

[Cite as *State v. Catron*, 2015-Ohio-1836.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101839

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JONATHAN F. CATRON

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-13-576819-A

BEFORE: S. Gallagher, J., E.A. Gallagher, P.J., and Laster Mays, J.

RELEASED AND JOURNALIZED: May 14, 2015

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SEAN C. GALLAGHER, J.:

{¶1} Defendant Jonathan Catron appeals from his conviction following a joint jury trial with his codefendant Carvin Catron. For the following reasons, we affirm.

{¶2} Jonathan and Carvin, Jonathan's half-brother, were angered over a dispute that occurred between Jonathan and one of Carvin's friends about a lighter. The brothers verbally sparred before each brandished a handgun. The verbal threats preceded a shootout. Carvin fired the first shot, although it is unclear who drew a weapon first — each claimed the other drew or attempted to draw first. Carvin did not claim his actions were in furtherance of self-defense, and there was a delay between the first shot and the subsequent barrage of bullets. There is no evidence that anyone besides Carvin and Jonathan were involved in the shooting. Unfortunately, the Catrons' neighbor, James Swindler III, was struck by a stray bullet from Jonathan's handgun. Mr. Swindler died as a result.

{¶3} Jonathan was charged with and found guilty of the purposeful murder of Mr. Swindler, in violation of R.C. 2903.02(A) with an associated three-year firearm specification; the felonious assault of Mr. Swindler, in violation of R.C. 2903.11(A)(1); the murder of Mr. Swindler, in violation of R.C. 2903.02(B) with an associated three-year firearm specification; the felonious assault of Carvin, in violation of R.C. 2903.11(A)(2) with an associated three-year firearm specification; and having a weapon while under disability in violation of R.C. 2923.13(A)(3). On the first three counts, Jonathan was sentenced to a term of imprisonment of 21 years to life (15 years to life on the base

charge and 6 years on the two firearm specifications to be served consecutive to each other and to the base charge). All other sentences were ordered to be served concurrently.

{¶4} Jonathan timely appealed, advancing six assignments of error. None has merit. In the first assignment of error, Jonathan claims the trial court abused its discretion by denying the motion for separation of the brothers' trials. Jonathan argues that his and Carvin's defenses at trial were mutually antagonistic — Jonathan claimed to have acted in self-defense while Carvin argued that Jonathan escalated the argument. Carvin, however, did not claim the affirmative defense of self-defense applied to him. The trial court did not abuse its discretion.

{¶5} As a panel of this court noted, "it is well established that the law and public policy generally favor the joinder of charges and defendants, which involve the same acts, transactions, or course of criminal conduct." *State v. Holloway*, 8th Dist. Cuyahoga No. 101289, 2015-Ohio-1015, ¶ 22, citing Crim.R. 8; *State v. Dunkins*, 10 Ohio App.3d 72, 460 N.E.2d 688 (9th Dist.1983), syllabus. Joinder and the avoidance of multiple trials is favored "because it 'conserves judicial and prosecutorial time, lessens the not inconsiderable expenses of multiple trials, diminishes inconvenience to witnesses, and minimizes the possibility of incongruous results in successive trials before different juries.'" *Id.*, quoting *State v. Thompson*, 127 Ohio App.3d 511, 523, 713 N.E.2d 456 (8th Dist.1998). A defendant may seek a separate trial pursuant to Crim.R. 14, upon demonstrating prejudice from the joinder. *Id.*; *State v. Harris-Powers*, 8th Dist.

Cuyahoga No. 87921, 2007-Ohio-389, ¶ 17; *State v. Owens*, 51 Ohio App.2d 132, 366 N.E.2d 1367 (9th Dist.1975). Generally, a court may sever trials if there is evidence that the codefendants will present mutually antagonistic defenses or confessions implicating nontestifying codefendants. See *State v. Humphrey*, 2d Dist. Clark No. 2002 CA 30, 2003-Ohio-3401. There must be evidence of mutually antagonistic defenses.

