inflicting a fatal wound." *State v. Eley*, 77 Ohio St.3d 174, 180, 1996-Ohio-323, 672 N.E.2d 640. An intent to kill "may be presumed where the natural and probable consequence of the wrongful act is to produce death." *State v. Edwards* (1985), 26 Ohio App.3d 199, 200, 499 N.E.2d 352. Because Dix's actions were consistent with an intent to kill anyone who was in the truck, there was sufficient evidence to find a separate animus for each count of attempted murder. Therefore, the attempted murder convictions are not allied offenses and do not merge for purposes of sentencing.

{¶ 41} With respect to the two felonious assault convictions, both of which stated the intended victim was B.L., by shooting multiple shots at B.L., one of which grazed her ear, Dix knowingly caused her serious physical harm. This conduct satisfied both felonious assault sections Fitzgerald was convicted of: R.C. 2903.11(A)(1) (cause serious physical harm to another) and 2903.11(A)(2) (cause or attempt to cause physical harm to another by means of a deadly weapon or dangerous ordnance.) Dix's conduct also necessarily satisfied the elements of attempted murder of B.L.: R.C.

2923.02(A)/2903.02(A) (purposely attempt to cause the death of another). The evidence demonstrated that the charges arose from the same conduct and that Dix committed the attempted murder and felonious assault of B.L. with a single animus. Therefore, the attempted murder count and the two felonious assault counts should be merged into a single count for sentencing. Accordingly, we reverse the sentence and remand for the State to elect on which of the offenses Fitzgerald will be sentenced.

{¶ 42} Appellant's fourth assignment of error is sustained in part and overruled in part.

Affirmed in part; reversed in part and remanded for resentencing.

It is ordered that the parties share equally the 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. 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.

KATHLEEN ANN KEOUGH, JUDGE
SEAN C. GALLAGHER, P.J., and
KENNETH A. ROCCO, J., CONCUR