{¶6} In *State v. Klinkner*, for example, three defendants were accused of assaulting a victim. *State v. Klinkner*, 10th Dist. Franklin Nos. 13AP-469, 13AP-521, and 13AP-595, 2014-Ohio-2022. One defendant claimed that the state failed to prove the assault, another that he did not participate in any alleged assault, and the third that he acted in self-defense of the first defendant. *Id.* at ¶ 6-9. The trial court held a single trial for all three defendants. The Tenth District affirmed the joinder, holding that in order to warrant severance, the defenses must be “antagonistic to the point of being irreconcilable and mutually exclusive.” *Id.* at ¶ 20, citing *State v. Miller*, 10th Dist. Franklin No. 11AP-899, 2013-Ohio-1242, ¶ 52. Because none of the defendants attempted to exculpate himself while inculcating the others, joinder was warranted. *Id.*

{¶7} Jonathan asserts his self-defense claim was mutually antagonistic without any demonstration. Carvin did not claim he acted in self-defense during the shooting, which was universally credited by all the witnesses to the two brothers alone. Therefore, the sole issue at trial was whether Jonathan acted in self-defense by inaccurately firing his weapon at Carvin, which killed the victim. Carvin presented no affirmative defenses, and therefore, Carvin’s sole defense was that the state failed to present sufficient evidence

to demonstrate the basis of the crimes as charged. This is the same issue addressed in *Klinkner*: defenses are not mutually antagonistic when one defendant attempts to discredit the state's case and the other claims self-defense. We agree. The defendants are not attempting to exculpate themselves at each other's expense. Jonathan did not demonstrate the existence of mutually antagonistic defenses and, therefore, the type of prejudice requiring separation of the cases for trial. His first assignment of error is overruled.

{¶8} In his second assignment of error, Jonathan claims his convictions were against the manifest weight of the evidence because he proved by a preponderance of the evidence that he acted in self-defense. We find no merit to Jonathan's second assignment of error.

{¶9} When reviewing a claim challenging the manifest weight of the evidence, the court, reviewing the entire record, must 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. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541. Reversing a conviction as being against the manifest weight of the evidence should be reserved for only the exceptional case in which the evidence weighs heavily against the conviction. *Id.* A claim that a jury verdict is against the manifest weight of the evidence involves a separate

and distinct test that is much broader than the test for sufficiency. *State v. Drummond*, 111 Ohio St.3d 14, 2006-Ohio-5084, 854 N.E.2d 1038, ¶ 193.

{¶10} In Ohio, the affirmative defense of self-defense can be established if the defendant demonstrates (1) that he was not at fault in creating the situation giving rise to the affray; (2) that he had a bona fide belief that he was in imminent danger of death or great bodily harm and that his only means of escape from such danger was in the use of such force; and (3) that he must not have violated any duty to retreat or avoid danger. *State v. Williford*, 49 Ohio St.3d 247, 249, 551 N.E.2d 1279 (1990). The rule is stated in the conjunctive, and all elements must be proven by a preponderance of the evidence. *State v. Jackson*, 22 Ohio St.3d 281, 284, 490 N.E.2d 893 (1986).

{¶11} In this case, Jonathan never established, much less demonstrated, the inability to retreat. The fight occurred on a public street, and the evidence demonstrated that each brother brandished a firearm while exchanging verbal barbs after the first shot was already fired. The evidence established that Carvin fired a single shot, and then both brothers grandstanded with firearms in hand. Thus, a break occurred after the first shot, before the shooting started anew. Neither brother backed down after the weapons were drawn but before shots were fired, nor attempted to physically extricate himself from the deadly confrontation. *See State v. Barbo*, 8th Dist. Cuyahoga No. 70281, 1997 Ohio App. LEXIS 99, *10-11 (Jan. 16, 1997) (overruling defendant's argument to create a right to use self-defense in a public street without evidence establishing no reasonable

escape). Both were armed and aware the other was armed after the first shot was fired, and yet the standoff persisted.

{¶12} There is no evidence demonstrating that Jonathan was somehow prevented from retreating to safety at that point. *See State v. Keahey*, 6th Dist. Erie No. E-13-009, 2014-Ohio-4729, ¶ 50 (there was no evidence presented why the defendant could not have retreated in any other direction, and therefore, the trial court did not err in omitting the self-defense jury instruction); *In re Z.G.*, 6th Dist. Erie No. E-12-063, 2013-Ohio-2482 (defendant failed to demonstrate that he attempted to withdraw from the confrontation, and instead chose to stand his ground in the face of a threat). Accepting Jonathan's argument would essentially create a judicial version of the "stand your ground" defense, an issue debated by the Ohio legislature. *Jackson* at 284 (declining to adopt a jury instruction providing that a defendant has no duty to retreat from any place where he has a right to be), *see also* Jeremy Pelzer, *Ohio House Passes Gun Bill with "Stand your Ground" Provision after Lengthy Debate*, http://www.cleveland.com/open/index.ssf/2013/11/ohio_house_passes_gun_bill_wit.html (accessed Apr. 8, 2015). The jury's guilty verdict was not against the weight of the evidence. Jonathan failed to prove that he acted in self-defense as legally defined, and his second assignment of error is overruled.

{¶13} In Jonathan's third assignment of error, he claims the trial court erred by giving the flight jury instruction. A trial court enjoys discretion to determine whether the evidence adduced at trial was sufficient to require an instruction. *State v. Fulmer*,

117 Ohio St.3d 319, 2008-Ohio-936, 883 N.E.2d 1052, ¶ 72. Jury instructions must be viewed as a whole to determine whether they contain prejudicial error. *State v. Fields*, 13 Ohio App.3d 433, 436, 469 N.E.2d 939 (8th Dist.1984).

{¶14} “Flight from justice may be indicative of a consciousness of guilt.” *State v. Santiago*, 8th Dist. Cuyahoga No. 95516, 2011-Ohio-3058, ¶ 30, citing *State v. Taylor*, 78 Ohio St.3d 15, 27, 1997-Ohio-243, 676 N.E.2d 82. The “‘mere departure from the scene of the crime is not to be confused with deliberate flight from the area in which the suspect is normally to be found.’” *State v. Johnson*, 8th Dist. Cuyahoga No. 99715, 2014-Ohio-2638, ¶ 108, quoting *Santiago* at ¶ 30; *State v. Norwood*, 11th Dist. Lake Nos. 96-L-089 and 96-L-090, 1997 Ohio App. LEXIS 4420 (Sept. 30, 1997). Courts have determined the flight instruction to be in error when the facts demonstrated that the defendant did not take affirmative steps to avoid detection or apprehension or the police officers take no steps to locate the suspect. *Id.* at ¶ 109; *State v. Jackson*, 8th Dist. Cuyahoga No. 100125, 2014-Ohio-3583, ¶ 48. Accordingly, and without more, flight immediately after the crime may be insufficient to warrant an instruction if, for example, everyone near the scene of the crime immediately flees — such as when a crowd disperses upon hearing gunshots. *Johnson* at ¶ 110. This analysis is inapplicable to the facts of the current case.

{¶15} Jonathan and Carvin, the shooters, were the only people to flee the scene of the crime. All other bystanders remained after the shooting ended. The flight instruction was warranted in light of the fact that Jonathan departed the scene

immediately after taking part in the shooting and did not return. *Santiago* at ¶ 34-35. We find no error in the trial court's instruction. Jonathan's third assignment of error is overruled.

{¶16} We can summarily dispose of Jonathan's remaining assigned errors. In his fourth and fifth assignments of error, Jonathan argues that the individual sentences on the counts relating to the murder of Mr. Swindler should have merged with the firearm specification attached to the felonious assault charge relating to Carvin, including the attached firearm specifications. As the Ohio Supreme Court recently held, "[t]wo or more offenses of dissimilar import exist within the meaning of R.C. 2941.25(B) when the defendant's conduct constitutes offenses involving separate victims *or* if the harm that results from each offense is separate and identifiable." (Emphasis added.) *State v. Ruff*, Slip Opinion No. 2015-Ohio-995, paragraph two of the syllabus. Thus, separate victims, Carvin and Mr. Swindler, alone warrants the imposition of separate punishments.

Further, in *State v. Lawrence*, 8th Dist. Cuyahoga Nos. 100371 and 100387, 2014-Ohio-4797, a panel of this court held, pursuant to R.C. 2929.14(B)(1)(g), that two separate three-year terms for the firearm specifications were statutorily required if, as here, the offender is found guilty of multiple, enumerated felonies. Jonathan's fourth and fifth assignments of error are overruled.

{¶17} And finally, in his sixth assignment of error, Jonathan claims his trial counsel rendered ineffective assistance by failing to object to the flight instruction, failing to seek merger of the counts pertaining to Mr. Swindler with those pertaining to Carvin,

and failing to object to the merger of the firearm specifications. In order to substantiate a claim of ineffective assistance of counsel, the appellant must show that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defendant so as to deprive him of a fair trial. *State v. Trimble*, 122 Ohio St.3d 297, 2009-Ohio-2961, 911 N.E.2d 242, ¶ 98, citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In light of the fact that we have found no error with any of Jonathan's claims underlying the deficient performance, we cannot say that Jonathan's trial counsel rendered ineffective assistance. The sixth and final assignment of error is overruled.

{¶18} The trial court did not err by denying Jonathan a separate trial from his codefendant, by giving the flight instruction at the close of trial, or by ordering consecutive service of the sentences imposed on the murder charge and the two firearm specifications. Further, the jury's determination that the defendant failed to prove self-defense was not against the manifest weight of the evidence. Jonathan's conviction is affirmed.

{¶19} 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. 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.

SEAN C. GALLAGHER, JUDGE

ANITA LASTER MAYS, J., CONCURS;
EILEEN A. GALLAGHER, P.J., CONCURS IN JUDGMENT ONLY